UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2024/013
Judgment No.: UNDT/2024/102
Date: 2 December 2024
Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: Geneva

Registrar: Liliana López Bello

RODRIGUEZ BREUNING

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Camila Nkwenti, HRLU, UNOG

Introduction

1. The Applicant, an Information Systems Officer, working with the United Nations Office at Vienna ("UNOV"), filed an application on 2 May 2024 contesting the decision to subject him to mandatory mobility.

2. The Respondent filed a reply on 3 June 2024 which was followed by the Applicant's rejoinder on 26 August 2024.

3. Thereafter, the parties filed closing submissions on 18 October 2024.

Factual background

4. Between 31 December 2021 and 29 January 2022, the Organization advertised the position of Solutions Architect, at the P-4 level, under Job Opening No. 170723 (the "JO").

5. The Applicant applied for the position on 27 January 2022. Thereafter, he participated in the recruitment process, and, on 22 June 2023, he was informed of his selection for the post.

6. On 23 June 2023, the Applicant accepted the selection and confirmed his interest in the position.

7. On 8 August 2023, the Applicant received the offer of appointment, which he accepted on 15 August 2023. In accepting the offer, the Applicant signed indicating (emphasis added):

> I hereby declare that I have read and fully understand the terms of this offer of appointment and accept it and the conditions herein specified, **subject to any modifications** to the Staff Regulations and Rules, administrative issuances or decisions by the General Assembly.

8. The offer of appointment reads in its relevant part (emphasis added):

> Your appointment **will take effect from** the date on which you are duly authorized to enter into official travel status to assume your duties, or if no travel is involved, **the day you report for duty**. A

> formal Letter of Appointment will be issued for your signature shortly thereafter. **The terms of your conditions of service will be subject to the provisions of** the Staff Regulations and Staff Rules and relevant administrative issuances, together with **such amendments as may from time to time be made to such Staff Regulations and Staff Rules and administrative issuances**.
>
> …
>
> By accepting an offer of appointment, United Nations staff members are subject to the authority of the Secretary-General and assignment by him or her to any activities or offices of the United Nations in accordance with staff regulation 1.2 (c).
>
> In this context, all internationally recruited staff members **shall be required to move periodically** to discharge new functions within or across duty stations **under conditions established by the Secretary-General** .

9. On 24 August 2023, ST/AI/2023/3 (Mobility) ("Mobility AI") was promulgated with an entry into force date of 1 October 2023, and later published on 6 October 2023.

10. Before and after the issue date of the Mobility AI, there was ongoing communication between the Applicant and the Organization. The correspondence included an email dated 31 August 2023 in response to the Applicant's query whether he could treat a prior email as confirmation of the offer and then start the process of resigning from his previous employment.

11. The Applicant was then informed as follows:

> I can only officially confirm the offer once you have been medically cleared and the reference verification process has been completed. …. Whether or not you already start your onboarding process at this point in time is your decision, you can of course await the offer confirmation as well, this is your prerogative.

12. The Applicant reported for duty on his selected date of 1 November 2023.

13. On 6 November 2023, the Applicant signed a letter of appointment ("LoA") of a duration of one year, expiring on 31 October 2024. The Applicant signed on the LoA that he accepted the appointment "subject to the conditions therein

specified and to those laid down in the Staff Regulations and in the Staff Rules and relevant administrative issuances" and that he had "acquainted [himself] with the Staff Regulations and Rules and relevant administrative issuances." The LoA provided in part that: (emphasis added)

> By accepting a letter of appointment, staff members are subject to the authority of the Secretary-General, who may assign them to any of the activities or offices of the United Nations in accordance with staff regulation 1.2 (c). Further, staff members in the Professional and higher category up to and including the D-2 level and the Field Service category are **normally required to move** periodically to discharge functions in different duty stations **under conditions established in ST/AI/2023/3 on Mobility**, as may be amended or revised.

14. On 1 November 2023, a broadcast was sent to all staff in the United Nations Secretariat announcing the launch of the 1st Annual Global Mobility Exercise and inviting staff members to opt-in to the exercise. The broadcast indicated that the opt-in exercise would take place from 1 November 2023 to 30 November 2023 and "staff members in the Professional and higher categories up to D-2 level, and Field Service Category, holding appointments other than temporary, can opt-in through Inspira". The broadcast also indicated that the 1st Annual Global Mobility exercise was opt-in only.

15. On 15 December 2023, the Applicant emailed his Human Resource Partner requesting his exclusion from the 1st Annual Global Mobility Exercise based on the grounds that he was not informed about the Mobility AI during the hiring process or in the offer of appointment.

16. On 19 December 2023, the Applicant sent a request to the Management Advise and Evaluation Section ("MAES") for management evaluation of the decision to subject him to the Mobility AI.

17. On 26 January 2024, the Human Resources Partner informed the Applicant that he did not have to take part in the 1st Annual Global Mobility Exercise unless he opted in, as it was voluntary. He was provided with a copy of the broadcasts and informed that pursuant to the Mobility AI, the maximum occupancy limit for the Vienna duty station is five years.

18. On 2 February 2024, the Applicant was informed of the outcome of his request for management evaluation. The Under-Secretary-General for Management Strategy, Policy and Compliance upheld the contested decision.

Consideration

Receivability

Respondent's submissions on receivability

19. The Respondent contends that the application is not receivable *ratione materiae* as the decision to subject the Applicant to the Mobility AI is not a unilateral decision taken by the Administration and does not apply only to the Applicant. It applies to all staff members in the United Nations Secretariat whose entry into duty is on or after 1 October 2023. In this context, it is not an administrative decision subject to judicial review.

20. The Applicant entered duty on 1 November 2023, i.e., after the effective date of the Mobility AI. The Applicant's alleged lack of knowledge of the policy before joining the Organization does not exempt him from its applicability.

21. On 1 October 2023, the Mobility AI entered into force. Accordingly, all staff members who entered on duty on or after 1 October 2023 in a rotational position are subject to lateral reassignment to rotational encumbered positions upon the duty station reaching the maximum occupancy limit.

22. Further, the Respondent argues that the Applicant's participation in any mandatory mobility exercise is uncertain and hypothetical. The Applicant is holding a fixed-term appointment for one year. The maximum occupancy limit for rotational positions in the Vienna duty station is five years. Therefore, since the Applicant has a one-year fixed-term appointment with no expectation of renewal, the mobility obligation under the Mobility AI will have no impact on his contract of employment at this time.

23. The Applicant has a one-year fixed term appointment which by its terms has no expectation of renewal. Given that the maximum occupancy limit in the Vienna

duty station is five years, the obligation to move will, presently, have no negative consequences to the Applicant's contract of employment and will depend on other factors at the time.

24. Should he then be subject to mandatory mobility there is a mechanism in the mobility AI to avoid any undue hardship on an individual basis. It would be speculative to anticipate the outcome of such an exercise. Thus, the challenged decision should not be considered an appealable administrative decision, at this stage.

Applicant's submissions on receivability

25. The Applicant's position is that the contested decision is one of individual application and receivable. The Applicant agrees that the principle is that a regulatory decision cannot be contested. However, when the rule is applied to the individual it then becomes a decision of individual application and is reviewable by the internal justice system.

26. The Applicant relies on *Pedicelli* 2015-UNAT-555, para. 29 where the United Nations Appeals Tribunal ("UNAT') held that:

> […] it is an undisputed principle of international labour law and indeed our own jurisprudence that where a decision of general application negatively affects the terms of appointment or contract of employment of a staff member, such decision shall be treated as an "administrative decision" falling within the scope of Article 2(1) of the Statute of the Dispute Tribunal and a staff member who is adversely affected is entitled to contest that decision.

27. The Applicant thus argues that he did not contest the promulgation of the rules regarding the mobility policy in the abstract. He waited until he was informed that he would be subject to mandatory mobility and contested that decision, which he contends is one of individual application.

Receivability examination

28. It is well-settled that before an administrative decision can be contested and held to be in non-compliance with the contract of employment of a staff member it

must be shown to adversely affect the rights or expectations of the staff member and have direct legal effect (see *Alvear* 2024-UNAT-1464, para. 39).

29. Therefore, if the Applicant can prove the direct legal effect of such a separate decision, then that decision would qualify as an administrative decision that can be the subject of a challenge before the Tribunal. The matter for the Tribunal to consider would be the substantive merits of the application. The merits include whether there was such a separate decision and, if so, whether it unlawfully included the Mobility AI under the terms and conditions of the Applicant's employment.

30. The Applicant has correctly submitted that he is not contesting the promulgation of the Mobility AI. The Tribunal observes that it is clear from the content of the application that he does not challenge the existence of the Mobility AI as a regulatory decision of the Secretary-General affecting all staff members. Instead, he is contesting the impact of what he perceives as a specific decision made after he accepted the offer of appointment, i.e., that the Mobility AI would be a term of his employment contract.

31. The Respondent also failed to establish that the application is speculative and premature. The Tribunal finds that if, in fact, a decision was made to unlawfully add terms to the Applicant's contract, the time to challenge such a decision would run from the date the decision was made.

32. Therefore, on the question of receivability, the Tribunal's determination is that the application is receivable.

Merits

Applicant's submissions on the merits

33. The Applicant's position is that his signing of the offer letter of employment amounted to a contract that existed between him and the Organization prior to the promulgation of the Mobility AI. He argues that he was provided with an offer of employment, which terms he agreed to unconditionally on 15 August 2023. That offer of employment set out the general conditions for his employment. Like any

other offer of employment prior to promulgation of the Mobility AI, it contained a reference to staff regulation 1.2 (c). However, it made no reference to the provisions of the Mobility AI and that the Applicant's employment would be subject to it.

34. Relying on *Gabaldon* 2011-UNAT-120, the Applicant contends that a contract of employment is fixed not on the first date of work but upon unconditional agreement to an offer of appointment.

35. The Applicant argues that the fact that he was required to take significant actions, such as resigning from his previous employment in reliance on the 15 August 2023 signing of the offer letter, demonstrated that a binding contract existed at that point. Those actions were taken in reliance upon the terms of employment as set out in the offer of appointment.

36. The Applicant, therefore, posits that the failure by the Administration to notify him of a term requiring mandatory mobility prior to the conclusion of the contract of employment, which he says was the offer of appointment letter, means such term does not apply.

37. The Applicant further seeks to draw a distinction between staff regulation 1.2 (c), which was mentioned in his offer of appointment letter, and the Mobility AI, which was not. He argues that there is no equivalence between the two, as staff regulation 1.2 (c) only provides for being subject to an authority that may move a staff member between posts. This, he says, is entirely different from being subject to a mandatory rotation policy under the Mobility AI requiring movement within five years. The first expresses a discretion, the second an obligation. The first is a possibility, and the second is a certainty.

38. The Applicant maintains that the non-equivalence between the two is demonstrated by the fact that all new vacancy announcements and offers of appointment since October 2023 provide specific information regarding the provisions of the Mobility AI and mandatory rotation. This shows that the rotation policy is considered a sufficiently fundamental contractual term that requires being referenced even in the offer of appointment letter.

39. The Applicant further contends that it is clear that the staff regulation 1.2 (c) notice is not equivalent to being notified of the Mobility AI because staff members onboard before 1 October 2023 are not subject to the rotation policy unless they voluntarily agree to such modification to their terms of appointment. This despite all having received offers of appointment and letters of appointment containing the standard staff regulation 1.2 (c) notice.

40. The Applicant emphasizes that he has significant and serious reasons not to wish to participate in a rotation policy. Prior to accepting his appointment at the Organization, he was employed in a position not subject to rotation. He says he was enticed to resign from that position and move to the Organization without ever being put on notice of the reality of the terms of such employment.

41. The Applicant asserts that the Organization had the opportunity to put him on notice of the Mobility AI being a condition of employment in the vacancy announcement, in the offer of appointment, in the personnel induction and at any other moment during the recruitment process. Instead, a few days after he joined the Organization, he was informed that the Mobility AI applied to his contract.

42. According to the Applicant, this meant that the terms of his appointment had been altered after his signing of the offer of appointment, i.e., after the date on which he considered his employment contract was completed. Such alleged alteration of terms is viewed by the Applicant as inconsistent with the Organization's obligation of good faith dealings with staff members.

43. Had the Applicant been properly put on notice, he argues that he would have been able to arrange his departure from the previous employment at an earlier date, avoiding, therefore, the commencement of the Mobility AI on 1 October 2023.

44. The Applicant also argues that whereas staff members are deemed cognizant of all Rules and Regulations governing their contract of employment, the same is not the case for prospective staff members. The Applicant had no access to the United Nations' intranet, and did not receive any information regarding the new Mobility AI in his email address. The only information he had regarding the terms of the employment contract he entered into were those provided to him by the

Organization. However, despite repeated opportunities, the Organization failed to inform him that he was subject to mandatory rotation under the new Mobility AI.

45. The Applicant thus requests the Tribunal by way of remedy to order:

a. Rescission of the contested decision; and

b. A confirmation that he will not be subject to the rotational policy.

Respondent's submissions on the merits

46. The Respondent's position is that the contested decision was lawful. The Applicant is subject to the managed geographical mobility exercise in the United Nations Secretariat pursuant to sections 3.1, 3.2 and 15.1 of the Mobility AI. The Mobility AI provides that the mobility exercise is mandatory for all staff members whose date of entry on duty is on or after 1 October 2023.

47. Therefore, since the Applicant entered on duty on 1 November 2023, which is after the effective date of the Mobility AI, he is bound by its provisions. His participation in an actual exercise depends on when the maximum duty station occupancy limit is reached and on whether the Applicant is encumbering a rotational position at that time. The maximum occupancy limit for the Vienna duty station is five years.

48. Regarding the Applicant's claims that applicability of the Mobility AI was not stated in his offer of appointment, the Respondent submits that the obligations of staff members were sufficiently referenced in the JO for which the Applicant applied. The obligations were also included in the offer of appointment which the Applicant signed. The Respondent emphasizes that the language in the JO and the offer of appointment clearly stated that (emphasis added):

> By accepting an offer of appointment, United Nations staff members are subject to the authority of the Secretary-General and assignment by him or her to any activities or offices of the United Nations in accordance with staff regulations 1.2 (c).

> In this context, all internationally recruited staff members shall be **required to move** periodically to discharge new functions within or across duty stations **under conditions established** by the Secretary-General.

49. In view of the above, the Applicant was adequately notified of his obligation of mobility at the time the offer of appointment was sent to him.

50. Furthermore, the Respondent emphasizes that, contrary to what the Applicant alleges, an offer of appointment is simply an offer with several terms and is not a binding contract or a formal employment contract for staff members even if signed by the Applicant. The Applicant's offer of appointment clearly indicated that it was subject to satisfactory completion of a medical examination, amongst other verifications to be conducted. It did not constitute the final contract with the Organization. It clearly stated that a letter of appointment would be issued, which is the official document by which the candidate becomes a staff member of the United Nations.

51. In closing submissions, the Respondent further highlights that the Tribunal has considered that the Letter of Appointment and not the Offer of Appointment is the legal act by which the Organization legally undertakes to employ a person as a staff member. The Tribunal notes, however, that the Respondent failed to cite said decisions.

52. The Respondent refutes the Applicant's contention that staff regulation 1.2 (c) and the Mobility AI are distinct and that he should have been specifically informed of the Mobility AI. The generic language contained in the offer letter on being subject to "the authority of the Secretary-General and assignment by him or her to any activities or offices of the United Nations" and being "required to move periodically to discharge new functions within or across duty stations under conditions established by the Secretary-General" is sufficient to address the fundamental terms and conditions of appointment with regard to mobility at the stage of onboarding.

53. Moreover, the Respondent avers that there was no obligation for the Organization to inform staff members of an AI of general application to all United

Nations Secretariat staff with entry on duty date on or after 1 October 2023. There is no general obligation for the Organization to bring the entire legal framework, including all administrative issuances, to the attention of a prospective staff member in offering an appointment.

54. The Respondent also maintains that the Applicant was not treated differently to others who received offers of employment between the promulgation of the Mobility AI on 24 August 2023 and its entry into force on 1 October 2023. The specific reference to the Mobility AI included in the more recent offer letters was only introduced in offers issued on or after the Mobility AI commencement date of 1 October 2023.

55. The Respondent, accordingly, requests the Tribunal to dismiss the application in its entirety.

Examination of the merits

Applicable law and scope of judicial review

56. Staff regulation 1.2(c) provides that:

> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations.

57. Relevant staff rules 4.1 and 4.2 provide the following:

> **Rule 4.1**
>
> **Letter of appointment**
>
> The letter of appointment issued to every staff member contains expressly or by reference all the terms and conditions of employment. All contractual entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment.
>
> **Rule 4.2**
>
> **Effective date of appointment**
>
> The effective date of appointment shall be the date on which staff members enter into official travel status to assume their duties or, if no travel is involved, the date on which they report for duty.

58. Section 3 of the Mobility AI provides in its relevant part as follows:

> **Scope**
>
> 3.1 The present administrative instruction applies to staff members in the Professional and higher category and in the Field Service category holding an appointment other than a temporary appointment who:
>
> (a) Entered into duty on or after the effective date of the present instruction and who encumber a rotational position. Staff members re-employed on or after the effective date of the present instruction will be subject to the present instruction. However, staff members who were initially appointed prior to the effective date of the present instruction but are reinstated in accordance with provisional staff rule 4.17 are not required to participate in an exercise;
>
> (b) Entered into duty before the effective date of the present instruction and who choose to opt in to an exercise in accordance with the provisions of subsections 6.7 to 6.9 of the present instruction. Such staff members do not become subject to mandatory mobility or to the maximum duty station occupancy limit.

59. Section 7 of the Mobility AI provides that:

> **Special Constraints Panel**
>
> In accordance with the annex to the present instruction, the Special Constraints Panel considers requests from participating staff members who believe that they have special constraints that limit their participation in an exercise.

60. Section 15.1 of the Mobility AI provides that "[t]he present administrative instruction will enter into force on 1 October 2023".

61. In determining the Applicant's case, the Tribunal recalls that the starting point when considering administrative decisions is the presumption that official functions have been regularly performed (*Lemonnier* 2017-UNAT-762, para. 32, citing *Rolland* 2011-UNAT-122, para. 5).

62. Further, the Tribunal bears in mind that in considering this case, it does not seek to replace the decision-maker's role in coming to a determination. Rather, the Tribunal's role is limited to a judicial review of the process by which the

decision-maker arrived at the decision that is being challenged (*Sanwidi* 2010-UNAT-084, para. 40).

Whether the Applicant is legally subject to the Mobility AI

63. The Tribunal observes that the Respondent's defence is primarily based on the argument that the Applicant's interpretation that his terms of employment were altered by the Mobility AI after the employment contract was concluded and without notice is factually incorrect. The Tribunal agrees with the Respondent.

64. Indeed, staff rules 4.1 and 4.2 provide that the LoA is the legal document containing, expressly or by reference, all the terms and conditions of employment, and that the effective date of appointment is the date on which staff members enter into official travel status to assume their duties or, if no travel is involved, the date on which they report for duty.

65. Contrary to the Applicant's interpretation, nowhere in the Organization's legal framework does it suggest that the offer of appointment is the legal document that concludes the contract of employment between a future staff member and the Organization.

66. In fact, as shown by the contemporaneous correspondence with the Applicant, the Organization made it clear during the recruitment process that even after he signed the letter of offer, the confirmation of the Applicant's appointment as a staff member was contingent on the clearance of a few pending matters (e.g., medical clearance and reference verification). The email stating this position was sent to the Applicant on 31 August 2023 after he had signed the offer letter earlier in August. Thus, there is no merit in law or fact to the Applicant's case that the offer letter concluded his contract.

67. In the Tribunal's view, the facts establish that the Applicant should have known that his employment would be subject to mobility, and that the offer letter did not conclude the employment contract. He signed, implicitly indicating as much when he endorsed the offer letter in August 2023.

68. The Applicant's signed endorsements to his offer letter and his LoA together reflect his constructive knowledge of all applicable Staff Regulations and Rules and administrative issuances. His letter of offer indicated expressly that his terms and conditions included this regulatory framework.

69. Thus, the Applicant should have known that his employment was subject to the aforementioned provisions, which included the Mobility AI that came into effect before he signed the LoA in November 2023.

70. Moreover, the Applicant's case is based on a false premise that, by only referencing staff regulation 1.2(c) in his offer letter, the Organization effectively did not inform him of the mandatory mobility under the new Mobility AI, which he only discovered after he reported to duty. However, this is not correct.

71. The Organization's pre-appointment documents did not merely speak to applicability of staff regulation 1.2(c) as a term of the employment contract. It was made clear in the letter of offer in August 2023, that mobility was a mandatory condition of the Applicant's employment.

72. This is so because, although the words "mandatory" and "mobility" are not stated in the pre-appointment documents, including the offer letter, these documents included synonymous terms. The Applicant was duly notified in the offer of employment by use of the words "shall" and "required" that it was mandatory that he would "move periodically to discharge new functions within or across duty stations".

73. In the offer of employment, it was further made clear that this document did not include all terms relating to mobility. The required movement would be "under conditions established by the Secretary-General". This was enough to put the Applicant on notice that he was "required to move" or, in other words, subject to mandatory mobility. There were clearly some conditions concerning that movement that would also be applicable.

74. The offer letter provided even more clarity, putting it beyond question that the terms and conditions on matters such as required movement (i.e., mobility)

could change and be contractually binding on the Applicant. Such changed conditions, including in "administrative issuances, together with such amendments as may from time to time be made", would also be part of the Applicant's terms and conditions of service.

75. The Applicant signed agreeing to these provisions in his offer letter. His case that it came as a surprise to find that the LoA included reference to the Mobility AI lacks inherent logic. On a comparison of the offer letter with the LoA, the addition of the reference to the Mobility AI simply gave substance to the reference in the offer letter to conditions established by the Secretary-General (*Stepanova* UNDT/2024/096, para. 66).

76. By the job opening and the offer letter, the Applicant was made aware that there would be conditions governing the required movement to which he would be subject on appointment. The insertion of the reference to the Mobility AI as the Secretary-General's conditions was, therefore, not a new term of the employment contract being imposed without prior notice.

77. In addition to the foregoing, UNAT jurisprudence explains the specific regulatory framework for employment contracts within the Organization. It is the LoA and not the offer letter accepted by a staff member that officially sets the terms and conditions of employment. In *Gabaldon*, UNAT explained that:

> 22. […] an employment contract of a staff member subject to the internal laws of the United Nations is not the same as a contract between private parties (*James*, Judgment No. 2010-UNAT-009). The aforementioned provisions confer upon the Secretary-General the power to engage the Organization in this matter. These provisions stipulate that the legal act by which the Organization legally undertakes to employ a person as a staff member is a letter of appointment signed by the Secretary-General or an official acting on his behalf. The issuance of a letter of appointment cannot be regarded as a mere formality (*El-Khatib*, Judgment No. 2010-UNAT-029).

78. Further in *Lloret Alcañiz et al.* 2018-UNAT-840, para. 94, the Appeals Tribunal underscored that:

> […] [s]taff members do not have a right, acquired or otherwise, to the continued application of the Staff Regulations and Rules […] in force at the time they accepted employment for the entirety of their service.

79. Similarly to *Stepanova*, this Tribunal found that the Applicant was duly informed, before accepting the offer letter, of the mandatory nature of the condition of mobility in his proposed employment. However, even if mandatory mobility had not been so explicit in the pre-appointment documents, staff rule 4.1 stipulates that it is the LoA that contains expressly or by reference the terms and conditions of employment.

80. As a prior outsider to the Organization, the Applicant may have been unaware of the promulgation of the Mobility AI in August 2023. However, the fact that he was not a staff member at the time of the offer letter does not excuse lack of knowledge of the regulations that would govern his proposed employment. He is presumed to know the rules applicable to the employing organization (*El-Khatib*, para. 16).

81. Therefore, the Tribunal's conclusion is that the Applicant has failed to demonstrate any unlawful factor in the decision that confirmed him as subject to the Mobility AI.

Conclusion

82. In view of the foregoing, the Tribunal DECIDES that the application is denied in its entirety.

(Signed)
Judge Eleanor Donaldson-Honeywell
Dated this 2nd day of December 2024

Entered in the Register on this 2nd day of December 2024
(Signed)
Liliana López Bello, Registrar, Geneva