

Case No.: UNDT/NBI/2022/123
Judgment No.: UNDT/2024/060
Date: 12 September 2024

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Aminata Terrine – Assistant Rep Admin – in Lebanon will be in need of placement soon, at the year-end. Her replacement in Lebanon, Irina, is already appointed as well. So, Aminata, would be available quite quickly in September/October - December. We should get her to DFAM for many reasons (we can discuss the details). N.b. She did pass the Regional Controllers Exam and is fully bilingual – French/English. I was thinking to get her into the Cash Hub as a [temporary appointment (“TA”)] – Chief Officer – Oversight for the Cash Hub: September – December – 4 months.

9. On the same day, the DFAM treasurer wrote to the Applicant “Seemingly you are free now? I am preparing the ground for you to come to Geneva!!! Are you ready?” The Applicant responded “Allow me to sincerely thank you for your help

will not be able to proceed as you will need to join your new duty station as soon as possible.

20. Within the week, the Applicant took annual leave from 8 to 31 August 2022. Then, on 1 September 2022, she requested certified sick leave through 15 October 2022. After independent medical evaluations, the Medical Section, UNHCR, determined that the Applicant was fit for work from October 2022 but, since the previous certified sick leave had been granted pending the medical evaluations, her sick leave was granted through 29 December 2022.

21. The Applicant took up her assignment to the Addis Ababa position on 2 January 2023.

Considerations

Receivability

22. Although the application complains of three decisions, this case actually revolves around just one actionable decision, that of 29 July 2022 accepting the Applicant for the Addis Ababa posting. The other two “decisions” are not actionable.

23. As the Appeals Tribunal recently held, an actionable administrative decision must have immediacy, finality and a direct legal effect on the staff member. *O’Brien*, 2022-UNAT-1313. Also, in *O’Brien* (para. 24), the Appeals Tribunal noted that:

Where a decision requires several steps to be taken by different functionaries, only the last of which is directed at the staff member, the previous decisions or actions of the administration lack direct effect, and only the final decision is appealable or reviewable.

25. To the extent that the application can be read as a challenge the decision to cancel the Applicant's recruitment to the Geneva TA it is moot. The Geneva TA was to expire on 23 February 2023 and thus has long since elapsed.

26. In addition, the Applicant was on sick leave from 1 September 2022 until 29 December 2022, amounting to four months of the six-month Geneva TA. Thus, she would not have been able to take up the temporary assignment, and for that additional reason, any challenge to the cancelation of the Geneva TA is moot.

27. Similarly, the response to the Applicant's request for management evaluation was only an affirmation of the 29 July 2022 decision and not an independent actionable decision. "Management evaluation is a mere condition of receivability of an application before the UNDT and does not form part of the contested administrative decision". *Nadeau*, 2017-UNAT-733, para. 36, citing *Kalashnik* 2016-UNAT-661, para. 29.

28. Thus, it is clear that these "decisions" are not reviewable and that those parts of the application raising them are not receivable.

29. Regarding the real decision in this case, the 29 July 2022 appointment of the Applicant to the Addis Ababa assignment, this challenge may also be not receivable

2011-UNAT-122, para. 26; *Russo-Got* 2021-UNAT 1905, para. 32; *Mirella* 2023-UNAT-1334, para. 61).

32. As noted above, the Applicant raises several arguments against the decision. The first of these is that the decision violated the principle of good faith and fair dealing in several ways, which will be examined *seriatim*.

33. First, the Applicant complains that there was no prior consultation with her, citing *Chemingui* 2019-UNAT-930, paras. 39 and 45. However, this argument is

36. Even if *Chemingui* were applicable, there is plenty of evidence that the Applicant was consulted in connection with this appointment. As set forth above, the Applicant discussed her predicament with the Head, ACMS, DHR, UNHCR. The Applicant agreed that the ACMS Head would advocate on the Applicant's behalf with the Representative in Addis Ababa to see if he could defer filling that post for six months to allow the Applicant to also have the Geneva TA.

37. However, the Applicant ignores that in those discussions she was advised repeatedly that "an assignment always takes priority over a TA" and that, if the Addis Ababa assignment would not be delayed, "then the TA could not take place".

38. As promised, the ACMS Head did discuss the matter with the Representative in Addis Ababa, who was sympathetic to the Applicant's request, but was unable to delay having the Applicant take up the Addis Ababa assignment for valid organizational reasons.

39. Thus, the record is clear that there was ample consultation with the Applicant and consideration of her desires. Consultation and consideration do not require capitulation, contrary to what the Applicant's argument implies.

40. Next, the Applicant cites UNHCR/AI/2017/7/Rev.2 (Recruitment and Assignments Administrative Instruction – "RAAI"), which at para. 118 provides for the Division of Human Resources to designate someone "to provide technical guidance and any other information that they may have at their disposal to facilitate the work of the [Joint Review Board]".

41. The Applicant argues that the DHR designee should have told the Joint Review Board about the Geneva TA and that the failure to do so was a "violation of mandatory procedures".

42. However, the Applicant points to no mandatory procedure that requires the DHR to advise the Joint Review Board of other recruitments for which a candidate has applied.

43. Indeed, it must be recalled that the work of the Joint Review Board is to select the best qualified candidate for a given vacancy.

44. According to RAAI para. 10, the “paramount consideration in selecting candidates for appointment and assignment is the necessity of securing the highest standards of efficiency, competence and integrity in UNHCR’s workforce in accordance with corporate and operational needs and priorities, taking into consideration the personal and professional needs of individuals to the extent

50. Similarly, her quotation of RAAI para. 14 omits crucial language that explains the paragraph. The entire paragraph reads (italics used to show language that the Applicant omitted in her argument):

Afin d'aider les membres du personnel à faire des choix de carrière éclairés, le HCR fournit des informations spécifiques aux pays, y compris des renseignements détaillés sur les conditions de vie et de travail, indiquant également toutes difficultés que certains fonctionnaires pourraient rencontrer durant une affectation en raison de leur genre, de leur identité, de leur handicap (note en bas de page omise), de leur situation familiale ou de contraintes médicales ou particulières. Le HCR remédiera à ces difficultés, dans la mesure du possible. Il encouragera l'équilibre vie professionnelle-vie privée et tiendra compte du bien-être et de la sécurité du personnel, ainsi que de l'exposition prolongée à des conditions de travail difficiles ou d'isolement.

51. When read in its entirety, the paragraph clearly states that it provides access to cited information “to help staff members make informed career choices”. What the Applicant ignores in her argument is that she made the informed career choice to apply for the position in Addis Ababa and never withdrew that application.

52. Her unwillingness to acknowledge this is obvious as the Applicant cites the mandatory rotation principle within UNHCR, as set forth in RAAI para 44. She argues that the Geneva TA “perfectly responded” to this principle but ignores the plain fact that the Addis Ababa assignment also accords with the principle of mandatory rotation.

53. In sum, the evidence is clear that the impugned decision fully complied with any obligation of good faith and fair dealing.

54. Finally, the Applicant challenges the decision on the grounds that it was not properly motivated and was arbitrary and capricious. She claims that the Administration gave no reasons for its decision to assign her to Addis Ababa, but that is simply not so.

55. The record demonstrates that the Applicant was told, in an email on 2 August 2022, the basis for the decision:

While [the Representative in Addis Ababa] is very sensitive and sympathetic to your request, unfortunately he is unable to wait for six months for you to take up your assignment. We have tried to look for a TA option to replace you in Addis for six months but unfortunately we have no one available who could do this job. It is one of the hardest roles to fill and there are simply no colleagues free who could step in and do the job. The position has been vacant for a long time and we have been unable to bridge the gap with a TA so

59. The Applicant claims that “[t]he post had been vacant for some time, having attracted no candidates. The Organization simply took advantage of the fact that the Applicant was in the middle of moving to take up an assignment in Geneva in order to fill a difficult post. This violates all the principles that should govern the assignment of staff members” (para. 42 of the application, English translation).

60. A more objective view is that the Applicant applied for the Addis Ababa assignment and was selected as the best candidate. To the extent that the assignment in Addis Ababa was a difficult post to fill, the Organization took advantage of the fact that someone with “demonstrated UNHCR leadership in administration and finance, in several contexts, for close to two decades, including in very complex situations” had applied for the position. There is nothing improper about that.

61. When the Applicant asked to defer her assignment to take the Geneva TA first, the Organization tried to accommodate her without success. Thus, the “paramount consideration” dictated that she takes up her assignment as scheduled, and there is nothing improper with this.

62. The Applicant’s requested remedies (sec. IX of the application form) offers a window into her mindset, and the nature of this claim. She asks the Tribunal to:

- a. Rescind the contested decisions;
- b. Order the Applicant’s reinstatement in the post of Assistant Treasurer (P-5) in Geneva or to order the Organization to either offer her a post in Geneva at the same grade and commensurate with her qualifications, or to pay her USD199,944 in damages for loss of opportunity and damage to her career; and
- c. Pay her USD50,000 in compensation for moral and psychological harm, plus USD5,000 for legal expenses.

63. In these requests, the Applicant is seeking more than she would have received had the challenged decision(s) not been made. The Geneva post was a temporary assignment until 23 February 2023. Yet, she asks to be awarded a long-term assignment as Assistant Treasurer (P-5) in Geneva or, in the alternative, a post at the same grade and commensurate with her qualifications.

64. The Respondent asserts that the Geneva TA was downgraded to P-4. Thus, granting the Applicant's requested relief would require removing someone else from an existing post, creating a post specifically for the Applicant or scrapping any existing recruitment to give the post to the Applicant. Of course, the Tribunal's power is limited by art. 10.5 of its Statute and these requests exceed that authority.

65. It is obvious that the Applicant has failed to show that the impugned decision was unlawful in any way.

66. Of course, it is unfortunate for the Applicant that she could not realize both her desire to work at least temporarily in Geneva and her need for continued longer term employment. However, if her desire for Geneva was so great, it was always within her power to withdraw her Addis Ababa application and decline this assignment at any time.

67. The Tribunal is not unmindful that this would have ramifications for the Applicant's career, but all decisions have consequences. To choose is to forsake. Thus, the common phrases in French and English: "On ne peut pas avoir le beurre et l'argent du beurre" and "you can't have your cake and eat it too".

Conclusion

68. In view of the foregoing, the Tribunal DECIDES to dismiss the application in its entirety.

(Signed)

Judge Sean Wallace

Dated this 12th day of September 2024

