



United Nations Dispute Tribunal

Case No.: UNDT/GVA/2009/18
JAB/2007/108
Judgment No.: UNDT/2009/044
Date: 16 October 2009
English
Original: French

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

MUTUTA

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 (JAB), registered on 10 December 2008, the applicant requested it to recommend that:

- The decision of the United Nations High Commissioner for Refugees denying him a promotion to the P-5 level during the 2007 promotion session should be rescinded;
- He should be promoted to the P-5 level;
- He should be awarded compensation equivalent to the additional salary that he would have received if he had been promoted.

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 promotion exercise was vitiated through the introduction of a de facto quota system. This system is at variance with the rules adopted and set forth in writing: the Methodological Approach. The Appointments, Postings and Promotions Board improperly drew up separate lists for women and men and 23 posts were allotted to each list. This is contrary to the principle of merit-based promotion. The gender parity criterion, which was only to have been additional, became decisive.

4. Based on a points system, the applicant ranked 29th among 314 eligible candidates for 46 promotion slots. The points system was not applied correctly in the applicant's case; he should have scored 12 points higher, since in 2006 his supervisor in the Sudan had failed to put his name forward for promotion before leaving his post at the Office of the United Nations High Commissioner for Refugees (UNHCR), and the Administration has a duty to prevent such oversights. He was promoted to the P-4 level in March 2000 and has not been promoted since then, despite the fact that his performance was rated "superior" in his last performance appraisal.

5. There was a lack of transparency in the application of the other four criteria. There is no indication that the geographical diversity criterion was taken into consideration, although it was directly applicable to him, as he is from Zambia.

6. The discretionary decision by the High Commissioner to appoint some people to the P-5 level was arbitrary, and no explanation had been given for the choices made, which was an infringement of the applicant's rights.

Respondent's observations

7. In UNHCR promotions are governed by the rules of procedure and the Procedural Guidelines of the Appointments, Postings and Promotions Board. 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 the Appointments, Postings and Promotions Board; it did not alter the existing rules in any way.

8. The Appointments, Postings and Promotions 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. Under its Procedural Guidelines, the Appointments, Postings and

Promotions Board is required to pay due regard to 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 awarded to women, which is in line with the policy advocated by the General Assembly and the instruction issued by the High Commissioner in January 2007.

9. In 2006 women made up only 30 per cent of UNHCR staff at the P-5 level. The approach applied in order to achieve the goal of parity is legitimate and falls within the discretionary authority of the High Commissioner, although he is expected to respect certain parameters in exercising that authority. In particular, women may be given preference only if they are overall as qualified as their male counterparts, which was the case in this instance with respect to promotion to the P-5 level, based on performance appraisals.

10. 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. The last five women promoted and the first five men promoted were equal with regard to performance. The applicant ranked 29th out of 314 candidates and scored 22 points for his performance, whereas the last five women promoted had scores ranging from 25 to 31.

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

12. With regard to 2006, there is no information in the file indicating that the applicant received a recommendation for promotion during the promotion session for that year.

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, during which the applicant's counsel and the Chief of the UNHCR Legal Affairs Section, representing the High Commissioner, presented oral arguments.

Judgment

15. 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 the Appointments, Postings and Promotions Board (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 Appointments, Postings and Promotions Board has issued a recommendation.

16. However, in respect of promotions to the P-5 level — the only level relevant to the applicant's situation — the judge's review of the file indicates that the High Commissioner promoted two staff members eligible for promotion to P-5 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 promotion session, since the High Commissioner has the authority to award promotions once the Appointments, Postings and Promotions Board has issued its recommendations.

17. The applicant alleges that there is no documentary evidence that the Appointments, Postings and Promotions Board assessed his situation on the basis of the non-weighted criteria set out in the Methodological Approach. However, that assertion is disproved by the minutes of the promotion session held from 27 January to 1 February 2008, which state that each candidate was assessed in the light of all the non-weighted criteria, including that of geographical diversity of the staff eligible for promotion. The applicant also contends that the Appointments, Postings and Promotions Board failed to take account of his language skills, but the minutes of the recourse session indicate that the Board did consider this matter, which was raised by the applicant in his recourse application.

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 Board will review eligible candidates for promotion as per an initial ranked list based on the 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.

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 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.

20. The minutes of the first session held by the Appointments, Postings and Promotions Board for the 2007 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 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.

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 his report to the 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 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.

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 its promotion recommendations to the High Commissioner, which in turn altered the decisions taken by the latter on the basis of those recommendations. Hence, the High Commissioner's decisions with regard to P-5 promotions were the result of an irregular procedure and vitiated the entire promotion process in respect of that grade and, consequently, also vitiated the decision to deny the applicant a promotion, since there were a limited number of promotion slots.

23. The applicant contends that his score after the application of the four main criteria set out in the Methodological Approach was miscalculated and that he should have scored 12 points higher because he should have been put forward for promotion in 2006. The Administration does not contest the applicant's allegation that he was not put forward for promotion simply because his manager left his post at UNHCR without providing him with a recommendation; it merely points out that the applicant did not ask his superiors to rectify that oversight. It is very clear from circular IOM/56-FQM/56/2006, dated 22 June 2006 and addressed to all staff by the Director of DHRM, that the Administration was responsible for ensuring that all eligible staff members had been put forward for promotion, with or without a recommendation, prior to the start of the 2006 promotion session. Hence, the applicant has established that he missed the chance to be proposed for promotion in 2006 and thus to be awarded an additional 12 points. The Appointments, Postings and Promotions Board therefore assessed his situation on the basis of incomplete information, and that error is sufficient to vitiate the denial of the applicant's promotion.

24. In view of the foregoing, the High Commissioner's decision to deny the applicant a promotion to the P-5 level should be rescinded.

25. 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.

26. The applicant has asked to be compensated for the material harm resulting from the loss of the additional salary that he would have received if he had been promoted to the P-5 level. However, as stated above, the

Administration may choose either to carry out the judge's order to rescind the decision denying the applicant's 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 decision to deny him a promotion. 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.

27. The judge has stated above the modalities for compliance with this judgment. Under the statute of the Tribunal, it is not for him to substitute himself for the Administration and to declare that the applicant should be promoted to the higher level. Thus, the applicant's claim in this regard must be rejected.

28. 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 this 16th day of October 2009

Victor Rodríguez, Registrar, UNDT, Geneva