



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

KAUF

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Mohamed Abdou, OSLA

Counsel for Respondent:

Bettina Gerber, UNOG

Cornelius Fischer, UNOG

Notice: This Order has been corrected in analogous application of art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. By application filed on 12 May 2017, the Applicant requests suspension of action, pending management evaluation, of the decision “to terminate the fixed-term appointment [of the Applicant], i.e. the withdrawal letter”.
2. The application was served on the Respondent, who filed his reply on 16 May 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”), the Applicant 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)”. Quite in contrast, under “Name of Employer” for the period “1 February 2014 to present”, he stated: “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.
 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)
6. Nothing led to understand when, between "February 2014 to present", he had been employed as Consultant by ECE.
7. The Hiring Manager recommended the Applicant's selection from the roster, and this recommendation was approved by the Executive Secretary of ECE on 31 March 2017. The Human Resources Management Service ("HRMS"), United Nations Office at Geneva ("UNOG") implemented the recruitment.
8. By email of 31 March 2017 from an Administrator of ECE, the Applicant was informed that the Head of the Department had selected him for the position. Also on 31 March 2017, 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.

9. The Applicant signed the acceptance of the 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.

10. 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.

11. 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 a meeting she had with the Applicant on the same 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 noted 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.

12. The Applicant stopped working for ECE effective 11 May 2017. He requested management evaluation of the contested decision on 12 May 2017.

Parties' contentions

13. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The unilateral decision to terminate his appointment is unlawful and breaches his contractual rights; the offer of appointment from ECE and the subsequent correspondence contained all the essential terms of the agreement. He accepted the offer unconditionally on 6 April 2017 and satisfied all its conditions; he also reported for duty and performed the functions, therefore, a valid contract was formed between the Applicant and the Organization (*Gabaldon* 2011-UNAT-120; *Fagundes* 2012/UNDT/056);

b. The suggestion by the Administration that new facts were discovered which render the Applicant ineligible is improper and cannot justify the decision; the Organization was well aware of his status, since he was working as a consultant in the same Division and Section where the post is located hence the hiring unit and HRMS could not have reasonably ignored his status; his description of duties in his PHP clearly mentions his status as "Project Manager (Consultant)" for ECE, and he could not have been clearer; the reasons put forward as the basis for the decision are therefore incorrect, and the decision is prima facie unlawful;

Urgency

c. The decision has not yet been implemented; he has not been provided with any notice period prior to the termination of the appointment; the Tribunal in other cases criticised thirty minutes notice for non-renewal of a contract of employment;

d. Also, the withdrawal letter stated that the Applicant “[would] be contacted by HRMS separately concerning administrative formalities to be completed”. The fact that no such formalities have yet been completed or even initiated constitutes clear evidence that the contested decision has not yet been implemented;

Irreparable damage

e. He had alternative employment opportunities that he forewent, the breach of his contract would result in irreparable damages as a result of his loss of employment and related loss of career opportunities.

14. The Respondent’s primary contentions may be summarized as follows:

a. The decision has already been implemented and the fact that not all administrative formalities have been taken care of following the withdrawal is immaterial; the time when the offer was withdrawn was clearly stipulated in the withdrawal memorandum; the Applicant received the withdrawal letter by email of 11 May 2017;

Prima facie unlawfulness

b. The conditions to employ the Applicant were not met and he provided false and misleading information in his PHP; the Administration had not only a right, but also a legal obligation to withdraw the offer;

c. The Applicant indicated in Inspira that he was a former/retired employee, under a fixed-term appointment from 1 November 2013 to 31 January 2014; had he, during the electronic submission of his candidature, correctly selected “I’m currently working for a United Nations

Common System entity”, and “Consultant” as the “type of appointment or relationship with the organization”, he would have been automatically disqualified from the selection process;

d. The Administration strictly adheres to sec. 3.15 of ST/AI/2013/4 (Consultants and individual contractors);

e. The Applicant’s argument that he was never informed that there were any actual or potential obstacles for his appointment is not correct; section 1 of his *Contract for the services of a consultant or individual contractor* refers in the *Terms of reference of work assignment* to sec. 3 of ST/AI/2013/4, which contains the above restriction to reemploy consultants as staff members; ignorance of the law is no excuse and, hence, no defence;

f. In view of the high volume of applications processed by the Administration, it relies on applicants as a first instance of control for submitting correct information; since the Applicant did not respect that obligation, his ineligibility was discovered lately by HRMS; that cannot lead to a situation where the Administration ignores an unlawful situation;

g. In case of withdrawal of a letter of offer, the latter only creates legal obligations if certain conditions are met, namely that the candidate (1) has accepted the conditions of the offer, (2) has satisfied all of the conditions of the offer, i.e. those mentioned in the letter of offer itself, those arising from the relevant rules of law for the appointment of staff members of the Organization, and those necessarily associated with constraints in the implementation of public policies entrusted by the Organization, and (3) is acting in good faith;

h. Since the Applicant did not provide complete information concerning his status as a consultant, and did not satisfy the conditions of the offer and did not act in good faith, the offer does not create any legal obligations, and its withdrawal was lawful; since he had already taken up his functions, he will be paid for the work performed, on the basis of a *de facto* employment contract, since the parties have not signed the letter of appointment.

Consideration

Receivability ratione personae

15. The Applicant applied for the post of Senior Economic Affairs Officer, ECE, while he was working as consultant in the same Division and Section. On the basis of his PHP, he was found eligible in Inspira and was selected for the post. The Applicant effectively started to perform the functions of the post on 1 May 2017, on the basis of the acceptance on 6 April 2017 of the offer of employment made to him on 31 March 2017. He continued to exercise his functions until 11 May 2017, when the Administration noted and informed him of its mistake, since as a former consultant, the Applicant was not eligible to apply and be selected for the post, pursuant to sec. 3.15 of ST/AI/2013/4.

16. Before entering into an examination of the requirements for the granting of a suspension of action, the Tribunal first has to determine the status of the Applicant and consider whether the present application is receivable, *ratione personae*, pursuant to art. 2 and 3 of its Statute.

17. Article 2, paragraph 1, of the Tribunal's Statute provides that:

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.

18. Article 3, paragraph 1, of the Tribunal's Statute further provides that:

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.

19. The Appeals Tribunal held in *Gabaldon* 2011-UNAT-120 that (emphasis added):

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.

...

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.

...

30. 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.

20. In the case at hand, the Applicant, having accepted the offer of employment, effectively started to perform the functions of Senior Economic Affairs Officer, ECE, on 1 May 2017. It follows that under the above-referenced terms of *Gabaldon*, the Organization treated him like a staff member, although he was not eligible to apply and to be selected for the position under the applicable rules and no letter of appointment was signed. Therefore, and while he did not formally become a staff member, since no valid employment contract was concluded, the Applicant is legitimately entitled to rights similar to those afforded to staff members, hence he has to be granted access to the internal justice system of the United Nations. The present application is thus receivable *ratione personae*.

Requirements for suspension of action

21. With respect to suspensions of action, art. 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation "where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage". These three requirements are cumulative and must, thus, all be met in order for a suspension of action to be granted (*Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014)).

Has the decision been implemented?

22. The Tribunal further recalls that a suspension of action is only possible regarding decisions that have not yet been implemented (see *Abdalla* Order No. 4 (GVA/2010), *Neault* Order No. 6 (GVA/2011) and *Quesada-Rafaraso* Order No. 20 (GVA/2013)).

23. To examine whether the contested decision has already been implemented, the Tribunal first has to determine the nature of the contested decision.

24. The Applicant states in his application that he is seeking suspension of the “decision to terminate the fixed-term appointment ... i.e. the withdrawal letter”. A decision to terminate an appointment presupposes that a valid contract has been concluded and exists. As stated above, and under the terms of *Gabaldon*, in situations like the present, a contract may be concluded, which, although it does not constitute a valid employment contract, may create obligations for the Organization and rights for the other party, if acting in good faith.

25. The question is whether the contract that was concluded between the Organization following the issuance and acceptance of the offer of employment is *void ab initio*,¹ that is, null from the beginning, since it was in clear contradiction with the applicable law.

26. Indeed, sec. 3.15 of ST/AI/2013/4 provides:

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

¹ Black’s Law Dictionary defines *void ab initio* as “Null from the beginning, as from the first moment when a contract is entered into. A contract is *void ab initio* if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one of the parties to the contract.”

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.

27. The same restriction is contained in sec. 6.11 of ST/AI/2010/3 (Staff selection system).

28. As the Respondent stressed in his reply, the purpose of this rule is to avoid any back door recruitment and not to give consultants an advantage over internal candidates when competing for a position whose functions had previously been carried out by a consultant. He also stated that this rule is applied strictly.

29. The Tribunal notes that recruitment of a former consultant, in clear violation of the above-rule, constitutes a breach of a norm that does not provide for any exception to be made to it, or for any discretion on behalf of the Administration. In light of that provision, offering the Applicant the position although he did not meet the eligibility criteria was beyond the power of the Organization. Arguably, a contract formed in violation of that rule is therefore *void ab initio*. In that case, the “withdrawal of the offer” had no legal effect, since the contract was not legally formed from the outset. It follows that the “withdrawal of the offer” cannot be qualified as a decision to “terminate the Applicant’s fixed-term appointment”. From that perspective, the memorandum of 10 May 2017 was merely of a declaratory nature. No further action was required for the decision to be implemented, independently from whether any further formalities were to be undertaken on behalf of the Administration. Thus, the decision has been implemented and there is nothing to be suspended by the Tribunal.

30. The foregoing notwithstanding, and for the sake of completeness, the Tribunal examined whether the result would be any different if one were to find that the contract was merely *voidable*², at the option of one of the parties to the contract, rather than *void ab initio*. In that case, the contract first produces legal effects, and, subsequently, becomes void from the beginning only once it is effectively voided by one of the parties. Arguably, the “withdrawal

² Black ‘s Law Dictionary defines voidable as “Valid until annulled; esp. (of a contract) capable of being affirmed or rejected at the option of one of the parties. This term describes a valid act that may be voided rather than an invalid act that may be ratified. Also termed avoidable.”

memorandum” of 10 May 2017 constitutes the voiding of the contract by the Administration. The reason for the Administration to withdraw the offer was that it was based on a defective declaration of intent on behalf of the Administration. Indeed, the offer was made since the Administration, mistakenly, thought on the basis of the information provided by the Applicant in Inspira, that the Applicant was eligible to apply and be selected for the post.

31. The Tribunal is satisfied that the Administration did not and reasonably could not conclude from the information provided by the Applicant in Inspira that he was employed as a consultant with ECE at the time of his application. In that case, the contract became void from the beginning as of the moment the memorandum was notified to the Applicant, that is, as from 11 May 2017. Therefore, there would be, equally, nothing that the Tribunal could suspend.

Prima facie unlawfulness

32. Even if it had found that the decision was not yet implemented, the Tribunal is of the view that it was not *prima facie* illegal. It recalls that the threshold required is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99(GVA/2015)).

33. As stated above, and 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.

34. 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.

35. Unlike in *Boutruche*, the information provided by the Applicant in Inspira and in his PHP were clearly misleading: instead of selecting in Inspira “I’m currently working for a United Nations Common System entity”, and under “Type of appointment or relationship with the organization “Consultant”, he selected “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. This selection is reflected on the first page of his PHP, which shows, under “Applicant’s UNCS Status” “Former/retired employee”, referring to his employment with UNCTAD from 2013 to 2014.

36. It is the Tribunal’s considered view that the Applicant was compelled to indicate without any ambiguity in his PHP that at the time of his application for the position of Senior Economic Affairs Officer at ECE, he was working as a consultant with the Sustainable Transport Division, ECE, namely from 15 December 2016 to 31 March 2017. Had he ticked the box “I’m currently working for a United Nations Common System entity”, and “Consultant”, he would have been automatically screened out by the system. Moreover, the information added by the Applicant under his last “Employment” was also misleading, since he stated under “Employer” that he was “Self-employed” from February 2014 to present, instead of stating that since December 2016 to “present”, he had been working as a consultant. It is on the basis of the information provided in the PHP that the Administration mistakenly found the Applicant eligible and offered him a fixed-term appointment as Senior Economic Affairs Officer at ECE.

37. As soon as the mistake was discovered, the Administration was bound to apply the rules and was entitled, even obliged, to put an end to the illegal situation, while paying the Applicant for the work effectively performed between 1 and 11 May 2017. This is what it did when it sent the Applicant the “withdrawal memorandum” of 10 May 2017. The decision is thus not *prima facie* illegal and the Tribunal will not address the two other cumulative conditions for a suspension of action, namely urgency and irreparable harm.

Conclusion

38. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Rowan Downing

Dated this 19th day of May 2017

Entered in the Register on this 19th day of May 2017

(Signed)

René M. Vargas M., Registrar, Geneva