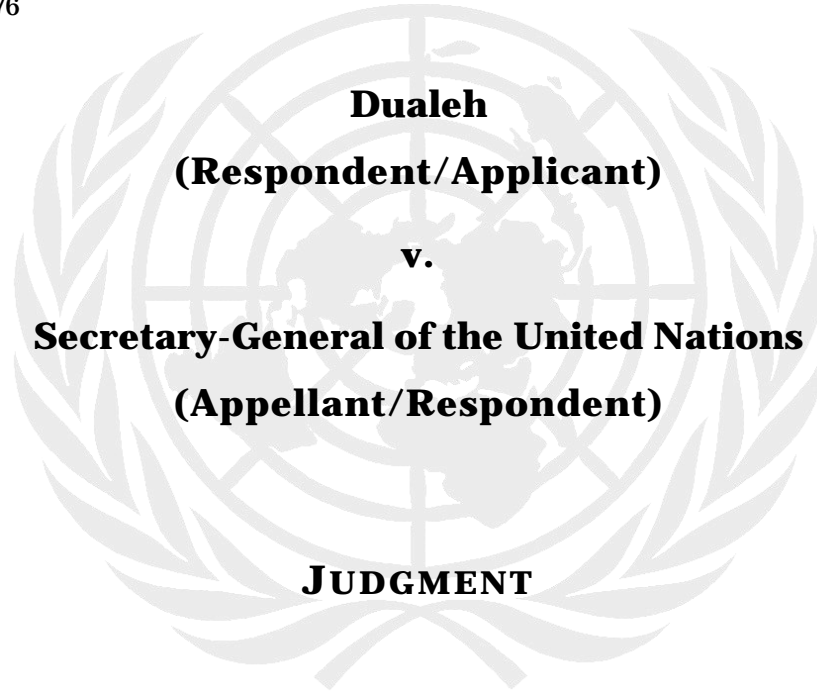




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-176



**Dualeh
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Luis María Simón
Judge Mark P. Painter

Judgment No.: 2011-UNAT-175

Date: 21 October 2011

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Not represented

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. An irregularity in a promotion procedure will only result in the rescission of the decision not to promote an appellant when he or she would have had a significant chance for promotion. Thus, where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.

Facts and Procedure

2. Mr. Mohamed Dualeh joined the Office of the United Nations High Commissioner for Refugees (UNHCR) in August 1988.

3. From 15 to 21 March 2009, UNHCR's Appointments, Postings and Promotions Board (APPB) conducted the 2008 annual promotion session (2008 session) in accordance with the promotions methodology that the APPB had developed for that session. As far as Mr. Dualeh was concerned, there were 10 slots for promotion from P-5 to D-1.

4. On 28 April 2009, UNHCR published a list of promoted staff. Mr. Dualeh was not among those promoted to the D-1 level.

5. On 15 May 2009, Mr. Dualeh initiated a recourse before the APPB against the decision not to promote him at the 2008 session.

6. The APPB reviewed Mr. Dualeh's request at its recourse session in June 2009. On 28 July 2009, UNHCR announced the results of the APPB recourse session. Mr. Dualeh was not among the staff members who were promoted following the recourse session.

7. On 10 September 2009, Mr. Dualeh filed a request for management evaluation of the decision not to promote him to the D-1 level at the 2008 session and recourse session, and on 4 December 2009, an Assistant High Commissioner sent to Mr. Dualeh the outcome of the management evaluation to the effect that the contested decision had been taken in accordance with the Organization's rules and procedure.

8. On 6 January 2010, Mr. Dualeh appealed to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal).

9. In Judgment No. UNDT/2010/187 dated 18 October 2010, Judge Cousin ordered the rescission of the contested decision, or in lieu thereof, the payment of 10,000 Swiss francs to Mr. Dualeh. Judge Cousin found merit in Mr. Dualeh's claim regarding the promotion to the D-1 level of two staff members who were not eligible and whose candidacy had not been examined by the APPB. In the view of Judge Cousin, by promoting such staff members, UNHCR "committed an irregularity which vitiates necessarily the legality of the decision to deny [Mr. Dualeh] a promotion, since there [was] a limited number of promotion slots". Judge Cousin specified that the 10,000 Swiss francs awarded to Mr. Dualeh as an alternative to the rescission of the contested decision "must be considered as compensation for the loss of salary due to the denial of promotion in 2008".

10. On 2 December 2010, the Secretary-General filed an appeal against the UNDT Judgment. Mr. Dualeh filed an answer on 17 January 2011.

Submissions

Secretary-General's Appeal

11. The Secretary-General submits that the UNDT erred in law and exceeded its competence by concluding that the procedural irregularity during the 2008 session rendered the decision not to promote Mr. Dualeh unlawful, warranting its rescission or the payment of compensation in lieu thereof, when Mr. Dualeh would have had no chance of being promoted even if the procedural irregularity had not occurred. The Secretary-General stresses that the 10 slots initially allotted for promotion from P-5 to D-1 did not operate as an absolute bar to the promotion of additional candidates following the recourse session. Indeed four additional staff members were promoted to the D-1 level following the recourse session. As he ranked the 27th out of 102 candidates against 10 posts for promotion, Mr. Dualeh stood no chance of being recommended for promotion during the 2008 session even if the procedural irregularity had not occurred. Consequently, the UNDT's award of compensation in lieu of rescission, especially "for the loss of salary due to the denial of promotion in 2008", was inconsistent with the principles on compensation

established by the United Nations Appeals Tribunal (Appeals Tribunal) in *Warren, Ardisson, Solanki* and *Wu*.¹

12. The Secretary-General also submits that the UNDT erred in law by failing to examine the nature and severity of the procedural irregularity and by failing to analyze whether the procedural irregularity had any relevance to the impugned decision. The Secretary-General stresses that the practical implication of the approach adopted by the UNDT in this case and *Allen* and *Ostensson*² is that it imposes upon the Administration a standard of procedural perfection, and that the Organization will be held liable for lapses even in cases where the correction of the procedural irregularity would not change the outcome of the decision under appeal.

Mr. Dualeh's Answer

13. The UNDT correctly acted within its competence in awarding compensation in lieu of the rescission of the impugned decision, and its Judgment should remain undisturbed.

14. The UNDT found that a grave procedural irregularity occurred, and that it had adversely impacted the morale of the entire workforce of the Organization and deprived the eligible candidates of an opportunity to receive full and fair consideration.

15. Mr. Dualeh requests that the Appeals Tribunal review the promotions methodology used by the APPB for the 2008 session, and that it find the methodology to be unfair and subjective and the evaluation system to be defective. Moreover, Mr. Dualeh requests that the Appeals Tribunal look into the impact of withholding pertinent information as well as the failure to develop fair systems of evaluation for expert positions, and order maximum compensation for the material and moral damages in his favour.

¹ *Warren v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059; *Ardisson v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-052; *Solanki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-044; and *Wu v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-042.

² *Allen v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/009; and *Ostensson v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/120.

Considerations

16. The UNDT did not sustain Mr. Dualeh's contentions regarding the promotion process, the promotions methodology, his mission expert status, his incomplete fact sheets, his performance at a higher level, and his performance appraisal reports. But the UNDT did find merit in Mr. Dualeh's claim that UNHCR promoted to the D-1 level two staff members who were not eligible and whose candidacy had not been examined by the APPB. Those findings have not been appealed.

17. Mr. Dualeh was not promoted as a result of the fact that there were candidates who had scored higher than he had. Even if the non-eligible candidates had not been promoted, he would not have been promoted during the 2008 session. The procedural irregularity had no impact on his non-promotion. There is consequently no link between the irregularity in the procedure and his non-promotion.

18. The UNDT may order that the decision not to promote Mr. Dualeh be rescinded, and in that event it must set an amount to be paid by the Secretary-General in lieu of the rescission. But a chance of promotion must exist.

19. The direct effect of an irregularity will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. Where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation. That was the case here.

20. Although there was a flaw in the procedure to select non-eligible candidates, there was none in not promoting Mr. Dualeh. For this reason, an award of compensation in lieu of rescission is reversed.

21. The UNDT should not have rescinded the decision not to promote Mr. Dualeh, nor awarded compensation.

Judgment

22. We grant the appeal and reverse the UNDT Judgment.

Original and authoritative version: English

Done this 21st day of October 2011 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Simón

(Signed)

Judge Painter

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar