



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/84

Judgment No.: UNDT/2010/178

Date: 14 October 2010

English

Original: French

Before: Judge 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, UNHCR

Introduction

1. In an application submitted on 13 October 2009 to the United Nations Dispute Tribunal, the Applicant requests the following:
 - a. The rescission of the decision by which the United Nations High Commissioner for Refugees refused to promote her to the P-4 level for 2008;
 - b. To be awarded compensation for the irregularities committed by the Administration during the promotion session and for the moral damage suffered;
 - c. The payment of all emoluments and allowances she would have received if she had been promoted to the P-4 level at the 2008 promotion session.

Facts

2. The Applicant has been working for the United Nations High Commissioner for Refugees (“UNHCR”) since September 2000.
3. Through IOM/FOM No. 010/2009 of 3 February 2009, the Director of the Division of Human Resources Management (“DHRM”) informed all UNHCR staff that the 2008 annual promotion session would be held in March 2009 and that the number of promotion slots for 2008 had been decided as follows:

P-5 to D-1:	10
P-4 to P-5:	20
P-3 to P-4:	42
<u>P-2 to P-3:</u>	<u>38</u>
Total:	110
4. By email dated 10 March 2009, the Director, DHRM, sent to all staff the promotions methodology for the 2008 session, as developed by the Appointments, Postings and Promotions Board (hereafter referred to as “the APPB”).
5. The APPB convened from 15 to 21 March 2009 for the 2008 promotion session.

6. Through IOM/FOM No. 022/2009 of 28 April 2009, the High Commissioner published the list of promoted staff. The Applicant was not amongst those promoted.
7. On 22 May 2009, the Applicant filed recourse before the APPB against the decision not to promote her at the 2008 session.
8. By letter dated 5 June 2009, the Applicant submitted a request to the Secretary-General for management evaluation of the High Commissioner's decision not to promote her to the P-4 level at the 2008 promotion session.
9. The APPB reviewed the Applicant's recourse at its recourse session which took place from 22 to 26 June 2009. The Applicant was not recommended for promotion.
10. On 1 July 2009, her request for management evaluation before the Secretary-General was forwarded to the Deputy High Commissioner, to whom the High Commissioner has delegated this function.
11. By memorandum dated 16 July 2009, the Deputy High Commissioner sent to the Applicant the outcome of his management evaluation, i.e., that the decision not to promote her to the P-4 level had been taken in accordance with the Organization's rules and procedures.
12. By IOM/FOM No. 035/2009 of 28 July 2009, the High Commissioner announced the results of the recourse session. The Applicant was not amongst the staff members who were promoted after the session.
13. On 13 October 2009, the Applicant filed an application before the United Nations Dispute Tribunal.
14. By letter dated 7 September 2010, the Tribunal informed the parties that it intended to raise on its own motion the issue of the legality of the 2008 promotion session and requested that the Respondent provide comments in this regard. The Respondent submitted his comments on 15 September 2010.
15. On 1 October 2010, an oral hearing took place in which the Applicant and Counsel for the Respondent participated.

Parties' contentions

16. The Applicant's contentions are:

a. The Administration did not inform the APPB of the recommendations made at the 2007 session according to which the Applicant should be given priority consideration at the 2008 session;

b. The promotions procedure was not duly followed, nor applied in a transparent and objective manner. The distribution of the number of available slots for promotion within each group was not transparent, and neither was the attribution of points to additional criteria such as professional competence, fluency in languages and service in D and E duty stations;

c. The promotions methodology was not applied correctly. The APPB did not take into consideration the fact that the Applicant had been serving in an expert position at a level (P-4) higher than her own since December 2007;

d. The Applicant endorses the information on the 2008 session submitted by the UNHCR Staff Council that the High Commissioner had promoted non-eligible individuals whereas a number of deserving staff had been ignored and additional promotions had been granted outside the regular process;

e. The Deputy High Commissioner, to whom was delegated the management evaluation function within UNHCR, is in a situation of conflict of interest as he is responsible for assessing a decision taken by his supervisor, the High Commissioner;

f. The methodology and the points system were not applied correctly. The APPB acknowledges having miscalculated the points to be attributed to the criterion of performance;

g. The Administration applied two different methodologies at the 2007 and 2008 promotion sessions. The methodology for the 2008 session

is based mainly on subjective criteria such as the appraisals and recommendations of supervisors, without consideration of other criteria such as qualifications, languages, training and geographical distribution;

h. A mistake was made in the calculation of her seniority as the APPB did not take into account the years she spent working for other organizations in the United Nations system before joining UNHCR. Thus, her seniority should have been calculated since 1995. She has more seniority than other staff members who have been promoted. She has been subject to discrimination because, despite her many years of experience, there is a ceiling on points attributed to this criterion;

i. Her candidacy was not properly examined at the recourse session. The criteria applied were unclear. The recourse session is part of the entire 2008 promotion session; thus, her contentions regarding the recourse session are receivable even though she filed a management evaluation request before the outcome of the recourse session was announced. Requesting management evaluation of the outcome of the recourse session would not have changed her case and would have caused a delay for the parties. Furthermore, if the decisions had been divided in two (promotion and recourse), the Tribunal would not have been able to address all aspects of the situation;

j. The promotions methodology is not in line with the APPB Procedural Guidelines with regard to priority consideration to be given to candidates appointed to a higher level position;

k. A non-eligible staff member was promoted at the recourse session. On that occasion, the High Commissioner also promoted candidates who had not been recommended by the APPB;

l. The rationale followed by the APPB for moving candidates from one group to another and ranking them within a same group is unclear;

m. A candidate who had been performing at the P-4 level, like herself, and who was in group 3 with 44 points, was moved into group 1. This

candidate was promoted whereas she was not even though she had been assigned to an expert post and had 46 points;

n. According to the APPB Procedural Guidelines and the promotions methodology, she meets the criteria for promotion, i.e., she is serving on an expert post, performs at a level higher than her own, is a woman and was not promoted the previous year.

17. The Respondent's contentions are:

a. The Applicant did not request management evaluation of the High Commissioner's decision regarding the outcome of the 2008 recourse session. Hence, her contentions against that decision cannot be examined by the Tribunal;

b. The 2008 promotion and recourse sessions were conducted in line with the APPB Procedural Guidelines and the promotions methodology for the 2008 session;

c. Contrary to what is alleged by the Applicant, the APPB took note of the recommendations made at the 2007 session. However, it had to apply the new promotions methodology to all staff members. Given that the promotions methodology for the 2007 session was different than for the 2008 session, the APPB was not bound by the recommendations made at the 2007 promotion session;

d. The APPB gave priority consideration to the Applicant by considering that although her personal grade was P-3 she had been performing at the grade above. Nevertheless, given the limited number of promotion slots available and the ranking of the Applicant, she could not be promoted;

e. Staff members who were promoted from P-3 to P-4 at the 2008 promotion session were reviewed according to the established procedure. It is within the High Commissioner's discretion to promote staff members

who have not been recommended but whose status has been examined by the APPB;

f. The distribution of promotions between the groups was carried out in a transparent manner and was in line with the promotions methodology;

g. According to paragraph 9 of the promotions methodology, additional criteria such as professional competence, fluency in languages and service in D and E duty stations are only taken into consideration during the second round of analysis. Promotions were awarded to candidates in the first group and there were no promotion slots left for the candidates of the other groups. The Applicant was therefore not considered during the second round;

h. Being in charge of the management evaluation function does not create a conflict of interest for the Deputy High Commissioner. Management evaluation is a procedure by which the Organization reviews its own decisions;

i. Although there was a mistake in the calculation of the points for performance of staff members at the P-3 level, the APPB acknowledged the mistake and all affected staff members were reconsidered at the recourse session. The Applicant, who was in group 3 with 46 points at the promotion session, was granted 57 points at the recourse session but remained in the same group;

j. The APPB has discretionary power to examine the status of candidates provided it does so according to the criteria contained in its Procedural Guidelines and the promotions methodology. Groups were formed according to the promotions methodology and the review of each candidate by the APPB. It divided the candidates into five groups on the basis of the points they scored and considered that candidates were equally qualified within each group;

k. Once the groups were established, candidates were placed in alphabetical order. No ranking took place within the groups;

- l. Performance, and not seniority, is the most important criterion in obtaining a promotion; thus, a ceiling on the number of points to be attributed for seniority is not unlawful;
- m. The Applicant's fact-sheet, which reflects her whole career, was considered by the APPB. Furthermore, the Applicant's work experience before joining UNHCR enabled her to be recruited at the P-3 level;
- n. The APPB took into account the fact that the Applicant was serving on an expert post and performing at a higher level than her own. Even though she had been given priority consideration, this did not necessarily mean that she should be recommended for promotion;
- o. The Applicant's contentions on the lack of objectivity and fairness of the promotion system are not justified. She received full and fair consideration during the 2008 promotion session;
- p. A staff member was promoted at the recourse session because he had mistakenly not been included in the promotion session. Thus, the APPB examined 358 candidates at the promotion session and 359 at the recourse session;
- q. The fact that a candidate was moved from group 3 to group 1, as mentioned by the Applicant, is explained in the minutes of the APPB.

Judgment

18. In her application submitted on 13 October 2009 to the United Nations Dispute Tribunal, the Applicant contested the refusal of the High Commissioner for Refugees to promote her to the P-4 level for 2008. By his decision of 28 April 2009, the High Commissioner published the list of staff members promoted to the P-4 level; it did not include the Applicant who filed recourse before the APPB against this decision on 22 May 2009. Without waiting for the response to her recourse, the Applicant then submitted on 5 June 2009 a request to the Secretary-General for management evaluation of the decision of 28 April 2009. At its recourse

session which took place from 22 to 26 June 2009, the APPB did not recommend her for promotion. On 16 July 2009, the Deputy High Commissioner informed the Applicant that her request for management evaluation was rejected and, on 28 July 2009, the High Commissioner confirmed his decision not to promote her following the outcome of the recourse session.

19. The Respondent maintains that, since only the decision of the High Commissioner of 28 April 2009 was submitted for management evaluation, then only this decision can be contested before the Tribunal by virtue of art. 8.1(c) of the Statute of the Dispute Tribunal which provides that an application shall be receivable if: “An applicant has previously submitted the contested administrative decision for management evaluation, where required...”.

20. However, in his response of 16 July 2009 to the management evaluation request, the Deputy High Commissioner took into account the review of the Applicant’s professional status by the APPB at the recourse session. Hence, although the Applicant did not expressly request management evaluation of the High Commissioner’s final decision of 28 July 2009 not to grant her a promotion and since the response to her management evaluation request covers both sessions, the Applicant shall be considered as having complied with the obligation contained in the above-mentioned provision. It follows that, contrary to the assertion of the Respondent, the legality of the final decision of the High Commissioner not to promote the Applicant to the P-4 level for 2008 has been duly referred to the Tribunal.

21. The Applicant holds that the Deputy High Commissioner, to whom the management evaluation function in UNHCR has been delegated, is in a conflict of interest since he is responsible for reviewing a decision taken by his supervisor, the High Commissioner. The Tribunal can only reject this argument since the management evaluation function provided for in the Staff Rules is a procedure by which the Administration is able to correct its own mistakes if necessary and the Deputy High Commissioner, due to the delegation of this function to him by the High Commissioner, can in no way be considered in a conflict of interest.

22. In any event, since the legality of a decision is assessed at the date at which it is taken, circumstances such as the ones above, which are subsequent to the contested decision, shall in no way vitiate the legality of the decision to refuse promotion.

23. Moreover, it is appropriate for the Tribunal to reaffirm that, given the discretionary nature of promotion decisions, the control it has over the legality of those decisions is limited to assessing the regularity of the procedure followed to take the decision and the factual errors in the review of the staff member's career.

24. By letter dated 7 September 2010, the Tribunal informed the parties that it intended to raise on its own motion the issue of the legality of the 2008 promotion session: indeed, contrary to paragraph 11 of the APPB Rules of Procedure and paragraphs 140 and 144 of the Procedural Guidelines, published in 2003, that provide that the annual promotion session takes place in October and that staff seniority is calculated up to that date, the High Commissioner accepted the proposal of the Joint Advisory Committee to fix 31 December 2008 as the cut-off date to determine the seniority and the eligibility of staff members at the 2008 session.

25. It is therefore important to ascertain whether the High Commissioner was in a position to modify the APPB Rules of Procedure and Procedural Guidelines. Firstly, it should be noted that under the letter from the Joint Advisory Committee, dated 27 January 2009, the decision to modify the date of October is a provisional measure that applies only to the 2008 session.

26. Regulation 8.2 of the Staff Regulations then in force provides that:

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.

27. Thus, the above-mentioned provision authorises the Joint Advisory Committee, a UNHCR body on which both the staff and the Administration are represented, to suggest to the High Commissioner any changes to the rules concerning the staff. Even though the APPB Rules of Procedure and Procedural Guidelines are the legal instruments that govern the promotions procedure at UNHCR, neither the Rules and Guidelines, nor any other legal text preclude the

High Commissioner from deciding on a specific measure for the 2008 session, thus derogating from the rule by which 1 October is the cut-off date to determine seniority and eligibility. However, the principle that similar acts require similar rules required that the amendment measure be taken in accordance with the same procedure by which the Rules and Guidelines had been enacted. In this case, the basic legal instrument governing the promotions procedure at UNHCR was introduced by the High Commissioner in 2003, after consultation of the Joint Advisory Committee. Hence, another legal text adopted by the High Commissioner upon the advice of the Joint Advisory Committee could legally modify the preceding one. It follows that there is no need to uphold the illegality of the decision of the High Commissioner to fix 31 December 2008 as the cut-off date to determine the seniority and the eligibility of staff members.

28. The Applicant holds that the promotions procedure used by the Administration was not transparent. It is appropriate for the Tribunal to recall that it is not sufficient for the Applicant to put forward a general argument on the transparency of the procedure, which is only a goal, but that she should provide specific facts establishing that the legal instruments guiding the selection of staff for promotion were not followed.

29. The fact that the Administration forwarded belatedly the 2008 promotions methodology to staff members, as regrettable as this may be, does not constitute a procedural flaw as no legal instrument stipulates a deadline for this type of communication. Furthermore, although the application of different methodologies by the APPB every year may constitute a source of uncertainty for staff members, this can in no way be punished by the Tribunal since the new methodology for the 2008 promotion session is consistent with the provisions contained in the APPB Procedural Guidelines published in 2003.

30. The only lack of transparency which could be punished by the judge would be the refusal of the Administration to inform the Tribunal and the applicant staff member of the considerations on which the High Commissioner based his decision. In this case however the documents contained in the case file show that the Applicant received from the Respondent all the necessary documents and information to effectively challenge the High Commissioner's

decision, i.e., the rules followed, the methodology applied by the APPB, the number of points attributed to the Applicant by application of the methodology, and the minutes of the sessions held by the APPB.

31. The Applicant holds that the methodology used during the promotion session is wrongly based on subjective criteria, disregarding other criteria such as qualifications, languages, training, and geographical distribution. However, art. 101.3 of the Charter of the United Nations provides that:

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. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

32. In addition, regulation 4.2 of the Staff Regulations provides that:

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. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

33. The APPB 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 supervisors, performance appraisals and seniority will be taken into consideration. Therefore, in accordance with the above-listed provisions, the Applicant cannot claim that competence is not the main criterion in granting promotions and the assessment of staff members' competence is inevitably affected by subjectivity, which cannot be considered unlawful.

34. The Applicant asserts that the number of promotion slots for each grade level was not set in a transparent manner and that it was modified by the High Commissioner in the course of the promotions procedure. Paragraph 141 of the APPB Procedural Guidelines clearly establishes that the number of promotion slots is determined each year by the High Commissioner, based on advice from the Joint Advisory Committee. The minutes of the meeting held on 19 January 2009 show that the Joint Advisory Committee suggested to the High Commissioner a number of promotion slots per grade and that the High

Commissioner established that number by decision of 3 February 2009. Thus, it cannot be maintained that the procedure for establishing the number of promotion slots was not adhered to, nor that the High Commissioner could not, upon his own initiative, subsequently modify the number of promotions to be granted.

35. It is also maintained that the methodology used during the 2008 session is not consistent with the Procedural Guidelines as priority consideration was not given to staff members who had been appointed to a post at a higher level.

36. Paragraph 150 of the APPB Procedural Guidelines stipulates that:

The APPB will present to the High Commissioner a ranked list of nominees for promotion, subject to the availability of promotion slots at each grade level. The APPB will give first consideration to eligible candidates who have been appointed to a post at a higher level, whether or not they are currently serving on that post.

37. The methodology adopted by the APPB for the 2008 promotion session specifies that, after having divided eligible staff members into groups on the basis of the number of points obtained by each of them according to the criteria defined in the methodology, when moving staff members from one group to another, the APPB will give particular attention to “staff members appointed to a higher level post, staff members who are already serving on a higher level post and staff members on expert posts. Eligible candidates on [e]xpert posts will be considered for inclusion in groups on a case-by-case basis with the above-mentioned methodology also used with the exception of [f]unctional [d]iversity and [r]otation criteria”. It is therefore clear from the above-mentioned provisions that the APPB can move into a higher group a staff member who meets the above conditions and thus give him/her priority consideration for promotion. Therefore, there is no contradiction on this point between the Procedural Guidelines and the methodology applied in the 2008 session.

38. The Applicant argues that, during the 2008 promotion session, the APPB committed an irregularity by not taking into account the recommendation made by the APPB at its 2007 session, asking that the Board give her priority consideration at the next promotion session. The minutes of the 2008 promotion session show that the APPB had been informed of the recommendation made by the Board in 2007 and that it deliberately chose not to consider it. Although this assessment

cannot be considered irregular since the APPB cannot be bound by the opinion of the previous APPB, it should be noted that such comments, which are binding neither on the APPB nor on the Administration, are unnecessary and cause frustration for the affected staff member, in particular considering that in 2008 the APPB made the same mistakes than in 2007 in refusing to recommend the Applicant for promotion while advising DHRM to regularise her status by granting her a promotion through a parallel path, which proved impossible to carry out as acknowledged by the Respondent at the oral hearing.

39. The Applicant objects to the fact that a staff member who was granted 44 points, i.e., less than herself, after calculation by the APPB of the points to be awarded to each candidate by application of the 2008 promotions methodology, was moved from group 3 to group 1 and subsequently recommended and promoted. However, it is not up to the Tribunal to substitute its own appreciation of the merits of staff members with either that of the APPB or of the High Commissioner, and although the Applicant maintains that she has been subject to discrimination, such a general allegation can only be rejected by the Tribunal.

40. In contesting the legality of the decision not to promote her in 2008, the Applicant asserts that the High Commissioner approved promotions in an irregular manner without obtaining first the advice of the APPB. The Board's Rules of Procedure provide that it is established to advise the High Commissioner on appointments, postings and promotions of staff members. Hence, the Applicant is correct in asserting that the High Commissioner may not promote a staff member if his/her situation has not been examined previously by the APPB.

41. It is clear from the judge's review of the file, with regard to promotions to the P-4 level, that the High Commissioner promoted a non-eligible staff member who, because he or she was not eligible, had not been considered by the APPB. In granting promotions without such consultations, the High Commissioner committed an irregularity which vitiates necessarily the legality of the decision to deny the Applicant a promotion, since there was a limited number of promotion slots.

42. It follows from the foregoing that the Tribunal should rescind the decision not to promote the Applicant.

43. Pursuant to art. 10.5 of the UNDT 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 CHF8,000.

44. The Applicant has asked to be compensated for the material damage resulting from the loss of the additional salary she would have received if she had been promoted to the P-4 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 take a new decision on the promotion of the Applicant who, if she is promoted, will be able to claim promotion retroactively and thus will not have suffered any material damage; however, if she is not promoted, she will not be able to claim any compensation unless she files an application before the Tribunal contesting the new decision to deny her a promotion. In the second case, should the Administration choose to pay the compensation set by the judge rather than take the action arising from the rescission order, that sum must be considered as compensation for the loss of salary due to the denial of promotion in 2008, since the Applicant will again be able to exercise her right to seek a promotion during the 2009 promotion session. Hence, in either of the two cases, her request for compensation for the salary she would have received must be rejected.

45. The Applicant has also requested compensation for the moral damage caused to her by the decision herein declared to be unlawful. This request refers to damage that cannot be deemed to be compensated by payment of the amount indicated in paragraph 43 of this judgment. However, the Applicant is not entitled to compensation for such damage unless the judge considers, as was decided by the Appeals Tribunal in its judgments dated 1 July 2010, *Solanki* 2010-UNAT-044 and *Ardisson* 2010-UNAT-052, that she would have had a real chance of being promoted if the Administration had applied the existing rules.

46. In the case in question, the Applicant firstly argues that the APPB did not consider the fact that she is serving on an expert post at the P-4 level, higher than

her own. However, the minutes of the first session show unquestionably that the APPB reviewed her status taking into account that she is an expert assigned to a P-4 level post.

47. Although she contests the number of points attributed to rotation by claiming that her assignments outside UNHCR should have been taken into account, she does not specify which rules the Administration has violated in applying to all eligible staff the same criteria to calculate the number of rotations.

48. In order to set the compensation for the moral damage suffered by the Applicant, the Tribunal shall, as recalled above, assess her chances for promotion should a regular procedure have been applied. Although the Applicant was ranked only in the third group after having received 57 points, the fact that she was serving on an expert post at the P-4 level, the recommendations of the APPB at the 2007 and 2008 sessions and the recommendations of her supervisors for 2007 and 2008 show that the Applicant's chances for promotion were not non-existent and that, as a result, the moral damage caused by the irregularity committed in promoting a non-eligible staff member was even greater. The Tribunal therefore sets the compensation for moral damage to be awarded to the Applicant at CHF4,000.

Decision

49. In view of the foregoing, the Tribunal DECIDES:

- 1) The High Commissioner's decision not to promote the Applicant to the P-4 level for 2008 is rescinded;
- 2) If rather than rescind the decision, UNHCR chooses to pay compensation, it shall pay the Applicant CHF8,000;
- 3) UNHCR is ordered to pay the Applicant compensation in the amount of CHF4,000 for the moral damage suffered;
- 4) The above compensation shall include interest at five per cent per annum as from 60 days following the date on which the judgment becomes executable and until payment of the said compensation;
- 5) All other claims are rejected.

(signed)

Judge Jean-François Cousin

Dated this 14th day of October 2010

Entered in the Register on this 14th day of October 2010

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva