



**Before:** Judge Teresa Bravo

**Registry:** Geneva

**Registrar:** René M. Vargas M.

FLEURANT

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON AN APPLICATION FOR  
SUSPENSION OF ACTION PENDING  
MANAGEMENT EVALUATION**

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**Counsel for Applicant:**

Sètonджи Roland Adjovi, Etudes Vihodé

**Counsel for Respondent:**

Yehuda Goor, AAS/ALD/OHR, UN Secretariat

## **Introduction**

1. By application filed on 17 February 2022, the Applicant, who does not currently have the status of a staff member, requests suspension of action, pending management evaluation, of the decision of the United Nations Global Service Centre (“UNGSC”) to withdraw the 28 October 2021 offer of employment that he accepted on 31 October 2021.

## **Facts**

2. The Applicant is an electronics engineer in the private sector in the United States of America who has worked for the United Nations in the past.

3. By letter dated 28 October 2021 (“offer letter”), the Applicant was offered a Fixed-Term Appointment for one year as Telecommunications Officer (P-3), Standing Police Capacity, UNGSC in Brindisi.

4. On 31 October 2021, the Applicant unconditionally accepted the offer.

5. By email dated 4 January 2022, the Applicant was informed that the Reference Verification Unit (“RVU”), UNGSC, received a negative verification from one of his past employers, Xformtex LLC.

6. On 6 January 2022, in response to the Applicant’s request for clarification, the RVU, UNGSC, informed the Applicant that the negative verification reported by his former employer through a Business Executive was abandonment of post and unsatisfactory performance, and that, as a result, his reference verification was closed.

7. On the same day, the Applicant replied to the RVU, UNGSC, contesting the negative evaluation and informing that he did not abandon his post but rather resigned and provided evidence of that by way of an email exchange with the Business Executive, Xformtex LLC, dated 15 October 2021. The Applicant also shared that the Business Executive was not his supervisor and had no way of evaluating his performance, sharing in turn the performance evaluation issued by

his supervisor at Maryland Port Administration (“MPA”), the company where the Applicant was working while under contract with Xformtex LLC.

8. Following this exchange, the Business Executive wrote to the RVU, UNGSC, correcting the information provided regarding the Applicant’s alleged abandonment of post and acknowledging receipt of the performance evaluation, which he claimed to not having seen before.

9. On 15 February 2022, the Human Resources Office, UNGSC, informed the Applicant that the Hiring Manager had decided to withdraw the offer letter.

10. On 16 February 2022, the Applicant filed a management evaluation request challenging the above-mentioned decision.

11. On 17 February 2022, the Applicant filed the application referred to in para. 1 above.

12. On the same day, the instant case was assigned to the undersigned Judge.

13. On 21 February 2022, the Responded filed his reply.

14. On 22 February 2022, the Applicant filed a motion for leave to respond to the Respondent’s reply and included therein his comments to said reply.

### **Parties’ contentions**

15. The Applicant’s primary contentions may be summarized as follows:

#### *Receivability*

a. As per *Trudi* UNDT/2015/049 and *Gabaldon* 2011-UNAT-120, the application is receivable *ratione personae* because the Applicant had already unconditionally accepted and signed the letter of offer, and met all the requirements therein;

b. The 15 February 2022 decision to withdraw the offer letter is a challengeable administrative decision, rendering this application receivable *ratione materiae*;

c. The Applicant was notified of the decision on 15 February 2022, against which he requested management evaluation on 16 February 2022. As per Staff Rule 11.2(c), the application is receivable *ratione temporis*;

*Prima facie unlawfulness*

d. A lawful administrative decision must be based on accurate facts at the time the decision is made. The RVU, UNGSC, was provided inaccurate and misleading information, which was promptly and diligently corrected by the Applicant. Yet, the decision to withdraw his offer of appointment was made based on such inaccurate and misleading information;

e. At the time of the decision, the Administration had the correct information but decided to rely, instead, on the misleading facts that had already been corrected, hence, the withdrawal decision is unlawful;

f. The refusal of the RVU, UNGSC, to correct the outcome of the verification check after being made aware of the misleading information it was given, and despite stating on the 4 January 2022 email that the case would be updated accordingly if the records were to be completed, is an abuse of authority;

*Urgency*

g. Given the 15 February 2022 decision notifying the Applicant of the withdrawal of the offer of appointment, the selection of another candidate is imminent and, if accepted, irreversible;

*Irreparable damage*

h. Should the application for suspension of action not be granted, the recruitment process will continue and eventually select another candidate, rendering the Applicant unable to have this unlawful decision reversed;

i. The withdrawal of the offer letter undermines the Applicant's prospects, as any future application for a job with the United Nations would be jeopardized by this negative background verification on his records; and

j. Monetary compensation should not be used as a shield against “blatant and unfair procedure in a decision-making process” (see *Tadonki* UNDT/2016/016, para. 13.1).

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

*Receivability* *ratione personae*

a. The application is not receivable *ratione personae*. The Dispute Tribunal lacks jurisdiction under arts. 2.1 and 3.1 of its Statute to adjudicate the instant case as the Applicant is not a staff member and was never given a letter of appointment;

b. The Applicant is not covered by *Gabaldon* 2011-UNAT-120 exception because he has not met all the requirements and did not unconditionally accept the letter of offer. As provided in the terms and conditions of the offer, appointment is subject to satisfactory completion of pre-recruitment formalities, including verification of qualifications. The latter necessary formality was not met;

c. Consequently, the Applicant’s reliance on *Gabaldon* and *Trudi* is misplaced. Since he did not satisfy all the conditions mentioned in the offer, there was no quasi-contract formed to allow him access to the United Nations internal justice system;

*Receivability* *ratione materiae*

d. The contested decision was implemented when the Administration communicated to the Applicant its decision to withdraw the offer because he did not satisfy the condition of satisfactory verification. There are no further actions to be taken to implement the contested decision now that it has been formally communicated to the Applicant. There is nothing to suspend;

e. The Dispute Tribunal cannot compel the Organization to rescind its decision or appoint the Applicant as relief. Suspension of action is only capable of maintaining the *status quo*, not modifying it;

f. Granting the suspension of action would effectively adjudicate on the merits and render moot the management evaluation request. Such a result would circumvent the established formal process for contesting a decision in bypassing management evaluation and substantive adjudication on the merits, exceeding the Dispute Tribunal's powers;

g. The waiver signed by the Applicant precludes him from pursuing any claim arising from the Organization's use of the information provided in the pre-recruitment verification process. Because the Organization's decision to withdraw the offer based on a former's employer's verification is a form of "using" information covered by the waiver, the Applicant has waived and released any claims with respect thereto;

*Prima facie unlawfulness*

h. The letter of offer was conditional on the satisfactory completion of pre-recruitment formalities, including verification of qualifications. The failure to meet one of the conditions presented in the offer is grounds for withdrawal of said offer. The withdrawal of the contingent offer due to unsatisfactory verification was therefore consistent with the agreement between the Applicant and the Organization. Thus, the contested decision is not unlawful;

i. The Applicant cannot claim, after learning the contents of the negative verification, that the Organization's reliance on information that he himself provided was unlawful;

*Urgency*

j. The contested decision has already been implemented and, accordingly, there is no urgency; and

*Irreparable damage*

k. The Applicant's career prospects have not been irreparably harmed by virtue of not being appointed to a single job opening. He is still free to apply to any other position he deems to be qualified for.

## Consideration

17. In the present case the Applicant seeks to suspend the decision to withdraw the 28 October 2021 offer letter, which he accepted on 31 October 2021.

18. The Respondent objects to the receivability of the application on two grounds: first, *ratione personae*, arguing that the Applicant is not a staff member and, second, *ratione materiae*, claiming that the contested decision has already been implemented.

### *Receivability ratione personae*

19. Art. 3.1 of the Dispute Tribunal's Statute provides that access to the Tribunal is limited to staff members and, under certain conditions, former staff members and persons making claims in the name of an incapacitated or deceased staff member.

20. Staff regulation 4.1 provides that a person only becomes a United Nations staff member after they are issued a Letter of Appointment ("LOA"). However, it is jurisprudentially established that, under certain circumstances, a person who has not yet been issued a letter of appointment is entitled to seek recourse within the internal justice system, provided that he/she has accepted unconditionally the terms and conditions of an offer of appointment (*Gabalton* 2011-UNAT-120).

21. Concerning the legal effects of an offer letter, *Gabalton* reads as follows (emphasis added):

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. **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 in respect of acts of the Organization that may ignore rights arising from a contract, which was ongoing 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.

22. Contrary to the Respondent's interpretation, *Gabaldon* applies to candidates who have unconditionally accepted an offer letter. Prerecruitment formalities are conditions established by the Organization, not by the candidate, for the appointment of a *selected* candidate.

23. Applying the above to the instant case, the Tribunal finds that the Applicant's acceptance of the offer letter was unconditional. He unconditionally accepted the terms of the offer of appointment and the only reason why an LOA was not issued is the allegedly false information that led to a negative verification. Had the verification check been successful, nothing on the record indicates that the



Applicant, the *selected* candidate after a regular recruitment exercise, would not have been appointed.

24. Thus, if the *selected* candidate for the post was not appointed due to an alleged mistake in the reference verification process, which is the key circumstance in the instant case, it is clear to this Tribunal that said candidate, upon unconditionally accepting the offer, enjoys similar albeit limited rights as those of a staff member. One of those rights is access to the Organization's internal justice system.

25. Otherwise, there would be no opportunity for judicial scrutiny of the Organization's use of its discretionary authority between the offer letter and the issuance of an LOA, thus depriving a selected candidate of the right to access to justice, in clear contradiction with all the international legal principles on which a system of justice should be based upon.

26. Thus, the Tribunal finds the application receivable *ratione personae*.

*Receivability ratione materiae*

27. A suspension of action is not receivable where the decision to be suspended, lawful or not, has already been implemented (*Pascal* Order No. 107 (NY/2021), *El-Awar* Order No. 59 (GVA/2017)). In this context, it is key to determine whether the contested decision in the instant case has been implemented or not.

28. The record shows that on 15 February 2022, a Human Resources Officer, UNGSC, informed the Applicant that his offer of appointment was withdrawn based on the information provided by the RVU.

29. The decision to withdraw an offer itself is a one-time act. Once it is issued and notified, it is completed. However, pursuant to established jurisprudence, this Tribunal has discretionary authority to interpret, define the administrative decision and issues under review by taking into account the entire application and all the various submissions made therein (*Nadeau* UNDT/2020/013, *Zachariah* 2017-UNAT-764, *Smith* 2017-UNAT-768, *Fasanella* 2017-UNAT-765, and *Cardwell* 2018-UNAT-876).

30. After a thorough reading of the case, it is clear to this Tribunal that the issue at hand is the continuation of the recruitment process for which the Applicant was the *selected* candidate. This is what, in reality, the Applicant, as the selected candidate for the position, is seeking to suspend.

31. Indeed, sec. V.6 of the Applicant's application reads as follows (emphasis added):

Date on which the decision is to be implemented:

**Imminent. The decision is to be implemented when the position is offered to someone else and accepted.**

32. Also, para. 16 of the Applicant's comments on the Respondent's reply reads as follows (emphasis added):

The Applicant submitted in para. 6 of his application for suspension of action that "The decision will be implemented when the position is offered to someone else and accepted". He did not seek to "compel the Organization to rescind its decision or appoint the Applicant as relief". All he seeks was **for the process to be suspended pending management evaluation to maintain the status quo and to prevent the Administration offering and appointing another applicant to the position.**

33. Therefore, following an interpretation of the application as a whole, it is clear that the relief sought through the instant application is the suspension of the recruitment process pending management evaluation, so that it does not continue to select another candidate.

34. In fact, justice calls for the recruitment process to be suspended pending management evaluation, so as to give an opportunity to the Organization to review the events that led to the withdrawal decision and, if warranted, reconsider it (*El-Awar* Order No. 59 (GVA/2017), while also providing the Applicant a fair possibility of having the situation reversed.

35. Finally, the Respondent's argument that the waiver signed by the Applicant precludes him from pursuing this claim has no grounds. To hold that the decision to withdraw the offer based on the negative verification is a form of "using" information covered by the waiver that the Applicant signed would be tantamount to abuse of contract. It would mean that the Organization could never be held accountable for actions arising between the offer letter and the start of the onboarding process, which would deny the fundamental right of access to justice.

36. Therefore, the application is receivable *ratione materiae*.

#### *Merits*

37. 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 case of particular urgency, and where its implementation would cause irreparable damage.

38. These three requirements are cumulative; in other words, they must all be met in order for a suspension of action to be granted. Furthermore, the burden of proof rests on the Applicant.

#### *Prima facie* unlawfulness

39. The Tribunal recalls that the threshold required in assessing this condition 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)).

40. In the case at hand, there are serious and reasonable doubts in relation to the legality of the decision to withdraw the offer of employment. Indeed, the Administration was timely informed about the mistake made by the person who provided a negative verification of the Applicant and, nonetheless, proceeded with the cancelation of the offer.

41. There is no evidence explaining the reasons for the Hiring Manager's decision to withdraw the offer despite the corrected information that the Applicant provided.

42. The Organization has a duty to act transparently and to consider all relevant information related to a recruitment process. In sum, it has a duty to demonstrate good faith in all steps of said process and there is no evidence that such was the case.

43. Likewise, the Respondent's argument that the Applicant cannot claim that the Organization's reliance on the information provided by himself through a reference was unlawful, has no grounds. First, the Applicant had no way of knowing that the reference would provide false information and cannot be held responsible for such action. Second, the core issue at hand is that the Organization apparently relied on false information *knowingly* despite said information having been challenged and corrected.

44. Therefore, the Tribunal finds there is *prima facie* evidence that the decision to withdraw the offer letter was unlawful.

#### Urgency

45. As mentioned by the Applicant, urgency relies on the fact that if the Tribunal does not order the requested suspension of action, the recruitment process will proceed, and the Applicant will definitely lose any possibility of being offered the job for which he was selected due to a lack of due diligence from the Organization.

46. The Tribunal finds that this imminent possibility meets the required standard of urgency.

#### Irreparable damage

47. Financial compensation, even if granted at a later stage, does not replace the Applicant's loss of being appointed to the post at stake in this case and the chance of appointment to future posts within the Organization if his professional record is not duly corrected. It follows that the withdrawal decision causes irreparable damage to the Applicant's career prospects.

**Conclusion**

48. In view of the foregoing, it is ORDERED that the recruitment process for which the Applicant was the selected candidate be suspended pending the outcome of the management evaluation.

*(Signed)*

Judge Teresa Bravo

Dated this 24<sup>th</sup> day of February 2022

Entered in the Register on this 24<sup>th</sup> day of February 2022

*(Signed)*

René M. Vargas M., Registrar, Geneva