UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2017/069
Judgment No.: UNDT/2018/121
Date: 4 December 2018
Original: English

**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

KAUF

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT

**Counsel for Applicant:**
Mohamed Abdou, OSLA

**Counsel for Respondent:**
Bettina Gerber, UNOG
Cornelius Fischer, UNOG

**Introduction**

1. By application filed on 19 September 2017, the Applicant contests the "decision to terminate [his] fixed-term appointment, i.e. the withdrawal letter".

2. The application was served on the Respondent, who filed his reply on 23 October 2017.

**Facts**

3. The Applicant worked as consultant with the Sustainable Transport Division, United Nations Economic Commission for Europe ("ECE"), from 15 December 2016 to 31 March 2017.

4. The position of Senior Economic Affairs Officer, Sustainable Transport Division, ECE, was published in *Inspira* on 14 November 2016, under vacancy announcement 16-ECO-ECE-68897-Geneva. The Applicant applied for the position on 12 January 2017.

5. On his Personal History Profile ("PHP"), he indicated being a "Former/Retired employee" under the section under "Applicant's UNCS Status", and noted "01-Nov-2013 31-Jan-2014" as the period of appointment. Under "Employment", the Applicant specified that from 1 November 2013 to 31 January 2014, he had been employed under a fixed-term appointment with the United Nations Conference on Trade and Development ("UNCTAD"). He also indicated, without any ambiguity, that the "Name of Employer" for that period was "UNCTAD, Trade and Logistics Branch (other)".

6. For the period "1 February 2014 to present" under "Name of Employer": "Expert on own account/in cooperation with Project teams and UN agencies (Self-employed)". Under "description of duties", the Applicant listed seven points, as follows:

> 1. Project Manager (Consultant) for the Secretariat of the United Nations Secretary-General's Special Envoy for Road Safety (UNECE) for Africa

> 2. Hach Lange Gmbh Berlin (D)/Geneva (CH), industrial project water measurement,
>
> 3. Collaborating with the advisory project on Public Private Development Partnerships (PPDPs) for Bolz+Partner working for Swiss Agency for Development and Cooperation. New strategy proposal for developing countries.
>
> 4. Advisor to the Geneva Canton government for the Lake crossing and ring road project (as Public Private Partnership (PPP) with user charges) and within a multi-modal transport strategy. In charge of the economic and financial part of the framework study (October 2015, updates 2016).
>
> 5. Trainer for UN agencies in PPP and transport logistics (multimodal, including road and maritime) for UNECE, UNCTAD/University of Lausanne (EPFL) and UNDP
>
> 6. Working with Bolz+Partner on advising Swiss communities (Suisse Romande) in finalizing project studies for a PPP project (public bath and Health project, sponsored by a group of 50 Cities/Communities). The final report is meant to prepare the launch of the final phase, structuring and managing the tender.
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> 7. PPP trainer for Swiss communities, on behalf of the Swiss think tank "PPP Schweiz". Also review on road and tunnel safety aspects (Gotthard 2nd tube)

7. He further indicated under "summary of achievements" that several of his work activities were "ongoing", including a consultancy with ECE".

8. The Hiring Manager recommended the Applicant's selection from the roster, and this recommendation was approved by the Executive Secretary, ECE, on 31 March 2017. The Human Resources Management Service ("HRMS"), United Nations Office at Geneva ("UNOG") subsequently started implementing the recruitment.

9. By email of 31 March 2017 from an Administrator, ECE, the Applicant was informed that the Head of Department had selected him for the position. On the same day, the Applicant received an offer of appointment for a fixed-term appointment from 1 May 2017 to 30 April 2018 as Senior Economic Affairs Officer, ECE. The offer of appointment stated, *inter alia*, the following:

> This offer is conditional upon the information provided by you when applying for the position remaining true and complete as at the date of your acceptance of the appointment. By accepting the terms of this offer of appointment, you accordingly confirm and certify that all information relevant to your fitness to meet the highest standards of efficiency, competence and integrity and to your ability to perform your functions, which you provided when applying for the position, remains true and complete as at the date of your acceptance of this offer.
>
> …
>
> Likewise, in the event that the pre-recruitment formalities are not satisfactorily completed, or where a condition is not met or no longer met, this may be grounds for withdrawal of this offer, or for termination or cancellation of any contract entered into.

10. The Applicant signed the acceptance of the letter of offer of appointment on 5 April 2017, thereby declaring that "[he had] read and fully [understood] the terms of this offer of appointment and [to] accept it and the conditions herein specified". He sent the signed acceptance of the offer of appointment to HRMS, UNOG, by email of 6 April 2017.

11. By email of 27 April 2017, the Applicant received confirmation that his medical clearance had been approved and recorded in HRMS' database. He took up the functions of Senior Economic Affairs Officer, ECE, on 1 May 2017.

12. The Applicant was called to a meeting with the Chief, HRMS, the Chief, Legal Unit, HRMS and others on 10 May 2017, at which he was informed that in light of his status as a consultant at ECE at the time of his application for the position, he was not eligible hence the letter of offer would be withdrawn.

13. By memorandum dated 10 May 2017 and entitled "[w]ithdrawal of Letter of Offer" from the Chief, HRMS, UNOG, to the Applicant, the former referred to their meeting of that day and stated that she was compelled to withdraw the offer for the position of Senior Economic Affairs Officer with effect from the next day. She reiterated that it had been brought to her attention that the Applicant was not eligible for the post, as he had been engaged as a consultant with ECE from 15 December 2016 to 31 March 2017 in the Sustainable Transport Division. While expressing regret that the ineligibility had not been discovered at an earlier stage,

the Chief, HRMS, UNOG, stressed that the information that the Applicant had provided in his application was not sufficiently clear to allow for an accurate determination of his status with the Organization during the assessment of his candidature. She further informed the Applicant that he would be paid for the work already performed. The letter was notified to the Applicant on 11 May 2017. No letter of appointment had been signed by the Applicant or an official of the Organization.

14. The Applicant requested management evaluation of the contested decision on 12 May 2017 and filed a request for suspension of action with the Tribunal on the same day. As part of the consideration of the request for suspension of action, the Registry informed the Respondent of the Judge's direction to refrain for as long as the suspension of action procedure was ongoing from taking any further action relating to the implementation of the decision that the Applicant sought to suspend.

15. By Order No. 116 (GVA/2017) of 19 May 2017, the Tribunal rejected the request for suspension of action, on the basis that the decision was not *prima facie* unlawful.

16. The Applicant was advised on 23 June 2017 that upon the recommendation of the Management Evaluation Unit, the Secretary-General had upheld the decision "to terminate the Applicant's appointment".

**Procedure before the Tribunal**

17. By Order No. 148 (GVA/2018) of 25 September 2018, the Tribunal ordered the parties to file a reasoned objection, if any, to a judgment being rendered without a hearing.

18. In a submission dated 9 October 2018, the Applicant's Counsel expressed his view that an oral hearing was important to allow his client to present evidence in support of his case. He also stressed that it was important for the Applicant to be able to respond to some legal issues arising from the Respondent's reply.

19. By Order No. 175 (GVA/2018) of 12 October 2018, the Applicant was granted leave to file comments on the Respondent's reply, and the parties were called to a case management discussion that was held on 1 November 2018.

20. After the case management discussion, the Applicant filed a witness statement from the Deputy Executive Secretary, ECE. The parties attended a hearing on the merits on 7 November 2018, at which the Applicant gave evidence.

**Parties' submissions**

21. The Applicant's principal contentions are:

a. The decision breaches the contractual relationship between him and ECE; the offer of appointment contained all the essential terms and conditions of the contract and he unconditionally accepted it; he fulfilled the conditions set out in the offer of appointment and effectively assumed his new functions; he was at no time informed that there were any actual or potential obstacles to his recruitment; hence, a valid contract was formed between him and the Organization, as recognized by the Administration in its most recent position expressed by the Management Evaluation Unit, as accepted by the Secretary-General;

b. A contractual relation, even if unlawful, may give rise to acquired rights; in exercising its right and duty to put an end to illegal situations, the Administration has to fully respect the staff member's acquired rights (*Boutruche* UNDT/*2009/085*);

c. The introduction of a new category of staff whose employment contracts may be voided *ab initio* is not allowed for under the Staff Rules and Regulations;

d. Before withdrawing the offer of appointment on the basis of the Applicant's purported ineligibility, the Administration had to first consider whether an acquired right had accrued and whether the staff member acted in good faith; the termination of an appointment affects a fundamental aspect of the employment relationship hence affects the Applicant's acquired rights;

e. The Administration failed in its duty to inform the Applicant of his ineligibility, pursuant to sec. 3.15 of ST/AI/2010/4; quite the contrary, he was encouraged to apply for staff positions during his consultancy and reassured that his status would not be an obstacle for recruitment for staff positions; the Respondent's reliance on *El-Khatib* 2010-UNAT-029 is misplaced;

f. He had no knowledge of his ineligibility and acted in good faith; no reference was made in the withdrawal letter to bad faith which even referred to the Organization's willingness to engage into informal settlement negotiations; the reliance by the Administration on bad faith on the basis of allegedly "false" information in the Applicant's Personal history profile ("PHP") is a novel allegation, which suggests that he had to choose "currently working for a [United Nations] common system entity" and "consultant", instead of "former/retired employee", which would also have been true since he is also a former UN staff member;

g. Although the Secretary-General characterized the decision as one of "termination", rather than one of "withdrawal of offer", the Administration failed to comply with termination procedures and to consider the statutory rights that apply in case of termination, including notice period/compensation in lieu or termination indemnity;

h. The contested decision should be rescinded and he should be compensated for the moral and financial harm that resulted from it.

22. The Respondent's principal contentions are:

a. The application is not receivable *ratione personae*, since the Applicant was not a staff member; the protection extended to non-staff members by the Appeals Tribunal in *Gabaldon* 2011-UNAT-120 should not apply to him, since there are serious doubts whether he acted in good faith when he applied for the position;

b. The Applicant has no claim against the Administration based on a contractual relationship, since any contractual relationship following the issuance of a letter of offer was either lawfully *voided* or *void ab initio*, due to the Applicant's ineligibility to apply or be appointed for a post at the United Nations, as well as the misleading statements made by him;

c. After the Applicant unconditionally accepted the offer, arguably a pre-contractual relationship existed; the Administration lawfully withdrew from this contract on 10 May 2017, when it discovered that it was in violation of the applicable Rules and Regulations; the letter of offer contained a reservation to be "conditional upon the information provided by [the Applicant] when applying for the position remaining true and complete as at the date of [his] acceptance of the appointment" and that the non-fulfilment of a condition may be grounds for the withdrawal of the offer;

d. The conditions of the offer are those contained in the offer itself as well as those resulting from the relevant Rules, in this case ST/AI/2010/3 (Staff selection system)—particularly sec. 3.15—and ST/AI/2013/4 (Consultants and individual contractors), particularly at its sec. 6.11; any application and appointment during or within six months of the end of the Applicant's current or most recent service would be in violation of these rules; this rule is without exception and strictly adhered to;

e. Alternatively, the contract is void *ab initio*, as the Tribunal held in Order No. 116 (GVA/2017);

f. Since the contract was thus either void *ab initio* or legally voided, the Applicant's acquired rights could not and have not been affected; since he did

not fulfil the conditions of the offer, provided incomplete information in his application concerning his status as a consultant, the withdrawal was lawful and the offer did not create any legal obligations for the Administration; therefore, the Applicant was neither entitled to a notice period or any type of compensation awarded to staff members in case of termination of appointment;

g. Cognizant of the fact that the Applicant had performed his functions between 1 and 11 May 2017, the Administration paid him for the work performed on the basis of a de facto employment contract;

h. Pursuant to the above referenced rules, the Applicant was not eligible to apply and be appointed for a staff position; even if one were to follow the Applicant's argument that a consultant is allowed to apply during the consultancy, he or she could not be appointed to that post; *Inspira* automatically screens out applications from consultants under current contracts;

i. The decision to withdraw the letter of offer on 10 May 2017 was lawful; no contractual relation has been breached and the Applicant may not claim any damages; hence, the application should be rejected.

**Consideration**

*Receivability*

23. As the Tribunal ruled in Order No. 116 (GVA/2017), the application is receivable *ratione personae*. After accepting the offer of employment, the Applicant effectively started to perform the functions of Senior Economic Affairs Officer, ECE, on 1 May 2017. The Organization thus treated him like a staff member, as per the Appeals Tribunal's ruling in *Gabaldon* 2011-UNAT-120, although he was not eligible to apply and be selected for the position and no letter of appointment was signed. As a result, the Applicant is legitimately entitled to rights similar to those afforded to staff members, for the purpose of being granted access to the internal justice system of the United Nations.

*Merits*

24. The Tribunal recalls that it is competent to examine the legality of the decision of 10 May 2017 to withdraw the offer of appointment made to the Applicant following his selection to the P-5 post of Senior Economic Affairs Officer, ECE, and after he started performing his functions, on the grounds that he was not eligible. It is not competent to examine the decision of the Secretary-General dated 23 June 2017, in response to the Applicant's request for management evaluation, to uphold the decision which the Secretary-General qualified as the decision as one "to terminate [the Applicant's FTA]"; the Tribunal is not bound by this characterization.

25. The Tribunal will thus examine whether the decision of 10 May 2017 to withdraw the offer of appointment was lawful. It recalls that sec. 3.15 of ST/AI/2013/4 contains the following restrictions on reemployment of consultants:

> *Restrictions on reemployment as a staff member*
>
> 3.15 In accordance with section III.B, paragraph 26, of General Assembly resolution 51/226, the offices responsible for the processing of the individual contracts are required to inform the consultants and individual contractors that they are not eligible to apply for or be appointed to any position in the Professional and higher categories and for positions at the FS-6 and FS-7 levels in the Field Service category within six months of the end of their current or most recent service. For such positions, at least six months need to have elapsed between the end of an individual contract and the time of application and consideration for an appointment as a staff member under the Staff Rules and Regulations of the United Nations.

26. The same restriction is contained in sec. 6.11 of ST/AI/2010/3 (Staff selection system). These rules are applied strictly and do not provide for any exception or for any exercise of discretion on behalf of the Administration. The employment of a former consultant in violation of above-referenced rule is thus illegal and the fulfilment of that, or any other, eligibility criteria for a certain position is a condition precedent to any appointment.

27. The Tribunal also recalls that staff regulation 4.1 states the following:

> 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.

28. The issuance of a letter of appointment is thus not a mere formality, but a constitutional requirement under the Charter. As the Appeals Tribunal ruled in *Gabaldon*, where no letter of appointment has been issued and signed, the person does not become a staff member, except for the purpose of being given access to the internal justice system; this "may be the case where a person has begun to exercise his or her functions based on acceptance of the offer of employment" (*Gabaldon*).

29. As this Tribunal held in *Boutruche* UNDT/2009/085 (not appealed):

> Contrary to that maintained by the Applicant, the Administration, bound as it is to apply existing rules, has a right and even an obligation to put an end to illegal situations as soon as it becomes aware of them, while preserving any rights acquired by staff members in good faith.

30. Pursuant to sec. 3.15 of ST/AI/2013/4 and sec. 6.11 of ST/AI/2010/3, the Applicant was not eligible to apply and to be selected for the position of Senior Economic Affairs Officer, ECE. As such, offering the position to the Applicant, a consultant with ECE, although he did not meet the eligibility criteria, was beyond the power conferred to the Organization.

31. That being said, the Tribunal notes that no letter of appointment was issued to the Applicant. He had been *offered* an appointment, and accepted that offer, but before a letter of appointment was issued, HRMS withdrew the offer on the grounds that he was not eligible, since he had been working as a consultant with ECE at the time of his application and during the recruitment process. The Applicant argues that it had been well known to both Senior Management at ECE—including the Hiring Manager—and HRMS that he had been a consultant and that in recruiting him, the Administration had waived the eligibility requirement for him. The Tribunal did not find it necessary to hear any evidence from Senior Managers or

staff at HRMS, since even if one were to accept the Applicant's evidence that Senior Management of ECE knew about his status as a consultant and told him it was no impediment to his recruitment, and that that had been confirmed by HRMS, the fact of the matter remains that when his consultant status, and ineligibly, came to the knowledge of the Chief, HRMS, she immediately stopped the recruitment process and withdrew the offer. She did so in due exercise of her duty to ensure a proper eligibility screening of all candidates, which is indeed the responsibility of HRMS. It is the Tribunal's view that when the Chief, HRMS, became aware of the ineligibility of the Applicant on the basis of his status as a consultant, she was duty bound by the Rules and Regulations to withdraw the offer and ensure that no letter of appointment be issued. Indeed, no reliance could be placed on advice or mistaken belief, if any, that the Applicant was eligible, which he was not, nor could any estoppel arise under the circumstances.

32. The Tribunal also finds it important to recall that the offer of appointment had been issued to the Applicant on the basis of a screening exercise undertaken in light of the information provided by him on his PHP through *Inspira*. Particularly, the Applicant chose to select under "UNCS Status" [1] "I have previously worked for a United Nations Common System entity"—referring to his employment under a fixed-term appointment with UNCTAD from November 2013 to January 2014—, instead of "I'm currently working for a United Nations Common System entity", and "Type of appointment or relationship with the organization 'Consultant'", as was equally and more relevantly available. At the hearing, the Applicant argued that the system was deficient and that any candidate should be able to select various of the available options; in his case, as he was both a former employee and a (current) consultant, he elected to click "former employee" since that was a status that he believed was more relevant for the P-5 position for which he was applying. The Tribunal expresses its surprise and concern in respect of this election made by the Applicant and stresses that in light of his then current status as a consultant, it would have been obvious to any reasonable person that he should click the option "I'm currently working for a United Nations Common System entity", as a "consultant". Any further reference to his previous regular appointment to a P-5

[1] United Nations Common System Status

position could have been duly highlighted in the cover letter and under the rubric working experience in the PHP. Clearly, at the time of the application, the Applicant was a "current employee", namely a "consultant" and it was his duty to clearly indicate this status in *Inspira*. Failure to do so was, at best, negligent. The Tribunal is also concerned that he somewhat blurred his current consultant status under the part "working experience" of the PHP.

33. As a result of his election of the option "former employee" under the UNCS Status, the Applicant's candidature to the post was not automatically screened out as being ineligible. In other words, had he elected "I'm currently working for a United Nations Common System entity", and "consultant", he would not have been offered the position because he would have been found ineligible from the outset.

34. The Tribunal took note of the written witness statement from the Deputy Executive Secretary, ECE, filed by the Applicant's Counsel, which according to the Applicant established that the Deputy Executive Secretary, ECE, in his capacity of Officer-in-Charge, or any other official of ECE Senior Management had waived the eligibility requirement for the Applicant. The Tribunal finds that the witness statement of the Deputy Executive Secretary does not lead to the conclusion that he had waived the legal requirements for the Applicant's recruitment. More importantly, the Tribunal underlines that a waiver of a rule which allows for no exception or discretion would be contrary to the rule of law within the Organization hence, illegal. The holders of a delegation have no power whatsoever to unilaterally decide to waive mandatory requirements provided in the administrative issuances of the Organisation.

35. As a consequence, and since no letter of appointment had been issued to the Applicant, the latter did not formally become a staff member—except for the purpose of access to the internal justice system, *Gabaldon*—and any reference to a termination of his appointment pursuant to staff rule 9.3(a)(v) and 9.3(c) is misplaced.

36. Having issued the offer of appointment on the basis of a factual error, and since as an ineligible candidate, the Applicant was legally barred from being recruited, the Administration had a duty to withdraw the offer, as soon as the

mistake was discovered. The Administration was legally precluded from issuing a letter of appointment to the Applicant and had to put an end to an illegal situation, while paying him for the work effectively performed. Since the Applicant did not become a staff member, his appointment could not be terminated. Rather, the contract concluded was *void ab initio*, since it was in clear contradiction with the applicable law. As the Tribunal held in Order No. 116 (GVA/2017), for the sake of completeness, even if one were to find that the contract was merely *voidable*, at the option of one of the parties to the contract, rather than *void ab initio*, by the memorandum of 10 May 2017, arguably, the Administration voided the contract since it was based on a defective declaration of intent. In that case, the contract became void from the date of the notification of the memorandum of 10 May 2017. It could thus not be "terminated".

37. The Tribunal notes that the Administration correctly paid the Applicant on the basis of a *de facto* contractual relationship for services rendered (*quantum meruit*), from 1 to 10 May 2017. However, it recalls that upon the Applicant's request for suspension of action, it had directed the Respondent not to take any action pending a determination of the request for suspension of action, which occurred on 19 May 2017. The Applicant could, and did, legitimately, stay at his post and continued working during the period from 11 to 19 May 2017; he should therefore have been paid for the services rendered during that period, on the basis of *quantum meruit*. While this matter is not properly before the Tribunal, it considers that it would be fair to make an *ex gratia* payment to the Applicant for the days worked from 11 to 19 May 2017.

38. Beyond 19 May 2017, the Applicant was not entitled to any payment, as following the rejection by the Tribunal of the Applicant's request for suspension of action through Order No. 116 (GVA/2017), the decision of 10 May 2017 took effect, as of 19 May 2017, when the decision of the Tribunal on the suspension application was communicated to the parties.

39. In light of the forgoing, the Tribunal finds that the decision to withdraw the offer of appointment was legal. The Applicant's argument that the Administration

failed in its duty to inform him about his ineligibility as a consultant does not impact the legality of the decision to withdraw the offer of appointment.

**Conclusion**

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

The application is rejected.

(*Signed*)
Judge Rowan Downing
Dated this 4th day of December 2018

Entered in the Register on this 4th day of December 2018

(*Signed*)

René M. Vargas M., Registrar, Geneva