



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/090

Judgment No.: UNDT/2010/190

Date: 19 October 2010

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

BOFILL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Claudio Realini

Counsel for respondent:
Shelly Pitterman, UNHCR

Introduction

1. In an application submitted on 15 June 2010 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 D-1 level for 2008;
 - b. To be promoted to the D-1 level or to be recommended for promotion at the D-1 level at the 2009 promotion session;
 - c. To be compensated for the material and moral damage suffered;
 - d. To receive fair compensation for her lawyer's fees.

Facts

2. The Applicant has been working for the United Nations High Commissioner for Refugees (“UNHCR”) since May 2001.
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 staff promoted. The Applicant was not amongst those promoted.

7. By email dated 8 May 2009, the Applicant received, at her request, a copy of her case file as examined by the APPB at the 2008 promotion session.

8. By letter dated 28 May 2009, the Applicant filed recourse before the APPB against the decision not to promote her at the 2008 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. Through 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.

11. By email dated 12 August 2009, the Applicant received the summary of the deliberations of the APPB regarding her recourse.

12. By letter dated 20 September 2009, the Applicant submitted a management evaluation request to the Deputy High Commissioner, as well as a request for amicable settlement, with regard to the High Commissioner's decision not to promote her to the D-1 level at the 2008 promotion session.

13. By email dated 21 October 2009, the Applicant was informed that it would not be possible to respond to her request for management evaluation within the stipulated time limit. She was also informed that the absence of a response did not impact on the time within which she may file an application to the Tribunal.

14. By memorandum dated 30 November 2009, the Assistant High Commissioner for Protection, on behalf of the Deputy High Commissioner, informed the Applicant that she had forwarded her request for amicable settlement to the UNHCR Ombudsman and that the time limit for management evaluation was suspended while consultations took place with the Ombudsman.

15. By email dated 29 March 2010, the UNHCR Ombudsman informed the Deputy High Commissioner that the parties had been unable to reach an amicable settlement.

16. By email dated 18 May 2010, 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 D-1 level had been taken in accordance with the Organization's rules and procedures.

17. On 15 June 2010, the Applicant filed an application before the United Nations Dispute Tribunal.

18. By letter dated 8 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.

19. On 1 October 2010, an oral hearing took place in which the Applicant, her Counsel and Counsel for the Respondent participated.

Parties' contentions

20. The Applicant's contentions are:

- a. Lack of predictability: The promotions methodology is issued extremely late and therefore does not comply with the requirements of the principle of predictability;
- b. Absence of good faith: The current promotions system violates the principle of good faith. Failure to meet the promotion criteria is apparently not an obstacle in obtaining a promotion. She fulfils the promotion criteria and has a letter from her supervisor recommending her for promotion;
- c. Gaps in the methodology: In the promotions methodology, little reference is made to the consideration of staff members serving on expert posts. Because of this omission, it is not possible to fully appreciate the qualities of staff members who are, or who have been, assigned to such functions. The methodology is also incomplete in the sense that it does not take into consideration the entire career of candidates. That she performed as an expert from 2001 to 2008 was not taken into account;

- d. Discrimination: The promotions system is discriminatory and violates the principle of equal treatment since more men than women are promoted. Moreover, there is a continuing failure to promote financial experts to the D-1 level;
- e. The Administration did not provide any explanations to her as to how the methodology criteria were applied in her case. Moreover, the Administration delayed the procedure despite her diligent behaviour;
- f. The contested decision is based on obvious unlawful grounds;
- g. The APPB minutes refer to a supernumerary promotion. However, this type of promotion is not envisaged in the promotions methodology published for the 2008 session. A staff member was granted this promotion. This staff member, who was competing with her for promotion, was also the UNHCR Ombudsman until February 2010. He was in charge of the procedure for reaching an amicable settlement in her case. He was therefore in a conflict of interest;
- h. She requests the production of documents relating to the 2008 promotion session, the summoning of several witnesses before the Tribunal and the opening of an investigation.

21. The Respondent's contentions are:

- a. A number of arguments raised in the application were not raised during the management evaluation phase. Therefore, the Applicant has not exhausted the internal remedies with regard to those arguments;
- b. Due to the limited number of promotion slots available at the D-1 level (10), the Applicant's promotion chances were low. Furthermore, 81 candidates obtained a higher score than her;
- c. There is no rule compelling the Organization to issue the promotions methodology in advance. This has already been ruled by the Tribunal;

d. The promotions methodology does not violate the principle of good faith. Supervisors' recommendations are only one of the criteria used by the APPB. There is no rule compelling the Organization to promote staff members who have been recommended by their supervisor;

e. It is within the High Commissioner's discretion to grant more promotions than previously planned. The Applicant's candidacy was not affected by these additional promotions;

f. Contrary to what is maintained by the Applicant, the promotions methodology gives special attention to staff members serving on expert posts. The APPB reviewed candidates as experts only if they were serving on expert posts at the time of the promotion session. The APPB took into consideration the candidates' entire career;

g. The 2008 promotion session was not discriminatory. The fact that more men than women were promoted is not sufficient to establish that discrimination has occurred;

h. Contrary to what is maintained by the Applicant, she was provided with detailed information by the Administration on the opinions held by the APPB during the promotion and recourse sessions. The Administration did not delay the procedure. On the contrary, the Deputy High Commissioner tried, with the consent of the Applicant, to reach an informal settlement of the case.

Judgment

22. Although the Applicant requested that witnesses be summoned to the hearing, the Tribunal considers that, as far as promotions are concerned and given the type of control the Tribunal has over non-promotion decisions, there is no cause to hear witnesses. Indeed, given the discretionary nature of promotion decisions, the control the judge has over the legality of those decisions is limited to assessing the regularity of the procedure followed to take the decision and to verifying that no error was made in the review of the staff member's career; for

this type of control, and in the present case, it does not appear useful that witnesses appear before the Tribunal.

23. By letter dated 8 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.

24. 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.

25. 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.

26. 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.

27. The Respondent maintains that the Tribunal must not review arguments submitted by the Applicant which have only been put forward before the Tribunal without having been submitted previously as part of the management evaluation request. However, although the UNDT Statute provides that the Tribunal can only be seized, with certain exceptions, of an administrative decision which has previously been submitted by the Applicant for management evaluation, no provision precludes the Applicant, including because she was subsequently better informed of her rights, from bringing before the Tribunal arguments that are different to those already raised in her management evaluation request. Therefore, the Tribunal will examine all legal and factual arguments raised by the Applicant.

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 fact 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 directly from the Respondent or through the Tribunal, 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 maintains that the methodology adopted for the 2008 promotion session did not take into account the situation of staff members serving as experts. However, paragraph 6 of the applicable methodology specifies that the APPB will pay 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”. Thus, the argument raised is actually mistaken.

32. 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.

33. The Applicant maintains that the APPB applied a discriminatory system since more men than women were promoted to the D-1 level. However, the applicable methodology specified that gender was only considered during the second round of analysis of individual situations and where staff members were

found to be equally competent. Therefore, by the mere fact that more men than women were promoted to the D-1 level following the session, it cannot be assumed that discrimination occurred against female staff members.

34. 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.

35. It is clear from the judge's review of the file, with regard to promotions to the D-1 level, that the High Commissioner promoted two non-eligible staff members who, because they were 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 were a limited number of promotion slots.

36. The Tribunal must therefore rescind the decision not to promote the Applicant.

37. 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 CHF10,000.

38. 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 D-1 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 rising 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.

39. 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 37 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.

40. In the case in question, the Applicant argues that the APPB did not take into account the fact that she had been serving on an expert post for many years, nor that she was no longer serving as an expert at the time of the promotion session. However, it is very clear from the minutes of the promotion session that the APPB was aware that the Applicant had served on an expert post.

41. Although the Applicant mentioned that the UNHCR Ombudsman, whom she contacted following the decision not to promote her, has himself been promoted to the D-1 level, this circumstance may in no case establish that the decision not to promote her was unlawful since, on the one hand, that circumstance occurred after the date of the contested decision and that the legality of a decision is assessed at the date at which it is taken and, on the other hand, that the Tribunal may under no circumstances interfere in the relations between the Ombudsman and the staff members who call upon him.

42. The minutes of the 2008 promotion and recourse sessions show that the Applicant obtained 47 points and was ranked in the fifth group, while at least 78

staff members at the P-5 level received more points than her and that only 19 staff members were promoted to the D-1 level. Thus, the irregularity committed by the High Commissioner in promoting two non-eligible candidates did not deprive the Applicant of a chance of being promoted. The Tribunal considers that her chances for promotion at the 2008 session were close to zero and that there is no need therefore to compensate her for any moral damage she may have suffered.

43. Lastly, the Applicant requests that she be awarded compensation for her lawyer's fees. Pursuant to art. 10.6 of the UNDT Statute, the Tribunal may award costs against a party that manifestly abused the proceedings before it. In the present case, the Tribunal found no abuse on the part of the Respondent and there is no need therefore to award costs against that party under the aforementioned art. 10.6.

Decision

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

- 1) The High Commissioner's decision not to promote the Applicant to the D-1 level for 2008 is rescinded;
- 2) If rather than rescind the decision, UNHCR chooses to pay compensation, it shall pay the Applicant CHF10,000;
- 3) 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;
- 4) All other claims are rejected.

(signed)

Judge Jean-François Cousin

Dated this 19th day of October 2010

Entered in the Register on this 19th day of October 2010

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva