



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/075

Judgment No.: UNDT/2010/179

Date: 14 October 2010

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

VANGELOVA

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 4 March 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 P-4 level for 2008;
 - b. To be awarded compensation for the damage suffered.

Facts

2. The Applicant has been working for the United Nations High Commissioner for Refugees (“UNHCR”) since 1992.

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 promotions 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. By email dated 26 May 2009, the Applicant filed recourse before the APPB against the decision not to promote her at the 2008 session.

8. The APPB reviewed the Applicant's request at its recourse session which took place from 22 to 26 June 2009. The Applicant was not recommended for promotion.

9. 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.

10. By email dated 20 August 2009, the Applicant received the minutes of the APPB's deliberations regarding her recourse.

11. By letter dated 25 September 2009, the Applicant submitted a request to the Deputy High Commissioner for management evaluation of the High Commissioner's decision not to promote her to the P-4 level at the 2008 promotion and recourse sessions.

12. 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.

13. By memorandum dated 4 December 2009, the Deputy High Commissioner sent to the Applicant the results 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. This memorandum was received by the Applicant on 8 December 2009.

14. On 4 March 2010, the Applicant filed an application before the United Nations Dispute Tribunal.

15. 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.

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

Parties' contentions

17. The Applicant's contentions are:

c. The methodology applied is inadequate and changes every year. Constant changes in the evaluation criteria put staff on a different level of competition at each session. Furthermore, the Administration does not comply with the recommendation of the former Joint Appeals Board ("JAB") to share the methodology with staff one year in advance;

d. The 2008 promotion session was not transparent because staff were not informed of the basic criteria used for comparing merits and skills, nor of the method of points calculation;

e. Her application is not time-barred. The annexes to the response to her request for management evaluation were received only on 22 December 2009 via internal mail. In addition, she went on leave on 24 December 2009 and was required upon return to take up an assignment in a remote area where she encountered communication problems. During this assignment, she witnessed a security incident. Furthermore, it has been difficult for her to find counsel;

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

g. The Tribunal must review the information contained in the minutes and the quality of the comparative review established by the APPB at the promotion and recourse sessions. The minutes of the APPB do not explain why the Applicant was not recommended for promotion;

h. The status of staff in between assignments (SIBA) is not taken into serious consideration. Seniority was calculated according to the number of effective working days. Having been SIBA for some time, she received a

limited number of points. However, the fact that she was SIBA is a consequence of the violation of her rights when she was not appointed to a P-4 level post in Belarus in 2007. The Applicant referred to case No. 588 of the former JAB;

i. The APPB has not taken into consideration the fact that she had performed at a higher grade. Her fact-sheet was inaccurate and the Administration had not corrected it despite her explicit request. Her fact-sheet did not reflect the period from June to October 2008 during which she had performed functions at the P-4 level, nor did it reflect her job title at that level;

j. The APPB has not considered her performance appraisal for the period from June to October 2008 even though performance is the most important criterion according to the promotions methodology. Her performance appraisals have always been satisfactory, not to say exceptional;

k. Although her supervisor had rated her performance as superior during the same period, he had not recommended her for promotion in 2008, without any explanation whatsoever. She contested his decision and informed DHRM, who did not provide any follow-up;

l. The promotions procedure has not been transparent and fair, in particular regarding the assessment by the APPB of her professional competence, her proficiency in three official languages of the United Nations, the work she performed in hardship duty stations, geographical distribution and the fact that she is a woman;

m. The methodology is flawed with respect to the evaluation criteria used for P-3 level staff members. Rotation and functional diversity are excluded from the evaluation criteria at this grade, thus enabling junior staff members to be promoted at the expense of staff like herself who have a more comprehensive employment background;

n. The principle of geographical distribution has not been applied because staff from Central and Eastern Europe countries were under-represented in the 2006, 2007 and 2008 promotion sessions;

o. Candidates were arbitrarily moved from one group to another. The APPB provided no justification for this apart from considering them as qualified as the candidates in another group. One candidate was promoted after having been ranked in group 1 with 44 initial points and 54 final points, whilst the Applicant was not promoted with 47 initial points and 60 final points;

p. She has been subject to discrimination and her right to have her candidacy fully assessed has been violated.

18. The Respondent's contentions are:

a. The application is not receivable since it was submitted after the deadline provided for in staff rule 11.4 (a). Although the Deputy High Commissioner responded to her request for management evaluation on 8 December 2009, the deadline to file an application was 7 February 2010, i.e., 90 days following the expiry of the response period of 45 days for the management evaluation. The application however was submitted on 4 March 2010 and is therefore late;

b. The Applicant was informed on 21 October 2009 that the absence of a response to her request did not impact on the time within which she may file an application. She does not put forward any exceptional circumstances that may justify a waiver of the time limits to submit an application. Even though the incident she refers to is regrettable, it took place on 3 March 2010, thus after the expiry of the deadline to file an application before the Tribunal. Her leave in January and the absence of a counsel are not exceptional circumstances. In any event, if she had needed more time to complete her application, she should have requested an extension of the deadline before it expired;

c. The promotions methodology is in line with the Procedural Guidelines of the APPB. Through the application of the promotions methodology, the APPB has ensured that the 2008 promotions exercise was carried out in a fair and transparent manner;

d. It is within the discretion of the APPB to decide how to weight each criterion. In addition, the criteria used by the APPB to rank candidates in the first round of analysis were the same as those used in the methodological approach for the 2007 promotion session;

e. The work of the APPB during the 2008 promotion session was carried out in a transparent manner. The promotions methodology was shared with all staff before the session. It described how the APPB would weight each criterion. The assessment of each candidate was registered in the minutes of the APPB and the Applicant's assessment was duly forwarded to her;

f. In total, 358 staff members were eligible for promotion at the P-4 level. All eligible candidates were placed on an initial ranking list. The APPB divided the candidates into five groups according to the number of points received. Having been granted a total of 47 points, the Applicant was placed in the third group, i.e., for candidates with 40 to 49 points. The APPB then re-examined each candidate's situation to determine whether they were equally qualified to those in other groups. Wherever necessary, candidates were moved to other groups. Promotions were awarded to the candidates of the first group. Subsequently, no more promotions were available for the other groups;

g. At the recourse session, the points were recalculated and five new groups were formed. Having received 60 points, the Applicant was ranked 28th and was moved to the second group. In total, 192 staff members scored more points than her;

h. The Applicant's candidacy was fully and fairly examined by the APPB at the 2008 promotion session. The Applicant received 53 points for

performance, 13 points for a fully satisfactory performance appraisal report and 40 points for two superior performance appraisals. She had worked an additional 1630 days to the minimum seniority required and was granted 4 points for the work performed at her level;

i. Her performance appraisal for the period from June to October 2008 was not considered by the APPB because it applied to a period of less than six months. However, instead of her 2008 appraisal, the APPB considered her performance appraisal for the period from April to July 2005 and she was granted 20 points instead of the 17 points she would have received if her 2008 appraisal had been taken into account. In any event, even if her 2008 appraisal with 20 points had been taken into account, this would not have impacted on the total of 53 points she was granted for her performance;

j. It was incumbent on the Applicant to contest through the appropriate procedure her supervisor's refusal to recommend her for promotion and it is not up to the APPB to ask supervisors to motivate their decisions;

k. The minutes of the APPB show that the Applicant's hardship duty station assignments, her proficiency in languages and the fact that she had performed functions at the P-4 level have all been taken into consideration;

l. The SIBA status of the Applicant was not a criterion in the review of her situation by the APPB. She does not explain in which way this status contributed to reducing her chances to be recommended for promotion;

m. This dispute does not pertain to the refusal to appoint her to the post of Representative in Minsk, a matter already reviewed by the JAB.

Judgment

19. Firstly, the Respondent argues that the application is late since it was filed on 4 March 2010, i.e., after the expiry of the deadline provided for in staff rule 11.4.

20. Staff rule 11.4 provides that:

a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within ninety calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2 (d), whichever is earlier.

21. Article 8, paragraph 1, of the UNDT Statute provides that:

1. An application shall be receivable if:

...

d) The application is filed within the following deadlines:

i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

...

22. On the assumption that the two above-mentioned legal instruments are contradictory, it cannot be challenged that the legal force of the Statute of the Dispute Tribunal is superior to that of the Staff Rules; thus, the Tribunal shall assess the receivability of the application only in light of its own Statute.

23. Although the above-mentioned provisions of the Statute require staff members to file their application with the Tribunal within 90 days of the expiry of the response period of 45 days for the management evaluation if no response to the request was provided, when the management evaluation is received after the deadline of 45 days but before the expiry of the next deadline of 90 days, the

receipt of the management evaluation in this case will result in setting a new deadline of 90 days for challenging it before the Tribunal.

24. Thereby, as the Administration received the Applicant's request for a management evaluation on 25 September 2009 and provided a late response to the Applicant on 8 December 2009, incomplete for that matter, it was still timely for the Applicant to file her application to the Tribunal on 4 March 2010. Therefore, the application shall be declared receivable with regard to deadlines.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. The fact that the Administration was late in forwarding 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 and as the recommendation of the former JAB in Geneva to communicate the methodology to staff one year in advance of the promotion session is not binding upon the Administration.

32. Furthermore, although the application of different methodologies every year by the APPB 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.

33. 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.

34. The Applicant holds that the methodology for the 2008 promotion session was inconsistent with the Procedural Guidelines since rotation and functional diversity were not taken into consideration for promotion to the P-4 level. However, although the Procedural Guidelines clearly specify that seniority shall be considered in recommending staff members for promotion, they do not specifically require that the number of rotations and functional diversity be specifically taken into account.

35. 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.

36. 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

37. 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.

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

39. 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.

40. The Applicant has requested to be awarded compensation for the material harm suffered following the unlawful refusal to promote her 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.

41. 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 39 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.

42. In the case in question, the Applicant firstly argues that the APPB did not take into account the fact that she was SIBA in 2007-2008. Since no text stipulates that SIBA staff members should be subject to a specific assessment, this argument cannot be sustained. Moreover, whilst she maintains that her performance at the P-4 level for nearly two years, i.e., at a higher level than her own, was not taken into account, the minutes of the promotion and recourse sessions show that these facts were taken into consideration by the APPB.

43. It is also for the Tribunal to check whether the Administration has made any factual errors in respect of her professional status.

44. Regarding her performance appraisal for 2008, the Applicant rightly argues that it was not taken into consideration by the APPB. However, the documents contained in the case file show that this did not result in her being granted less points than what she was entitled to but, on the contrary, in her being awarded at least six additional points.

45. Regarding the recommendations of her supervisor, no errors were found by the Tribunal and it is established that her non-recommendation for promotion in 2008 does not arise from an omission on the part of her supervisor but from his refusal to recommend her for promotion. Whilst the Applicant contests that her supervisor informed her directly of her non-recommendation for 2008, contrary to what he has certified, the fact is that she was not recommended for promotion; as to the alleged false assertion, this forms the subject matter of another dispute to which the Applicant and the Administration can provide the appropriate follow-up.

46. It follows from the foregoing that the Applicant was granted 60 points taking into account her seniority after the APPB amended the number of points at the recourse session, whilst 192 staff members eligible for promotion to the P-4

level were granted more points than her and 67 staff members were promoted to that level by the High Commissioner at the 2008 session.

47. To assess the moral damage suffered by the Applicant, the Tribunal shall, as reiterated above, assess her chances for promotion should a regular procedure have been applied. In the light of what was mentioned earlier, and in particular given the fact that for the last two years the Applicant had not been recommended for promotion by her supervisors, 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.

Decision

48. 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) 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 14th day of October 2010

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

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva