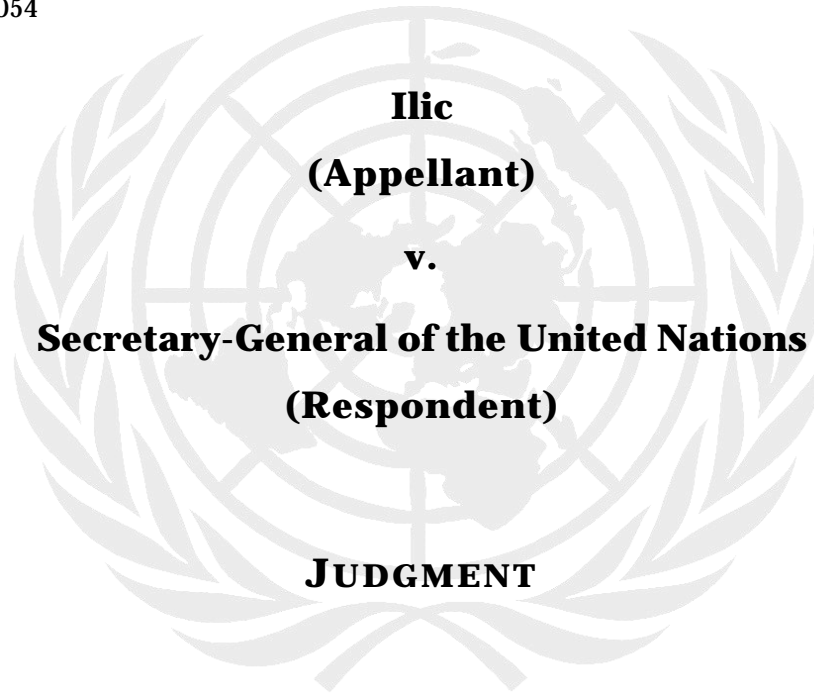




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-054



Before: Judge Sophia Adinyira, Presiding
Judge Mark P. Painter
Judge Luis María Simón

Judgment No.: 2010-UNAT-051

Date: 1 July 2010

Registrar: Weicheng Lin

Counsel for Appellant: Edward P. Flaherty

Counsel for Respondent: John Stompor

JUDGE SOPHIA ADINYIRA, Presiding.

Synopsis

1. Maja Ilic (Ilic) unsuccessfully applied for promotion to the P-4 level during the promotion session conducted by the Office of the United Nations High Commissioner for Refugees (UNHCR) in 2007 (2007 Promotion Session). Her application to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) failed mainly on the ground that she failed to demonstrate how some material mistakes on her fact-sheet prejudiced her chances of promotion. This Court affirms the Judgment of the Dispute Tribunal.

Facts and Procedure

2. Ilic is a staff member of UNHCR. Ilic applied for a promotion to the P-4 level during the 2007 Promotion Session. The High Commissioner did not promote Ilic. Ilic's appeal to the Geneva Joint Appeals Board (JAB) was transferred to the Dispute Tribunal.

3. On 16 October 2009, Judge Cousin of the UNDT rendered Judgment No. UNDT/2009/046, rejecting the application. The UNDT found that the promotion by the High Commissioner of another staff member who was not recommended by the Appointments, Postings and Promotions Board (APPB) was not irregular. Ilic's general argument that UNHCR's promotion system lacked transparency could not be the basis for rescission of the decision not to promote her. For the UNDT to rescind the decision, Ilic needed to show either that the list of promotions to the P-4 level had been drawn up following an irregular procedure, or that, without the mistakes made when reviewing her employment history, she would have had a real chance of being promoted.

4. The UNDT rejected the argument that an irregular procedure was followed. The fact that the minutes of the APPB's first session did not refer to Ilic specifically was not sufficient to prove that her application was not considered in accordance with the Methodological Approach, which guided the APPB in its assessment of the candidates for promotion.

5. The UNDT considered Ilic's specific arguments regarding the application of the Methodological Approach. UNHCR calculated her service as from 13 October 2002, whereas Ilic argued that the correct date was in 1998 in accordance with Staff Rule 104.3 on reinstatement. As Ilic's contract, effective as from 13 October 2002, made no mention of reinstatement, the UNDT found that the number of points awarded to her for service was correct. Ilic was not eligible for promotion until 2005, and so the recommendation by her supervisor for her promotion in 2005 could not be taken into account. The UNDT also rejected Ilic's arguments that her rotation history and academic qualifications were not properly taken into account.

6. During its recourse session, the APPB acknowledged that Ilic's performance evaluation for 2007 had not been taken into account during the first promotion session. But, the additional points arising from this correction did not lead to a change in the recommendation not to promote Ilic. The UNDT found that the fact-sheet submitted to the APPB concerning Ilic's employment history contained mistakes. First, her assignment to the Office of the Humanitarian Coordinator for Iraq was incorrectly classified as experience outside the United Nations. This was not taken into account at the APPB's recourse session. Second, the fact-sheet did not mention that Ilic had performed duties at the higher level from January 2007 to July 2007. Using the Methodological Approach, the APPB ranked Ilic 190th with a total of 61.5 points, whereas the last staff member promoted was ranked 157th with a total of 66.4 points. The UNDT found that Ilic failed to show that the few material mistakes on her fact-sheet caused her to lose a chance to be recommended for promotion and thus to be promoted.

7. After receiving a translation of the UNDT's Judgment on 23 December 2009, Ilic filed an appeal on 22 February 2010. The Secretary-General filed an answer to the appeal on 12 April 2010. On 27 April 2010, counsel for Ilic submitted an affidavit deposing to facts relating to the filing of the appeal.

Submissions

Ilic's Appeal

8. Ilic seeks an order from the Appeals Tribunal that the Secretary-General produce additional information and documents, including: a copy of the legal opinion relating to the adoption of the Methodological Approach; evidence regarding the consideration by the APPB of the non-weighted/so-called "soft criteria" set out in the Methodological Approach; and an explanation for the errors contained in Ilic's fact-sheet. Ilic also requests an oral hearing.

9. Ilic submits that the UNDT made errors of fact and law. First, Ilic submits that the UNDT's findings regarding her seniority are flawed. There is no legal basis for UNHCR's decision to limit the calculation of her seniority to service within UNHCR, instead of within the United Nations system. Ilic refers to the Staff Administration Mobility and Administration Manual (SAMM) General Principles, Chapter VI, Section 3.23, and the Administrative Instruction ST/AI/2007/1 entitled "Mobility and Hardship Scheme of the United Nations". Ilic argues that her seniority should have been calculated as from 1 November 1999 at the latest.

10. Second, Ilic submits that the UNDT made erroneous findings regarding the consideration by the APPB of her university degrees and the application of the soft criteria under the Methodological Approach. She also submits that the UNDT erred in finding that the errors contained in her fact-sheet did not diminish her chances of promotion. The fact that the minutes of the APPB do not refer to Ilic's university qualifications amounts to a lack of transparency, which violates her right to due process. The consideration by the APPB of an inaccurate fact-sheet violated her right to full and fair consideration for a promotion. Further, Ilic asserts that the fact-sheet was "wrongfully and illegally manipulated by the UNHCR Administration". Ilic argues that, had the APPB properly considered her seniority, hardship duty station assignments, performance evaluation in 2007, university degrees, and the fact that she was performing functions at the P-4 level, she would have been in contention for promotion.

11. Third, Ilic submits that the UNDT erred in finding that the promotion by the High Commissioner of staff members who were not recommended for promotion by the APPB was proper as he was not required to follow the recommendations of the APPB. Ilic argues that many of the staff members did not meet the requirements for promotion or did not participate in the recourse session of the APPB and the grounds for the exercise of the High Commissioner's discretionary powers were not identified. Accordingly, the decision to promote the staff members violated the fundamental principle of equal treatment.

12. Fourth, Ilic submits that UNHCR's promotions system "was not properly executed and the rules not properly followed". The APPB did not follow its Procedural Guidelines, which required the APPB to give first consideration to eligible candidates who were performing P-4 functions, whether or not they were permanently assigned such functions. Ilic had been serving at the P-4 level, although her fact-sheet did not reflect this fact.

13. Fifth, Ilic submits that the Methodological Approach does not establish a fair and objective process for promotions. The process was not properly administered and was inherently flawed so as to render it null and void. The specific contentions made by Ilic are as follows. Two of the weighted criteria, the performance appraisal reports (PAR) and rotation service, were not properly considered, costing her about 12 points. The APPB was not able to demonstrate what consideration was given to the non-weighted/soft criteria in her case. Further, the APPB considered male and female staff members separately, which was a discriminatory practice. The Methodological Approach and the matrix were published after the deadline for promotions recommendations, which did not meet the minimum standards of transparency. Also, the Approach was not submitted to and approved by the Joint Advisory Committee (JAC) as required under the Staff Rules. Further, the Approach was not properly communicated to staff serving on the APPB and it was improperly applied by the APPB. The APPB was not properly constituted as the Staff Council withdrew its confidence in its nominee, an APPB Co-Chair. The APPB exceeded its mandate to act as an advisory body to the High Commissioner. Lastly, "the APPB recourse against non-promotion was rejected and staff members [were] not clearly shown how their individual review had taken place".

14. Ilic requests that the Appeals Tribunal reverse the decision of the UNDT and order that the 2007 Promotion Session be “invalidated” and conducted again.

Secretary-General’s Answer

15. The Secretary-General submits that the appeal is not receivable as it was filed by Ilic 14 days after the deadline of 6 February 2010, calculated in accordance with Article 7(1) of the Statute of the Appeals Tribunal (Statute) and Articles 7(1) and 29 of the Rules of Procedure of the Appeals Tribunal (Rules). The Secretary-General contends that Ilic’s request for production of additional information and documents does not satisfy the statutory requirements set out in Articles 2(5) and 8(1) of the Statute.

16. With regard to the merits of the appeal, first, the Secretary-General submits that Ilic does not identify any errors warranting a reversal of the UNDT’s finding that she failed to prove that the list of promotions to the P-4 level during the 2007 Promotion Session was drawn up following an irregular procedure. To the extent that Ilic seeks to introduce new evidence, the Secretary-General submits that the Appeals Tribunal should not receive it as the requirements of Article 2(5) of the Statute have not been met.

17. There are no grounds for reversing the UNDT’s finding that the High Commissioner did not promote a staff member irregularly, as the staff member concerned was not required to have a post-graduate degree to be eligible for promotion and the staff member’s situation was considered at the APPB’s recourse session. Further, the High Commissioner is not necessarily bound by the APPB’s recommendations on promotions.

18. Responding to the general argument that UNHCR’s promotion system lacks transparency, the Secretary-General submits that the promotion system is transparent and the Procedural Guidelines and Methodological Approach are available to staff members. In response to Ilic’s contention that her situation was not considered in light of the criteria set out in the Methodological Approach, the Secretary-General refers to the minutes of the APPB meeting on the 2007 Promotion Session and the conclusion reached by the UNDT.

19. The Secretary-General submits that the Appeals Tribunal should not consider Ilic's additional arguments supporting her contention that the APPB followed an irregular procedure because they were not made before the UNDT, lack any evidentiary support, and do not meet the statutory requirements for introducing additional evidence. If the Appeals Tribunal does consider them, the Secretary-General submits the following arguments. As to the allegation of a discriminatory practice, the Secretary-General cites paragraph 152 of the Procedural Guidelines concerning gender parity. As to Ilic's arguments about the Methodological Approach, there was no deadline for publishing the Approach or the matrix. The allegation that the Approach was not properly communicated to the APPB is incorrect – the Approach and the matrix were published in advance of the 2007 Promotion Session. There is no requirement for approval of the Approach by the JAC as it is an advisory body. The withdrawal of support by the Staff Council for its representative does not prevent him from lawfully attending the APPB meetings. In response to Ilic's submission that the APPB "overstepped its mandate", the Secretary-General notes that the Methodological Approach restates the Procedural Guidelines. Lastly, Ilic has been provided with extensive information about the review of her application from the minutes of the APPB's sessions.

20. Second, the Secretary-General submits that there are no grounds for reversing the UNDT's finding that Ilic failed to show that, but for the few mistakes on her fact-sheet, she would have had a real chance to be promoted. Neither Section 2.3 of the Administrative Instruction on the Mobility and Hardship Scheme, nor Chapter IV, Section 3.23, of the SAMM is relevant to the calculation of service for the purpose of promotion. The finding that Ilic was not reinstated under Staff Rule 104.3 by her contract, effective as from 13 October 2002, was correct. With respect to Ilic's argument that she was denied credit for service in additional duty stations, these assignments were not with UNHCR and took place prior to her appointment in October 2002. In response to the contention that Ilic's academic degrees were denied proper consideration, the fact-sheet reflected the academic degrees and the UNDT correctly found that there was no reason to believe that the APPB did not take them into account.

21. With regard to the submission that Ilic was denied the correct number of points for her 2007 performance evaluation, the Secretary-General argues that the UNDT correctly found that the APPB took the evaluation into account at the recourse session and the additional points received did not cause Ilic to lose a chance to be recommended for promotion. In response to the contention that Ilic was not included among the candidates performing a P-4 level function who were required to be given first consideration by the APPB, the Secretary-General submits that the APPB has consistently interpreted the Procedural Guidelines as requiring that a candidate perform in a higher function for more than one year. Ilic did not have sufficient experience at the P-4 level. The Secretary-General argues that Ilic's assertions regarding tampering with her fact-sheet are not supported by the evidence.

22. The Secretary-General requests that Appeals Tribunal deny Ilic's request for an order for the production of additional information and documents, find that Ilic has not identified any errors warranting a reversal of the UNDT's findings, affirm the UNDT's rejection of the application, and dismiss the appeal in its entirety.

Affidavit Filed by Counsel for Ilic in Response to the Secretary-General's Answer to the Appeal

23. In his affidavit, counsel for Ilic deposes to the fact that on 4 February 2010 he caused the appeal and attached annexes to be sent to the Registrar of the Appeals Tribunal by e-mail and registered mail.

Considerations

24. The Appeals Tribunal first considers whether the appeal is receivable. Under Article 7 of its Statute, this Tribunal is only competent to hear and pass judgment on an appeal filed against a judgment of the UNDT if the appeal is filed within 45 days of the receipt of the judgment. From the records, Ilic received the English version of the UNDT Judgment on 23 December 2009. She submitted her appeal to the Registry of the Appeals Tribunal on 22 February 2010, which was 14 clear days outside the statutory period of 45 days.

25. In response to the Secretary-General's submission that the appeal was time-barred, counsel for Ilic deposes that the appeal was filed timely, both electronically and by registered mail, on 4 February 2010. Apparently only the hardcopy of the appeal was received by the Registry, although the date of its receipt does not appear on the record. The Registrar requested counsel to resend the appeal in electronic form. This was done on 22 February 2010.

26. There is no provision in the Statute or the Rules for the parties to file additional documents after the answer, however we find the situation quite exceptional and we will therefore consider this deposition of facts, and hold that the appeal is receivable.

27. Turning to Ilic's request for discovery of evidence and an oral hearing, we find that there are no exceptional circumstances justifying the exercise of our discretion in granting such requests under Articles 2(5) and 8(3) of the Statute.

28. We now turn to consider the merits of the appeal. Article 2 of the Statute, which establishes the competence of the Appeals Tribunal, provides, in part, as follows:

1. The Appeals Tribunal shall be competent to hear and pass judgment on an appeal filed against a judgment rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:
 - (a) Exceeded its jurisdiction or competence;
 - (b) Failed to exercise jurisdiction vested in it;
 - (c) Erred on a question of law;
 - (d) Committed an error in procedure, such as to affect the decision of the case; or
 - (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

29. The function of this Tribunal under Article 2 was considered in *Tsoneva*.¹ When the Appeals Tribunal hears an appeal, it does not simply re-try the case. The function of the Appeals Tribunal is to determine if the Dispute Tribunal has made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Statute. The appellant has the burden of satisfying the Appeals Tribunal that the judgment rendered by the Dispute Tribunal is defective. It follows that the appellant must identify the alleged defects in the judgment and state the

¹ *Tsoneva v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-045.

rounds relied upon in asserting that the judgment is defective. It is not sufficient for an appellant to state that he or she disagrees with the outcome of the case or repeat the arguments submitted before the Dispute Tribunal.

30. Ilic asserts that the Dispute Tribunal made errors in law and fact and therefore reached erroneous conclusions regarding the consideration by the APPB of her university degrees, the application of the criteria under the Methodological Approach, and the errors in her fact-sheet.

31. In our opinion, the minutes of the recourse session held by the APPB clearly show that the experience and achievements of Ilic were properly considered at the 2007 Promotion Session. With the additional points granted by the APPB in respect of “an additional 4 months outstanding in the PAR calculation”, she achieved a total score of 61.5 while the last staff member promoted within her group reached a total score of 66.4. The APPB therefore decided not to recommend her for promotion.

32. We note that the Dispute Tribunal took “into consideration the unfortunate errors contained in [her] fact-sheet and ... assess[ed] whether they may have seriously undermined her chances of promotion in 2007”. The Dispute Tribunal was of the view that, with 61.5 points and ranked 190th, Ilic stood no chance of being promoted as the last staff member promoted was ranked 157th.

33. We do not fault the conclusion reached by the Dispute Tribunal on this issue as Ilic, who bore the burden of proof, failed to discharge it.

34. Ilic also complained about the lack of transparency of the promotion system and the criteria used under the Methodological Approach. We share the view of the Dispute Tribunal that Ilic’s general argument that UNHCR’s promotion system lacked transparency could not be the basis of the UNDT’s decision to rescind a decision to deny a promotion.

35. We note that there have been various expressions of dissatisfaction by staff members appearing before this Tribunal that the Methodological Approach used by the APPB had a negative impact on the evaluation and ranking for “staff in between

assignments” and “specialist” staff.² However, we wish to stress that any deficiencies that may be perceived by staff members to exist in the Methodological Approach cannot be the basis for this Court to rescind an otherwise regular promotion session.

36. The Dispute Tribunal found that the promotion by the High Commissioner of a staff member not recommended by the APPB was not an irregular promotion. The only promotion made in the P-4 category of a staff member who was not recommended by the APPB was a staff member whose situation was reviewed by the APPB in the recourse session during the 2007 Promotion Session. We find no reason to reverse the UNDT’s finding.

37. We have come to the conclusion that all the arguments raised before us are a mere repetition and in some instances an embellishment of the same arguments raised by Ilic at the APPB’s recourse session during the 2007 Promotion Session and before the Dispute Tribunal.

38. We find that Ilic has failed to establish any error by the Dispute Tribunal on questions of fact or law. For the above reasons we do not find any merit in the grounds of appeal. The appeal is dismissed in its entirety.

² See *Vangelova v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-046; *Mebtouche v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-033.

Judgment

39. The Appeals Tribunal dismisses the appeal. The UNDT Judgment is affirmed.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Painter

(Signed)

Judge Simón

Entered in the Register on this 17th day of August 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal