



Before

Registry:

Registrar:

Council
Secretary

Council
Member
Lawyer

INTRODUCTION AND PROCEDURAL HISTORY

1. The Applicant is a former staff member of the United Nations High Commissioner for Refugees (UNHCR). On 30 July 2016, he filed an application with the United Nations Dispute Tribunal (the Tribunal/UNDT) contesting the decision not to renew his fixed term appointment (FTA) and to separate him from service (Case No. UNDT/NBI/2016/054)
2. On 9 March 2018, the Applicant filed an application requesting suspension of the decision “to insert adverse material into [his] online personnel file” (Case No. UNDT/NBI/2018/035). The Tribunal granted the application for suspension of action and directed the Respondent to “immediately” remove the adverse material from the Applicant’s online personnel file pending the result management evaluation. This case was closed on 6 March 2018.
3. On 28 March 2018, the Applicant filed a substantive application challenging the decision to insert adverse material into his online personnel file (Case No. UNDT/NBI/2018/040).
4. He filed a third application on 18 August 2018 challenging the decision to appoint another candidate to the position of Senior Protection Officer in TUN 14082, (Case No. UNDT/NBI/2018/083)
5. The Respondent filed replies to the three of 2018 challenges.

po-16(n)

Ombudsman and Mediation Services (UNOMS) 14 November 2018 for mediation and suspended proceedings until 24 January 2019.

8. UNOMS informed the Tribunal on 21 December 2018 that the parties had been unable to reach amicable resolution through mediation

9. By Order No.080 (NBI/2019) dated 25 June 2019, the Tribunal directed the Respondent to file, on an *ex parte* basis, an unredacted copy of the "DHRM Shortlisting Matrix for JO 14082 and submissions in relation to Case No. UNDT/NBI/2018/083. The Respondent complied on 27 June 2019.

10. On 30 June 2019, the Applicant filed three motions relating to additional information/evidence, witnesses and moral damages.

FACTS

11. The Applicant entered service with UNHCR on 3 November 2008 as a P3 Legal Officer in the Legal Affairs Service (LAS) in Geneva, Switzerland. From 1 November 2010 to 31 December 2012, he served as a Senior Protection Officer in Kassala, Sudan; from 1 January to 30 June 2013, he served on a temporary assignment as Legal Officer in Nairobi, Kenya; and from 1 July 2013 to 30 June 2015, he was on special leave without pay for family reasons.

12. On 1 January 2015, the High Commissioner promoted the Applicant to the P-4 level while he was on special leave without pay.

13. On 1 July 2015, the Applicant commenced a temporary assignment as a Senior Protection Officer in Rabat, Morocco. His temporary assignment was extended until 31 March 2016.

14. The P4 Senior Protection Officer position in Rabat was advertised as a regular post as part of the September 2015 compendium. The Applicant applied for the post.

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25.

still. Grateful if you could let me know and also whether we should pass this course of action through LAS?"

32. Mr. Pasquali responded to Ms. Karlsson's email as follows: "[...] Concerning the flag, I am going to ask Zin to include the consult per/ex notation in the last row of the MSRP."

33. A note was included in the Applicant's record in the MSRP that read

concerted efforts to comply with Order No. 032 (NBI/2018) and therefore rejected the Applicant's motion for interim measures on 6 April 2018⁴

46. On the same day, the Applicant wrote to Respondent's counsel reiterating his disagreement with the annotation, his view that he was *de jure* blacklisted and a request that the annotation be deleted in its entirety.

47. The Applicant requested management evaluation of the decision not to select him for the Senior Protection Officer post in Tunis on 7 April 2018. The Deputy High Commissioner upheld the selection decision in a response dated 22 May 2018.

48. The Respondent's counsel responded to the Applicant on 25 April 2018 informing him that the 19 March 2018 decision of the Deputy High Commissioner would remain in effect and that "[...] it is proposed to insert into your personnel file the comments contained in your email of 6 April 2018. That is, a hard copy of your email to me of 6 April 2018 would be placed in your physical Official Status File and the contents of that email would be inserted as text into MSRP under your entry."

49. On the same day, the Applicant objected to the inclusion of any annotation in his electronic or physical OSF on the basis that it was discriminatory and illegal. He requested again that the annotation be deleted entirely.

50. According to the Respondent, he understood the Applicant's 25 April 2018 email to mean that the Applicant did not want his comments to be inserted in his OSF. However, the Respondent has neither modified the annotation in the Applicant's MSRP nor has he added the Applicant's comments to his OSF.

⁴ Order No. 045 (NBI/2018).

PRELIMINARY MATTERS

Hearing

51. Pursuant to art. 16.1 of the UNDT Rules of Procedure, the Dispute Tribunal has discretionary authority as to whether to hold an oral hearing. Additionally, art. 19 of the Rules of Procedure provides that the Tribunal may at any time ~~in a case~~ order or give any direction which appears to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

52. In *Lee* 2015-UNAT-583, the Appeals Tribunal held that:

17. It is clear that the UNDT has broad discretion in managing its cases and rightly so, since the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and to do justice to the parties. This discretion, though broad, is not unfettered and the exercise thereof ought not to be arbitrary and/or improper.

18. In the absence of an error in the procedure adopted by the UNDT which may render the hearing of the case unfair, the Appeals Tribunal will not interfere with the discretion of the UNDT to manage its cases. In the instant case, the UNDT was in possession of the respective applications and documentations which it considered to be sufficient to make the relevant decisions to facilitate the fair and expeditious disposal of the case.

53. It is clear from the UNDT Rules of Procedure and the Appeals Tribunal's jurisprudence that a hearing is not mandatory for every case. Whilst the Tribunal may take the parties' views into consideration, the decision to hold an oral hearing lies squarely within the authority of the Tribunal.

54. In the present matter, the Tribunal has concluded that the parties have submitted a substantial and sufficient amount of documentary evidence to allow it to render decisions on the issues raised without resort to an oral hearing. A determination will therefore be made based on the parties' pleadings and supporting documentation.

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will determine which evidence in Ms. Pace's statement is relevant and decide on the weight to be accorded.

ISSUES

62. The issues for determination are:

- a. Was the decision not to renew the Applicant's Fixed-Term Appointment (FTA) and to separate him from service made in compliance with the UNHCR's policy on the administration of Fixed Term Appointments (UNHCR/HCP/2015/9)?
- b. Was it lawful for UNHCR to insert adverse material into the Applicant's online personnel file after his separation from service?
- c. Is the A

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to separate him. Two of them, the former UNHCR Legal Advisor, Mr. Frits Bontekoe, and the Senior Legal Officer, Ms. Elizabeth Brown, held grudges against him for various reasons. Additionally, Pasquali and Ms. Farkash harbored animosity against him because of his complaints and his challenges against two selection processes at the beginning of 2016. They retaliated against him by ensuring his appointment was not renewed.

g. The Applicant was not the author of his own misfortune because he had every intention of being appointed to a regular position and made best efforts in this regard. Between April 2015 and April 2016, he unsuccessfully applied for a position. The selection process was not renewed.

Senior Protection Officer post in Rabat, Morocco, which was encumbered by the Applicant under a temporary assignment, he challenged the decision and filed a complaint against his supervisor. Thereafter, the Applicant whose temporary contract was to expire on 31 March 2016, informed the Director of DHRM on 28 January 2016 by email that he was taking annual leave until 21 February 2016.

66. In the same email, the Applicant also asked the Director of DHRM to end his assignment in Morocco immediately because he could no longer work with his supervisor and to offer him another suitable assignment.

67. It is also established that on the same day, 28 January 2016, the Applicant was informed that the selected candidate had declined the Senior Protection

Applicant on 24 March 2016 by a letter dated 18 March 2016 that since there was no notice of extension of his contract, he would be separated on 1 April 2016.

71. It is not contended that the discussions about the Applicant taking up a temporary position in Djibouti were concluded by 18 March 2016 when he was informed that there was no funding to support the position. In those circumstances, it was only proper to separate the Applicant on 1 April 2016 since he would not be sitting on any post by 1 April 2016. The fact that the notice of separation for 1 April 2016 was conveyed to him on 24 March 2016 while the letter was dated 18 March 2016 did not materially affect the separation.

72. Similarly, the Applicant's argument that his services were solicited and that the Respondent did not make any efforts to maintain his services has no merit because he elected to leave his temporary assignment ahead of its expiry date and declined to be recommended to the position he had previously applied and competed for. It is difficult to understand how a staff member, who refuses to accept an extension of his temporary assignment and an offer to be recommended for a regular position, turns around to blame the Organization for not extending the same contract.

73. The Tribunal agrees with the Respondent's submission that the Applicant knowingly assumed the risk of not being able to secure another assignment or position before the expiration of his FTA on 31 March 2016 when he declined the offer to be recommended for the regular budget position in Rabat as well as declining the extension of his temporary assignment. This application in these circumstances constitutes an abuse of the Tribunal's process since the Tribunal is not a playground. The Applicant cannot blow hot and cold at the same time.

74. The Respondent correctly submitted that pursuant to the UNHCR policy, a recommendation from a staff member's supervisor to renew his or her FTA is required for a renewal and that since the Applicant had no position at the time of the expiration of his FTA, he had no supervisor to recommend a renewal of his FTA. Paragraph 14 of the said policy provides that a recommendation by the staff

member's manager is to be supported by a performance appraisal with at least an overall rating of "successfully meets performance expectations" for the renewal of the staff member's FTA.

75. The Tribunal also agrees with the Respondent that the fact that the Applicant was negotiating a possible assignment did not earn him a right to renewal of his FTA on a position he had declined to continue. Save for unsustainable and unproven allegations, no evidence of extraneous reasons for the non-renewal of the Applicant's FTA was tendered.

76. As to whether the decision not to renew the Applicant's FTA and separate him from service complied with the UNHCR's policy on the administration of FTAs, the Tribunal is of the firm view that this legislation was fully complied with in the prevailing circumstances.

Conclusion

77. Accordingly, Case no JNDT/NBI/2016/054 fails. There is no merit in the Application.

Was it lawful for UNHCR to insert adverse material into the Applicant's online personnel file after his separation from service?

UNHCR once it became clear that he was still an internal candidate they blacklisted him as retaliation for seeking legal redress regarding another selection process.

c. The annotations sanctioned by Mr. Pasquali was only visible to human resources and administrative staff worldwide. Since it was the last annotation, it was the most prominent entry displayed in the Applicant's electronic OSF. Since the annotation was sanctioned by the Deputy Director of DHRM, Mr. Pasquali, the message that the Applicant was not to be rehired was very clear.

d. The amended annotation still constitutes adverse material that obstructs the Applicant's right to full and fair consideration in any selection process. Asking staff members to consult Mr. Pasquali does not resolve the problem because he is the person who sought to blacklist him in the first place. The Applicant is still *de facto* blacklisted and this is unlawful.

e. There is no legal basis or justifiable reason for the annotation.

f. The electronic OSF the Applicant was given access to was not a true copy of the physical file. Unlike the physical file, the electronic file contained the illegal annotation.

g. The new Director of DHRM tried to cover up the fact that the Applicant had been blacklisted by providing him with a fact sheet that had been tampered with.

h. UNHCR has failed to investigate the Applicant's complaints of serious misconduct against several senior officials and to protect him from further harassment.

i. The Applicant was not selected for the Senior Protection Officer position in Tunis because of the blacklisting. If he had been selected, he

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would have been rehired by UNHCR as of 1 January 2018 on-a two

human resources to flag a range of typical situations that may affect staff members and which require consultation with a senior DHRM staff member and various units within UNHCR. It does not prevent former staff members from being reemployed.

d. The annotation was used in the Applicant's case to ensure a coordinated and meaningful response to his various requests that were sent to several staff members of UNHCR. The Respondent does not deny that some of the Applicant's requests related to legitimate matters but the quantity and accusatory content of his messages, as well as the Applicant's desire to involve senior UNHCR officials in his issues, necessitated that the Respondent take this action to coordinate his responses.

e. The Organization does not have any rules prohibiting the inclusion of a mention or a note requiring a coordinated response in a staff member's OSF.

f. ST/AI/292 does not apply to UNHCR since it has not formally accepted the applicability of⁵ it. Nonetheless, in light of the Treef -76 Tm [(5)] TJ ET Q q B

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include annotations in the staff member's MSRP files ~~adopted~~ or any statistics to show that such a practice existed.

83. The Tribunal concluded that based on the evidence before it, the decision to place the contested annotation on the Applicant's file ~~was~~ *prima facie* unlawful and ordered that it be immediately removed pending the result of management evaluation.

84. The substantive case now before the Tribunal is that rather than remove the adverse annotation, the Respondent amended it in management evaluation to read instead, "In case of queries or requests administrative action by the staff member, for purposes of coordination please contact Deputy Director, DHRM."

85. In his Reply, the Respondent claims that the annotation with which he replaced the one that the Tribunal had ordered him to remove following SOA is not adverse material. He continued that although ST/AI/292 does not apply to the UNHCR, he nevertheless applied the safeguards in that legislation by his new/amended annotation to the Applicant and his comments. The Applicant objected to it and asked that it be deleted.

86. The Respondent also claims that the new annotation is meant to accurately reflect the Organization's intention and ensure that the said annotation cannot be misconstrued.

87. The Tribunal recalls that during the ~~high~~ *high* of the suspension of action application that preceded the substantive applica Q q BT /F1 7(a)3(c)3(c)[(i)Q q BT /F1 12.0 -22

members of UNHCR about human resources matters and made accusations against some totally disingenuous

89. The initial annotation that was later varied or modified following the order of the Tribunal spoke volumes. It directed that the Chief of a section of UNHCR be contacted before recruiting the Applicant to any position in the Organization. The new annotation directs that where there are requests for administrative action by the Applicant, the Deputy Director of Human Resources should be notified.

90. The fact that the words, "for purposes of coordination" are added is of little consequence. The Respondent's intention to flag any contact made by the Applicant to certain UNHCR officials, including any job application by him is alive in the present annotation as it was in the previous one against which the Tribunal made an order.

91. The Tribunal is not satisfied that

94. The Tribunal further finds that while the instructions of Mr. Pasquali and the Deputy High Commissioner to include the

96. The Applicant's case is as follows:

- a. He was never formally notified of the appointment decision. He points out that UNHCR does not generally notify former staff members individually of appointment decisions. He only found out about the decision informally in mid-February 2018 when he talked to a former colleague. He then filed a timely request for management evaluation on 7 April 2018.
- b. He was still an internal candidate when he applied for the Senior Protection Officer post in Tunisia. This matter is closely connected to his illegal separation as well as his blacklisting by UNHCR officials.

Considerations

97. Even though the Applicant had been separated, he continued to have a legal relationship with the Respondent for purposes of internally advertised positions. It is not contested that at the time that he applied for the Senior Protection Officer position in issue, the Applicant remained an internal candidate.

98. To the extent that the Applicant could apply to internally advertised positions, he remained an internal candidate for purposes of the vacancy advertisement to which he applied. 0.0 2126-20(s)-11(i)3 0.0 17(v)-20(i)17(du230(a)1Q0s)-

Applicant learned of his non-selection unofficially in the middle of February 2018 and filed a management evaluation request against it on 7 April, the Tribunal finds and holds that the Applicant was not out of time.

101. Regarding the limited protection that a non-staff member may enjoy in applying to this Tribunal which has jurisdiction to receive applications from staff members and those who sue on behalf of deceased staff members only, the Tribunal recalls the case of Trudi. In that case, the application of a non-staff member whose letter of appointment was withdrawn by the Respondent due to the refusal of the host country to grant her a visa, was entertained by the Tribunal. The applicant was granted compensation only because the Respondent failed to promptly inform her that the contract of employment was frustrated due to the actions or decisions of a third party.

Conclusion

102. In view of the foregoing review, the application is receivable

Was the Applicant given full and fair consideration for the position of Senior Protection Officer in Tunis, JO 14082?

Submissions

103. The Applicant's case is as follows:

- a. He was an internal candidate in accordance with paragraph 20 of UNHCR's Revised Policy and Procedures on Assignments
- b. Based on the documentation provided by UNHCR, his candidacy was not considered at all in the selection process because he was excluded from the process at an early stage due to his blacklisting
- c. The selection documentation provided has no probative value because it was created *post factum* to support UNHCR's arguments. In

⁶ UNDT-2018-049

support of this contention reference is made to the documents submitted by UNHCR in another matter, Case No. UNDT/NBI/2016/9.

d. UNHCR probably submitted flawed documentation because the second candidate in the table (pages 45/46 of the annexes) has no manager's views and nevertheless appears to have been appointed. This means that either the High Commissioner did not follow the recommendation of DHRM and appointed a candidate who was not on the shortlist or whoever put the table together made a mistake. Candidates 1 and 2 are probably the same person because the last two names of the candidates are the same length and the row of candidate 2 contains no other information.

e. The table is also incomplete because it does not contain the Career Management Support Section (CMSS) Suitability Assessment. This would contain the suitability assessments for most candidates. He suspects that the CMSS is missing because UNHCR most likely never assessed his application since his application was taken out of the selection process from the very beginning.

f. The Applicant submits further that he would have had high chances in the selection process since he was as qualified as the other shortlisted candidates. He had previously served for more than two years as a P Senior Protection Officer in Kassala, Sudan, as well as for more than six months in Rabat, Morocco. The position in Rabat is like the position in Tunis as both operations face the same challenges.

g. UNHCR failed to take into consideration the fact that wife was working for IOM in Tunisia

104. The Respondent's case is as follows:

a. When reviewing promotion or selection decisions, the Tribunal is required to assess whether the applicable rules and regulations have been

applied in a fair, transparent and non-discriminatory manner.⁷ If the Respondent can show even minimally that the Applicant's candidature was given full and fair consideration, the burden shifts to the Applicant who must show through clear and convincing evidence that he was denied a fair chance of promotion.⁸

b. The Applicant has failed to prove that the contested decision was based on extraneous reasons. He has been treated fairly and transparently by UNHCR.

c. Contrary to the Applicant's contention, he was not an internal candidate at the time of his application. Under paragraph 20 of the Revised Policy and Procedures on Assignments, he, as a former staff member, could apply for internally advertised vacancies in the international professional category at his previous grade. The Applicant was afforded the opportunity to apply to the P4 Senior Protection Officer post in Tunis although it was only advertised internally.

d. Paragraph 23 of the new UNHCR Recruitment and Assignment Policy, which was not in force at the time of the recruitment, defines internal and non-internal applicants.

e. Nine applicants, who were current staff members holding the personal grade of P4, were shortlisted for the P4 Senior Protection Officer post in Tunis while 23 applicants, including the Applicant, were not. Since these nine candidates met the required qualifications for the position, the pool of current staff members was thought to not have to consider a former staff member or current staff members at a lower grade. This is in line with UNHCR's need to ensure that qualified current staff members at the grade of the position are encumbering posts before other potential candidates, such as former staff members, are considered.

⁷ *Bali* 2014-UNAT-450.

⁸ *Rolland* 2011-UNAT-122.

- f. The Applicant has not established that he had a significant chance of selection against the nine shortlisted candidates. The appointed candidate was a more suitable candidate and a female, which is in line with the Policy on Achieving Gender Equity in UNHCR staffing (IOM/018/2007/FOM/019/2007).
- g. The Applicant's characterization of the documents in Case No. UNDT/NBI/2016/9 is inaccurate. To protect the privacy of the other candidates, UNHCR provided the Applicant with redacted documentation prior to the matter becoming contentious. The Applicant was later given access to all the documents when ordered to do so by UNDT. The documents were not created *post facto*.
- h. The Applicant's allegation that two of the candidates in the matrix are the same is erroneous. The second candidate was appointed to another position before the candidacies to the position were assessed thus the candidate's "ShortList" column reads "Appointed" instead of "Manager Reviewed" and therefore the "Manager's views" section was left blank.
- i. The CMSS Suitability Assessments are no longer intended for all candidates on an individual basis. The only comments that are now provided by the Career Management Support Section are those indicated on the first page of the DHRM shortlisting matrix, which briefly describes the job.
- j. The Applicant's request for an accountability referral is unfounded.

Considerations

selection process reviewed by the Joint Review Board (JRB) or previous similar bodies appointed by the High Commissioner.

111. One of the special eligibility criteria provided for by paragraph 20 of the

c. An award of six months' net base salary as compensation for missed advancement opportunities and six months' net base salary for moral damages.

d. An award of costs

e. Accountability referrals against the former UNHCR Legal Advisor, Mr. Bontekoe, and the Senior Legal Officer, Ms. Brown.

120. The Applicant seeks the following remedies in Case No. UNDT/NBI/2018/040:

a. Deletion of the adverse material from his personnel file.

b. An award of two years' net base salary plus the Organization's pension fund contributions as compensation for harm suffered.

c. An award of one year's net base salary for moral damages.

d. An award of costs and accountability referrals against the former UNHCR DHRM, Ms. Farkas, and the Deputy Director/DHRM, Mr. Pasquali.

121. The Applicant seeks the following remedies in Case No. UNDT/NBI/2018/083:

a. Rescission of the non-selection decision and re-employment by UNHCR as of 1 January 2018 or in the alternative, three years' net base salary at the P4 level plus the Organization's pension fund contributions for three years as in lieu compensation

b. An award of six months' net base salary as compensation for missed advancement opportunities and one year's net base salary for moral damages.

c. An accountability referral for any possible identified misconduct.

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damages¹ The Applicant has submitted a statement from his wife, Ms.

Entered in the Register on the 16th day of July 2019

(Signed) 2(gn) TJ ET Q q BT /F4 12.0 Tf 0.0 0.0 0.0 rg 0.9998 0.0 0