



United Nations Dispute Tribunal

Case No.: UNDT/GVA/2009/8
Judgment No.: UNDT/2009/048
Date: 16 October 2009
English
Original: French

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

TSONEVA

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 25 July 2008, the applicant requested it to recommend that:

- The decision of 29 February 2008 by the High Commissioner for Refugees not to promote her to the P-4 level during the 2007 promotion session should be rescinded;
- She should be awarded compensation for the moral and material harm caused by the unlawful decision to deny her a promotion.

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 letter of 15 July 2008 and the letter of 16 June 2008 attached thereto from the Administrative Law Unit of the United Nations Office of Human Resources Management cannot be taken into account owing to their late submission to the Joint Appeals Board.

4. The contested decisions are contrary to Article 101 of the Charter of the United Nations, the United Nations Staff Rules and the rules of the Office of the United Nations High Commissioner for Refugees (UNHCR) governing staff promotions, since the Methodological Approach adopted by the Administration failed to give priority to competence when the list of promotions was drawn up.

5. The Methodological Approach was not approved by the Joint Advisory Committee or any other body representing the UNHCR staff. The participation of the members of that Committee was required under staff regulations 8.1 (a) and (b) and 8.2.

6. The applicant submits on her own behalf the arguments put forward by the UNHCR Staff Council in support of staff appeals. The Appointments, Postings and Promotions Board (APPB) was flawed in its composition since it was co-chaired by a staff member who was unable to attend on a regular basis.

7. The procedure followed to determine promotions was unfair and was neither objective nor transparent in its application. The methodology and the points system were not applied correctly, including during the recourse session, when no points system was applied.

8. The High Commissioner for Refugees has recognized that the promotion system for the 2007 session was stupid and that he had acted arbitrarily. He committed an irregularity in that, following the APPB recourse session, there was a decision by the High Commissioner to promote staff who had not submitted a recourse.

9. Since the applicant's fact-sheet had not been kept up to date, the information before APPB was incomplete. The Board should have taken into consideration the new information produced by the applicant. It erred by concluding that there was no new documented evidence when in fact numerous documents had been submitted to it. The applicant had worked in Georgia for UNHCR from September 2000 to February 2003, but only the period from October 2000 to October 2001 was mentioned in the fact-sheet.

10. The applicant performed the functions of Senior Contracts Officer from 1 May 2007 to 1 December 2007 and was de facto head of the Contracts Unit, with responsibilities that exceeded those of a P-3. The

recommendation for promotion to the P-4 level made in 2007 failed to mention that she had held those two posts. No rules were cited in justification of the decision to ignore her assignments outside UNHCR.

Respondent's observations

11. UNHCR submits that the application should be rejected as unfounded. Assuming that the reply of the Office of Human Resources Management of the United Nations Secretariat to the Joint Appeals Board was late, the respondent reiterates the content of that response. According to the jurisprudence of the United Nations Administrative Tribunal, it is for the Administration to evaluate the performance of the staff member. The only question at issue is whether the applicant has been fully and fairly considered for promotion and whether her statutory rights were respected.

12. Promotions within UNHCR are governed by the rules of procedure and the Procedural Guidelines of the Appointments, Postings and Promotions Board (APPB Guidelines), especially sections IV and VII thereof. The Methodological Approach was designed to provide an objective and transparent instrument, in accordance with the wishes of the Joint Appeals Board and the Secretary-General. Since no changes to the previous rules were involved, it was not necessary to consult the Joint Advisory Committee. The recommendation of the Joint Appeals Board to communicate the Methodological Approach to the staff at least one year in advance was not incorporated in the regulations.

13. The decision of the Staff Council to withdraw its confidence in the Co-Chair of the APPB has no effect on the competence of the Board itself, since its members are appointed by the High Commissioner pursuant to paragraph 16 of the Board's rules of procedure. The conflict of interest deriving from the appointment of the staff-nominated Co-Chair of APPB to the post of Deputy Inspector-General is not established.

14. UNHCR applied the new Methodological Approach with a view to transparency. The criteria for the approach are contained in the APPB Guidelines. The applicant had all the information concerning the promotions review list of staff members, which showed the points allocated to the various criteria, the staff members' ranking on the list and the final recommendation by the Board.

15. Contrary to what the applicant claims, the fact-sheet as reviewed by the Board reflected her latest appointment of Senior Contracts Officer from May to December 2007 and her latest supervisory appraisal covering the period from January 2006 to April 2007. The performance appraisal report to which the applicant refers was not concluded until 27 February 2008, that is subsequent to the 2007 promotion session. Consequently, the fact-sheet could not reflect the "superior" rating and was therefore up to date. Contrary to what the applicant claims, at the time of the recourse the Board was not required to examine developments subsequent to the first promotion session. Consequently, the applicant's performance appraisal report, finalized subsequent to the first promotion session, was not relevant information in terms of paragraph 180 of the APPB rules of procedure. Moreover, even if it had been, the number of points allocated to the applicant would not have changed. There was no incorrect calculation to her disadvantage. In addition, the applicant shared the responsibility to keep the fact-sheet up to date and had not done so for five years. In any event, the errors in her fact-sheet did not affect the number of points allocated to her, as only the last 36 months were relevant.

16. Contrary to the applicant's assertions, her entire career was considered, not merely the last two years before the promotion session. The

applicant cannot claim that her service prior to her recruitment by UNHCR should be taken into account for the calculation of points allocated to rotation history, since that service allowed her to enter UNHCR at the P-3 level.

17. With regard to the applicant's further claims, reference should be made to the Secretary-General's reply to her request for an administrative review. The reply contained the following points: consultation of the Joint Advisory Committee was not necessary given that the methodology did not introduce any changes to the evaluation or eligibility criteria specified in the APPB Guidelines. The UNHCR management nonetheless discussed the methodology with the Staff Council, and adaptations were made based on its comments. The system of calculating points used by the Board reflected the Staff Council recommendations. The Methodological Approach, by giving slightly more weight to performance than to seniority and rotation, was in line with the relevant provisions of the Charter of the United Nations and the Staff Regulations. The applicant cannot complain about not being promoted in 2005 or 2006, since she was not recommended, and recommendation is an absolute requirement for promotion. The applicant cannot complain about a failure to take into account the non-weighted criteria, because any change of ranking resulting from such criteria would have to be justified by exceptional circumstances, which were not present in the applicant's case. By arguing that her manager's recommendation failed to reflect various important tasks executed, at the P-4 and P-3 levels in this instance, she is appealing against the decision not to promote her, not the evaluation.

18. Where a staff member occupies a post at a higher level, this fact is not taken into account for promotion purposes until there has been one year of fully effective performance at a higher level, according to paragraph 148 of the APPB Guidelines.

Judgment

19. The applicant first of all requests the Tribunal not to take into account the letter of 15 July 2008 from the Office of Human Resources Management of the United Nations Secretariat and the letter of 16 June attached thereto owing to their late submission by the Administration to the Joint Appeals Board. However, the judge is required to take his decision on the basis of all the documents in the file, inasmuch as all the parties have examined them and been able to discuss them. The judge cannot set aside a document produced by one of the parties unless it is received after the expiration of a time limit which he sets or which is imposed by the rules, and then only if the document is unlikely to change the outcome of the case, an eventuality that would require the judge to grant more time to the parties to ensure that the adversarial requirements of the procedure are met. In this instance, these conditions are not present, and it is therefore inappropriate to set aside the relevant documents.

20. The applicant maintains that the High Commissioner's decision not to promote her during the 2007 promotion session was unlawful because it relied on the recommendation of APPB, which, by applying the Methodological Approach, failed to observe the principle that priority is given to competence and therefore breached the provisions of the Charter of the United Nations and the UNHCR rules specifically applicable to promotions.

21. Article 101 of the Charter of the United Nations provides: "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing

the highest standards of efficiency, competence, and integrity.” Staff regulation 4.2 provides: “The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity”. The 2003 APPB Guidelines applicable to UNHCR staff provide that, once the minimum seniority requirements for eligibility for promotion are met, account will be taken of manager’s recommendations, performance appraisal reports and seniority in grade. It follows from the foregoing provisions that the applicant is entitled to claim that priority should be given to competence when a decision is taken about which staff to promote.

22. In order to draw up the list of staff members to be promoted to the P-4 level during the 2007 promotion session, UNHCR asked the Board to make recommendations by applying a Methodological Approach. The approach evaluates eligible staff members on the basis of four principal criteria: performance appraisal reports, managers’ recommendations, seniority in grade, including recognition for underfilling (i.e. performing functions at a higher level), and rotation history. Each criterion is allocated a maximum number of points: 36 for performance appraisal reports, 36 for managers’ recommendations, 30 for seniority, and 39 for rotation history. Hence, contrary to what the applicant maintains, and bearing in mind that rotation history can also count, at least in part, as a factor of experience and therefore of competence, the Methodological Approach advocated to evaluate the merits of eligible staff members is based principally on competence, not on seniority, and therefore is not contrary to the aforementioned rules.

23. The applicant claims that UNHCR, acting on the Board’s recommendation, should not have adopted the Methodological Approach so described without prior consultation of the Joint Advisory Committee. United Nations staff regulation 8.1 provides: “The Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other personnel policies”. Staff regulation 8.2 provides: “The Secretary-General shall establish joint staff/management machinery at both local and Secretariat-wide levels to advise him or her regarding personnel policies and general questions of staff welfare as provided in regulation 8.1”. Accordingly, the applicant is entitled to claim that the aforementioned provisions require the Joint Advisory Committee, a UNHCR body on which both the staff and the Administration are represented, to be informed of any changes to the rules that affect the staff. However, a comparison of the criteria established by the APPB Guidelines, as specified earlier, and the criteria established in the Methodological Approach reveals that the approach merely provides a new instrument for determining the weight to be given to the criteria, which were unchanged, for the purpose of injecting greater transparency into the process of drawing up promotion lists. That being the case, the Administration was not required by any rule to obtain the agreement of the Joint Advisory Committee before using the new instrument to evaluate eligible staff, as there was no change to any of the measures provided for in the APPB Guidelines. Moreover, since the recommendations of the Joint Appeals Board are not in themselves binding, no regulation required the Administration to observe a one-year period before implementing the Methodological Approach.

24. The applicant claims that her situation was reviewed by an irregularly constituted APPB in that one of the Co-Chairs was a person who was not entitled to represent the staff after the Staff Council had withdrawn its

confidence in him. At least one month before the functions of the Board expired, the Staff Council and the Administration, on the basis of the combined provisions of paragraphs 11, 16 and 19 of the APPB rules of procedure, compiled a list containing equal numbers of staff representatives and Administration representatives, the members of the Board were then appointed by the High Commissioner, and the Board at its first meeting elected two Co-Chairs, one representing the staff and the other the Administration.

25. Therefore, once a staff member had been proposed by the Staff Council as its representative and appointed by the High Commissioner, the fact that the Staff Council withdrew its confidence in this representative did not have the effect of preventing the representative from sitting legally on the Board. The provisions of the Staff Association regulations which require members designated to take part in the proceedings of certain bodies to apply the decisions of the Staff Council govern only relations between members of the Association and do not affect the legality of proposals made to the Administration by the various bodies on which staff representatives sit. The assignment of the Co-Chair, subsequent to his nomination by the staff to the Board, to the post of Deputy Inspector-General does not of itself give rise to a conflict of interest such as to cast doubt on his impartiality when issuing opinions on promotions.

26. Although the applicant claims that the High Commissioner's award of promotions was irregular because he failed to seek the Board's advice, the judge's examination of the file shows that, with respect to promotions to the P-4 level, which was the only level relevant to the applicant's situation, the High Commissioner promoted only one staff member not recommended by the Board. 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 the Board at the first promotion session and then reviewed again following the staff member's recourse. Consequently, the arguments put forward by the applicant fail to establish that the staff member in question was promoted irregularly.

27. While the applicant claims that the UNHCR promotion system, despite recent progress compared with past years, continues to lack transparency from the standpoint of the staff, a general argument such as this, even if correct, does not suffice to establish that a non-promotion is unlawful, 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.

28. Statements by the High Commissioner concerning the value of the UNHCR promotion system cannot serve as a legal argument which the judge could invoke to rescind the contested decision. Therefore, the applicant's claim that the non-promotion to the P-4 level was tainted with a procedural flaw is unfounded.

29. The applicant claims that, in reaching its opinion not to recommend her for promotion to the P-4 level in 2007, the Board relied on inaccurate information because the fact-sheet before it contained errors and was incomplete. Paragraph 140 of the APPB Guidelines provides that a promotion session must be held every year in October. It is therefore incumbent on the Administration to review the situation of staff as at 1 October of the year of the session and then to transmit to the Board the fact-sheets of eligible staff members updated to 1 October of that year. It follows that the applicant is entitled to maintain that her fact-sheet should be complete and error-free as at 1 October 2007, but she cannot claim that information obtained subsequent to 1 October 2007 should be included in

the fact-sheet and taken into consideration by the Board, even though the promotion session for 2007 was not held until 27 January 2008.

30. In the recourse she submitted on 25 March 2008 to the Board, a recourse which on 24 June 2008 resulted in another recommendation not to recommend promotion, the applicant specified the errors in the fact-sheet. It is apparent from the case file and in particular from a comparison of the fact-sheet used by the Board to study the applicant's situation and the fact-sheet of 23 October 2008 as corrected by the Administration following the applicant's recourse that: first, the period from July 1995 to September 2000, when the applicant was serving in Haiti and Rwanda, was classified by UNHCR as United Nations experience, whereas it had not been so classified before; second, for the period from October 2001 to January 2003, her performance rating was reflected in the fact-sheet, whereas it had not been so reflected before; and, third, for the period subsequent to May 2007, the fact-sheet shows a "superior" rating, which it had not shown before for that period, and reflects the applicant's comments, including the statement that, beginning in May 2007, she was implementing tasks at the P-4/Senior Contracts Officer level. Since, as stated earlier, the applicant's situation had to be considered as it stood at 1 October 2007, the applicant establishes that the Board committed an error by rejecting her recourse on the ground that she had not provided new elements to support her claims.

31. However, in order for the Tribunal to rescind a decision not to promote, the applicant has to establish either that the decision was taken following an irregular procedure, which, as was stated earlier in this judgment, she has failed to do, or that, but for the errors committed in the review of her professional career, she would have had a real chance of being promoted.

32. The applicant claims that it was wrong of her managers not to recommend her for promotion in 2005 and 2006 and that this had cost her the 24 points allocated to this criterion by the Methodological Approach. However, the decisions not to recommend her for promotion became final because they were not contested within the time limits, and therefore the question could not be reopened either by the Board or during the present proceedings. While the applicant maintains that no account was taken of the fact that she occupied a post at the P-4 level for several months, she does not substantiate her claim, whereas the Administration contests it in precise terms. The fact that the rating of her performance as "superior" was not taken into account for the period up to 1 October 2007 does not in any case affect the Board's calculation of the number of points, which would have been the same even if it had been taken into account. Lastly, although she challenges the number of points allocated to her rotation history, claiming that her assignments outside UNHCR should have been taken into account, she does not specify which regulation the Administration breached by applying the same calculation method for rotation history to all eligible staff.

33. Therefore, the applicant, who is contesting only the application to her case of the weighted criteria under the Methodological Approach and who was consequently ranked 187th with a total of 62.1 points, whereas the last woman to be promoted scored 66.4 points, fails to establish that the few material errors in her fact-sheet deprived her of the chance to be promoted.

34. Therefore, it follows from the foregoing that her request for rescission of the decision not to promote her during the 2007 promotion session and hence her request for payment of 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