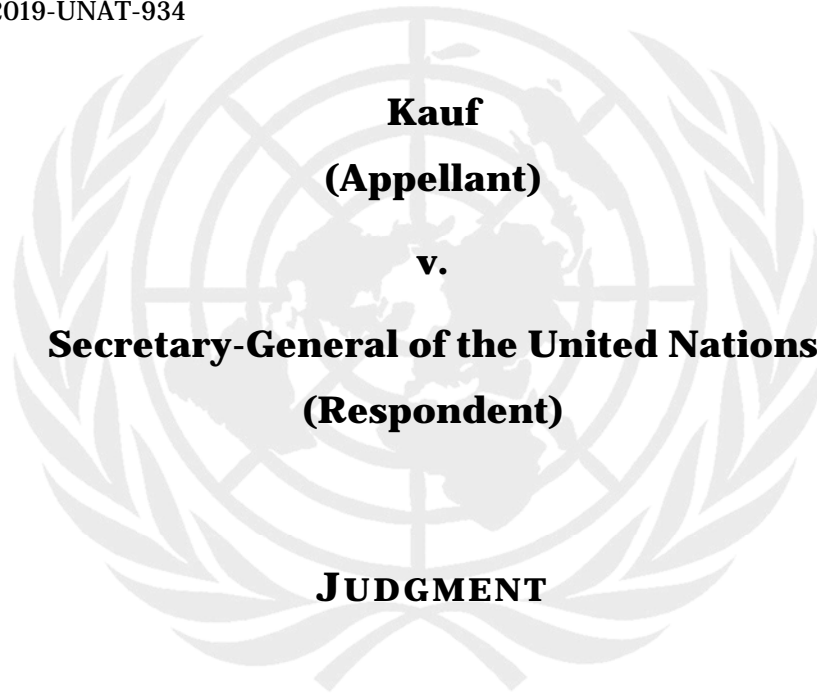




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

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:¹

... 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 to 31 March 2017.

... 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.

... 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 to 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)”.

... 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 [ECE] for Africa[:]
2. Hach Lange GmbH Berlin (D)/Geneva (CH), industrial project water measurement[:]

¹ Impugned Judgment, paras. 1-20.

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 [ECE], 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[; and]

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)[.]

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

... 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.

... 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.

... 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.

... 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.

... 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.

... 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.

... The Applicant requested management evaluation of the contested decision on 12 May 2017 and filed a request for suspension of action with the [Dispute] 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.

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

... 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”.

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

... 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.

... 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.

... 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.

3. On 4 December 2018, the UNDT issued its Judgment dismissing Mr. Kauf’s application. The UNDT first held that the application was receivable *ratione personae* on grounds that Mr. Kauf, after accepting an offer of employment, began to perform the functions of the post, and the “Organization thus treated him like a staff member, as per the Appeals Tribunal’s ruling in *Gabaldon 2011-UNAT-120*” and that “[a]s a result, [he was] legitimately entitled to rights similar to those afforded to staff members, for the purposes of being granted access to the internal justice system of the United Nations”.² On the merits, the UNDT identified the issue before it as the contested decision of 10 May 2017 to withdraw the offer of appointment. It found, however, that it was “not competent to examine the decision of the Secretary-General dated 23 June 2017, in response to [Mr. Kauf’s] request for management evaluation, to uphold the decision which the Secretary-General qualified as the decision (...) to terminate Mr. Kauf’s [fixed-term appointment]”.³ The UNDT noted it was “not bound by this characterization”.⁴

² Impugned Judgment, para. 23.

³ *Ibid.*, para. 24.

⁴ *Ibid.*

4. The UNDT found that the withdrawal of the offer of appointment was lawful since Mr. Kauf was not eligible to have been appointed pursuant to Section 3.15 of Administrative Instruction ST/AI/2013/4 (Consultants and individual contractors) and Section 6.11 of Administrative Instruction ST/AI/2010/3 (Staff selection system), which restricted the reemployment of a former consultant for six months following the end of his or her consultancy service. The UNDT noted that per Article 101 of the United Nations Charter the power of appointment rests with the Secretary-General and each staff member shall receive a letter of appointment. Mr. Kauf did not receive a letter of appointment and thus, did not become a staff member, except for the purpose of access to the internal justice system as was established in *Gabaldon*.⁵ Accordingly, the UNDT held that any reference, even by the Secretary-General, to the termination of his appointment pursuant to Staff Rule 9.3(a)(v) and 9.3(c) was misplaced. The UNDT further held that Mr. Kauf had been correctly paid for his work on a *de facto* contractual relationship for services rendered (*quantum meruit*) for the dates 1 May 2017 to 10 May 2017. He legitimately continued in his post from 11 May 2017 to 19 May 2017 pending the determination of his request for suspension of action and should have been paid for this period as well on the basis of *quantum meruit*. The UNDT, however, noted this issue was not before it and suggested nonetheless that an *ex gratia* payment be made to Mr. Kauf.

Submissions

Mr. Kauf's Appeal

5. Mr. Kauf argues that the UNDT erred in law in finding that he could commence employment without being a staff member of the Organization. The UNDT found that where no letter of appointment has been issued and signed, the person did not become a staff member, except for the purpose of access to the internal justice system. The UNDT concluded that since he did not become a staff member, his appointment could not be terminated. This is a clear legal error as an individual who commences employment with the Organization on the basis of a contract is a staff member of the Organization. The UNDT acknowledged that he had already accepted the offer of employment and that the Organization treated him like a staff member. The UNDT erred in law in relying upon *Gabaldon*, where the selected candidate did not take up his post after receiving his offer of appointment, unlike Mr. Kauf who was in the post following the offer of appointment. In the instant matter, however, he not only reported for duty, but he was paid as a staff member and

⁵ *Gabaldon v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-120.

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 and immunities convention and contravene the legal certainty of employment matters.

6. The UNDT further erred in law in finding that, because Mr. Kauf was never a staff member, any contractual relationship that existed was void *ab initio*. This finding conflicts with the Appeals Tribunal's jurisprudence in *Sprauten*, which found that "a contract is formed, before issuance of the letter of appointment, by an unconditional agreement between the parties on the conditions for the appointment of a staff member, if all the conditions of the offer are met by the candidate".⁶ Both the Administrative Tribunal of the International Labour Organization (ILOAT) and the former United Nations Administrative Tribunal have favourably considered the notion of *de facto* employment.

7. The UNDT erred in law as the purported discovery of facts which would have rendered Mr. Kauf ineligible to apply for staff positions did not affect his status as a staff member. This specific situation is addressed in Staff Regulation 9.3(v), which authorizes the Administration to terminate an appointment if facts anterior to the appointment that are relevant to suitability come to light. The UNDT did not reference Staff Regulation 9.3(v). The UNDT does not have authority to deviate from the Staff Regulations and it introduced a new category of staff members whose employment contracts may be voided *ab initio*. The UNDT is not empowered to retroactively strip any staff member of his or her status, even in the most serious situations of misconduct. Thus, the UNDT's newly formed category of officials, subject to a regime of "*de facto* contractual relationships for services rendered (*quantum meruit*)" constitutes an error of law. Furthermore, the UNDT did not define this novel notion of a *de facto* contractual relationship but did recognize that he had signed a contract. This does not reconcile with the finding that his contract was void *ab initio* and it remains unclear how he could have been in a contractual relationship yet his contract was deemed to have never existed. Lastly, as relates to this contract, his employment offer provided only for the possibility of withdrawal during "pre-recruitment" formalities, but in his case, he had already taken up his duties. Thus, the express terms of the contract precluded withdrawal

⁶ *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-111, para. 25.

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

8. Mr. Kauf argues that the UNDT erred in law in finding that he was without rights or remedies because he had not received a letter of appointment. Staff Regulation 4.1 and Article 101 of the United Nations Charter oblige the Administration to timely issue a letter of appointment, before employing a staff member. Issuing a letter of appointment is not a mere formality and the Administration was obliged to do it before employing Mr. Kauf. To suggest otherwise would mean that the United Nations is entitled to employ undocumented workers who do not benefit from the protections of the laws of the Organization. The factual circumstances of taking up the post, receiving an access pass, performing the functions, being paid, representing the Organization, and being treated by the Administration as a staff member created a legitimate expectation that he was employed as a staff member of the Organization. The Administration does not have clean hands and should be precluded from invoking its own failures as a defense, namely, failing to issue a timely letter of appointment and subsequently relying on it to preclude him from the rights afforded to a staff member.

9. Mr. Kauf lastly argues that the UNDT erred in law and fact in finding that his employment offer was based on a defective declaration of intent when it accepted the Administration's assertion that it was unaware of his prior consultancy. The UNDT contradicted this finding. The UNDT noted in its Judgment that while the Administration was aware of his prior status, it did not find it necessary to hear any evidence from senior managers at HRMS. Even if the UNDT were to accept Mr. Kauf's evidence that senior managers knew about his status and had advised him that it was no impediment to recruitment, the fact remained that once the Chief knew she withdrew the offer. The UNDT, thus, unreasonably refused to call the Chief of HRMS as a witness and instead relied upon unsubstantiated assertions regarding her lack of knowledge about his status. The UNDT erred in law and fact in its failure to consider evidence of his good faith acceptance of the offer and in turn did not consider whether the Administration acted fairly, justly and transparently, when it failed to inform him of his ineligibility as required in Section 3.15 of ST/AI/2013/4 and despite his assertions that the Chief, HRMS knew about his status and yet told him that it was not an impediment to his appointment to the role.

10. Based on the foregoing, Mr. Kauf requests the Appeals Tribunal to vacate the UNDT Judgment and remand the case back to the UNDT for a "new factual assessment".

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 the conditions set forth in the offer had been met, however, *Sprauten* provides that "conditions for an offer should be understood as all those mentioned in the offer, those arising from the relevant rules of law for the appointment of staff members of the Organization"⁸ and thus Mr. Kauf was required to meet all the conditions of appointment including those set out in administrative issuances. In the present case, ST/AI/2010/3 and ST/AI/2014/3 contained criteria upon which the offer of appointment was conditioned. The mandatory requirement of a six-month elapse between end of a consultancy service and time of application to a post had not been fulfilled. Thus, the UNDT correctly applied *Sprauten* in holding that the contract was void. Consequently, Mr. Kauf's claim that the UNDT should have applied Staff Regulation 9.3 is without merit as no valid contract of employment existed that could have been terminated.

⁷ General Assembly resolution 51/226, Human resources management, 25 April 1997.

⁸ *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-111, para. 25.

13. Lastly, the Secretary-General argues that the UNDT was correct in finding that Mr. Kauf was not a staff member when he provided services to the Organization between 1 May 2017 and 19 May 2017. Article 101 of the United Nations Charter and Staff Regulation 4.1 provide that an individual becomes a staff member upon receipt of the letter of appointment signed by the Secretary-General or by an official in the name of the Secretary-General. If the *Galbadon* case is to be given effect, the issuance of an appointment letter cannot be treated as a mere formality to cover the status created when the Organization mistakenly avails itself of the services of an individual due to a defective acceptance of an offer of appointment. Mr. Kauf is correct in stating that a legal relationship was created when the Organization availed itself of Mr. Kauf's services but this relationship was between an uncontracted service provider and the Organization. This relationship does not leave Mr. Kauf without any rights and remedies, as the UNDT correctly found that he must be paid for his services. These are his rights and remedies—payment for his services—nothing more and nothing less.

Considerations

14. The issue in this appeal is whether the UNDT erred in law or fact resulting in a manifestly unreasonable decision when it concluded that the decision of 10 May 2017 by the Chief, HRMS to withdraw Mr. Kauf's offer of appointment was lawful.

15. Section 3.15 of ST/AI/2013/4 provides:

Restrictions on reemployment as a staff member

... 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.

16. Article 2(1) of our Statute provides that the Appeals Tribunal is competent to hear and pass judgment on an appeal filed against a judgment rendered by the Dispute Tribunal in which it is asserted that the Dispute Tribunal has: (a) exceeded its jurisdiction or competence; (b) failed to exercise the jurisdiction vested in it; (c) erred on a question of law; (d) committed an error of

procedure, such as to affect the decision of the case; 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.

However, if the staff member has acted in good faith, he or she is entitled to compensation for the damage suffered as a result.¹⁰

22. We recall the jurisprudence of this Tribunal that in instances where the eligibility criteria have been wrongly applied, the Administration has a duty, and is entitled, to rectify its own error.¹¹ In *Cranfield*, a staff member's fixed-term contract was converted to an indefinite contract retroactively. The Administration claimed it had made a mistake and notified the staff member accordingly. The Appeals Tribunal held that the Administration was entitled to correct erroneous decisions and stated *inter alia*:¹²

In situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation. The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration. How the Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case. When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility therefor and act with due expedition once alerted to the unlawful act.

23. In the present case, as per the evidence on file established by the UNDT, between 15 December 2016 and 31 March 2017, Mr. Kauf was engaged by ECE as a consultant. On 12 January 2017, while engaged by ECE as a consultant, he submitted an application for the post of Senior Economic Affairs Officer at ECE. When applying for the post, Mr. Kauf completed an online PHP form, where he chose to select under "UNCS Status" "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.¹³ Thus, the first page of the PHP form did not reveal that Mr. Kauf was engaged as a consultant with the Organization when he applied for the post.

¹⁰ *Wang v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-140, para. 66; *Castelli v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-037, para. 26.

¹¹ *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 30; *Neocleous v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-635, para. 32; *Cicek v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-636, para. 32, citing *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367, para. 36.

¹² *Cranfield v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-367, para. 36.

¹³ Impugned Judgment, para. 32.

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. Consequently, the Administration, having wrongly applied the eligibility criteria, had a duty, and was entitled, to correct this irregularity, which it did by withdrawing the illegal offer of appointment of 10 May 2017. The fact that Mr. Kauf had meanwhile commenced employment and begun to exercise his functions based on the acceptance of the offer of employment and received payments thereof does not entail that this unlawful situation justified continuing it. Nor do the principles of good faith or of protection of legitimate expectations demand, under the aforesaid circumstances, that the Administration be precluded from invoking its own failure, withdrawing the offer of appointment, or, much more, exercising its discretion to make right the erroneous decisions of the past in the direction of issuing Mr. Kauf a letter of appointment. On the contrary, as stated earlier in this Judgment, the Administration made its choice and took the lawful decision to withdraw Mr. Kauf’s offer of appointment on the ground that he did not fulfil the specific eligibility requirement. Hence, Mr. Kauf’s arguments to the contrary are without merit.

¹⁴ *Ibid.*, para. 32.

¹⁵ *Ibid.*, para. 33.

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 by Mr. Kauf that the UNDT erred in law by finding that: i) his contract was void *ab initio*, ii) there was a *de facto* contractual relationship with the Organization, iii) he was without rights or remedies simply because he had not received a letter of appointment, and iv) the employment offer was based on a defective declaration of intent. They are not decisive for the outcome of the present case, where it comes solely to the issue of the withdrawal of the offer of appointment of Mr. Kauf by the Administration, which was found to be in compliance with the principle of legality and the principles governing the revocation of illegal administrative acts, as it is, in this case, the offer of appointment made to Mr. Kauf on 10 May 2017.

29. Concomitantly, we do not endorse the UNDT’s specific reasoning that the “contract concluded was void *ab initio*, since it was in clear contradiction with the applicable law”¹⁷ and that there was a *de facto* contractual relationship for services rendered (*quantum meruit*) between Mr. Kauf and the Organization, as these findings were irrelevant and legally unnecessary to support the UNDT’s prior correct holdings that Mr. Kauf’s offer of appointment was lawfully revoked by the Administration due to his ineligibility for the position.

30. Mr. Kauf contends that the UNDT erred in law and fact in that it disregarded the evidence given by the Deputy Executive Secretary, ECE, the very official who issued the offer of employment, who, in his statement indicated quite unequivocally that he had been well aware of the Appellant’s status and that the issue of ineligibility had been discussed extensively within ECE and HRMS. More importantly, he had confirmed having issued the offer of appointment in full knowledge of Mr. Kauf’s status as a consultant.

¹⁶ *Ibid.*, para. 36.

¹⁷ *Ibid.*

31. We find Mr. Kauf's argument unpersuasive. Even if we assume that the Deputy Executive Secretary had issued the offer of appointment in full knowledge of Mr. Kauf's status as a consultant, which is not the case here as per the evidence on file, this could not be construed as a waiver of the latter's ineligibility to apply for or be appointed to the post, as the Deputy Executive Secretary's will could not override the law expressly forbidding it. Further, as correctly found by the UNDT, in light of the specific circumstances, Mr. Kauf was not allowed to place reliance on assurances given on a mistaken belief, if any, that he was eligible, which he was not, nor could any estoppel arise thereunder.

The issue of compensation

32. Mr. Kauf, knew or ought to have known that his application for appointment was subject, *inter alia*, to the provisions of Section 3.15 of ST/AI/2013/4, which prohibited his appointment to posts for a period of six months following the end of his consultancy. Candidates for a public post are presumed to know the rules applicable to the employing public corporation.¹⁸ However, in breach of the prohibition, he applied for the position of Senior Economic Affairs Officer, ECE, while he was still engaged as a consultant with ECE in the Sustainable Transport Division. Moreover, as already noted, the information he provided on his PHP form through Inspira, on the basis of which he was issued the offer of appointment, was objectively inaccurate. As a result, his candidature to the post was not automatically screened out as being ineligible, which would have occurred, had he declared the true status of his employment.

33. The maxim "he that comes to equity must come with clean hands"¹⁹ is of direct application here. Mr. Kauf cannot be allowed to knowingly breach the rules, engage in an activity which is unlawful and then seek compensation. The integrity of this justice system and the administration of justice must be protected and maintained, and the Appeals Tribunal will not allow Mr. Kauf to profit from his own wrong.

¹⁸ *El-Khatib v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-29, para. 16.

¹⁹ *Amarah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-898, para. 28.

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