Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ARANGO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Evelyn Kamau, OSLA

Counsel for the Respondent:
Elizabeth Brown, UNHCR
Francisco Navarro, UNHCR

Introduction

1. The Applicant challenges

9. On 26 September 2017, Ms. Elizabeth Brown, Senior Legal Affairs Officer, Legal Affairs Service, explained to the Applicant's Counsel the reasons for excluding him from the TA P-3 Resettlement Officer position in Brasilia as follows:

> … [Applicant] was previously hired by UNHCR under the Entry-Level Humanitarian Programme (EHP). After serving for two months in the deep field, a pre-existing medical condition came to light and he had to leave the duty station. He was subsequently subject to a medical constraint limiting his deployment to H, A, B and C duty stations only. This information is confidential and field offices, including Brasilia, do not have access to it. A copy of the memorandum by the Medical Section Board dated 27 January 2015 was nevertheless provided to [Applicant].
>
> UNHCR's Recruitment and Assignments Policy, HCP/2017/2, provides at paragraph 9 that delivering on UNHCR's mandate for persons of concern requires a workforce that is "committed to being present where persons of concern are, particularly in hardship, high-risk and non-family duty stations". Pursuant to paragraph 19 of the Policy, "UNHCR's International Professional staff members are required to rotate. Rotation is designed to meet corporate and operational needs, to provide opportunities for career development through exposure to different operations and functions, in respect of service in remote and hardship duty stations, including high-risk, as well as to ensure burden-sharing." In addition, paragraph 37 provides that staff members "serve at the discretion of the High Commissioner and are committed to the principle of rotation in the interest of persons of concern and organizational priorities".
>
> Therefore, re-recruiting [Applicant] to a position in the international professional category would, in our view, be inconsistent with several principles and standards in the Policy. While this may be disappointing for [Applicant], we count on his understanding.[6]

10. On 7 October 2017, the Applicant sought management evaluation of the decision to exclude him from the recruitment exercise for the TA P-3 Resettlement Officer position in Brasilia.[7]

[6] Application, Annex F.
[7] Application, Annex G.

Respondent

19. The Applicant has not suffered prejudice because he has no right to be re-employed or to be considered for re-employment with UNHCR.

20. The Applicant had the right to apply for positions in UNHCR as an internal candidate for a period of two years following his separation, that is, until 13 March 2017. Following that date, the Applicant's status is the same as that of a wholly external candidate.

21. The Applicant is confusing the right to submit an application to a position with the right to be considered for that position. Neither in his application, nor in his submissions of 27 December 2019 or 20 March 2020, has the Applicant identified any right to be re-employed or to be considered for re-employment with UNHCR based on his former terms of appointment. Indeed, such right does not exist under pertinent regulations and rules and all relevant administrative issuances. If the Applicant was not entitled to be re-employed or to be considered for re-employment with UNHCR, it follows that a decision not to re-employ him cannot be in breach of his rights.

22. The Applicant has not suffered prejudice because he had no right to be considered for the temporary assignment in Brasilia. Under UNHCR's regulatory framework, temporary assignments or appointments are granted without advertisement or competitive recruitment process. Rather, UNHCR may identify a suitable candidate and grant him or her a temporary assignment under certain conditions. That is what happened in this case. Ms. Gómez and the Representative approached the Applicant about his interest and availability for a temporary appointment. The Representative then submitted a request for temporary staffing needs in which the Applicant was the proposed candidate to meet the identified short-term requirements. At the time of the request, on 14 July 2017, there was no position as Resettlement Officer (P-3) in Brasilia, not even a temporary one. Such position was only created in September 2017 and advertised in October 2017.

29. The Applicant was never offered a temporary appointment and therefore UNHCR was under no obligation to have him undergo medical clearance procedures.

30. The Applicant characterizes the impugned decision as being solely based on the 2015 determination by the MSB in order to argue that UNHCR wrongly considered a medical assessment outside the context of medical clearance procedures. The Applicant was not cleared also on account of his less than stellar employment record with UNHCR. In August 2014, the Applicant refused to comply with instructions to return to his duty station, despite the assessment by the Department of Safety and Security, the memorandum by the Under-Secretary-General for Safety and Security, and the fact that his colleagues returned to Dollo Ado. UNHCR nevertheless accommodated the Applicant.

31. The Applicant was an external candidate with no right to be re-employed or to be considered for re-employment with UNHCR. The Applicant himself acknowledges that his record with UNHCR was not satisfactory, as he asks for an opportunity to redeem himself. The request for temporary staffing needs concerned functions for which other suitable candidates were or would become available shortly – including Ms. Alfaro, who was available from 1 July 2017 and other external candidates. In this context, UNHCR's decision not to offer the Applicant a temporary appointment was a legitimate exercise of administrative discretion.

32. The exchanges between the Applicant, Ms. Gómez and the Representative in July and August 2017 did not create any rights for the Applicant with respect to the temporary appointment in Brasilia because there was no contract or quasi-contract between the Applicant and UNHCR. Any commitment undertaken by Ms. Gómez and the Representative on behalf of UNHCR with respect to the Applicant's TA was unlawful and UNHCR had the right to correct it.

33. Paragraph 3.1 of IOM No. 36/2010/Corr. 2 is clear that the authority to grant a temporary appointment lies with the Director of DHRM. The Standard Procedure furthe0 1 99.408 361.78 Tm0 g31

for short-term staffing need and that for re-hire of former staff, the previous clearance from the Head of HRSS has to be sought.

34. Neither Ms. Gómez, who was a Resettlement Officer in the Division of International Protection, nor the Representative, as hiring manager, had the requisite authority to offer a TA to the Applicant. The only representation they could lawfully make to the Applicant is that the Representative would submit a request for temporary staffing needs identifying the Applicant as a suitable candidate. Any further commitment by Ms. Gómez or the Representative was *ultra vires* and therefore illegal.

35. The Administration is only estopped from correcting an illegal commitment or erroneous representation where the staff member has relied on the representation to his or her prejudice. This is not the Applicant's case. The Applicant did not resign from his job at the time, and he has not submitted evidence of any prejudice he suffered as a result of relying on the representation by Ms. Gómez or the Representative.

36. A promise made by an official who lacks the necessary authority to deliver on the promise may not create legitimate expectations. Neither Ms. Gómez nor the Representative could have known, before making the request for temporary staffing needs, whether there would be any internal candidates with preference over the Applicant. By the same token, the administrative issuances governing TAs and appointments are pu

38. In this case the Applicant was considered for a six-month TA. Given that a TA does not carry any expectancy, legal or otherwise, of renewal, and that it shall not be converted to any other type of appointment in accordance with staff regulation 4.5(b), the Applicant's loss of opportunity cannot be in excess of six months. An assumption that the Applicant would have been granted the appointment, had an appointment been offered to him, is not warranted. In accordance with IOM-FOM 36/2010/Corr. 2 and the Standard Procedure, the Applicant's appointment would have been subject to medical clearance and satisfactory reference checks.

39. Any award of compensation for loss of opportunity should take into account the Applicant's earnings during the relevant period of time. In this respect, the

UNHCR. In November 2018, the Applicant was shortlisted, invited to a test and interviewed for the position of Head of UNHCR Field Office in Toronto, Canada. Only five out of 41 candidates to the position made it to the final round of the selection process. The Applicant was one of them. This is evidence that he is not being unfairly treated or discriminatorily barred from employment.

43. As regards the Applicant's claim for moral damages, it is trite law that moral damages may not be awarded without specific evidence supporting the award.

44.

was given a fair and adequate consideration. Once management satisfies this initial requirement, the burden shifts to the Applicant to show through clear and convincing evidence that he was not given fair and adequate consideration.[8]

47. The record shows that on 4 July 2017,

Administration. Rather, the Dispute Tribunal's role in reviewing an

Reliefs

57. The Applicant seeks the following reliefs:

Rescission of the contested decision.

58. Article 10.5 (a) of the UNDT Statute provides that: As part of its decision, the Dispute Tribunal may only order one or both of the following (a) "Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered". The Tribunal has wide discretion in setting the amount of in lieu of compensation, however it must be guided by judicious principles which are outlined as follows:

> "The UNDT may award compensation for actual pecuniary or economic loss, including loss of earnings. We have consistently held that "compensation must be set by the UNDT following a principled approach and on a case by case basis" and "[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case". "Contemplating the particular situation of each claimant, it carries a certain degree of empiricism to evaluate the fairness of the 'in lieu compensation' to be fixed." Relevant considerations in setting compensation include, among others, the nature of the post formerly occupied (e.g., temporary, fixed-term, permanent), the remaining time to be served by a staff member on his or her appointment and their expectancy of renewal, or whether a case was particularly egregious or otherwise presented particular facts justifying compensation beyond the two-year limit"[19].

The wording of art. 10.5(a) makes it mandatory for the UNDT to set a compensatory sum in lieu of rescission or specific performance, however, UNAT has held that "a staff member may prevail or succeed on his claim without receiving an award of damages"[20] and "not every violation of a staff member's legal rights or due process

[19] *Krioutchkov* 2017 -UNAT- 712, para. 16.
[20] *Lemonnier*,

rights will necessarily lead to an award of compensation. "Where the staff member does not show the procedural defect "had any impact on him, his circumstances or his entitlements, and that he suffered no adverse consequences" or harm from the procedural defect, compensation should not be awarded".[21]

59. The circumstances of this application are that although the Applicant mitigated his loss by securing alternative employment throughout the contested period, the violation of his rights is what UNAT may describe as egregious[22] as it goes against the United Nations principles in selecting staff members under art. 101 of its Charter and it violates a fundamental human right of non-discrimination. Therefore, the Applicant is awarded compensation equivalent to the full six months' earnings that he could have earned on the Position.

Moral damages for the harm

60. Compensation may be ordered for harm after the existence of such harm is proved to the requisite standards as set out in *Kallon*[23] that;

> Compensation may only be awarded for harm, supported by evidence. The mere fact of administrative wrongdoing will not necessarily lead to an award of compensation under Article 10(5)(b) of the UNDT Statute. The party alleging moral injury (or any harm for that matter) carries the burden to adduce sufficient evidence proving beyond a balance of probabilities the existence of factors causing harm to the victim's personality rights or dignity, comprised of psychological, emotional, spiritual, reputational and analogous intangible or non- patrimonial incidents of personality.

61. Sufficient evidence requires that the Applicant's testimony be "corroborated by independent evidence (expert or otherwise) affirming that non-pecuniary harm has indeed occurred".[24] The Applicant has not

[21] *Nyakossi* 2012-UNAT-254, para. 19.
[22] *Krioutchkov*, para. 16.
[23] 2017-UNAT-742.
[24] *Ross* 2019-UNAT-926, para. 57.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 4th day of August 2020

Entered in the Register on this 4th day of August 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi