



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/GVA/2009/93

Judgment No.: UNDT/2010/189

Date: 19 October 2010

English

Original: French

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**Before:** Judge Jean-François Cousin

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

AKYEAMPONG

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for applicant:**

Anne-Marie Demmer

**Counsel for respondent:**

Shelly Pitterman, UNHCR

## **Introduction**

1. In an application submitted on 19 November 2009 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 D-1 level for 2008;
  - b. To be promoted to the D-1 level with effect from 1 November 2008;
  - c. To be awarded compensation for the damage suffered.

## **Facts**

2. The Applicant joined the United Nations High Commissioner for Refugees (“UNHCR”) in 1993.

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 and recommended the Applicant for promotion.

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 8 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 recourse at its recourse session which took place from 22 to 26 June 2009 and confirmed its first recommendation.
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 23 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 D-1 level at the 2008 promotion session.
11. 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.
12. On 19 November 2009, the Applicant filed an application before the United Nations Dispute Tribunal.
13. By memorandum dated 30 November 2009, in response to the Applicant's management evaluation request, the Assistant High Commissioner for Protection, on behalf of the Deputy High Commissioner, suggested that she take her case to the UNHCR Ombudsman to settle the dispute amicably.
14. 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.
15. 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**

16. The Applicant's contentions are:

- a. The decision not to promote her due to the existence of two written reprimands is a retaliatory measure and an additional sanction. This is unfair and amounts to an abuse of authority;
- b. She is performing at the D-1 level with a special post allowance granted to her by the Administration, which was aware of the written reprimands. She is fulfilling her functions satisfactorily. Therefore, the written reprimands cannot be used to justify the decision not to promote her to the D-1 level. The High Commissioner's decision not to promote her is arbitrary;
- c. The High Commissioner promoted two non-eligible staff members to the D-1 level whereas she was not promoted, despite having been recommended by the APPB. This demonstrates bias against her;
- d. Her low standards of integrity are put forward by the Respondent to justify not having promoted her. However, this was not taken into consideration when it was decided that she would fulfil functions at the D-1 level, a duty that she performed efficiently;
- e. The actions for which she received two written reprimands do not amount to misconduct according to former staff rule 110.1. The written reprimands sanctioned errors of judgment;
- f. Even though 10 promotion slots at the D-1 level were available, the High Commissioner promoted 15 candidates, two of which were not eligible. This resulted in reducing the number of available promotion slots for the next session;
- g. The High Commissioner was wrong in not giving her priority as a staff member performing at a higher grade than her own, as is provided for in the APPB rules.

17. The Respondent's contentions are:

- a. The APPB Rules of Procedure allow the High Commissioner to decide upon appointments, postings and promotions. The APPB has merely an advisory function;
- b. The High Commissioner had the right not to follow the recommendations of the APPB and not to promote the Applicant;
- c. The High Commissioner justified his decision not to promote the Applicant due to her level of integrity. The Applicant received two written reprimands in 2007 and 2008. These reprimands constitute administrative measures issued at the end of a disciplinary process. They follow the Applicant's failure to uphold the highest standards of integrity expected of an international civil servant;
- d. The High Commissioner took his decision on the basis of the number of candidates eligible for promotion and the number of available promotion slots;
- e. The Applicant fails to substantiate her allegations of bias. The High Commissioner's decision to promote non-eligible candidates to the D-1 level is independent from the decision not to promote the Applicant.

## **Judgment**

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. 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.

24. 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.

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

26. 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.

27. The Applicant has asked to be compensated for the material damage resulting from the unlawful refusal to promote her 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 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.

28. 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 26 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.

29. Nevertheless, it follows from the facts described above that, despite the recommendation made by the APPB in favour of the Applicant, the High Commissioner, who is not bound by the opinion of the Board, refused to promote her to the D-1 level due to the existence of two written reprimands in 2007 and 2008. Thus, given the reasons put forward, the Tribunal considers that the Applicant had no chance of being promoted even if the High Commissioner had not committed any irregularity by promoting non-eligible staff members.

30. In addition, for the sake of completeness, the Tribunal considers that the refusal of promotion can in no way be deemed to be a sanction for actions that have already been punished by the existing reprimands since the aim is precisely that they appear in the staff member's file so that the Administration may draw certain consequences, such as in the present case.

31. Thus, the Applicant cannot claim compensation for moral damage of any kind.

## **Decision**

32. 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.

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(signed)

Judge Jean-François Cousin

Dated this 19<sup>th</sup> day of October 2010

Entered in the Register on this 19<sup>th</sup> day of October 2010

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(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva