UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/09
Judgment No.: UNDT/2010/072
Date: 29 April 2010
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

ADRIAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON AN APPEAL AGAINST A FAILURE BY THE ORGANIZATION TO HONOUR REMUNERATION OFFERED TO THE APPLICANT IN A REASSIGNMENT MEMORANDUM

Counsel for Applicant:
Self Represented

Counsel for Respondent:
Joerg Weich, HRMS/UNON

1. CASE BACKGROUND

1.1 The Applicant, a staff member of the United Nations Human Settlements Programme (UN-Habitat), is appealing against a decision not to honour the remuneration offered to him through a reassignment memorandum dated 10 June 2008. The facts of this application are set out in UNDT Judgment No. 053 (2010) with certain clarifications which are explained below. In the said Judgment, the Tribunal referred this application to mediation with the Mediation Division of the Office of the United Nations Ombudsman pursuant to Article 15.4 of the UNDT Rules of Procedure. The parties failed to reach an agreement and the case has therefore been referred back to the Tribunal for the continuance of the proceedings as the parties have not requested otherwise pursuant to Article 10.3 of the UNDT Statute.

1.2 On 23 February 2010, the Applicant advised the Tribunal that paragraph 1.2 of UNDT Judgment No. 053 (2010) should be amended to reflect that he did not sign the Letter of Agreement (LOA) dated 9 July 2008 as it did not correspond to the figures that were stated in the reassignment memorandum dated 10 June 2008. The Respondent did not object to this proposed amendment.

1.3 On 10 March 2010, the Respondent requested the Tribunal that the record should reflect the fact that the Human Resources Management Service of the United Nations Office at Nairobi ("HRMS/UNON") was in touch with the Applicant concerning his complaints on 26 August 2008 and 4 September 2008 and requested for his patience while the incoming Human Resource Officer dealt with a backlog and obtained information on the administrative background before reverting to the Applicant on 31 October 2008 with a comprehensive reply.

1.4 On 3 March 2010, the Tribunal requested the parties to file a joint statement of agreed facts with the Registry by 12 March 2010. On 11 March 2010, the Applicant's request for an extension of the deadline to submit the said joint statement of facts was extended to 19 March 2010. As the Applicant had failed to

meet the deadline, the Registry addressed an email reminder to him on 19 April 2010 but did not receive a response.

2. Parties Contentions

2.1 The Applicant

2.1.1 The Applicant's contentions are set out in his Statement of Appeal dated 20 March 2009 and are summarized below.

2.1.2 He received his reassignment memorandum on 10 June 2008, he traveled to Washington D.C. on 19 June 2008 and signed a contract to buy a house on 15 July 2008. He received his LOA on 18 July 2008. He noted a discrepancy between the original reassignment memorandum and the LOA and immediately requested HRMS/UNON to correct the mistake.

2.1.3 He submitted two requests to receive a corrected LOA on 26 August and 20 October 2008, and on 21 October 2008, the Respondent explained that the discrepancy between the original reassignment memorandum and the LOA was "an administrative mistake that needed to be corrected."

2.1.4 The Applicant contends that he acted in good faith and was fully convinced that the salary offered in the reassignment memorandum was agreed upon and would be forthcoming. The Applicant concedes that administrative errors may occur but the four months it took for HRMS/UNON to inform him of the error was unfair given that he had already moved to his new duty station and that he had made repeated efforts to rectify the situation.

2.1.5 The Applicant submits that his previous reassignment in 2006 from Nairobi to Islamabad resulted in a promotion from a P4 to an L5 position and therefore he was under the impression that the reassignment to Washington must have meant an increase in salary. The Applicant contends that this impression was reinforced by the fact that his UN-Habitat colleagues who were seconded to Washington before

him were posted at D1 and L6 level and that the official offer which he accepted and on the strength of which he took up his position specified a new-term, that is, an increase in salary.

2.1.6 Contrary to HRMS/UNON's argument that the reassignment was a lateral move, this notion of a lateral move was never communicated to him in any correspondence prior to the email dated 21 October 2008 and that, in addition, his 2006 memorandum of reassignment which resulted in a promotion used exactly the same language as the one dated 10 June 2008.

2.1.7 In regard to HRMS/UNON's contention that a communication to his bank on 24 July 2008 provided the relevant entitlement and the correct gross salary amount which would demonstrate that the Applicant should have been aware of the error, the Applicant submits that this information does not constitute any proof of an understanding or agreement to the unilaterally modified salary conditions and that it was at best a confirmation of the discrepancy between the conditions originally promised and the subsequent LOA he received only a few days before communicating this information to the bank. The Applicant further submits that it should also be noted that in terms of timescale, he had already relocated to Washington a month earlier in order to take up his new position on the basis of the original contract.

2.1.8 Since 2006, HRMS/UNON has made several mistakes relating to mobility, non-removal, step increment, travel claim, which through a six month period of follow-up, have now all been settled in his favour and that this is yet another reason why the discrepancy between the LOA and the reassignment memorandum was considered by him to be another administrative error which would be corrected to his benefit.

2.1.9 The Applicant argues that the clause contained in his reassignment memorandum, stating that, "the above rates and figures are for information and are subject to change as per the UN Staff Rules and Regulations and cost of living

fluctuations," are not applicable in his case to support the contention that the Administration should be able to change the information subject to changes as per the rules and cost of living. The Applicant submits that a reliance on this clause is inappropriate in his case because the clause is generally used to reflect the system wide salary variations and adaptation of post adjustment to changing local circumstances and that this clause is unfairly being used by the Respondent as a "cover all" clause to justify an administrative error which the Respondent failed to rectify in a timely manner.

2.1.10 In response to HRMS/UNON's statement that he made such a major decision as buying a house instead of renting without taking into account the relevant entitlement deductions which were more clearly and correctly reflected in his pay slip as of July 2008, the Applicant submits that a review of the chronology of events shows that he signed the contract for the house on 15 July 2008 before he had received the LOA on 18 July or his pay slip on 24 July 2008.

2.1.11 The Applicant submits that in keeping with the general principles of contract law, the ILO Administrative Tribunal observed that,

> "There is a binding contract if there is manifest on both sides an intention to contract and if all the essential terms have been settled and if all that remains to be done is a formality which requires no further agreement."[1]

The Applicant argues that in his case, the initial reassignment memorandum shows contractual intent, contains all essential terms worked out and agreed upon, was formally accepted by him and that there was no further agreement required following his acceptance.

2.1.12 The Applicant submits that Staff Rule 104.2 provides that the appointment of every staff member internationally recruited shall take effect from the date of which he enters into official travel status to assume his duties and that this rule recognizes the legal significance of the authorization to begin official travel for an

[1] ILOAT Judgment No. 307, *re Labarthe.*

appointment to take effect. The Applicant argues that in his case, he had not only accepted the offer and had been authorized to travel, he had also traveled to his duty station and taken up his new appointment.

2.1.13 The Applicant submits that there was a binding contract which the Administration could not change unilaterally months after and expect him to bear the financial burden stemming from what the administration terms an administrative error. The Applicant submits that he acted in good faith and made decisions based on the initial contract.

2.1.14 In light of the foregoing, the Applicant requests the Tribunal:

> "to find on the merits:
>
> a) A binding contractual agreement was made by both parties following an offer communicated by initial reassignment memorandum to the [Applicant] dated 10 June 2008 and acceptance of the offer being duly communicated to the Organisation on 16 June 2008;
>
> b) The Respondent did not change the amount of remuneration which had been agreed upon in the said agreement in a timely manner;
>
> c) The decision by the Respondent to unilaterally change the terms of this contract more than four months after this agreement, when the [Applicant] had, on the basis of the agreed upon terms already made financial commitments and settled into his new duty station, violates the Appellant's contractual rights;
>
> d) The [Applicant]entered into the contractual agreement in good faith; and
>
> e) The [Applicant] has suffered financial loss due to the decision of the Administration not to honour the remuneration specified in the original contract which includes the predicament of being financially over-extended.
>
> 7. Having found the above to be true, the members of the JAB panel are respectfully requested to recommend to the Secretary-General the following remedial action:

a) The Administration should honour the remuneration offered as per the original agreement with immediate effect and retroactively reimburse the [Applicant] for losses to his salary from the date of the reassignment to date."

2.2. The Respondent

2.2.1 The Respondent's contentions are contained in his Reply dated 15 June 2009 and are summarized below.

2.2.2 The Respondent argues that the legal nature of the reassignment memorandum is that of an information document and not an offer of contract and that the Applicant errs when he suggests that his travel to Washington following the receipt of the reassignment memorandum concluded the contract. The Respondent submits that the United Nations Administrative Tribunal has been clear in its jurisprudence that it is the LOA which is the contract and cites *Newton*[2] as authority for this contention.

2.2.3 The Respondent submits that the memorandum of reassignment contained a disclaimer that made it clear that the information provided was subject to the application of UN Rules and Regulations and that this disclaimer has to be read together with the header of the document that makes reference to the stated intent of the memorandum of reassignment, that is, to provide the Applicant with information on the allowances and benefits and should be interpreted accordingly. The Respondent submits that all subsequent documentation, the LOA, the salary slip and the information provided to the mortgage bank contained the correct information concerning the Applicant's income.

2.2.4 The Respondent submits that the Applicant's claim has to be assessed against the general legal parameters that were established by the United Nations Administrative Tribunal for cases where there is a discrepancy between the terms of an offer and the regulatory framework that governs the employment of UN staff members. The United Nations Administrative Tribunal postulated that,

[2] United Nations Administrative Tribunal Judgment No. 1195 (2004).

> "employment with the United Nations is regulated by a series of regulations and rules which have been drafted and are the result of long lasting policies; agreements with staff representatives; experience, and, the desire to create a well functioning work environment,"

and,

> "unless it is shown that the Administration had the authority to, and indeed did, deviate from the Staff Regulations and Rules to the benefit of the employee, exceptions of this kind are presumed to have been made due to a mistake."[3]

2.2.5 The Respondent submits that nothing in the Applicant's submissions allows for an assessment that the UNON Administration had the authority to deviate from established salary levels and that there is also no indication that the administration wanted to deviate from established salary levels. The Respondent submits that all the facts including the text of the memorandum of reassignment and the disclaimer contained therein show that the intention of the Administration was to act within the Staff Regulations and Rules and not to pay the Applicant the salary at the level claimed.

2.2.6 In view of the foregoing, the Respondent requests the Tribunal to reject this application.

3. The Legal Issues

3.1. The legal issues for determination in this case are:

(i) Whether the Applicant entered into a binding contract of employment with the organization on 10 June 2008 and if so, what those terms were.

(ii) Whether the Administration violated the terms of employment or its contract of employment with the Applicant.

[3] Ibid at paragraph IV.

(iii) Whether the Applicant was justified in incurring any financial liability in reliance on the terms of the reassignment memorandum dated 10 June 2008 and if so, whether the Applicant is entitled to any compensation.

4. Applicable Law

4.1 Articles 2(1) and 2(1) (a) of the Statute of the UNDT provide that:

> 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;

4.2 Former Staff Regulation 1.2(c) provided that:

> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them;

4.3 Former Staff Regulation 4.1 provided that:

> As stated in Article 101 of the Charter, the power of appointment of staff members rests with the Secretary-General. Upon appointment, each staff member, including a staff member on secondment from government service, shall receive a letter of appointment in accordance with the provisions of annex II to the present Regulations and signed by the Secretary-General or by an official in the name of the Secretary-General.

4.4 Former Staff Regulation 4.2 provided that:

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

4.5 Former Annex II of the Staff Regulations provided as follows:

Letters of appointment

(a) The letter of appointment shall state:

(i) That the appointment is subject to the provisions of the Staff Regulations and of the Staff Rules applicable to the category of appointment in question and to changes which may be duly made in such regulations and rules from time to time;

(ii) The nature of the appointment;

(iii) The date at which the staff member is required to enter upon his or her duties;

(iv) The period of appointment, the notice required to terminate it and the period of probation, if any;

(v) The category, level, commencing rate of salary and, if increments are allowable, the scale of increments, and the maximum attainable;

(vi) Any special conditions which may be applicable;

(b) A copy of the Staff Regulations and the Staff Rules shall be transmitted to the staff member with the letter of appointment. In accepting appointment the staff member shall state that he or she has been acquainted with and accepts the conditions laid down in the Staff Regulations and in the Staff Rules;

(c) The letter of appointment of a staff member on secondment from government service signed by the staff member and by or on behalf of the Secretary-General, and relevant supporting documentation of the terms and conditions of secondment agreed to by the Member State and the staff member, shall be evidence of the existence and validity of secondment from government service to the Organization for the period stated in the letter of appointment.

5 Considerations

5.1 Under the general principles of contract law, the fundamental requirement of a contract is that the parties should have reached agreement. It is trite law that an agreement is made when one party accepts an offer made by the other. Other requirements are that the agreement must be certain and final, that is, without qualification. The above-cited Articles 2(1) and 2(1) (a) of the Statute of the UNDT define a contract of employment to include "all pertinent regulations and rules and all relevant administrative issuances in force at the time of the alleged non-compliance." What then are the terms of appointment that the Applicant is alleging have not been complied with?

5.2 In the present case, the Applicant was agreeable to the terms of the reassignment memorandum dated 10 June 2008 but did not sign the Letter of Agreement dated 9 July 2008 as it did not correspond to the remuneration that was stated in the said reassignment memorandum. There is nothing before the Tribunal to evidence that the Applicant signed any LOA in relation to the offer made by the organization to employ him on the terms defined in the reassignment memorandum dated 10 June 2008. Further, the terms of the reassignment memorandum of 10 June 2008 contained such qualifying terms as,

> "[t]he above rates and figures are for information and are subject to change as per the UN Staff Rules and Regulations and cost of living fluctuations. All benefits are subject to the application of the UN Rules and Regulations."

The above-cited clause evidences that the reassignment memorandum contained terms that were not certain, that were qualified and cannot therefore be said to have been a final and binding agreement.

5.3 In accordance with former Staff Regulation 4.1 and former Annex II of the Staff Regulations, such a final agreement would have taken the form of a Letter of Agreement. The Tribunal finds, therefore, that there was no binding contract of

employment in relation to the contents of the reassignment memorandum of 10 June 2008.

5.4 In this instance, we have a situation where there has been a variation in the terms of the offer of employment before its final binding contractual terms have been concluded, which variation the Respondent has conceded was due to an administrative error. On 15 July 2008, the Applicant signed a contract to purchase a property in Washington city, USA, before becoming aware of error on or about 18 July 2008. From this date onwards, the Applicant exchanged various communications with the Administration in a bid to resolve the misunderstanding on the correct grade and step level that he should be entitled to. On 21 October 2008, the Administration finally informed him of its findings regarding the various issues related to his reassignment. The delay in responding to the Applicant was justified by the Administration to have been occasioned by the fact that an incoming Human Resources Officer had to deal with a backlog of information before responding to the Applicant. The Tribunal has reviewed the evidence on record and is satisfied with this explanation.

5.5 Having found that there was no binding agreement between the Applicant and the organization on the terms contained in the reassignment memorandum dated 10 June 2008, the question to be determined is to what extent, if any, the Administration can be held to be responsible for the financial detriment incurred by the Applicant. Having considered the evidence before it, the Tribunal finds that the Applicant should not have entered into such an onerous undertaking of purchasing a property on 16 July 2008 before he had signed a LOA setting out all the terms and conditions including salary and benefits. The Applicant cannot hold the Administration responsible for this lack of due diligence on his part.

5.6 Finally, the Tribunal finds that there is no evidence before it or in all the “pertinent regulations and rules and all relevant administrative issuances in force” to give rise to the presumption that the reassignment of a staff member would of necessity involve an increase in such a staff member’s grade or step level.

6. Conclusion

6.1 It is the judgment of the Tribunal that the Applicant's case fails in its entirety and is therefore dismissed.

(Signed)

Judge Vinod Boolell

Dated this 29th day of April 2010

Entered in the Register on this 29th day of April 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi