



United Nations Dispute Tribunal

Case No.: UNDT/GVA/2009/20
Judgment No.: UNDT/2009/039
Date: 16 October 2009
English
Original: French

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

MEBTOUCHE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Ulrich Garms and Ugo Cedrangolo

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 Geneva Joint Appeals Board, registered on 12 December 2008, the applicant requested it to recommend that:

- The decision of the United Nations High Commissioner for Refugees not to promote him to the D-1 level during the 2007 promotion session should be rescinded;
- He should be awarded compensation for harm arising from the unlawful decision and for the suffering caused to him.

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

Applicant's submissions

3. The applicant has been a staff member of the Office of the United Nations High Commissioner for Refugees (UNHCR) since March 1984 and was promoted to the P-5 level in July 1993. The promotion process was vitiated by the failure to take into account his specific professional history as a staff member recruited as a specialist. The Methodological Approach addressed the specific case of specialists and the question of rotation history. It stipulated that their situation should be reviewed on a case-by-case basis, as confirmed by the minutes of the 2007 promotion session of the Appointments, Postings and Promotions Board (APPB). The Board communicated its deliberations to the applicant. It failed to take into consideration his professional history.

4. The Board did not take into account the fact that his poor rotation history was the result of his status as a specialist and the absence of a UNHCR strategy for managing the careers of specialists. The new Methodological Approach assigned considerable importance to rotation history. Moreover, as a staff member in between assignments, he could not be recommended for a promotion. His appeal was rejected. The Board ignored the fact that he had been assigned to an expert post from 1984 to 2001. By its failure to adhere to the Methodological Approach, the Board had put him at a disadvantage.

5. The respondent has not filed any observations on how the Board applied the non-weighted criteria; moreover, it has been established that the geographical diversity criterion was taken into account only if it did not alter the outcome of the recommendations.

6. The Board introduced a gender quota system. Even though the promoted candidates did not reflect an exact gender balance, what is important is that the applicant was ranked only against other male candidates. This proves that a quota system existed. The Board unlawfully decided not to apply the Methodological Approach: it failed to respect the system of criteria and to take into consideration his seniority in order to compare his situation to that of a woman.

7. In addition, the High Commissioner acknowledged that, with regard to promotions, he had acted in a "totally arbitrary way". In his decisions on promotions, the High Commissioner is required to specify what criteria he has taken into account and whether any persons have been promoted who did not have the required seniority. The observations made in defence of the arbitrary nature of the

promotions awarded outside the promotion session are incorrect, in that these promotions inevitably had a bearing on the promotions that took place the following year.

Respondent's observations

8. UNHCR promotions are governed by the rules of procedure and the Procedural Guidelines of the Appointments, Postings and Promotions Board (APPB). On the recommendation of the Joint Appeals Board (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.

9. The Board did not introduce a gender quota system. Each candidate's situation was reviewed in three stages, and gender was not taken into consideration until the third stage. The Procedural Guidelines of the Board stipulate that due regard must be paid to enhancing gender parity. The UNHCR gender policy requires the Board to ensure that, at the grade levels where parity has not been achieved, half of all promotions will be rewarded to women. This is in line with the policy submitted to the United Nations General Assembly by the Secretary-General, which was referred to in the instruction issued by the High Commissioner in January 2007. In UNHCR, the percentage of women at levels P-5 to D-2 is far below that of men.

10. There were 32 promotions to the D-1 level. The difference in performance scores between men and women was negligible: the average for men was 28.36, and for women, 27.1. The applicant was ranked 70th out of 117 eligible staff members and received a performance score of 16.5. Women had an advantage over men in that their performance scores were weighted more heavily than their seniority. A comparison of the male and female candidates shows that, in terms of competence, the women who were promoted were at least on a par with, if not superior to, the men.

11. Each candidate was assessed on the basis of the non-weighted criteria, as evidenced by the minutes of the APPB meeting for the 2007 promotion session. There was complete transparency, as the Methodological Approach had been communicated in writing.

12. As regards the High Commissioner's decision to promote some people without a recommendation from the Board, it should be recalled that the High Commissioner has the 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 as it was taken in the best interests of the Organization.

13. The Methodological Approach provides for the case of experts and the issue of rotation history. It stipulates that their situation must be studied on a case-by-case basis; this is confirmed by the minutes of the APPB 2007 promotion session. As for the applicant, the reasons for the Board's deliberations were communicated to him; thus, the Board did take into account his professional history.

14. In a letter and memorandum dated 26 August 2009, the parties were invited to a hearing to be held on 24 September 2009.

The applicant's counsel and the Chief of the UNHCR Legal Affairs Section presented oral arguments.

Judgment

15. 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 Board will review eligible candidates for promotion as per an initial ranked list based on the following four main criteria: performance appraisal reports; 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.

16. The Methodological Approach drawn up jointly by the Board and others was limited to setting out a new working method for determining the weight to be assigned to the criteria, which remained unchanged, in order to improve the transparency of the promotion process. According to the Procedural Guidelines and the Methodological Approach, the Board, 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. However, the minutes of the first 2007 session indicate that, after drawing up a single list of eligible candidates 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.

17. 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 before 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 by his instruction of January 2007. The goal was to achieve gender parity at all grade levels by 2010 and the above-mentioned instruction requested the Board to ensure that, at grade levels where parity is not achieved, "50/50 per cent of the promotions slots at that level will be awarded to eligible staff with the required competencies". 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 also 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 request the Board, through the Division of Human Resources Management (DHRM), to apply such quotas.

18. In contesting the legality of the decision not to promote him during the 2007 promotion session, the applicant contends that the High Commissioner awarded promotions arbitrarily, without obtaining the advice of the Board. The APPB rules of procedure provide that the Board was 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.

19. 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 ineligible and who had therefore not been considered by the Board. By granting these promotions without consulting the Board, the High Commissioner committed an irregularity which inevitably vitiates the decision not to promote the applicant, given that the number of promotion slots was limited.

20. The irregularity committed by the 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 D-1 and the irregularity committed by the High Commissioner vitiated the contested decision, which should be rescinded.

21. 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.

22. The applicant has requested compensation for moral suffering caused to him by the decision herein declared to be vitiated. This request refers to harm that cannot be considered compensated by payment of the amount indicated in paragraph 21 of this judgment. However, the applicant is not entitled to compensation for such harm unless the judge considers that, if the Administration had applied the existing rules, the applicant would have had a real chance of being promoted. The applicant first argued that the Board did not take into account his situation as a specialist. However, the minutes of the promotion session show that the Board considered that the applicant was not assigned to an expert post; therefore, there was no need to examine his situation as such. Contrary to the applicant's assertions, the minutes of the first 2007 promotion session indicate that the Board did examine the situation of persons who were eligible under the geographical diversity criterion.

23. In view of the foregoing, and especially the applicant's performance appraisal reports over the previous three years, which led him to receive a score of 62.5 and to be ranked 70th out of a total of 117 candidates, even including 30 points for seniority, the applicant's chances of being promoted were very slim. Thus, his request for compensation for moral suffering is rejected.

24. For the above reasons, the Tribunal DECIDES:

Article 1: The High Commissioner's decision not to promote 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 the 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 this 16th day of October 2009

Víctor Rodríguez, Registrar, UNDT, Geneva