



United Nations Dispute Tribunal

Case No.: UNDT/GVA/2009/19
Judgment No.: UNDT/2009/046
Date: 16 October 2009
English
Original: French

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

ILIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

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 her appeal to the Joint Appeals Board, registered on 11 December 2008, the applicant requested it to recommend that:

- The decision of the United Nations High Commissioner for Refugees not to promote her to the P-4 level during the 2007 session should be rescinded;
- She should be promoted with retroactive effect;
- She should be awarded compensation for harm arising from the unlawful decision and for the suffering caused to her.

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. Her application is admissible because the reply to her request for review by the Secretary-General did not arrive until 13 November 2008 and the e-mails cited do not constitute proof that a reply was sent earlier.

4. The applicant joined the Office of the United Nations High Commissioner for Refugees (UNHCR) in September 1993 and has been at the P-3 level since November 1999. In 13 years of service her performance has been rated superior or outstanding. As early as 2003, her supervisor recommended her for promotion to the higher level.

5. She has performed duties at the higher level yet her case was considered with those of women serving in a post corresponding to their level.

6. The fact-sheet concerning her employment history is incorrect because it does not show that she is underfilling a post at the P-4 level. The Division of Human Resources Management (DHRM) acted wrongly when it refused to take her service at another United Nations office into account; as a result she could not be recommended in 2003, 2004 or 2005. The fact-sheet concerning her employment history is full of mistakes which have led to errors in the calculation of her points; she drew attention to these mistakes in her appeal. The academic degrees that she earned while at the P-3 level were not taken into account. The reference to her work in other organizations was removed from the fact-sheet. Her three years of service in the Office of the Humanitarian Coordinator for Iraq (UNOHCI) were classified as experience outside the United Nations, yet she states that she worked in that office — which is part of the United Nations system — from November 1999 until September 2002 and the respondent gives no legal basis for the failure — contrary to the general principles in chapter IV, section 3.23 of the Staff Administration and Management Manual — to take account of her service in that post.

7. As regards rotation history, reference must be made to IOM/FOM No.13/2007 of 19 February 2007, paragraph 11, and to the DHRM document of February 2007 on mobility. Her tours of duty in Baghdad and Sarajevo should have been taken into account for purposes of mobility. Although these errors were pointed out during the appeal, her fact-sheet was not corrected. The reply to her request for review by the Secretary-General contains errors and her employment history was incorrectly presented. At the hearing the applicant maintained that the various errors committed by the Administration show that the fact-sheet was tampered with.

8. Application of the Methodological Approach to her case resulted in errors in the calculation of points, given that the data in her fact-sheet were incorrect. She scored 61.5 points whereas the last person in her group to be promoted scored 80.5 points. She ranked 190th out of 338 people eligible for 77 available posts. But for those mistakes, she would have scored 93 points. She lost 12 points because the recommendation for promotion in 2005 was not taken into consideration. She lost three points because her outstanding performance was not mentioned on her fact-sheet. Her service prior to 2002 was not taken into account and she therefore lost at least 7.46 points, plus another 9 because her mobility and service in hardship duty stations were not taken into consideration. She worked for eight months as a P-4 in 2006 and 2007, but this was not taken into account.

9. She was given no information regarding the application to her case of the non-weighted criteria. The respondent gave an erroneous interpretation of the application of non-weighted criteria by stating that they are used only to decide between candidates who have the same score; that is contrary to the Methodological Approach.

10. Many of her colleagues who were promoted by decision of the High Commissioner did not meet the requirements for promotion, and the lack of information on the manner in which they were promoted showed a lack of transparency which constituted a violation of her rights.

Respondent's observations

11. The application is not admissible because it is time-barred. The applicant received the Secretary-General's reply to her request for review on 27 October 2008. She had one month in which to submit her application to the Joint Appeals Board (JAB) but did not do so until 11 December 2008.

12. Promotions within UNHCR are governed by the rules of procedure and the Procedural Guidelines of the Appointments, Postings and Promotions Board (APPB), especially sections IV and VI thereof. The Methodological Approach was designed to provide an objective and transparent instrument, in accordance with the wishes of JAB; it did not change the previous rules.

13. Contrary to what the applicant claims, the minutes of the recourse session demonstrate that APPB did take the four months during which her performance was rated as outstanding into account. As regards time spent in posts at a higher level than her own, the fact-sheet reflects only the periods officially recognized as having been spent in such posts; the same applies to all candidates.

14. When she appealed, APPB considered that she had not been eligible for promotion in 2005 and it therefore was not in a position to recognize any recommendation for that year.

15. The applicant was recruited by UNHCR in September 1993; she left the service for two years, returned in August 1998 and then left again. She came back in October 2002 at the P-3 level. APPB made no mistake when calculating her service; the periods not taken into account were those when the applicant chose of her own free will to leave UNHCR; only moves within UNHCR are taken into account.

16. UNHCR points out that APPB has discretionary power to interpret the rules of the Procedural Guidelines and thus to limit calculation of service and mobility to periods spent within UNHCR, provided that the same method is applied to all candidates.

17. The mistake with regard to her time in UNOHCI was immaterial for that work was prior to her entry into UNHCR on 13 October 2002. Her degrees are reflected on the fact-sheet concerning her employment history. The minutes of the APPB meeting show that candidates were reviewed in the light of the non-weighted criteria and thus the promotion system was transparent.

18. The High Commissioner may award whatever promotions he decides, provided that the performance of the people promoted was outstanding and that the decisions are taken in the best interests of the Organization and thus are not arbitrary.

19. The hearing was held on 24 September 2009; the applicant and the Chief of the Legal Affairs Section, who represented the High Commissioner, presented oral arguments. The applicant maintained inter alia that the Administration had tampered with the fact-sheet concerning her employment history.

Judgment

20. UNHCR maintains that the application is inadmissible because it is time-barred given that the applicant filed her appeal with JAB on 11 December 2008, whereas she received the Secretary-General's reply rejecting her request for review on 27 October 2008 and, pursuant to staff rule 111.2 (a) (i), she had one month in which to file it. The applicant, on the other hand, maintains that she received the reply by diplomatic pouch and that it did not arrive until 13 November 2008. Given that the Administration cannot prove that the applicant received the e-mail which it sent on 27 October 2008, the Tribunal considers that the appeal the applicant filed with JAB was not time-barred and is therefore admissible.

21. The applicant alleges that the High Commissioner promoted people to the P-4 level without seeking the advice of APPB and that this was irregular. The judge examined the file and found that, with respect to promotions to the P-4 level — the only level relevant to the applicant's situation — the High Commissioner did promote one staff member not recommended by APPB. In that instance, the High Commissioner, who is not required to follow the Board's recommendations, promoted, a staff member who was eligible and whose situation had been reviewed by APPB at the first promotion session and then reviewed again following the staff member's recourse. Thus the applicant has failed to establish that the staff member in question was promoted irregularly.

22. While the applicant claims that the UNHCR promotion system lacks transparency, a general argument such as this, even if correct, cannot be used to make the Tribunal rescind a decision to deny a promotion if the Administration provides the judge, as it has in this case, with all the evidence he needs to rule on the merits of the application.

23. Although the applicant alleges, more specifically, that she did not receive any information concerning how the non-weighted criteria were applied in her case, the minutes of APPB's first session in 2007 show that the applicant's situation and the situation of the other staff members eligible for promotion to the P-4 level were indeed considered taking into account their entire career. Given that 338 people were eligible for promotion to the P-4 level, the fact that the minutes did not make any specific mention of the applicant's name is not sufficient to prove that her situation was not considered in light of all the criteria of the Methodological Approach.

24. In order for the Tribunal to rescind a decision to deny a promotion, the applicant would have to prove either that the list of promotions to the P-4 level had been drawn up following an irregular procedure — which, as noted above, she has not done — or that, but for the mistakes made when reviewing her employment history, she would have had a real chance of being promoted.

25. The applicant contests the way in which the Methodological Approach — including the non-weighted criteria — were applied to her situation.

26. Firstly, she contests the date the Administration uses to judge her length of service for it calculates her service with UNHCR as beginning on 13 October 2002, whereas she maintains that it should be calculated as starting at least in 1998. Staff rule 104.3 states that:

“(a) A former staff member who is re-employed shall be given a new appointment or, if re-employed within twelve months of separation from service or a longer period following retirement or disability under the Joint Staff Pension Fund Regulations, he or she may be reinstated in accordance with paragraph (c) below.

“(b) If the former staff member is reinstated, it shall be so stipulated in his or her letter of appointment. If he or she is given a new appointment, its terms shall be fully applicable without regard to any period of former service, except as provided below:

“(i) Former service may be considered when establishing the level on recruitment and the record of mobility of the staff member; [...]

“(c) On reinstatement the staff member’s services shall be considered as having been continuous, and the staff member shall return to the United Nations any moneys he or she received on account of separation, including termination indemnity under rule 109.4, repatriation grant under rule 109.5 and payment for accrued annual leave under rule 109.8. [...]”

27. It is clear from the above that a staff member’s service is determined according to the terms of his or her contract; however, the contract which the applicant signed effective as from 13 October 2002 makes no mention of reinstatement in light of prior service with UNHCR. Thus the applicant cannot complain that, in calculating the number of points allocated for service and the number of times her name was put forward, the Administration calculated her service as starting only in October 2002 and therefore noted that, since she was not eligible for promotion in 2005, the recommendation for promotion made that year could not be taken into account.

28. While the applicant contests the points allocated for rotation history, saying that her assignments outside UNHCR should have been taken into account, she does not say which rule the Administration violated when applying that same rule for calculating the rotation history of all eligible staff members.

29. The file shows that, contrary to what the applicant maintains, her academic degrees are recorded in the fact-sheet and there is no reason to believe that APPB did not take them into consideration.

30. The applicant claims that, at the first promotion session, her latest evaluation for 2007 — where her performance was described as outstanding — was not taken into account. In fact, APPB acknowledged this mistake at the recourse session; however, the additional points

resulting therefrom under the Methodological Approach did not cause it to alter its recommendation.

31. However, the Administration does not dispute that the fact-sheet concerning the applicant's employment history which was submitted to APPB at the first session contained a mistake in that her assignment to the Office of the Humanitarian Coordinator for Iraq from December 2000 until September 2002 was wrongly classified as experience outside the United Nations; this mistake was not taken into account at the recourse session. Furthermore, it is not disputed that the fact-sheet did not mention that she had performed duties at the higher level from January to July 2007.

32. The applicant claimed, during the oral hearing, that the fact-sheet concerning her employment history had been tampered with; these claims were not substantiated. However, it is up to the judge to take into consideration the unfortunate errors contained in the said fact-sheet and to assess whether they may have seriously undermined her chances of promotion in 2007.

33. The documents in the file show that the applicant, who has failed to establish that the Board's ranking was incorrect, was ranked 190th with a total of 61.5 points calculated using the Methodological Approach, whereas the last staff member promoted had 66.4 points and was ranked 157th. Given that 84 people were promoted to the P-4 level, the applicant has failed to show that the few material mistakes on her fact-sheet — however regrettable — caused her to lose a chance to be recommended for promotion and thus to be promoted.

34. It is therefore clear from the foregoing that the applicant's request for rescission of the decision denying her a promotion in 2007 and, consequently, her request for promotion to the P-4 level as of 2007 and for compensation for the harm suffered must be rejected.

35. For these reasons, the Tribunal DECIDES:

The application is 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