

Case No.:

UNITED NATIONS DISPUTE TRIBUNAL

Introduction

1. On 20 August 2019, the Applicant, an Investigation Specialist at the P-3 level, with the United Nations Children's Fund UNICEF in New York, filed an application for suspension of action pending management evaluation under art. 2.2 of , seeking to suspend the decision of the to revoke an offer of employment to the Applicant for the position of Senior Investigation Specialist at the P-4 level in Nairobi dated 20 June 2019.

2. On 22 August 2019, the Respondent filed a reply contending that the application is not receivable *ratione materiae* because the contested decision has been implemented. The Respondent further submits that should the Dispute Tribunal find the application receivable, it has no merit as the Applicant failed to meet his burden of

Factual background

3. The Applicant presents the following factual background in his application.

4. On or about 18 October 2018, the Applicant applied for the position of Senior Investigation Specialist with UNHCR.

5. As part of the application process, the Applicant was required to complete specific questions relating to previous acts of misconduct. Specifically, the Applicant answered two questions as follows:

3. Have you ever been the subject of an investigation into allegations of misconduct?

Yes

4. Have you ever been subject to disciplinary proceedings or measures?

Yes

6. On 16 January 2019, the Applicant was invited to an evaluation and to participate in a panel interview.
7. On 24 May 2019, the Applicant received an email from Chief, Affiliate Partnerships and Recruitment Section, notifying him that he was selected for the position. The email stated that it was not an official offer and that the recruitment is subject to satisfactory reference checks, which include employment history verification, academic verification, and professional reference checks.
8. On 27 May 2019, the Applicant was contacted by the United Nations Global Center for Human Resources Services One HR , asking for his cooperation in conducting reference checks.
9. On 17 June 2019 and again on 31 July 2019, the Applicant brought to the attention of One HR that he was the subject of an investigation and that he did receive a sanction.
10. The Applicant was informed on 1 August 2019 that One HR had finalised his reference verification on 18 June 2019.
11. On or about 20 June 2019, the Applicant received a letter of offer for the position signed by the Chief of Section, Division of Human Resources. The letter of offer stated that,
examination) and satisfactory reference checks, as well as security clearance and visas
12. On or about 27 June 2019, the Applicant accepted and signed the letter of offer.
13. On 1 July 2019, the Applicant received an email from an Administrative Assistant, stating,

Please note that the Affiliate Partnership and Recruitment Section (APRS) is currently undertaking employment reference checks in your regard. Your appointment is subject to successful completion of the

22. On or around 1 April 2018, the Applicant was subject to the disciplinary measure of demotion (from P-3 to P-2) for misconduct in accordance with staff rule 10.2(a)(vii). The disciplinary measure included deferment of eligibility for consideration fode

28. On 31 July 2019, the Applicant wrote again to One HR, stating that he was not sure if the reference check process was over. He also stated that:

As I reiterated in an email I sent to you on 17 June 2019, I just wanted to make sure that it was well understood that while working for UNDP as P-3 Investigation Specialist, I was administratively sanctioned with demotion from P3 to P2! I have noticed that this is not very clear in the PHP, because details are not required when you answer the questions related to the administrative investigations and disciplinary sanctions, and in the PHP I have stated that I am at P 3 level, as I was recruited and worked since September to April 2018 when I was sanctioned.

29. In his email to One HR dated 31 July 2019, the Applicant did not disclose that the disciplinary measure included deferment of eligibility for consideration for promotion until April 2020.

30. On 1 August 2019, One HR transmitted the information to UNHCR.

31. Upon receipt of One email on 1 August 2019, UNHCR put the Applicant's recruitment on hold. The Applicant was informed accordingly two working days later, on 5 August 2019.

32. On 6 August 2019, the Applicant informed UNICEF that he was withdrawing his resignation. UNICEF accepted the Applicant's withdrawal of his resignation and confirmed on the same day that he could return to the position from which he had resigned. The Applicant's secondment from UNDP to UNICEF will run until 6 January 2021.

33. On 9 August 2019, the Head of the Investigations Service of the IGO notified the Applicant of UNHCR's decision to withdraw the offer of employment during a telephone conversation.

Consideration

Legal framework

34.

Procedure, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements have been met.

Consideration on receivability

35. In the present case, the Respondent submits that the application is not receivable on the grounds that the contested decision has already been implemented. The Respondent argues that a decision to revoke an offer of employment is implemented

Consideration on the merits

Prima facie unlawfulness

37. For the *prima facie* unlawfulness test to be satisfied, the Applicant must show a fairly arguable case that the contested decision is unlawful. It would be sufficient for an applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was made in good faith (*Jaen* Order No. 29 (NY/2011); *Villamorán* UNDT/2011/126).

38. y be summarized as follows:

- a. The decision to revoke the offer of employment within UNHCR was *prima facie* unlawful as there was a quasi-contract between himself and UNHCR and there was no legitimate justification to revoke the offer after it was accepted by the Applicant;
- b. UNHCR failed to act in good faith and in accordance with its duty to act fairly, justly and transparently in dealing with him. UNHCR was fully aware that the Applicant had been disciplined in the past as the Applicant was always upfront and honest and repeatedly disclosed the matter in his application, during reference checks and after reference checks had concluded;
- c. UNHCR implicitly waived any condition prohibiting appointment of an individual with a prior disciplinary record by offering him employment with full knowledge of that fact;
- d. UNHCR unfairly and unlawfully added a new condition to the offer after it was presented to the Applicant and signed by him i.e. to not have been the subject of an investigation and to not have received a sanction;
- e. There was no risk posed by the Applicant performing the functions of the position. On the contrary, the Applicant has an exemplary performance

staff rule 10.2(a)(vii), separation from service and dismissal are referred to in staff rules 10.2(a)(viii) and (ix) respectively). Rather, the Applicant stated that his grade was P-3;

e.

- i. UNHCR has the right and the duty to revoke the offer of employment

