



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

BYE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Sarah Hunt

Counsel for Respondent:
Ivan Koulov, HRMS/UNOG

The issues

1. By application submitted on 26 January 2009 to the Geneva Joint Appeals Board (JAB), transferred to the United Nations Dispute Tribunal (UNDT) as of 1 July 2009 and registered as case UNDT/GVA/2009/27, the Applicant contests the decision to terminate his fixed-term appointment effective 26 October 2008, which was notified to him by letter from the Chief of the Human Resources Management Section dated 26 September 2008.

Facts

2. The Applicant entered the service of the United Nations Office of the High Commissioner for Human Rights (hereinafter OHCHR) on 26 April 2004. He worked as Head of Mission of the Office of the OHCHR in Angola, at the P-5 level, on the basis of a one-year short-term appointment (300 series).

3. From 26 April 2005 to 31 March 2006, the Applicant continued to serve at the Office of the OHCHR in Angola on a program-linked fixed-term appointment at the L-5 level.

4. After being selected for a position of Chief of the OHCHR Office in Angola - advertised through Galaxy system - the Applicant was granted a two-year fixed-term appointment with the Organization at the P-5 level (step 8), effective 1 April 2006.

5. After having shared with his direct supervisor, the Chief, Field and Operations and Technical Cooperation Division (CBB), his concerns regarding the latter's management style, the Applicant wrote a letter to the High Commissioner for Human Rights on 4 November 2006 voicing such concerns, and in particular that he felt not adequately supported by Headquarters. The High Commissioner replied to the Applicant by letter of 24 November 2006, stating that the deep changes the OHCHR was undergoing required flexibility from all and urged him to "work directly with his Desk Officer, Unit Coordinator, and with [the Chief, CBB] to resolve such matters in the most constructive manner."

6. Over the time he worked at the OHCHR the Applicant stated in several occasions that, for family reasons, he had a strong preference for serving in a duty station in Latin America; more specifically, as close as possible to Nicaragua.

7. The Applicant applied for the position of Head of the new regional office in Panama and for that of Chief of the Bolivia Office. By mid-2007, he was recommended for the position in Panama, and he withdrew his application for the Bolivia Office. However, he was eventually not appointed as Representative of the Panama Office, since the position was granted, by executive decision, to the former Head of Office in Santiago de Chile, which had had to be closed owing to budgetary reasons. The Applicant then re-applied for the position of Representative in Bolivia, following the advice of the Chief, CBB. He was interviewed but not recommended for this post. The vacancy announcement was cancelled and later re-advertised.

8. The Applicant applied for a P-4 position as Human Rights Advisor in Nicaragua. He was selected, but his hierarchy apprised him that in order to accept this offer he would need to resign from his fixed-term appointment.

9. The Applicant applied for an advertised temporary post as Representative *ad interim* in Bolivia, and he was selected in February 2008.

10. In March 2008 the government of Angola communicated its decision to close the OHCHR Office in Luanda.

11. The Applicant's fixed-term appointment was renewed for two more years from 1 April 2008. It was due to expire on 31 March 2010.

12. On 6 April 2008, as arrangements for the closure of the Office in Angola were being made, the Applicant was transferred to the Office of the OHCHR in Bolivia, on the basis of the temporary assignment as Representative *ad interim*. This assignment was initially for 3 months, but it was subsequently extended twice, until 26 October 2008. The selection process for the position as Representative of the High Commissioner in Bolivia was opened at that time.

13. The Office in Luanda of OHCHR was closed on 31 May 2008, following the government of Angola's decision. In this context, the post of Chief of Office, encumbered by the Applicant, was abolished.

14. While serving in Bolivia, he applied for two other positions as Representative: in Colombia (permanent) and Mexico (temporary). The announcement for the post in Colombia was cancelled on the ground of lack of suitable candidates; the Applicant was unsuccessful in being recruited for the Mexico position.

15. On 23 July 2008, the Applicant was made an offer for the position of Deputy Representative in the Office of the OHCHR in Guatemala, a newly created post at the P-5 level with funding secured for one year. The Applicant's supervisors advised him at that point that efforts had been made in order to identify a position in line with the Applicant's level and qualifications and taking into account his desire of serving in the Latin American region, and that this was the only suitable post found.

16. By letter of 10 September 2008 to the Director of the Field and Operations and Technical Cooperation Division, the Applicant declined this offer. By e-mail of 16 September 2008, the Director took note of the aforementioned letter and reiterated her position that the only option, in view of his refusal to accept the position offered, would be his separation from OHCHR.

17. By letter dated 26 September 2008, the Chief of the Human Resources Management Section (HRMS) communicated to the Applicant that, in view of his decision to decline the offer of a P-5 post in Guatemala, his contract would be terminated within 30 days from the date of that letter on the grounds of abolition of post. He further specified that the Applicant's temporary assignment in Bolivia would be extended so that it covered the notice period.

18. The Applicant's separation was effective on 26 October 2008.

19. In November 2008 (i.e. after his separation) the Applicant took the test of the United Nations Resident Co-ordinator Assessment Centre. The Report of the Centre, dated 5 December 2008, concluded that "On the basis of this competency

evaluation, [the Applicant was] placed in Category 2, “Recommended for Appointment with Some Development Needs”.

20. On 14 October 2008, the Applicant wrote to the Secretary-General requesting that the decision to terminate his contract, dated 26 September 2008, be reconsidered.

21. On 21 October 2008, the Applicant’s counsel wrote to the Secretary of the Geneva Joint Appeals Board (JAB) to request a suspension of action of the “decision, dated 26 September 2008, to terminate the Applicant’s contract”. Such request was dismissed by decision of the Deputy Secretary-General dated 24 October 2008, as recommended by the JAB report.

22. By memorandum dated 10 December 2008, the Administration Law Unit (ALU) gave a negative response to the Applicant’s request for review.

23. By e-mail of 15 December 2008, the Applicant’s counsel asked for a two-week extension of the time-limit for lodging an appeal before the JAB, which was granted by letter by the JAB Secretary on the same day. The appeal was indeed filed before the JAB on 26 January 2009, i.e. the deadline then established to this effect. The Respondent submitted his reply on 3 April 2009.

24. On 1 July 2009, the case was transferred to the United Nations Dispute Tribunal, following the abolition of the JAB.

25. On 30 July 2009 the Respondent filed his final comments. The Applicant declared not having additional observations by e-mail of 19 August 2009.

26. On 15 October 2009 parties were convoked to an oral hearing, which took place on 3 November 2009.

27. After the hearing, the Applicant submitted a letter, dated 19 November 2009, enclosing an e-mail from one of his former colleagues. The Applicant stated in this letter that he had never been seriously considered for a Resident Coordinator position due to his age (near 58 years old), as the attached message allegedly showed that there was “an apparent policy of deliberate age discrimination.”

The Applicant seeks redress by requesting:

(a) that the impugned decision be set aside and that the Applicant be awarded a commensurate post;

(b) that the Applicant be retroactively paid his full salary until such time as he re-enters the UN service;

in the alternative,

that the Organization pay the Applicant damages equivalent to the full salary and post adjustment which he would otherwise be entitled for the balance of his fixed-term contract (i.e. until 31 March 2010), less any sums already received from the Organization.

Parties' Contentions

The Applicant's main contentions are the following:

28. The Applicant sustains that the impugned decision was motivated by personal animosity and prejudice on the part of the Applicant's direct supervisor, the Chief, CBB, OHCHR; it reveals discrimination against him and constitutes abuse of authority. He explains that his supervisor's bias arose from a long-lasting professional disagreement, which led to a consistent pattern of harassment (belittling his work, humiliations, lack of understanding, undermining his capacity).

29. The Applicant holds that the said decision amounted to constructive dismissal, inasmuch as it aimed at side-lining him, placing him in his way out of the Organization. He further stresses that the decision is not in the best interest of the Organization.

30. The Applicant submits that prejudice is evidenced by the manner in which he was put aside before the closing of the Angola office, first, and, later, during

the Bolivian crisis; in both cases he was removed from his position at a critical moment and when his expertise was most needed. He also alleges, in this regard, that while in Bolivia, he was placed “under Administration” by his hierarchy and his work systematically subject to “micro-management” from Headquarters. The Applicant suggests that the fact that he was not selected for the three posts being filled in Latin America at the time he was separated further shows personal bias by his direct supervisor, the Chief of CBB, which did not deem him prepared to assume the responsibilities of a head of office/mission. It is stated that there is no other explanation for not being selected than his being on his supervisor’s “black list”. This impression was reinforced since some of these positions were re-advertised as if no qualified candidate had applied, and finally filled, according to the Applicant, by less qualified, external candidates. However, the Applicant claims that the fact that he was successful in the Resident Coordinator Assessment Test proves wrong the Chief of CBB’s poor regard of his capacity.

31. The Applicant accessorially submitted that the OHCHR had a practice of systematically excluding candidates approaching the age of 60-62 year old from the posts of Chief of country office.

32. While acknowledging that the abolition of the Applicant’s post was the result of the decision to close the Office in Luanda, which was made by the Angolan government, the Applicant holds the Administration should have found a post for him. He avers that the Organization did not show good faith in its efforts to place him, and that it did not seriously and energetically try to find a proper position for the Applicant. On this point, he stresses that inasmuch as various positions matching his profile were available at the time of his separation, namely, those of Representative of the High Commissioner in Colombia, Mexico and Bolivia, and he was not selected for any of them (although he met the requirements and had more relevant experience than the successful candidates) or even appointed to one of them by executive decision of Headquarters, the Organization cannot be said to have deployed every *bona fides* efforts to identify an adequate alternative position for him. The Applicant adds that he did not feel he had the Organization’s support in his subsequent applications, notably after his separation.

33. The Applicant considers that his refusal of the post offered to him as Deputy Representative at the Guatemala Office may not justify the termination of his appointment. In this connection, he points out that the said post was not in line with his qualifications and experience, it was temporary (12 months) and entailed a *de facto* demotion to the extent the Applicant would not have been the head of office and, hence, he would have not played a role of political leadership, of the nature he intended to discharge when joining the Organization. Moreover, in the Applicant's view, this "take-it-or-leave-it offer" was in itself belittling, it constituted a sign of lack of confidence and an attempt to side-line him, and was, as such, humiliating. In addition, the Applicant disagrees with the Respondent's assertion that there was room for him to develop his skills in the position of Deputy Representative in Guatemala. Likewise, he denies that this position, if temporary, would have "bought some time" for him to find a more attractive position, as he believes he had little chances of being country representative anew as long as CBB was managed by the same person.

34. The questioned decision caused serious damage to the Applicants's professional standing and reputation. It impaired his prospects for a future job both inside and outside the UN system, particularly given his age and the fact that he would be deprived of the possibility of applying as an internal candidate from his separation onwards. The Applicant is thus entitled to compensation for such damage suffered.

The Respondent's main contentions are the following:

35. At the outset, the Respondent emphasises that the abolition of a staff member's post falls within the authority of the Secretary-General in accordance with Staff Regulation 9.1 and Staff Rule 109.1. In such a case, the Administration is only obliged to a) properly arrive to the decision in terms of formal procedures and motivations, and b) make every good faith effort to find the staff member alternative employment.

36. It is underscored that the decision to close down the OHCHR office in Angola –which brought about the abolition of the Applicant's post- was not taken

by the OHCHR, but rather by the Angolan government. Therefore, the Respondent states, it is excluded that the abolition of the post could have been based on improper motives. He denies that the Applicant has any valid ground to claim the contrary.

37. The Respondent claims that the Administration made every good faith effort to find an alternative suitable post for the Applicant, who had been at the OHCHR's service for only four and a half years. He stresses that the OHCHR actually proposed to him a position as Deputy Representative in the Guatemala office, a suitable post, in line with his qualifications and his experience. Moreover, this offer took into account the Applicant's expressed desire to serve in Latin America and his family situation.

38. It is submitted that the Guatemala offer was adequate, noting that it is at the P-5 level (the same grade the Applicant had held). Moreover, it is underlined that the Guatemala office is an important one in terms of size and activity, that it represented an interesting challenge for the Applicant and an opportunity to further develop his professional skills. The funding for this position was secured for the next 12 months, which would at least have bought the Applicant time to apply for other positions, while securing his employment and pension rights. The Respondent refutes that the said offer was downgrading and does not see how offering the Applicant a post in the Guatemala office would have hampered his chances to obtain employment. He also recalls that he does not have an acquired right to a certain job title.

39. Furthermore, the Respondent stresses that the Organization has a prerogative and a duty to take appropriate measures to ensure the good functioning of the Administration, and this includes assessing the suitability of a given candidate for a certain position. In this connection, the Respondent states that some problems had arisen –and had been brought to his attention– concerning the Applicant's performance, in particular regarding his diplomatic skills and some reluctance on his part to take guidance from Headquarters.

40. In response to the Applicant's argument that he was never selected for posts in Latin America for which he applied despite being better qualified than the

successful candidates, the Respondent affirms that he was not the best qualified candidate. In this regard, the Respondent states that the allegation that the fact that he was not selected for the three positions being filled at the time (in the Colombia, Mexico and Bolivia offices) would prove the ill will of the Organization towards the Applicant is unfounded. Besides, he recalls that he has not challenged his non-selection for these posts. He further clarifies that the Applicant did not apply for the post of Chief of Office in Bolivia when it was advertised for the second time in January 2008.

41. As regards allegations of prejudice and discrimination against him, the Respondent opposes that the Applicant, who bears the burden of proof according to the United Nations Administrative Tribunal (UNAT)'s long lasting jurisprudence, does not provide any factual basis for his assertions that the Chief, CBB, abused his power or that his separation was tainted by prejudice.

42. Based on the above, the Respondent requests that the Tribunal that the application be rejected in its entirety.

Considerations

43. The application meets the receivability conditions, as prescribed by Article 8 of the Tribunal's statute.

44. Former Staff Rule 109.1 (c), which was in force at the time of the facts alleged, established that:

“if the necessities of service require abolition of a post and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments.”

45. First, it has to be pointed out that the closing of the Office in Luanda was due to the decision of the Angolan Government. Thus, the necessities of service required the abolition of the Applicant's post.

46. The UNAT has consistently interpreted the above-cited provision to mean that "a good faith effort must be made by the Organization to find alternative posts for permanent staff members whose post are abolished." It has also stated that where there is a doubt that a staff member has been afforded reasonable consideration for available posts, it is incumbent on the Administration to prove that such consideration was given (Cf. Judgment No. 910, *Soares* (1998), citing Judgment No. 447, *Abbas* (1989); Judgment No. 85, *Carson* (1962); Judgment No. 1128, *Banerjee* (2003)).

47. Even if UNAT's reading of Staff Rule 109.1 (c) should be endorsed, it is questionable, to say the least, that the said provision applies to the case at hand. Indeed, it unambiguously flows from the above-referred rule that its effects are limited to staff members *with permanent appointments*. The Applicant was the holder of a fixed-term appointment and, as such, he appears to fall out of the scope of application of the relevant provision.

48. In this regard, it is worth noting that UNAT seemed to imply in certain judgments that a duty to deploy efforts in good faith to find alternative employment for the concerned staff member would exist for any person at the service of the Organization on the basis of a contract under the 100-Series of the Staff Rules and Regulations (Cf. Judgment No. 1163, *Seaforth* (2003); Judgment No. 1254 (2005)). In view of this jurisprudence, and even though it apparently goes beyond the clear wording of Staff Rule 109.1 (c), it is appropriate to enter into considering whether the Administration did or did not make *bona fides* efforts in order to identify an adequate position for the Applicant further to the abolition of his post in the Angola office.

49. In considering this issue, due note is taken of the Applicant's allegation that the Organization may not be deemed to have resolutely sought to find an adequate position for the Applicant inasmuch as at least three positions for which he had expressed interest were in process of being filled during the relevant period and

the Applicant was not selected for any of them. Notwithstanding, it may not be overlooked that the said posts were filled through competitive selection processes. In this context, it is for the Administration to assess which is the best suited candidate for a given position, following the established rules and procedures, and no staff member may claim to have a right to be appointed to a specific post.

50. As a matter of fact, the Applicant never contested the decisions not to have been selected to the Mexico, Colombia and Bolivia positions. It is neither possible nor appropriate to make up for the Applicant's failure to do so within the present case.

51. In any event, the incontrovertible fact in the present case remains that the Organization did actually offer a position to the Applicant after the abolition of his post. Consequently, the key question comes to whether the position proposed to him was an adequate one. After careful examination of the circumstances of the case, it results that the offer of being appointed as Deputy Representative in the Guatemala office of the OHCHR was appropriate, in so far as it was in line with the Applicant's grade, with his qualifications and experience; it even fitted with his desire of serving as close as possible to Nicaragua.

52. The offered position was at the P-5 level, that is, the same grade the Applicant had in his previous posts. Nevertheless, the level of the position proposed is not the only relevant consideration in verifying the appropriateness of an offer. In other terms, it is not sufficient that the post offered be at the same grade than that previously held by the staff member. It is equally necessary to examine whether the functions the concerned one will be called upon fulfilling correspond to the latter's skills, qualifications, and professional experience.

53. In the present case, there is no convincing indication that the post of Deputy Representative of the High Commissioner in Guatemala entailed significantly lower responsibilities or activities of a dramatically different nature than those he used to fulfil in his previous positions. While the Applicant holds that, as the "number two" in the hierarchy of the office, he would have had to deal mainly with administrative, personnel and budgetary issues, nothing confirms this

assertion. In fact, the Guatemala office was considerably more important in size and activities than the Angola or the Bolivia offices. It is thus reasonable to assume that in such a structure, he would have been in charge of activities of not lesser importance than those the Applicant used to perform. In sum, the mere fact that the Applicant would not have been Head of Mission does not mean that the position of Deputy Representative in Guatemala was not adequate, and certainly not humiliating.

54. More importantly, administrative functions, if not of the Applicant's liking, are just as crucial for the good functioning of the office and entail high responsibility for the official in charge of them. Finally, it has to be pointed out that the Applicant himself recognizes that he had performed this kind of tasks as well in his capacity as Chief of office in Luanda and later in La Paz. He expressly declared that he considered himself able to carry them out successfully. The conclusion to be drawn is that, in any case, activities he would have been performing fitted with his skills.

55. It should be recalled in this connection that, in accordance with Staff Regulation 1.2 (c) and Staff Rule 101.2 (b), it falls within the Administration's discretionary power to assign every staff member where he or she is more needed, provided that the functions attributed are not at odds with his or her skills and qualifications, not being bound by the preferences of the employee. Otherwise, the effective functioning of the Organization could not possibly be ensured. Furthermore, the fact that the Applicant had acted as Chief of mission/office since he joined the Organization, does not confer him any right or legal expectation of being maintained in this specific category of posts.

56. Having concluded that the Applicant was offered an adequate position following the abolition of his post, it is important to observe that he took the decision to decline it. Hence, it was ultimately his decision which led to the termination of his appointment.

57. It results from all the foregoing, that the contested decision to terminate the Applicant's fixed-term appointment before the date of expiration was not due to a

lack of good faith efforts by the Organization to identify a suitable alternative position for him.

58. Turning to the Applicant's allegation that the impugned decision was motivated by his direct supervisor's personal prejudice against him, this contention does not appear founded.

59. It has been UNAT's long lasting jurisprudence that anyone alleging harassment, prejudice, discrimination or any other extraneous factor or improper motivation of a particular decision, has the *onus probandi* of such an assertion (Cf. Judgments No. 554, *Fagan* (1992); No. 553, *Abrah* (1992); No. 312, *Roberts* (1983) and No. 428, *Kumar* (1988)). This is in fact in line with a well-known maxim of law that the party who alleges a fact bears in principle the burden of proving its veracity.

60. In the present case, the Applicant has not discharged this burden, for he has not adduced evidence establishing that his supervisor, the chief, CBB, had embarked on a course of harassment or observed a biased attitude against him. Nor has he brought any evidence supporting that the termination of his appointment was in any manner linked to the alleged personal dislike.

61. The Applicant has indeed reported a professional disagreement between him and his supervisor. A difference in views may very well have existed; this does not suffice to prove a pattern of discrimination against the Applicant, or even that the particular decision contested in the present case was motivated by it. The Applicant also submitted that the OHCHR would systematically put aside candidates approaching retirement age in the selection processes for positions as head of mission. This allegation is exclusively based on the statement informally transmitted by a former colleague, reporting hearsay more than one year after the facts which gave rise to this case; it is doubtful that this may suffice to satisfy the required standard of proof. Be it as it may, this has not prevented his hierarchy from making the Applicant an offer which would have allowed him to stay at the Organization's service in an appropriate position – as it has been shown.

62. The Applicant submits that the fact that he was repeatedly not selected for positions of head of mission after his post in the Angola office was abolished suggests *per se* a deliberate intention to exclude him from similar posts. It is suitable at this point reminding that, in accordance with its statute, in particular with article 2.1 of same, the Tribunal must restrain itself to examine the administrative decisions formally challenged by means of a duly constituted application. Yet, as a matter of fact, the Applicant did not contest his non-selection for the vacancies in Mexico, Bolivia and Colombia. Accordingly, those non-selection decisions may, at the most, be taken into consideration as factual context surrounding the subject matter of his application (i.e. the termination of his contract as of 26 October 2008); under no circumstances may the Tribunal pass judgment on the legality of one or more of those non-selection decisions.

For the reasons stated above,

It is DECIDED that

the application under review be rejected.

(Signed)

Judge Thomas Laker

Dated this 30th day of November 2009

Entered in the Register on this 30th day of November 2009

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva