



**JUGE JEAN COURTIAL**, Presiding.

### **Synopsis**

1. The Appeals Tribunal finds that a contract is formed, before issuance of the letter of appointment, by an unconditional agreement between the parties on the conditions for the appointment of a staff member, if all the conditions of the offer are met by the candidate. By continuing to contest the start date, Mr. Rolf Sprauten never unconditionally accepted the offer made to him. Under these circumstances, in its judgment that the withdrawal of this offer was a breach of contract and that the harm suffered as a result should be compensated, the United Nations Dispute Tribunal (UNDT) was factually incorrect and committed an error of law. Its Judgment pertaining to this matter is overturned. The application submitted to the UNDT by Mr. Sprauten concerning the withdrawal of an offer of employment in Johannesburg is therefore dismissed.

### **Facts and Procedure**

2. Mr. Sprauten, a long-standing staff member of the United Nations Office for Project Services (UNOPS), contested two decisions before the UNDT: first, his non-selection for a P-4 position with UNOPS (case 1); and second, the withdrawal of an offer of appointment as a Procurement Specialist, at the P-4 level, in Johannesburg, South Africa (case 2).

3. Both cases were heard together by the UNDT. By Judgment No. UNDT/2010/087 of 6 May 2010, the Tribunal concluded, as to case 1, that the procedure which led to the non-selection of Mr. Sprauten was incurably flawed and, thus, the contested decision was in breach of the Applicant's contractual rights to have his candidacy adequately and properly considered. As to case 2, the UNDT found that the Secretary-General was in breach of the contract to recruit Mr. Sprauten to the post in Johannesburg at the P-4 level for a period of six months. The Judge requested the parties to make submissions on the issue of compensation.

4. On 21 June 2010, the Secretary-General filed an appeal against the UNDT Judgment relating to case 2. In the view of the Secretary-General, the UNDT committed an error of law in its Judgment that Mr. Sprauten had accepted the offer from UNOPS and that a contract had been concluded between him and UNOPS.

5. The facts of case 2 are presented in the contested Judgment (paragraphs 18 to 40). This information is summarized below.

6. In a memorandum dated 28 November 2008, the UNOPS Human Resources Director informed Mr. Sprauten that his appointment in New York had been extended until 28 February 2009, that the length of his employment would not be extended beyond that date and that he would be separated from service on that date unless he found another post with UNOPS. He could apply for vacancies at UNOPS or elsewhere and, exceptionally, could submit applications for several vacancies at the first round of staff rotations in 2009. In a subsequent letter dated 19 December 2008, the same Director informed Mr. Sprauten that he had been selected for the post of Procurement Specialist, at the P-4 level, in Johannesburg, South Africa. The Director's letter specified that while the start date remained to be determined, it should be no later than 1 February 2009. She requested a response from Mr. Sprauten by 30 December 2008 at the latest.

7. In an e-mail dated 29 December 2008, Mr. Sprauten replied that although he was glad to learn of his selection and would accept the post, there was a problem with regard to the start date. It was his understanding that the UNOPS rotation would be effective in June 2009. He added that a change of residence in the middle of the school year would be difficult for his two children and that maintaining two sets of households would be very costly. He concluded by expressing the hope that an acceptable solution to everyone could be found.

8. In an e-mail sent to Mr. Sprauten on 31 December 2008, the General Counsel of UNOPS noted that the incumbent of the post in Johannesburg needed to be operational as early as possible. The date of 1 February 2009 was therefore given as the latest starting date.

9. In an e-mail to the General Counsel dated 2 January 2009, Mr. Sprauten stressed that he was open to finding an acceptable solution for everyone. He recalled that he had accepted the offer of employment with the exception of the start date.

10. On 13 January 2009, the Africa Regional Office Director replied to Mr. Sprauten's e-mail, informing him that he was still expecting him by the beginning of February. If Mr. Sprauten was not able to start in February, the recruitment process would be restarted. However, if Mr. Sprauten changed his mind before another person was recruited, the

recruitment process would be stopped. The Director requested an answer by the following week.

11. Mr. Sprauten did not reply directly. On 26 January 2009, he wrote to the Director and others, referring to the administrative instruction on staff rotational movements (AI/OEC/2008/05). According to the instruction, as far as possible, rotational movements should occur in the third quarter of the year in order to take into account leave periods and school calendars.

12. In an e-mail dated 29 January 2009, the General Counsel wrote to inform Mr. Sprauten that he needed to make a decision, that he had been offered the post effective 1 February 2009 and that he should make efforts to take up his position at a reasonable date in early February or it would be assumed that he had declined the offer.

13. In an e-mail dated 6 February 2009, the Africa Regional Office Director requested Mr. Sprauten to notify him by Monday, 9 February 2009 at the latest whether he would start working in Johannesburg by 1 March 2009. Otherwise, he noted that he would ask Human Resources to put alternative arrangements in place on Tuesday.

14. After another exchange of e-mails in February, Mr. Sprauten was informed that the post had been filled by another staff member and that the offer of recruitment had therefore been withdrawn. Mr. Sprauten's services were terminated on 28 February 2009.

15. The UNDT Judge was of the view that although Mr. Sprauten had tried to negotiate a

the offer. In line with case law of the former United Nations Administrative Tribunal arising from *Kofi* (Judgment No. 519 of 1991), an acceptance which is conditional on a change in date does not constitute a legal basis for the formation of a contract. The Secretary-General contends that the UNDT Judgment contains legal and factual errors in considering that the Respondent had accepted the UNOPS offer and that a contract had thereby been concluded between the parties.

17. The Appellant recalls that employment relationships within the United Nations are governed by the Staff Regulations and Rules and cannot be compared with employment relationships between private parties, as noted previously by the Appeals Tribunal in *James* (Judgment No. 2010-UNAT-009, paragraph 45). The Appellant maintains that the UNDT committed an error of law by ignoring the fact that, under Regulation 4.1 of the Staff Regulations, contracts for staff members of the Organization are concluded only upon receipt of a letter of appointment.

#### **Sprauten's Answer**

18. Mr. Sprauten submits that the Appellant has not effectively challenged the Judgment and is merely attempting to remake its case. Neither the vacancy announcement nor the offer of employment stipulated a start date. The dates referred to by the Appellant had not been finalized but rather changed over time, during the course of the discussions. There was clearly nothing conditional in his acceptance. He never rejected the dates mentioned by the Appellant; he merely wished to explore solutions that would have better suited his family situation.

19. Mr. Sprauten maintains that the arguments put forward by the Appellant concerning letters of appointment are irrelevant. He had a letter of appointment for the post that he held until 28 February 2009. This was not a first appointment, rather he was a staff member seeking a new assignment. Case law concerning first appointments could therefore not be meaningfully applied to him.

20. Mr. Sprauten requests that the appeal be dismissed. Furthermore, with a view to discouraging unfounded attempts to appeal first-instance applications already dealt with, he requests the Appeals Tribunal to award him interest on the date of this judgment and costs in the amount of US\$ 5,000 under Article 9, paragraph 2, of its Statute.

**THE UNITED NATIONS APPEALS TRIBUNAL**

Judgment No. 2011-UNAT-111

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**Judgment**

30. The Judgment No. UNDT/2010/087 with respect to case 2 is hereby annulled. The application submitted to the UNDT by Mr. Sprauten, concerning the withdrawal of an offer of employment as a P-4 Procurement Specialist in Johannesburg, is hereby dismissed.

Original and Authoritative Version: French

Dated this 11<sup>th</sup> day of March 2011 in New York, United States.

*(Signed)*

Judge Courtial, Presiding

*(Signed)*

Judge Painter

*(Signed)*

Judge Simón

Entered in the Register on this 19<sup>th</sup> day of April 2011 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar