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UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/033

Judgment No.: UNDT/2019/005

Date: 16 January 2019

Original: English

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**Before:** Judge Agnieszka Klonowiecka-Milart

**Registry:** Nairobi

**Registrar:** Abena Kwakye

## **Introduction**

1. The Applicant is a former Senior Protection Officer with the United Nations High Commissioner for Refugees (UNHCR).

2. In this application dated 29 April 2016, he is contesting the High in Rabat, Morocco, received by him on 23 December 2015.

3. The Respondent filed a reply on 27 May 2016.

4. A case management discussion was held on 17 October 2017, following which the parties filed amended pleadings and the Respondent provided additional documents. The Applicant, in turn, withdrew his motion for the production of documentation outlined in paras. 17–20 of his application. Both parties declared that documentary evidence was sufficient and they did not deem a hearing necessary.

5. The case was suspended during the period 20 November 2018 to 31 January 2019 pending mediation, together with other four cases filed by the Applicant against the UNHCR. On 24 December 2018, the Regional Ombudsman, Office of the Ombudsman for Geneva, informed the Tribunal that the mediation had failed.

## **Facts**

6. The facts as set out below are undisputed and/or result unambiguously from the submitted documents.

7. On 3 November 2008, the Applicant joined UNHCR in the Legal Affairs Service as a Legal Officer at the P-3 level. On 1 November 2010, he was selected for the position of Senior Protection Officer in Sudan. On 1 January 2013, he was

temporarily reassigned as Legal Officer Nairobi, Kenya, in Private Sector Fundraising (PSFR).

8. From 1 July 2013 to 1 July 2015, the Applicant was on special leave without pay.

9. On 1 July 2015, the Applicant returned from special leave without pay and accepted a temporary assignment -4 level in Rabat.

10. On 6 November 2015, the High Commissioner promoted the Applicant to the P-4 level. Subsequently, a controversy ensued as to whether this promotion took effect only upon the Applicant being successful in a selection for a P-4 position or independent of it. This issue was resolved in March 2016 through confirmation that the promotion was unconditional and in effect.

11. The position the Applicant was temporarily encumbering was advertised as part of the September 2015 compendium as a regular post and the Applicant applied for it.

12. The Division of Human Resources Management (DHRM) sought from the Hiring Manager his views on all of the candidates in accordance with the UNHCR *Revised Policy and Procedures on Assignments* (RPPA). The Hiring Manager for this particular post was Mr. Jean-Paul Cavalieri, who had supervised the Applicant from 1 July 2015. Mr. Cavalieri expressed his strongest preference for a female candidate. As an alternative, he had also expressed his preference for two male candidates. In his

recommending the Applicant, this being lack of demonstrated leadership skills and sufficient experience in Refugee Status Determination (RSD).<sup>1</sup> At the time, the had not yet taken place.

13. On 30 November 2015, DHRM reviewed all the candidacies for the position as

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<sup>1</sup> Annex R-1 to the reply, at page 13.



recommend him for the position. In an email dated 29 January 2016, the Applicant thanked Ms. Shimosawa and requested time to consider the offer.

18. In an email dated 31 January 2016, the Applicant informed Ms. Shimosawa that he was no longer interested in the assignment:

We discussed it at length this weekend and came to the conclusion that



- the staff member: has seniority in grade beyond minimum eligibility for promotion;
- to encourage rotation to hardship duty stations (C,D,E and unclassified categories);
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***The case has not become moot***

30. The Applicant maintains that the case has not become moot by his declining the subsequent offer by Mr. Cavalieri and DHRM to be recommended for appointment by the High Commissioner. This would require granting him a remedy that fully made up for the violation of his rights. Whereas the Applicant has only been offered that the

appointment. This offer was neither an appropriate remedy, nor was it a comprehensive remedy as it m

31. The procedures in UNHCR do not not no12 792 re4wa do not 45367248 TmC>30046400-3(e)4(r )



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39. The application is not receivable for two reasons.
- a. It does not contest an administrative decision that adversely affected the  
  
the Respondent rescinded the contested decision by re-advertising the vacancy  
announcement for the same position;
  - b.

particular case P-4, be matched first. When no suitable applicant at the level of the position can be matched, the Organization is entitled to consider applicants with a grade

relation to priority or preference in the promotion exercise, the Appeals Tribunal has ruled that priority consideration cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for; and that to hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under Article 101 of the Charter.<sup>12</sup> It results that, no matter which of the disputed interpretations of the RPPA were to be adopted, the Applicant has no claim to be actually promoted but only to be considered.

*Appropriate remedy*

47. A violation of the right so defined is optimally remedied where the staff member is placed in the same position he or she would have been in had the Organization complied with its contractual obligations<sup>13</sup>, *i.e.*, when he or she does receive a full and fair consideration in the selection process. In most cases that reach

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framework, the Tribunal notes that information available on the record does not

Applicant. Third, these comments appear a one time antagonizing incident. Whereas the complaint that the Applicant filed against Mr. Cavalieri on 14 January 2016 depicts their rapport as dysfunctional from the onset, an inescapable observation is that the Applicant had nevertheless applied for a regular post in that office and in December 2015 still wanted it; as such, his January 2016 complaints appear as exaggerated

gave any other reason for conflict. There is, moreover, no basis to presume that, having supported the Applicant for the position, Mr. Cavalieri would have subsequently

reasonably expected of the Applicant to continue to serve under the supervision of Mr. Cavalieri, to undertake to sort out any remaining disagreements in a constructive manner and re-establish a proper professional cooperation. This would not preclude a parallel search for another assignment by the Applicant.

52. In conclusion, the Tribunal finds that the Respondent promptly restored the Applicant in the position in which he would have been prior to the alleged violations, by providing conditions for a full and fair consideration.

*Whether the application is moot*

53.

rendered moot, the Tribunal recalls its holding in *Lahoud* application moot insofar as either the matter is resolved in a manner consistent with the thrust of the application, e.g., the Administration withdrew from the decision or the claim was otherwise satisfied to the effect there is no *gravamen* on the part of the

question needs to be analyzed

<sup>14</sup> The

same idea has been expressed by

be astute to reject a claim of mootness in order to ensure effective judicial review,

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<sup>14</sup> *Lahoud* UNDT/2017/009 at para. 23.

where it is warranted, particularly if the challenged conduct has continuing collateral

<sup>15</sup> Accordingly, this Tribunal considers that mootness would be the case had the Applicant requested a rescission of the contested decision. Since the Applicant requests reinstatement in the alternative with financial compensation, plus compensation for moral damage, these are not automatically rendered moot and need to be considered on the merits.

*Reinstatement*

54. In the first respect, the Tribunal finds no relevant causality between the alleged procedural violations in the selection process and the claim to be reinstated in the service of UNHCR. The impugned decision was not about non-extension of the

a complainant for actual loss as well as the vexation or inconvenience caused by the breach, then, either the contract or the infringing conduct must be attended by peculiar features, or must occur in a context of peculiar circumstances.<sup>16</sup>

56. The Applicant maintains that Mr. Cavaliere acted out of improper motive, albeit after the Respondent informed that the successful candidate had been recommended by Mr. Cavaliere in third place only, this allegation shifted from attributing to him the intent to ensure the post for his favourite candidate to attributing him the intent to block the Applicant. Either way, these allegations remain unsubstantiated. The question of a tort.

57. The Applicant claims harm inflicted upon his *dignitas*, reputation and career potential. The Tribunal considers that the career potential of the Applicant was not harmed by the Respondent as another opportunity was created for him to run for the post. As concerns dignity and reputation, the Tribunal considers that a negative outcome in the selection exercise, while harming the ego, may not be *per se* impugned as damage to dignity and reputation - as previously noted by this Tribunal in another process becomes a fact of life for staff members in the increasingly competitive working reW0SirrsRpincrive 912 0 612 792 rUW\*1(a)42 rNa0 6





Entered in the Register on this 16<sup>th</sup> day of January 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi