

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

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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

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.

The Applicant seeks redress by requesting:

(a) that the impugned decision be set aside and tha

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.

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.”

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

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 YYc8lcHh--8T d híAhecAh,cK-HSrRzhF,H

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 rep