



UNITED NATIONS DISPUTE
TRIBUNAL

Case No.: UNDT/GVA/2012/023

Judgment No.: UNDT/2012/165

Date: 5 November 2012

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

BOFILL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Claudio Realini

Counsel for Respondent:
Shelly Pitterman, UNHCR

Application

1. By her application submitted to the United Nations Dispute Tribunal on 2 March 2012, the Applicant requests the following:

(a) Rescission of the decision of the United Nations High Commissioner for Refugees (“High Commissioner”) not to promote her to the D-1 level during the 2009 annual promotions session;

(b) To be promoted to the D-1 level or recommended for promotion to the D-1 level;

(c) To be compensated for material and psychological damage suffered, and for her attorney’s fees.

Facts

2. The Applicant joined the Office of the United Nations High Commissioner for Refugees (UNHCR) in May 2001 at the P-5 level.

3. By inter-office memorandum IOM/FOM/043/2010 of 16 July 2010, UNHCR transmitted to its entire staff the promotions methodology applicable to the 2009 annual promotions session as established by the Appointments, Postings and Promotion Board (“APPB”). It also informed staff that the number of promotion slots for 2009 had been decided as follows:

P-5 to D-1:	10
P-4 to P-5:	10
P-3 to P-4:	40
<u>P-2 to P-3:</u>	<u>35</u>
Total:	95

4. By inter-office memorandum IOM/FOM/068/2010 of 29 October 2010, the Director of Human Resources Management informed all UNHCR staff that the 2009 annual promotions session would be held at the end of November 2010. The APPB convened from 23 November 2010 to 2 December 2010.

5. By inter-office memorandum IOM/013-FOM/014/2011 of 1 March 2011, the High Commissioner published the list of promoted staff. The Applicant’s name was not on the list.

6. On 24 March 2011, the Applicant introduced a recourse before the APPB against the decision not to promote her at the 2009 annual promotions session.

7. The APPB reviewed the Applicant's request at its recourse session held from 16 to 19 May 2011 and found that there was no additional or new element allowing finding the recourse receivable. The Applicant was consequently not recommended for promotion.

8. By inter-office memorandum IOM/046-FOM/047/2011 of 25 July 2011, the High Commissioner announced the results of the recourse session. The Applicant was not on the list of staff members promoted following the session.

9. On 4 August 2011, the Applicant received a copy of the minutes of the APPB deliberations regarding her recourse.

10. On 17 August 2011 the Applicant submitted to the Deputy High Commissioner a request for a management evaluation of the High Commissioner's decision not to promote her to the D-1 level at the 2009 annual promotions session.

11. In an e-mail dated 5 October 2011, the Applicant was informed that it would not be possible to respond to her request for a management evaluation within the mandatory time limit.

12. In a memorandum dated 6 December 2011, the Deputy High Commissioner responded to the Applicant's request for management evaluation by confirming that the decision not to promote her to the D-1 level had been taken in accordance with the Organization's rules and procedures.

13. The Applicant completed her application with the Registry of this Tribunal on 2 March 2012. The Respondent submitted his reply on 30 April 2012.

14. By Order No. 135 (GVA/2012) of 27 August 2012, the Tribunal requested the Respondent to produce the following documents:

(a) The minutes of the APPB deliberations relating to the 2009 annual promotions session;

(b) The list of candidates considered by the APPB during the session, showing the ranking of eligible candidates, including the number of points allocated to each criterion (especially performance appraisal reports, manager's recommendations, seniority in grade, etc.);

(c) The list of candidates (matrix), as divided into groups, that was considered by the APPB in the second round of analysis;

(d) The list of candidates considered by the APPB at its recourse session including the APPB recommendations.

15. On 4 September 2012, the Respondent submitted to the Tribunal the documents that had been requested on a confidentiality basis.

16. By Order No. 141 (GVA/2012) of 14 September 2012, the Tribunal transmitted to the Applicant those documents produced by the Respondent that were relevant to her, some of which had been redacted in order to protect the personal information pertaining to other candidates.

17. On 3 October 2012, a hearing was held in the presence of the Applicant and her Counsel as well as of the Respondent's Counsel.

18. Following a request made by the Tribunal during the hearing, the Respondent submitted additional information on 8 October 2012, and the Applicant transmitted her observations in response thereto on 11 October 2012.

Parties' submissions

19. The Applicant's contentions are:

(a) The promotion system is discriminatory and violates the principle of equal treatment of staff because, for those who joined the Organization later in life after excelling in their profession outside the Organization, the system does not take into account their entire career and their previous mobility;

(b) The fact that the High Commissioner desired to correct the results of the 2009 annual promotions session by granting one additional promotion demonstrates the shortcomings of the promotion methodology;

(c) She was shortlisted and then interviewed on 10 March 2011 for the D-2 level post of Controller and Director of the Division of Financial and Administrative Management (DFAM). There is, therefore, a contradiction between the fact that she was shortlisted for a D-2 post and the fact that she had earlier been considered as ineligible for promotion to the D-1 level;

(d) Her points for performance were systematically lowered by various supervisors, although these points are crucial for obtaining a promotion;

(e) By its Judgment *Bofill* UNDT/2010/190, the Tribunal rescinded the decision by which the High Commissioner had refused to promote the Applicant to the D-1 level during the 2008 annual promotions session. The procedure for appealing against this judgment and the rejection of any offer of mediation demonstrate the High Commissioner's bad faith. Moreover, the refusal to promote the Applicant and the psychological harassment she has suffered constitute retaliatory actions for her having denounced the dysfunctions of the UNHCR promotions system.

20. The Respondent's contentions are:

(a) Contrary to the Applicant's contentions, the promotions methodology is not discriminatory. The Applicant's prior career was fully taken into account when she was recruited by UNHCR. As for the criteria considered under the promotions methodology, her entry on duty date did not have any significant effect. The Applicant had reached the third and last phase of the examination, at which time the only criterion considered was her individual performance;

(b) The selection process for a post is different to that of annual promotions. Thus, contrary to what the Applicant asserts, her shortlisting for a D-2 post is not an argument in favour of a promotion to a D-1 post in the framework of the 2009 annual promotions session;

(c) The questions raised by the Applicant concerning her performance evaluation reports should have been brought up when the relevant recourses were submitted. Likewise, her allegations that her non-promotion constitutes a retaliatory measure for having exposed the dysfunctions of the promotions system should have been addressed to the Ethics Office in accordance with the applicable procedures;

(d) Judgment *Bofill* UNDT/2010/190, to which the Applicant refers, was reversed by the Appeals Tribunal in its Judgment *Bofill* 2011-UNAT-174, which noted that an irregularity does not necessarily result in rescission or compensation if, in any case, the staff member had no foreseeable chance for promotion.

Judgment

21. In contesting the decision by which the High Commissioner refused to promote her from the P-5 to the D-1 level during the 2009 annual promotions session, the Applicant asserts that the rules set out in inter-office memorandum IOM/FOM/043/2010 are unlawful, since they lead to discrimination against some staff members, including her. The Tribunal observes, however, that she does not claim that the memorandum is contrary to a rule having higher legal force.

22. The Applicant specifies that the applicable procedure leads to discrimination among staff members because, for some of them, it does not take into account the professional experience they acquired before joining the Organization. The Respondent is justified, however, in asserting that there is no discrimination on this basis, since the professional experience of candidates is taken into account at the time of their initial recruitment to UNHCR and, in the case of the Applicant, the consideration of her previous experience led to her recruitment at the P-5 level, although she had never previously served in the United Nations system.

23. The Applicant then claims that the weight accorded by the memorandum to the criteria of functional diversity and mobility is so high in comparison to that of seniority that it actually blocks the promotion of staff members who, like her, were recruited as experts and have served for a long time as such. Nonetheless, it is up to the High Commissioner, who is responsible for the smooth functioning of UNHCR, to determine the relative importance of the criteria used to select the staff members who will be promoted.

24. In any case, the minutes of the APPB deliberations at its annual session show that the Applicant, although she was ranked 79th out of 91 candidates on the list of eligible staff members, was included in group 1 as being at the same level of qualification as the other staff members in this group, and that the APPB then studied, in particular, the Applicant's situation and did not recommend her, solely on the ground of her performance. Thus the Applicant cannot assert that the refusal to recommend her is linked to her previous position as an expert.

25. The fact that the High Commissioner deemed it appropriate to grant one additional promotion subsequent to its first decision of 16 July 2010, which had been taken after consultation with the Joint Advisory Committee, and without requesting another opinion from that Committee, cannot be considered an

unlawful act. Indeed, the High Commissioner has the discretionary power to determine the number of promotions to be granted, since the Joint Advisory Committee was initially consulted on the number of promotion slots per grade. Moreover, in any case, the granting of an additional promotion to the D-1 level could in no way have caused harm to the Applicant.

26. At the hearing, the Applicant requested that some members of the APPB, including its Chairperson, should be heard as witnesses by the Tribunal with regard to the Chairperson's statements as reported in paragraph 8 of the minutes:

One member expressed his opinion that all new information should be accepted at face value and reviewed without looking into the reasons why the information had not been available at the time of the original review. It was his opinion that if a [performance appraisal report] had existed at the time of the Annual Session, it was not up to the Board to review why it had not been available and judge whether it could be considered admissible. The Chairperson responded that this would be unfair to other staff members who might be in a similar situation but who had not submitted a recourse.

However, these statements have nothing to do with the Applicant, who does not contend that the APPB failed to examine the new information she submitted to it. Thus, the Tribunal considers that there is no need, in the present case, for it to hear the testimony requested by the Applicant.

27. The Applicant submits that the evaluations on which the APPB based itself in assessing her performance do not represent an accurate picture. However, at the time of its review, the APPB is required to base itself on the evaluations as they appear on the fact-sheet or possibly the performance appraisal reports of the staff member. The Applicant did not contest her evaluation reports on the date they were prepared, and she may not call them into question in the context of the current case.

28. The Applicant contends that there is a contradiction between the fact that she was shortlisted and then interviewed in March 2011 for the D-2 post of Controller and Director of DFAM and the fact that she was not promoted during the 2009 annual promotions session; however, the procedures followed to select a candidate for a specific post and those followed for the purposes of promotion are not identical. The Applicant's argument is therefore rejected.

29. Lastly, the Applicant asserts that the refusal to promote her is a retaliatory measure because she revealed dysfunctions within UNHCR. However, the Applicant provides no specific information to the Tribunal on the reasons that

would have led the UNHCR Administration to take such measures against her, and the fact that the Secretary-General filed an appeal against a judgment of this Tribunal, which gave her some satisfaction, may in no case be considered as retaliation but rather as the normal exercise by one party of the available avenues of appeal against a judgment of the Tribunal.

Decision

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

The application is rejected.

Judge Jean-François Cousin
So decided on 5 November 2012

Entered in the Register on 5 November 2012

René M. Vargas M., Registrar, Geneva
