



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/004

Judgment No.: UNDT/2010/181

Date: 14 October 2010

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

IPPOLITO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Amal Oummih

Counsel for respondent:
Shelly Pitterman, UNHCR

Introduction

1. In an application submitted on 11 January 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 him to the P-5 level for 2008;
 - b. To be awarded compensation for the violation of his rights.

Facts

2. The Applicant, a P-4 staff member, has been working for the United Nations High Commissioner for Refugees (“UNHCR”) since April 1987.

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 to the P-5 level. The Applicant was not amongst those promoted.

7. On 29 May 2009, the Applicant filed recourse before the APPB against the decision not to promote him at the 2008 session.

8. 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.

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 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 him to the P-5 level at the 2008 promotion session.

11. By memorandum dated 4 December 2009, the Deputy High Commissioner sent to the Applicant the outcome of his management evaluation, i.e., that the decision not to promote him to the P-5 level had been taken in accordance with the Organization's rules and procedures.

12. On 11 January 2010, the Applicant filed an application before the United Nations Dispute Tribunal.

13. 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.

14. On 1 October 2010, an oral hearing took place in which Counsel for the Applicant and Counsel for the Respondent took part. The Applicant participated via audio conference.

Parties' contentions

15. The Applicant's contentions are:

- a. He did not have access to the minutes of the APPB and was therefore unable to verify how the promotions methodology was applied;
- b. The 2008 promotions methodology was introduced unilaterally by the Administration. The Joint Advisory Committee was not consulted nor

had adopted the new methodology. Furthermore, the methodology was communicated to staff members five days before the 2008 promotion session;

c. The criteria for obtaining a promotion change every year, making it difficult for staff members to plan their career. At the 2008 promotion session, the main criterion for promotion was performance. However, this criterion is not objective as it is dependent on each supervisor. Furthermore, the performance appraisal system is discredited;

d. A de facto gender quota was applied during the 2008 promotion session and several women were promoted although they had fewer points than him;

e. The APPB recommended 20 candidates for promotion to the P-5 level, amongst which 10 women, which represents 50 per cent of those recommendations. Thus, several female candidates were promoted despite having less points than the male candidates;

f. Some staff members were promoted by the High Commissioner without having been recommended by the APPB. The number of promotion slots for each grade was increased by the High Commissioner during the promotions procedure;

g. His performance was not evaluated correctly because he had held several temporary contracts that had prevented him from benefiting from a full appraisal. The APPB should have taken into account his appraisal for the period 1999-2001, which was his last full appraisal;

h. No explanation was given by the Administration to justify the rationale of having two different time periods, one for performance appraisals, i.e., the last three performance appraisal reports completed during the last five years, and the other for supervisors' recommendations, i.e., the last three years;

i. Mistakes were made in the calculation of the points required to establish the groups. Some of these mistakes were admitted by DHRM while others were not. Thus, he should have received maximum points (7) for rotation as he counts nine assignments in different locations. In addition, he should have received 53 points for performance. Lastly, the APPB should have considered the recommendation of his supervisor for 2005 and not taken into account the absence of a recommendation in 2006. Thus, he should have been granted a total of 84 points and been placed in the first group;

j. In the event that only the assignments for a period of one year or more had been considered by the APPB, he should have received at least 6 points for rotation;

k. The 2008 promotion and recourse sessions were not transparent. There were irregularities, in particular regarding the number of points attributed to each criterion and the fact that some candidates were moved by the APPB into different groups. For example, a staff member who was in the fourth group was considered as qualified as the staff members in the first group. She was moved into another group, recommended and promoted;

l. The 2008 promotions methodology constitutes a change in the promotion rules, in particular with regard to the adoption of a points system and the distribution of candidates into groups. Thus, the advice of the Joint Advisory Committee should have been sought;

m. Performance was the main criterion considered in the 2008 promotion session. In the points system, an excessive weighting of 69 out of 100 points was attributed to performance. This is equivalent to more than two thirds of the total points, disregarding other criteria such as seniority, rotation history and functional diversity;

n. At the promotion session, the High Commissioner promoted six staff members who had not been recommended by the APPB and who may not have been eligible;

o. The decision not to promote him has damaged his reputation as well as his psychological and intellectual equilibrium. His non-promotion also resulted in financial damage for him.

16. The Respondent's contentions are:

a. The Applicant's candidacy received full and fair consideration at the 2008 promotion session;

b. At the 2008 promotion session, a total of 324 candidates were eligible for promotion at the P-5 level. All candidates were placed on an initial ranking list. The APPB divided them into seven groups on the basis of the points they had scored. Having received a total of 66 points, the Applicant was placed in the second group, i.e., for candidates with 65 to 69 points. The APPB then reviewed each candidate to determine whether they were equally qualified to those in other groups. Whenever necessary, candidates were moved to other groups. The APPB deemed the Applicant as qualified as the candidates in the second group. Promotions were awarded to the candidates of the first group. Twenty promotion slots were available at the P-5 level. The APPB recommended 21 candidates for promotion. In addition to those 21 recommended candidates, the High Commissioner promoted five more candidates who were all eligible and who had been reviewed by the APPB without being recommended;

c. The Applicant received all the documents concerning his case that had been used by the APPB, including a summary of the deliberations and recommendations of the APPB in his case;

d. Neither the Rules of Procedure nor the Procedural Guidelines of the APPB have changed. There was therefore no need to submit the promotions methodology to the Joint Advisory Committee;

e. Staff members' performance is evaluated on a yearly basis with their participation, and then reviewed by their supervisors in light of the objectives agreed upon at the beginning of the year. The rating obtained in the performance appraisal is reflected in the staff member's fact-sheet. Performance appraisal reports, fact-sheets and supervisors' recommendations are the only instruments the APPB can use to review the situation of staff members eligible for promotion;

f. Contrary to what is maintained by the Applicant, all staff members promoted to the P-5 level by the High Commissioner were eligible and had been reviewed by the APPB which has an advisory function only. The High Commissioner has the discretion to promote eligible staff who have been considered by the APPB, whether or not they have been recommended;

g. Even though the number of promotion slots for each grade is determined upon advice of the Joint Advisory Committee, the High Commissioner has discretionary power to increase that number. The Committee has an advisory function only;

h. The number of points allocated to the Applicant was calculated correctly. With regard to rotation, the assignments of a staff member for a period of one year or more are taken into consideration. The Applicant correctly received 5 out of 7 points. His service outside UNHCR was included in his fact-sheet and thus taken into account by the APPB;

i. The discretionary power of the APPB with regard to promotions is determined by its Procedural Guidelines and the promotions methodology. The APPB has the discretion to assess whether the Applicant had the required skills to perform at the higher level. The Applicant was compared to all eligible candidates. His capacity to successfully perform in a higher level position was seriously examined by the APPB;

j. Contrary to the assertion of the Applicant, a gender quota was not applied at the 2008 promotion session. Gender parity and geographical

distribution were taken into account to decide between staff members who were found to be equally deserving;

k. The Applicant fails to substantiate his argument regarding the appraisal of staff members under temporary contracts;

l. With regard to the weighting of performance appraisals and supervisor recommendations, the APPB has discretionary power to weigh the different criteria providing this is done in line with the Procedural Guidelines;

m. The period during which the Applicant worked for the International Organization for Migration does not count as an assignment for UNHCR because, during that period, he was on special leave without pay. As to his assignment in Geneva in 2005, it should have been taken into account for rotation purposes and he should have received an additional point. However, this mistake was not prejudicial to him as he would still have remained in the second group with 67 points and only the candidates in the first group were recommended for promotion;

n. The promotions were granted to the candidates of the first group. No promotion slots were available for the lower groups. The Applicant was in the second group. The APPB did not need to examine the non-weighted criteria in the case of the Applicant as only the candidates of the first group were recommended for promotion;

o. Contrary to what is maintained by the Applicant, the APPB followed the established procedure in moving candidates from one group to another. Furthermore, the Applicant did not suffer any damage due to the changes in the groups, given his ranking and the number of promotion slots available.

Judgment

17. First of all, 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.

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: 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.

19. 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.

20. 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.

21. 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.

22. The Applicant maintains that the methodology applied at the 2008 promotion session could not be decided upon by the High Commissioner, following a proposal of the APPB, without the advice of the Joint Advisory Committee having been sought beforehand. In this regard, regulation 8.1 of the Staff Regulations then in force provides that:

- a) The Secretary-General shall establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and other personnel policies.

23. Thus, the Applicant has the right to maintain that the above-mentioned provision, as well as the above-mentioned staff regulation 8.2, requires that the Joint Advisory Committee, a UNHCR body on which both the staff and the Administration are represented, be informed of changes in the rules concerning the staff. However, the comparison between the criteria contained in the Procedural Guidelines, as specified above, and the criteria contained in the methodology, shows that the latter merely set out a new working method to determine the weight of criteria that have remained unchanged, in order to ensure more transparency when establishing the promotion lists. Thus, no rule required that the Administration obtain the agreement of the Joint Advisory Committee before applying this new working method for assessing eligible staff members that did not constitute a change in the rules set out in the Procedural Guidelines. In addition, no rule required that the Administration comply with a time limit before applying the methodology.

24. Although it could be regretted that the methodology used to determine which staff members are to be recommended for promotion changes every year, this circumstance cannot be considered unlawful since the methodology is consistent with the Procedural Guidelines.

25. 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 he should provide specific facts establishing that the legal instruments guiding the selection of staff for promotion were not followed.

26. 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. Although it is maintained that no explanation was given to the Applicant on the rationale of having different time periods to, firstly, assess his performance and, secondly, for his supervisor's recommendations, this argument is in fact mistaken since the methodology applicable for 2008 specifies that the time period considered in both cases is 2006-2008 and that it is only on an exceptional basis that performance appraisals of previous years are considered should a performance appraisal for one year be missing.

27. The Applicant holds that the methodology used during the 2008 promotion session is wrongly based on subjective criteria such as performance. However, art. 101.3 of the Charter of the United Nations provides that:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

28. In addition, staff regulation 4.2 provides that:

The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall

be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

29. The APPB Procedural Guidelines applicable to UNHCR staff, issued in 2003, provide that, after it has been determined that a staff member meets the minimum seniority requirements for promotion, recommendations from supervisors, performance appraisals and seniority will be taken into consideration. Therefore, in accordance with the above-listed provisions, the Applicant cannot claim that competence is not the main criterion in granting promotions and the appraisal of staff members' competence is inevitably affected by subjectivity, which cannot be considered unlawful.

30. The Applicant maintains that the APPB applied a gender quota since 50 per cent of women were recommended for promotion, some with fewer points than non-recommended staff members. 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; in any event, paying particular attention to female staff members is consistent with the Procedural Guidelines. By the mere fact that 50 per cent of women were recommended for promotion at the P-5 level, it cannot be assumed that female staff members would have been recommended while being less competent than non-recommended men.

31. Although the Applicant asserts that the High Commissioner approved promotions in an irregular manner without obtaining first the advice of the APPB, it is clear from the judge's review of the file, with regard to promotions to the P-5 level, the only grade that could affect the Applicant's situation, that the High Commissioner did not promote non-eligible staff members. The High Commissioner, who is not bound to follow the recommendations of the APPB, could promote with good reason officials who were eligible and who had been examined by the APPB without having been recommended.

32. The Applicant criticises the fact that several staff members, who were granted fewer points than himself after calculation by the APPB of the points to be awarded to each candidate in application of the 2008 promotions methodology, were recommended by the APPB and subsequently promoted. However, it is not

for the Tribunal to substitute its own appreciation of the merits of staff members with either that of the APPB or of the High Commissioner.

33. Lastly, it is alleged by the Applicant that the APPB made a number of mistakes in the calculation of the points he should have been awarded by application of the methodology. With regard to his performance appraisals, the Applicant was awarded 40 points for two superior appraisals for 2007 and 2008 and a fully effective appraisal for 2005, in line with the 2008 promotions methodology, since no appraisal had been carried out for 2006. Thus, no mistake was made by the APPB in this regard. With regard to his supervisors' recommendations, the documents contained in the case file show that the Applicant was not recommended for 2006 and, contrary to his assertions, the methodology did not provide that consideration should be given to a recommendation for 2005. With regard to points awarded for rotation, it is not contested that a mistake was made and that the Applicant should have received an additional point, thus adding up to a total of 67 points instead of the 66 points acknowledged by the APPB.

34. Assuming that 67 points had been taken into consideration, the Applicant would have remained in the second group with 47 other eligible staff members, while 47 staff members were placed in group 1, having all obtained at least 70 points, and that for the entire promotion session, only 33 staff members were promoted to the P-5 level. Thus, the only mistake made by the APPB, that involved one point, had no influence on the legality of the decision not to promote the Applicant and the application should therefore be rejected.

Decision

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

The application is 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