



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

SAMUEL THAMBIAH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for Applicant:
Amal Oummih, OSLA

Counsel for Respondent:
Ivan Koulov, HRMS/UNOG

Introduction

1. On 6 January 2010, the Applicant filed an application requesting the United Nations Dispute Tribunal (UNDT) to suspend, during the pendency of the management evaluation, the implementation of the decision, verbally notified by the Deputy Chief, Human Resources Management Service (HRMS), United Nations Office at Geneva (UNOG), on 24 December 2009, that “his employment [be] immediately terminated”, that “he [be] not issued a temporary contract for a position for which he was the selected candidate and which he is currently occupying”, and that “he [be] instead issued a consultant contract to cover the shorter period worked by the Applicant”.

Facts

2. Since 2005, the Applicant has held a number of appointments with UNOG, the last of which went from 14 to 26 November 2009.

3. On 9 December 2009, the Applicant was interviewed for a temporary position in the Joint Inspection Unit (JIU). By e-mail of the same date, an Administrative Assistant, JIU, informed the Applicant that the Executive Secretary of the JIU had requested her “to prepare a temporary contract for [the Applicant] starting Monday, 14 December 2009 through 31 January 2010”. He was furthermore asked to send his Personal History Profile (PHP), what he did.

4. In his PHP, dated 9 December 2009, the Applicant mentioned a previous employment as Chief, Office of the Administration and Management, International Seabed Authority (ISA), from December 2001 to July 2002. He stated the following under “reason for leaving”: “Assignment ended. Personal/lack of appreciation for financial discipline implemented. Details with Director HR, UNOG.”

5. On 14 December 2009, the Applicant reported to work, even though he did have not a signed contract. He was issued a UN staff ground pass valid until 31 January 2009.

6. On 17 December 2009, the Executive Secretary, JIU, apprised the Applicant that HRMS had informed her of “an issue” related to his background with an impact on the issuance of his contract.

7. On 24 December 2009, the Deputy Chief, HRMS, UNOG, met with the Applicant and informed him orally that it had been decided not to recruit him on a temporary appointment but to offer him a consultant contract due to end on 31 December 2009, to cover the work he had already undertaken.

8. According to the Applicant, the reason offered for this change was “an issue of integrity”, as he would not have adequately disclosed the circumstances of the termination of his contract with ISA in 2002.

9. The Applicant wrote to the Deputy Chief, HRMS, UNOG, on 25 December 2009, requesting clarifications as to the basis for questioning his integrity. He stressed that he had disclosed the reasons for his termination by ISA through a memorandum provided to HRMS on 12 October 2009, which was referred to in his PHP dated 9 December 2009.

10. On 6 January 2009, the Applicant submitted a request for management evaluation of the contested decision to the Management Evaluation Unit of the UN Secretariat.

Parties' contentions

11. The Applicant's principal contentions are:

- a. The contested decision is unlawful because:
 - i. The Applicant has a de facto contract.
 - ii. The Administration has not provided any legal justification for the challenged decision, the latter is tainted by procedural irregularities, and there is no legal basis not to issue a contract along the lines of the offer previously made to the Applicant.
 - iii. The decision in question is thus unlawful and unjustified; it is unfair and violates the Applicant's due process rights.
 - iv. The Applicant has held a number of contracts with UNOG, the last one of which expired less than one month before the

contested decision was made. Hence, it appears arbitrary to refuse issuing a new contract at this stage.

- b. The case is of particular urgency because the Applicant has already been working on his new assignment since 14 December 2009. The implementation of the decision would result in the Applicant being left with no employment. Moreover, any future applications for employment may be negatively affected.
- c. Irreparable damage will be caused because the Applicant would be immediately separated or forced to sign a different contract than the one promised. The result in any case would be damaging to his professional reputation, employability and career aspirations.

12. The Respondent's principal contentions are:

- a. The contested decision is not admissible:
 - i. The Applicant is not a staff member of the United Nations since he was the holder of a consultant contract.
 - ii. The decision has been implemented and has no continuous effects. It is not possible to suspend a decision already implemented in full, as this would in fact amount to reversing the contested decision, whereas the Tribunal has not been conferred this power under article 2.2 of its statute.
- b. The decision in question is not unlawful. It is based on valid and legitimate grounds. It falls within the discretionary authority of de Secretary-General, who has the responsibility to ensure that UN employees meet the highest standards of efficiency, professionalism and integrity. Moreover, the contested decision did not constitute a definitive one, preventing the Applicant from being subsequently recruited.
- c. This is not a case of particular urgency since the contested decision has been already implemented.

- d. In light of the short duration of the contract which the Appellant expected to be issued, the decision does not cause any damage that could not be repaired financially.

Considerations

13. The receivability of applications *ratione personae* is restricted to a rather narrow circle of individuals. The statute of the United Nations Dispute Tribunal (UNDT statute) contains the following provisions:

Article 2, paragraph 1:

“The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations: (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.”

Article 3, paragraph 1:

“An application under article 2, paragraph 1, of the present statute may be filed by: (a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes; (b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes ...”

Article 2, paragraph 6:

“In the event of a dispute as to whether the Dispute Tribunal has competence under the present statute, the Dispute Tribunal shall decide on the matter.”

14. In the case at hand, the Applicant does not belong to any of the above categories.

15. Considering that the Applicant's last appointment with the Organization came to an end on 26 November 2009, it is clear that he cannot be considered as a current 'staff member'.

16. The Applicant cannot be considered either as a 'former staff member' within the meaning of article 3.1 (b) of the UNDT statute, which must be read in conjunction with article 2.1 (a). Former staff members are only entitled to appeal decisions alleged to be in non-compliance with the terms of their former appointment, e.g. in case of non-renewal or other kinds of separation. This case is not related to any of the Applicant's former appointments. On the contrary, the application is confined to the new relation between the parties, starting with a selection process that took place on 9 December 2009.

17. Finally, on the basis of rules and regulations which it is the responsibility of the UNDT to apply, the Applicant may not be regarded as a 'staff member' for the purposes of the present application (cf. UNAT judgement n° 96, *Camargo* (1965)). Unlike in the situation warranting the Tribunal's order No. 2 (GVA/2010), *Gabaldon*, the Applicant in this case never received a formal offer of appointment, and therefore he never accepted it. Hence, the status of the Applicant is not disputed, as it is in the *Gabaldon* case. The short e-mail addressed to the Applicant by the Administrative Assistant, JIU, on 9 December 2009 is – according to its clear wording – aimed at informing the Applicant that the Executive Secretary of the JIU, had requested her “to prepare a temporary contract” for him, but did not contain such an offer in itself. Therefore, the Applicant can by no means claim to have become a 'staff member'. The same applies to the fact that the Applicant started to work for the Organization as of 14 December 2009. This may create an obligation to pay him for his services. However, it does not grant him the status of 'staff member'.

Conclusion

18. In view of the foregoing and of all the circumstances of the case, the application must be regarded as irreceivable *ratione personae*.

(Signed)

Judge Thomas Laker

Dated this 12th day of January 2010

Entered in the Register on this 12th day of January 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva