



United Nations Dispute Tribunal

Case No.: UNDT/GVA/2009/22
Judgment No.: UNDT/2009/038
Date: 16 October 2009
English
Original: French

Before: Judge Jean-François Cousin
Registry: Geneva
Registrar: Víctor Rodríguez

ANDRYSEK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Anne-Marie Demmer

Counsel for respondent:
Shelly Pitterman, DHRM/UNHCR

Notice: The format of this judgment has been modified for publication purposes in accordance with article 31 of the rules of procedure of the United Nations Dispute Tribunal.

Application

1. In his appeal to the Joint Appeals Board, registered on 19 December 2008, the applicant requested it to recommend that:

- The decision of the United Nations High Commissioner for Refugees (UNHCR) not to promote him to the D-1 level during the 2007 promotion session should be rescinded;
- He should be awarded compensation for the unlawful decision and the moral suffering caused to him;
- The High Commissioner should be ordered to take all necessary measures to devise a fair and appropriate promotion procedure.

2. In its resolution 63/253, the General Assembly decided that all cases pending before the Joint Appeals Board (JAB) as at 1 July 2009 would be transferred to the United Nations Dispute Tribunal.

Applicant's submissions

3. The applicant states that his appeal is receivable because JAB granted him an extension of the deadline for submitting it until 19 December 2008.

4. The Methodological Approach modified the existing rules and should have been submitted for the consideration of the Joint Advisory Committee (JAC), according to staff regulations 8.1 and 8.2. The Methodological Approach introduced some elements that had not been envisaged in the Procedural Guidelines of the Appointments, Postings and Promotions Board (APPB). The application of a points system in the Methodological Approach is at variance with the Board's Procedural Guidelines, because it does not give priority to competency and integrity. The Methodological Approach should therefore have been submitted to JAC.

5. Two days before the end of the promotion session, the number of D-1 slots available for promotion was reduced from 36 to 32, without consulting JAB, and it was difficult to know whether that decision had affected his chances of promotion.

6. Since the Staff Council had withdrawn its confidence from the Co-Chair of APPB, who represented the staff, he could only be considered to represent the UNHCR Administration; consequently, parity was not respected. Thus, there was irregularity in the composition of the Board; moreover, there was a conflict of interest between the Co-Chair's functions as staff representative and his functions as Deputy Inspector-General. This conflict of interest affected the legality of all the Board's recommendations.

7. The Board improperly introduced another criterion — gender — thus creating its own rules. This criterion is at variance with the rule that priority is given to merit when promotions are granted. The applicant cannot be sure that he would have been promoted if the Methodological Approach had not been applied, but this method is unlawful. Points were calculated separately for men and women, which amounted to discrimination.

8. His fact-sheet contains errors. His most recent performance appraisal report for the period from 21 May to October 2007 is missing.

9. Over the last three years, he had applied for very difficult posts, but had not been selected; this had had negative consequences on his career path. The points system had retroactively given importance to recommendations made by supervisors.

10. Staff had no access to their supervisors' recommendations and thus could not verify the calculation of points under the Methodological Approach. The flaws in the UNHCR evaluation system vitiated the system put in place for promotions. The 2007 promotion session lacked transparency, because it was unclear how the situation of staff underfilling a post had been considered. The reply to his appeal gave no indication as to whether the non-weighted criteria had been applied in his case. He had not obtained any minutes of the promotion session establishing that the non-weighted criteria had been taken into consideration in his case.

11. The High Commissioner's decision to promote nine additional people meant that the promotion session was irregular and arbitrary.

Respondent's observations

12. The applicant's appeal should be considered withdrawn, because he did not submit his full statement of appeal before the expiry of the deadline set at 10 December 2008 in application of article 10.2 of the rules of procedure of the Geneva JAB.

13. In UNHCR promotions are governed by the rules of procedure and the Procedural Guidelines of APPB. On the recommendation of JAB, the High Commissioner took steps to improve the promotion system for 2007. The Methodological Approach was put in place in order to ensure transparency in the working methods of APPB; it did not alter the existing rules in any way. It is in keeping with the Board's rules of procedure and Procedural Guidelines. It added nothing to the existing regulations; thus, there was no need to submit it to JAC.

14. Since the Co-Chair of APPB was appointed by the High Commissioner, the fact that the Staff Council withdrew its confidence in him did not prevent him from sitting on the Board and his appointment as Deputy Inspector-General did not create a conflict of interest.

15. There was no written stipulation that UNHCR should publish the Methodological Approach one year before its application. The Board had the authority to apply the Methodological Approach for the 2007 session, as requested by the Division of Human Resources Management (DHRM).

16. During the 2007 promotion session, APPB applied the criterion of gender parity envisaged in the Methodological Approach. This criterion was taken into account only to compare candidates with similar qualifications for promotion. Thirty-two candidates were promoted to D-1. The average number of points awarded for performance was 28.36 for men and 27.1 for women. For women, the Board chose to increase the weight of performance in relation to seniority and rotation history, owing to their family constraints. The High Commissioner's instruction on gender parity required the Board to ensure that, at the levels where parity has not been achieved, half of all promotions will be awarded to women, which is in line with the policy advocated by the General Assembly and the Secretary-General.

17. The applicant is correct in saying that his performance appraisal for the period from 21 May to 21 October 2007 should have been taken into account, but his fact-sheet had not been updated. Nevertheless, even if it had been included, he would have had 69.50 points instead of 68.25 and thus would have been ranked 55th instead of 59th on the list. In his recourse, the applicant did not inform APPB that his appraisal for that period was not reflected in his fact-sheet, even though, following the first session of the Board, he had received all the information relevant to his case. Contrary to the applicant's assertion, the non-weighted criteria had been taken into consideration under the Methodological Approach, as shown in paragraph 16 of the minutes of the APPB promotions session for 2007.

18. Even if his fact-sheet had not contained an error, he would not have been proposed for promotion. It is the responsibility of the staff member as well as of the Administration to ensure that the contents of the fact-sheet are complete and accurate.

19. As regards the High Commissioner's decision to promote some staff without a recommendation from APPB, it should be recalled that he has the discretionary authority to do so. That decision was not prejudicial to the applicant as no promotion slots were eliminated from the promotion session. The decision was not arbitrary inasmuch as it was taken in the best interests of the Organization, and the High Commissioner's statements on the promotion system were designed only to demonstrate his intention to change it.

20. The parties were invited to a hearing on 24 September 2009 by a letter and a memorandum of 26 August 2009. The applicant's counsel and the Chief of the UNHCR Legal Affairs Section presented oral arguments during the hearing.

Judgment

21. Article 10 of the rules of procedure of the Geneva JAB states:

"1. An incomplete statement of appeal will be accepted by the secretariat as evidence of an attempt to comply with the time limits stipulated in Staff Rule 111.2(a). Upon receipt of an incomplete statement, the secretariat will request the Appellant to provide within one month a full statement of appeal containing all the information stipulated in article 9.

"2. If the Appellant, without explanation, fails to submit a full statement of appeal within the month, the appeal shall be deemed to have been abandoned (see article 18), and shall be removed from the list of appeals pending before the Board."

22. The documents in the file show that the applicant received the Secretary-General's response to his request for administrative review on 9 October 2008. Following the applicant's request, JAB granted him a final extension to submit his appeal by 19 December 2008. Thus, the appeal registered with the Geneva JAB on 19 December 2008 was not time-barred and, contrary to the Administration's allegation, the applicant cannot be considered to have abandoned his appeal.

23. In requesting rescission of the decision by which the High Commissioner refused to grant him a promotion to the D-1 level during the 2007 session, the applicant stated that there were irregularities in the procedure used to draw up the list of people for promotion.

24. The applicant maintains that the Methodological Approach agreed on jointly by the Administration and APPB to determine which staff should be recommended for promotion to the D-1 level could not regularly be applied for the 2007 promotion session, because JAC had not been consulted about the method. Staff regulation 8.1 (a) stipulates that the Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other personnel policies. Staff regulation 8.2 provides that the Secretary-General shall establish joint staff management machinery at both local and Secretariat-wide levels to advise him or her regarding personnel policies and general questions of staff welfare as provided in regulation 8.1. Accordingly, the applicant is entitled to claim that the aforementioned provisions require JAC, a UNHCR body on which both the staff and the Administration are represented, to be informed of any changes to the rules that affect the staff.

25. The Procedural Guidelines applicable to UNHCR staff, issued in 2003, provide that, after it has been determined that a staff member meets the minimum seniority requirements for promotion, recommendations from managers, performance appraisals and seniority will be taken into consideration. The Methodological Approach provides that the Bard will review eligible candidates for promotion as per an initial ranked list based on the four main criteria, namely: performance, manager's recommendations, seniority in grade, and rotation history. The Board will then assess candidates on the basis of other criteria relating to efficiency and competency. Lastly, additional criteria, such as gender parity and geographical diversity, will be taken into account.

26. A comparison of the criteria established in the Procedural Guidelines and those established in the Methodological Approach reveals that the Methodological Approach merely defined a new way of determining the weight to be given to criteria which remained the same, so as to ensure greater transparency in drawing up the promotion lists. Hence, there was no rule obliging the Administration to obtain the agreement of JAC before applying this new working method for evaluating candidates, which did not change the rules in the Procedural Guidelines. Moreover, since JAB recommendations are not binding in themselves, no rule required the Administration to wait one year before implementing the Methodological Approach.

27. Paragraph 141 of the APPB Procedural Guidelines clearly establishes that the number of promotions is determined each year by the High Commissioner, based on advice from JAC. However, even if this provision means that JAC must be consulted on the number of promotions in each category, its opinion is only advisory and the applicant cannot claim that the High Commissioner acted irregularly by altering the number of D-1 promotion slots without again consulting JAC.

28. The applicant contends that there was irregularity in the composition of APPB when it considered his situation, because it was co-chaired by a person who could no longer represent the staff after the Staff Council had withdrawn its confidence in him. It is clear from the combined provisions of paragraphs 11, 16 and 19 of the APPB rules of procedure that, at least one month before the expiry of the tenure of the current APPB, the Staff Council and the Administration draw up a list with an equal number of representatives of staff and Administration, that the members of the Board are then appointed by the High Commissioner and that, at its first meeting,

APPB elects two chairpersons, one representing the staff and the other representing the Administration.

29. Consequently, when a member of the staff has been proposed by the Staff Council as its representative and appointed by the High Commissioner, the fact that the Staff Council withdraws its confidence from that representative does not prevent him from lawfully attending APPB meetings. The provisions of the Staff Association's Regulations which oblige its members appointed to certain bodies to apply the Staff Council's decisions regulate only relations between the Association's members and have no impact on the legality of the recommendations made to the Administration by the various committees on which staff representatives sit. The appointment of the Co-Chair to the post of UNHCR Deputy Inspector-General, subsequent to his appointment to the Board as the representative of the staff, does not in itself place him in a situation of conflict of interest that would raise doubts about his impartiality to provide advice on promotions.

30. While the applicant claims that the UNHCR promotion system lacks transparency for the staff, a general argument such as this, even if correct, cannot be used before the Tribunal to obtain the rescission of a decision denying promotion if, as in this case, the Administration provides the judge with all the evidence he needs to rule on the merits of the application.

31. Although the applicant alleges more specifically that he did not receive any information on the way in which the non-weighted criteria were applied in his case, the minutes of the first session of APPB in 2007 and those of the review session show that his situation, like that of the other staff eligible for promotion to the D-1 level, had indeed been considered taking into account their entire career.

32. It is thus clear from the above-mentioned Procedural Guidelines and Methodological Approach that APPB, in drawing up the list of staff members to be recommended to the High Commissioner for promotion, was required first to determine which staff members were eligible for promotion, then to rank them according to the four main weighted criteria, then to evaluate them on the basis of the non-weighted criteria and lastly, where staff members were found to be equally deserving of promotion, to take into consideration gender parity and geographical diversity. Yet, the minutes of the first session of APPB in 2007 indicate that, after drawing up a single list of staff members eligible for promotion and ranking them according to points scored following the four main criteria, the Board divided them by gender, decided to recommend equal numbers of women and men for promotion, and then separately assessed the merits of the candidates. Thus, the Board, although it was attempting to achieve the goal of gender parity set by the High Commissioner, did not follow the order for the application of criteria established under the Procedural Guidelines or the rules that it had set itself under the Methodological Approach.

33. The High Commissioner recalls that, on the one hand, the provisions of the Charter of the United Nations setting out the principle of the equal rights of men and women and, on the other, the goals set by the Secretary-General in the United Nations General Assembly at its sixty-third session imposed on him an obligation to establish a policy for the achievement of gender parity in UNHCR, which he did in January 2007. He explains that the goal was to achieve gender parity at all grade levels by 2010 and notes that his instruction requested APPB to ensure that, for all grade levels at which parity had not been achieved, the number of female staff

recommended for promotion was equal to that of male staff, provided that the women had the required qualifications. Accordingly, the High Commissioner is justified in claiming that the system put in place, whereby equal numbers of women and men would be promoted to the D-1 level in order to achieve gender parity was not in itself unlawful, since it was consistent with another principle enshrined in the Charter of the United Nations, namely merit-based promotion. Nevertheless, in seeking to achieve that goal, the High Commissioner had a duty to set clear rules for promotion, reconciling the two principles, and if that was not possible under the rules in force — as stated above — he had a duty to modify the rules before the annual promotion session. He could not merely require the Board, through a DHRM directive, to apply the said quotas.

34. In contesting the legality of the decision not to promote him during the 2007 promotion session, the applicant contends that the High Commissioner improperly awarded promotions without obtaining the advice of APPB. The Board's rules of procedure state: "The APPB is established to advise the High Commissioner [...] on appointments, postings and promotions". Hence, the applicant is correct in asserting that the High Commissioner may not promote a staff member until the Board has issued a recommendation.

35. However, in respect of promotions to the D-1 level, the judge's review of the file indicates that the High Commissioner promoted three staff members who were not eligible for promotion and who had therefore not been considered by APPB. Consequently, by granting promotions without consulting APPB, the High Commissioner committed an irregularity that inevitably vitiated the decision not to grant the applicant a promotion, since there were a limited number of promotion slots.

36. The irregularity committed by APPB by not following the order established under the existing rules for the application of criteria when listing staff to be recommended for promotion to D-1 and the irregularity committed by the High Commissioner vitiated the contested decision, which should be rescinded.

37. Pursuant to article 10, paragraph 5, of its statute, when the Tribunal orders the rescission of a decision concerning promotion, the judge also sets an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision. In this case, if UNHCR chooses this option, it will have to pay the applicant the sum of 9,000 Swiss francs.

38. The applicant has asked to be compensated for the moral suffering caused by the decision that has been declared unlawful. This request concerns compensation for harm that cannot be considered to be redressed by payment of the sum indicated in paragraph 37 of this judgment. Nevertheless, although he contests the merits of the Methodological Approach in force, the applicant may obtain redress for the said harm only if the judge considers that he would have had a real chance of being promoted if the Administration had followed the applicable regulations. Examination of the file shows that, if the applicant's most recent performance appraisal for the period from May to October 2007 had been taken into account, after correction the applicant would have been ranked 55th out of 117 eligible staff members, whereas the High Commissioner had decided that there would only be 41 promotions to the D-1 level for 2007. Consequently, even if no irregularity had been committed in the assessment of his situation, the applicant had little possibility

of being promoted. Therefore, his request for compensation for moral suffering must be rejected.

39. Even though the refusal to grant the applicant a promotion has been declared unlawful owing to a procedural flaw and therefore rescinded, under the Tribunal's statute the judge may not substitute himself for the Administration and give orders to UNHCR on staff promotion procedure. Accordingly, the applicant's request in this regard is rejected.

40. For these reasons, the Tribunal DECIDES:

Article 1: The decision of the High Commissioner not to promote grant the applicant to the D-1 level during the 2007 promotion session is rescinded.

Article 2: If, instead of carrying out the rescission order, UNHCR elects to pay compensation, it must pay the applicant the sum of 9,000 Swiss francs, plus interest at an annual rate of 8 per cent, starting 90 days after notification of this judgment.

Article 3: The applicant's other requests are rejected.

Judge Jean-François Cousin

Dated this 16th day of October 2009

Entered in the Register on this 16th day of October 2009

Víctor Rodríguez, Registrar, UNDT, Geneva