



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/033

Judgment No.: UNDT/2019/005

Date: 16 January 2019

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ROSS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Louis-Philippe Lapicerella, UNHCR

Introduction

1. The Applicant is a former Senior Protection Officer with the United Nations High Commissioner for Refugees (UNHCR).

2. In this application dated 29 April 2016, he is contesting the High Commissioner's decision not to appoint him to the position of Senior Protection Officer in Rabat, Morocco, received by him on 23 December 2015.

3. The Respondent filed a reply on 27 May 2016.

4. A case management discussion was held on 17 October 2017, following which the parties filed amended pleadings and the Respondent provided additional documents. The Applicant, in turn, withdrew his motion for the production of documentation outlined in paras. 17 – 20 of his application. Both parties declared that documentary evidence was sufficient and they did not deem a hearing necessary.

5. The case was suspended during the period 20 November 2018 to 31 January 2019 pending mediation, together with other four cases filed by the Applicant against the UNHCR. On 24 December 2018, the Regional Ombudsman, Office of the Ombudsman for Geneva, informed the Tribunal that the mediation had failed.

Facts

6. The facts as set out below are undisputed and/or result unambiguously from the submitted documents.

7. On 3 November 2008, the Applicant joined UNHCR in the Legal Affairs Service as a Legal Officer at the P-3 level. On 1 November 2010, he was selected for the position of Senior Protection Officer in Sudan. On 1 January 2013, he was

temporarily reassigned as Legal Officer Nairobi, Kenya, in Private Sector Fundraising (PSFR).

8. From 1 July 2013 to 1 July 2015, the Applicant was on special leave without pay.

9. On 1 July 2015, the Applicant returned from special leave without pay and accepted a temporary assignment to a Senior Protection Officer's post at the P-4 level in Rabat.

10. On 6 November 2015, the High Commissioner promoted the Applicant to the P-4 level. Subsequently, a controversy ensued as to whether this promotion took effect only upon the Applicant being successful in a selection for a P-4 position or independent of it. This issue was resolved in March 2016 through confirmation that the promotion was unconditional and in effect.

11. The position the Applicant was temporarily encumbering was advertised as part of the September 2015 compendium as a regular post and the Applicant applied for it.

12. The Division of Human Resources Management (DHRM) sought from the Hiring Manager his views on all of the candidates in accordance with the UNHCR *Revised Policy and Procedures on Assignments* (RPPA). The Hiring Manager for this particular post was Mr. Jean-Paul Cavalieri, who had supervised the Applicant from 1 July 2015. Mr. Cavalieri expressed his strongest preference for a female candidate. As an alternative, he had also expressed his preference for two male candidates. In his views concerning the Applicant's candidacy, Mr. Cavalieri provided reasons for not recommending the Applicant, this being lack of demonstrated leadership skills and sufficient experience in Refugee Status Determination (RSD).¹ At the time, the Applicant's promotion had not yet taken place.

13. On 30 November 2015, DHRM reviewed all the candidacies for the position as

¹ Annex R-1 to the reply, at page 13.

well as the manager's views relating to these applicants and recommended to the High Commissioner, Mr. Madjora, a candidate who had received the third highest recommendation from Mr. Cavaliere. At this point the DHRM already had information of the Applicant's promotion, albeit considered it conditional upon the Applicant's actually being recruited for a P 4 position.²

14. On 23 December 2015, the Applicant received a notification informing him that the High Commissioner had selected Mr. Madjora for the position of Senior Protection Officer.

15. On 8 January 2016, the Applicant obtained from DHRM the Manager's views pertaining to his candidacy. Dissatisfied with their contents, on 14 January 2016 the Applicant complained to the UNHCR Deputy Director, Africa Bureau, against Mr. Cavaliere for not recommending him for the position.³ The subsequent investigation into the matter did not find grounds to impugn the conduct of Mr. Cavaliere.⁴

16. In mid-January 2016, the Applicant took annual leave followed by special leave without pay and returned to Nairobi. The Applicant remained in Nairobi until the expiration of his fixed term appointment on 31 March 2016.

17. On 28 January 2016, while away from his temporary duty station in Rabat, the Applicant had a telephone conversation with Ms. Shoko Shimosawa, Deputy Director of Middle East and North Africa Bureau. During this conversation, Ms. Shimosawa informed the Applicant that the selected candidate – Mr. Madjora – was no longer available to take up the assignment. Therefore, Ms. Shimosawa informed the Applicant that Mr. Cavaliere and Ms. Farkas, Director of DHRM, were both prepared to

² Annex R-1 to the reply.

³ Annex 7 to the application.

⁴ Annex R-3A to the reply.

recommend him for the position. In an email dated 29 January 2016, the Applicant thanked Ms. Shimozawa and requested time to consider the offer.

18. In an email dated 31 January 2016, the Applicant informed Ms. Shimozawa that he was no longer interested in the assignment:

We discussed it at length this weekend and came to the conclusion that Rabat is not an option for us anymore. I hope you understand. I nevertheless would like to thank you for your efforts in this regard.⁵

19. On 1 February 2016, after the Applicant had declined the offer to be recommended for the position, the Respondent re-advertised the vacancy announcement.⁶

20. The following day, 2 February 2016, Mr. Cavaliere sent a reconciliatory email to the Applicant explaining his position at the time of the expression of his views as manager as well as why currently he was ready to change his views and recommend the Applicant.⁷

21. On 15 February 2016, the offer was reiterated by Ms. Karen Farkas, the Director of DHRM, who wrote the Applicant:

Please also let me know whether you would be interested in the offer for an extension of the temporary assignment and whether you might reconsider being recommended to the position of Senior Protection Officer in Rabat, Morocco.⁸

22. The Applicant did not apply for the re-advertised position.

23. On 12 May 2016, the High Commissioner appointed another staff member to the re-advertised position.⁹

24. On 1 February 2016, the Applicant requested management evaluation of the

⁵ Annex R-2 to the reply.

⁶ Annex R-5 to the reply.

⁷ Annex R-8 to the reply, at page 5.

⁸ Annex 11 to the application.

⁹ Annex R-6 to the reply.

decision not to select him for the position of Senior Protection Officer in Rabat.

25. On 29 March 2016, the Deputy High Commissioner upheld the contested decision.

Applicant's case

He was not given a full and fair consideration

26. The Respondent initially insisted that the Applicant's promotion was subject to the appointment to a new P-4 position and would thus only be implemented once the Applicant was appointed to a new P-4 position. Only in March 2016, the Respondent conceded that the promotion was unconditional and retroactive. This error impeded him during the selection process for the Senior Protection Officer regular position because he was not given priority (or at least high preference) due to him because of his grade as foreseen by the RPPA:

Paragraph 68h

All applicants at the grade level of the position shall be considered individually. If such an applicant is matched, no further consideration of candidates who are at a grade level lower than the position level shall be required. However, if an applicant with a grade lower than that of the position is considered, then all applicants with that grade level shall be considered.

Paragraph 75

For the matching and selection process, DHRM will apply the criteria below. The criteria and annotations will not be applied in any order of priority, with the exception of grade of applicant, competencies and performance which will be given more weight. [...]

Paragraph 79 A (excerpt)

Preference will be given to staff members at the grade of the position, including those who have been promoted subject to an assignment at the relevant grade. Under filling may be acceptable when "successfully meets performance expectations" is indicated in the last completed performance appraisal and one or more of the following criteria are met:

- the staff member: has seniority in grade beyond minimum eligibility for promotion;
- to encourage rotation to hardship duty stations (C,D,E and unclassified categories);
- when analysis shows that there are no suitable applicants at the grade of the position and when DHRM can demonstrate that efforts have been made to contact eligible non applicants at the grade of the position and encourage them to express interest and where such interest was not expressed.

27. The Applicant maintains that, notwithstanding the contradiction in the cited provisions of the RPPA as to whether an applicant at the grade of the advertised position enjoys priority consideration under para. 68 or only preferential consideration under paras. 75 and 79A, his grade entitled him to be given, at minimum, a high preference. However, there is no indication that he was given any of these in the matching exercise.

28. Moreover, there was a violation of procedure in that, as the DHRM Final Recommendation Meeting minutes show¹⁰, no matching was conducted whatsoever. Instead, DHRM simply accepted the manager's views on the different candidates and ruled out one candidate at the P-4 level after another, based on whatever argument was used by the manager to exclude them. It was *de facto* the manager who conducted a selection process outside the matching procedure, even though the managers are only meant to provide views.

29. The manager, Mr. Cavalieri, lied about the Applicant's lack of leadership and other pertinent skills in his input in the selection process. These lies influenced the outcome. This was done to block the Applicant and secure the selection for the preferred candidate.

¹⁰ Annex R-1 to the reply at pages 21-23.

The case has not become moot

30. The Applicant maintains that the case has not become moot by his declining the subsequent offer by Mr. Cavalieri and DHRM to be recommended for appointment by the High Commissioner. This would require granting him a remedy that fully made up for the violation of his rights. Whereas the Applicant has only been offered that the Director of DHRM would pursue an option that only could have led to the Applicant's appointment. This offer was neither an appropriate remedy, nor was it a comprehensive remedy as it might not even have resulted in the Applicant's appointment.

31. The procedures in UNHCR do not foresee for a non-recommended candidate, like the Applicant, to be appointed. Normally positions are re-advertised and a new selection process is carried out if an appointed candidate does not take up the appointment. The only lawful way to appoint a candidate from the initial round of candidates would have been for the High Commissioner to rescind the initial decision because it was flawed and either re-examine the candidates himself or ask DHRM to redo the matching process and make a new recommendation through the JRB.

32. The proposed remedy was inappropriate because Mr. Cavalieri's views as Hiring Manager led to the Applicant not being appointed to the position on which he was serving and seriously damaged the Applicant's reputation. The Applicant also had to fear retaliation from Mr. Cavalieri. There was absolutely no basis for any future cooperation and it could not be expected from the Applicant to continue to serve as Senior Protection Officer under Mr. Cavalieri for the following four or five years after what had happened.

33. What the Respondent should have done is to tell the Applicant that it understands that he no longer wished to serve in Morocco for good reasons and therefore the High Commissioner chose not to reexamine the candidates from the initial selection process, but to re-advertise the position. The Respondent should have then made all efforts to find the Applicant a new temporary assignment and eventually appoint him to a new position. The Applicant declined with good reasons one of many

possible remedies, the offer to pursue an option that could have – under different circumstances – maybe remedied the violation of his rights. Declining the pursuit of this option did not render the Applicant’s case moot.

Relief sought

34. The Applicant had initially requested compensation equalling two-years’ net base salary. According to the amended pleading, the Applicant requests his reinstatement in the service of UNHCR as well as appointment to a position or a suitable temporary assignment.

35. Alternatively, if the Respondent decides not to reinstate him, the Applicant, requests compensation in the amount of three years’ net base salary. Had he been appointed to the position, his appointment would have been extended by three years and the Applicant would have served on the position for at least five years, until the end of the standard assignment length of the position in Morocco. He moreover requests the Tribunal to also award compensation in the amount equal to the contributions that would have been paid to the United Nations Joint Staff Pension Fund for three years.

36. The Applicant further requests the award of moral damages in the amount of six months’ net base salary for the damage to his dignity, reputation and career prospect.

37. The Applicant requests all the payments to be ordered with the appropriate interest.

38. Finally, the Applicant requests the Tribunal to refer for accountability any person found responsible for violation of his rights.

Respondent's case

39. The application is not receivable for two reasons.

a. It does not contest an administrative decision that adversely affected the Applicant's contractual rights or terms of appointment. On 1 February 2016, the Respondent rescinded the contested decision by re-advertising the vacancy announcement for the same position;

b. Any adverse consequence flowing from such a decision is attributable entirely to the Applicant who on 31 January 2016 declined the offer to be recommended for the position and did not apply when it was re-advertised. As it appears from Mr. Cavalieri's courteous and conciliatory email to the Applicant dated 2 February 2016, Mr. Cavalieri was prepared to revise the "manager's views" and express his preference for the Applicant. DHRM also agreed to recommend the Applicant to the High Commissioner. Under his executive power provided for in paragraph 137 of the RPPA, the High Commissioner could appoint the Applicant at any time before, during, or after the selection process.

40. The Respondent further submits that, in any event, even if the application were receivable, it would nevertheless be unfounded since the Applicant failed to establish that he was denied fair consideration or that the contested decision was procedurally flawed or based on extraneous reasons.

41. The Respondent puts forth that DHRM was aware that the Applicant had just been promoted to the P-4 level. DHRM, therefore, asked Mr. Cavalieri whether he wished to amend his views in light of this new development. Mr. Cavalieri declined the opportunity because he was of the view that the Applicant's promotion had no impact on his suitability for the advertised position.

42. Moreover, the Applicant's interpretation of paragraph 68(h) of the RPPA is unfounded. It merely requires that applicants at the grade level of the position, in this

particular case P-4, be matched first. When no suitable applicant at the level of the position can be matched, the Organization is entitled to consider applicants with a grade level lower than that of the position. Further, the Applicant was not the only candidate at the P-4 level considered for this position. Therefore, even assuming for the sake of argument that the Organization was required to select a P-4 staff member, there is no guarantee that it would have been the Applicant. It could have been any of the four P-4 candidates who expressed an interest in this position.

43. There was no ulterior motive on the part of the Hiring Manager in promoting the successful candidate. This is evidenced by the fact that the selected candidate was not the Hiring Manager's preferred candidate. The selected candidate was recommended only in the third position.

44. The offer to recommend the Applicant by the Hiring Manager and DHRM was made not in recognition of a violation of the Applicant's rights but because none of the three recommended candidates eventually proved available to take up the position.

Considerations

45. The primary question to be considered is the content of the right invoked and an appropriate remedy for the alleged infringement. Then, the Tribunal will address the question whether under the circumstances of the case, the Applicant's claim, as articulated in the latest pleading, has been rendered moot. Last, it will address the merits of any unsettled claim.

Content of the right

46. The Tribunal considers that, as firmly established in the Appeals Tribunal jurisprudence, a staff member has a right to be fully and fairly considered for promotion through a competitive selection process untainted by improper motives like bias or discrimination. A candidate, however, has no right to a promotion.¹¹ Specifically, in

¹¹ *Andrysek* 2010-UNAT-070, in *Charles* 2013-UNAT-286, para. 27; *Hersh* 2014-UNAT-433, para. 30; *Wang* 2014-UNAT-454, para. 41; *Luvai* 2014-UNAT-417, para. 32.

relation to priority or preference in the promotion exercise, the Appeals Tribunal has ruled that ‘priority consideration’ cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for; and that to hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under Article 101 of the Charter.¹² It results that, no matter which of the disputed interpretations of the RPPA were to be adopted, the Applicant has no claim to be actually promoted but only to be considered.

Appropriate remedy

47. A violation of the right so defined is optimally remedied where the staff member is placed in the same position he or she would have been in had the Organization complied with its contractual obligations¹³, *i.e.*, when he or she does receive a full and fair consideration in the selection process. In most cases that reach the Tribunal, this kind of restorative remedy is not available due to the acceptance of the offer by a successful candidate; therefore, other remedies are entertained, mainly compensation. Where a restorative remedy is available, however, an applicant does not get to elect another type of relief; alternative remedies could only be negotiated in a settlement.

48. In the Applicant’s case, it was made available for him to, first, accept to be recommended for appointment by the High Commissioner and, second, to apply for the position once it was re-advertised. Both scenarios availed the Applicant of an opportunity to receive not just consideration but also the claimed preference in the selection. The Tribunal finds that reasons given by the Applicant for his refusal to accept recommendation or to re-apply for the post are irrelevant for the question of appropriateness of the offered remedy.

49. As concerns the argument that the first proposal was outside the applicable legal

¹² *Megerditchian* 2010-UNAT-088, at para. 28; See also *Charles* 2012-UNAT-242, at para. 33.

¹³ *Warren* UNAT-2010-065.

framework, the Tribunal notes that information available on the record does not indicate how, in detail, the recommendation of the Applicant for the position as initially advertised would have been effected. What transpires from email exchanges between the Applicant and the Deputy Director of Middle East and North Africa Bureau, and between the Applicant and the Hiring Manager, Mr. Cavalieri, is only that Mr. Cavalieri and the Director of DHRM were prepared to recommend the Applicant for the position. This does not exclude that indeed the DHRM would have redone the matching process and made a new recommendation through the JRB. Alternatively, as pointed out by the Respondent, the RPPA at paragraph 137 confirms the High Commissioner's ultimate discretion to appoint staff as appropriate, notwithstanding the provisions of the RPPA. In any event, it may be assumed that once the Applicant had expressed his interest in the position, the DHRM would have figured out the appropriate modality for proceeding further. At the time the Applicant did not inquire as to how the process was to be implemented; it was also not the perceived illegality that the Applicant had originally put as the reason for his refusal.

50. The illegality argument, obviously, does not stand in relation to the second option, i.e., applying for the position once re-advertised.

51. As concerns the argument that it could not be expected from the Applicant to continue to serve under the supervisor who had expressed negative views as to sufficiency of his skills and experience for the position, the Tribunal disagrees for the following reasons: First, Mr. Cavalieri expressed readiness to revisit his views based on the Applicant's most recent performance and to recommend him for the position. Second, a staff member, and in particular one aspiring to a senior position with managerial responsibility, is expected to respond to criticism in a mature and constructive manner. Mr. Cavalieri's views, albeit critical in part, were done in the exercise of his official function; they were detailed, delivered in an objective, measured and not denigrating fashion, and certainly capable of being discussed. His views regarding other candidates whom he did not support were expressed in the same manner, which belies that Mr. Cavalieri would have discriminated against the

Applicant. Third, these comments appear a one –time antagonizing incident. Whereas the complaint that the Applicant filed against Mr. Cavalieri on 14 January 2016 depicts their rapport as dysfunctional from the onset, an inescapable observation is that the Applicant had nevertheless applied for a regular post in that office and in December 2015 still wanted it; as such, his January 2016 complaints appear as exaggerated reaction to Mr. Cavalieri’s comments. There is no basis to assume that Mr. Cavalieri gave any other reason for conflict. There is, moreover, no basis to presume that, having supported the Applicant for the position, Mr. Cavalieri would have subsequently retaliated against him. As such, it is the Tribunal’s opinion that, indeed it could be reasonably expected of the Applicant to continue to serve under the supervision of Mr. Cavalieri, to undertake to sort out any remaining disagreements in a constructive manner and re-establish a proper professional cooperation. This would not preclude a parallel search for another assignment by the Applicant.

52. In conclusion, the Tribunal finds that the Respondent promptly restored the Applicant in the position in which he would have been prior to the alleged violations, by providing conditions for a full and fair consideration.

Whether the application is moot

53. With respect to the Respondent’s claim that the Applicant’s case has been rendered moot, the Tribunal recalls its holding in *Lahoud*, in that it will consider “an application moot insofar as either the matter is resolved in a manner consistent with the thrust of the application, e.g., the Administration withdrew from the decision or the claim was otherwise satisfied to the effect there is no *gravamen* on the part of the applicant, or the claim cannot be satisfied for objective reasons.[...] However, the question needs to be analyzed in relation to the nature and extent of the claim.”¹⁴ The same idea has been expressed by the Appeals Tribunal’s position that “a court should be astute to reject a claim of mootness in order to ensure effective judicial review,

¹⁴ *Lahoud* UNDT/2017/009 at para. 23.

where it is warranted, particularly if the challenged conduct has continuing collateral consequences.”¹⁵ Accordingly, this Tribunal considers that mootness would be the case had the Applicant requested a rescission of the contested decision. Since the Applicant requests reinstatement in the alternative with financial compensation, plus compensation for moral damage, these are not automatically rendered moot and need to be considered on the merits.

Reinstatement

54. In the first respect, the Tribunal finds no relevant causality between the alleged procedural violations in the selection process and the claim to be reinstated in the service of UNHCR. The impugned decision was not about non-extension of the Applicant’s appointment which happened several months later; moreover, claims related to non-extension of the Applicant’s appointment are subject to another case pending before the UNDT. Neither was it demonstrated that the Applicant, if not for the alleged violations, would have been selected for the advertised post the first time around. Even removing Mr. Cavaliere’s views from the equation, there were other candidates at the P-4 level, possibly with longer seniority at the P-4 grade than one month, as in the Applicant’s case, and there were candidates at the P-3 level who were considered suitable; as such, given the wide discretion exercised by the management in staff selection exercise, the Applicant had not more than a probability to be selected. Therefore, notwithstanding whether indeed there was a breach of the right to full and fair consideration, reinstatement is not an appropriate remedy. By the same token, a compensation *en lieu* is not due.

Moral damages

55. As concerns the request for compensation for moral damage, the Tribunal recalls the Appeals Tribunal’s holding in *Kallon*, that for a breach or infringement to give rise to moral damages, especially in a contractual setting, where normally a pecuniary satisfaction for a patrimonial injury is regarded as sufficient to compensate

¹⁵ *Kallon* 2017-UNAT-742 at para. 45.

a complainant for actual loss as well as the vexation or inconvenience caused by the breach, then, either the contract or the infringing conduct must be attended by peculiar features, or must occur in a context of peculiar circumstances.¹⁶

56. The Applicant maintains that Mr. Cavaliere acted out of improper motive, albeit after the Respondent informed that the successful candidate had been recommended by Mr. Cavaliere in third place only, this allegation shifted from attributing to him the intent to ensure the post for his favourite candidate to attributing him the intent to block the Applicant. Either way, these allegations remain unsubstantiated. The question of the Respondent's liability is thus to be viewed in the contractual regime and not as a tort.

57. The Applicant claims harm inflicted upon his *dignitas*, reputation and career potential. The Tribunal considers that the career potential of the Applicant was not harmed by the Respondent as another opportunity was created for him to run for the post. As concerns dignity and reputation, the Tribunal considers that a negative outcome in the selection exercise, while harming the ego, may not be *per se* impugned as damage to dignity and reputation - as previously noted by this Tribunal in another of the Applicant's cases, being rejected in the process becomes a fact of life for staff members in the increasingly competitive working environment at the United Nations. Moreover, staff selection is not an exact science. Whereas the Applicant persistently calls his supervisor's views "lies", the Tribunal sees them mainly as value judgment, which does not fall to be assessed for veracity; which the supervisor was called to express; and which was expressed in a form that was not inappropriate. The Applicant vehemently disagrees with these views; he, however, did not offer any proof that they would have been patently unsound or malicious. An investigation initiated by the Applicant against Mr. Cavaliere did not confirm abuse of authority in providing his comments. This Tribunal has no basis to find otherwise. In any event, whatever the

¹⁶ Ibid., at para. 62.

Applicant perceives as infringement to *dignitas* and reputation could have been largely redeemed had he accepted his superiors' offer to reprise the process.

58. Another breach of procedure invoked by the Applicant as morally damaging concerns the failure to recognize in the matching procedure the *ex tunc* effect to his promotion to P-4 grade. In this respect, the matching matrix demonstrates that the DHRM recognized the Applicant's promotion as a conditional one, akin to clearance for a P-4 roster rather than an actual promotion. This however is a technical issue, which apparently was unclear to the Respondent; it does not suggest improper motive or ignorance of the Applicant's functional qualifications for a P-4 grade. The question of the effect of the promotion was ultimately clarified in March 2016. Whatever impediment it may have occasioned in the first matching exercise, which has not been demonstrated, it could have been addressed in the reprise.

59. In totality, the Tribunal understands that the result of the process may have occasioned disappointment and the need to repeat it may have caused vexation. It, however, does not find a breach of a great magnitude. The Administration acted promptly to address the Applicant's grievance on all levels. Communications from the Deputy Director of the Bureau, the DHRM and the manager exude helpful attitude, courtesy and a genuine intent to constructively address the problem and mitigate the Applicant's disappointment and vexation. Any lasting consequences of the impugned decision are attributable to the choices made by the Applicant. The Tribunal therefore does not find peculiar circumstances that would warrant moral damages.

Conclusion

60. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 16th day of January 2019

Entered in the Register on this 16th day of January 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi