

Translated from French

United Nations Appeals Tribunal

Case No. 2010-055

Mr. Ardisson (appellant)

v.

Secretary-General of the United Nations (respondent)

JUDGMENT

Before:

Judge Jean Courtial, presiding

Judge Kamaljit Singh Garewal

Judge Rose Boyko

Judgment No.: 2010-UNAT-052

Date: 1 July 2010

Registrar: Weicheng Lin

Counsel for appellant: Edward P. Flaherty

Counsel for respondent: Cristián Gimenez Corte

Judge Jean Courtial, Presiding Judge

Synopsis

1. Mr. Ardisson appeals against a judgment in which the United Nations Dispute Tribunal rescinded the decision of the United Nations High Commissioner for Refugees not to promote him to the P-5 level, and determined at 8,000 Swiss francs the compensation which the High Commissioner for Refugees could elect to pay instead of executing that decision. Whatever the irregularity of the Administration's approach and the number of points obtained by the appellant in the 2007 promotion session, the Dispute Tribunal did not commit an error of law in judging that it was not for the Tribunal to decide that this staff member should be promoted to the P-5 level and in providing that the High Commissioner could decide to pay compensation instead of executing the decision of rescission. The sum of compensation determined by the Dispute Tribunal is not judged to be unreasonable. The judgment is upheld.

Facts and procedure

2. Mr. Ardisson, a staff member of the Office of the United Nations High Commissioner for Refugees, applied for promotion to the P-5 level at the 2007 promotion session. The High Commissioner did not promote him. Mr. Ardisson appealed to the Joint Appeals Board on 12 October 2008. The appeal was referred to the Dispute Tribunal after the entry into force of the new internal justice system on 1 July 2009.

3. The Dispute Tribunal delivered Judgment No. UNDT/2009/040 on 16 October 2009. The Dispute Tribunal examined the procedure followed by the Appointments, Postings and Promotions Board, which had drawn up a list of staff members considered for promotion. It rejected the appellant's argument that on the one hand, the Board had not followed the Methodological Approach during the 2007 promotion session and, on the other hand, the decision of the High Commissioner concerning the number of promotions to be granted was not consistent with the procedural guidelines of the Board.

4. The Dispute Tribunal took the view that the High Commissioner could not merely request the Appointments, Postings and Promotions Board to ensure gender parity. He had a duty to modify the rules before the annual promotion session. The irregularity committed by the Appointments, Postings and Promotions Board by not following the order established under the existing rules for the application of criteria when listing staff to be recommended for promotion to the P-5 level inevitably altered the decision taken by the High Commissioner on the basis of those recommendations.

5. The Dispute Tribunal stated that it was not authorized under the statute to substitute itself for the Administration and declare that Mr. Ardisson should be promoted to the higher grade. It rescinded the decision to refuse Mr. Ardisson promotion to the P-5 level at the 2007 session, and determined at 8,000 Swiss francs the sum that the High Commissioner could elect to pay instead of executing the rescission order.

6. On 23 December 2009, Mr. Ardisson received an English translation of Judgment No. UNDT/2009/040. On 22 February 2010, he filed an appeal against that Judgment. The respondent filed a defence brief on 12 April 2010.

Submissions

Appellant

7. Mr. Ardisson requests the Appeals Tribunal to order that the Secretary-General should produce certain documents. He contends that those documents are absolutely necessary for a full and genuine consideration of his appeal. The documents include a copy of a legal opinion concerning the adoption of the Methodological Approach for the 2007 promotion session, and documents concerning the decision not to promote him. He also requests the convening of oral proceedings.

8. Mr. Ardisson contends that he would have been promoted if the procedure for promotion had not been tainted. In the 2007 promotion session, he had obtained a score of 110.51 points and was ranked 12th out of 314 candidates eligible for promotion. He argues that if the Appointments, Postings and Promotions Board had followed its own procedures, 32 men, including him, would have been appointed to the P-5 level.

9. The appellant contends that in view of the gravity of the procedural irregularities, his right to reclassification should be enforced. He argues that the actions of the Administration have placed him at a great disadvantage in terms of career and pension rights. It follows that the only way to remedy that harm is to order the Secretary-General to promote him to the P-5 level as from 1 November 2007.

10. Mr. Ardisson contends that if the Secretary-General refuses to promote him, he is owed appropriate compensation. He states that the compensation should be determined as a sum equal to the net financial advantage that he would have accrued if the procedure had been properly followed. He evaluates the loss at \$10,000 per annum over 16 years.

11. Mr. Ardisson requests that the Appeals Tribunal order the Secretary-General to promote him retroactively to the P-5 level. Should the Secretary-General refuse to do so, he requests adequate compensation. In that regard, he requests the Appeals Tribunal to order the payment of \$69,749 in compensation for loss of income and \$160,000 in compensation for loss of pension rights. He further requests the Appeals Tribunal to order the payment of at least \$50,000 in compensation for the moral prejudice suffered as a result of the grossly irregular actions of the Administration, and the payment of at least \$15,000 with interest for the cost of the proceedings, on the grounds that he was not in a position to consult the Office of Staff Legal Assistance.

Respondent

12. The respondent contends that the appeal is not receivable. It was filed by Mr. Ardisson on 22 February 2010, whereas the deadline for appeals in accordance with the Statute of the Appeals Tribunal, article 7, paragraph 1 (c), was 8 February 2010.

13. Should the Appeals Tribunal decide that the appeal is receivable, the respondent contends that contrary to article 8, paragraph 2 (a), the appellant did not specify the legal basis or motive of his appeal, but merely reiterated the arguments submitted to the Joint Appeals Board and considered by the Dispute Tribunal.

14. The respondent contends that Mr. Ardisson is wrong to claim that he would have been promoted if the selection process had not been tainted. Even assuming that the Appointments, Postings and Promotions Board would indeed have recommended Mr. Ardisson's promotion, the High Commissioner has discretionary power in taking final decisions, and would not have been obliged to comply with the recommendation.

15. The respondent contends that Mr. Ardisson has not identified any error of law or fact on the part of the Dispute Tribunal. The respondent argues that the decision of the Dispute Tribunal is in conformity with its Statute and the Charter of the United Nations, which unambiguously grant the Secretary-General alone discretionary power to appoint staff members. The Dispute Tribunal rightly concluded that the judge was not authorized to stand in the shoes of the Administration and to declare that the applicant should be promoted.

16. The respondent maintains that the Dispute Tribunal made a fair evaluation of the compensation amount. The respondent adds that if the High Commissioner were to act on the rescission of the administrative decision not to promote Mr. Ardisson, a new selection process would have to be organized, without any guarantee of ultimate promotion. Article 10, paragraph 5 (b), of the Statute of the Dispute Tribunal provides that compensation shall not normally exceed the equivalent of two years' net base salary, and that a higher compensation may be ordered only in exceptional cases. The applicant has not alleged, let alone demonstrated, any exceptional circumstances. The respondent notes that in most cases of denied

promotion, the former United Nations Administrative Tribunal granted compensation amounting to between three months' and one year's base salary on a case-by-case basis, depending on the nature of the irregularity. The Dispute Tribunal has granted similar amounts in other cases of denied promotion. The respondent concludes that Mr. Ardisson has not identified any reversible error by the Dispute Tribunal with regard to the compensation amount.

17. The respondent contends that the Appeals Tribunal is not required to consider additional evidence because the facts have not been called into question. The appellant has not cited exceptional circumstances that would justify the submission of additional evidence in accordance with article 2, paragraph 5, of the Statute of the United Nations Administrative Tribunal. As regards the request for oral proceedings, the respondent maintains that if questions of fact need to be clarified, the Appeals Tribunal could refer the case to the Dispute Tribunal in accordance with the aforementioned provisions.

Considerations

18. The appeal is not late. From the file it can be seen that Mr. Ardisson's appeal was received at the Registry of this Court by electronic mail on 4 February 2010. The application for appeal was also sent by post to the Registry of the Appeals Tribunal that same day. An application containing supplementary material was later registered on 22 February 2010. Under the circumstances, this Court considers that the appeal was filed on 4 February 2010, before the deadline of 45 calendar days had expired, counting from 23 December 2009, the date on which the appellant had received the text of the contested judgment in the language in which he had made his complaint before the judge of first instance. The respondent therefore has no grounds to maintain that Mr. Ardisson's appeal was late.

19. In the words of article 10, paragraph 5, of the Statute of the Dispute Tribunal: "As part of its judgement, the Dispute Tribunal may order one or both of the following: (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph; (b) compensation, which shall not normally exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision."

20. From the foregoing provisions, it is clear that, whatever the gravity of the irregularity committed by the administration and the number of points obtained by Mr. Ardisson in the 2007 promotion session, the Dispute Tribunal did not commit an error of law in judging that it was not for the Tribunal to decide that this staff member should be promoted to the P-5 level and, having rescinded the High Commissioner's decision denying promotion of Mr. Ardisson to P-5 during 2007, in providing that the High Commissioner could decide to pay compensation rather than execute the rescission order.

21. The powers of the Appeals Tribunal are limited by the provisions of article 9, paragraph 1, of its Statute, which are similar to article 10, paragraph 5, of the Statute of the Dispute Tribunal. In any case, the conclusions drawn by Mr. Ardisson

that the Appeals Tribunal should order the respondent to promote him to the P-5 level retroactively can only be rejected.

22. Mr. Ardisson maintains that the amount of compensation that the respondent may choose to pay as an alternative to the rescission of the contested administrative decision was set at too low a level by the Dispute Tribunal. He states that adequate compensation should include the loss of salary resulting from the denial of promotion to P-5 since 1 November 2007 and, later on, the corresponding loss of pension.

23. As stated above, the Statutes of the Dispute Tribunal and the Appeals Tribunal have provided that the compensation shall not normally exceed the equivalent of two years' net base salary of the applicant.

24. We believe that in determining compensation, the Dispute Tribunal should bear in mind two considerations. The first is the nature of the irregularity that led to the rescission of the contested administrative decision. The second is an assessment of the staff member's genuine prospects for promotion if the procedure had been regular.

25. In this case, the Dispute Tribunal first of all found no grounds for Mr. Ardisson's contention that the 2007 promotion session had been tainted by several irregularities. It then considered that the system established for the 2007 promotion session aiming at promoting equal numbers of men and women to the P-5 level with the goal of achieving gender parity in accordance with the objectives submitted by the Secretary-General to the General Assembly was not illegal in and of itself, since it also observed the principle stated in the Charter of the United Nations of promotion on the basis of merit. The Dispute Tribunal nevertheless considered that while the High Commissioner, in order to meet this objective, must establish clear rules for advancement reconciling gender parity and the principle of merit-based promotion, the rules should be modified before the beginning of the annual promotion exercise. He had committed an irregularity by merely asking the Appointments, Promotions and Postings Board, on the instructions of the Division of Human Resources Management, to apply such quotas. The Dispute Tribunal had retained that procedural irregularity alone, which had no direct bearing on Mr. Ardisson's promotion prospects, as grounds for the rescission decision.

26. Under the circumstances as just described, which are not exceptional, the Court believes that the Dispute Tribunal, in setting the amount of compensation at 8,000 Swiss francs, did not make a manifest error.

27. Concerning the documentation which the applicant has asked to be produced, the Court believes that it has no bearing on the circumstances of the case.

28. Concerning the conclusion that compensation should be paid for moral damages, the Court notes that none can be discerned from the evidence presented in this case as submitted to the Dispute Tribunal. Such a request cannot be made for the first time on appeal.

Judgment

29. Mr. Ardisson's appeal is rejected. Dated this 1st day of July 2010 in New York, United States.

(Signed)
Judge Courtial, Presiding

(Signed)
Judge Garewal

(Signed)
Judge Boyko

Entered in the Register on this 16th day of August in New York, United States

(Signed)
Weicheng Lin, Registrar, UNAT
