



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

WARE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for the Applicant:

Alexandre Tavadian, OSLA

Nicole Washienko, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

The Application

1. On 25 June 2015, the Applicant filed an Application titled “Application for Suspension of Action Pending Management Evaluation and Motion for a Stay of Proceedings Pursuant to Rules 19 and 36 of the UNDT Rules of Procedure”.

2. The Applicant is contesting the failure to implement the decision to select and appoint him for the P-4 post of Logistics Officer at the United Nations Support Office for Amisom (UNSOA). The Applicant further submits that the underlying application is a management evaluation request challenging the implied decision not to extend his appointment with the United Nations Mission in Darfur (UNAMID). He seeks the following remedies:

a. That the administrative decision not to renew his appointment be suspended for five working days – until 3 July 2015 – in order to allow the Tribunal to adjudicate his Application for Suspension of Action pursuant to article 13 of the UNDT Rules of Procedure.

b. An order referring Mr. Amareswara Rao, Chief Civilian Personnel Officer (CCPO) of UNSOA to the Secretary-General for accountability under art. 10.8 of the Statute of the United Nations Dispute Tribunal.

3. The Respondent filed his Reply on 29 June 2015 in which he submitted that the Application was moot as the Applicant’s fixed-term appointment has been renewed beyond 30 June 2015.

4. The Tribunal heard the matter on 30 June 2015. At the hearing, Counsel for the Respondent was ordered to submit a witness statement from Mr. Rao. The witness statement was filed on 30 June 2015.

Facts

5. The Applicant joined the United Nations in 2003. Since that time, he has been continuously employed by the Organization on a series of one-year fixed-terms appointments.

6. The Applicant is currently a Logistics Officer at the P-4 level with UNAMID, though he has been on a Temporary Duty Assignment (TDY) to UNSOA since April 2014. His current appointment expires on 30 June 2015.

7. In late 2014, the Applicant applied for the post of Logistics Officer at the P-4 level in UNSOA (“the Post”).

8. On 7 December 2014, the Applicant received an email from Ms. Maria Carmencita Goss, a Human Resources Officer with UNSOA, informing him that he had been selected for the Post and requiring his confirmation of his continued interest in and availability for the position.

9. The Applicant responded to Ms. Goss’s email that same day stating that he had accepted the offer.

10. On 12 December 2014, Ms. Goss wrote to the Applicant informing him that UNSOA had received confirmation from UNAMID that he could remain in UNSOA on TDY “until the completion of [his] onboarding process”.

11. On 23 June 2015, the Applicant met with Mr. Rao who informed him that he would not be placed on the Post for which he had been selected in December 2014.

12. The Applicant requested management evaluation on 25 June 2015.

Submissions

Applicant

13. The Applicant raises three separate issues.

a. Whether the Tribunal should grant a provisional suspension of the implementation of the contested decision.

b. Whether he meets the tri-partite test for the granting of a suspension of action under Rule 13 of the UNDT Rules of Procedure.

- c. Whether Mr. Rao should be referred to the Secretary-General for accountability.

Motion Pursuant to Article 19 and 36 of the UNDT Rules of Procedure

14. His appointment with UNAMID expires on 30 June 2015. He has not requested its renewal on the basis of the decision to select him for the Post. The decision to select him for the Post has not been implemented. The failure to implement this decision is the subject of the underlying management evaluation request.

15. The expiration of his appointment will occur before the United Nations Dispute Tribunal will have time to adjudicate the application for suspension of action under art. 13 of the Dispute Tribunal's Rules of Procedure. Consequently, to preserve his contractual rights, the Applicant requests the Tribunal to provisionally suspend the implementation of the decision pending the adjudication of the suspension of action. The Applicant cites arts. 19 and 36 of the Dispute Tribunal's Rules of Procedure and the United Nations Appeals Tribunal's (UNAT) holding in *Villamorán* 2011-UNAT-160 in support of this submission.

Application for Suspension of Action Pursuant to Rule 13 of the Rules of Procedure

Prima Facie Unlawfulness

16. The Applicant submits that in the present case, the decision is unlawful for three reasons.

- a. The refusal to implement the selection decision violates paragraph 10.2 of ST/AI/2010/3 (Staff selection system) which stipulates that the decision to select a candidate shall be implemented upon its official communication to the individual concerned.

- b. The decision is contrary to fundamental jurisprudential principles. In *Gabaldon* 2011-UNAT-120 and *Sprauten* 2011-UNAT-111, UNAT held that a mere offer of employment produces legal effects upon its

unconditional acceptance by a candidate even before a letter of appointment is issued. In the present case, on 7 December 2014, the Applicant was asked to confirm within five working days his continued interest. The Applicant confirmed his interest on the same day. Thus, as of 7 December 2014, the Administration was bound by a valid employment contract. By failing to implement the decision, the Administration breaches its contractual obligations.

c. The decision violates the Applicant's legitimate expectation. The email dated 7 December 2014 was an express promise that gave rise to legal obligations. In addition, the subsequent email correspondence between the Applicant and the Administration reinforced the Applicant's legitimate expectation. Furthermore, the Administration's failure to inform the Applicant of its intentions over a period of seven months is an additional indication that the Applicant could legitimately rely on the decision to select him.

Urgency

17. The Applicant's appointment expires on 30 June 2015. He filed a management evaluation request on 25 June 2015. The final decision of the Management Evaluation Unit (MEU) is due on 10 August 2015, which is 40 days after the expiration of his current appointment. A suspension of action is the only means to preserve his contractual rights.

18. The urgency was not created by the Applicant. As soon as he was notified of the refusal to implement the decision to select him, he filed this Application.

19. If the Suspension of Action is not granted, the Administration will implement the impugned decision thereby significantly undermining the Applicant's career prospects with the United Nations.

Irreparable Harm

20. If the Applicant's appointment is allowed to expire, his employment prospects with the United Nations will be significantly and adversely affected. The Applicant has been a United Nations staff member for over 12 years.

21. The Suspension of Action is the only remedy available to the Applicant which can prevent the Administration from unlawfully depriving him of employment and career prospects.

22. No amount of monetary compensation can adequately repair damages caused by such an egregious violation of his fundamental rights.

Referral of Mr. Amareswara Rao to the Secretary-General for Accountability

23. Article 10.8 of the Statute of the Dispute Tribunal stipulates that the Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

24. The Applicant submits that, in the present case, the conduct of Mr. Rao warrants such an order. Mr. Rao has waited for seven months before informing the Applicant that the Administration no longer intended to honor its contractual obligations without providing any reasons. Indeed, the decision to select the Applicant was made on 7 December 2014 and Mr. Rao informed the Applicant of his intentions on 23 June 2015 – only one week prior to the expiration of the Applicant's appointment with the United Nations.

25. On 24 June 2015, Counsel for the Applicant wrote to Mr. Rao in relation to this case with a "return receipt" option and received an automatic confirmation of delivery. Mr. Rao chose not to reply to this email.

26. The Applicant submits that Mr. Rao's conduct is discourteous. It has also placed him in an impossible situation creating uncertainty. It also created an unnecessary urgency. For these reasons, the Applicant respectfully requests that Mr. Rao be referred to the Secretary-General for accountability.

Respondent

Response to the Application for Suspension of Action Pursuant to article 13 of the Rules of Procedure

27. The Respondent submits that this Application is moot as the Applicant's fixed-term appointment has been renewed beyond 30 June 2015.

28. The Respondent cites *Gehr* 2013-UNAT-328 and *Castelli* UNDT/2015/057 as authority for his submission that where an impugned decision has been reversed, corrected or superseded, it is in the power of the Tribunal to find that the challenge is moot and therefore not receivable.

29. In this case, the contested decision has been superseded by the decision to renew the Applicant's appointment for three months. Furthermore, UNSOA has informed the Applicant that no action will be taken in respect of the recruitment process for the post of Logistics Officer pending the outcome of his request for management evaluation. As a consequence, the Application for suspension of action has been rendered moot and there is no aspect of the contested decisions remaining to be adjudicated.

Accountability Measures

30. The Respondent submits that the Dispute Tribunal does not have competence to refer the case to the Secretary-General for possible action to enforce accountability under art. 10.8 of the Statute of the Dispute Tribunal.

31. The referral of a case to the Secretary-General under art. 10.8 is inappropriate given that the Secretary-General has the opportunity to review the contested decisions during the management evaluation process. The referral of an individual under art. 10.8 on the basis of a finding of *prima facie* unlawfulness is inappropriate. In the usual course, such an order would be appropriate following a hearing on the merits.

32. Further, an order under art. 10.8 is not appropriate in the circumstances. Mr. Rao was not in a position to respond to the Applicant's Counsel's email as he was in hospital at the time.

DELIBERATIONS

33. The Applicant is seeking suspension of the decision of the Administration not to implement the recruitment process in regard to the position of P-4 Logistics Officer in UNSOA. He submits that an offer was made to him which he accepted and that the Administration cannot now without any valid reason suspend the implementation of the recruitment process. The Applicant also submits that the Tribunal has jurisdiction under art. 10.2 of its Statute and art. 13 of its Rules of Procedure to suspend the decision not to implement the recruitment process.

34. The Respondent submits that there was no offer of appointment made and that the UNDT has no jurisdiction to make an order to implement a decision to recruit an individual. In the alternative, should the Tribunal find that there was a valid offer of employment to grant the Application would amount to directing the Administration to implement a decision and the Tribunal is not vested with that power.

Was there a valid offer of employment?

35. The facts show that the Applicant received an email from Ms. Goss in English and French about the position of Logistics Officer, P4, United Nations Office for Amisom, Mogadishu, (Job Opening 37331) dated 7 December 2014 informing him as follows:

In reference to your application to the above-mentioned Job Opening, we are pleased to inform you that the Head of Department/Office/Mission has selected you for the position.

Please confirm by return e-mail, within five business days of receipt of this message, your continued interest and availability for this position.

The Human Resources Management Office will be contacting you shortly with regard to further recruitment and staffing procedures. In the meantime, if you have any questions or comments, please do not hesitate to contact me.

36. That email was sent at 1400 hours. On the same day at 1525 hours, that is, one and half hours later, the Applicant wrote back by email

I accept this offer.

Please advise what my travel arrangements should be.

I'm due to return to UNAMID tomorrow...

37. On the same day Ms. Goss wrote to the Applicant as follows:

Dear Paul,

We are preparing a fax to UNAMID requesting their concurrence that you remain in UNSOA

until your on-boarding has been completed. We will keep you posted.

38. On 12 December Ms. Goss wrote to the Applicant:

Dear Paul,

We received confirmation from UNAMID that you can remain in UNSOA on TDY until the completion of your onboarding process?

39. Can it be said that this was an offer of employment that the Administration was bound to implement unless there were good grounds for not doing so?

40. In *Sprauten* 2011-UNAT 111, UNAT held that:

A contract is formed by an unconditional agreement between the parties on the terms and conditions for the appointment, before issuance of the letter of appointment, if all the conditions for the offer are met by the candidate. The conditions for an offer should be understood as all those mentioned in the offer, those arising from the relevant rules of law for the appointment of staff members of the Organization, as recalled in Article 2, paragraph 2 (a) of the Statute of UNDT, and those necessarily associated with constraints in the implementation of public policies entrusted to the Organization¹.

41. The facts in *Sprauten* were as follows as they appear at paragraphs 6 and 7 of the judgment of UNAT;

In a memorandum dated 28 November 2008, the UNOPS Human Resources Director informed Mr. Sprauten that his appointment in

¹ At para. 25.

New York had been extended until 28 February 2009, that the length of his employment would not be extended beyond that date and that he would be separated from service on that date unless he found another post with UNOPS. He could apply for vacancies at UNOPS or elsewhere and, exceptionally, could submit applications for several vacancies at the first round of staff rotations in 2009. In a subsequent letter dated 19 December 2008, the same Director informed Mr. Sprauten that he had been selected for the post of Procurement Specialist, at the P-4 level, in Johannesburg, South Africa. The Director's letter specified that while the start date remained to be determined, it should be no later than 1 February 2009. She requested a response from Mr. Sprauten by 30 December 2008 at the latest.

In an e-mail dated 29 December 2008, Mr. Sprauten replied that although he was glad to learn of his selection and would accept the post, there was a problem with regard to the start date. It was his understanding that the UNOPS rotation would be effective in June 2009. He added that a change of residence in the middle of the school year would be difficult for his two children and that maintaining two sets of households would be very costly. He concluded by expressing the hope that an acceptable solution to everyone could be found.

In an e-mail sent to Mr. Sprauten on 31 December 2008, the General Counsel of UNOPS noted that the incumbent of the post in Johannesburg needed to be operational as early as possible. The date of 1 February 2009 was therefore given as the latest starting date.

42. UNAT held that because the appellant was asking for a change of the start date he had not accepted the offer unconditionally and the offer was properly withdrawn.

43. In the case of *Gabaldon 2011-UNAT-120*, UNAT held:

Unconditional acceptance by a candidate of the conditions of an offer of employment before the issuance of the letter of appointment can form a valid contract, provided the candidate has satisfied all of the conditions. The conditions of an offer are understood as those mentioned in the offer itself, those arising from the relevant rules of law for the appointment of staff members of the Organization, as recalled in article 2, paragraph 2 (a) of the UNDT Statute, and those necessarily associated with constraints in the implementation of public policies entrusted to the Organization².

44. UNAT went on to add that,

² At para. 23.

[A] contract concluded following the issuance of an offer of employment whose conditions have been fulfilled and which has been accepted unconditionally, while not constituting a valid employment contract before the issuance of a letter of appointment under the internal laws of the United Nations, does create obligations for the Organization and rights for the other party, if acting in good faith. Having undertaken, even still imperfectly, to conclude a contract for the recruitment of a person as a staff member, the Organization should be regarded as intending for this person to benefit from the protection of the laws of the United Nations and, thus, from its system of administration of justice and, for this purpose only, the person in question should be regarded as a staff member³.

45. The facts in *Gabaldon* were as follows as they appear in the UNAT judgment:

On 30 April 2008, the Chief Civilian Personnel Officer of the United Nations Mission in the Sudan (UNMIS) sent Mr. Gabaldon an offer of employment for a six-month appointment of limited duration (300 series of the Staff Rules) at the P-3 level.

The offer was subject to the Appellant being medically cleared by the United Nations Medical Doctor and would elapse in the event that the results of the medical examination proved unsatisfactory. It was also subject to the verification of references provided by Mr. Gabaldon in support of his qualifications and mission service. The offer of employment mentioned that Mr. Gabaldon would receive a letter of appointment, which was the official document by which he would become a staff member of the United Nations.

Mr. Gabaldon accepted the offer of appointment on 1 May 2008. The UNMIS Medical Unit issued the medical clearance for the Appellant on 26 May 2008.

However, on 28 July 2008, when his letter of appointment had not yet arrived and he had not yet taken up his post, Mr. Gabaldon fell ill and was hospitalized. Subsequently, although in the meantime the Appellant had provided a medical report from his treating physician stating that he was in full remission and ready to start work, the UNMIS Medical Unit, on 17 December 2008, assessed Mr. Gabaldon as "not fit" under classification 2B (candidates with reduced life expectancy, or reduced work capacity, who are ineligible for employment). On 21 December 2008, Mr. Gabaldon was informed of the withdrawal of the offer of appointment on the grounds that he had not been declared physically fit.

³ At para. 28.

46. In the present case, there can be no doubt that there was an offer of appointment to the post of Logistics Officer made to the Applicant. The offer was accepted unconditionally and the Applicant was informed that the administrative process for his onboarding would be under way. As pointed out in *Sprauten*, such a situation did create “obligations for the Organization” and ‘rights’ for the Applicant who acted “in good faith”. “Having undertaken, even still imperfectly, to conclude a contract for the recruitment’ of the Applicant, the “Organization should be regarded as intending for this person to benefit from the protection of the laws of the United Nations and, thus, from its system of administration of justice and, for this purpose only, the person in question should be regarded as a staff member”.

Was the offer validly withdrawn?

47. Unlike the situation in *Gabalton* where the applicant was being recruited as an external candidate but like the situation in *Sprauten*, the Applicant here was being recruited as a person who was already an employee of the Organisation.

48. In the case of *Sprauten* UNDT/2010/087, Adams J made a distinction between a candidate who was already an employee of the Organization and an external candidate. This what Adams J said:

The crucial issue here is whether respondent’s offer had been accepted by the applicant and, thus, a binding agreement created. In this regard, it is important to note that the applicant was already a UN employee when this occurred and rather than recruiting him for a new position the Organization was therefore offering a variation to an existing employment relationship⁴.

49. UNAT approved that approach by holding that,

The UNDT Judge rightly noted that the Respondent was a staff member when he received a letter of employment. He appropriately concluded that his situation should be distinguished from an external candidate seeking a first appointment⁵.

50. It should be recalled that the Applicant is a serving member of the Organization and as pointed out in the case of *Sprauten* by Adams J, when there is

⁴ At para. 76.

⁵ *Sprauten* 2011-UNAT-111, at para. 22.

no repudiation of the offer by an applicant, the refusal to employ him is a breach of the offer made.

51. In the course of the hearing that took place on 30 June, the Respondent did not intend to call Mr. Rao. The Tribunal asked Counsel for the Respondent whether he intended to call Mr. Rao to explain who took the decision not to implement the recruitment process and if it was Mr. Rao, whether he had delegated authority to do so. The issue of delegation of authority is important and it was pointed out by UNAT in the cases of *Malmström et al.* 2013-UNAT-357⁶ and *Longone* 2013-UNAT-358 that “[in] matters of delegation of authority, the legal instrument delegating authority must be read carefully and restrictively”.

52. The question became pertinent because in the email to the Applicant it is stated that it was the Head of Department/Office/Mission and not Mr. Rao who had selected the Applicant. The Tribunal requested that the Respondent file a written statement from Mr. Rao to explain the sequence of events leading to the recruitment, the offer and its non-implementation. This procedure was followed in view of time constraints in dealing with suspension of action applications. In his statement, Mr. Rao gave the following explanation:

I confirm that the delegation of authority to decide on matters of staff selection rests solely with the Director of UNSOA and I, in my capacity as the Chief Human Resources, provide him with advice and implement the decisions given to me.

53. Mr. Rao also explained that the reason for not implementing the recruitment process was because the post of Deputy Chief Security Officer (P-4) under the staffing table of the United Nations Assistance Mission in Somali (UNSOM) was loaned to recruit the post of Logistics Officer (P-4) for which the Applicant was selected. The new Chief of the Safety and Security Section who was appointed in February 2015 requested in March 2015 for all posts loaned to other sections of UNSOA and UNSOM to be returned. However the Management of UNSOA maintained that the agreement reached between the former Chief of Security and the Director of UNSOA should be honoured and the on-boarding process should continue for the position of Logistics Officer.

⁶ At para. 52.

54. Nothing more is said about this. Nor is there any explanation why the recruitment was not implemented soon after December 2014 and before the request of the new Chief of Security in February 2015 or after the Director of UNSOA insisted that the on-boarding should go ahead. It was not until April 2015 when serious incidents occurred in Somalia that the posts were returned in May 2015 as it is explained in the statement of Mr. Rao.

55. Though it may appear unlawful that the Administration did not implement the recruitment process timely the Tribunal takes the view that there is no decision to suspend as the post is no longer available to be filled by the Applicant. This is the unfortunate situation that has been created by the inaction of the Administration. However unpalatable this is for the Applicant, the blunt fact remains that a Tribunal cannot make an interim order in vain.

56. In view of the above finding there is no necessity to consider the two other components of suspension of action.

Referral for Accountability

57. The Applicant also moved the Tribunal for an order referring Mr. Rao to the Secretary-General for accountability pursuant to art. 10.8 of the UNDT Statute.

58. The Respondent submitted that “the referral of a case to the Secretary-General under art. 10.8 is inappropriate given that the Secretary-General has the opportunity to review the contested decisions during the management evaluation process. The referral of an individual under art. 10.8 of the Statute on the basis of a finding of prima facie unlawfulness is inappropriate. In the usual course, such an order would be appropriate following a hearing on the merits”.

59. Article 10.8 reads: “The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce

accountability.” In *Abboud* 2011-UNAT-103, the UNAT observed that the article means exactly what it says⁷.

60. There is nothing in art. 10.8 that would restrict its application to cases that are heard on the merits. Even applications for suspension of action may reveal a certain form of conduct or attitude on the part of a manager that would warrant a referral for accountability. There is no reason that potentially unlawful conduct should not be accounted for at any stage of the proceedings. It is obvious that a remedy at the earliest possible stage would serve the interest of both the Organization and the staff member.

61. Additionally, the Tribunal considers that the power to refer Mr. Rao for accountability is a matter within its discretion and it is not appropriate for parties to make motions for referral.

62. In the present case, the Tribunal declines to refer Mr. Rao for accountability because the impugned decision appears to have been taken by a series of actors and through a culmination of events, the circumstances of which are unclear to the Tribunal.

Conclusion

63. In view of the foregoing, the Application for Suspension of Action is refused.

(Signed)

Judge Vinod Boolell

Dated this 2nd day of July 2015

Entered in the Register on this 2nd day of July 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

⁷ At para. 6.