UNITED NATIONS DISPUTE TRIBUNAL

Original: English

Before: Judge Coral Shaw

Registry: Geneva

Registrar: Víctor Rodríguez

GABALDON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Bart Willemsen, OSLA

Counsel for Respondent:
Marcus Joyce, ALS/OHRM, UN Secretariat

10. On 30 April 2008, the Chief Civilian Personnel Officer, UNMIS, sent the Applicant an offer for a six-month appointment of limited duration ("ALD", under the 300 series of the former Staff Rules) as Humanitarian Affairs Officer at the P-3 level. The offer of appointment stipulated that it was "subject to [the Applicant] being medically cleared by the United Nations Medical Doctor" and that it "automatically elapse[d] in the event that the results of [the Applicant's] medical examination prove[d] unsatisfactory". It further provided that: "This offer of appointment is subject not only to medical clearance but also to the verification of references in support of [the Applicant's] qualifications or mission service." The offer also informed the Applicant that "[a] copy of the Staff Regulations and Rules [would] be made available to [him] when [he would sign] a Letter of Appointment, which [was] the official document by which [he would become] a staff member of the United Nations".

11. The Applicant accepted the offer of appointment on 1 May 2008, indicating that he would be available "30 days from the date of medical clearance". In its response dated 13 May 2008, UNMIS sent the Applicant additional forms for completion and return.

12. The UNMIS Medical Unit issued the medical clearance for the Applicant on 26 May 2008.

13. The Applicant wrote to the Human Resources Services Section ("HRSS") of UNMIS on 3 June 2008, asking whether it was in receipt of the results of the medical evaluation and requesting confirmation of the medical clearance. By email of the same day, an Officer of HRSS responded to the Applicant, informing him that he was medically cleared and that UNMIS was awaiting the issuance of the United Nations *laissez-passer* ("UNLP").

14. The Applicant was diagnosed with an illness on 28 July 2008 and was hospitalized. On 6 August 2008, he informed UNMIS about the diagnosis and the estimated recovery period. He explained that he would have to postpone his trip to

15. By email dated 20 August 2008, a Doctor from the UNMIS Medical Unit noted that a new medical report was needed stating that the Applicant's therapy was finished successfully and that he was "fit for job and fly".

16. By email dated 21 August 2008, copied to the Applicant, an Officer from HRSS confirmed that the Applicant would be able to report for duty contingent upon a medical report clearing him as fit for work in Sudan.

17. The Applicant sought clarification from the Humanitarian Affairs Liaison Unit of UNMIS in Khartoum in the following terms:

> That doesn't mean my recruitment is cancelled but that I need to be medically cleared again … to be deployed in Sudan.

23. On 24 December 2008, the Applicant sent a copy of a sworn translation of his treating physician's report to a Doctor of the UNMIS Medical Unit.

24. MSD confirmed on 31 December 2008 that the Applicant was unfit for deployment to UNMIS, which was reiterated by MSD, again, on 30 January and on 23 February 2009.

25. By memorandum dated 13 January 2009, the Chief Civilian Personnel Officer, UNMIS, informed the Applicant that the decision not to medically clear him and to withdraw the offer of appointment was taken in accordance with the applicable rules.

26. The Applicant requested administrative review of the decision to withdraw the offer of appointment on 29 January 2009.

27. By letter dated 20 February 2009, the Administrative Law Unit of the Office of Human Resources Management, UN Secretariat, advised the Applicant that since he was not a staff member the internal justice system was not available to him.

Parties' contentions

28. In summary, the Applicant's principal contentions are:

a. The application is receivable *ratione personae* pursuant to former staff rule 111.2;

b. The offer of appointment was subject to medical clearance and the provision of additional documentation which had already been provided by the Applicant. The Applicant was medically cleared on 26 May 2008, and was informed in writing on 3 June 2008. As of the moment he received medical clearance the Organization could no longer withdraw the offer of appointment, as the conditions of the contractual terms agreed had been fulfilled;

c. The Applicant's acceptance of the offer of appointment created a contract for employment, entitling him to seek redress under the UN

g. The diagnosis of hie 8 of 15

h. The prognosis for the serious illness that the Applicant suffers is

signed by the Secretary-General or an official on his behalf cannot be regarded as a mere formality. UNAT held that the contract by which an individual acquires staff member status can only be concluded validly on the date at which an official of the Organization signs the staff member's letter of appointment. However, the Appeals Tribunal went on to say in *Gabaldon* that:

> [T]his does not mean that an offer of employment never produces any legal effects. Unconditional acceptance by a candidate of the conditions of the offer of an appointment before the issuance of a letter of employment can form a valid contract, provided the candidate has satisfied all of the conditions.

31. In the present case, it is for the Tribunal to decide as a matter of fact whether the conditions of the offer of appointment made to the Applicant had been met to the extent that the only formal step left was the signing of a formal letter of appointment.

32. The relevant facts are that the Applicant received an offer of appointment on 30 April 2008. That offer was subject to three conditions before a letter of appointment could be signed. Each of these conditions is considered separately as follows:

a. Medical clearance by the UN Medical Doctor

33. It is an undisputed fact that the medical clearance for the Applicant was issued by the UNMIS Medical Unit on 26 May 2008. This condition was fulfilled.

b. The automatic lapse of the offer if the clearance was not satisfactory

34. There is no suggestion by the Respondent that the medical clearance

c. Verification of the Applicant's references and diplomas

35. It was only when the case was remanded to the Dispute Tribunal that the Respondent raised the point that there is no evidence that the Applicant provided his references and diplomas, as required in the letter of offer.

36. The Tribunal finds, as a matter of inferred fact from the papers submitted to it by the parties for consideration, that there is no evidence that the required references and diplomas had not been submitted. In the first place the Applicant said that the letters of reference and copies of diplomas had already been submitted. Second, there is no evidence of the Respondent requesting the Applicant to provide these documents or any indication that their absence was an impediment to the conclusion of the offer of acceptance. To the contrary, HRSS requested and obtained the issuance of the UNLP for the Applicant in anticipation of his taking up the post. As there is no reason to doubt that the required references had been provided to the satisfaction of the Organization, the Tribunal finds that this condition had been fulfilled.

37. In summary the Tribunal finds that by 1 May 2008 the Applicant had accepted the offer of employment subject to the medical clearance being issued. The Applicant was granted a medical clearance from the Organization on 26 May 2008. At that point, while in the words of UNAT this did not constitute "a valid employment contract before the issuance of a letter of appointment under the internal laws of the United Nations", it did "create obligations for the Organization and rights for the other party, if acting in good faith".

38. The Tribunal finds as a matter of fact that at 26 May 2008 all the essential conditions of the offer of appointment had been fulfilled by both parties creating the obligations and rights referred to by UNAT.

Issue 2: If the offer had become unconditional, did the Organization meet its

40. A frustrating event is one that is unforeseen or not in the direct control of either party. It so alters the nature of the contract that the continued employment of the employee would be radically different from what was contemplated at the time the contract was entered into. It would therefore be unjust to hold the parties to its original terms. In the words of Judgment No. 1290 “the contract has become impossible of performance at any particular time or the assignment proves not to be feasible in the near future”.

41. In employment law, if a contract of employment is frustrated by a supervening event, both parties are discharged from further performance of it. Where a putative employee becomes ill after the agreement to employ has been concluded, the illness must be of sufficiently long lasting seriousness to amount to frustration.

42. In this case the Respondent argues that the Applicant’s condition was too uncertain and required too much ongoing treatment to enable him to be declared fit for deployment to a location as harsh and lacking of medical facilities as

45. However the Tribunal considers that the Respondent was in breach of its obligations to the Applicant prior to the discharge of the contract. This arose from the Respondent's written answer to a specific question from the Applicant. He told him that all he needed to do before taking up his position was to provide a medical certificate from his own doctor which cleared him for service. This advice was wrong and unrealistically raised his expectations that his offer of employment was still alive in spite of his new illness.

46. The Applicant relied on that information in good faith and to his detriment. In acting in this way the Organization was in breach of its obligations to the Applicant to act with due diligence and fairness.

47. For this breach of fair procedure the Applicant is entitled to an award of compensation.

Remedies

48. Of the remedies claimed the only one which is sustainable in light of the Tribunal's findings is the claim for compensation for immaterial damages. Such damages are limited to the damage arising out of the breach of procedure.

49. In his request for administrative review of the decision of 29 January 2009, the Applicant referred to the stress caused by the long period of recruitment and the subsequent uncertainty and anxiety. In his application to the Tribunal the Applicant submitted that based on the communications received about the medical certificate required before he could take up his post, he made no efforts to find alternative employment for the period following his recovery.

50. The length of the recruitment period is not a matter before the Tribunal. No compensation can be awarded for that.

51. However the Applicant is entitled to compensation for the damage caused to him in reliance on the inaccurate information about the medical clearance.

Conclusion

52. In view of the foregoing, the Tribunal DECIDES:

a. The decision to withdraw the offer of employment was lawful because the contract was frustrated by the Applicant's illness;

b. The Respondent breached its obligations to the Applicant when it failed to act with fairness and due diligence when it misinformed him of the correct procedural steps required before he could take up the offered position.

53. Tribunal therefore ORDERS:

a. The Applicant is awarded compensation equivalent to three months of the net base salary for the position of Humanitarian Affairs Officer with UNMIS at the P-3 level that was offered to him;

b. This sum is to be paid within 60 days after the Judgment becomes executable. N2.1(r (t)6.1(o)-.1(r)3)-5st2(E)3be