



Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

TOPAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON SUSPENSION OF ACTION
PENDING MANAGEMENT
EVALUATION**

Counsel for Applicant:
Natalie Puchalka, OSLA

Counsel for Respondent:
Elizabeth Brown, UNHCR
Francisco Navarro, UNHCR

Note: For administrative purposes, this order cover page has been updated with the correct name for the Applicant's Counsel. The date and the content of the order remain the same.

Introduction

1. On 20 August 2019, the Applicant, an Investigation Specialist at the P-3 level, with the United Nations Children's Fund (“UNICEF”) in New York, filed an application for suspension of action pending management evaluation under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure, seeking to suspend the decision of the United Nations High Commissioner for Refugees (“UNHCR”) to revoke an offer of employment to the Applicant for the position of Senior Investigation Specialist at the P-4 level in Nairobi dated 20 June 2019.

2. On 22 August 2019, the Respondent filed a reply contending that the application is not receivable *ratione materiae* because the contested decision has been implemented. The Respondent further submits that should the Dispute Tribunal find the application receivable, it has no merit as the Applicant failed to meet his burden of proving the three statutory prerequisites under art. 2.2 of the Dispute Tribunal’s Statute.

Factual background

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

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

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

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

Yes

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

Yes

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

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

aforementioned reference checks, medical clearance and receipt of visa (if applicable).

14. On 17 July 2019, the Applicant obtained medical clearance.
15. On or about 24 July 2019, the Applicant submitted his letter of resignation to UNICEF.
16. On 26 July 2019, the Applicant received a letter of recruitment from a Personnel Admin Officer, providing the Applicant with detailed instructions on administrative procedures and information concerning the Applicant's appointment with UNHCR. The letter stated that, "[y]our appointment is subject to satisfactory reference checks, receipt of medical clearance, security clearance, and visa".
17. On 5 August 2019, the Applicant received an email from an Administrative Associate, stating:

Please be advised that we are not in a position to proceed with your recruitment at this stage, as we have been informed by our colleagues from Risk and Oversight Unit that your case is on hold until further notice.
18. On 6 August 2019, the Applicant received an email from the Senior Intelligence Analyst, UNHCR stating that,

... we most likely will start the procedure to revoke the offer for the P4 position with the UNHCR IGO ["The Inspector General's Office"] in Nairobi starting on 1 September 2019.
19. On 20 August 2019, the Applicant requested a management evaluation of the decision of UNHCR to revoke the offer to appoint him to the position.
20. The Respondent presents the following additional facts in his reply.
21. The Applicant joined the United Nations Development Fund ("UNDP") on 1 September 2016 as an Investigations Specialist at the P-3 level.

22. On or around 1 April 2018, the Applicant was subject to the disciplinary measure of demotion (from P-3 to P-2) for misconduct in accordance with staff rule 10.2(a)(vii). The disciplinary measure included deferment of eligibility for consideration for promotion and for in step increments for a period of two years i.e. until April 2020.

23. On 18 October 2018, the Applicant submitted his application for the position. In the application, the Applicant stated that his grade was P-3.

24. In January 2019, the Applicant was seconded from UNDP to UNICEF as an Investigations Specialist at the P-3 level. For the purposes of the secondment UNDP shared with UNICEF a document with administrative information on the Applicant. This document specified that the Applicant's level at the time was P-2, Step 7.

25. On 17 June 2019, the Applicant wrote to One HR to inquire about the status of his reference checks. The Applicant also stated that:

I am sure I mentioned in my CV that I was disciplinary sanctioned with demotion from P3 to P2, and I just want to reiterate it in case it has some impact on the recruitment process!

26. In his email to One HR dated 17 June 2019, the Applicant did not disclose that the disciplinary measure included deferment of eligibility for consideration for promotion until April 2020.

27. The references obtained by One HR concerning the Applicant's employment with UNDP consisted of an employment record verification, completed by the Operations Manager, and a qualitative reference check form completed by the Applicant's supervisor. The employment record verification stated that the Applicant had not been subject to any disciplinary or administrative measures. The qualitative reference stated that the Applicant's supervisor understood that the Applicant "rightly disclosed to UNHCR a disciplinary sanction that was taken against him in relation to facts before he joined UNDP".

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

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

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

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

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

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

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

Consideration

Legal framework

34. Under art. 2.2 of the Dispute Tribunal's Statute and art. 13.1 of the Rules of Procedure, the Tribunal may suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. The Dispute Tribunal can suspend the contested decision only if all three requirements have been met.

Consideration on receivability

35. In the present case, the Respondent submits that the application is not receivable on the grounds that the contested decision has already been implemented. The Respondent argues that a decision to revoke an offer of employment is implemented when the recipient of the offer is informed that the offer is revoked and that no further action is required for the decision to be implemented. In the present case, the Respondent states that the Applicant was informed that the offer of employment was revoked and that he would not be appointed to the position during his telephone conversation with the Head of the Investigations Service of the Inspector General's Office on 9 August 2019.

36. The Tribunal notes that there has been no formal written renovation of the offer of appointment dated 20 June 2019 signed by the Chief of Section, Division of Human Resources, and accepted by the Applicant on 27 June 2019. The Tribunal further notes that the recruitment process for the position remains pending, and UNHCR has not offered the position to an alternative candidate. Therefore, the Tribunal considers that the decision to revoke the offer of employment to the Applicant has not been fully implemented and finds the application for suspension of action of this decision under art. 2.2 of the Dispute Tribunal's Statute is receivable.

Consideration on the merits

Prima facie unlawfulness

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

38. The Applicant's principal submissions may be summarized as follows:

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

record and extensive relevant experience and there is no evidence to suggest that the Applicant would not be able to complete the functions required for the new position adequately. Indeed, the reference check process was successfully completed prior to the offer of appointment being issued; and

f. In consequence, there are serious and reasonable doubts about the lawfulness of the decision made by the Administration and as such, the decision is *prima facie* unlawful.

39. The Respondent's principal submissions may be summarized as follows:

a. The Applicant bears the burden of identifying valid reasons that would lead the Dispute Tribunal to reasonably hold serious and reasonable doubts about the lawfulness of the contested decision. The Applicant has failed to meet this threshold and establish that the decision is *prima facie* unlawful;

The conditions for the offer of employment were not met

b. The offer of employment extended to the Applicant on 20 June 2019 was explicitly conditioned on the completion of satisfactory reference checks. A reference check entails contacting a job applicant's previous employers, colleges, and other sources to learn more about his or her employment history, educational background, and suitability for a job;

c. Only on 1 August 2019 did UNHCR receive specific information that the Applicant had been sanctioned with demotion for misconduct while he was employed with UNDP. This information is qualitatively different from that included by the Applicant in his personal history form, which did not specify which measure, if any, had been imposed or for what type of misconduct;

d. Indeed, the personal history form did not contain information that the Applicant been sanctioned with demotion for misconduct with deferment of eligibility for consideration for promotion, which is the most severe disciplinary measure after separation from service (demotion is referred to in

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

e. In light of the information received on 1 August 2019, which was not contained in the references forwarded by One HR, it was reasonable for UNHCR to make further enquiries about the Applicant's disciplinary record with UNDP as part of the reference check process. In this respect, the Respondent recalls that securing the highest standards of efficiency, competence, and integrity is the paramount consideration in the employment of staff in accordance with art. 101.3 of the Charter;

f. Once it was confirmed that the Applicant had been subject to the disciplinary measure of demotion with deferment of eligibility for consideration for promotion for helping another person during an examination, it was reasonable for UNHCR to conclude that this constituted an unsatisfactory reference check. Indeed, a position of Senior Investigations Specialist with the Inspector General's Office requires the highest degree of honesty and integrity, as it is charged with investigating misconduct, including breaches of integrity, by UNHCR personnel;

g. As the reference check was unsatisfactory, one of the conditions of the offer of employment was not met. Accordingly, UNHCR had the right and the duty to withdraw the offer;

h. Indeed, considering that the Applicant received a disciplinary measure deferring his eligibility for consideration for promotion until April 2020, the offer of employment at the P-4 level was arguably void *ab initio*. Since the Applicant was not eligible for a promotion, the contract could not be lawfully concluded and could not produce any legal effects;

The Applicant made a misrepresentation in his application

i. UNHCR has the right and the duty to revoke the offer of employment because the Applicant made a misrepresentation in his application for the position;

j. Specifically, the Applicant stated at page 12 of his personal history form that his grade was P-3. This information is wrong. When the Applicant submitted his application for the position on 18 October 2018, his grade was P-2. Indeed, the Applicant, on his own evidence, had been demoted from the P-3 grade in April 2018. Furthermore, the Applicant's P-2 grade is corroborated by the document issued by UNDP in December 2018 on the occasion of the Applicant's secondment to UNICEF; and

k. If the inclusion of a false statement by a candidate in the application form for a position constitutes grave misconduct and warrants the termination of a contract of employment, it follows that the withdrawal of an offer of employment, which is a lesser measure in that there is no contract of employment between the parties, is also warranted.

40. The Tribunal's considers that the essence of the Applicant's case is that UNHCR unlawfully revoked its offer of appointment dated 20 June 2019. He contends that all the conditions in the letter of appointment were met by him, and therefore that the decision to revoke the offer of employment within UNHCR was *prima facie* unlawful.

41. The Tribunal observes that UNHCR's offer of appointment dated 20 June 2019 specified that the appointment was subject to the following conditions: 1) the Applicant was to obtain medical clearance, 2) satisfactory reference checks were to be performed, 3) the Applicant needed to obtain security clearance, and 4) the Applicant needed to have a visa (if applicable).

42. On review of the record, the Tribunal finds that the Applicant did not meet the condition of a satisfactory reference check. The record evidences that he did not disclose material information which would be relevant for the recruitment of the

position, namely, that the disciplinary measure included deferment of eligibility for consideration for promotion and for in-step increments for a period of two years i.e. until April 2020.

43. Furthermore, it appears that the Applicant incorrectly stated that his grade as P-3, instead of P-2, in his application for the position. Although the Applicant brought this to the attention of One HR by emails dated 17 June 2019 and again on 31 July 2019, the Applicant did not disclose at any time that the disciplinary measure included deferment of eligibility for consideration for promotion.

44. The Tribunal is satisfied that based on the information provided by the Applicant in his personal history form and the references by UNDP available at the time that the offer of employment was made, UNHCR did not know prior to the offer of appointment dated 20 June 2019 that the Applicant's disciplinary measure included deferment of eligibility for consideration for promotion for a period of two years. Accordingly, on a *prima facie* basis and the papers before the Tribunal, the Tribunal is satisfied that UNHCR decided to withdraw the offer of employment based on the information retrieved during the reference check process, including the nature of the misconduct and the severity of the disciplinary measure.

45. Furthermore, considering that the Applicant received a disciplinary measure deferring his eligibility for consideration for promotion until April 2020, the offer of employment at the P-4 level is arguably not enforceable. Since the Applicant was precluded for a promotion until April 2020, it is difficult to understand how the contract could be lawfully concluded.

46. As the Tribunal finds that the first element for the granting of an order for suspension of action is not satisfied, the other two conditions do not need to be considered and suspension of action cannot be granted.

Conclusion

47. In light of the above, the Tribunal rejects the application for suspension of action.

(Signed)

Judge Joelle Adda

Dated this 23rd day of August 2019