



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

ISKANDAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Muhammad Mohi-us Sunnah, OSLA

Counsel for respondent:

Josianne Muc, ALS/OHRM, UN Secretariat

Introduction

1. In an appeal submitted on 15 March 2010 to the United Nations Dispute Tribunal (UNDT), the applicant contested the decision “not to grant [him] a higher grade at D-1 level as initially offered” while he was on a reimbursable loan from the World Food Programme (WFP) to the African Union/United Nations Hybrid operation in Darfur (UNAMID).

Facts

2. The applicant served at the P-5 level in WFP. From 3 June 2008 to 26 January 2010, he was loaned to UNAMID on a reimbursable basis under the terms of the Inter-Organization Agreement Concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances.

3. By memorandum dated 12 May 2008 from the Officer-in-Charge (OIC), Darfur Recruitment Cell (DRC), Field Personnel Operations Service (FPOS), Field Personnel Division (FPD), Department of Field Support (DFS), UNAMID, the applicant was informed that “he [had] been selected to serve as Principal Officer, subject to medical clearance and release by [his] Office, for an initial period of three (3) months to [UNAMID]”. On the same day, the above-mentioned Officer sent a memorandum to the Director, Human Resources Division, WFP, requesting “release of [the applicant]... to [UNAMID]”.

4. By fax dated 16 May 2008, the Director, Human Resources Division, WFP, replied to the OIC, DRC/FPOS/FPD/DFS, UNAMID. She stated that “[WFP was] in agreement with the Reimbursable Loan of [the applicant] to [UNAMID], for an initial period of [three] months with a tentative effective date from 3 June 2008, in accordance with the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff amongst the Organizations applying the UN Common System of Salaries and Allowances”. She further stated that the applicant would “be maintaining specific return rights to WFP at his current P-5 grade level”.

5. The “Inter-Organization agreement covering the reimbursable loan of [the applicant] from [WFP] to UNAMID” was signed by the applicant on 23 May 2008 and by representatives of WFP and UNAMID on 22 and 25 May 2008 respectively. The agreement states *inter alia* that the applicant “continue[s] to be employed by WFP”, that he “continue[s] to be paid on WFP’s payroll” and that he retains “specific return rights to WFP”. It further provides that “UNAMID will reimburse [WFP] for all the expenses incurred in connection with [the] loan agreement, including the [applicant’s] salary, benefits and allowances at his current P-5 step XI grade level”. It also stipulates that the applicant “shall return to [WFP] upon completion or termination of his assignment with UNAMID and that no offer of continuing employment shall be made to him by UNAMID without consulting [WFP]”. The reimbursable loan agreement (RLA) was for an initial period of three months as of 3 June 2008.

6. On 5 June 2008, the applicant assumed his functions in UNAMID. His official functional title was “Principal Officer”. However, according to the respondent, his title was changed to Deputy Director because “the position required, among other duties, dealing with the Ministry of Foreign Affairs (MOFA) of the Sudan [and] [i]t was considered that the title of ‘Deputy Director’ would afford him leverage in his negotiations with the Sudanese MOFA officials”.

7. By facsimile dated 25 August 2008, UNAMID requested that WFP extend the reimbursable loan of the applicant for two months, i.e. until 2 November 2008, “based on the provisions of the Inter-Organization Agreement covering the reimbursable [loan], pending filling of the post”.

8. By fax dated 29 October 2008, UNAMID asked WFP agreement to further extend the applicant’s RLA until the end of January 2010, stating that he had agreed to stay on. UNAMID referred mistakenly in its communication to the “secondment” of the applicant and by e-mail dated 25 November 2008, a Human Resources Assistant, FPOS/FPD/DFS, clarified that the applicant was not on secondment but on reimbursable loan.

9. On 18 November 2008, WFP agreed to extend the applicant’s RLA and stated that it would extend the applicant’s fixed-term appointment until 26

January 2010. However, WFP added that “[the applicant] [was] due for mandatory retirement on 27 January 2010” and that “as [WFP was] not in a position to grant return rights to the Programme, UNAMID would be liable for any termination indemnity payment as a result of early termination of appointment prior to the agreed RLA end date”. WFP requested UNAMID concurrence with this proposal.

10. On 23 December 2008, the Chief Civilian Personnel Officer, UNAMID, recommended to the Chief, FPD/DFS, with copy to the Director, Human Resources Division, WFP, a further extension of the applicant’s RLA until 2 February 2009.

11. By e-mail dated 14 January 2009, WFP informed UNAMID that it had “taken action to extend [the applicant’s] [f]ixed-[t]erm contract and secondment to UNAMID until 26.10.2010 [*sic*, instead of 26.01.2010] with no returns rights to WFP...”. On the same day, WFP corrected that “this regards an extension of [RLA] (not Secondment)”.

12. By e-mail dated 15 January 2009, WFP informed the applicant of the extension of his WFP fixed-term appointment and the RLA with UNAMID until 26 January 2010, when he was due for mandatory retirement. WFP also pointed out that the extension of the RLA to UNAMID did not include return rights to the Programme.

13. By e-mail dated 18 January 2009, the applicant replied to WFP expressing his disagreement. He stated that “as a WFP staff member, [he] [was] entitled to be retired by WFP and WFP [was] obligated to repatriate [him] to [his] home country”. He added that “should DPKO decide that they still desire to retain [his] services, DPKO [would] engage [him] as a Mission Appointee and bring [him] back [to] [his] home country”. He also indicated that “the request UNAMID made was for an extension of the current RLA and not a new RLA, the terms and conditions being different from the original RLA which was accepted both by UNAMID and [himself]”. He thus stressed that “[he] [was] not inclined to accept the new RLA under [those] terms and conditions”. On the same day, UNAMID informed the applicant in writing that it did not agree either with the terms of the extension of his RLA as proposed by WFP.

14. By facsimile dated 19 January 2009, UNAMID informed the OIC, FPD/DFS, with copy to WFP, that “UNAMID [was] not in agreement with [WFP] unilateral extension of [the applicant’s] RLA [until 26 October 2010 as erroneously mentioned in WFP e-mail dated 14 January 2009] with no right to return to WFP and with a proviso that UNAMID should be liable for any termination indemnity payment that might result due to early termination of the staff member’s appointment prior to the end of the RLA date”. UNAMID indicated that under those circumstances, “[it could] only accept the extension of [the applicant]’s RLA through 6 June 2009 when he [would] complete one year on RLA... and if he [was] the successful candidate after a competitive selection process”. UNAMID also highlighted that it could only accept the extension of the RLA on the condition that the applicant continued to maintain a lien on a post in WFP and with return rights to WFP.

15. On 14 February 2009, the applicant was interviewed for the position of Deputy Director (D-1), Khartoum Liaison Office, UNAMID.

16. By memorandum dated 8 March 2009, the Director of Mission Support, UNAMID, informed the Acting Chief Civilian Personnel Officer, UNAMID, of the selection of the applicant for the above-mentioned post.

17. By e-mail dated 8 June 2009, the applicant sought information from the Acting Chief Civilian Personnel Officer, UNAMID, concerning his “situation”. By e-mail of the same date, the Acting Chief Civilian Personnel Officer informed the applicant that “there [was] no need for a letter of appointment to be issued to [him] since [he] remained a staff member of WFP on [RLA] to UNAMID/DFS”. He also highlighted that “[he] [could] be considered for [a] UNAMID appointment and if selected given a letter of appointment, if [he] resign[ed] from WFP”.

18. On 21 June 2009, the applicant wrote to the OIC, FPD/DFS, stating *inter alia* that he had been performing duties at the D-1 level since he joined UNAMID but that he had not received a special post allowance (SPA) at that level.

19. On 15 July 2009, the applicant was assigned to perform the functions of Acting Chief, Integrated Support Services, in El-Fasher.

20. By memorandum dated 1 September 2009, the Acting Chief Civilian Personnel Officer, UNAMID, informed the applicant that his RLA had expired on 30 June 2009. The memorandum mentioned that depending on the duration of the applicant's mission, there were two options for his further services in UNAMID, i.e. secondment or travel status. It also indicated that "staff members in the professional category could, if they wished, request a transfer to the mission post, provided they were competitively selected through the established procedures". On 10 September 2009, the applicant agreed to extend his mission service for more than three months under a secondment arrangement from 1 July 2009 to 26 January 2010. However, according to the respondent, since his RLA was still in effect until 26 January 2010, "it was considered that the [applicant] ... would continue under the same RLA, with specific return rights to WFP".

21. On 5 September 2009, the applicant was requested to provide a copy of his latest e-PAS/Special Performance Report to the Human Resources Services Section, UNAMID, in order to process his SPA to the D-1 level. On the same day, the applicant replied stating that he would submit his e-PAS but that he would like to know which rule or regulation states that a performance report is required for the granting an SPA. He never provided his e-PAS and no further action was taken in respect of an SPA.

22. By letter dated 5 November 2009 to the Secretary-General, the applicant requested a management evaluation. In the attached "summary of grievance", the applicant pointed out, among other things, that he was seeking either a transfer from WFP to UNAMID as Principal Officer or an official letter from UNAMID to WFP requesting WFP to remunerate him as Principal Officer at a higher grade.

23. By letter dated 18 December 2009, the Under-Secretary-General for Management, on behalf of the Secretary-General, replied to the applicant's request for a management evaluation "of the decision not to appoint [him] as Deputy Director, UNAMID, Khartoum Liaison Office at the D-1 Level" and upheld that decision.

24. In January 2010, the applicant retired.

25. On 15 March 2010, the applicant filed an appeal before the UNDT.

Parties' contentions

26. The applicant's principal contentions are:
- a. The applicant had a legitimate expectation that he would receive the benefits and entitlements of a D-1 post because (i) he was offered a post at the D-1 level, and (ii) he was performing at that level since his arrival at UNAMID;
 - b. The exchange of documents and agreements between UNAMID and WFP regarding the extension of his services with UNAMID created a situation in which he legitimately believed that he had been transferred to UNAMID and would remain there on a D-1 post until his retirement, with no return rights to WFP;
 - c. The applicant signed a second agreement with UNAMID in September 2009 concerning his secondment. Based on this agreement, he was entitled to receive a salary at the D-1 level.
27. The respondent's principal contentions are:
- a. The appeal is not receivable because the applicant does not contest an administrative decision within the meaning of article 2 of the UNDT statute, provisional staff rule 11.4 (a) and the jurisprudence of the UNDT and the former United Nations Administrative Tribunal;
 - b. The applicant's terms of appointment were that of a WFP staff member holding a fixed-term contract at the P-5 level who was on a reimbursable loan to UNAMID from 3 June 2008 to 26 January 2010. According to the RLA terms, he remained a WFP staff member at the P-5 level throughout. The extensions of his RLA were only confirmation of an existing arrangement agreed upon in May 2008 by all parties involved;
 - c. If the applicant wished to challenge a decision, it should have been the decision of May 2008 to maintain him at the P-5 level on a reimbursable loan basis following the offer for a mission assignment. However, he accepted the terms of the RLA and a

request for a management evaluation of that decision would be out of time.

Considerations

28. At the outset, the Tribunal notes that according to the wording of his application, the applicant contests the decision “not to grant [him] a higher grade at the D-1 level as initially offered, although [he] was working at a D-1 level post”. Since, in accordance with article 2 of its statute, the Tribunal’s competence to hear a case is mainly restricted to the review of an administrative decision, such a decision has to be identified. In this case, there are doubts as to whether any administrative decisions were taken with respect to the applicant’s complaints. Neither a clear request from the applicant to the Administration, nor a clear negative response from the Administration can be found. On the other hand, it appears from the record that the applicant made several attempts to clarify his contractual situation and to convey his wish to be treated as staff member at the D-1 level. The applicant seems to have interpreted the Administration’s lack of reaction as a negative decision. The Management Evaluation Unit accepted his request for a management evaluation and rendered a decision in a letter that ended advising him that he could apply to the UNDT if he was not satisfied with the outcome of the management evaluation.

29. Assuming that administrative decisions, either explicit or implicit ones, had been taken, the Tribunal clarified at the oral hearing that, in view of the facts of the case, the applicant seemed to contest two decisions, which should be reviewed separately. The first one may be characterized as WFP decision not to treat him as a staff member at the D-1 level while he was on loan from WFP to UNAMID. The second one, clearly identified, is the decision of UNAMID not to appoint him to the post of Deputy Director, Khartoum Liaison Office.

30. With respect to both decisions, the crucial question is whether the Tribunal has jurisdiction to review them. Not all organizations of the UN common system are under the jurisdiction of the newly established UN Dispute Tribunal and Appeals Tribunal. Whereas some of them, including UNAMID, are part of this new system of administration of justice, others, such as WFP, have recognized the

jurisdiction of the International Labour Organization Administrative Tribunal (ILOAT). Since different systems of judicial review exist, the Tribunal must, in the first place, assess to which system this case belongs.

31. In order to determine the competence of this Tribunal to hear the case, it is necessary to establish the applicant's relationship with WFP, on the one hand, and with UNAMID, on the other hand. In this regard, the Tribunal notes that the agreement covering the applicant's reimbursable loan was concluded within the framework of the Inter-Organization Agreement Concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances. This instrument provides in its paragraph 10 that:

“(a) When a staff member is loaned, he will be under the administrative supervision of the receiving organization, but will have no contractual relationship with it, continuing to be subject to the staff regulations and rules of, and retaining his contractual rights with, the releasing organization. He may, however, be suspended from duty by the receiving organization in circumstances which would justify the suspension of a staff member of that organization. In such event, the receiving organization will consult with the releasing organization to enable the latter to decide the appropriate consequential action.”

32. The agreement on the reimbursable loan of the applicant from WFP to UNAMID states that:

“2. Under the terms of this agreement, [the applicant] shall, inter alia:

- a. be on reimbursable loan from WFP to UNAMID;
- b. be subject to the administrative supervision of UNAMID;
- c. continue to be employed by WFP;
- d. be subject to the releasing agency's Staff Rules and Regulations;
- e. continue to be paid on WFP's payroll and receive all benefits and allowances to which he is entitled under the FAO/WFP Staff Rules and Regulations, and
- f. have specific return rights to WFP.

3. UNAMID will reimburse the releasing agency for all expenses incurred in connection with this loan agreement including the loaned employee's salary, benefits and allowances at his current P-5 step XI grade level.”

33. The record of the case shows that the applicant was working from 3 June 2008 to 26 January 2010 on an RLA from WFP, the releasing organization, to UNAMID, the receiving organization. Although there may have been some misunderstandings and disputes among the three parties to this agreement, there is no doubt that, during the whole period, the applicant remained a staff member of WFP.

34. As a WFP staff member, pursuant to paragraph 10 of the Inter-Organization Agreement cited above, the applicant did not have any contractual relationship with UNAMID, although he was under its administrative supervision. In fact, he continued to be subject to the staff regulations and rules of WFP and retained his contractual rights with it.

35. It also follows from the application of the provision cited above that UNAMID, as the receiving organization, did not have authority to take administrative decisions affecting the applicant's contractual status (except for suspension from duty which does not apply in the applicant's case) even if it wanted to do so. Administrative decisions affecting the applicant's contractual status could only be taken by WFP.

36. The Inter-Organization Agreement Concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances also provides, in its paragraph 11, that:

“Appeals against administrative decisions taken before or after a transfer, or during a period of secondment or loan, will be heard by the appropriate appeals body of the organization which took the decision appealed against, and be dealt with under the regulations and rules of that organization.”

37. In accordance with the above-mentioned provisions, since UNAMID was not in a position to take a decision affecting the applicant's contractual status, the applicant could only contest an administrative decision affecting his terms of appointment before the appropriate appeals body established by WFP.

38. As already indicated, WFP recognized the jurisdiction of ILOAT. In light of the foregoing, the Tribunal has no jurisdiction to review the decision not to treat the applicant as a staff member at the D-1 level while he was on a reimbursable loan from WFP to UNAMID.

39. The Tribunal now turns to the only administrative decision that was taken by UNAMID with respect to the applicant. As indicated in paragraphs 15 and 16 above, UNAMID had interviewed and selected the applicant for the post of Deputy Director, Khartoum Liaison Office, at the D-1 level. However, the applicant never received a letter of appointment from UNAMID.

40. Since the applicant took part in the selection process for the above-mentioned post as a WFP staff member and did not have a contractual relationship with UNAMID, he does not have standing *ratione personae* to contest the above-mentioned decision before this Tribunal, in accordance with article 3, paragraph 1, of its statute, which provides:

“An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes...”

41. The Tribunal considers that in view of the complexity of the United Nations common system, article 3, paragraph 1, of its statute must be interpreted in a restrictive way. Since, as shown above, there is more than one system of judicial review of administrative decisions, only staff members of the United Nations entities that recognize the jurisdiction of the newly founded system of administration of justice may have access to the Tribunal.

42. Although WFP is an organization of the United Nations common system, it is not a programme within the meaning of article 3, paragraph 1 (a), of the UNDT statute. In this respect, article VIII of the General Regulations and Rules of WFP provides that:

“1. WFP is an autonomous joint subsidiary programme of the United Nations and [the Food and Agriculture Organization of the United Nations (FAO)].

2. WFP shall, drawing on the legal personality of the United Nations and FAO, have legal capacity...

(c) to be party to judicial proceedings...”

43. According to these provisions, WFP has the legal status of a subsidiary programme that was established not only by the United Nations but also by FAO, a specialized agency of the UN common system. Furthermore, WFP has legal

capacity to be part to judicial proceedings and in the exercise of this capacity, it has recognized the jurisdiction of ILOAT.

44. Therefore, the applicant, being a WFP staff member, has no legal standing to contest before this Tribunal the decision of UNAMID not to appoint him to a post. The Tribunal is not competent to judge the manner in which external candidates are considered for posts within the UN Secretariat. The Tribunal is only open to individuals who file appeals alleging the non-observance of their contracts of employment. In the present case, the applicant cannot allege the non-compliance of his contract of employment because such a contract only exists with WFP, an organization that does not recognize the UNDT jurisdiction.

45. As a result of its examination of the file and in light of the foregoing considerations, the Tribunal concludes that the application does not fulfill the requirements of article 3, paragraph 1 (a), of its statute and declares itself not competent to consider the application.

Conclusion

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

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 1st day of June 2010

Entered in the Register on this 1st day of June 2010

(Signed)

Víctor Rodríguez, Registrar, Geneva