Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

GABALDON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Bart Willemsen, OSLA

Counsel for respondent:
Josianne Muc, ALS/OHRM, UN Secretariat

Introduction

1. The applicant received an offer of appointment and accepted it. After he fell ill, the Organization withdrew the offer. The issue is whether the applicant became a staff member and, therefore, has access to the Tribunal.

Facts

2. On 30 April 2008, the Chief Civilian Personnel Officer of the United Nations Mission in the Sudan (UNMIS) sent the applicant an offer for a six-month appointment of limited duration (ALD, 300 series of the former Staff Rules) as Humanitarian Affairs Officer at the P-3 level. The offer of appointment stipulated that it was "subject to [the applicant] being medically cleared by the United Nations Medical Doctor" and that it "automatically elapse[d] in the event that the results of [the applicant's] medical examination prove[d] unsatisfactory". It further provided that: "This offer of appointment is subject not only to medical clearance but also to the verification of references in support of [the applicant's] qualifications or mission service." The offer also informed the applicant that "a copy of the Staff Regulations and Rules [would] be made available to [him] when [he would sign] a Letter of Appointment, which [was] the official document by which [he would become] a staff member of the United Nations".

3. The applicant accepted the offer of appointment on 1 May 2008, indicating that he would be available "30 days from the date of medical clearance". In its response dated 13 May 2008, UNMIS sent the applicant additional forms for completion and return.

4. The UNMIS Medical Unit issued the medical clearance for the applicant on 26 May 2008.

5. The applicant wrote to the Human Resources Services Section (HRSS) of UNMIS on 3 June 2008, asking whether it was in receipt of the results of the medical evaluation and requesting confirmation of the medical clearance. By email of the same day, an Officer of the HRSS responded to the applicant,

informing him that he was medically cleared and that UNMIS was awaiting the issuance of the laissez-passer.

6. The applicant was diagnosed with an illness on 28 July 2008 and was hospitalized. On 6 August 2008, he informed UNMIS about the diagnosis and the estimated recovery period.

7. By email dated 20 August 2008, a Doctor from the UNMIS Medical Unit noted that a new medical report was needed, stating that the applicant's therapy was finished successfully and that he was "fit for job and fly".

8. By email dated 21 August 2008, copied to the applicant, an Officer from the HRSS confirmed that the applicant would be able to report for duty contingent upon a medical report from his attending doctors.

9. On 16 December 2008, the applicant provided HRSS with a medical report – in Spanish - from his treating physician, who stated that he was in full remission and that he could "retake his duties in his usual job".

10. On 17 December 2008, the UNMIS Medical Unit assessed the applicant as "not fit" under classification 2B (i.e. candidates with reduced life expectancy, or reduced work capacity, who are ineligible for employment).

11. By letter dated 21 December 2008, the Officer-in Charge, HRSS, informed the applicant of the formal withdrawal of the offer of appointment on the grounds that he was not medically cleared.

12. On 22 December 2008, the applicant requested the UNMIS Medical Unit to review its decision to deny him medical clearance; the same day, UNMIS Medical Unit forwarded this request to the Medical Services Division (MSD) at UN Headquarters.

13. On 24 December 2008, the applicant sent a copy of a sworn translation of his treating physician's report to a Doctor of the UNMIS Medical Unit.

14. The MSD confirmed on 31 December 2008 that the applicant was unfit for deployment to UNMIS. This was confirmed by MSD, again, on 30 January and 23 February 2009 respectively.

15. By memorandum dated 13 January 2009, the Chief Civilian Personnel Officer informed the applicant that the decision not to medically clear him and to withdraw the offer of appointment was taken in accordance with the applicable rules.

16. The applicant requested administrative review of the decision to withdraw the offer of appointment on 29 January 2009.

17. By letter dated 20 February 2009, the Administrative Law Unit of the Office of Human Resources Management, UN Secretariat, advised the applicant that since he was not a staff member, the internal justice system was not available to him.

18. The applicant submitted an incomplete statement of appeal to the New York Joint Appeals Board (JAB) on 23 March 2009 and a complete statement of appeal on 23 April 2009.

19. This appeal was transferred to the United Nations Dispute Tribunal (UNDT) on 1 July 2009 and registered under UNDT/GVA/2009/48.

20. On 30 December 2009, the respondent filed a motion to dismiss the application on the grounds that it was not receivable *ratione personae*. The respondent subsequently filed his reply to the statement of appeal on 4 January 2010, requesting "leave from the Tribunal to file additional particulars should the motion to dismiss not be successful". By order dated 8 January 2010, the Tribunal rejected the motion to dismiss and granted the respondent until 9 February 2010 to submit additional particulars to the application, which he did on that date. The applicant submitted his comments on the respondent's submissions of 9 February 2010 on 25 February 2010.

21. By letter dated 3 March 2010, the Registrar informed the parties that the Judge entrusted with the examination of the case considered that a hearing was not necessary and asked them to take position thereon. On 18 March 2010, the parties made a joint submission, informing the Tribunal that an oral hearing was not necessary.

Parties' contentions

22. The applicant's principal contentions are:

a. The application is receivable *ratione personae* pursuant to former staff rule 111.2. The respondent's reliance on article 2, paragraph 1, and article 3, paragraph 1, of the UNDT statute is procedurally flawed since the case was submitted under the former internal justice system, hence it is not possible to dismiss the applicant's case on the basis of a provision not in force at the time. The applicant does, however, concede that in practical terms, the jurisdiction *ratione personae* of the JAB and of the former United Nations Administrative Tribunal (former UNAT) appear to be identical to that of the UNDT;

b. The applicant was formally a staff member of the United Nations as of 3 June 2008, or even 26 May 2008, and as such entitled to seek redress under the United Nations internal justice system: the offer of appointment transmitted to the applicant on 30 April 2008 stipulated that it was "subject to medical clearance"; by accepting the offer of appointment on 1 May 2008, a "contract for employment" was created, which has to be differentiated from a "contract of employment". The latter entered into force on the date the applicant was informed in writing that he was medically cleared, i.e. on 3 June 2008, or even before that, when he was actually medically cleared, i.e. on 26 May 2008. The medical clearance, which was provided for in the offer of appointment, constituted a suspensive condition so that, once that condition was fulfilled, a contract of employment came into existence. As such, the fact that the applicant was not provided with a letter of appointment was legally irrelevant, since such a letter would constitute a mere written confirmation of the contract of employment. According to the jurisprudence of the International Labour Organization Administrative Tribunal (ILOAT), "[a] contract is concluded only if both parties have shown contractual

intent, all the essential terms are worked out and agreed on, and all that may remain is a formality of a kind requiring no further agreement. The [dispatch] of the letter of appointment was promised in the telegram of 4 February; it was stated not just as a possibility but as a definite and unqualified intention." In the present case, both parties demonstrated contractual intent and the essential terms of the contract were worked out, hence "a valid employment contract was in force and Applicant accordingly must have *locus standi* before the Tribunal";

c. The required additional documentation, i.e. letter of reference and copies of diploma, had already been submitted, hence "this condition had been fulfilled, and, in contractual terms, agreed upon". The subsequent communications never referred thereto, but only to the medical report, which showed that the only outstanding issue was his medical clearance;

d. Since as of the moment he had received medical clearance – 26 May 2008 - the applicant had become a staff member, the Organization could no longer withdraw the offer of appointment and the contested decision has no legal validity and is null. He is thus entitled to payment of all outstanding salaries and benefits and reimbursement of all medical expenses;

e. In the alternative, it is submitted that his acceptance of the offer of appointment created a contract for appointment, entitling the applicant to seek redress under the UN internal justice system. It appears in judgement No. 1290 of the former UNAT that the JAB considered the matter to be receivable as per a so called contract for employment. In that case, by agreeing with the conclusions of the JAB, the Secretary-General implicitly recognized "that once an anticipated staff member accepts an offer of appointment from the Organization, a legal agreement is in force entitling that staff member to seek redress against an administrative decision alleging the non-observance of his or her rights under the agreement".

Hence, in the present case, by accepting the offer of appointment, a valid contract for employment was created and the Tribunal is open to the applicant to contest the non-observance of the rights afforded to him under this agreement;

f. It further appears in judgment No. 1290 of the former UNAT that the Secretary-General accepted the JAB findings, according to which "[t]he legal consequence of such a contract for employment is that the agreement remains valid, effective and in force, unless the respondent can show that the contract has become impossible of performance at any particular time or the assignment proves not to be feasible in the near future". In his case, at the time of the impugned decision, "performance on part of [applicant] was not [*sic*] impossible, nor unfeasible in the near future". He informed UNMIS of his recovery ten days before the contested decision and five days before the contested decision he provided UNMIS with a medical report, in Spanish, confirming that he had fully recovered from his illness and was medically fit to resume his duties. He further provided UNMIS with an English translation of the medical report on 24 December 2008. As such, the Organization failed to respect the contract for appointment, since it did not demonstrate "that performance would no longer be possible or feasible in the near future, in accordance with the terms of [judgment No. 1290 of the former UNAT]". By withdrawing the offer of appointment without verifying the applicant's medical condition, the Organization failed to exercise due diligence, to which the applicant was entitled;

g. By accepting the offer of appointment on 1 May 2008, the applicant indicated that he would be available to report for duty no later than 30 days from the date of medical clearance and the Organization did not refuse the suggested date to report for duty. When the applicant requested confirmation of the medical clearance, the Organization indicated that the laissez-passer only had to be issued before the applicant could travel to Sudan and

report for duty. The laissez-passer reached the applicant on 23 July 2008 and he was diagnosed with an illness, precluding any travel, a few days later, i.e. on 28 July 2008. The applicant submits, nevertheless, that his appointment started formally 30 days from the date of the medical clearance, i.e. on 26 June 2008 or 3 July 2008, when he would have been available for official travel. Hence, should the Tribunal find that there was no contract on 26 May 2008, such contract then entered into force on 26 June 2008, which is when he would have been available. Also, the receipt of the UNLP, which confirmed the medical clearance, was equivalent to a travel authorization;

h. Without prejudice as to whether or not he was a staff member of the Organization at the moment of the contested decision, denying him access to the internal justice system, "on the sole basis that he was not a staff member at the time of the impugned decision" "would violate the universal prohibition against discrimination *and* violate Appellant's fundamental right to legal recourse";

i. The question whether the withdrawal of the offer was reasonable and appropriate is immaterial for the determination of the Tribunal's jurisdiction *ratione personae*. As ILOAT held in judgment No. 2657, "[i]t follows that persons who are applicants for a post in an international organisation but who have not been recruited are barred from access to the Tribunal. It is only in a case where, even in the absence of a contract signed by the parties, the commitments made by the two sides are equivalent to a contract that the Tribunal can decide to retain jurisdiction".

23. The respondent's principal contentions are:

a. The Tribunal lacks competence *ratione personae* for the present case under article 2, paragraph 1, article 3, paragraph 1, and article 8, paragraph 1, of the UNDT statute, since the applicant is not a staff member, or former staff member, of the United Nations;

b. Former UNAT has consistently held "that the signing of an offer of appointment, in itself, is not sufficient to create rights under a binding employment contract between the applicant and the United Nations" and that "[u]nless the applicant undergoes the procedures required by the offer of appointment and unless the Organization 'confirms the provisional offer of appointment' with the issuance of a letter of appointment, no binding employment contract between the applicant and the Organization exists";

c. The offer clearly provided that the letter of appointment is the "official document by which [the applicant] becomes a staff member of the United Nations". The detailed conditions of service of the United Nations were to be made available to the applicant upon signature of the letter of appointment;

d. According to former staff rule 304.1, "[t]he letter of appointment issued to every staff member contains expressly or by reference all the terms and conditions of employment. All contractual entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment." Hence, it would be illogical to conclude that a contract was established between the parties "before all its terms and conditions were known by same";

e. The actual terms of the offer of appointment in the present case show that the offer of appointment was subject to medical clearance and a reference check. In view of the fact that the offer of appointment contained two specific conditions, the argument that the first medical clearance of June 2008 had the effect of creating a contract of employment cannot stand, since an offer containing two specific conditions cannot lead to the establishment of a valid and executable contract if only one of the conditions is fulfilled;

f. When the applicant accepted the terms of the offer of appointment, by letter dated 1 May 2008, he himself stated his understanding that the "offer of appointment commences on the date of [his]

official entry [on] duty" and that the offer was "subject to medical clearance and … lapses if [he] do[es] not, in the opinion of the United Nations Medical Service meet its medical standards". Hence, he was fully aware that the offer of appointment was subject to the fulfillment of certain conditions and that a valid contract of employment could not be created earlier than at his official entry on duty;

g. Before the letter of appointment could be issued to the applicant, the UN had to perform another unilateral act, which was to obtain security clearance on behalf of the applicant;

h. The signing by the applicant of the offer of appointment did not create rights under a binding employment contract and the applicant never obtained final and official medical clearance while he and the UN were in the process of performing several acts that were required before a letter of appointment could be issued. The applicant's provisional offer of appointment was never confirmed but, on the contrary, was withdrawn and the Organization was never under any obligation to provide the applicant with a travel authorization;

i. Former staff rule 304.2 provided that "[t]he appointment of a staff member engaged for activities of a limited duration under staff rule 301.1 (a) (ii) (LD appointment) shall take effect from the date on which the staff member enters into official travel status to assume his or her duties or, if no official travel is involved, from the date on which the staff member starts to perform his or her duties". In fact, persons under recruitment are authorized to travel ("appointment travel") one day or more before they are expected to report for duty; once they report for duty, those persons sign the letter of appointment, which is the moment they become staff members of the Organization. In such case, the contract of employment enters into force, retroactively, on the date the staff member entered into official travel status;

j. The applicant's argument that the offer of appointment and his acceptance thereof "were governed by general contract law and not the internal rules of the Organization" is wrong since article 101.1 of the United Nations Charter states that "[t]he staff [of the United Nations] shall be appointed by the Secretary-General under regulations established by the General Assembly". Also, former staff rules 304.1 and 304.2 and the offer of appointment were clear about the question when a person becomes a staff member, hence there was no lacuna in this respect;

k. Pursuant to article 3 of the UNDT statute, the applicant, who never became a staff member of the Organization, is therefore not eligible to file an application. His claim for a general competence of the Tribunal to hear cases arising out of the various steps preceding the appointment of a staff member is groundless;

l. For the reasons outlined above with respect to the Tribunal's competence, the applicant's alternative argument that his "acceptance of the offer of appointment created a contract for appointment, thereby entitling [him] to seek redress under the internal justice system" cannot stand. The applicant's reference to judgement No. 1290, *Kotecha* (2006) of the former UNAT, is not relevant, first because the exact conclusions of the JAB agreed upon by the Secretary-General are not specified in that judgement and the Secretary-General's decisions on JAB recommendations "did not have the status of legislation or precedent", and second, because the facts of that case are not the same. In judgment No. 1290, it was determined that the applicant's contract became effective because he was physically working for the Organization, which was not the case in the present application, since the applicant never worked for the Organization or even entered official travel status;

m. The Organization did at no time make a promise to the applicant that he could assume his duties upon recovery; on the contrary, he

> was advised by email dated 21 August 2008 that following his treatment, he would have to submit a "medical report clearing [him] as fit for Sudan", which he never did. He merely submitted a certificate that he had recovered from his illness and that he could "retake his duties in his usual job", without indication that the physician was aware of the conditions in Sudan.

Considerations

24. The Tribunal held in Order No. 2 (GVA/2010) that the question whether or not the applicant shall be regarded as the holder of a contract of employment with the United Nations was one which had to be resolved on the basis of the rules and regulations, which it was the responsibility of the UNDT to apply, and that this question could not be decided without entering into a substantive consideration of the case. It therefore declared the application receivable only for the purpose of assessing whether a valid contract of employment was concluded with the Organization, as such granting the applicant access to the Tribunal under article 3, paragraph 1, and article 2, paragraph 1, of its statute.

25. Article 2, paragraph 1, of the Tribunal's statute provides:

> "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."

26. Article 3, paragraph 1, of the Tribunal's statute further 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; (b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes; (c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations,

> including the United Nations Secretariat or separately administered United Nations funds and programmes."

27. The United Nations Appeals Tribunal (UNAT) stated in judgment No. 2010-UNAT-009, *James*, that "an employment contract is not the same as a contract between private parties". UNAT further held in judgment No. 2010-UNAT-029, *El-Khatib*, that "the contract whereby the Agency recruited a staff member who would be governed by the staff rules is not a common-law contract. According to the staff rules, the contract can only be concluded validly on the date when the Commissioner-General or an official of the Agency duly empowered to act on his behalf signs the staff member's letter of notification." The reference to the Staff Rules made in this judgment clarifies that the so-called "letter of notification" ("lettre de notification" in the original version in French) is in fact the letter of appointment ("lettre de nomination" in French). In *El-Khatib*, UNAT also noted that, in the absence of a letter of appointment, the applicant could not claim that a valid employment contract had been in force at the moment the decision to withdraw the offer of appointment was taken.

28. It must be concluded from the foregoing that in view of the special relationship between the United Nations and its civil servants, the legal principles that may be applicable to a contract between private parties are not relevant to assess if a valid contract of employment has been concluded between the Organization and a civil servant. It further results from that special relationship that a person cannot obtain the status of a staff member of the United Nations before his letter of appointment is signed by a duly authorized official of the Organization.

29. As a first instance court, the Dispute Tribunal follows the legal pronouncements of its court of appeal. In view of the recent UNAT jurisprudence, the applicant's elaborate argumentation is therefore irrelevant for the assessment of the present application and does not need to be further discussed by the Tribunal.

30. In the present case, according to the available record, the applicant never received a letter of appointment and no such letter was ever signed by an authorized official. He did not, therefore, become a staff member of the United Nations within the meaning of article 3, paragraph 1, of the UNDT statute and his application must be rejected on the grounds that it is not receivable.

31. The record shows that the limitation of the Tribunal's jurisdiction to persons having acquired the status of staff member, as reflected in the Tribunal's statute, was not unintentional, but was the clear wish of the General Assembly. Indeed, the General Assembly, which had considered proposals to open the Tribunal to non-staff personnel, such as for example Interns and Type II gratis personnel (e.g. A/62/748, referred to in A/RES/63/253) opted to reject such proposals and to limit the scope of the Tribunal's statute as reflected in article 3, paragraph 1. Hence, this limitation does not constitute an "unintended lacuna", and there is no room for a larger interpretation of the actual wording of the statute.

32. The foregoing notwithstanding, the limitations of access to the Tribunal for different categories of non-staff personnel are still the subject of discussions. The General Assembly, in its resolution A/RES/64/233 dated 22 December 2009, requested the Secretary-General with respect to remedies available to different categories of non-staff personnel, to analyse and compare the advantages and disadvantages of several options listed there, including granting access to UNDT and UNAT, to non-staff personnel. For the time being, there is however no way to grant access to the Tribunal to other applicants than persons having acquired the status of a staff member.

33. The fact that the present application was transferred to this Tribunal from the JAB does not impact on this conclusion, given that under former staff rule 111.2 a), access to the former internal justice system was equally limited to staff members and the same considerations presented in paragraphs 27 to 30 above apply.

Conclusion

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

The application is rejected.

(*Signed*)

Judge Thomas Laker

Dated this 31st day of May 2010

Entered in the Register on this 31st day of May 2010

(*Signed*)

Víctor Rodríguez, Registrar, Geneva