



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2019-UNAT-934

Kauf
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Martha Halfeld Judge Deborah Thomas-Felix
Case No.:	2019-1230
Date:	28 June 2019
Registrar:	Weicheng Lin

Counsel for Mr. Kauf:	Mohamed Abdou, OSLA
Counsel for Secretary-General:	Noam Wiener

JUDGE DIMITRIOS RAIKOS , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/121, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 4 December 2018, in the case of *Kauf v. Secretary-General of the United Nations*. Mr. Ansgar Kauf filed the appeal on 4 February 2019, and the Secretary-General filed his answer on 8 April 2019.

Facts and Procedure

2. The following facts and procedure have been established by the UNDT:

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

...

... The Applicant worked as consultant with the Sustainable Transport Division, United Nations Economic Commission for Europe (“ECE”), from 15 December 2016

3. Collaborating with the advisory project on Public Private Development Partnerships (PPDPs) for Bolz+Par

...

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.

... The Applicant signed the acceptance of the letter of offer of appointment on

he was subjected to the laws of the Organization. Mr. Kauf is not aware of any jurisprudence whereby the Tribunals have found that a person was not a staff member even after effectively taking up the position, assuming the functions, and being paid, etc. Any such precedent would be problematic as it would call into question the validity of all acts performed by officials of the Organization and put in jeopardy the privileges

of the offer following recruitment and the Administration could have only terminated his contract in accordance with the Staff Regulations.

8.

The Secretary-General's Answer

11. The Secretary-General requests the Appeals Tribunal to dismiss the appeal in its entirety. In support thereof, the Secretary-General argues that the UNDT correctly found that the offer of employment was void *ab initio* in accordance with General Assembly resolution 51/226,⁷ ST/AI/2010/3 and ST/AI/2013/4. The provisions therein do not afford discretion or exceptions. HRMS acted *ultra vires* in sending the offer of appointment. Mr. Kauf's arguments that the UNDT erred by not considering that certain HRMS individuals knew he was a consultant or that he accepted the offer in good faith are irrelevant as HRMS did not have authority to act in contravention of a General Assembly resolution and therefore the entire exercise was void *ab initio*. In keeping with the Appeals Tribunal's jurisprudence, which obliges the Administration to swiftly correct its errors, the Administration, in this matter, properly acted to correct its error.

12. The UNDT correctly found that the conditions of the offer of appointment were not fulfilled and consequently the contract between the Administration and Mr. Kauf was void. *Sprauten* is the binding precedent on contract formation, wherein the Appeals Tribunal affirmed the Organization's decision to withdraw an offer made to a staff member after the staff member had failed to unconditionally accept that offer by declining the start date. Mr. Kauf argues that all of

13. Lastly, the Secretary-General argues that the UNDT was correct in finding that Mr. Kauf

procedure, such as to affect the decision of the *cæ*; or (e) erred on a question of fact, resulting in a manifestly unreasonable decision.

17. The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.⁹

18. On appeal, Mr. Kauf appears to be restating the claims which he made before the UNDT. He has not identified any of the above grounds in his appeal and has failed to demonstrate that the UNDT committed any error of fact or law in arriving at its decision.

19. Moreover, we have reviewed the UNDT's Judgment and find that Mr. Kauf's case was fully and fairly considered; we can find no error of law or fact in its decision.

20. Specifically, in the case at bar, the challenged administrative decision of 10 May 2017 by the Chief, HRMS of UNOG to withdraw Mr. Kauf's offer of appointment was predicated on the latter not being eligible for the post of Senior Economic Affairs Officer, ECE, as he had been engaged as a consultant with ECE from 15 December 2016 to 31 March 2017 in the Sustainable Transport Division.

21. Pursuant to the principle of legality of the Administration, where the Administration commits an irregularity or error in the exercise of its competencies, then, as a rule, it falls to the Administration to take such measures as are appropriate to correct the situation and align itself with the requirements of the law, including the revocation of the possibly illegal administrative act.

⁹ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19; *El Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-594, para. 30; *Achkar v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-579, para. 15; *Ruyooka v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-487, para. 24.

24. In the course of its judicial review, the UNDT noted that: ¹⁴

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 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.

25. Following this finding, the UNDT concluded that “[a]s 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”.¹⁵

26. In these circumstances, on account of his consultancy status with ECE at the material time, Mr. Kauf was not permitted to apply or to be appointed to posts, during the period, and for a period of six months after the end of the consultancy. Conseqt perm9u0 af-9 d to 1s/ herm9u0 cy. Co2(th)7.3(e P)5.2(H

27. For all of these reasons, the Appeals Tribunal finds that the UNDT did not make any errors of law and fact when it concluded that the Administration, “[h]aving 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.”¹⁶

28. Our conclusion renders it unnecessary to examine the other grounds of appeal advanced

34. The Appeals Tribunal deems Mr. Kauf's conduct as self-serving and unlawful and we find that he knew or ought to have known the law when he applied for the position, and that he breached the law. Consequently, the Organization cannot be made liable and Mr. Kauf cannot be awarded damages for the taking of the unlawful offer of appointment decision.

35. Accordingly, the appeal fails.

Judgment

36. The appeal is dismissed and Judgment No. UNDT/2018/121 is hereby affirmed.

Original and Authoritative Version: English

Dated this 28th day of June 2019 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Halfeld

(Signed)

Judge Thomas-Felix

Entered in the Register on this 19th day of August 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar