

UNDT/2020/190, Andrysek

UNAT Held or UNDT Pronouncements

The Applicant, a UNHCR staff member in between assignments (“SIBA”), was placed on SLWOP after having exhausted a nine-month period on Special Leave With Full Pay (“SLWFP”). The Tribunal reviewed the legality of the contested decision in light of the arguments put forward by the Applicant. Is the contested decision consistent with staff rule 5.3? The Tribunal found that the circumstances for the placement of SIBAs on SLWOP are per se exceptional and, consequently, the text of para. 139 of the RAAI is consistent with staff rule 5.3. Staff rule 5.3(f) sets the general principle that a staff member can be exceptionally placed on SLWOP when the interest of the Organization so requires, whereas para. 139(c) of the RAAI simply materializes the conditions under which a SIBA staff member can be placed on SLWOP in the specific context of UNHCR. Therefore, the Tribunal found that there is no contradiction between these two provisions. What is the effect of the “undertaking clause”? The Applicant’s indefinite appointment includes an undertaking clause providing that “[t]he High Commissioner undertakes not to terminate [the] appointment except by applying the termination criteria provided in Staff Regulation 9.1(a) relating to the termination of a permanent appointment”. The Tribunal considered that while termination is not the contested decision in the present case, it is indeed a possible outcome in the long term (pursuant to art. 21 of the UNJSPF Regulations) and should be taken into consideration to determine the obligations of the Organization and SIBA staff members placed on SLWOP when their contract contains the undertaking clause. The Tribunal applied the standard of Timothy 2018-UNAT-847 and considered that there was a shared responsibility between the Administration and the Applicant in finding an alternative position. Have the parties fulfilled their respective obligations? Regular positions: the Tribunal considered that the overall set of factual circumstances, that is, the Applicant’s medical constraint, his limited UN official languages skills, and rotation history, as well as the relatively small number of his applications prior to his placement on SLWOP, combined with his reluctance to be appointed to P-5 level positions and the number of limited vacant positions at the D-1 level, had undoubtedly a negative impact in his chances of

being successfully chosen for another regular position. Bearing in mind the Appeals Tribunal jurisprudence and the relevant facts of the case, the Tribunal was not persuaded that the Administration has failed in its obligations. The evidence rather shows that the Applicant had not made good faith efforts to find an alternative position. Indeed, the Tribunal was persuaded that the Applicant bears a significant share of the responsibility for the situation he is currently in. Temporary positions

The Tribunal found that the Applicant was not selected for temporary assignments in Cox's Bazar and Kabul (positions for which he had been proposed) because he was not found suitable for them. Furthermore, the Tribunal considered that the Organization fulfilled its obligation by (i) proposing SIBA candidates, including the Applicant, with the requesting operations after receiving the temporary assignment requests (ii) making sure that the suitability of the SIBA candidates proposed was assessed for the temporary assignments and (iii) ensuring that external candidates were only considered after the respective managers had duly reviewed all the SIBA candidates and assessed them as unsuitable. Has the discretionary authority for placement been properly exercised? The Applicant claimed that he should have been placed in an alternative position (commensurate with his skills and experience) in accordance with paras. 133 and 134 of the RAAI. The Tribunal found that it was not the legislator's intention to turn the "assignment" of SIBA staff members to regular positions or temporary assignments into an automatic prerogative of said staff members as it would go against the rationale and the main principles that guide the recruitment processes in the Organization. Has the Applicant's right to work been breached? The Tribunal did not consider that the Applicant's right to work has been breached. The evidence showed that the Applicant is not working because he has not been successful in getting an alternative position after the end of his SAL. Nonetheless, the fact that he has not secured a position does not entail an immediate breach of this subjective right. Is the contested decision tainted by improper motives? The Tribunal found that it was not possible to establish a clear connection between the Applicant's lack of success in his applications and the alleged undue interference of his former supervisor in his career progression. For the above-mentioned reasons, the Tribunal found the decision to place the Applicant on SLWOP lawful (majority decision). However, the Tribunal found it unreasonable not to establish a finite period in the RAP or the RAAI, at the end of which, a staff member may be terminated and entitled to the correspondent benefits. The Tribunal also noted that not to include the payment of health insurance coverage and pension contributions in the applicable legal framework for those SIBA staff members who are placed by the Administration on SLWOP creates a heavy financial

burden on the affected staff members who find themselves without a salary but yet with important contributions to be paid. Dissenting opinion by Judge Buffa Contrary to the majority opinion, Judge Buffa considered that the reference to the powers of the High Commissioner (“may” art. 134 RAAI) in the matter, allows the latter to assign to available posts even in the absence of a SIBA staff member's application (provided that the person is suitable for the position), and does not mean, instead, that the High Commissioner has the discretionary power to refuse a suitable position to the SIBA staff member when all the regulatory conditions are met. In his view, notwithstanding the regulatory framework, the Administration did not provide any evidence that the Applicant did not have the qualification or skill required for the available positions and temporary assignments. Furthermore, differently from the opinion of the majority, Judge Buffa considered it completely irrelevant, on the one hand, that the outcome of the specific recruitment or selection procedures was not contested by the Applicant, because he never claimed to be the best or that the procedures were flawed, but he just complained about the non-assignment to the posts/TAs on a non-competitive basis. Judge Buffa considered, as to regular recruitment, that the opinion by the majority that the Applicant was not fully committed to finding alternative employment is not substantiated. With reference to temporary assignments, Judge Buffa found that the opinion by the majority is not founded at all, as in these procedures (where TAs are not advertised) it is incumbent only on UNHCR to offer SIBA staff any available TA. Judge Buffa found that the contested decision was unlawful and should be rescinded. As to remedies, Judge Buffa considered inter alia that the Applicant should be placed in the same situation he was prior to the contested decision, that is on SLWFP for a period of nine months as of the date that this Tribunal’s Judgment becomes executable.

Decision Contested or Judgment/Order Appealed

The Applicant contests the decision to place him on Special Leave Without Pay (“SLWOP”) effective 11 June 2019.

Legal Principle(s)

In the context of judicial proceedings, it is incumbent on the Tribunal to interpret and define the scope of its jurisdictional review based on the application, the management evaluation request and the documents on file. Administrative decisions

taken by the Organization benefit from a presumption of regularity (Rolland, 2011-UNAT-122). The right to work is an essential element of the working relationship and it is also an obligation of the employer towards the employee. However, the different dimensions of this “right to work” need to be considered bearing in mind the context of the case, the applicable legal framework, and the nature of an entity’s mandate.

Outcome

Dismissed on merits

Outcome Extra Text

The case was rejected by majority with Judge Buffa dissenting. A dissenting opinion was appended to the judgment.

Full judgment

[Full judgment](#)

Applicants/Appellants

Andrysek

Entity

UNHCR

Case Number(s)

UNDT/GVA/2019/069

Tribunal

UNDT

Registry

Geneva

Date of Judgement

6 Nov 2020

Duty Judge

Judge Buffa

Judge Adda

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Benefits and entitlements

Applicable Law

Staff Regulations

- Regulation 1.2(c)

Staff Rules

- Rule 5.3(f)
- Rule 9.6(e)

Related Judgments and Orders

2011-UNAT-122

2017-UNAT-730

2010-UNAT-041

UNDT/2010/110

2013-UNAT-282

2010-UNAT-012

2018-UNAT-847