



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/48

Order No.: 2 (GVA/2010)

Date: 8 January 2010

Original: English

**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

GABALDON

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON MOTION TO DISMISS**

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**Counsel for Applicant:**

Bart Willemsen, OSLA

**Counsel for Respondent:**

Josianne Muc, ALU/OHRM, UN Secretariat

## Facts

1. On 30 April 2008, the Chief Civilian Personnel Officer of the United Nations Mission in 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 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.”
2. 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”.
3. The UNMIS Medical Unit issued the medical clearance for the Applicant on 26 May 2008.
4. 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.
5. The Applicant was diagnosed with *L.* on 28 July 2008 and was hospitalized. On 6 August 2008, he informed UNMIS about the diagnosis and the estimated recovery period.
6. 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”.

7. 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.
8. On 16 December 2008, the Applicant provided a medical report from his treating physician – in Spanish – to the HRSS, which stated that the Applicant was in full remission and that he could “retake his duties in his usual job”.
9. 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).
10. 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 the Applicant was not medically cleared.
11. On 22 December 2008, the Applicant requested the UNMIS Medical Unit to review its decision to deny him medical clearance, request which UNMIS Medical Unit forwarded the same day to the Medical Services Division (MSD) at UN Headquarters.
12. On 24 December 2008, the Applicant sent a copy of a sworn translation of the report of his treating physician to a Doctor of the UNMIS Medical Unit.
13. 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.
14. The Applicant requested administrative review of the decision to withdraw the offer of appointment on 29 January 2009.
15. 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.

16. The Applicant submitted an incomplete statement of appeal to the New York Joint Appeals Board on 23 March 2009 and a complete statement of appeal on 23 April 2009.

17. This appeal was transferred to the UNDT on 1 July 2009 and registered under UNDT/GVA/2009/48. By motion dated 29 October 2009, the parties requested the Tribunal to suspend the proceedings as they were attempting to negotiate a settlement with a view to closing the case.

18. By order dated 2 November 2009, the Tribunal suspended the proceedings until 2 January 2010, ordering that the “Respondent submit a response to the Applicant’s appeal by 2 January 2010 if no settlement has been reached”.

19. 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 on 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”.

### **Considerations**

20. Considering that the Respondent asks the Tribunal to declare the application non-receivable on the grounds that the Applicant is not a person to whom the Tribunal is open under article 2, paragraph 1, of its statute which 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”.

21. Considering that article 3, paragraph 1, of the Tribunal's statute 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.”
22. Considering that article 2, paragraph 6, of the Tribunal's statute provides that:
- “In the event of a dispute as to whether the Dispute Tribunal has competence under the present statute, the Dispute Tribunal shall decide on the matter.”
23. Considering that the Applicant is asking the Tribunal to examine a legal situation arising out of a letter by the Chief Civilian Personnel Officer, UNMIS, with respect to an appointment governed by the former Staff Regulations and the 300 series of the former Staff Rules;
24. Considering that the question whether or not the Applicant shall be regarded as the holder of a contract of employment with the United Nations is one which must be resolved essentially on the basis of rules and regulations which it is the responsibility of the UNDT to apply;
25. In view of the foregoing and of all the circumstances of the case, this question cannot be decided without entering into a substantive consideration of the case. Therefore, the application must be regarded as receivable *ratione personae* (cf. UNAT judgement n° 96, *Camargo* (1965)); and

IT IS ORDERED THAT

1. The motion to dismiss is rejected.
2. The Respondent submits, by **Tuesday, 9 February 2010**, additional particulars in reply to the application.

*(Signed)*

Judge Thomas Laker

Dated this 8<sup>th</sup> day of January 2010

Entered in the Register on this 8<sup>th</sup> day of January 2010

*(Signed)*

Víctor Rodríguez, Registrar, Geneva