UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/046
Judgment No.: UNDT/2018/019
Date: 14 February 2018
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TRUDI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Lawrence Christy

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

Introduction

1. At the time of the Application, the Applicant was not a staff member of the United Nations.

2. On 13 March 2015, the Applicant filed a substantive application with the United Nations Dispute Tribunal (UNDT) in Nairobi challenging the Respondent's decision to withdraw the letter of offer that was issued to her for appointment as a Humanitarian Affairs Officer with the Office for Coordination of Humanitarian Affairs (OCHA). The post was at the P-4 level, and based in Damascus, Syria.

Procedural History

3. The Respondent filed his reply to the application on 17 April 2015.

4. On 5 May 2015[1], the Tribunal gave the Applicant the opportunity to respond to the Respondent's reply particularly on the question of the receivability of the application. The Applicant responded on 10 May 2015 indicating that she had nothing more to add to what had already been submitted in her application.

5. On 11 June 2015, the Tribunal issued Judgment UNDT/2015/049 and found the application receivable.

6. On 18 August 2015, the Tribunal held a case management discussion. Both parties agreed that this matter could be decided based on the parties' written submissions.

7. On 19 August 2015, the Tribunal issued Order No. 255 (NBI/2015) directing the parties to file their respective closing submissions by 30 September 2015.

[1] Order No. 150 (NBI/2015).

Facts

8. On 4 June 2014, the Applicant received a letter from the Office for the Coordination of Humanitarian Affairs (OCHA) offering her a one-year appointment as a humanitarian affairs officer at the P-4 level. The offer was subject to medical and security clearances, security training certificates, confirmation of diplomas and satisfactory reference checks.

9. The applicant accepted the offer on 9 June 2014.

10. On 6 July 2014, OCHA asked the Applicant for various documents for the processing of a Syrian visa for her. She submitted her visa application to the Office of the Regional Coordinator in Damascus on the same day. The application for her visa was submitted to the Ministry of Foreign Affairs the following day.

11. The Applicant was scheduled to travel to Damascus via Beirut on 3 August 2014.

12. By 28 July 2014, she had heard nothing about her visa and asked OCHA what was happening. On 31 July 2014, she was told that the visa had not yet been issued so she should postpone her departure.

13. In the following weeks, the Applicant received no communication from OCHA concerning her visa, and her emails went unanswered. After several phone calls to OCHA in Geneva, she was told that the visa request had been denied.

14. The record shows that the Syrian authorities advised OCHA that the Applicant's visa application was denied on 2 September 2014. No reasons were provided.

15. On 29 October 2014, OCHA withdrew its offer and stated as follows in its letter conveying the withdrawal: "As it is clearly stated in the offer, it was subject to

security clearances, which we were unable to obtain for you. As discussed, a working visa has been denied to you by the Syrian Authorities."

16. The Applicant requested management evaluation of this decision on 30 November 2014.

17. On 20 January 2015, she received a response from the Under-Secretary-General for Management, upholding the decision to withdraw the offer and awarding compensation of one month net base salary at the P-4 level.

Submissions

Applicant

18. It is the Applicant's case that she had a valid contract with the United Nations which the Respondent unlawfully rescinded. All conditions stipulated in the written offer, but for security clearance, were satisfied. Security clearance is issued by the United Nations Department for Safety and Security (UNDSS), which clearance the Applicant submits, was never in fact, requested by OCHA.

19. The denial of a visa by the Syrian authorities was not a condition of the contract as offered and accepted. The Management Evaluation Unit's position that any letter of offer is subject to the issuance of a visa by the host country is erroneous. The denial of a visa as happened in this case cannot properly be construed as frustration of the contract between the parties.

20. The Applicant also argues that it was open to OCHA to employ her services at the same level in other duty stations such as Iraq, Lebanon, or Turkey, while a Syrian visa was properly pursued.

21. Under the terms of the contract between the parties, OCHA should have opted to terminate (rather than withdraw/rescind) her appointment. This would have

entailed 30 days' notice or salary *in lieu* of notice in addition to any compensation for delay.

22. OCHA's conduct of concealing the truth concerning the Applicant's assignment between 2 September and 29 October 2014 was harmful to the Applicant. She was without employment, waiting to start her assignment and increasingly uncertain when it would start. None of her pleas for information was answered. The very circumstances were stressful.

Respondent

23. The Respondent contends that the contract between him and the Applicant was frustrated by a "supervening event." The denial of a visa by the Syrian authorities was not in the control of either of the parties to the contract so that both parties were therefore "discharged from further performance of the contract."

24. Contrary to the Applicant's submissions, she has no right to be reassigned or be paid termination indemnity per the terms of ST/AI/2010/3 on the *Staff Selection System.* A non-staff member seeking the protection of the Dispute Tribunal is to be treated as a staff member only for the limited purpose of accessing the United Nations' internal justice system. She cannot be treated as a staff member for the purposes of the Staff Regulations and Rules governing benefits or entitlements, which are only applicable to staff members. Any contract that was created was limited to a contract that the Applicant would start once she has commenced duty, and not before that time.

25. The Applicant has already been adequately compensated for the delay in informing her that the offer was being withdrawn. The Applicant has received one months' net base salary as compensation. Furthermore, OCHA has been in contact with the Applicant to settle payment of costs related to her medical examination.

Issues and Deliberations

26. The issues that must be resolved here are: (a) whether the Applicant had a valid contract with the Respondent; (b) whether the issuance of a Syrian visa was a condition for performance of the contract and whether the non-issuance of the said visa was a supervening event giving rise to legal frustration of that contract and discharging both parties from it; and (c) whether OCHA had an obligation to terminate rather than rescind or withdraw from the Applicant's contract of employment.

Was there a valid contract between the parties?

27. The Respondent had earlier on raised the issue of receivability in this case. He had argued that this Tribunal lacks the jurisdiction to entertain the present application because the Applicant is not a staff member of the United Nations. He argued further that pursuant to staff rule 4.2, the effective date of appointment of a staff member is either the date he or she enters into official travel status to assume their duties or, if no official travel is involved, the date on which the staff member reports for duty and signs a letter of appointment.

28. According to the Respondent, the United Nations Appeals Tribunal ("UNAT") decision in the case of *Gabaldon*[2] would not avail the Applicant since she was not legitimately entitled to the rights of a staff member because she had not: (1) commenced the performing of any services for the Organization; and (2) satisfied all pre-conditions for appointment.

29. The Applicant contended that the authority of *Gabaldon*[3] clearly showed that an individual may be legitimately entitled to the rights of a staff member where the applicant proves that he or she has fulfilled all the conditions of the offer and that his

[2] 2011-UNAT-120.
[3] ibid.

or her acceptance is unconditional and that no issue of importance remains to be discussed between the parties. The Applicant further submitted that her acceptance of the offer was unconditional and all important issues had been settled.

30. The Tribunal in a considered ruling held that applying the test of *Gabaldon*[4] to this case meant that even though all the conditions of staff rule 4.8 had not been fulfilled, the Applicant had *locus standi* and was legitimately entitled to similar rights as those of staff members and that the Organization must be regarded as having extended to her the protection of its administration of justice system. By necessary implication, it is clear that since the Applicant has *locus standi* before this Tribunal, she has a valid contract the scope of which must be determined when other issues are considered.

Was the non-issuance of a Syrian visa to the Applicant a supervening event giving rise to legal frustration of the contract and the discharge of both parties from it?

31. Part of the Respondent's case is that the contract between the parties was frustrated as soon as the Syrian authorities denied the Applicant a visa. He argued that the denial of the visa constituted a supervening event that was outside the control of both parties. He continued that due to the actions of a third party, the Applicant could not deliver the services she was contracted to perform and that as a consequence both parties are discharged from further performance of the contract.

32. On her part, the Applicant argued that the Respondent knew that when he applied for Syrian visas for staff members, they were frequently delayed. She referred to the OCHA Under-Secretary-General's briefing to the Security Council on Syria on 23 October 2013 in which it was reported that the processing of Syrian visas for United Nations staff were often delayed, single entry visas were sometimes given to some while others were issued visas for shorter durations than the staff members' contracts. She continued that while the Respondent knew about the situation, the

[4] ibid

Applicant did not know and therefore the Respondent could not claim that it was a supervening event.

33. As a general rule, a contract is deemed to have been automatically frustrated upon the occurrence of an extraneous event, or change in circumstances so fundamental, as to strike at the root of a contract as a whole and beyond the contemplation of the parties. In other words, there must be an extraneous event outside the control of the parties to the contract that takes place and has the effect of making performance of the contract impossible.

34. But for the doctrine of frustration to be properly applied, it must also be shown that the supervening event is unforeseen by the parties. Part of the Applicant's case is that the Respondent knew at the material time that Syrian visas were often delayed or denied to United Nations staff members and that that knowledge on the part of the Respondent meant that the denial of the visa to the Applicant was not a supervening event that rendered the contract legally frustrated.

35. In reviewing the circumstances in this case, the Tribunal finds that the Respondent does not deny that he had knowledge that staff members were sometimes denied Syrian visas when he entered into an employment contract with the Applicant for her to work in Syria. It goes without saying however, that it would be impossible for either the Respondent or the Applicant to fulfil any of the terms of the employment contract if the Syrian authorities did not grant the Applicant a visa.

36. An important issue for consideration here is whether the issuance of a Syrian visa was an implied term of the contract since as in this case, the performance of the contract did not depend solely on the actions of the two parties to it. In the view of the Tribunal, the issuance of a Syrian visa was indeed an implied term of the contract.

37. As has been reiterated above, if Syrian authorities did not issue a work visa, it would be impossible to perform the contract. Even though the Respondent knew that

staff members were sometimes denied Syrian visas, he would still be placed in an unnecessarily tenuous position, if he were to be found liable for non-performance of an employment contract whenever a visa was refused a staff member by State authorities.

38. In other words, the non-issuance of the Syrian visa to the Applicant in this case was a supervening event giving rise to a legal frustration of the contract and having the effect of legally discharging both parties from the employment contract.

Did OCHA have an obligation to terminate rather than rescind or withdraw from the frustrated contract? Was the Applicant entitled to more compensation than was paid her?

39. The Applicant had argued that OCHA had an obligation to terminate the contract of employment rather than cancel or rescind it. She argued further that if OCHA had opted to terminate the contract, it would first consider alternative assignments for the Applicant and where reassignment was not possible, she would be entitled to a salary in lieu of 30 days' notice based on the conditions of the contract in addition to any other compensation she was paid.

40. The Respondent contended that the authority of *Gabaldon* meant simply that a non-staff member seeking the protection of the Tribunal is to be treated as a staff member only for the limited purpose of accessing the United Nation's internal justice system. The Applicant cannot be treated as a staff member with regard to the Staff Regulations which govern benefits and entitlements.

41. The Tribunal agrees with the Respondent that the reach and application of *Gabaldon* is indeed limited and does not entitle the Applicant to take full benefit of the Staff Regulations regarding benefits and entitlements. To put it more succinctly, the Applicant could not be given notice of termination or paid any salary in lieu of

such notice when she had not even started performing her duties under the employment contract that would entitle her to remuneration.

42. The Tribunal in the course of reviewing the documents before it found that the Respondent's Annex R1 showed that the Syrian authorities communicated to the Respondent their refusal of visa to the Applicant on 2 September 2014. The letter from the Syrian Ministry of Foreign Affairs was already received and stamped in the Respondent's office on 3 September 2014. It appears that nothing was further done towards obtaining the visa. Unfortunately, nothing was done by the Respondent's agents until 29 October 2014 to inform the Applicant that the employment contract was frustrated as a result of denial of the visa to her.

43. It must be noted that the Applicant accepted the offer of employment on 9 June 2014. On 6 July 2014, she was asked by the Respondent to send the documents for a visa application. She promptly did so. The following day which was 7 July 2014, she was informed by email that the process for applying for her visa would start on that day. She was issued a ticket with a travel date of 3 August 2014. On 30 July 2014, she was told not to travel because she did not as yet have a visa.

44. The Applicant sent emails on 4 September, 23 September and 16 October 2014 to the Respondent's agents to inquire as to the status of the Syrian visa which would enable her take up the employment in Syria. When she was finally able to speak to an official by phone on 27 October 2014, only then was she informed that her application for the Syrian visa was refused. Two days later, on 29 October 2014 that telephone conversation was then followed by a letter informing her of the refusal of her visa by Syrian authorities and a withdrawal of her offer of appointment by the Respondent.

45. The Respondent's case is that the Applicant has already been adequately compensated for the delay in informing her that the offer was withdrawn because she was paid one month's net base salary as compensation and OCHA was ready to pay

the Applicant's medical examination costs. It is grossly unfair that in spite of the fact that the Syrian authorities communicated their refusal of the Applicant's visa on 2 September 2014 to the Respondent, nothing was done to inform her of the situation and that the employment was being withdrawn. Totally disregarding her several emails, she was thus kept in limbo for a total of two months from 3 September until 29 October 2014.

46. The Tribunal finds that the award of one month's net base salary to the Applicant as compensation for the delay in informing her that her contract was being withdrawn is inadequate. This is because two clear months elapsed between the refusal of visa and the withdrawal of the Applicant's contract. Even then, the Respondent's agent only acted to withdraw the contract following the Applicant's incessant inquiries on the matter. The delay was unprofessional and unwarranted. Additionally, the Tribunal accepts the Applicant's explanation that from the time she accepted the OCHA offer, the could not, in good faith, apply for different employment until the offer was withdrawn. Thus, due to the one-year appointment that she had been given, there was no possibility of her arranging other employment until 29 October 2014. At that time, she sought other employment but remained unemployed until the beginning of March 2015.

Judgment

47. The Applicant is entitled to compensation of two months' net base salary in the circumstances. With regard to the Applicant's claim that she forfeited other employment for purposes of taking up the contract of employment with OCHA, no evidence was tendered. The Tribunal cannot therefore make any award on that claim.

(*Signed*)

Judge Nkemdilim Izuako

Dated this 14th day of February 2018

Entered in the Register on this 14th day of February 2018

(*Signed*)

Abena Kwakye-Berko, Registrar, Nairobi