



UNITED NATIONS DISPUTE TRIBUNAL

---

Case No.: UNDT/GVA/2010/105

Judgment No.: UNDT/2010/187

Date: 18 October 2010

English

Original: French

---

**Before:** Judge Jean-François Cousin

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

DUALEH

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 6 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 D-1 level for 2008;
  - b. To be promoted retroactively to the D-1 level;
  - c. To be awarded compensation for the damage suffered.

## **Facts**

2. The Applicant joined the United Nations High Commissioner for Refugees (“UNHCR”) in August 1988.

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. The Applicant was not amongst those promoted.

7. On 15 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. On 10 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 D-1 level at the 2008 promotion session.
11. By memorandum dated 4 December 2009, the Assistant High Commissioner for Protection, on behalf of the Deputy High Commissioner, sent to the Applicant the outcome of her management evaluation, i.e., that the decision not to promote him to the D-1 level had been taken in accordance with the Organization's rules and procedures.
12. On 6 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 the Applicant and Counsel for the Respondent participated.

#### **Parties' contentions**

15. The Applicant's contentions are:
  - a. He has been serving at the P-5 level for nearly 20 years, he has proven managerial competencies and his performance is excellent. Moreover, he has considerable experience of complex situations.

However, a number of functions he has performed were not taken into consideration by the APPB. His seniority and high rotation history were also not correctly considered by the Board;

b. The promotions methodology does not take into account the situation of experts. No points were attributed for the missions undertaken by experts. Eleven years as an expert in his case, five of which in the field, were not taken into account;

c. His performance appraisal carried out by the African Union whilst he was on secondment was not taken into account;

d. The information contained in his fact-sheets had been manipulated deliberately and persistently over a long period of time and this negatively impacted his career within the Organization. This constituted an attempt to deny him his rights;

e. His fact-sheets remained incomplete over the last five years, despite instructions from the Secretary-General and the current Director, DHRM, to correct them (case No. 589 of the former Joint Appeals Board). His fact-sheets do not reflect that he occupied a P-5 level post for 21 years and that during 11 of those years, he performed at the P-5 level while his personal grade was P-4;

f. The fact that he had performed at a higher level was not taken into account in his case unlike for other candidates who were recommended for promotion. This is an arbitrary application of paragraph 150 of the APPB Procedural Guidelines;

g. The High Commissioner did not provide equal treatment to candidates for promotion. Two staff members who were not eligible, but who were close to the High Commissioner, were promoted to the D-1 level, to the detriment of deserving staff members in the field. Moreover, three staff members were promoted without having been recommended by the APPB. This is an abuse of authority. The promotions procedure is discriminatory;

- h. Contrary to what is maintained by the Respondent, candidates who were in the second and third groups were promoted;
- i. The criterion of rotation was assessed arbitrarily and none of his assignments in emergency situations were taken into account;
- j. Candidates' performance was not properly evaluated as appraisals for periods of 12, 18 or 24 months received the same number of points than appraisals for a period of 6 months;
- k. The Organization failed to verify whether supervisors had complied with the rules governing staff appraisal. No appraisal was made for the Applicant for the last six last months of 2007 and the Organization refused to rectify this error, despite his repeated requests, and this impacted him negatively during the 2007 and 2008 promotion sessions;
- l. He unsuccessfully requested that the High Commissioner and the Director of the African Bureau order his supervisor to carry out an appraisal of his performance for 2007. Because of the lack of appraisal and the absence of a recommendation from his supervisor in 2007, he was not promoted at the 2007 and 2008 sessions. He received no explanation as to whether the APPB had taken into account the reasons for which he had not received a performance appraisal and a recommendation from his supervisor for 2007;
- m. The promotions methodology is neither objective nor transparent.

16. The Respondent's contentions are:

- a. The Applicant's contention that the promotions methodology ignores the situation of experts is not accurate. This situation is specifically accounted for, in particular in paragraph 144 of the APPB Procedural Guidelines and paragraph 6 of the 2008 promotions methodology;
- b. The APPB determined, in its official capacity, that only persons currently serving on expert posts would be reviewed as experts, rather than

those who had formerly occupied expert posts. The legitimacy of this interpretation was confirmed by this Tribunal in its judgment *Mebtouche* UNDT/2009/039. As it happened, the Applicant was not assigned to an expert post at the time of the 2008 annual promotion session;

c. With regard to extended missions, which were not taken into account in the calculation of the number of rotations, the minutes of the APPB recourse session explain how the Applicant's rotation history was calculated and that this was calculated in the same way for all candidates. When deliberating on his candidacy, the APPB did take note of the reasons for which the Applicant had a low number of rotations, i.e., that he had served for a long time on an expert post;

d. The Applicant's contention that the superior rating attributed to him by the African Union in his performance appraisal was not taken into consideration is incorrect. This appraisal, that covered the period from July to December 2008, was taken into account in calculating the points at the recourse session. However, this did not change his final score of 40 points, as reflected in the minutes;

e. With respect to the contention that the Applicant's fact-sheet had not been updated despite instructions from the Director, DHRM, and the Secretary-General, it is true that the aforementioned fact-sheet does not reflect the fact that the Applicant had performed at a higher level than his own from 1989 to 1998. However, this is due to a technical issue related to the configuration of the database used to record the summary of staff members' professional information: one column refers to the staff member's personal grade, P-3 in this case, another refers to the grade at which the staff member is paid, i.e., P-4, but no column indicates the level of the post actually occupied, i.e., P-5. There is no evidence of manipulation. Furthermore, the Applicant's fact-sheet was corrected manually in order to include the information on the level of the post occupied;

f. Moreover, the issue was duly examined, as recorded in the APPB minutes. The omission was therefore not prejudicial to the Applicant since the Administration ensured that the APPB had a precise knowledge of his situation. In any event, this circumstance was not relevant to his promotion to the D-1 level, since the higher level post he had occupied was at the P-5 level, while the Applicant had already been promoted to the P-5 level in 1998. Therefore, paragraph 150 of the APPB Procedural Guidelines was applied correctly;

g. The High Commissioner did promote to the D-1 level two candidates who were not eligible. The High Commissioner considers that he is entitled to grant promotions outside of the promotion and recourse sessions. The Administration is preparing an amendment of the promotion rules so that they expressly state that the High Commissioner has the right to grant promotions without seeking the advice of the APPB;

h. It follows from paragraphs 13 and 38 of the APPB Rules of Procedure that the Board is in no way obliged to conduct further investigations on the candidates' profile but that it must only review the information available on file;

i. The Applicant has not established that information was deliberately manipulated, nor did he substantiate his allegations and the way the alleged manipulation may have favoured other candidates.

## **Judgment**

17. It follows from the terms of the application and the management evaluation request submitted by the Applicant on 10 September 2009 that he intended to contest only the decision of the High Commissioner not to promote him to the D-1 level. Although the Applicant requested that the Tribunal examine in which way his fact-sheet could have been manipulated for many years, he did not specify which administrative decision was challenged in relation to the latter request and, in any event, as mentioned above, only the decision not to promote

him was submitted for management evaluation and can therefore be duly contested before this Tribunal.

18. Firstly, 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. The Applicant cannot maintain that the methodology did not sufficiently take into account the situation of staff members who are, or who have been, assigned to expert posts and who necessarily have a lower rotation count and less functional diversity, since paragraph 6 of the applicable methodology specifies that the APPB will pay particular attention to “staff members appointed to a higher level post, staff members who are already serving on a higher level post and staff members on expert posts. Eligible candidates on [e]xpert posts will be considered for inclusion in groups on a case-by-case basis with the above-mentioned methodology also used with the exception of [f]unctional [d]iversity and [r]otation criteria”.

25. In contesting the legality of the decision not to promote him 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.

26. It is clear from the judge's review of the file, with regard to promotions to the D-1 level, that the High Commissioner promoted two non-eligible staff members who, because they were 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 were a limited number of promotion slots.

27. The Tribunal must therefore rescind the decision not to promote the Applicant for 2008.

28. 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 CHF10,000.

29. The Applicant has asked to be compensated for the material damage suffered following the unlawful refusal to promote him to the D-1 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 he is promoted, will be able to claim promotion retroactively and thus will not have suffered any material damage; however, if he is not promoted, he will not be able to claim any compensation unless he files an application before the Tribunal contesting the new decision to deny him a promotion. In the second case, should the Administration choose to pay the compensation set by the judge rather than take the action rising 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 his right to seek a promotion during the 2009 promotion session.

30. In the case in question, the Applicant has not requested compensation for the moral damage suffered as a result of the decision not to promote him. It follows that the Tribunal, which is restricted by the Applicant's own requests, cannot legally take a decision on this question.

### **Decision**

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

- 1) The High Commissioner's decision not to promote the Applicant to the D-1 level for 2008 is rescinded;
- 2) If rather than rescind the decision, UNHCR chooses to pay compensation, it shall pay the Applicant CHF10,000;
- 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 18<sup>th</sup> day of October 2010

Entered in the Register on this 18<sup>th</sup> day of October 2010

*(signed)*

\_\_\_\_\_  
Victor Rodríguez, Registrar, UNDT, Geneva