



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/044

Judgment No.: UNDT/2012/166

Date: 5 November 2012

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

DUALEH

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Shelly Pitterman, UNHCR

Introduction

1. By his application submitted to the United Nations Dispute Tribunal on 22 February 2012, the Applicant is requesting:

a. That the decision, of the United Nations High Commissioner for Refugees (“High Commissioner”) at the annual promotions session in 2009 not to promote him to the D-1 level be rescinded;

b. That he be awarded compensation for the material and moral damage suffered.

Facts

2. The Applicant joined the Office of the United Nations High Commissioner for Refugees (“UNHCR”) in August 1988. In 2009, he was serving at the P-5 level.

3. By inter-office memorandum IOM/FOM/043/2010 of 16 July 2010, UNHCR circulated to its entire staff the promotions methodology applicable to the 2009 promotions session as established by the Appointments, Postings and Promotions Board (“APPB”). It also informed all UNHCR staff that the number of promotion slots available 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 the Division of Human Resources Management (“DHRM”) informed all UNHCR staff that the 2009 annual promotions session would be held at the end of November 2010.

5. The APPB convened from 23 November 2010 to 2 December 2010.

6. By inter-office memorandum IOM/013-FOM/014/2011 of 1 March 2011, the High Commissioner published the list of promoted staff. The Applicant was not among those promoted.
7. On 8 March 2011, the Applicant filed a recourse before the APPB against the decision not to promote him at the 2009 annual promotions session.
8. The APPB reviewed the Applicant's request at its recourse session held from 16 to 19 May 2011. After taking into account the corrections made to the matrix in respect of the Applicant's performance and mobility, the APPB maintained its recommendation not to grant him a promotion.
9. 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 among promoted staff members following the session.
10. On 4 August 2011, the Applicant received a copy of the minutes of the APPB deliberations regarding his recourse.
11. By email dated 18 August 2011, the Applicant submitted to the Deputy High Commissioner a request for management evaluation of the High Commissioner's decision not to promote him to the D-1 level at the 2009 annual promotions session.
12. By email dated 5 October 2011, the Applicant was informed that it would not be possible to respond to his request for management evaluation within the mandatory time limit.
13. By memorandum dated 22 December 2011, the Deputy High Commissioner transmitted to the Applicant the outcome of the management evaluation, namely that the decision not to promote him to the D-1 level had been taken in accordance with the rules and procedures of the Organization.
14. The Applicant filed his application with the Tribunals' Registry at Nairobi on 19 March 2012. On 5 April, the Respondent asked for the application to be transferred from the Nairobi Registry to the Geneva Registry. By Order No. 61

(NBI/2012) of 25 April 2012, the Tribunal decided to transfer the case to the Geneva Registry so that it could be decided there.

15. The Respondent submitted his reply on 4 May 2012.

16. 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 in groups that was considered by the APPB in the second round of analysis;
- d. The list of candidates considered by the APPB at its 2009 recourse session, including the APPB recommendations.

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

18. 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 him, in a redacted form, so as to protect the personal information pertaining to other candidates.

19. On 3 October 2012, a hearing took place in which the Applicant participated by telephone conference, and in the presence of the Respondent's Counsel.

20. On 8 October 2012, following a request made by the Tribunal during the hearing, the Respondent submitted additional information which was communicated to the Applicant.

Parties' submissions

21. The Applicant's contentions are:

- a. The assertion in the minutes of the APPB annual session that he had been a staff member in between assignments was a distortion of the facts. During the period in question, he had been either on secondment or on special assignment for the High Commissioner;
- b. The APPB was silent on how his period of service on an expert post for 12 years was taken into consideration. Moreover, the promotions methodology was discriminatory towards staff occupying expert posts and systematically disadvantaged them;
- c. His performance score had not been calculated correctly and this error had an impact on his overall evaluation;
- d. The fact that he had served 4 times in category E and D duty stations was not reflected in the calculation of points given for mobility. Moreover, his assignments as Senior Liaison Officer in South Sudan and as Special Adviser to the Special Representative of the African Union for Somalia were not taken into account. Furthermore, the minimum length of service required for the acquisition of points for mobility had not been made public and was not specified in the promotions methodology;
- e. He met the promotions criteria established for the 2009 annual promotions session and the APPB had ascertained that he was substantially equally qualified as the other candidates in group 1. He was discriminated against in not being promoted;
- f. His fact sheets do not show that he had been performing P-5 functions since 1989 and had not been corrected despite his repeated requests;
- g. The former Joint Appeals Board, as well as the Tribunal in its judgment *Dualeh* UNDT/2010/187, had found that his rights had been violated at previous promotions sessions;

h. He had been ranked 13th at the 2006 annual promotions session. Since then, his fact sheets had been persistently manipulated so as to conceal from the APPB the information needed for a full and fair evaluation;

i. No other staff member had occupied a P-5 post for such a long time. Most colleagues occupying posts at the D-2 level had been at a lower level than him in the 1980s and 1990s, when he had supervised and coached most of them. Since his current salary was equivalent to that of a D-1, step 2 post, a promotion would have a minimal impact on the salary costs of UNHCR.

22. The Respondent's contentions are:

a. Contrary to the Applicant's argument, the 11 years during which he served on an expert post were fully taken into account since the Applicant received the maximum number of points for seniority, as well as for functional diversity. Only the points awarded for mobility were lower than those given to other eligible staff, and that was because of the years he had spent on an expert post. Nevertheless these points were not considered in the final round of analysis and therefore had no impact on the decision regarding his promotion. Furthermore, the Tribunal, in its Judgment *Mebtouche* UNDT/2009/039, had found that only persons currently assigned to expert posts should be considered as such. The Applicant, however, was not assigned to an expert post at the time of the 2009 promotions session;

b. The errors in the initial calculation were corrected during the APPB recourse session, as well as the Applicant's ranking, which was revised from 22nd to 15th. Nevertheless, the correction of the final calculation had no effect on the Applicant's promotion, since the next closest candidate had a higher final score. In any event, the initial ranking is not taken into consideration during the third and final round of analysis;

c. With respect to the Applicant's assignments as Senior Liaison Officer in South Sudan and as Special Adviser to the Special Representative of the African Union for Somalia, they were not counted towards mobility because they had been for periods of less than one year. The fact that the Applicant

had served in category D and/or E duty stations was taken into account, however, as reflected in the minutes of the APPB session;

d. It was recognized in the management evaluation that the APPB assertion that the Applicant had been a staff member in between assignments was inaccurate. Nevertheless, the Applicant had no reasonable likelihood of promotion given the limited number of slots available at the D-1 level.

e. With regard to the Applicant's assertion that he met all the criteria for promotion at the 2009 annual promotions session, it should be borne in mind that the Applicant's performance rating was significantly lower than that of the candidates who were promoted;

f. The recommendation of the former Joint Appeals Board, and Judgment *Dualeh* UNDT/2010/187, are not relevant to the present dispute. Moreover, Judgment *Dualeh* UNDT/2010/187 was set aside by the Appeals Tribunal in its Judgment *Dualeh* 2011-UNAT-175;

g. The Applicant's allegations regarding manipulations of his fact sheets are unsubstantiated. The question of the impact on salary costs of a promotion of the Applicant to the D-1 level is not relevant to the matter at issue. With regard to the Applicant's allegation that staff members with less seniority were promoted, it should be noted that the Applicant's seniority was fully taken into account in the consideration of his candidacy.

Consideration

23. In contesting the High Commissioner's decision denying him a promotion to the D-1 level at the 2009 annual promotions session, the Applicant maintains, first, that the APPB did not take into consideration his situation as an expert. However, in 2009, the Applicant was no longer assigned to an expert post and it was therefore correct for him not to have been considered as occupying such a post. Moreover, contrary to the Applicant's contention, the years spent as an expert were taken into account in terms of his seniority in UNHCR.

24. Even if it is assumed that the Applicant is correct in maintaining that staff members who have occupied expert posts are disadvantaged for promotion compared with other staff, it should be recalled that the principle of equality of treatment among staff members requires only that staff in the same situation be treated in the same way (see *Tabari* Judgment 2011-UNAT-177). It is evident that staff members recruited as experts who have spent several years in this function are not in the same situation as other staff members.

25. The Applicant then alleges that, at its annual session, the APPB based its consideration of his situation on incorrect calculations of the points awarded to him for mobility and performance. It is not disputed, however, that at the recourse session, the APPB took into account its errors and revised the Applicant's ranking from 22nd to 15th, although the APPB did not see fit to recommend him for promotion. At all events, the APPB minutes show that at its annual session it included the Applicant in group 1 without taking into account his ranking, and that it was only after considering his situation that it did not recommend him solely based on his performance.

26. The Applicant then contests the fact that in the calculation of points awarded for mobility, the years he had spent in category D or E duty stations were not taken into account. While the inter-office memorandum IOM/FOM/043/2010 requires that the APPB take into account this criterion, the High Commissioner, who has the authority to do so, did not see fit to award points under this heading. It may be seen from the minutes of the first session, however, that the APPB was informed of the fact that the Applicant had spent several years in such assignments.

27. The Applicant maintains that it was an error to disregard his assignments in South Sudan and in Somalia. While the Respondent maintains that they were not taken into account because they had lasted for less than one year, the Tribunal notes that the Respondent was unable to specify which text applicable in 2009 imposed this minimum length of service.

28. It is not disputed by the Respondent that the APPB, at the first session and at the recourse session, mistakenly considered that on several occasions the Applicant had been a staff member in between assignments.

29. It follows from the foregoing that the APPB, in deciding whether the Applicant should be recommended for promotion, incorrectly applied a rule which had not been issued and incorrectly considered that the Applicant had been a staff member in between assignments on several occasions.

30. The Appeals Tribunal, in its Judgments *Vangelova* 2011-UNAT-172, *Bofill* 2011-UNAT-174 and *Dualeh* 2011-UNAT-175, ruled that in respect of promotions in UNHCR, the Tribunal could not rescind a decision not to promote a candidate unless it discovered procedural irregularities that had deprived an Applicant of a significant chance for promotion.

31. The Tribunal therefore needs to consider whether the Applicant would have had a significant chance of being promoted if the APPB had not committed the errors indicated above.

32. The APPB minutes show that the Applicant's ranking, at the first session, led to his inclusion in group 1 of the candidates, namely those whose situation needed to be reviewed at the first stage by the APPB, and that it was only after comparing his performance evaluations with those of other candidates that the Applicant was not recommended. Subsequently, after making the necessary corrections in the calculation of the points he had obtained, the APPB again considered the Applicant's performance, for which the latter maintains that he should have been awarded 39.24 points, and did not recommend him.

33. Even assuming that the performance score of 39.24 points put forward by the Applicant is correct, this score is lower than that of all the staff members who were recommended for promotion to the D-1 level. Thus the APPB did not commit any manifest error in assessing the Applicant's performance.

34. Since it follows from all the applicable texts in respect of promotion in UNHCR that a staff member's performance is the principal criterion on which the APPB should base itself in making its recommendations to the High Commissioner, the points awarded for the Applicant's performance gave him little chance of being recommended for a promotion at the 2009 annual promotions session (see, in this regard, *Hastings* 2011-UNAT-109). Thus, the irregularities indicated above do not justify the Tribunal rescinding the decision not to promote the Applicant or compensating him for any damage.

Conclusion

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

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 5th day of November 2012

Entered in the Register on this 5th day of November 2012

(Signed)

René M. Vargas M., Registrar, Geneva