



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/114

Judgment No.: UNDT/2010/082

Date: 6 May 2010

Original: English

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**Before:** Judge Ebrahim-Carstens

**Registry:** New York

**Registrar:** Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for applicant:**  
Duke Danquah, OSLA

**Counsel for respondent:**  
Susan Maddox, ALS/OHRM, UN Secretariat

Notice: This Judgement has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

## **Introduction**

1. The applicant contests the decision not to extend her fixed-term contract. In September 2005, the applicant joined the then newly formed Counter-Terrorism Committee Executive Directorate (CTED) of the United Nations. Between July 2006 and January 2007 the applicant was admitted to four different hospitals for treatment (including alcohol-related detoxification) and, in January 2007, she was medically evacuated to her home country and subsequently placed on special leave without pay. On 1 August 2007, the applicant was informed that her contract would not be extended beyond its expiration date of 2 September 2007. The applicant subsequently filed a request for administrative review, contesting the decision not to extend her contract. Having received the Administration's reply dated 2 November 2007 and not being satisfied with the outcome of the review, the applicant filed a statement of appeal with the Joint Appeals Board (JAB). The applicant subsequently filed an application with the Dispute Tribunal.

2. The main legal issues in this case are whether the decision not to renew the applicant's contract was proper and whether additional claims raised by the applicant are receivable.

3. A directions hearing was held on 18 December 2009 to identify the issues and to give the necessary directions for an expeditious disposal of the case. Pursuant to my order, the parties made additional submissions with respect to the legal issues identified at the directions hearing, and subsequently agreed that the Tribunal consider the matter on the papers as the facts are largely common cause. In view of the nature of this case and the diverse allegations made by the applicant, a more than cursory examination of the facts is necessary.

## **The facts**

4. CTED, which reports to the steering committee of the Counter-Terrorism Committee (CTC), was established in 2005. On 3 September 2005, the applicant

joined CTED on a two-year fixed-term contract as a P-4 Legal Officer in New York. The applicant, a civil servant from her national government ministry, was granted special leave without pay from her ministry for the duration of the contract with CTED. The applicant was deployed in one of three clusters within the office.

5. Between October 2005 and June 2006 the applicant underwent what she describes as three major surgeries, the first of which was a nose fracture following an accident in her apartment. Following an ankle fracture in April 2006 in her home country, her surgeon recommended that she remain there for approximately six weeks to allow the fracture to heal. By the applicant's own admission, she disobeyed the recommendation of her doctor and returned to work in New York on crutches ten days after the surgery. This necessitated further surgery in June 2006 regarding the selfsame fracture.

6. On 4 May 2006, the applicant's electronic performance appraisal system (e-PAS) report was signed by the applicant and her supervisors. The e-PAS report stated in the overall comments section:

[The applicant] is hard-working, conscientious and undaunted in performing the tasks assigned to her. She writes well and produces high-quality, accurate analysis. Unfortunately, health problems during the past few months have prevented her from fully realizing her potential.

7. On 19 September 2006, the applicant's supervisor wrote a memorandum to the then Assistant Secretary-General (Director of CTED) regarding the applicant, stating:

I am increasingly concerned at [the applicant's] frequent unexplained absences from work. She disappears for days at a time without telephoning the office. Some examples in 2006 are January (three days), March (two days) and May (two days). She also does not answer the telephone during these absences and several times we had to send colleagues to her home.

The situation continues to worsen. She was recently absent for three days without explanation (13, 14 and 15 September 2006). These absences make it very difficult for my cluster to conduct its work.

Despite her undoubted good will and experience, we cannot count on [the applicant] to meet deadlines, participate in joint projects, attend meetings of the Committee and the subcommittees or conduct negotiations with the Permanent Missions of Member States.

I am convinced that [the applicant] has a medical problem and that we would be remiss if we failed to seek guidance on this matter from the United Nations Medical Service.

8. On 27 September 2006, the Director of CTED sent a letter to the applicant, stating that the applicant's unauthorised absences had had a negative impact on her performance for the cluster as well as her ability to meet deadlines imposed on CTED by the CTC, and recommending her to seek the assistance of the Staff Counselor's Office in the Office of Human Resources Management.

9. On 29 September 2006, CTED's Administrative Officer sent a letter to the applicant stating, "We have now received medical certificates from you that will, if approved by Medical Services [Division], result in your exceeding your entitlement to three months on full salary". The Administrative Officer asked the applicant to sign a form giving her the option of requesting that each day of sick leave at half pay may be combined with one half day's annual leave in order to maintain her full pay status. The applicant signed the form on 2 October 2006, agreeing "that sick leave at half pay be combined with annual leave".

10. On 8 October 2006, the applicant responded to the CTED Director's letter of 27 September 2006, expressing her dissatisfaction with her supervisor. The Director of CTED subsequently shared the letter with the applicant's supervisor, seeking his comments. The supervisor replied in writing to the applicant's allegations on 26 October 2006, asking that she be removed from his supervision and stating that it had been impossible to manage her attendance and performance.

11. On 3 November 2006, the applicant was taken to a hospital for treatment after she was found in her apartment by her landlord in a serious condition. On 6 November 2006, the applicant informed CTED that she had been admitted to a hospital and might need several weeks of medical treatment.

12. On 8 November 2006, CTED referred the case to the Director of the UN Medical Services Division to determine whether the staff member should be considered for disability benefit since at that point in time she had exhausted her sick leave entitlements on full pay and needed to be placed on sick leave at half pay combined with annual leave to maintain her on full pay status.

13. On 10 November 2006, the CTED Director sent a letter to the Director of the UN Medical Services Division “in response to ST/AI/372” (administrative instruction on employee assistance in cases of alcohol/substance abuse) stating that the applicant was reportedly in a hospital in a “serious condition” and formally referring the case to the Medical Services Division to inform them of the matter and to request that appropriate action be taken.

14. The applicant was hospitalised again on 1 January 2007. The Deputy Director of the Medical Services Division authorised her sick leave until 25 January 2007. Between July 2006 and January 2007, the applicant was admitted to four different New York hospitals for alcohol detoxification.

15. On 8 January 2007, the Head of Legal and Consular Affairs of the applicant’s Consulate in New York sent an email to the applicant’s supervisor, summarising the situation as follows:

This is to follow up on the results of our discussion this afternoon with [the applicant], that she is finally willing to travel to [her home country] for a therapy by the end of this week (while her employment with UN-CTC will not be terminated within the next 30 days, starting next weekend). In view of the expert opinion of Dr. [TS], MD . . . that she must urgently seek treatment in [her home country], that she must travel in the company of one medical staff, begin an in-patient therapy immediately and that her unsupervised discharge from hospital would foreseeably result in a relapse and lead to her death within one month: I suppose that these imperative medical necessities ought to be covered by the UN as present employer of [the applicant] and by the medical insurance she has. Would you please verify this matter and let me know the outcome as soon as possible?

16. On 9 January 2007, the applicant's supervisor sent an email to the Deputy Director, Medical Services Division, requesting him to authorise under ST/AI/2000/10 (Medical evacuation), on an exceptional basis, a medical evacuation for the applicant from New York to her home country with a medical escort. The email stated:

CTED would be prepared to pay for [the applicant's] ticket . . . and a ticket for her medical escort, including two days DSA in New York for the escort. I would appreciate your earliest response since [the applicant's hospital] will not be able to hold [the applicant] beyond Friday, 12 January, when she would be released to return to her apartment and could resume abuse of alcohol.

17. The medical evacuation was approved on 9 January 2007. The Deputy Director, Medical Services Division, sent an email to the applicant's supervisor, stating:

Considering the circumstances surrounding this case and taking into account the seriousness of [the applicant's] medical condition, as well as recommendations of Dr. [TS], with whom I had an extensive discussion on further treatment options of [the applicant], I approve the medical evacuation of [the applicant] to [her home country] with a medical escort on an exceptional basis. DSA period for an escort is two days at the New York rate. With reference to section 8.3 of the ST/AI/2000/10 which is attached herein for your easy reference, DSA is not applicable for [the applicant].

Please proceed with all arrangements necessary for the medical evacuation of [the applicant].

18. On 12 January 2007, the applicant's treating doctor signed a note stating, "[The applicant] is currently able to travel by air". The applicant was evacuated on 13 January 2007. She was accompanied by her brother, who the record indicates is a medical doctor. There is some contention regarding the propriety of the evacuation which is discussed below.

19. On 7 March 2007, the applicant wrote an email to OHRM enquiring about her status and stating that she wished to continue her alcohol rehabilitation in a New York hospital. OHRM replied to the applicant on 16 March 2007, stating:

After conferring with the UN Medical Director, we have been advised as follows:

“[The applicant] . . . was medically evacuated . . . to ensure that she would receive treatment she urgently needed and which she repeatedly failed while staying in New York. She has to continue this treatment in [her home country] and her return to New York may be considered only after [the applicant] will completely recover from the condition for which she was evacuated.

At this point, she is not medically cleared to return to New York.”

As you have exhausted all entitlements to sick leave (and annual leave), you have therefore been placed on special leave without pay effective 24 January 2007 in accordance with Staff Rule 106.2(b).

20. On 19 March 2007, the applicant was informed, again, that she had been placed on special leave without pay effective 24 January 2007 in accordance with staff rule 106.2(b), initially for three months, ending 24 April 2007. The applicant had been advised previously, by a letter dated 29 September 2006, that she was entitled to “three months on full salary and three months on half salary in any period of twelve consecutive months” and that, as at 29 September 2006, she was in excess of her entitlement to three months on full salary.

21. The applicant returned to New York on 13 April 2007, unbeknown to CTED and OHRM, who only became aware of her return in June 2007 when the applicant made an unannounced visit to the CTED office.

22. On 5 July 2007, the applicant met a colleague in the city who advised her to contact the UN medical services. On the same day, the applicant telephoned the Deputy Director of the Medical Services Division and arranged a meeting with him. However, the applicant did not attend the appointment. Subsequent attempts by the Medical Services Division to obtain information, along with supporting documentation, about the applicant’s condition were unsuccessful.

23. On 27 July 2007, the representatives of CTED, OHRM, and the Medical Services Division convened to discuss the applicant’s situation. The content of the meeting was summarised in a note dated 17 August 2007, which stated:

On 27 July 2007, CTED convened a meeting with [the Deputy Director of Medical Services Division] and . . . OHRM. During the meeting, [the Deputy Director of Medical Services Division] confirmed that [the applicant] has not provided any medical information to him nor had he granted authorization for the release of [the applicant] from her treating doctors in [the applicant's home country] and USA to return to the United States. Although [the applicant] . . . mentioned [to the Deputy Director of Medical Services Division] that she continues to receive out-patient treatment . . . [the applicant] did not provide any information to affirm that claim.

. . .

Since all reasonable efforts have been made to assist the staff member, CTED is not prepared to extend [the applicant's] fixed-term appointment beyond the end of her contract on 2 September 2007. Due to exigencies of service, CTED needs to fill the post right away from an active roster of P-4 candidates approved by the Board.

24. In a letter dated 1 August 2007, CTED informed the applicant that her contract would expire on 2 September 2007. The letter stated:

[T]he Counter-Terrorism Committee Executive Directorate will not be in a position to extend your fixed term appointment beyond 2 September 2007.

This memorandum will serve as an official notice so that you have time to pursue other opportunities.

25. On 17 August 2007, the supervisor informed the applicant that the UN payroll system generated a salary payment to her in the amount of USD18,273.51 covering the period of 24 April to 30 June 2007 (while she was on special leave without pay) and asked for this money to be returned. This was followed by a series of communications between March 2008 and June 2009 to the applicant on the same subject matter from the UN Chief, Payroll Operations Unit.

26. The applicant's contract expired on 2 September 2007. On 1 October 2007, the applicant submitted a request for review of the decision not to extend her appointment. Although the applicant's request for review contained a lengthy discussion questioning various issues, including her medical evacuation in January 2007, her placement on special leave without pay, and the withholding of her final



separation payments, the applicant described the subject matter of her request for review as follows:

In accordance with the provision of Staff Rule 111.2(a) I am requesting a review of the administrative decision conveyed to me on 1 August 2007 by . . . Head AIO/CTED informing me that my 2-year contract with the United Nations would not be extended beyond 2 September 2007.

27. The Administration's reply on 2 November 2007 referred to the applicant's request to "review the decision not to renew [her] two year fixed-term contract beyond 2 September 2007", addressing each issue raised by the applicant and concluding that "[t]he foregoing notwithstanding, the Secretary-General always reserves the right to raise the issues of receivability, as is deemed appropriate".

28. On 5 December 2007, the applicant filed an incomplete statement of appeal, followed by a full statement of appeal dated 4 January 2008. The full statement of appeal stated: "Contested decision: stating that Appellant's fixed-term appointment will not be extended beyond 2 September 2007".

29. The JAB issued its report on 29 April 2009, unanimously concluding that the Administration did not violate the applicant's due process rights and that no further investigation was warranted. On 25 May 2009, the applicant received the Secretary-General's decision dated 22 May 2009, accepting the JAB's conclusion.

### **Applicant's submissions**

30. In summary, the applicant makes the following contentions:

- a. Her claims in respect of medical evacuation and placement on special leave without pay are receivable. The applicant avers that she was prevented from exercising her right to request a review of these decisions as she was, between January and April 2007, hospitalised in her home country against her will and held incommunicado with no lines of contact with the United Nations in New York. Upon her

return to New York on 13 April 2007, she was again confined in a hospital in a repressive framework under medical orders. After her release from hospital she was denied permission to use her computer for purposes that did not strictly relate to her official duties in the office and was unaware of her rights in general. She only found her way to the Panel of Counsel's office in July 2007 when she learnt of the availability of legal remedies. Further, her claims with respect to the medical evacuation were raised in her request for administrative review and the appeal to the JAB, and responded to and canvassed in both the Administration's response and the JAB report. In any event, the applicant requests the Tribunal to lift the time limitations barring her claim on the medical evacuation under art 8.3 of the Statute.

- b. The applicant contends that her medical evacuation was in contravention of the procedures set out in ST/AI/2000/10, was unlawful and violated her rights. Her health was not in a life-threatening condition such as to require medical evacuation, and the decision to evacuate her was unlawful as it was approved by the Deputy Director of the Medical Service, whilst under sec 4.1 of ST/AI/2000/10, the authority to approve a medical evacuation is delegated to heads of department or officers from Headquarters. Further, the administrative instruction does not envisage any evacuation on an "exceptional basis". The approval of the Deputy Director of the Medical Services Division was also in violation of sec 4.2 of ST/AI/2000/10, which provides that "the period spent on medical evacuation shall normally not exceed 45 days, and for an extension of medical evacuation beyond 45 days, authorisation must be obtained from the UN Medical Director". The applicant's medical evacuation lasted at least 70 days.

- c. The instrument of medical evacuation was misused by the Administration to suspend the applicant from her post until the expiration of her contract and, in fact, CTED never intended to allow the applicant to return to her post after the medical evacuation.
- d. Under staff regulation 5.2, special leave without pay is to be authorised by the Secretary-General only in exceptional cases. These conditions were not met in the applicant's case. Further, the applicant should not have been put on special leave because she had not used her full entitlement to three months of full sick leave and three months of half pay sick leave during each year of her two-year contract.
- e. The decision not to extend her appointment beyond 2 September 2007 was improper as it was made by reference to extraneous factors. The supervisor inserted misleading and false passages about the applicant's health into her e-PAS for the period of 2005–2006 and threatened her with “severe consequences” if she refused to sign the e-PAS immediately. The supervisor's unauthorised disclosure of confidential medical information, threats, false statements about the applicant's professional performance and false promises about her return to work after her treatment, violated her fundamental rights.
- f. The applicant is entitled to salary and sick leave compensation owed to her from 24 January to 2 September 2007 (minus the salary payment the applicant received for the period of 24 April to 30 June 2007). The denial of the payment to the applicant from 24 January to 23 April 2007 and from 1 July 2007 to 2 September 2008 is in violation of sec 7.1 of ST/AI/2000/10, which provides that “[w]hile on medical evacuation, the staff member's absence is charged to sick leave entitlements”. Further, the Administration unlawfully refuses to process the final separation payments due to the applicant, including the repatriation grant.

31. The applicant seeks: (i) compensation for the violations of her due process rights, (ii) payment of the full amount of the repatriation grant due to her, (iii) the full pension benefits and due payments without any deductions, (iv) investigation of the various violations of her rights which occurred while she worked for CTED before the decision to medically evacuate her, and (v) appropriate compensation for moral suffering she endured as well as for the professional prejudice inflicted on her.

### **Respondent's submissions**

32. The respondent's position may be summarised as follows:

- a. The claim in relation to the applicant's medical evacuation is not receivable since it was never raised as a claim in her request for administrative review and in her case before the Joint Appeals Board. The claim in relation to the decision to place the applicant on special leave without pay is also not receivable as it was not submitted for administrative review within two months of receiving notice of the decision.
- b. The Tribunal's role is to review the decision of the Secretary-General and not to consider the matter afresh. Paragraph 4.3 of ST/SGB/2009/11 on transitional measures related to the introduction of the new system of administration of justice provides that "[d]ecisions made by the Secretary-General between 2 April 2009 and 30 June 2009 on appeals . . . may be challenged before the Tribunal". It is decisions of the Secretary-General that may be challenged, not the original decisions by the programme managers. Therefore, the Tribunal should limit its review to considering if the 22 May 2009 decision of the Secretary-General to accept the findings of the JAB was reasonable and justified on the face of the record at the time it was made.

- c. The placement of the applicant on special leave without pay in January 2007, extended in June 2007, was undertaken in accordance with the regulations and rules of the Organisation. Once a staff member exhausts sick leave at full pay, he or she “is normally given the option of combining annual leave with sick leave at half pay to maintain full pay status”. The applicant was given this option in August 2006 and agreed to it. The applicant’s sick leave entitlement, when combined with her annual leave entitlement, extended her status as a staff member on full or half pay until 24 January 2007. At that point, the applicant was placed on special leave without pay pursuant to sec 3.1 of ST/AI/2005/3 (administrative instruction on sick leave).
- d. The actions of the Administration in connection with the applicant’s health and medical evacuation were proper and in line with ST/AI/2000/10.
- e. The decision not to extend the applicant’s contract beyond 2 September 2007 was proper. Fixed-term appointments do not carry any expectancy of renewal or of conversion to any other type of appointment, and the applicant failed to show that there were any extraneous factors or improper motives in the decision not to extend her appointment. Contrary to the applicant’s obligation under staff rule 106.2(g), she did not provide the information requested of her by the Medical Services Division with respect to her absences from service in 2007. Accordingly, the Medical Services Division was in no position to consider whether she was fit to return to service.
- f. The applicant was paid, in error, USD18,273.51 for the period she was on special leave without pay. The applicant was duly notified of the overpayment. Paragraphs 11–13 of ST/AI/155/Rev.2 (administrative instruction on personnel payroll clearance action) provide that failure by a staff member to settle all indebtedness to the United Nations may

delay any payments otherwise due to the staff member on separation. The respondent submitted that, in the absence of an agreement to the contrary, the Organisation is not entitled to set off any sums owed to it against the staff member's pension entitlements and that the applicant has no remaining pending entitlements. The only entitlement possibly remaining was the applicant's relocation entitlement. However, the applicant has stated in her submissions to the Tribunal that she did not relocate and, accordingly did not submit a relocation claim. The amount owed by the applicant to the Organisation remains USD17,841.13 as no payments have been received from her by the United Nations (the original amount of USD18,273.51 had been reduced by USD432.38, the applicant's entitlement to one-day travel).

### **Findings on scope of review and receivability of claims**

33. The respondent contends that the scope of the Tribunal's review should be limited to the examination of whether the Secretary-General's decision of 22 May 2009 to accept the findings of the JAB was reasonable and justified. According to the respondent, the Tribunal should not examine the administrative decisions taken in 2007. I cannot accept this argument. Under art 2.1 of its Statute, the Tribunal is competent to "hear and pass judgments on an application filed by an individual . . . [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment". The applicant's claims relate to specific administrative decisions and nothing in the Statute of the Tribunal precludes it from examining those claims. Although the respondent is correct in that ST/SGB/2009/11 provides in sec 4.3 that "[d]ecisions made by the Secretary-General between 2 April 2009 and 30 June 2009 on appeals . . . may be challenged before the Tribunal", this provision is clearly intended to serve as a transitional measure to ensure that no appeals filed between 2 April and 30 June 2009 are left unaddressed. To argue that this provision is a necessary condition for the Tribunal to exercise its jurisdiction is plainly incorrect (also see *Avina* UNDT/2010/054).

34. Under the former system of internal justice, as well as under the system in place since 1 July 2009, requests for administrative review and management evaluation are mandatory first steps in the appeal process and cannot be waived (*Crichlow* UNDT/2009/028, *Vangelova* UNDT/2009/049, *Costa* UNDT/2009/051, *Parmar* UNDT/2010/006, *De Porres* UNDT/2010/021, *Sethia* UNDT/2010/037).

35. The applicant's request for administrative review dated 1 October 2007 concerned the non-renewal of her two-year fixed-term contract beyond 2 September 2007. This is the only request for administrative review filed by the applicant in this case. Although the applicant made detailed references in her request for review to the circumstances surrounding her medical evacuation in January 2007, her placement on special leave without pay, and the withholding of her final separation payments, the subject of her request for administrative review was clearly stated as follows:

[T]he administrative decision conveyed to [the applicant] on 1 August 2007 by . . . [the] Head AIO/CTED informing [the applicant] that [her] 2-year contract with the United Nations would not be extended beyond 2 September 2007.

36. The applicant's statement of appeal to the JAB also identified the contested decision as "stating that Appellant's fixed-term appointment will not be extended beyond 2 September 2007", although the applicant again made reference to the other issues. In her application to the Dispute Tribunal, the applicant again states that the decision that is the subject matter of her complaint is the one issued on "1 August 2007", this being clearly the decision not to extend her fixed-term appointment. Therefore, although the request for review, the statement of appeal and the application refer to various other issues, the actual administrative decision that was the subject of the 1 October 2007 request is the decision not to extend the applicant's contract beyond 2 September 2007.

37. It is therefore questionable that the applicant's claims regarding special leave without pay and medical evacuation are receivable, meaning that the only issue before me is the propriety of the decision not to extend the applicant's contract beyond 2 September 2007. I am also of the view that even if I were to find that the

applicant's claims concerning the medical evacuation and special leave were the subject of her request for administrative review (and, by extension, of the present appeal), these claims would not be receivable because the applicant failed to comply with the time limits and I do not find this to be an exceptional case with exceptional circumstances justifying waiver of the time limits. I will elaborate on the non-receivability of the applicant's claims concerning the medical evacuation and the special leave below.

*Claims concerning medical evacuation*

38. Even if I were to find that the applicant's request for administrative review of 1 October 2007 included the decision to medically evacuate her, it is noted that it was not until she was informed that her contract would not be renewed more than eight months later, that the applicant protested her evacuation, thus rendering her appeal regarding this issue time-barred. Although the applicant communicated with OHRM in March 2007, returned to New York in April 2007, and had contact with the Medical Services Division and CTED, she did not seek a review of the decision to evacuate her. Indeed, her colleagues and supervisors were unaware of the applicant's return to New York until June 2007. The applicant also did not reply to the several requests for information initiated by the Organisation in July 2007. Further, I do not think that the applicant, who is a lawyer by training, did all that could be expected of her to comply with the time limits, by her own inaction. I am not satisfied that the reasons furnished by the applicant are sufficient to justify a waiver or extension of the time limits.

39. The applicant also challenged procedural irregularities in her evacuation contending that various decisions were made by persons without the appropriate authority and that since treatment was available locally, it was unnecessary and improper to evacuate her. For a power to be lawfully exercised it must of course be exercised by officials in possession of the required authority. A power may be delegable, and some degree of delegation may be allowed where a matter is purely administrative. Even if I were to waive the time limits and find the issue receivable, I



find it difficult to infer that someone not properly delegated in this instance, on the strength of the applicant's medical history, could motivate and justify the applicant's treatment overseas and her evacuation accompanied by a family member who travelled from and to her home country. Even if I were to accept the applicant's submission concerning the lack of delegated authority, the circumstances of this case and the information available to the Administration were such that the Organisation had no choice but to evacuate the applicant in order to ensure her well-being. I find, on a very careful review of the record, including medical admission reports, that any reasonable decision-maker in this case was bound to make the decision to evacuate the applicant. Further, it is clear to me that the decision involved both the applicant's department and the Medical Services Division at the highest levels and that at the time the applicant consented to evacuation and was assisted by her brother, a medical doctor. Regarding the duration of the medical evacuation, the Director of the Medical Services Division was consulted about the applicant's status in March 2007 and the applicant was advised that she "has to continue this treatment in [her home country] and her return to New York may be considered only after [the applicant] will completely recover from the condition for which she was evacuated".

40. Even if the applicant were able to demonstrate that some formal procedures were not followed, I do not think that such irregularities would be capable of vitiating the decision in these circumstances. The conditions under which the applicant's medical evacuation took place did not have prejudicial effect on the applicant (see UN Administrative Tribunal Judgment No. 99, *Mr. A* (1966), in which the Administrative Tribunal found that, although the decision to commit the applicant to a mental institution was correct, the conditions under which the applicant was committed to the institution had a prejudicial effect on him because of the calling of UN guards and New York police, the threat to use force and the omission to inform the applicant's wife of what was going on). In the instant case, the applicant consented and acquiesced to the evacuation in January 2007, and did not challenge it upon her return in April. I am satisfied on a very careful review of the record that the decision to evacuate the applicant was made with her agreement and carried out with

the active involvement of her superiors, her Consulate and her brother. Further, this decision was reasonable and made in her best interests based on sincere and serious concerns about her well-being and state of health.

*Claim concerning placement of the applicant on special leave without pay*

41. The applicant failed to request a review of the decision to place her on special leave without pay. Therefore, her claim with respect to that decision is not receivable. Even if I were to find that the scope of the request included that decision, the applicant was fully aware of her placement on special leave without pay in or before March 2007 but failed to object in a timely manner. I do not accept the applicant's explanations for the delay as reasonable for the same reasons stated above with respect to the medical evacuation. In any event, the Administration's calculation of the applicant's sick leave entitlements was correct and the applicant would not have succeeded on the merits had I found this claim receivable (see below).

**Non-renewal**

42. When a staff member brings a case against the Administration alleging that a decision he or she is contesting was improper, the Tribunal will be required to draw conclusions from the evidence presented by both parties and, generally, the outcome of the case will be determined by the preponderance of evidence.

43. The reason for the non-renewal of the applicant's contract is clear from the record before me. The decision not to renew the applicant's contract was made in July 2007 in consultation with CTED, the Medical Services Division, and OHRM on the particular facts of this case and as a result of the applicant's failure, despite several requests, to provide medical information and supporting documentation to the Medical Services Division about her fitness for work. I also accept that CTED needed to "fill the post right away" due to exigencies of service (the applicant did not perform any work functions between January and September 2007).

44. In considering cases of incapacity due to ill health, particularly in the light of prolonged or persistent absences from work by an employee, an employer is entitled to look at not only the employee's condition but also the operational requirements of the Organisation. In order to determine whether an employee is medically fit an employer needs to make a considerate assessment, in consultation with the employee and the medical practitioner, of what the illness is, the seriousness of the illness and its prognosis. This necessarily implies a certain degree of information sharing. See, as an example, *Sebonego v Newspaper Editorial and Management Services (Pty) Limited* [1999] Botswana Law Reports (BLR) 120 (IC), as published in the Use of International Law by Domestic Courts, Compendium of Court Decisions, International Labour Organization, July 2006 (*Sebonego* was a case of dismissal on the grounds of ill health; however, the discussion in *Sebonego* appears to me, on first principles, to be also applicable to cases of non-renewal).

45. In this case the staff member was unable to render services for which she was employed for a considerable time. She failed to apprise the respondent with information confirming her fitness for duty. Thus, in the light of information available to the respondent, a decision was made not to renew her contract on 27 July 2007. I find there were no extraneous factors or improper motives in the decision not to extend the applicant's appointment.

46. The applicant also claims that the decision not to renew her appointment beyond 2 September 2007 was influenced by her e-PAS report for 2005–2006, which, according to the applicant, was unfair, ill-motivated, and misleading. I do not think that the applicant has established that the contested decision was, indeed, somehow influenced by the e-PAS report. The report was generally positive and described the applicant's performance as "[f]ully successful". In any case, it is not disputed that the applicant did not rebut her e-PAS report pursuant to ST/AI/2002/3, as would have been appropriate if she disagreed with anything stated in it. The applicant signed her e-PAS report for 2005–2006 on 4 May 2006, and her submissions with respect to that report are now well out of time.

47. I have also considered the applicant's claim that the decisions on leave and evacuation somehow influenced the decision not to extend her contract. To accept the applicant's claims that there was a link between the three decisions and that they show a pattern of unfair treatment I would have to find that there was a system-wide effort involving her supervisors, colleagues, doctors in the Medical Services Division, doctors in several private hospitals, and the officials in her Consulate in New York, extending over a significant period of time, to separate the applicant from service with the Organisation. The evidence proffered by the applicant is insufficient to support her claims, and I find that the reason provided by the Administration for not extending the applicant's contract, as explained above, was reasonable, proper and justified.

48. For the reasons stated above, I find that the decision not to renew the applicant's appointment was lawful and that the applicant's claim in this respect must fail.

### **Financial claims**

49. According to the applicant, the Organisation unlawfully refuses to process the final payments due to her as a result of her separation, including the repatriation grant. The respondent submitted that the applicant has no further entitlements and that the Organisation cannot set off the amounts owed to it against the applicant's pension entitlements. According to the respondent, the applicant owes USD17,841.13 for the period of 24 April to 30 June 2007, when she was on special leave without pay.

50. The applicant has failed to articulate which separation payments are still being withheld and it appears that the parties disagree whether the applicant was entitled to a repatriation grant. (I note that it appears undisputed that the applicant's pension entitlements, if any, cannot be affected by the Organisation's claim.) The Tribunal does not need to decide whether the applicant is entitled to a repatriation grant; this issue is not before the Tribunal.

51. As regards the applicant's claim that her sick leave entitlements were improperly calculated, I am of the view that the respondent's computation was correct. The applicant asserts that she was entitled to three months of sick leave on full salary and three months on half salary during *each calendar* year of her two-year contract. The applicant alleges that (i) from 5 September 2005 to 6 September 2006, she took 70 days of certified sick leave and 2 days of uncertified sick leave and (ii) between 7 September 2006 and 7 January 2007 she took 73 days of certified sick leave and no uncertified sick leave. According to the applicant, "neither in the first year nor in the second year of her appointment had [she] exhausted her entitlement to receive 3 months of sick leave at full pay". However, former staff rule 106.2 provided that the calculation of sick leave days should be based on "*any period of twelve consecutive months*" (emphasis added), not calendar years. Between September 2005 and January 2007, the applicant took 143 days of certified sick leave, two days of uncertified sick leave, and 12.5 days of annual leave. These numbers are not contested by the parties and I accept them as accurate. The applicant was placed on special leave without pay effective 24 January 2007. In the preceding twelve-month period (i.e., between 1 February 2006 and 24 January 2007) the applicant took a total of 129.5 days—approximately 25 weeks or six months—of combined sick leave on full and half salary (the applicant's sick leave on half salary was combined with her annual leave, which was fully exhausted by January 2007). Accordingly, the Administration's calculation of the applicant's sick leave entitlements was correct. Section 3.1 of ST/AI/2005/3 on sick leave provides that "[w]hen the entitlement to sick leave has been exhausted, further certified sick leave shall be charged to annual leave. When the entitlements to sick leave and annual leave have been exhausted, the staff member *shall* be placed on special leave without pay" (emphasis added). This is precisely what happened in this case—once the applicant exhausted her sick leave and annual leave entitlements, she was placed on special leave without pay.

**Conclusion**

52. In conclusion, the Tribunal rejects the application in its entirety.

53. In view of the circumstances of this case, the Tribunal orders that the name of the applicant be omitted from the published version of the judgment.

*(Signed)*

Judge Ebrahim-Carstens

Dated this 6<sup>th</sup> day of May 2010

Entered in the Register on this 6<sup>th</sup> day of May 2010

*(Signed)*

Hafida Lahiouel, Registrar, New York