



**Before:** Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

KHAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Elisabeth Brown, UNHCR

Jan Schrankel, UNHCR

## **Introduction**

1. By application filed on 21 July 2015, the Applicant, a staff member of the United Nations High Commissioner for Refugees (“UNHCR”), contests the decision of the High Commissioner not to promote him from the P-4 to the P-5 level during the 2013 Promotions Session.

## **Facts**

2. The Applicant joined UNHCR in March 1989, as a Project Officer (L-3) in Gambella, Ethiopia. Since 2013, he held a position at the P-4 level as Senior Organisational Development and Management Officer in Geneva.

3. On 5 February 2014, the High Commissioner promulgated the Policy and Procedures for the Promotion of International Professional Staff Members (UNHCR/HCP/2014/2) (“Promotions Policy”).

4. By email of 4 April 2014 from the Division of Human Resources Management (“DHRM”), the Applicant was informed of his eligibility to be considered for promotion to the P-5 level during the 2013 Promotions Session. The Applicant was advised to ensure completion of his e-PAD, and accuracy of all data contained in his fact sheet by 14 April 2014. This deadline was subsequently extended to 24 April 2014.

5. By memorandum to the UNHCR’s Joint Advisory Committee dated 4 July 2014, the High Commissioner announced that 56 slots would be available for promotions from the P-4 to P-5 level.

6. By memorandum dated 17 October 2014 and distributed to all UNHCR staff members via email on 20 October 2014, the High Commissioner published the list of promoted staff members. The Applicant was not among them.

7. By email of 30 October 2014, the Applicant requested DHRM to provide him the documentation considered by the Senior Promotions Panel regarding his candidacy. On the same day, DHRM responded to the Applicant's request, transmitting to him his fact sheet as reviewed by the Senior Promotions Panel. DHRM further informed the Applicant of the reason for his non-selection (namely that his overall ranking placed him outside the margin of 200% of the number of slots allocated for promotion to P-5 level), and explained to him the procedure for seeking recourse, including the requirement to submit a written and fully documented application "no later than four weeks after the receipt of [the 30 October 2014] message".

8. On 29 November 2014, the Applicant submitted a recourse application.

9. By email of 10 December 2014, the Applicant explained that he had been on uncertified sick leave on 27 and 28 November 2014, and requested that his recourse application, which he resubmitted, be considered. By a second email of the same day, the Applicant asked DHRM to confirm whether his recourse application "[would] be positively responded or not" and to share with him "all the documents including the ranking document for [his] information and use". By email of the same day, DHRM responded to the Applicant's second query, informing him of his individual ranking during the Second Round Evaluation.

10. On 11 December 2014, the Promotions Secretariat acknowledged receipt of the Applicant's recourse application and stated: "[y]our recourse request will be forwarded to the Panel members along with the justification for delay. It's the panel members (sic) prerogative to determine admissibility of your appeal."

11. The Senior Promotions Recourse Panel convened on 19 and 20 January 2015. Pursuant to the minutes of the Recourse Session, disclosed later with the Respondent's reply on 24 August 2015, the Deputy Director, DHRM, who participated *ex officio* in the session, "explained that applications received after the deadlines established by the Policy were not accepted and were not presented to the Panel".

12. By memorandum dated 2 March 2015 and distributed to all UNHCR staff members via email on 3 March 2015, the High Commissioner announced his decisions following the Recourse Session. The Applicant was not among the candidates promoted upon recourse.

13. By memorandum dated 20 March 2015 addressed to the Deputy High Commissioner, the Applicant requested management evaluation of the Senior Promotions Recourse Panel's decision of 2 March 2015 to reject his recourse application. The memorandum was initially sent to the Promotions Secretariat and was sent again, on 29 March 2015, to the Office of the Deputy High Commissioner.

14. By email of 29 April 2015, the Office of the Deputy High Commissioner informed the Applicant that his request for management evaluation, received on 29 March 2015, was still under consideration and of his right to file an appeal before the Dispute Tribunal within the time limit set forth in art. 8 of its Statute and Staff Rule 11.4(a). The Applicant received no further response to his request for management evaluation.

15. The Applicant filed his application with the Registry of this Tribunal on 21 July 2015.

16. The Respondent submitted his reply on 24 August 2015, wherein he challenged, *inter alia*, the receivability of the application.

17. On 11 November 2015, the Tribunal held a case management discussion during which it informed the parties that it considered appropriate to decide, first, on the receivability of the application as a preliminary issue.

18. On 1 December 2015, the Tribunal held a hearing on the receivability of the application.

### **Parties' submissions**

19. The Applicant's principal contentions concerning the receivability of his application are:

a. He provided a legitimate justification for the late filing of his recourse application as he was on uncertified sick leave for two days due to severe headaches;

b. His request for management evaluation was receivable as it was filed within 60 days from the notification of the decision of the Senior Promotions Recourse Panel rejecting his recourse application; and

c. He did not challenge, through management evaluation, the initial 17 October 2014 decision not to promote him as he had filed a recourse application, and only learned on 24 August 2015, when he received the Respondent's reply, that said recourse had not been considered by the Senior Promotion Recourse Panel.

20. The Respondent's main contentions concerning the receivability of the application are:

a. The application is irreceivable as it was filed more than 120 days after the request for management evaluation, which was initially submitted on 20 March 2015 to the Promotions Secretariat;

b. The application is also irreceivable on the ground that the underlying request for management evaluation was filed more than 60 days after the contested decision, which is the initial decision on promotions notified on 20 October 2014, and is therefore time-barred;

c. The filing of the recourse application did not trigger a new deadline for the submission of a management evaluation: the recourse, which was not receivable, was not considered by the Senior Promotions Recourse Panel and did not lead to a new decision by the High Commissioner in respect of the Applicant's promotion; and

d. The Applicant did not have any legitimate expectation that a decision would be taken on his recourse application, although the Respondent acknowledges that the Applicant was provided with inaccurate information about the forum for deciding on the receivability of his late recourse application; to protect his rights, the Applicant should have filed a request for management evaluation against the initial decision on promotion, as the deadline had not expired at the time.

### **Consideration**

21. Pursuant to sec. 5.13.1 of the Promotions Policy, staff members may, without prejudice to their right to formally contest the initial non-promotion decision in the internal justice system, seek recourse “on the basis that some documentation relating to the period under review that may have had an impact on the final recommendation was not available at the time of the review”. The procedure for seeking recourse is described in sec. 5.13.2, which provides:

Staff members considering recourse shall be provided, upon request to the Panel Secretary within two weeks after the publication of decisions, documentation submitted to, and considered by the Panel. A staff member who chooses to seek recourse shall submit a written and fully documented application for recourse no later than four weeks after receipt of the documentation.

22. The decisions in respect of recourse applications are taken following the procedure set forth in sec. 5.13.3, which provides:

There will be a recourse session following the main promotions session to examine all recourse applications. [...] The minutes and the recommendations of each Panel will be submitted to the High Commissioner for decision. A written explanation of the relevant Panel’s determination of the recourse process (the minutes pertaining to each individual staff member’s application for recourse) will be provided to the staff member by the Panel’s secretariat.

23. As to the internal justice system, Staff Rule 11.2 provides:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

24. In turn, an application before the Dispute Tribunal is receivable if, *inter alia*, the applicant has previously submitted the contested administrative decision for management evaluation, and the application is filed within 90 calendar days of the expiry of the relevant management evaluation response period if no response to the request was provided (art. 8(1)(d)(i)(b) of the Tribunal's Statute).

25. Both the Appeals Tribunal and the Dispute Tribunal have stressed the importance of compliance with statutory deadlines (see, to that effect, *Mezoui* 2010-UNAT-043, *Ibrahim* 2010-UNAT-069 and *Christensen* 2012-UNAT-218, on the one hand, and *Odito-Benito* UNDT/2011/019 and *Larkin* UNDT/2011/028 on the other hand).

26. It is also established that art. 8(3) of the Tribunal's Statute prevents the Tribunal from extending the deadline for filing a request for management evaluation with the Secretary-General (see e.g. *Costa* 2010-UNAT-036, *Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, *Adjini et al.* 2011-UNAT-108). Consequently, an application before the Dispute Tribunal is not receivable if the underlying request for management evaluation was itself time-barred.

27. In view of the foregoing, the Tribunal has to first consider whether the request for management evaluation was filed in a timely manner, that is, within 60 calendar days from the Applicant's receipt of the notification of the contested administrative decision. In this respect, the Tribunal stresses that the contested decision in the present case is the High Commissioner's decision not to promote the Applicant to the P-5 level. The question at issue is whether this decision was notified to the Applicant on 20 October 2014, when the High Commissioner announced, through his 17 October 2014 memorandum, his initial decision on promotions, or on 3 March 2015, when the High Commissioner announced, through his 2 March 2015 memorandum, his decision on promotions upon recourse.

28. At the outset, the Tribunal recalls that the right to seek recourse against non-promotion decisions provided for in the Promotions Policy is not mandatory, but optional. As such, UNHCR staff members may either challenge immediately a decision on non-promotion through a request for management evaluation or, first, submit a recourse application, within four weeks, in which case the deadline to file a request for management evaluation starts from the decision on recourse. If no recourse is sought within the four-week time period, the staff member is deemed to have waived his or her right to seek recourse, and the initial decision on promotion, which becomes final, can only be contested through a request for management evaluation.

29. In the present case, the Applicant received the documentation submitted to, and considered by, the Senior Promotions Recourse Panel on 30 October 2014; he subsequently submitted his recourse application on 29 November 2014, which is two days after the four-week deadline. By that time, the Applicant's right to seek recourse had elapsed.

30. The Tribunal notes that by an email sent on 10 December 2014, the Applicant explained that he had been on uncertified sick leave on 27 and 28 November 2014, and requested that his recourse application be considered although submitted out of time.



31. The Applicant's request to have his recourse considered, although filed out of time, was ultimately denied by DHRM, which generally decided not to "accept" and submit to the Senior Promotions Recourse Panel "applications received after the deadlines established by the [Promotions] Policy". In the Tribunal's view, this may constitute a procedural flaw in the consideration of the receivability of the Applicant's recourse application, as the Promotions Policy vests the authority to decide on "all recourse applications". This necessarily implies the authority to decide on their receivability before the High Commissioner, upon recommendation from the Senior Promotions Recourse Panel (see sec. 5.13.3 of the Promotions Policy).

32. Furthermore, the Promotion Policy does not explicitly preclude the possibility for the Senior Promotions Recourse Panel and the High Commissioner from considering recourse applications filed out of time, or to waive or extend the four-week time limit. The Applicant was indeed led to believe by the Promotions Secretariat, through its email of 11 December 2014, that his recourse application, although filed out of time, could possibly be considered by the Senior Promotions Recourse Panel.

33. That being said, the fact remains that any decision to consider the Applicant's recourse application out of time was always to be left, at best, to the discretion of the decision maker, and that the time limit set forth in sec. 5.13.2 of the Promotions Policy for the Applicant to file a recourse application was neither waived nor extended in the instant case.

34. In view of the circumstances recalled above, the Tribunal finds that the contested decision in the present case is the High Commissioner's decision of 17 October 2014, which considered the Applicant's candidacy for promotion at the P-5 level, notified to the Applicant on 20 October 2014. This decision was not subject to any further review or superseded by a new one. Indeed, the decision of 2 March 2015 did not consider the Applicant's recourse application on the merits but rejected it as irreceivable for non-compliance with the statutory time limit, which left the original decision of 17 October 2014 undisturbed. The Tribunal finds that the decision of 2 March 2015, which rejected the Applicant's recourse

application for procedural defect, did not create a new right for the Applicant to challenge the original, substantive, decision not to promote him to the P-5 level and, therefore, cannot be considered for the purpose of art. 8(1)(d)(i)(b) of the Tribunal's Statute.

35. Likewise, the Tribunal finds that the Applicant's filing of a recourse application after the deadline set forth in sec. 5.13.2 of the Promotions Policy had no bearing on the time limit to challenge the initial decision on his promotion, which started to run from 20 October 2014. In this respect, the Tribunal stresses that the filing of a recourse application that does not comply with the four-week deadline does not suspend the time limit to file a request for management evaluation of the original decision, which the applicant seeks to contest. To find otherwise would allow any staff member to re-open the deadline for management evaluation at any time, simply by filing a late application for recourse.

36. The Tribunal notes that it could conclude otherwise only if a recourse application filed after the four-week deadline was ultimately found to be receivable and considered on the merits. Indeed, in such a scenario, the initial non-promotion decision might be superseded by a new decision; hence, the deadline for management evaluation might start to run upon notification of the new non-promotion decision resulting from the recourse. In contrast, in a scenario like the present one, where the recourse application was found to be time-barred, the initial decision remained final and the deadline for requesting management evaluation started to run as of the notification of said initial decision.

37. In view of the foregoing, the Tribunal finds that the decision on non-promotion insofar as the Applicant is concerned was notified on 20 October 2014 and not subject to any further review. The Applicant's request for management evaluation, submitted on 20 and 29 March 2015, was thus time-barred.

38. Therefore, the application before the Tribunal is irreceivable, *ratione materiae* (*Egglefield* 2014-UNAT-402).

**Conclusion**

39. In view of the foregoing, the Tribunal REJECTS the application.

*(Signed)*

Rowan Downing

Dated this 15<sup>th</sup> day of January 2016

Entered in the Register on this 15<sup>th</sup> day of January 2016

*(Signed)*

René M. Vargas M., Registrar, Geneva