



United Nations Dispute Tribunal

Case No.: UNDT/GVA/2009/16
Judgment No.: UNDT/2009/041
Date: 16 October 2009
English
Original: French

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

IPPOLITO

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 Joint Appeals Board, registered on 9 December 2008, the applicant requested it to recommend that:

- The decision by the United Nations High Commissioner for Refugees not to promote the applicant to the P-5 level during the 2007 promotion session should be rescinded;
- He should be awarded compensation for violation of his rights when the P-5 promotion list was drawn up for the 2007 promotion session.

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 had been serving at the P-4 level since 1993, or more than 15 years, and always received very good appraisals from his supervisors. The denial of promotion is damaging to his dignity and his professional and personal life and has affected his health.

4. The promotion process was vitiated by the introduction of a quota system which is not envisaged in the rules. The Appointments, Postings and Promotions Board did not respect the Methodological Approach and established a gender quota instead of taking into account that additional criterion only to differentiate between equally qualified candidates.

5. The applicant was ranked 116th on the basis of the weighted criteria; there were 46 promotion slots, a much smaller number than had been announced by the Director of the Division of Human Resources Management and recommended by the Joint Advisory Committee. Of the 46 posts for promotion, 23 were awarded to men, and of those 23 posts, 13 were awarded to men already performing functions at the P-5 level. Gender became the main criterion, which is contrary to the rules. This quota system is not proportionate to the aim of achieving gender parity while respecting the fact that promotions must be merit-based. The system enables candidates with fewer points to be selected instead of other, more qualified candidates simply because they are women. The Appointments, Postings and Promotions Board decided not to apply the methodology in respect of female candidates with the objective of achieving parity. This decision is therefore contrary to the rules in force. In an e-mail of 14 March 2008, the Secretary of the Appointments, Postings and Promotions Board acknowledged that the applicant's case had been reviewed within a group of male staff members within the same grade and that the last eligible candidate had been ranked in tenth place.

6. There is a lack of transparency in the way in which the four other non-weighted criteria were applied. No information was provided either for the first decision of denial or for the decision taken on recourse. Moreover, it is apparent from the respondent's observations that the Appointments, Postings and Promotions Board decided not to take into account the non-weighted criteria.

7. The High Commissioner acted in an arbitrary way in announcing on 23 June 2008 that additional staff members would be promoted without giving any indication as to the criteria used; some of the individuals did not meet the

requirements for promotion and had not applied for a promotion; there is therefore a lack of transparency. Contrary to the respondent's assertions, the arbitrary promotions decided on by the High Commissioner inevitably had an impact on promotions in the following year and therefore on the applicant's situation.

Respondent's observations

8. In light of the complex subject-matter, an oral hearing was needed. The Methodological Approach did not introduce new rules and was only an instrument to make the deliberations of the Appointments, Postings and Promotions Board more transparent.

9. The Appointments, Postings and Promotions Board did not introduce a de facto gender quota system because it did not propose an equal number of men and women irrespective of their performance and qualifications. The Procedural Guidelines and the Methodological Approach formed the basis for the recommendations on promotion and the gender criterion is included in them. For promotion to the P-5 level, it is only where a female candidate is found to be substantially equally qualified to a male candidate that she is selected for promotion. The performance of some female candidates who were promoted was superior to that of the male candidates. A comparison between the last five women promoted and the first five men shows that their performance appraisals were similar.

10. The applicant scored 8 points for his performance. The Appointments, Postings and Promotions Board placed more emphasis on the performance criterion compared with the criteria of seniority and rotation history in line with the jurisprudence of the United Nations Administrative Tribunal (UNAT) with reference to Article 8 of the Charter of the United Nations and with the objective of achieving gender parity. In 2006, only 30 per cent of the staff of UNHCR at the P-5 to D-2 levels were women. The General Assembly has directed the Administration to respect the goal of parity and the Secretary-General has established 2010 as the time-limit for achieving that objective.

11. Paragraph 16 of the minutes of the meeting of the Appointments, Postings and Promotions Board for the 2007 session demonstrates that the Board properly respected the Procedural Guidelines and the Methodological Approach and that transparency was ensured.

12. The minutes of the promotion session show that the Appointments, Postings and Promotions Board took into account the non-weighted criteria, in accordance with the rules, and that these criteria served to differentiate between candidates with essentially the same number of points.

13. As regards the High Commissioner's decision to promote some people without a recommendation from the Appointments, Postings and Promotions Board, 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.

14. A hearing was held on 24 September 2009 at which the applicant's counsel and the Chief of the Legal Affairs Section of UNHCR, representing the High Commissioner, presented oral arguments.

Judgment

15. Although in his latest submission the applicant asked for his application to be judged without a hearing, according to article 16 of the rules of procedure adopted by the judges of the Tribunal the decision as to whether or not to hold a hearing is left entirely to the discretion of the judge hearing the case, who, in the present instance, decided to hold a hearing.

16. The applicant, in contesting the legality of the decision not to promote him during the 2007 promotion session, asserts that the High Commissioner approved promotions in an irregular manner without obtaining the advice of the Appointments, Postings and Promotions Board. The Board's rules of procedure provide that "The Board 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 Appointments, Postings and Promotions Board has issued a recommendation.

17. It is clear from the judge's review of the file that, with regard to promotion to the P-5 level, the only level that is relevant to the applicant's situation, the High Commissioner approved a promotion to the next level for two eligible staff members who had been considered but not recommended by the Appointments, Postings and Promotions Board. The fact that one of the two staff members was promoted although he had not sought recourse against the Board's decision not to recommend him during the first session does not vitiate his promotion, nor does it vitiate the overall P-5 promotions procedure for the 2007 session, since the High Commissioner has the authority to award promotions once the Appointments, Postings and Promotions Board has issued its recommendations.

18. 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 Appointments, Postings and Promotions Board 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 the candidates on the basis of other criteria relating to efficiency and competence. Lastly, additional criteria, such as gender parity and geographical diversity, will be taken into account.

19. It is thus clear from the above-mentioned Procedural Guidelines and Methodological Approach that the Appointments, Postings and Promotions 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 in accordance with 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.

20. The minutes of the first session held by the Appointments, Postings and Promotions Board for the 2007 promotion exercise 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 respect the order for the application of criteria established under the Procedural Guidelines or the rules that it had set itself under the Methodological Approach.

21. 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 the Appointments, Postings and Promotions Board 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 P-5 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 this 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 — he had a duty to modify the rules before the annual promotion session. He could not merely request the Board, through DHRM, to apply such quotas.

22. 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 P-5 inevitably altered the decisions taken by the High Commissioner on the basis of those recommendations. Hence, the decisions on promotions to the P-5 level for the 2007 promotion session were the result of an irregular procedure and vitiated the entire promotion process to that level and, consequently, also vitiated the decision to deny the applicant a promotion, since there were a limited number of promotion slots.

23. It follows from all the foregoing that the High Commissioner's decision not to promote the applicant to the P-5 level should be rescinded.

24. 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 8,000 Swiss francs.

25. The applicant has asked to be compensated for the material harm resulting from the denial of promotion to the P-5 level. However, as stated above, the Administration may choose either to carry out the judge's order to rescind the denial of promotion or to pay the amount specified above. In the first case, the High Commissioner will have to reconsider the promotion of the applicant, who, if he is promoted, will be able to claim promotion retroactive to 1 November 2007 and thus will not have suffered any harm but if he is not promoted will not be able to claim any compensation unless he files a new application before the Tribunal contesting the denial. In the second case, should the Administration choose to pay the

compensation set by the judge rather than taking the action arising from the rescission order, that sum must be considered compensation for the material harm that the applicant suffered over a one-year period, starting on 1 November 2007, since he was able to exercise his right to seek a promotion during the 2008 promotion session. Hence, in either of the two cases, his request for compensation for the salary he would have received must be rejected.

26. For these reasons, the Tribunal DECIDES:

Article 1: The High Commissioner's decision not to promote the applicant to the P-5 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 8,000 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