



Case No.: UNDT/NY/2009/112

Judgment No.: UNDT/2010/191

Date: 25 October 2010

Introduction

1. The Applicant received and accepted an offer of appointment for a one-year fixed-term contract at the L-5 level from the United Nations Development Programme (“UNDP”) subject

Service Agreement—“SSA”) to act as a Regional Programme Advisor for the Middle East with UNDP’s Bureau for Development Policy. The SSA was subsequently extended until 30 November 2007.

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7. The offer was signed by the Applicant on 24 August 2007 (as stated above, at the time the Applicant's SSA had not yet expired).

8. At this juncture, I deem it important to set out the circumstances that the Respondent alleges led to the cancellation of the Applicant's appointment. In April 2007 the United Kingdom ("UK") police authorities contacted UNDP and the Global Fund regarding an investigation they had initiated into possible collusion in the awarding of contracts in the DRC during the Applicant's tenure as Principal Coordinator. On 4 May 2007 the UK Mission to the United Nations forwarded a request to the Respondent from the UK police for information and documentation relating to the selection of a pharmaceutical company as a supplier of HIV and malaria drugs. The UK investigation centred on accusations that the pharmaceutical company paid bribes to a consultancy firm to secure a contract with UNDP for its project in the DRC, funded by the Global Fund. Following the receipt of the report on possible fraud, on 12 May 2007, a UNDP procurement official gave his opinion on the report, indicating that the Applicant may have improperly influenced the procurement process. After being advised informally of the accusations that were being made, the Applicant asked on 3 July 2007 to be provided with the allegations against him, but received no response at the time. In August 2007, UNDP's Office of Audit and Performance Review ("OAPR") examined the Applicant's laptop computer and the correspondence between the Applicant and a senior employee of the consultancy firm, examining whether the integrity of the procurement process that led to the selection of the pharmaceutical company was compromised. The Applicant was not charged with any misconduct or criminal offence.

9. On 5 September 2007 the Applicant received an advance from UNDP for his travel and removal allowances (which I understand did not have any conditions attached to it), and subsequently to that made preparations to leave for Cairo to take up his post as of 1 October 2007. During a mission to Cairo conducted from 28 August to 7 September 2007, while under the SSA as facilitator of two workshops,

located in Cairo, Egypt ..., which was expected to start on 1 October 2007.

I will be contacting you soon on the administrative arrangements following the cancellation of your appointment.

14. Upon enquiry as to the reason for the cancellation, the Applicant was advised, by email from the Human Resources Business Advisor, dated 26 September 2007, that his actions as special adviser of the Global Fund projects in the DRC were under investigation by OAPR:

obligated to cooperate with any investigation and assist designated investigators as required in accordance with Staff Regulation 1.2(r)".

Applicant's submissions

21. The Applicant's subm BDC s

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expressed in the form of a letter of appointment. In the present case, unlike in *Adrian*

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the basis for the Respondent's concession? The Respondent's decision to compensate the Applicant for the relocation expenses renders unsustainable the Respondent's position that there was no contractual relationship between the parties.

36. It is clear to me that the parties intended to be bound by the agreement created by the offer and subsequent acceptance. The promises exchanged by the parties and the steps they took were sufficient to create a binding contract. Actions were taken by both parties in reliance on and in compliance with their contractual obligations under the agreement. The Respondent paid a relocation grant and proceeded with finalisation of the induction documents, including a Laissez Passer. The Applicant took steps to rent accommodation in Cairo and to send his belongings there, expecting to depart for Egypt in a matter of days.

37. With respect to clearances, the Respondent submitted that the Applicant's job description referred to "commitment to UNDP's core values" as a competency and that under the Recruitment Guidelines, all candidates must be screened based on performance and through reference checking to ensure that the candidates meet the technical and competency requirements of the position. Therefore, according to the Respondent, having been made aware of the allegations against the Applicant, UNDP had to take this new information into account. I find the reference to competencies and UNDP's core values in this context misguided; as it is clear from UNDP's Recruitment Guidelines, the verification of technical and competency requirements takes place during the selection exercise. There is no evidence to suggest—and it would not be reasonable to conclude—that the technical and competency requirements had (or, in fact, were permitted) to be checked again after the completion of the selection process and, more importantly, that the Applicant failed or would have failed them. The Respondent's submission in this regard is plainly not supported by UNDP's own recruitment rules. It is instructive that in its contemporaneous emails with the Applicant, UNDP did not claim discharge from its obligations due to the Applicant's failure to satisfy any clearances. The email dated 26 September 2007 singularly articulates the reason for cancellation of the

appointment as being the contravention of staff regulation 4.2 and art. 101 of the Charter of the United Nations, no doubt questioning the Applicant's integrity based on suspicion and conjecture as there was no investigation report nor were there any findings that the Applicant had done anything wrong. The contemporaneous records in this case do not support the position now taken by the Respondent that the Applicant had failed to satisfy any clearances and formalities to which the offer of appointment referred. Had UNDP considered at the time that the Applicant had failed some clearances, it would and should have stated so, with references to the specific clearances and formalities.

38. I also do not accept the Respondent's argument that no contract could have been concluded prior to September 2007 because the Applicant was still employed as a consultant on an SSA. It was agreed by the parties that the Applicant would assume his duties on 1 October 2007. Nothing precluded the Applicant from performing duties under his SSA prior to that, while at the same time being in a binding agreement with the Organisation that he would assume his duties as a staff member in Cairo on 1 October 2007. There is no reason why parties cannot enter into a binding contract on a particular date with a future date for commencement of duties.

39. As the former UN Administrative Tribunal stated in Judgment No. 106, *Vasseur* (1967), dealing with a similar case,

[A]lthough the Applicant's appointment did not take effect within the meaning of Staff Rule 204.2, he did not receive the letter of appointment, and the expiration date of the appointment therefore was not specified, a real contract by which the Respondent undertook to employ the Applicant was concluded between the parties, and they have recognized the existence of legal obligations arising out of this contract.

III. The Tribunal is called upon to determine the legal consequences of the Respondent's refusal to execute this contract. As this contract is related to the appointment procedure laid down by the Staff Regulations and Staff Rules, it is not open to dispute that the issue is one which must be resolved on the basis of rules of law which it is the responsibility of the Tribunal to apply.

40. I find that there was a binding contract between the Applicant and the Respondent, with the latter recognising the existence of legal obligations arising therefrom. As this contract and the contested decision concerned the appointment procedure, it follows that the present application is receivable (see *Vasseur*). The Tribunal also finds that the Organisation's refusal to execute the employment relationship on 1 October 2007 was in breach of its contract with the Applicant.

Conclusion

41. The offer of appointment accepted by the Applicant and the communications between the parties contained the terms necessary for the formation of a binding contract. All the essential terms of the appointment were agreed by the parties and there is no basis to find that the parties intended any subsequent document to vary or add to the terms contained in the offer of appointment in any significant respect. There is no evidence to support the Respondent's averment that the Applicant had failed to satisfy any clearances and formalities. On the particular facts of this case, including the agreement reached and the actions of the parties, there was a binding contract between the Applicant and the Respondent and UNDP's refusal to execute the employment relationship on 1 October 2007 was in breach of this contract.

42. Where there is a breached right, there should be a remedy. Liability having been established, it is now a matter for determination of appropriate relief. Further submissions will be required on relief to be ordered on the basis of this judgment. The parties may also consider resolving the issue of relief between themselves in the light of this judgment.

Orders

43. On or before **Monday, 15 November 2010**, the Applicant is to file and serve a submission on relief to be ordered, attaching supporting documentation.

44. On or before **Monday, 6 December 2010**, the Respondent is to file and serve a submission in response.

(Signed)

Judge Ebrahim-Carstens

Dated this 25th day of October 2010

Entered in the Register on this 25th day of October 2010

(Signed)

Morten Albert Michelsen, Officer-in-Charge, UNDT, New York Registry