



**United Nations Dispute Tribunal**

Case No.: UNDT/GVA/2009/17  
Judgment No.: UNDT/2009/045  
Date: 16 October 2009  
English  
Original: French

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

SOLANKI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**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 19 December 2008, the applicant requested it to recommend that:

- The decision of the High Commissioner for Refugees denying him a promotion to P-5 during the 2007 promotion session should be rescinded;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 applicant was promoted to the P-4 level in June 1994 and received no further promotions, although he was recommended and his performance was rated "superior" several times.

4. The promotion process 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. The respondent's assertion that only those women whose competence was equal to that of the men were promoted is inaccurate and contradicted by the message sent on 11 March 2008 by the Secretary of the Appointments, Postings and Promotions Board.

5. Under the Methodological Approach involving weighting by points, his ranking was 40th among 314 eligible candidates for 46 promotion slots. After correction at the recourse session, he had 99.51 points, whereas the last woman promoted had obtained 62.92 points, including 39 points for performance alone.

6. 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; the Appointments, Postings and Promotions Board had clearly indicated that that criterion would be taken into account only if it did not alter the final outcome.

7. 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**

8. 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.

9. 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. This is in line with the policy advocated by the General Assembly and was the subject of the High Commissioner's instruction of January 2007.

10. In 2006 women made up only 30 per cent of UNHCR staff at the P-5 level and the approach applied 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 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 the promotions to P-5 level.

11. 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 40th out of 314 candidates and scored 18 points for his performance, whereas the last five women promoted had scores ranging from 25 to 31.

12. 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.

13. As regards the High Commissioner's decision to promote some people without a recommendation from the Board, it should be recalled that he has the discretionary authority to do so. That decision was not prejudicial to the applicant, since 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. The Board's rules of procedure state: "The Appointments, Postings and Promotions 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.

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 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 promotion 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 allegation 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.

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 requirements for promotion, the recommendations from managers, performance appraisals and seniority will be taken into consideration. The Methodological Approach provides that the Board will first draw up a list of eligible candidates, ranked on the basis of the number of points for 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.

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. However, 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 to be followed in UNHCR for the achievement of gender parity, which he did in his instruction of January 2007. He explains that the goal was to achieve gender parity at all grade levels by 2010 and notes that the 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. However, 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 the decisions of the High Commissioner taken in the light of those recommendations. Hence, the High Commissioner's decisions with regard to P-5 promotions for 2007 were the result of an irregular procedure and vitiated the entire promotion process in respect of that grade and, consequently, vitiated the decision to deny the applicant a promotion, since there were a limited number of promotion slots.

23. In view of the foregoing, the High Commissioner's decision to deny the applicant a promotion 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 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 salary he would have received must be rejected.

26. 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.

27. 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 remainder of the applicant's claims 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