



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.

5.

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



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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27. On the facts before me, therefore, the offer and the acceptance, particularly in light of the subsequent actions of the parties, produced a legally binding contract that the Applicant would commence the performance of his official functions on 1 October 2007. It does not mean, of course, that the Applicant was entitled to receive his salary as a staff member *prior* to 1 October 2007, but it does mean, among other things, that the Applicant was legally required to commence his duties on 1 October 2007 and the Organisation was legally required to start paying his salary starting 1 October 2007. Any further documentation confirming the contractual relationship would have been a formality and reiteration of the terms already agreed.

28. Furthermore, the language in which the emails of 21 and 26 September 2007 were couched is indicative of the understanding of UNDP that its communications had the effect of a “cancellation of [the Applicant’s] appointment”. There is no evidence to support the bare assertion made by the Respondent that the email dated 21 September 2007 mistakenly referred to “the cancellation of [the Applicant’s] appointment” and that it was in fact a withdrawal or cancellation of the *offer* of appointment. In any event, by the time of this communication the parties were in a binding agreement.

29. I have considered the recent case law of the Dispute Tribunal (*Adrian* UNDT/2010/072, *Gabaldon* UNDT/2010/098) and the UN Appeals Tribunal (*El-Khatib* 2010-UNAT-029), as well as the jurisprudence of the former UN Administrative Tribunal (see, e.g., Judgment No. 1195, *Newton* (2004)), and I find that the unique language of the offer of appointment made to the Applicant, the surrounding circumstances, and the legal relationship created between the parties make the present case significantly distinguishable from some of the pronouncements in these cases.

30. In *Adrian*, the Dispute Tribunal found that the memorandum and conditions of service reassignment/agreement, the Dispute Tribunal’s decision, and the offer of appointment to a different duty station were not sufficiently specific to create a binding contract, and that the parties expected the findings to be different.

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 25<sup>th</sup> day of October 2010

Entered in the Register on this 25<sup>th</sup> day of October 2010

*(Signed)*

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