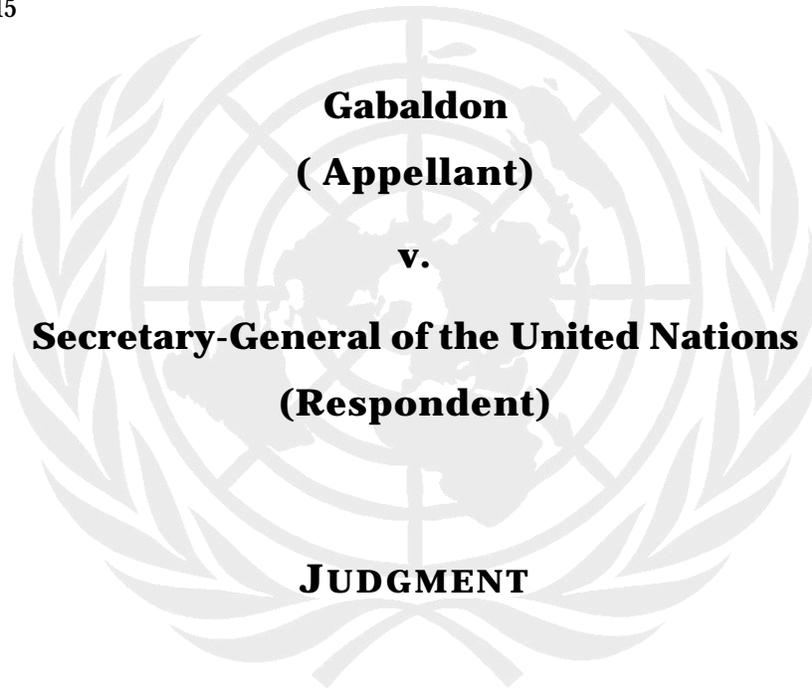




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-115



**Gabaldon
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Jean Courtial, Presiding Judge Mark P. Painter Judge Inés Weinberg de Roca
Judgment No.:	2011-UNAT-120
Date:	11 March 2011
Registrar:	Weicheng Lin

Counsel for Appellant: Bart Willemsen

Counsel for Respondent: Amy Wood

JUGE JEAN COURTIAL, Presiding.

Synopsis

1. This Court recalls that the internal laws of the United Nations stipulate that the legal act by which the Organization legally undertakes to employ a person as a staff member is a letter of appointment signed by the Secretary-General or an official acting on his behalf. However, a contract concluded following the acceptance of an offer of employment whose conditions have been fulfilled by the candidate gives rise to obligations for the Organization and to rights for a candidate acting in good faith. The Court finds that since the Organization had undertaken a contract, even still imperfectly, for the recruitment of a person as a staff member, it should be considered as intending for this person to benefit from the protection of the laws of the United Nations and, thus, from its system of administration of justice and, for this purpose only, this person should be regarded as a staff member. The Appeals Tribunal finds that the United Nations Dispute Tribunal (UNDT) committed an error of law in denying Mr. Diego Fernandez Gabaldon access to the Tribunal on the sole grounds that the Appellant had never received a letter of appointment. The judgment is annulled. The case is referred to UNDT, which, following a thorough examination of the facts of the case, should determine whether Mr. Gabaldon satisfied all the conditions of the offer of employment and is entitled to contract-based rights with a view to employment as a staff member within the Organization.

Facts and Procedure

2. On 30 April 2008, the Chief Civilian Personnel Officer of the United Nations Mission in the Sudan (UNMIS) sent Mr. Gabaldon an offer of employment for a six-month appointment of limited duration (300 series of the Staff Rules) at the P-3 level.

3. The offer was subject to the Appellant being medically cleared by the United Nations Medical Doctor and would elapse in the event that the results of the medical examination proved unsatisfactory. It was also subject to the verification of references provided by Mr. Gabaldon in support of his qualifications and mission service. The offer of employment mentioned that Mr. Gabaldon would receive a letter of appointment, which was the official document by which he would become a staff member of the United Nations.

4. Mr. Gabaldon accepted the offer of appointment on 1 May 2008. The UNMIS Medical Unit issued the medical clearance for the Appellant on 26 May 2008.

5. However, on 28 July 2008, when his letter of appointment had not yet arrived and he had not yet taken up his post, Mr. Gabaldon fell ill and was hospitalized. Subsequently, although in the meantime the Appellant had provided a medical report from his treating physician stating that he was in full remission and ready to start work, the UNMIS Medical Unit, on 17 December 2008, assessed Mr. Gabaldon as "not fit" under classification 2B (candidates with reduced life expectancy, or reduced work capacity, who are ineligible for employment). On 21 December 2008, Mr. Gabaldon was informed of the withdrawal of the offer of appointment on the grounds that he had not been declared physically fit.

6. Having received confirmation of the decision to declare him physically unfit, Mr. Gabaldon contested the decision to withdraw his offer of employment under the former United Nations system of administration of justice. The case was referred to UNDT after the former system was abolished.

7. By Judgment No. UNDT/2010/098 of 31 May 2010, the UNDT rejected Mr. Gabaldon's application on the ground that it was brought before a tribunal lacking jurisdiction. Having noted that employment relationships between the Organization and its staff members were governed by the internal laws of the United Nations, the UNDT Judge found that a person could not obtain the status of a staff member of the United Nations before receiving a letter of appointment signed by a duly authorized official of the Organization. The Judge noted that Mr. Gabaldon had never received such a letter and therefore had not become a staff member of the United Nations within the meaning of article 3, paragraph 1, of the UNDT Statute. The Judge rejected the application on the grounds that UNDT lacked jurisdiction *ratione personae* to adjudicate his claim.

8. Mr. Gabaldon, having obtained an extension of five days to file his appeal, lodged an appeal against the Judgment on 26 July 2010. The Secretary-General produced his answer on 13 September 2010.

Submissions

Mr. Gabaldon's Appeal

9. Mr. Gabaldon notes that, in rejecting his application, the UNDT followed the holding set down by the Appeals Tribunal in Judgment No. 2010-UNAT-29, *El Khatib*. The Appellant requests the Appeals Tribunal to depart from the jurisprudence arising from that case and to find that, in applying the holding, the UNDT committed an error of law.

10. The Appellant submits that an offer of employment cannot be withdrawn after its acceptance, particularly if there was agreement on the terms of the offer. An offer may be withdrawn only if the withdrawal is accepted by the other party. Mr. Gabaldon maintains that this is a universally accepted principle of the civil and common law systems, and is designed to protect both the legal person who made the offer and the legal person who received it. This principle is applicable in an international context and should apply to employment relations within the United Nations.

11. The Appellant adds that the fact that no letter of appointment was issued is immaterial in determining whether he was a staff member. The final delivery of a letter of appointment is a mere formality which has no impact on the conclusion of the contract. In practice, moreover, letters of appointment are issued retroactively to United Nations staff members. In the present case, the essential terms of the contract had been met, in particular the notification of the required medical clearance on 3 June 2008.

12. The unilateral withdrawal of an offer of employment after its acceptance and after all the terms had been met constitutes a violation of the principles of contract law.

13. Mr. Gabaldon also maintains that, contrary to the finding by the UNDT, he held a valid contract as a staff member of the United Nations and, accordingly, had recourse to the tribunals of its new system of administration of justice.

14. He requests the Appeals Tribunal to remand the case to the UNDT for adjudication on the merits.

Secretary-General's Answer

15. The Secretary-General submits that the UNDT correctly concluded that it did not have jurisdiction *ratione personae* to consider an application submitted by a person who was not a staff member of the United Nations.

16. Contrary to the assertions made by the Appellant, the jurisprudence of the United Nations Appeals Tribunal developed in the *El-Khatib* Judgment is in line with that of the former Administrative Tribunal, which held that the signature of an offer of appointment, in and of itself, is not sufficient to create rights for a candidate or to impose obligations on the Organization. The candidate must undergo the appointment procedures and the Organization must confirm the offer with the issuance of a letter of appointment in order for a binding employment contract to exist between them.

17. The Respondent argues that the internal laws of the United Nations prevail and are the relevant legal basis upon which the UNDT, as the Administrative Tribunal before it, operates. In the present case, there is no ambiguity regarding the applicable laws. Accordingly, recourse to general principles of law is in no way justified.

18. The Respondent submits that the Appellant has failed to establish any error that would warrant a reversal of the contested Judgment.

Considerations

19. Article 101, paragraph 1, of the Charter of the United Nations reads: "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly." According to staff regulation 1.1 (a): "Staff members are international civil servants." Staff regulation 4.1 reads:

1. As stated in Article 101 of the Charter, the power of appointment of staff members rests with the Secretary-General. Upon appointment, each staff member, including a staff member on secondment from government service, shall receive a letter of appointment in accordance with the provisions of annex II to the present Regulations and signed by the Secretary-General or by an official in the name of the Secretary-General.

20. Staff rule 304.1 (300 series), governing appointments for service of a limited duration, reads: "The letter of appointment granted 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."

21. It follows from these provisions, all in force in 2008, that staff members of the Organization, including those with appointments for service of a limited duration, are civil servants governed by the internal laws of the United Nations.

22. In that regard, this Court recalls that an employment contract of a staff member subject to the internal laws of the United Nations is not the same as a contract between private parties (*James*, Judgment No. 2010-UNAT-009). The aforementioned provisions confer upon the Secretary-General the power to engage the Organization in this matter. These provisions stipulate that the legal act by which the Organization legally undertakes to employ a person as a staff member is a letter of appointment signed by the Secretary-General or an official acting on his behalf. The issuance of a letter of appointment cannot be regarded as a mere formality (*El Khatib*, Judgment No. 2010-UNAT-029).

23. However, this does not mean that an offer of employment never produces any legal effects. Unconditional acceptance by a candidate of the conditions of an offer of employment before the issuance of the letter of appointment can form a valid contract, provided the candidate has satisfied all of the conditions. The conditions of an offer are understood as those mentioned in the offer itself, those arising from the relevant rules of law for the appointment of staff members of the Organization, as recalled in article 2, paragraph 2 (a) of the UNDT Statute, and those necessarily associated with constraints in the implementation of public policies entrusted to the Organization.

24. At this stage, it is important to bear in mind that the present case concerns an external candidate seeking employment for the first time. In what follows, the Court intends to limit its considerations to the question of the jurisdiction *ratione personae* of the UNDT over a dispute that arose from the withdrawal of an offer of employment in such a situation. It will not address the significantly different issue of reassigning an incumbent staff member.

25. In the contested Judgment, the UNDT correctly referred to Articles 2 and 3 of its Statute. Under article 2, paragraph 1: "The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provide for in article 3, paragraph

1...: (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment... ." Article 3, paragraph 1, stipulates: "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."

26. The question that arises here is whether the UNDT Judge committed an error of law by concluding that Mr. Gabaldon, who had never received a letter of appointment signed by an authorized official, could not be considered a staff member within the meaning of Article 3, paragraph 1, of the UNDT Statute.

27. On the one hand, the UNDT Judge correctly stressed that the limitation of the Tribunal's jurisdiction to persons having acquired the status of staff members clearly resulted from the wish of the General Assembly to exclude from the Tribunal's jurisdiction applications from non-staff personnel, such as interns and type II gratis personnel.

28. On the other hand, a contract concluded following the issuance of an offer of employment whose conditions have been fulfilled and which has been accepted unconditionally, while not constituting a valid employment contract before the issuance of a letter of appointment under the internal laws of the United Nations, does create obligations for the Organization and rights for the other party, if acting in good faith. Having undertaken, even still imperfectly, to conclude a contract for the recruitment of a person as a staff member, the Organization should be regarded as intending for this person to benefit from the protection of the laws of the United Nations and, thus, from its system of administration of justice and, for this purpose only, the person in question should be regarded as a staff member.

29. Finding otherwise would mean denying the right to an effective remedy before a tribunal in respect of acts of the Organization that may ignore rights arising from a contract, as stated above, which was concluded for the appointment of a staff member.

30. However, in accordance with the aforementioned provisions of the UNDT Statute, this opportunity must be understood in a restrictive sense. Access to the new system of administration of justice for persons who formally are not staff members must be limited to persons who are legitimately entitled to similar rights to those of staff members. This may

be the case where a person has begun to exercise his or her functions based on acceptance of the offer of employment. Having expressly treated this person as a staff member, the Organization must be regarded as having extended to him or her, the protection of its administration of justice system. This may also be the case where the contracting party proves that he or she has fulfilled all the conditions of the offer and that his or her acceptance is unconditional, i.e. no issue of importance remains to be discussed between the parties.

31. It follows from the foregoing that the UNDT Judge committed an error of law in denying Mr. Gabaldon access to the Tribunal solely on the grounds that the Appellant had never received a letter of appointment signed by an authorized official, without seeking to ascertain whether, following a thorough examination of the facts of the case, Mr. Gabaldon had satisfied all the conditions of the offer of employment and was entitled to contract-based rights with a view to his employment as a staff member within the Organization.

32. Since it is not for the Appeals Tribunal to undertake an initial thorough examination of the facts of the case, it has decided to remand this matter to the tribunal of first instance. It will be the responsibility of this tribunal, following a comprehensive examination of the facts of the case in the light of the foregoing, to judge whether Mr. Gabaldon is entitled to access to the United Nations system of administration of justice and, if so, to rule on the case.

Judgment

33. Judgment No. UNDT/2010/098 is annulled. The case is remanded to the UNDT.

Original and Authoritative Version: French

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Courtial, Presiding

(Signed)

Judge Painter

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 19th day of April 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar