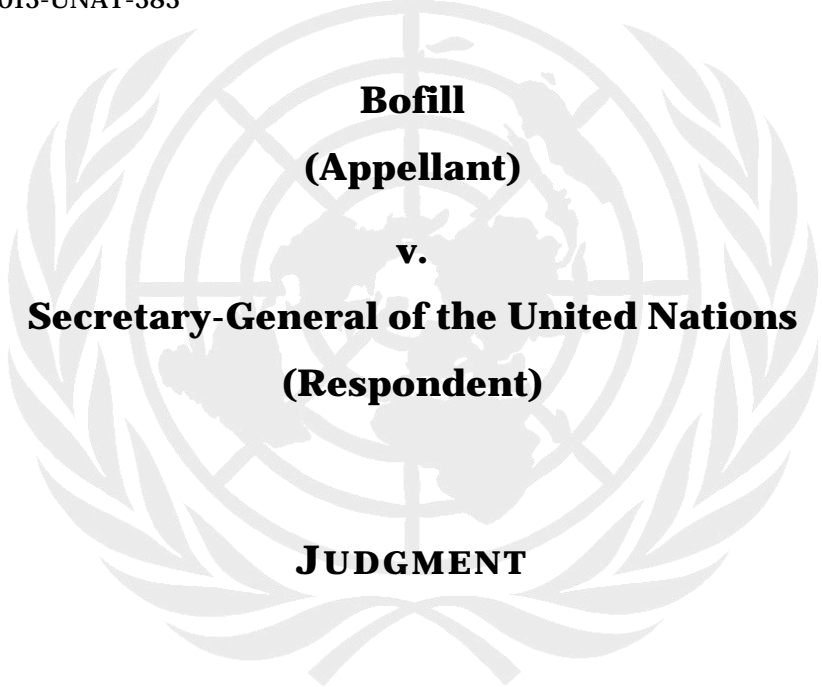




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-383



**Bofill
(Appellant)
v.
Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Inés Weinberg de Roca
Judge Luis María Simón

Case No.: 2013-437

Date: 17 October 2013

Registrar: Weicheng Lin

Counsel for Appellant: Claudio A. Realini

Counsel for Respondent: Paul Oertly

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Marie-José Bofill against Judgment No. UNDT/2012/165, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 5 November 2012 in the case of *Bofill v. Secretary-General of the United Nations*. Ms. Bofill appealed on 28 December 2012 and the Secretary-General answered on 22 March 2013.

Facts and Procedure

2. The facts established by the Dispute Tribunal in this case, which are not contested, read as follows:¹

... [Ms. Bofill] joined the Office of the United Nations High Commissioner for Refugees (UNHCR) in May 2001 at the P-5 level.

... By inter-office memorandum IOM/FOM/043/2010 of 16 July 2010, UNHCR transmitted to its entire staff the promotions methodology applicable to the 2009 annual promotions session as established by the Appointments, Postings and Promotion Board (“APPB”). It also informed staff that the number of promotion slots for 2009 had been decided as follows:

P-5 to D-1: 10

P-4 to P-5: 10

P-3 to P-4: 40

P-2 to P-3: 35

Total: 95

... By inter-office memorandum IOM/FOM/068/2010 of 29 October 2010, the Director of Human Resources Management informed all UNHCR staff that the 2009 annual promotions session would be held at the end of November 2010. The APPB convened from 23 November 2010 to 2 December 2010.

... By inter-office memorandum IOM/013-FOM/014/2011 of 1 March 2011, the High Commissioner published the list of promoted staff. [Ms. Bofill’s] name was not on the list.

... On 24 March 2011, [Ms. Bofill] introduced a recourse before the APPB against the decision not to promote her at the 2009 annual promotions session.

... The APPB reviewed [Ms. Bofill’s] request at its recourse session held from 16 to 19 May 2011 and found that there was no additional or new element allowing

¹ Judgment No. UNDT/2012/165, paras. 2-13.

finding the recourse receivable. [Ms. Bofill] was consequently not recommended for promotion.

... By inter-office memorandum IOM/046-FOM/047/2011 of 25 July 2011, the High Commissioner announced the results of the recourse session. [Ms. Bofill] was not on the list of staff members promoted following the session.

... On 4 August 2011, [Ms. Bofill] received a copy of the minutes of the APPB deliberations regarding her recourse.

... On 17 August 2011 [Ms. Bofill] submitted to the Deputy High Commissioner a request for a management evaluation of the High Commissioner's decision not to promote her to the D-1 level at the 2009 annual promotions session.

... In an e-mail dated 5 October 2011, [Ms. Bofill] was informed that it would not be possible to respond to her request for a management evaluation within the mandatory time limit.

... In a memorandum dated 6 December 2011, the Deputy High Commissioner responded to [Ms. Bofill's] request for management evaluation by confirming that the decision not to promote her to the D-1 level had been taken in accordance with the Organization's rules and procedures.

... [Ms. Bofill] completed her application with the Registry of [the Dispute] Tribunal on 2 March 2012. The [Secretary-General] submitted his reply on 30 April 2012.

3. The Dispute Tribunal dismissed Ms. Bofill's application in its entirety. The UNDT concluded that Ms. Bofill's non-selection was not discriminatory, as her previous work experience had been considered by UNHCR at the time of her initial appointment and her non-promotion was due to her performance evaluation. The UNDT also rejected Ms. Bofill's contention that there was a contradiction between the fact that she had been interviewed for a specific D-2 position and the fact that she was not promoted to a D-1 position. The UNDT stated that the procedures followed for the purposes of selection for a specific post and those followed for the purposes of promotion are not identical. Finally, the UNDT found that Ms. Bofill failed to provide any evidence in support of her allegation that her non-promotion was retaliatory in nature and rejected the allegation on that ground.

Submissions

Ms. Bofill's Appeal

4. Ms. Bofill submits that the UNDT Judgment is tainted by errors of law and material errors of procedure.
5. Ms. Bofill submits that her non-promotion is a result of UNHCR's discriminatory promotion system. The promotion methodology automatically excludes candidates who, like her, joined UNHCR at a later point in their career.
6. Ms. Bofill alleges that she is a victim of harassment and abuse of authority by her supervisor and other high UNHCR officials.
7. Ms. Bofill alleges a contradiction between the fact that she had been interviewed for a specific D-2 position and the fact that she was not promoted to a D-1 position; a contradiction, which reveals that the UNHCR methodology is "absurd", "senseless" and "characterized by bad faith".
8. Ms. Bofill requests that the Appeals Tribunal order the initiation of an investigation as well as the personal appearance of the parties. Ms. Bofill requests that this Tribunal vacate the UNDT Judgment and that the Appeals Tribunal either itself promote her to the D-1 position or order UNHCR to do so. Alternatively, she requests that the Appeals Tribunal direct UNHCR "to reconsider [her] promotion ... for the 2009 promotions session". In addition, she seeks compensation for harm sustained as a result of psychological harassment as well as legal costs.

Secretary-General's Answer

9. The Secretary-General contends that an overwhelming proportion of Ms. Bofill's appeal arguments on the merits merely constitutes a re-statement, in almost identical terms, of her application to the lower court and that as such, she has not met the burden of satisfying this Tribunal that the UNDT's decision is defective.
10. The Secretary-General submits that Ms. Bofill has not shown any error in the UNDT's rejection of her claim of discrimination and arbitrariness inherent in the UNHCR promotion system. Ms. Bofill contradicts herself on this ground of appeal when she contends that UNHCR's promotion methodology automatically excludes later entrants to the United Nations system and

“irremediably prevent[s] [her] from ever being promoted”, but subsequently states that she had been cleared and interviewed for a specific D-2 post.

11. The Secretary-General contends that Ms. Bofill has not demonstrated that the Dispute Tribunal erred in rejecting her claim of harassment and abuse of authority. In addition, Ms. Bofill has again failed to provide supporting evidence in her appeal to substantiate this claim.

12. The Secretary-General requests that the Appeals Tribunal reject the appeal in its entirety.

Considerations

13. Having considered both parties’ submissions, the Appeals Tribunal was satisfied that the issues could be determined without the requirement of an oral hearing and therefore did not grant Ms. Bofill’s request for an oral hearing.

14. The jurisprudence of this Tribunal has repeatedly emphasized that it is not sufficient for a party, when appealing a judgment of the Dispute Tribunal, to merely disagree with the UNDT’s legal and factual findings.² An appellant must demonstrate that the trial court has exceeded its jurisdiction or competence, failed to exercise the jurisdiction vested in it, erred on a question of law, committed an error of procedure such as to affect the decision of the case or erred on a question of fact, resulting in a manifestly unreasonable decision.

15. It is against these criteria that Ms. Bofill’s appeal arguments must be measured.

Ms. Bofill’s claims of discriminatory and arbitrary practices in the 2009 selection process

16. In so far as Ms. Bofill takes issue with the UNDT’s rejection of her claim that the promotion process initiated by IOM/FOM/043/2010 was unfairly weighted against her, we do not find that in considering this issue, the UNDT committed any error of law or procedure or any factual error such as to result in a manifestly unreasonable decision. On the contrary, the UNDT’s findings demonstrate that it took cognizance of all relevant information before adjudicating on and reaching a considered decision on the merits of her application.

² See *Antaki v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-096; *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051; *Tsoneva v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-045.

17. In particular, we note that by Order No. 135 (GVA/2012), the UNDT requested the Secretary-General to produce (a) the minutes of the APPB deliberations relating to the 2009 promotions process; (b) the list of candidates considered during that session showing the ranking of eligible candidates, including the number of points allocated to each criterion; (c) the list of candidates (matrix), as divided into groups, that was considered by the APPB in the second round; and (d) the list of candidates considered by the APPB as its recourse session, including its recommendations following upon its deliberations.

18. We are satisfied that the UNDT gave due regard to Ms. Bofill's argument that the applicable procedure did not take her past professional experience into account and her claim that the criteria of functional diversity and mobility were so high, in comparison to that of seniority, such as to block the chance of promotion of staff who, like her, were recruited as experts and served for long periods as such.

19. With respect to the first issue, the UNDT opined: "The Respondent is justified ... in asserting that there is no discrimination on this basis, since ... in the case of [Ms. Bofill], the consideration of her previous experience led to her recruitment at the P-5 level, although she never previously served in the United Nations system."³

20. Regarding the second issue, the UNDT's conclusion was that "it is up to the High Commissioner, who is responsible for the smooth functioning of UNHCR, to determine the relative importance of the criteria used to select the staff members who will be promoted".⁴

21. We find no error on the part of the UNDT in so holding. The Appeals Tribunal has consistently held that the Secretary-General has a broad discretion in matters of promotion and it is not the function of this Tribunal, or the UNDT, in the absence of evidence of bias, discriminatory practices or *mala fides* to substitute its judgment for that of the competent decision-maker.⁵

22. Ms. Bofill relies on the 2010 Report of the UNHCR Ombudsman in aid of her plea to this Tribunal to reverse the UNDT Judgment. Specifically, she quotes that Report as follows:

³ Impugned Judgment, para. 22.

⁴ *Ibid.*, para. 23.

⁵ See *Charles v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-242; *Fröhler v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-141.

Likewise, the Ombuds Office noted frustration of some staff as regards promotion criteria due to limited points allocated to specific expertise as opposed to diversity and mobility: staff on expert position may hold that same position for an extended period of time, without rotation and, by implication, without changing function. Only on exceptional grounds could such staff be considered for promotion. Similarly, staff who join the Organization at a later point in their career will accumulate none or limited mobility and diversity points and may hence not (ever) pass the first round of analysis. They may also have had fewer opportunities to serve in hardship duty stations. In its deliberations on the future promotion criteria and methodology, UNHCR should consider including specific measures for staff on expert positions and those joining the organization later on, provided they are eligible, who will otherwise almost automatically be excluded early on in the review process.⁶

23. Notwithstanding the contents of the above Report, it is a matter of fact, as demonstrated by the APPB minutes, that Ms. Bofill's candidacy for promotion in the 2009 session did not suffer from the infirmity contemplated by the Report. Although ranked 79th out of 91 candidates, Ms. Bofill survived both the first and second round analyses conducted by APPB and, following the second round, she was one of 45 equally-qualified candidates in group 1 remaining for consideration. The APPB minutes record:

The Board then proceeded with the third round of review for group 1 only (due to the limited number of slots) where it compared the above-mentioned 45 candidates based on a detailed analysis of their fact sheet and performance appraisal reports, giving also priority consideration, where appropriate, to gender and geographical diversity. The review also considered the demonstration of managerial competencies, fluency in UN languages and service in D/E locations.

24. Specifically addressing Ms. Bofill's promotion prospects for one of the ten slots from P-5 to D-1, in the context of 45 short-listed candidates, the Board noted:

The candidate was ranked number 79 out of 91 eligible staff members for promotion to D-1. The candidate was therefore initially in group 1. Following the second round analysis, the Board decided that the candidate was also substantially equally qualified as the candidates of group 1 since she:

- Has been at the P-5 level in UNHCR since May 2001;
- Fulfilled the managerial requirement having served as Chief of Section;
- Had not served in a category D and/or E location;

⁶ Emphasis omitted.

- Did not fulfil the “Diversity in Performance Appraisals” criteria. It was recalled that “Diversity in Performance Appraisals” would be considered as being met if consistent superior evaluations (i.e. those with a rating of “superior” or “outstanding”) are provided during the period under review (2005/2009) by different managers. In this respect, the Board noted that the performance appraisal reports on record related to the period under review reflected a mix of superior and fully effective ratings;
- Fulfilled the two UN languages criteria since her mother tongue is French and she has passed the UN language proficiency examination in English;
- Had not underfilled on a D-1 position during the period under review.

When comparing the staff member with the remaining candidates during the third round analysis in terms of performance and her position in the ranking order (the staff member is ranked number 79 out of 91 eligible staff members), the Board decided that while a valued staff member Ms. Bofill’s name could not be retained given the limited number of available slots. **The staff member is therefore not recommended for promotion.**⁷

25. In all those circumstances, we do not find that the UNDT erred in law or fact when it determined, effectively, that Ms. Bofill was afforded proper consideration during the 2009 promotions session and in finding that the APPB did not recommend her “solely on the ground of her performance”. Furthermore, the UNDT correctly found:

The Applicant submits that the evaluations on which the APPB based itself in assessing her performance do not represent an accurate picture. However, at the time of its review, the APPB is required to base itself on the evaluations as they appear on the fact-sheet or possibly the performance appraisal reports of the staff member. The Applicant did not contest her evaluation reports on the date they were prepared, and she may not call them into question in the context of the current case.⁸

Ms. Bofill’s claim that her selection for interview and short-listing for a D-2 position demonstrates the arbitrariness of the promotions structure

26. We find no merit in this ground of appeal. No persuasive argument has been advanced to the Appeals Tribunal that the procedure applicable to the selection of a candidate for a specific post and those followed for the purposes of promotion ought to be regarded as identical. Absent any evidence of unfairness or discrimination, the respective structures put in place by the Administration to manage the advancement of staff within the Organization must be respected.

⁷ Emphasis in the original.

⁸ Impugned Judgment, para. 27.

In any event, we note that Ms. Bofill's late entry into the United Nations' system did not debar her from at least having been shortlisted for a position two grades above her P-5 level.

The allegations of harassment, abuse of authority and retaliatory conduct

27. Before the UNDT, Ms. Bofill raised issues of harassment and retaliatory conduct by the Administration based, she alleged, on the fact that she had denounced the dysfunctional nature of the UNHCR promotions system and had partially succeeded before the UNDT⁹ in her challenge to the 2008 promotions session. In the present case, the UNDT rejected her claim that the appeal by the Secretary-General to this Tribunal of Judgment No. UNDT/2010/190 was retaliatory conduct. We uphold the UNDT on this point.

28. The UNDT also rejected her other claims of retaliatory conduct, in the absence of any evidence thereof adduced by Ms. Bofill.

29. In this appeal, Ms. Bofill has reiterated her claims of harassment and abuse of power but refrains from elaborating thereon.¹⁰ In light of her failure to adduce evidence of those allegations before the UNDT, this Tribunal declines to embark on a consideration of her claims in this regard.

30. In all the circumstances, Ms. Bofill has failed to demonstrate that the UNDT committed any error of fact or law or error of procedure in arriving at its decision. Accordingly, we find there is no merit in this appeal and it must be dismissed.

Judgment

31. The appeal is dismissed and the Judgment of the UNDT is affirmed.

⁹ Judgment No. UNDT/2010/190. However, the UNDT Judgment was subsequently overturned by the Appeals Tribunal in Judgment No. 2011-UNAT-174.

¹⁰ Similarly, Ms. Bofill advised the UNDT that she was declining to furnish any documentation to that effect "for the sake of confidentiality".

Original and Authoritative Version: English

Dated this 17th day of October 2013 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Simón

Entered in the Register on this 19th day of December 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar