



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/054
UNDT/NBI/2018/040
UNDT/NBI/2018/083
Judgment No.: UNDT/2019/126
Date: 10 July 2019
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ROSS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Marisa Maclellan, UNHCR
Louis-Philippe Lapicerella, UNHCR

INTRODUCTION AND PROCEDURAL HISTORY

1. The Applicant is a former staff member of the United Nations High Commissioner for Refugees (UNHCR). On 30 July 2016, he filed an application with the United Nations Dispute Tribunal (the Tribunal/UNDT) contesting the decision not to renew his fixed-term appointment (FTA) and to separate him from service (Case No. UNDT/NBI/2016/054).
2. On 9 March 2018, the Applicant filed an application requesting suspension of the decision “to insert adverse material into [his] online personnel file” (Case No. UNDT/NBI/2018/035). The Tribunal granted the application for suspension of action and directed the Respondent to “immediately” remove the adverse material from the Applicant’s online personnel file pending the results of management evaluation. This case was closed on 16 March 2018.
3. On 28 March 2018, the Applicant filed a substantive application challenging the decision to insert adverse material into his online personnel file (Case No. UNDT/NBI/2018/040).
4. He filed a third application on 18 August 2018 challenging the decision to appoint another candidate to the position of Senior Protection Officer in Tunis, JO 14082, (Case No. UNDT/NBI/2018/083).
5. The Respondent filed replies to the three applications on 26 August 2016, 3 May 2018 and 20 September 2018.
6. The three cases were consolidated by the Tribunal by its Order No. 147 (NBI/2018).
7. During a Case Management Discussion (CMD) on 12 November 2018, the parties indicated willingness to have the consolidated matters formally mediated. The Tribunal formally referred the matter to the Office of the United Nations

Ombudsman and Mediation Services (UNOMS) on 14 November 2018 for mediation and suspended proceedings until 24 January 2019.¹

8. UNOMS informed the Tribunal on 21 December 2018 that the parties had been unable to reach an amicable resolution through mediation.

9. By Order No. 080 (NBI/2019) dated 25 June 2019, the Tribunal directed the Respondent to file, on an *ex parte* basis, an unredacted copy of the “DHRM Shortlisting Matrix for JO 14082 and submissions in relation to Case No. UNDT/NBI/2018/083. The Respondent complied on 27 June 2019.

10. On 30 June 2019, the Applicant filed three motions relating to additional information/evidence, witnesses and moral damages.

FACTS

11. The Applicant entered service with UNHCR on 3 November 2008 as a P-3 Legal Officer in the Legal Affairs Service (LAS) in Geneva, Switzerland. From 1 November 2010 to 31 December 2012, he served as a Senior Protection Officer in Kassala, Sudan; from 1 January to 30 June 2013, he served on a temporary assignment as a Legal Officer in Nairobi, Kenya; and from 1 July 2013 to 30 June 2015, he was on special leave without pay for family reasons.

12. On 1 January 2015, the High Commissioner promoted the Applicant to the P-4 level while he was on special leave without pay.²

13. On 1 July 2015, the Applicant commenced a temporary assignment as a Senior Protection Officer in Rabat, Morocco. His temporary assignment was extended until 31 March 2016.

14. The P-4 Senior Protection Officer position in Rabat was advertised as a regular post as part of the September 2015 compendium. The Applicant applied for the post.

¹ Order No. 175 (NBI/2018).

² Applicant’s UNHCR Fact Sheet, Application, Annex M-5 (page31).

15. On 23 December 2015, the High Commissioner's decisions on appointments for the September 2015 compendium were announced and the Applicant learned that another candidate had been appointed to the regular P-4 Senior Protection Officer post in Rabat.

16. At the Applicant's request, UNHCR's Division of Human Resources Management (DHRM) provided him with the hiring manager's views on his candidacy for the regular P-4 Senior Protection Officer post in Rabat on 8 January 2016. The hiring manager, Mr. Jean-Paul Cavalieri, was also the Applicant's supervisor.

17. On 14 January 2016, the Applicant filed a complaint with the UNHCR Inspector General's Office (IGO) against Mr. Cavalieri, alleging that Mr. Cavalieri: (i) had breached the selection procedures by discussing the process with him prematurely; (ii) had lied to him about his chances of success in the recruitment process; (iii) had provided comments on his candidacy and performance to DHRM that were a "total fabrication"; (iv) was acquainted with the appointed candidate and "wanted [him] for the position at all cost"; and (v) had created a "negative atmosphere within the office" with his authoritative management style.

18. The IGO informed the Applicant on 18 January 2016 that after a review of his complaint, the Investigation Service had decided not to proceed with a formal investigation. The Applicant was advised to seek management evaluation instead. The Applicant emailed the IGO on 28 January 2019 requesting reasons for the Investigation Service's decision. The IGO informed the Applicant on 29 January 2019 that his email had been forwarded to the Investigation Service for assessment.

19. The Applicant emailed Ms. Karen Farkas, then Director DHRM, on 28 January 2016 informing her that he was taking annual leave until 21 February 2016 and requesting that UNHCR end his assignment in Morocco immediately

because he could no longer work with Mr. Cavaliere due to the complaint he had filed against him. He called on UNHCR to offer him another suitable assignment.

20. On the same day, the Deputy Director of the Middle East and North Africa Bureau informed the Applicant that the selected candidate had declined the Senior Protection Officer post in Rabat and that DHRM was prepared to recommend him for the position.

21. The Applicant declined the Deputy Director's offer on 31 January 2016.

22. In an email dated 15 February 2016, Ms. Farkas informed the Applicant that Mr. Cavaliere was keen to have him return to Rabat to complete his temporary appointment. She requested that the Applicant: confirm his return to work in Rabat on 22 February 2016; consider an extension of his temporary assignment; and that he reconsider being recommended to the Senior Protection Officer post in Rabat.

23. In a response dated 16 February 2016, the Applicant declined to return to Rabat to complete his temporary appointment and to extend the assignment for fear of retaliation from Mr. Cavaliere. He elected to remain on annual leave and to use special leave without pay to cover the period from 22 February to the end of his temporary appointment on 31 March 2016. This arrangement was approved by DHRM on 17 February 2016.

24. On 2 March 2016, UNHCR's Emergency Response and Temporary Staffing Needs Unit in Geneva emailed the Applicant about his interest to serve as a P-4 Senior Protection Officer in Djibouti for six months. Between 2 and 28 March 2016, the Applicant communicated with the UNHCR Representative in Djibouti (the Representative) about the temporary assignment being offered to him. On 8 March 2016, the Applicant informed the Representative that although he was interested in the position in Djibouti, he was unable to commit due to his family situation. He stated further that he would only go to Djibouti if his wife was also assigned there by her employer, the International Organization for Migration (IOM).

25. On 24 March 2016, the Applicant was informed by the Human Resources Staff Services (HRSS)/DHRM by a letter dated 18 March 2016 that since they had not been notified of the extension of his appointment or of his selection for a new post within UNHCR, they would proceed with his separation from service effective 1 April 2016.

26. The Applicant accepted the offer of a six-month temporary assignment as a P-4 Senior Protection officer to Djibouti on 29 March 2016.

27. On 30 March 2016, the UNHCR Representative in Djibouti informed him that since he was not a staff member in between assignments (SIBA), the operation in Djibouti would not be able to pay the costs related to his temporary assignment. DHRM confirmed to the Applicant by email dated 31 March 2016 that the temporary assignment could not be approved due to funding issues.

28. The Applicant was separated from service on 1 April 2016 and on 8 April 2016, he requested management evaluation of the decision not to renew his fixed-term appointment beyond 31 March 2016.

29. The UNHCR Deputy High Commissioner upheld the administrative decision not to renew the Applicant's fixed-term appointment in a memorandum dated 10 June 2016.

30. On 11 October 2016, the Applicant emailed DHRM requesting documentation on the selection process for a Senior Legal Officer position he had applied for in Brussels.

31. On the same day, Ms. Carina Karlsson, the Senior Principal Secretary of DHRM, emailed Mr. Lorenzo Pasquali, the Deputy Director/DHRM, and a Ms. SW about the Applicant's email and included the following: "Karen³ has moreover enquired if the name of the former staff member could be "flagged" to say "consult" as [the Applicant] will have internal status to apply for positions

³ Ms. Karen Farkas, the former Director of DHRM.

still. Grateful if you could let me know – and also whether we should pass this course of action through LAS?”

32. Mr. Pasquali responded to Ms. Karlsson’s email as follows: “[...] Concerning the flag, I am going to ask Z to include the consult per/ex notation in the last row of the MSRP.”

33. A note was included in the Applicant’s record in the MSRP that read “Consult PER/EX or the Chief of PAPS before any possible rehire. Action recorded as per the request from Lorenzo Pasquali, the Deputy Director of DHRM via email on 11 October 2016”.

34. UNHCR advertised job opening 14082 for the position of Senior Protection Officer at the P-4 level in Tunis, Tunisia, on 21 July 2017. The Applicant applied for the position but was not selected. The result of the selection decision for this position was circulated to UNHCR staff members on 14 November 2017.

35. Upon the Applicant’s repeated requests, the Respondent provided him access to an electronic copy of his Official Status File (OSF) on 17 November 2017. The Applicant wrote to Respondent’s counsel the same day challenging the completeness of the file provided and requesting that missing documentation (a PAF regarding his termination and email communication regarding his separation) be provided to him.

36. Counsel for Respondent responded on 19 November 2017 that UNHCR had given him access to an electronic copy of his OSF and that the electronic copy was a true copy of his physical file.

37. On 20 February 2018, the Respondent filed a submission in Case No. UNDT/NBI/2016/054 in compliance with Order No. 018 (NBI/2018), which included the information that had been inserted into the Applicant’s OSF at Mr. Pasquali direction.

38. On 21 February 2018, the Applicant wrote to the current Director of DHRM, Ms. Terry Morel, to request the deletion of “records illegally entered into MSRP”.

39. On 27 February 2018, Ms. Morel replied to the Applicant indicating, *inter alia*, that the Respondent's Principal Legal Adviser would reply to his query.

40. On 28 February 2018, the Respondent's Principal Legal Adviser responded to the Applicant by explaining the purpose of the "consult PER/EX" notation and noting the Agency's view that there was no valid reason to accede to the Applicant's request for deletion.

41. On 2 March 2018, the Applicant filed a request for management evaluation contesting the Respondent's alleged decision to "insert adverse material into [his] online personnel file to hinder [him] from getting reemployed by UNHCR".

42. On 9 March 2018, the Applicant filed an application for suspension of action pending management evaluation with the Tribunal.

43. On 16 March 2018, the Tribunal granted the application for suspension of action by way of its Order No. 032 (NBI/2018) and ordered the Respondent to remove the adverse material from the Applicant's online personnel file, pending management evaluation.

44. On 19 March 2018, the Deputy High Commissioner, UNHCR, issued a management evaluation decision which found the Applicant had not been blacklisted or retaliated against by UNHCR and amended the MSRP entry to read as follows: "In case of queries or requests for administrative action by the staff member, for purposes of coordination please contact Deputy Director, DHRM". The Deputy High Commissioner informed the Applicant that he could communicate his views to the Principal Legal Adviser, UNHCR, if he considered the amended annotation to constitute adverse material.

45. On 28 and 29 March 2018, the Applicant filed a substantive application and a motion for interim measures pending proceedings, respectively, with the Tribunal challenging the decision to insert adverse material into his online personnel file. The Tribunal was satisfied that the Respondent was making

concerted efforts to comply with Order No. 032 (NBI/2018) and therefore rejected the Applicant's motion for interim measures on 6 April 2018.⁴

46. On the same day, the Applicant wrote to Respondent's counsel reiterating his disagreement with the annotation, his view that he was still *de facto* blacklisted and a request that the annotation be deleted in its entirety.

47. The Applicant requested management evaluation of the decision not to select him for the Senior Protection Officer post in Tunis on 7 April 2018. The Deputy High Commissioner upheld the non-selection decision in a response dated 22 May 2018.

48. The Respondent's counsel responded to the Applicant on 25 April 2018 informing him that the 19 March 2018 decision of the Deputy High Commissioner would remain in effect and that "[...] it is proposed to insert into your personnel file the comments contained in your email of 6 April 2018. That is, a hard copy of your email to me of 6 April 2018 would be placed in your physical Official Status File and the contents of that email would be inserted as text into MSRP under your entry."

49. On the same day, the Applicant objected to the inclusion of any annotation in his electronic or physical OSF on the basis that it was discriminatory and illegal. He requested again that the annotation be deleted entirely.

50. According to the Respondent, he understood the Applicant's 25 April 2018 email to mean that the Applicant did not want his comments to be inserted in his OSF. However, the Respondent has neither modified the annotation in the Applicant's MSRP nor has he added the Applicant's comments to his OSF.

⁴ Order No. 045 (NBI/2018).

PRELIMINARY MATTERS

Hearing

51. Pursuant to art. 16.1 of the UNDT Rules of Procedure, the Dispute Tribunal has discretionary authority as to whether to hold an oral hearing. Additionally, art. 19 of the Rules of Procedure provides that the Tribunal may at any time issue any order or give any direction which appears to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

52. In *Lee* 2015-UNAT-583, the Appeals Tribunal held that:

17. It is clear that the UNDT has broad discretion in managing its cases and rightly so, since the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and to do justice to the parties. This discretion, though broad, is not unfettered and the exercise of it ought not to be arbitrary and/or improper.

18. In the absence of an error in the procedure adopted by the UNDT which may render the hearing of the case unfair, the Appeals Tribunal will not interfere with the discretion of the UNDT to manage its cases. In the instant case, the UNDT was in possession of the respective applications and documentations which it considered to be sufficient to make the relevant decisions to facilitate the fair and expeditious disposal of the case.

53. It is clear from the UNDT Rules of Procedure and the Appeals Tribunal's jurisprudence that a hearing is not mandatory for every case. Whilst the Tribunal may take the parties' views into consideration, the decision to hold an oral hearing lies squarely within the authority of the Tribunal.

54. In the present matter, the Tribunal has concluded that the parties have submitted a substantial and sufficient amount of documentary evidence to allow it to render decisions on the issues raised without resort to an oral hearing. A determination will therefore be made based on the parties' pleadings and supporting documentation.

Applicant's motion to obtain information

55. The Applicant filed a motion on 30 June 2019 requesting additional information from the Respondent due to the refusal by UNHCR's IGO and the Office of Internal Oversight Services (OIOS) to investigate the Applicant's allegations of serious misconduct against several senior UNHCR officials.

56. The Tribunal refuses to grant this motion for two reasons. First, the motion is, in actuality, a submission that is shrouded in speculation and is guaranteed to set the Tribunal on a random fishing expedition into peripheral matters, if entertained. Additionally, he failed to seek leave before filing the said motion. A party may make additional submissions where either the Tribunal orders such submissions or a party has applied or sought leave of the Tribunal to do so.

57. Thus, before a party may proceed to file any additional submissions on his or her own initiative, two elements must be satisfied. One, there must be an application by the party seeking leave to file the additional submissions and two, permission must be granted by the Tribunal.

Applicant's motion to hear witnesses

58. The Applicant filed a motion on 30 June 2019 requesting that the Tribunal take oral evidence from five witnesses, including himself.

59. The Tribunal has explained at paragraphs 51 – 54 its decision not to hold an oral hearing. Accordingly, this motion is refused.

Applicant's motion for leave to submit evidence regarding moral harm

60. The Applicant filed a motion for leave to submit a witness statement from his wife, Ms. Paola Pace, regarding the moral harm he has sustained.

61. The motion is granted and the witness statement of Ms. Pace is admitted into evidence. Should the Tribunal decide it necessary to award moral damages, it

will determine which evidence in Ms. Pace's statement is relevant and decide on the weight to be accorded.

ISSUES

62. The issues for determination are:

- a. Was the decision not to renew the Applicant's Fixed-Term Appointment (FTA) and to separate him from service made in compliance with the UNHCR's policy on the administration of Fixed Term Appointments (UNHCR/HCP/2015/9)?
- b. Was it lawful for UNHCR to insert adverse material into the Applicant's online personnel file after his separation from service?
- c. Is the Application in Case No. UNDT/NBI/2018/083 receivable?
- d. Was the Applicant given full and fair consideration for the position of Senior Protection Officer in Tunis, JO 14082?

Was the decision not to renew the Applicant's fixed-term appointment (FTA) and to separate him from service made in compliance with the UNHCR's policy on the administration of FTA (UNHCR/HCP/2015/9)?

Submissions

63. The Applicant's case is that:

- a. The reason for his separation was not established on 18 or 24 March 2016 since he was still in discussions with UNHCR about the possibility of a temporary assignment in Djibouti. It was not until 30 March that it became clear he would not be offered the temporary assignment in Djibouti due to funding issues. Thus, UNHCR failed to act diligently and in good faith by taking a decision to separate him on 18 March when discussions were still on-going.

b. The reasons provided were invalid and incorrect because UNHCR did not fairly establish that operational needs justified the non-renewal of his appointment. The Applicant's services were still needed but he was treated unfairly because staff members on FTAs are unfairly obliged to apply for and obtain new positions in other duty stations before the end of their Standard Assignment Length (SAL) to obtain extensions of their FTAs. UNHCR failed to consider his profile, his promotion to the P-4 level and his personal circumstances and failed to make any effort to maintain his services although he had undergone a competitive recruitment exercise.

c. He was treated unfairly in three selection processes and these flawed processes led to his separation from service. The Representative in Rabat disrespected him by lying to him and about his performance. However, the IGO failed to investigate the Representative's behavior although it amounted to misconduct.

d. The Applicant was entitled to a three-year extension of his FTA because he had completed more than five years of continuous service following a UNHCR competitive selection process, he had a consistent record of excellent performance appraisals, he had less than 18 cumulative months of missing or unfinalized performance appraisals and he had served on regular or temporary assignments without any interruption during the preceding three years. Organizational needs are not a requirement for a three-year appointment and special leave does not interrupt said appointment.

e. The Applicant had a legitimate expectation of renewal. Throughout March 2016, he was given every impression that he could serve on a temporary assignment as of 1 April 2016 in Djibouti.

f. The contested decision was tainted by extraneous factors and improper motives. There were several managers involved in the decision

to separate him. Two of them, the former UNHCR Legal Advisor, Mr. Frits Bontekoe, and the Senior Legal Officer, Ms. Elizabeth Brown, held grudges against him for various reasons. Additionally, Mr. Pasquali and Ms. Farkas harbored animosity against him because of his complaints and his challenges against two selection processes at the beginning of 2016. They retaliated against him by ensuring his appointment was not renewed.

g. The Applicant was not the author of his own misfortune because he had every intention of being appointed to a regular position and made best efforts in this regard. Between April 2015 and April 2016, he unsuccessfully applied for 27 positions in UNHCR worldwide. He was a suitable candidate for only 10 out of the 70 positions advertised by UNHCR during the two months before his separation. He applied for three of these positions but was not selected for two and the third one was cancelled.

64. The Respondent's case is that:

a. The Applicant knowingly assumed the risk of not being able to secure another assignment or post before the expiration of his FTA by declining the offer to be recommended for the regular position in Rabat, as well as the extension of his temporary assignment. Further, he limited his chances of selection by applying for only three posts out of the 70 that were advertised by UNHCR.

b. The decision not to renew the Applicant's FTA was based on the UNHCR Policy on the Administration of FTAs (the Policy). Pursuant to the Policy, a recommendation from the staff member's supervisor to renew his/her FTA is required for a renewal. Since the Applicant had no position at the time of the expiration of his FTA, he had no supervisor to make a recommendation for renewal.

c. Additionally, the staff member must meet or exceed performance expectations and must be serving on or must have been selected for a

regular or temporary assignment at the time the renewal would take effect. An FTA is not renewed if a staff member's overall performance rating is "does not meet performance expectations" or only "partially meets performance expectations" and the staff member has no regular or temporary assignment on the day the FTA is to be renewed.

d. There was no basis to renew the Applicant's FTA on 31 March 2016 because he was neither serving on nor selected for a temporary or regular assignment. Negotiating a possible assignment is insufficient to warrant a renewal. On 24 March 2016, the Applicant had not yet expressed his interest in the temporary assignment in Djibouti. He did not do so until 29 March 2016. Thus, UNHCR correctly notified him on 18 March 2016 that there was no justification to renew his appointment.

e. The Applicant did not have a legitimate expectation of renewal because there was never an explicit or implicit undertaking to renew his appointment. DHRM never made an unconditional offer of appointment or assignment to the Applicant. It merely asked the Applicant to express his interest in the temporary assignment in Djibouti. The assignment was subject to the consent of the Representative and availability of funds. Even if the reasons provided in the 18 March 2016 letter were inaccurate, the Applicant received a comprehensive explanation from DHRM on 31 March 2016.

f. There is no evidence of extraneous or improper motives. The Applicant failed to substantiate his unfounded allegation that Mr. Bontekoe and Ms. Brown harbored personal animosity against him. Additionally, he described alleged events that are irrelevant to the present case.

Considerations

65. Uncontroverted evidence before the Tribunal show that when in December 2015 it was announced that another candidate was selected for the regular P-4

Senior Protection Officer post in Rabat, Morocco, which was encumbered by the Applicant under a temporary assignment, he challenged the decision and filed a complaint against his supervisor. Thereafter, the Applicant whose temporary contract was to expire on 31 March 2016 informed the Director of DHRM on 28 January 2016 by email that he was taking annual leave until 21 February 2016.

66. In the same email, the Applicant also asked the Director of DHRM to end his assignment in Morocco immediately because he could no longer work with his supervisor and to offer him another suitable assignment.

67. It is also established that on the same day, 28 January 2016, the Applicant was informed that the selected candidate had declined the Senior Protection Officer post for which he (the Applicant) had competed and that DHRM wanted to recommend him for the position but he declined the offer to be recommended for the position barely three days later.

68. The evidence shows that also on 15 February 2016, the Applicant was asked to confirm that he would return to work in Rabat on 22 February 2016, consider an extension of his temporary assignment and reconsider also a recommendation by the DHMS to the regular P-4 Senior Protection Officer position he had competed for.

69. The Applicant promptly refused, by a response the next day, to return to Rabat to complete his temporary appointment or to extend it. Instead, he elected to remain on annual leave until 22 February and to use special leave without pay to cover the remaining period up to the end of his temporary assignment on 31 March 2016. This arrangement, which the Applicant proposed, was approved by the DHRM on 17 February 2016.

70. The Tribunal finds no merit in the Applicant's submission that the Respondent's decision to separate him on 18 March or 24 March 2016 was made in bad faith because he was still engaged in negotiations concerning another offer in Djibouti. It is established by evidence that the Respondent only informed the

Applicant on 24 March 2016 by a letter dated 18 March 2016 that since there was no notice of extension of his contract, he would be separated on 1 April 2016.

71. It is not contended that the discussions about the Applicant taking up a temporary position in Djibouti were concluded by 30 March 2016 when he was informed that there was no funding to support the position. In those circumstances, it was only proper to separate the Applicant on 1 April 2016 since he would not be sitting on any post by 1 April 2016. The fact that the notice of his separation for 1 April 2016 was conveyed to him on 24 March 2016 while the letter was dated 18 March 2016 did not materially affect his separation.

72. Similarly, the Applicant's argument that his services were still needed and that the Respondent did not make any efforts to maintain his services has no merit because he elected to leave his temporary assignment ahead of its expiry date and declined to be recommended to the P-4 position he had previously applied and competed for. It is difficult to understand how a staff member, who refuses to accept an extension of his temporary assignment and an offer to be recommended for a regular position, turns around to blame the Organization for not extending the same contract.

73. The Tribunal agrees with the Respondent's submission that the Applicant knowingly assumed the risk of not being able to secure another assignment or position before the expiration of his FTA on 31 March 2016 when he declined the offer to be recommended for the regular budget position in Rabat as well as declining the extension of his temporary assignment. This application in these circumstances constitutes an abuse of the Tribunal's process since the Tribunal is not a playground. The Applicant cannot blow hot and cold at the same time!

74. The Respondent correctly submitted that pursuant to the UNHCR policy, a recommendation from a staff member's supervisor to renew his or her FTA is required for a renewal and that since the Applicant had no position at the time of the expiration of his FTA, he had no supervisor to recommend a renewal of his FTA. Paragraph 14 of the said policy provides that a recommendation by the staff

member's manager is to be supported by a performance appraisal with at least an overall rating of "successfully meets performance expectations" for the renewal of the staff member's FTA.

75. The Tribunal also agrees with the Respondent that the fact that the Applicant was negotiating a possible assignment did not earn him a right to renewal of his FTA on a position he had declined to continue. Save for unsustainable and unproven allegations, no evidence of extraneous reasons for the non-renewal of the Applicant's FTA was tendered.

76. As to whether the decision not to renew the Applicant's FTA and separate him from service complied with the UNHCR's policy on the administration of FTAs, the Tribunal is of the firm view that this legislation was fully complied with in the prevailing circumstances.

Conclusion

77. Accordingly, Case no. UNDT/NBI/2016/054 fails. There is no merit in that Application.

Was it lawful for UNHCR to insert adverse material into the Applicant's online personnel file after his separation from service?

Submissions

78. The Applicant's case is that:

a. The Respondent breached ST/AI/292 (Filing of adverse material in personnel records) by not showing the adverse material to the Applicant before inserting it into his online OSF. The insertion of the adverse material into his online OSF amounts to prohibited conduct under ST/SGB/2008/5.

b. Ms. Farkas and Mr. Pasquali intentionally inserted the adverse material in the Applicant's OSF to bar him from being re-employed by

UNHCR once it became clear that he was still an internal candidate. They blacklisted him as retaliation for seeking legal redress regarding another selection process.

c. The annotation sanctioned by Mr. Pasquali was only visible to human resources and administrative staff worldwide. Since it was the last annotation, it was the most prominent entry displayed in the Applicant's electronic OSF. Since the annotation was sanctioned by the Deputy Director of DHRM, Mr. Pasquali, the message that the Applicant was not to be rehired was very clear.

d. The amended annotation still constitutes adverse material that obstructs the Applicant's right to full and fair consideration in any selection process. Asking staff members to consult Mr. Pasquali does not resolve the problem because he is the person who sought to blacklist him in the first place. The Applicant is still *de facto* blacklisted and this is unlawful.

e. There is no legal basis or justifiable reason for the annotation.

f. The electronic OSF the Applicant was given access to was not a true copy of the physical file. Unlike the physical file, the electronic file contained the illegal annotation.

g. The new Director of DHRM tried to cover up the fact that the Applicant had been blacklisted by providing him with a fact sheet that had been tampered with.

h. UNHCR has failed to investigate the Applicant's complaints of serious misconduct against several senior officials and to protect him from further harassment.

i. The Applicant was not selected for the Senior Protection Officer position in Tunis because of the blacklisting. If he had been selected, he

would have been rehired by UNHCR as of 1 January 2018 on a two-year FTA.

j. The Applicant has suffered reputational harm and his career prospects within UNHCR have been ruined due to the blacklisting. He has also suffered significant moral harm from the sustained harassment and retaliation.

k. The Applicant requests also that costs should be awarded against the Respondent for abuse of process and that due to his specialization in international civil service law he should be reimbursed for legal costs as if another specialized lawyer had been consulted.

l. He further requests that Ms. Farkas and Mr. Pasquali be referred for accountability under the UNDT Statute.

79. The Respondent's case is that:

a. The Application is not receivable because the Applicant is not a staff member or a former staff member under art. 3.1(c) of the UNDT Statute. He was separated from service on 31 March 2016 whereas the decisions he is contesting were taken on 11 October 2016, more than six months after his separation, and on 21 March 2018, almost 24 months after his separation.

b. There is no administrative decision that is alleged to be in non-compliance with the Applicant's terms of appointment or contract of employment because he did not have an appointment or contract at the time of the alleged decisions or any link with events that took place while he was a staff member.

c. The annotation is not adverse material. No information was added to the Applicant's physical OSF but the "consult PER/EX" annotation was added through an electronic entry in UNHCR's human resources management system, MSRP. The "consult PER/EX" annotation is used by

human resources to flag a range of atypical situations that may affect staff members and, which require consultation with a senior DHRM staff member and various units within UNHCR. It does not prevent former staff members from being re-employed.

d. The annotation was used in the Applicant's case to ensure a coordinated and meaningful response to his various requests that were sent to several staff members of UNHCR. The Respondent does not deny that some of the Applicant's requests related to legitimate matters but the quantity and accusatory content of his messages, as well as the Applicant's desire to involve senior UNHCR officials in his issues, necessitated that the Respondent take this action to coordinate his responses.

e. The Organization does not have any rules prohibiting the inclusion of a mention or a note requiring a coordinated response in a staff member's OSF.

f. ST/AI/292 does not apply to UNHCR since it has not formally accepted the applicability of it.⁵ Nonetheless, in light of the Tribunal's 16 March 2018 ruling that the 11 October 2016 annotation constituted adverse material, the Respondent replaced the annotation and offered the Applicant the safeguard provided in ST/AI/292 by showing him the annotation and giving him the opportunity to comment. The Applicant apparently objected to the inclusion of his comments in the MSRP or his OSF so the Respondent has not inserted them into his electronic or physical OSF.

g. With respect to the Applicant's allegation that the annotation resulted in his non-selection for the Senior Protection Officer position in Tunis, the Respondent notes that the Applicant has challenged this selection exercise and the matter is pending before the Tribunal.

⁵ See ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances).

h. The Applicant has failed to meet the burden of proving that he was blacklisted. The Applicant's various allegations of improper conduct, including retaliation, by UNHCR and its officials are inaccurate because he has been treated fairly and transparently by the Organization.

i. The Applicant's allegation that the Respondent has abused the procedures is without basis because the Respondent took immediate steps to comply with the Tribunal's Order No. 032 (NBI/2018).

Considerations

80. In a Suspension of Action application brought to the Tribunal on 9 March 2018, the Applicant sought an order of the Tribunal suspending the decision to insert adverse material into his online personnel file.

81. The Tribunal made an order on 16 March 2018 granting the requested relief.

82. After a review of the arguments presented by the Respondent in defense of his action to insert the annotation, this Tribunal observed as follows:

The content of the annotation which states "Consult PER/EX or the Chief of PAPS before any possible rehire" breaches ST/AI/292 (Filing of adverse material in personnel records). While the Respondent argues that ST/AI/292 is not applicable to UNHCR, it is not in doubt that the content of the annotation constitutes adverse material. Indeed, the Respondent does not contest that the annotation was added to the Applicant's profile in the MSRP system without being shown to the Applicant.

Furthermore, while the Respondent argues that no rules prohibit the Organization from including in a staff member's personnel records a mention or note requiring a coordinated response, the Tribunal finds that the content of the "Consult PER/EX" annotation in the instant case clearly goes beyond the issue of a coordinated response and smacks of prejudice.

At the hearing, the Respondent's counsel admitted that there was no basis in law for the insertion of this kind of annotation in the staff member's MSRP files. Although he submitted that such annotations are made by UNHCR as a matter of practice, counsel could not provide any information on when the alleged practice to

include annotations in the staff member's MSRP files was adopted or any statistics to show that such a practice existed.

83. The Tribunal concluded that based on the evidence before it, the decision to place the contested annotation on the Applicant's file was *prima facie* unlawful and ordered that it be immediately removed pending the result of management evaluation.

84. The substantive case now before the Tribunal is that rather than remove the adverse annotation, the Respondent amended it in management evaluation to read instead, "In case of queries or requests for administrative action by the staff member, for purposes of coordination please contact Deputy Director, DHRM."

85. In his Reply, the Respondent claims that the annotation with which he replaced the one that the Tribunal had ordered him to remove following the SOA is not adverse material. He continued that although ST/AI/292 does not apply to the UNHCR, he nevertheless applied the safeguards in that legislation by showing his new/amended annotation to the Applicant and asking for his comments. The Applicant objected to it and asked that it be deleted.

86. The Respondent also claims that the new annotation is meant to accurately reflect the Organization's intention and ensure that the said annotation cannot be misconstrued.

87. The Tribunal recalls that during the hearing of the suspension of action application that preceded this substantive application, the Respondent's counsel admitted that there was no law or policy in existence that enabled the insertion of annotations by UNHCR into the MSRP files of a staff member. His submission that such a practice existed could not be substantiated as he could not show a single instance where this had been done. Clearly, the situation remains the same.

88. The Respondent's pleading that the annotation placed on the Applicant's MSRP file is a tool to ensure that he can respond to the Applicant's various requests in a coordinated way because the Applicant had contacted several staff

members of UNHCR about human resources matters and made accusations against some is totally disingenuous.

89. The initial annotation that was later varied or modified following the order of the Tribunal spoke volumes. It directed that the Chief of a section of UNHCR be contacted before recruiting the Applicant to any position in the Organization. The new annotation directs that where there are requests for administrative action by the Applicant, the Deputy Director of Human Resources should be notified.

90. The fact that the words, “for purposes of coordination” are added is of little consequence. The Respondent’s intention to flag any contact made by the Applicant to certain UNHCR officials, including any job application by him is alive in the present annotation as it was in the previous one against which the Tribunal made an order.

91. The Tribunal is not satisfied that the new annotation serves any useful purpose except to alert or warn senior UNHCR officials and the Human Resources unit whenever the Applicant contacts the Agency especially about a possible recruitment. The Respondent’s submission that the Agency has no rules prohibiting such an annotation amounts to turning the law on its head. The proper question is whether UNHCR has any rule or policy for placing such annotations on the official files of former staff members.

92. Since it has no such rule, policy or practice; singling the Applicant out for such treatment amounts to discrimination. It is illegal for an Agency or Organization governed by rules and policies to act outside of those rules and policies and to introduce whatever they like as it suits them.

Conclusion

93. The Tribunal finds that the present annotation on the Applicant’s MSRP file is illegal. It breaches the Applicant’s right to equal treatment as other former staff members of UNHCR.

94. The Tribunal further finds that while the instructions of Mr. Pasquali and the Deputy High Commissioner to include the annotations in the Applicant's MSRP exhibit a serious error in judgment, there is no clear evidence of blacklisting.

Receivability of the application in Case No. UNDT/NBI/2018/083

Submissions

95. The Respondent's case is as follows:

- a. The Applicant lacks *locus standi* because he is contesting a decision that was taken more than 19 months after his separation from service to fill a position that was advertised more than 15 months after his separation from service.
- b. There is no administrative decision under art. 2.1(a) of the UNDT Statute because the Applicant did not have an appointment or contract at the time of the alleged decision and there is no link to events that took place when he was a staff member.
- c. The Applicant failed to request management evaluation in a timely manner. The selection decision was communicated to all UNHCR staff on 14 November 2017. Unsuccessful candidates are not further informed of the outcome of a recruitment process.
- d. While it is unclear when the Applicant became aware of the decision, he admitted in his application in Case No. UNDT/NBI/2018/040, which was filed on 27 March 2018, that his challenge against this non-selection decision is time-barred. Additionally, the Applicant indicated in his application that he became aware of the non-selection decision in "mid-February 2018". He has not provided any evidence to support this claim.

96. The Applicant's case is as follows:

a. He was never formally notified of the appointment decision. He points out that UNHCR does not generally notify former staff members individually of appointment decisions. He only found out about the decision informally in mid-February 2018 when he talked to a former colleague. He then filed a timely request for management evaluation on 7 April 2018.

b. He was still an internal candidate when he applied for the Senior Protection Officer post in Tunis. This matter is closely connected to his illegal separation as well as his blacklisting by UNHCR officials.

Considerations

97. Even though the Applicant had been separated, he continued to have a legal relationship with the Respondent for purposes of internally advertised positions. It is not contested that at the time that he applied for the Senior Protection Officer position in issue, the Applicant remained an internal candidate.

98. To the extent that the Applicant could apply to internally advertised positions, he remained an internal candidate for purposes of the vacancy advertisement to which he applied. He was accordingly entitled to be informed of the selection decision in which he was not successful in the same way that other UNHCR staff members who were internal candidates were informed.

99. While the Applicant may not have *locus standi* as any *bona fide* staff member would to approach this Tribunal under art. 2.1(a) of the UNDT Statute having been earlier separated, he is entitled to a limited protection regarding his right to be informed of his unsuccessful candidacy and to a fair consideration of his application to the position as an internal candidate.

100. Regarding the timelines governing the Applicant's recourse to the Tribunal in respect of his non-selection, time began to run when he became aware of the said non-selection. Since the only available and un rebutted evidence is that the

Applicant learned of his non-selection unofficially in the middle of February 2018 and filed a management evaluation request against it on 7 April, the Tribunal finds and holds that the Applicant was not out of time.

101. Regarding the limited protection that a non-staff member may enjoy in applying to this Tribunal which has jurisdiction to receive applications from staff members and those who sue on behalf of deceased staff members only, the Tribunal recalls the case of Trudi.⁶ In that case, the application of a non-staff member whose letter of appointment was withdrawn by the Respondent due to the refusal of the host country to grant her a visa, was entertained by the Tribunal. The applicant was granted compensation only because the Respondent failed to promptly inform her that the contract of employment was frustrated due to the actions or decisions of a third party.

Conclusion

102. In view of the foregoing review, the application is receivable.

Was the Applicant given full and fair consideration for the position of Senior Protection Officer in Tunis, JO 14082?

Submissions

103. The Applicant's case is as follows:

- a. He was an internal candidate in accordance with paragraph 20 of UNHCR's Revised Policy and Procedures on Assignments.
- b. Based on the documentation provided by UNHCR, his candidacy was not considered at all in the selection process because he was excluded from the process at an early stage due to his blacklisting.
- c. The selection documentation provided has no probative value because it was created *post factum* to support UNHCR's arguments. In

⁶ UNDT-2018-049

support of this contention, reference is made to the documents submitted by UNHCR in another matter, Case No. UNDT/NBI/2016/9.

d. UNHCR probably submitted flawed documentation because the second candidate in the table (pages 45/46 of the annexes) has no manager's views and nevertheless appears to have been appointed. This means that either the High Commissioner did not follow the recommendation of DHRM and appointed a candidate who was not on the shortlist or whoever put the table together made a mistake. Candidates 1 and 2 are probably the same person because the blacked-out names of the candidates are the same length and the row of candidate 2 contains no other information.

e. The table is also incomplete because it does not contain the Career Management Support Section (CMSS) Suitability Assessments. This would contain the suitability assessments for most candidates. He suspects that the CMSS is missing because UNHCR most likely never assessed his application since his application was taken out of the selection process from the very beginning.

f. The Applicant submits further that he would have had high chances in the selection process since he was as qualified as the other shortlisted candidates. He had previously served for more than two years as a P-4 Senior Protection Officer in Kassala, Sudan, as well as for more than six months in Rabat, Morocco. The position in Rabat is very like the position in Tunis as both operations face the same challenges.

g. UNHCR failed to take into consideration the fact that his wife was working for IOM in Tunisia.

104. The Respondent's case is as follows:

a. When reviewing promotion or selection decisions, the Tribunal is required to assess whether the applicable rules and regulations have been

applied in a fair, transparent and non-discriminatory manner.⁷ If the Respondent can show even minimally that the Applicant's candidature was given full and fair consideration, the burden shifts to the Applicant who must show through clear and convincing evidence that he was denied a fair chance of promotion.⁸

b. The Applicant has failed to prove that the contested decision was based on extraneous reasons. He has been treated fairly and transparently by UNHCR.

c. Contrary to the Applicant's contentions, he was not an internal candidate at the time of his application but under paragraph 20 of the Revised Policy and Procedures on Assignments, he could, as a former staff member apply for internally advertised vacancies in the international professional category at his previous grade. The Applicant was afforded the opportunity to apply to the P-4 Senior Protection Officer post in Tunis although it was only advertised internally.

d. Paragraph 23 of the new UNHCR Recruitment and Assignment Policy, which was not in force at the time of the recruitment, defines internal and non-internal applicants.

e. Nine applicants, who were current staff members holding the personal grade of P-4, were shortlisted for the P-4 Senior Protection Officer post in Tunis while 23 applicants, including the Applicant, were not. Since these nine candidates met the required qualifications for the position, the pool of current staff members was enough to not have to consider a former staff member or current staff members at a lower grade. This is in line with UNHCR's need to ensure that qualified current staff members at the grade of the position are encumbering posts before other potential candidates, such as former staff members, are considered.

⁷ *Bali* 2014-UNAT-450.

⁸ *Rolland* 2011-UNAT-122.

f. The Applicant has not established that he had a significant chance of selection against the nine shortlisted candidates. The appointed candidate was a more suitable candidate and a female, which is in line with the Police on Achieving Gender Equity in UNHCR staffing (IOM/018/2007-FOM/019/2007).

g. The Applicant's characterization of the documents in Case No. UNDT/NBI/2016/9 is inaccurate. To protect the privacy of the other candidates, UNHCR provided the Applicant with redacted documentation prior to the matter becoming contentious. The Applicant was later given access to all the documents when ordered to do so by UNDT. The documents were not created *post facto*.

h. The Applicant's allegation that two of the candidates in the matrix are the same is erroneous. The second candidate was appointed to another position before the candidacies to the position were assessed thus the candidate's "Short-List" column reads "Appointed" instead of "Manager Reviewed" and therefore the "Manager's views" section was left blank.

i. The CMSS Suitability Assessments are no longer indicated for all candidates on an individual basis. The only comments that are now provided by the Career Management Support Section are those indicated at the first page of the DHRM shortlisting matrix, which briefly describes the job.

j. The Applicant's request for an accountability referral is unfounded.

Considerations

105. Within the maze of contentions, submissions and documents presented by the parties, the crux of the Applicant's case stands out in bold relief that although he was an internal candidate, his candidacy was excluded from the process at an early stage and not considered at all. He was therefore not given full and fair

consideration for the P-4 Senior Protection Officer position in Tunis that he applied to.

106. For his part, the Respondent's answer to the Applicant's case is that out of over thirty candidates who applied for the P-4 position in issue, only nine of the said candidates, who were serving staff members on the P-4 level, were shortlisted while twenty-three other candidates, including the Applicant, did not make the shortlist.

107. The Respondent continued that because this pool of nine serving staff members on the P-4 level provided an ample number of candidates from which a selection could be made, the Agency did not consider current staff members on a lower grade or the Applicant who was a former staff member.

108. The Respondent also stated that UNHCR's decision to consider only current staff members on the P-4 level was in line with its need to ensure that qualified current staff members at the P-4 level are made to encumber available posts before other potential candidates such as former staff members.

109. The Respondent referred the Tribunal to paragraph 23 of the UNHCR's Recruitment and Assignments Policy of 2017⁹ which defines internal candidates. That document is irrelevant for deciding whether the Applicant was an internal candidate when he applied for the position in issue in this case. At all the times material to this Application, the applicable legal instrument is UNHCR's Revised Policy and Procedures on Assignments of 9 September 2015.¹⁰

110. In the said legal instrument 'Revised Policy and Procedures on Assignments' of September 2015, paragraphs 18 to 24 deal with 'Applications and Eligibility.' At paragraph 18, an internal candidate is defined as a UNHCR staff member in the international professional category currently holding an indefinite or fixed-term-appointment who was appointed following a competitive

⁹ UNHCR/HCP/2017/2

¹⁰ UNHCR/HCP/2015/2/Rev.1

selection process reviewed by the Joint Review Board (JRB) or previous similar bodies appointed by the High Commissioner.

111. One of the special eligibility criteria provided for by paragraph 20 of the applicable legal instrument is for former UNHCR international professional staff members who were appointed following a competitive UNHCR selection process and held indefinite appointments or fixed-term-appointments for an uninterrupted period of at least one year, to apply for internally advertised vacancies at their previous grade or one grade above for a period of two years after separation in the case of men. For women in similar situations, they were eligible to apply for up to five years after separation.

112. In other words, internal candidates for UNHCR-advertised international positions included current international staff members and former international staff members who had been separated for not more than two years or five years, depending on their gender. Thus, the Applicant qualified as an internal candidate and was eligible to be considered as such. Additionally, the Applicant had been promoted to the P-4 level in January 2015, thus his level was the same as the level of the nine staff members who were shortlisted.

113. The Respondent's failure to shortlist the Applicant for the P-4 position he was eligible to apply for on the excuse that he did not do so because the pool of current staff members met the required qualifications for the position in issue is without merit. The explanation that the failure to shortlist the Applicant was in line with UNHCR's need to ensure that qualified current staff members were to encumber the advertised position other than such potential candidates as former staff members is similarly without merit.

114. UNHCR cannot invoke a "need" to trump an existing legislation. The Organization is bound to observe its own laws. No 'need' upstages or sets aside an applicable law. To all intents and purposes, the Applicant was an internal candidate for the advertised position to which he applied in the same way that other currently serving candidates were. It has not been shown by the Respondent

that the Applicant did not meet any valid criteria in the shortlisting process. The decision to exclude him and not allow him to fairly compete with other internal candidates in the selection process was unlawful.

115. The Tribunal is convinced that the Respondent has not minimally shown that the selection process was fair.

116. The Tribunal will not address the claims by the Applicant regarding the matrix showing that two candidates on the selection list were one and the same person because the Respondent's explanation and his subsequent submission of the unredacted DHRM Shortlisting Matrix for JO 14082 are satisfactory.

117. Similarly, the Tribunal accepts the Respondent's explanation regarding the CMSS suitability assessment.

118. Conclusively, the Applicant's case on this score succeeds. However, since the applications of 23 candidates, including the Applicant's, were not considered in the selection process because they were all excluded at an early stage, the Tribunal cannot conclude that the Applicant's candidacy was rejected due to blacklisting or retaliation. UNHCR apparently applied the wrong criteria to each of these internal candidates by limiting itself solely to current staff members on the P-4 level without a proper legal basis.

REMEDIES

119. The Applicant seeks the following remedies in Case No. UNDT/NBI/2016/054:

a. Rescission of the non-renewal/separation decision and reinstatement or in the alternative, three years' net base salary plus the Organization's pension fund contributions for three years as in lieu compensation.

b. An award of two years' net base salary as compensation under art. 10.5(b) of the UNDT Statute.

- c. An award of six months' net base salary as compensation for missed advancement opportunities and six months' net base salary for moral damages.
- d. An award of costs
- e. Accountability referrals against the former UNHCR Legal Advisor, Mr. Bontekoe, and the Senior Legal Officer, Ms. Brown.

120. The Applicant seeks the following remedies in Case No. UNDT/NBI/2018/040:

- a. Deletion of the adverse material from his personnel file.
- b. An award of two years' net base salary plus the Organization's pension fund contributions as compensation for harm suffered.
- c. An award of one year's net base salary for moral damages.
- d. An award of costs and accountability referrals against the former UNHCR DHRM, Ms. Farkas, and the Deputy Director/DHRM, Mr. Pasquali.

121. The Applicant seeks the following remedies in Case No. UNDT/NBI/2018/083:

- a. Rescission of the non-selection decision and re-employment by UNHCR as of 1 January 2018 or in the alternative, three years' net base salary at the P-4 level plus the Organization's pension fund contributions for three years as in lieu compensation.
- b. An award of six months' net base salary as compensation for missed advancement opportunities and one year's net base salary for moral damages.
- c. An accountability referral for any possible identified misconduct.

JUDGMENT

122. Pursuant to art. 10.5(a) of its Statute, the Tribunal may rescind a contested administrative decision or order specific performance. In cases of appointment, promotion or termination it must set an amount of compensation the Respondent may pay in lieu of rescission or specific performance. Article 10.5(b) regulates awards of compensation. The General Assembly, by its resolution 69/203, amended art. 10.5(b) of the UNDT Statute to ensure that compensation is ordered only for harm and that the existence of such harm is proven or supported by adequate evidence.

123. The Tribunal holds that the Applicant failed to substantiate his claims in Case No. UNDT/NBI/2016/054. Therefore, his prayer for remedies in that case is refused in its entirety.

124. The Tribunal finds that the Respondent failed to follow proper procedure with respect to the placement of adverse material on the Applicant's MSRP/OSF in Case No. UNDT/NBI/2018/040. Accordingly, the Tribunal orders the immediate removal/deletion of the notation contained in the Applicant's MSRP/OSF and that no annotations not specifically permitted by UNHCR's rules or documented policies be made on the Applicant's MSRP file.

125. The Tribunal however refuses the Applicant's petition for compensation, moral damages, costs and accountability referrals in Case No. UNDT/NBI/2018/040 because the Applicant has not substantiated his general allegations of blacklisting, retaliation and harm to warrant the requested awards. In this respect, the Tribunal finds that:

- a. There is no nexus between the Applicant's non-renewal/separation from service (Case No. UNDT/NBI/2016/054) and the placement of the adverse material on his MSRP (Case No. UNDT/NBI/2018/040) since, due to his own intransigence, he was separated from service approximately seven months before the adverse notation was included in his MSRP.

b. There is no nexus between Case No. UNDT/NBI/2018/040 and his non-selection for JO 14082 (Case No. UNDT/NBI/2018/083) because UNHCR applied the wrong criteria not only to the Applicant but also to 22 other candidates. Based on the facts before it, the Tribunal cannot conclude that the Applicant was singled out for discriminatory treatment during the selection process for JO 14082 because of the adverse notation on his MSRP.

126. With respect to the non-selection decision (Case No. UNDT/NBI/2018/083), the Tribunal finds as follows:

a. The decision to exclude the Applicant at an early stage and not allow him to fairly compete with other internal candidates in the selection process was tainted by procedural error and was unlawful. There was a direct link between the procedural irregularity and the Applicant not being placed on the shortlist. The Respondent is therefore ordered to rescind the impugned decision.

b. Pursuant to art. 10.5(a) of the UNDT Statute, the Tribunal shall set an amount of in-lieu compensation that the Administration may elect to pay as an alternative to rescission of the impugned decision. If the Applicant had been short-listed, he would have been one of ten short-listed candidates. The Tribunal considers that with a one-tenth probability, he had a fair chance of selection. Since the Applicant had previously served on one-year FTAs, the Tribunal sets the alternative compensation as an amount equal to one-tenth of the net base salary the Applicant would have received at the P-4 level for one year had he been appointed to the post.

c. Regarding the Applicant's claim for moral damages, the Tribunal is guided by the Appeals Tribunal's pronouncement that the testimony of an applicant alone without corroboration by independent evidence affirming non-pecuniary harm is not satisfactory proof to award

damages.¹¹ The Applicant has submitted a statement from his wife, Ms. Pace, in support of his claim for moral damages. The gist of Ms. Pace's statement is that the Applicant has become more angry, moody, bad-tempered, demotivated, frustrated and unhappy because of his exclusion from the selection process for JO 14082. According to Ms. Pace, the Applicant suffers from "severe sleep deprivation, nightmares and is irritated very easily. The Tribunal considers that this evidence is adequate to support the Applicant's allegation of harm and therefore orders the Respondent to pay the Applicant the amount of USD2,000 for moral harm.

d. The Applicant has failed to establish that the Respondent has manifestly abused the process under art. 10.6 of the UNDT Statute thus there is no justification for an award of costs.

e. Although the Respondent failed to follow the rules with respect to the selection process for JO 14082, the Tribunal cannot conclude that there was misconduct on anyone's part. Accordingly, there is no justification for an accountability referral.

127. The compensation ordered shall be paid within 60 days of this judgment becoming executable. Interest will accrue on the total sum from the date of recovery to the date of payment. If the total sum is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Nkemdilim Izuako

Dated this 10th day of July 2019

¹¹ *Kallon* 2017-UNAT-742; *Auda* 2017-UNAT-787.

Entered in the Register on this 10th day of July 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi