



Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MBALLA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:

Sètondji Roland Adjovi, *Etudes Vihodé*

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

Introduction

1. On 28 October 2021, the Applicant filed an application before the Dispute Tribunal seeking the suspension of the implementation of the decision to withdraw the 8 September 2021 conditional offer of appointment for the position of P-4 Human Rights Officer with the United Nations Multidimensional Integrated Stabilization Mission in Mali (“MINUSMA”) in the Gao duty station advertised as a Temporary Job Opening (“TJO”) No. 153612 (“the contested decision”). She was notified of the decision on 25 October 2021.

2. The Respondent filed a reply on 1 November 2021 in which he argues that the application is not receivable *ratione personae* and *ratione materiae*.

3. The Applicant filed a motion seeking leave to file a rejoinder to the reply on 2 November 2021. The rejoinder was attached to the motion.

Summary of the relevant facts

4. On 12 April 2021, TJO 153612 was advertised with a closing date of 18 April 2021.¹ The position was advertised as being for six months duration. The Applicant applied for the position during the advertising period.

5. On 1 June 2021, the Applicant was interviewed by the Deputy Director of the Human Rights and Protection Division of MINUSMA.

6. On 23 August 2021, the Applicant received a request for confirmation of interest from MINUSMA human resources. The Applicant confirmed her continued interest in the position.

7. On 8 September 2021, the Applicant received a letter of offer for a temporary appointment at step 6 of the P-4 level as a Human Rights Officer in the MINUSMA,

¹ Application, annex 3.

Gao.² Under the section titled “ACCEPTANCE” the offer letter stated,

... I Understand this offer is subject to medical clearance, issuance of visa and verification of references, academic qualification, and work experience. I also understand that the offer lapses if I do not in the opinion of the United [N]ations Medical service meets its medical standards.

8. On 9 September 2021, the Applicant submitted to a medical evaluation by the United Nations Clinic in Cameroon.

9. On 21 September 2021, the Applicant was copied on an email from a Medical Officer in MINUSMA’s Medical Services Division to the Administrative Assistant of MINUSMA Medical Services Section, stating that she could only be granted medical clearance for the duty station of Bamako and not to any other duty station.³

10. The Applicant followed up with the Medical Officer regarding the justification for the decision to only grant her the medical clearance for the duty station of Bamako. The Medical Officer informed her that from a medical point of view, bringing her to a duty station lacking the appropriate level of medical facilities to intervene in the likely event of a prenatal complication, would put her, her baby or even both of them under potential risk in more than one way.⁴

11. On 25 October 2021, the Applicant was informed that she was not cleared for JO 153612 and that the letter of offer would be withdrawn.⁵

12. The Applicant submitted a request for management evaluation on 28 October 2021 of the contested decision.

² Ibid., annex 5.

³ Ibid., annex 8.

⁴ Ibid., para. 9.

⁵ Ibid., annex 11.

Parties' submissions

Receivability

Applicant

13. The Applicant's submissions on receivability are summarized below.
- a. She is not a current staff member despite having served the Organization on many previous contracts, from 2011 to 2020. However, as she unconditionally accepted and signed a letter of offer and had already met all requirements including being medically cleared to work in MINUSMA (just not for Gao), the challenge is receivable *ratione personae*.
 - b. The decision to withdraw the letter of offer is a challengeable administrative decision. Therefore, as per art. 2(1)(a) of the UNDT Statute, the application is receivable *ratione materiae*.
 - c. She was notified of the decision on 25 October 2021. Therefore, the challenge of the decision is receivable *ratione temporis*.
 - d. She submitted a request for management evaluation on 28 October 2021. The Management Evaluation Unit ("MEU") has not yet replied. The MEU response is not due until 12 December 2021. Consequently, her request for management evaluation is still pending and the contested decision is the subject of an ongoing management evaluation.
 - e. Despite being informed of the decision, the decision has not yet been implemented and can be suspended.
 - f. For all those reasons, the Applicant submits that, as per art. 2(2) of the UNDT Statute, the application is receivable.

Respondent

14. The Respondent's makes the following submissions on receivability.
- a. Pursuant to arts. 2(1) and 3(1) of the Statute, to have standing before the Dispute Tribunal, the Applicant must be a staff member, or former staff member making a claim in relation to her terms of appointment as a staff member.
 - b. Pursuant to staff regulation 4.1, a person becomes a United Nations staff member after they are issued a Letter of Appointment ("LOA") once all pre-employment conditions have been met. Upon selection for a position, a selected candidate typically receives an "offer of appointment" subject to the fulfillment of certain conditions, including a medical clearance. If all of the conditions are met, then the selected candidate will normally be issued a formal LOA without conditions which creates the employment contract.
 - c. In *Gabalton* 2011-UNAT-120, the Appeals Tribunal identified the principles under which a person who has not yet been issued an LOA may be regarded as a staff member for the purposes of art. 3(1) of the UNDT Statute. The Appeals Tribunal recognized that access to the new system of administration of justice could be extended to persons who are not formally staff members, i.e., those who have not received an LOA, but who could legitimately be entitled to rights similar to those of a staff member. However, the Appeals Tribunal limited such access to instances such as where those persons have fulfilled all the pre-employment conditions and have begun to exercise their functions based on acceptance of the offer of appointment. Neither these nor similar facts apply to this case.
 - d. The Applicant did not satisfy the conditions of the offer and, therefore, there was no *quasi* contract formed to allow the Applicant standing under the Statute. The Applicant is not entitled to the rights of a staff member simply because she received a conditional offer of appointment that was subsequently

withdrawn.

e. The Applicant's claim that the Organization violated the fundamental right afforded by art. 8 of the United Nations Charter is unfounded. The informed professional medical assessment that the Applicant was not cleared to work in Gao was based on the Applicant's medical condition in consideration of the availability and standard of medical care in that duty station. It was not based on the Applicant's gender. The fact that only women can become pregnant does not render an objective medical assessment about the risks attendant to the pregnancy discriminatory. The Applicant has not adduced any evidence to support her claim of discrimination nor has she pointed out to any decision to grant medical clearance for a person to be initially appointed to Gao where the person has a high risk medical condition that requires specialist care.

f. To file an application based on the status of a former staff member, a sufficient nexus must exist between the contested administrative decision and the Applicant's previous contractual rights. There is no nexus between the Applicant's rights acquired under the Applicant's former employment contract and the contested decision.

g. The conditional offer of appointment was withdrawn on 25 October 2021. The Applicant requests the Dispute Tribunal to reverse that decision. However, an order for suspension of action cannot restore or reverse an alleged unlawful decision which has already been implemented. On 25 October 2021, the Onboarding and Separation Officer relayed to the Applicant the decision of the MINUSMA recruitment team to withdraw the offer of appointment because she was not medically cleared for the Gao duty station where the position is located. There are no further actions to be taken to implement the contested decision now that it has been formally communicated to the Applicant. There is nothing to suspend.

h. The Dispute Tribunal cannot compel the Organization to rescind its decision or appoint the Applicant as relief. Jurisdiction is limited to suspension

of a decision that has not yet been implemented and which is pending management evaluation. Rescission and specific performance are available only under art. 10.5 of the Statute following an adjudication of the merits. The application should be rejected for lack of personal and subject matter jurisdiction.

Considerations

15. The Applicant's motion to file a rejoinder to the reply is granted.

16. The Respondent argues that the Applicant not being a staff member within the meaning of staff regulation 4.1 has no right of access to the system of administration of justice. The Applicant maintains that the fact that she unconditionally accepted and signed a letter of offer⁶ and had already met all requirements including being medically cleared to work in MINUSMA (just not for Gao), created *quasi* contractual obligations and rights which clothed her with the right to access the system of administration of justice in line with the Appellate jurisdiction guidance in *Gabaldon*.

17. The Tribunal, however, determines that the mere fact that the Applicant "unconditionally accepted and signed a letter of offer" dated 8 September 2021 did not create any *quasi* contractual obligations. In the first place, the offer letter was for a Human Rights Officer position in Gao, Mali and not in MINUSMA generally. The generic medical clearance for MINUSMA is therefore irrelevant to the offer in issue.

18. More important is that the offer was subject to satisfactory medical clearance. The offer letter is clear that the mission Chief Medical Officer or the designated medical officer was the one to determine whether or not the medical clearance was satisfactory. In this regard, the Medical Officer determined that it was not. This left a major condition of the offer unfulfilled.

19. The fact that a condition of the offer was not fulfilled places this application outside the purview of the Appellate Tribunal jurisprudence that "following the

⁶ Application, annex 5.

issuance of an offer of employment whose conditions have been fulfilled and which has been accepted unconditionally [by a potential staff member], while not constituting a valid employment contract before the issuance of a letter of appointment [...], does create obligations for the Organization and rights for the [potential staff member], if acting in good faith”.⁷ Accordingly, such a potential staff member has access to the system of administration of justice and is considered as a staff member “for this purpose only”.

20. The Tribunal determines that since the conditions of the offer were not fulfilled, the offer did not create obligations and rights for the Applicant. The Applicant has no right to access to the system of administration of justice. The challenge is therefore not receivable *rationae personae*.

Conclusion

21. The application is rejected as irreceivable.

(Signed)

Judge Margaret Tibulya

Dated this 3rd day of November 2021

Entered in the Register on this 3rd day of November 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

⁷ *Gabaldon*, para. 28.