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.

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 j3YW0FFhW-v--Rf-hcícc-RlBvhHv-cvzRiB-z-íRhBlvh,Fvcc

15.

Parties' contentions

22. The applicant's principal contentions are:

a.

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

b. Former UNAT has consistently held "that the signing of an offer of

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

> 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,

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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 í-YHRNBlzhízzíHRDBlchFYz,zRTBlvhcHH-HWR/BlFhYvW-Y

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