



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/061

Judgment No.: UNDT/2010/188

Date: 18 October 2010

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

BOUCHARDY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Anne-Marie Demmer

Counsel for respondent:

Shelly Pitterman, UNHCR

Introduction

1. In an application submitted on 18 January 2010 to the United Nations Dispute Tribunal, the Applicant contests the decision by which the United Nations High Commissioner for Refugees refused to promote him for 2008. He requests the following:

- a. To receive compensation for the damage suffered due to the fact that his services as an expert over a period of 10 years were not taken into account;
- b. The revision of the methodology used to determine which staff members are to be recommended for promotion.

Facts

2. The Applicant has been working for the United Nations High Commissioner for Refugees (“UNHCR”) since January 1996.

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. By email dated 21 May 2009, the Applicant requested a copy of his case file, as examined by the APPB at its 2008 promotion session; these were sent to him the following day, i.e., on 22 May 2009.
8. By email dated 28 May 2009, the Applicant filed recourse before the APPB against the decision not to promote him at the 2008 session.
9. The APPB reviewed the Applicant's recourse at its recourse session which took place from 22 to 26 June 2009.
10. 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.
11. By email dated 2 September 2010, the Applicant received the summary of the deliberations of the APPB regarding his recourse.
12. 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.
13. 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 P-5 level had been taken in accordance with the Organization's rules and procedures.
14. On 18 January 2010, the Applicant filed an application before the United Nations Dispute Tribunal.
15. 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.
16. On 1 October 2010, an oral hearing took place in which the Applicant, his Counsel and Counsel for the Respondent participated.

Parties' contentions

17. The Applicant's contentions are:
- a. His performance and activities for the Organization were not taken into account. The APPB had at its disposal neither the performance appraisals, nor the job descriptions, the terms of reference, or the staff members' annual objectives. Without them, the APPB was unable to acquire a detailed knowledge of his profile, particularly considering that he had performed functions that were not well-known and that were distinct from those of other experts;
 - b. His functional diversity is not insignificant. The APPB was misinformed about the diversity of his functions, in particular with regard to those undertaken at the Headquarters and in Armenia;
 - c. Functional diversity was assessed on the basis of standard job titles even though job titles reflect only imperfectly the actual content of a post and the work carried out;
 - d. With regard to rotation, the APPB did not take into account the fact that during 10 years of work in Geneva, he spent roughly a quarter of each year outside the Headquarters, covering more than 50 different operations. This kind of availability and mobility should not be overlooked. In addition, the way in which rotation is weighted is far from transparent, making it impossible for him to know whether and how his time in Armenia was counted;
 - e. The weighting attributed to rotation is unfair given that it is the Administration that decides to assign staff members to different posts and in different duty stations and that considerations other than a candidate's competence, experience and performance come into play;
 - f. The methodology is not consistent with the principle set out in the Staff Rules according to which promotion is based on performance. The fact that rotation is one of the weighted criteria, as well as the fact that

functional diversity is assessed on the basis of standard job titles and categories, is a disadvantage for those who, like himself, have served as experts for a significant part of their career;

g. Overall ratings in performance appraisals do not necessarily reflect the evaluations of the various elements retained to measure performance. To review fact-sheets only is not sufficient for the APPB to form its opinion;

h. The fact that he was not recommended for promotion by his supervisor for 2008 was wrong, since at his performance appraisal for the same year, his supervisor had indicated that he would recommend him for promotion;

i. By attributing points to supervisors' recommendations, significant emphasis is being placed on an element that is not necessarily objective;

j. The points system devised cannot serve as an objective, fair and transparent measurement of the capacity of a staff member to fulfil functions at a higher grade;

k. Whilst it was planned at previous promotion sessions to give special attention to candidates performing in expert posts, this did not happen in his case as he was disadvantaged by his expert status. The Assistant High Commissioner for Protection recognised this in her response to the Applicant's management evaluation request, but did not offer a practical short-term solution. In addition, the practice of UNHCR to appoint to a number of posts staff members whose grade is lower than that post—and who would then be given some priority consideration in terms of promotion—reduces in practice the number of promotion slots available for staff members performing in functions equivalent to their grade, and affects experts and former experts in particular since it is difficult for them to be appointed to standard UNHCR functions;

l. The discretionary authority of the APPB does not exempt it from the obligation to treat all eligible staff members equally.

18. The Respondent's contentions are:
- a. The application is not receivable insofar as the Tribunal is requested to order that measures are taken to change the UNHCR promotions system. Such an order would interfere with the discretionary powers of the High Commissioner and falls outside the Tribunal's powers as provided for in article 10 of its Statute;
 - b. The Applicant received the same attention by the APPB as other candidates and the Board considered his individual profile. In addition to applying the points system, the APPB reviewed the situation of each candidate in detail in order to decide whether candidates were equally qualified within a group;
 - c. The attribution of points to the Applicant for functional diversity was determined in the same way as for other candidates. The APPB was fully aware of the functions performed by the Applicant;
 - d. The calculation of points for rotation was transparent and carried out in accordance with what is provided for in the methodology. The Applicant's duty travels were indeed not taken into consideration since he did not change duty stations. The APPB did not consider it necessary to consider the number of his duty travels and it is within its discretion to do so;
 - e. Contrary to the Applicant's assertion, former experts were not disadvantaged by the methodology. Experts in UNHCR have the same rotation possibilities as other staff members. It is their choice to move or not to other functions and they know from the beginning of their career with UNHCR that rotation is valued by the Organization. Rotation is one of the underlying principles of the UNHCR human resources policy and is imperative for the Organization. The rotation criterion was therefore introduced to reflect this need. The Assistant High Commissioner for Protection has indeed recognised that the methodology makes no reference to how former experts ought to be assessed and that this issue deserves

further discussion. Nevertheless, the fact that former experts were not given special attention does not constitute a procedural irregularity;

f. In its judgment *Andrysek* UNDT/2009/038, the Tribunal confirmed that the criteria used for the 2007 promotion were in line with the APPB Procedural Guidelines. The same applies for the 2008 session methodology;

g. Although the Applicant criticises the use of performance appraisal reports for the measurement of performance because they are subjective, no performance appraisal can ever be entirely objective and the APPB has chosen to use the performance appraisals reports to do so, which is within its discretion;

h. To use the number of supervisors' recommendations as a criterion to measure performance is also within the discretion of the APPB.

Judgment

19. Although the Applicant is entitled to contest before this Tribunal the legality of the decision not to promote him to the P-5 level for 2008, his request that the Tribunal order UNHCR to amend the procedure for granting promotions can only be rejected since the UNDT Statute does not authorise the Tribunal to substitute itself to the Administration in enacting the rules applicable to the staff.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

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 Applicant holds that the methodology used during the 2008 promotion session is not in line with the Staff Rules that require that, with regards to promotions, priority consideration be given to performance. In that respect, 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.

27. 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. With regard to promotion to the P-5 level, the methodology applied at the 2008 session attributes a maximum of 69 points for performance and a maximum of 9 points for supervisors' recommendations, while a staff member can only obtain a maximum of 22 points for seniority, rotation history and functional diversity. Thus, the Applicant cannot maintain that performance did not receive priority consideration.

28. With regard to the subjective nature of performance appraisals and supervisors' recommendations, the assessment of staff members' performance is inevitably affected by subjectivity, which cannot be considered unlawful.

29. 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 whose rotation count and functional diversity are necessarily lower, 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”.

30. The Applicant maintains that the documents provided to the APPB by the Administration, including the fact-sheets, prevent the Board from carrying out an in-depth assessment of staff members’ career and competencies. However, assuming that a fact-sheet contains only the most important elements of a staff member’s career, which the Tribunal considers inevitable, all staff members are placed in the same situation and therefore treated equally. The same is true of the fact that, to calculate the number of points for rotation purposes, the methodology did not take into account short-term missions carried out in field operations. This can in no way be considered an irregularity since it is up to the APPB to determine how many points are to be attributed to each criterion and to ensure that this is strictly applied to individual cases, the only other obligation of the APPB being to review the individual situation of all eligible staff members, which was done in the present case.

31. Although the Applicant maintains that the fact that he formerly occupied an expert post for a long period of time was not taken into consideration by the APPB, he does not establish that if the APPB had had a detailed knowledge of the expert functions he performed, he could have been moved into the first group, despite the number of points scored.

32. Lastly, the Applicant holds that the fact that he was not recommended for promotion for 2008 by his supervisor was wrong since, during his performance appraisal for the period from July 2006 to February 2008, his supervisor had indicated that he supported him for promotion. However, the oral proceedings and documents contained in the case file show that, following a change of supervisor, the new supervisor refused categorically to recommend the Applicant for promotion in 2008 and it cannot be challenged that the APPB should take into account the latter document only.

33. Therefore, it follows from the foregoing that the Applicant has established neither a procedural irregularity nor a factual error in the decision not to promote him for 2008.

Decision

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

The application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 18th day of October 2010

Entered in the Register on this 18th day of October 2010

(signed)

Victor Rodríguez, Registrar, UNDT, Geneva