



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/7

Judgment No.: UNDT/2009/013

Date: 27 August 2009

Original: English

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

PARKER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Nicole Lewis

Counsel for Respondent:
Shelly Pitterman, DHRM/UNHCR

BETWEEN:

Case No: UNDT/GVA/2009/7

PARKER

APPLICANT

AND

THE UNITED NATIONS HIGH
COMMISSIONER FOR REFUGEES,

RESPONDENT

JUDGMENT

1- Considering that the Applicant, assisted by Ms. Nicole Lewis as his counsel, has submitted on 28 July 2008 an appeal before the Geneva Joint Appeals Board (JAB) seeking:

- 1- The rescission of the decision of 7 November 2007 by which the United Nations High Commissioner for Refugees (UNHCR) rescinded his appointment as Senior Desk Officer (SDO) on the Middle East and North Africa Desk (MENA);
- 2- That a suitable post be found for him within 6 months;
- 3- To be provided with a written apology explaining that the Applicant's having to vacate the SDO post with the Desk for East and Horn of Africa (DEHA) and with MENA was not due to any fault on his part;
- 4- Reparation amounting to five years of salary for harm caused to his career and reputation and for the stress and anxiety he suffered.

2. Considering that, in accordance with the General Assembly Resolution A/RES/63/253, all cases pending before the JAB on 1 July 2009 have been transferred to the new United Nations Dispute Tribunal.

1- CONCERNING THE APPLICANT'S REQUEST SEEKING THE RESCISSION OF THE DECISION OF 7 NOVEMBER 2007 BY WHICH UNHCR RESCINDED HIS APPOINTMENT AS SDO ON MENA AND REPARATION

Summary of Facts

3. In January 2007, the Applicant, staff member currently employed on an Indefinite Appointment at UNHCR, was placed in situation of Staff In Between Assignments (SIBA). In September 2007 he was appointed SDO at the Iraq Support Unit and took office on 1 October 2007. Then, after an incident occurred with his supervisor on 8 October 2007, he fell ill and was placed on sick leave by his personal doctor for an indefinite period. On 2 November 2007, this same doctor certified that the Applicant was able to work half-time as of 5 November and for an indefinite period. The Applicant was convoked by the Director, Medical Service, UNHCR, for a consultation on 5 November 2007. Director of the Medical Service concluded that the position held by the Applicant at the Iraq Support Unit put him under important psychological pressure and that it was desirable that his appointment to such post be rescinded and to place the Applicant against a less stressful position. On 7 November 2007, the Applicant received the impugned decision to rescind his appointment, which was based on the Director of the Medical Service's advice dated 6 November 2007. The Applicant has not been appointed to any post since then.

Contentions of the Parties

4. The arguments submitted by the Applicant in his statement of appeal are the following:

- the contested decision was taken in violation of the Applicant's rights, since his appointment with MENA was not subject to medical clearance, as he was being assigned to a new post and a medical clearance is required only in specific situations stipulated by the relevant administrative issuances. Staff Rule 106.2(g)

does not allow for removing a staff member from a post for medical reasons without him being examined by a medical board or by an independent medical specialist. He should have been informed when he was convoked to the medical examination of its purpose, i.e. determining his ability to fulfill his functions at MENA and, given that he and his personal doctor contested the results of the examination, his case should have been submitted to a medical board;

- The Director of the Medical Service's opinion to place the Applicant on sick leave for an indefinite period is founded on insufficient evidence and, thus, arbitrary. The Director of the Medical Service did not examine the Applicant prior to providing his advice and no diagnosis of the Applicant's condition was provided. There is no justification for the conclusion that the Applicant was not fit to carry out his position;

- the contested decision was not based on medical reasons, but was in fact taken because the Administration wished to remove the Applicant from his post at MENA and prevent him from pursuing his career, and this decision had already been made before the medical examination. The Administration did not give him any indication concerning the positions for which he was eligible;

- the contested decision was taken in order to protect the staff member responsible for having harassed the Applicant. This results from the exchanges between the Director, Human Resources Management Service, UNHCR, and the Deputy Director, Bureau for Africa, UNHCR. The contested decision is the culmination of a course of conduct which has caused the Applicant repeated harm and he requests his appointment to his position and compensation for damage suffered.

5. In his reply dated 15 December 2008 the Respondent presents the following observations:

- the Applicant's application seeking the rescission of the decision of 7 November 2007 by which the UNHCR rescinded his appointment as SDO on MENA is inadmissible as it is time-barred, having been submitted nearly five months after

the notification of the negative response to the Applicant's request for administrative review to the Secretary-General;

- the Respondent recalls UNAT's consistent jurisprudence recognizing the Administration's broad discretion in matters of personnel management;

- the contested decision has been taken in the best interest of the Applicant and of the service based on medical reasons alone. It is established that on 5 November 2007 the Director of the Medical Service examined the Applicant and his psychological examination was conducted taking into account the Applicant's medical file, considering his position and his state of health at the time. The Administration has a duty to protect its staff and their mental condition must to be assessed in light of the position the staff member is holding. The Applicant's post, being associated with the Iraq Operation, is prone to create a large amount of anxiety and psychological pressure and UNHCR's medical specialist's opinion was that the Applicant was not in a condition to sustain such pressure without detrimental effects to his health;

- in addition, the Administration has a duty to verify that the staff member is able to carry out the functions for which he has been selected and to rescind his/her appointment in order to ensure the functioning of the service;

- UNHCR has never alleged that the Applicant's assignment was subject to medical clearance. The Applicant's medical examination was based on Section 9 of ST/AI/2005/12, which authorises the Administration to remove staff from certain positions in exceptional circumstances, where there is a threat to the incumbent's health and to the functioning of the service. This is not a disproportionate measure given that, even if a new appointment could not be identified at short notice, the staff member remains entitled to his salary and benefits as SIBA. The medical examination undergone by the Applicant is not subject to any formal or procedural requirement;

- Moreover, UNHCR has made every effort to place the Applicant in a suitable position, even though the Applicant's failure to report to the Medical Service's convocation for periodic examination makes it difficult to find a solution.

6. In his memorandum registered on 2 March 2009 the Applicant makes observations on the Respondent's Reply and contends that:

- his request for rescission of the decision of 7 November 2007 is receivable as the JAB has granted him extensions of the relevant time-limits;

- the Administration's powers are not unlimited, as stated in UNAT jurisprudence;

- during the consultation conducted on 5 November 2007, the Director of the Medical Service has limited himself to asking the Applicant on the incident with his supervisor after which he felt unwell;

- the procedure to be followed should have been the following: convening of a medical board comprised of mental health specialists, to proceed to an appropriate scientific medical examination of the Applicant's mental state. Instead, he has not been examined by a doctor specialized in mental health.

7. The memorandum submitted by UNHCR, registered on 24 March 2009, and the Applicant's final observations submitted on 4 May 2009, do not bring any new elements, neither as to the facts nor regarding the law, save for the argument presented by UNHCR that it is not for the JAB to grant to the Applicant time-limit extensions which are not provided for in the relevant rules.

Considerations

8. UNHCR asserts that the above-mentioned request for rescission, submitted to the JAB on 28 July 2008, is inadmissible as time-barred. Nevertheless, it

clearly results from the message addressed by the Geneva JAB to the Applicant's counsel that a new extension was granted to the Applicant to submit his statement of appeal, the new deadline thus being 28 July 2008. Even assuming, as UNHCR alleges, that the JAB afforded such extensions in an irregular manner, the fact that an official United Nations body has granted extensions has necessarily the effect of rendering the appeal receivable as long as it was submitted, as it was in the present case, within the time-limits established by the JAB. It is therefore appropriate for the Tribunal to declare the Applicant's above-referred application as admissible.

9. In questioning the decision of 7 November 2007 rescinding his appointment with MENA, the Applicant argues in the first place that the Administration has no authority to make such a decision based on medical reasons, as staff members may only be subject to medical examinations in certain cases as defined in the applicable rules. Section 1.2 of Administrative Instruction of 8 November 2005 ST/AI/2005/12 on Medical Clearances and Examinations provides that: "All staff members may be required to undergo medical examination to ensure that they remain medically fit to perform the functions assigned to them, under the conditions set out in section 9 below." Section 9.1 lays down: "All staff members may be required at any time to undergo medical examination, when requested by the United Nations Medical Director or a medical officer duly authorized by the Medical Director, to protect the health and safety of staff members or to follow up chronic medical conditions." It flows from the above-cited provisions that the Director of UNHCR Medical Service, had the authority to convoke the Applicant at any moment to undergo a medical examination with a view to verify whether his state of health permitted him to discharge the functions he was assigned to.

10. Yet, the Applicant affirms that the impugned decision of rescinding his appointment as SDO on MENA was made following an irregular procedure, in as much as it was only based on his state of health as assessed by the Director of the Medical Service, and he had not the possibility to present his observations regarding his ability to carry out his post during the medical examination. It results from the documents in the file that the Applicant, who held his post since 1

October 2007, fell ill and was placed on sick leave for an indefinite period by his personal doctor following an incident with his supervisor which occurred on 8 October 2007. The same doctor certified on 2 November 2007 that the Applicant was able to work half-time starting 5 November 2007 for an indefinite period. The Applicant was convoked by the Director of the UNHCR Medical Service, for a medical examination which took place on 5 November 2007. It was not indicated to the Applicant that the purpose of the examination was determining his general ability to discharge his functions, neither in the letter convoking the Applicant nor during the medical examination, and so, being on sick leave, he could reasonably assume that the medical examination was simply aimed at checking whether this sick leave granted by his personal doctor was warranted. Hence, the Applicant was prevented from preparing himself for such an examination, in particular by gathering the medical personal documents or by securing the assistance of his personal doctor. Not having been informed of the aim of his convocation during the examination either, he was furthermore deprived of the right to discuss his aptitude with the doctor. Moreover, the decision at issue was made by UNHCR on the basis of his state of health without him being informed in advance of the opinion of the doctor and, hence, he was not in a position to contest the said medical opinion before the decision was made. Therefore, the procedure which led to the questioned decision is flawed, to the extent that it did not respect the essential right of the staff member to be informed in advance of the motives behind decisions made in function of his person and notably in function of his state of health.

11. The Tribunal thus finds the decision of 7 November 2007 by which the UNHCR rescinded the appointment of the Applicant as SDO on MENA to be illegal as it is vitiated by a procedural flaw and hereby decides the rescission of the said decision.

12. In accordance with Article 10, paragraph 5 of the Statute of the Tribunal, when proceeding to rescind an appointment decision, the Judge shall establish the amount that the Administration may chose to pay to the applicant in lieu of implementing the rescission decision. In the case at hand, it is decided, taking into account that the decision is rescinded for a procedural flaw only, that, should

UNHCR chose this option, it must pay to the Applicant the lump sum of two months' net base salary.

13. The Applicant requested to be compensated for moral damage suffered as a result of the above-mentioned unlawful decision. This constitutes a different harm, not compensated by paying the amount indicated in the paragraph above, which corresponds to anxiety suffered by the Applicant for having been illegally removed from his post for medical reasons without having been given the opportunity to submit observations and having thereby been left without any assignment during a long period. The compensation to be paid to him on this ground is of three months' net base salary.

2 – CONCERNING THE APPLICANT'S REQUEST TO BE COMPENSATED FOR THE DAMAGE CAUSED TO HIS CAREER DEVELOPMENT DUE TO THE COURSE OF ACTION OF SEVERAL PERSONS IN THE ADMINISTRATION, WHICH HAS RESULTED IN HIM NOT BEING PROMOTED AS HE DESERVED AND HAS CAUSED HIM MORAL SUFFERING

14. UNHCR states in his reply dated 15 December 2008 that the present part of the application is not receivable since the Applicant made a request for administrative review regarding harassment he allegedly suffered after the mandatory time limits and has failed to make such a request for review concerning the non-clearance of the Appellant for a number of positions he applied for.

15. It is clear from the documents contained in the file that the letter dated 2 January 2008 sent by the Applicant to the Secretary-General constitutes the request for review required by Staff Rule 111.2 (a). By this letter, the Applicant requested compensation for damage caused by harassment that he allegedly suffered from the beginning of 2005 until the decision taken on 7 November 2007 - found above to be illegal. Therefore, while UNHCR rightly pointed out that the Applicant did not request administrative review concerning compensation for damage allegedly suffered after 7 November 2007, the Applicant's application,

contrary to what UNHCR holds, is receivable concerning the damage that he alleges to have suffered during the period from January 2005 to 7 November 2007.

16. In view of the regrettable shortcoming in the response by the Administration, which may not content itself with alleging that the application is not receivable without entering into the merits of the request, the Judge is prevented from passing judgement on this second issue of the Applicant's application. Consequently, there are grounds, before deciding upon the applicant's compensation request, to order that UNHCR submit, within one month as from the notification of the present Judgement, its observations concerning both the reported facts that, in the Applicant's opinion, would amount to harassment - described through paragraphs 11 to 17 of his statement of appeal - and the damage allegedly stemming from them.

3 – CONCERNING THE APPLICANT'S REQUEST TO ORDER UNHCR THAT HE BE PLACED AGAINST A POST WITHIN A PERIOD OF 6 MONTHS AND TO PROVIDE APOLOGIES TO HIM

17. There is no provision in the Tribunal's Statute as adopted by the General Assembly resolution A/RES/63/253 allowing the Judge to issue such a decision. Hence, the above-mentioned requests must be rejected.

For the reasons stated above,

It is DECIDED that:

1. The decision of 7 November 2007 by which UNHCR rescinded the Applicant's appointment as SDO on MENA be annulled. If UNHCR chooses to pay a compensation instead of implementing the rescission decision, it shall pay to the Applicant two months' net base salary at the rate in effect on the date of the present Judgement, with interest payable at eight per cent per annum as from 90 days from the date of notification of this Judgement until payment is effected;

2. UNHCR is to pay the Applicant three months' net base salary as compensation for moral damage, applying the rate and interest under the same modalities specified above.

3. Before pronouncing a decision on the Applicant's request seeking compensation for damage suffered as a result of alleged harassment, UNHCR submit its observations concerning the facts recounted as well as the damage alleged within one month as from the notification of this Judgement.

4. The rest of the Applicant's claims are dismissed.

(Signed)

Judge Jean-François Cousin

Dated this 27 day of August 2009

Entered in the Register on this 27 day of August 2009

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva