



United Nations Dispute Tribunal

Case No.: UNDT/GVA/2009/11
Judgment No.: UNDT/2009/040
Date: 16 October 2009
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

ARDISSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Jay Wormus

Counsel for respondent:

Shelly Pitterman, DHRM/UNHCR

Notice: The format of this judgment has been modified for publication purposes in accordance with article 31 of the rules of procedure of the United Nations Dispute Tribunal.

Application

1. In his appeal to the Joint Appeals Board in Geneva, registered on 17 October 2008, the applicant requested it to recommend that:

- The decision of 29 February 2008 by which the United Nations High Commissioner for Refugees denied him a promotion to the P-5 level during the 2007 promotion session should be rescinded;
- He should be promoted to the P-5 level.

2. In its resolution 63/253, the General Assembly decided that all cases pending before the Joint Appeals Board as at 1 July 2009 would be transferred to the United Nations Dispute Tribunal.

Applicant's submissions

3. The applicant contends that the procedure for drawing up the list of promotions for the year 2007 was irregular, because the Administration unilaterally introduced a new methodology in breach of the existing procedures.

4. Under the rules of procedure and Procedural Guidelines of the Appointments, Postings and Promotions Board promulgated on 3 November 2003, the Joint Advisory Committee has authority to propose changes to the rules. Paragraph 141 of the Procedural Guidelines provides that the number of promotions is to be decided each year by the High Commissioner, on the advice of the Joint Advisory Committee. The Director of the Division of Human Resources Management (DHRM) refused on several occasions to submit the final draft of the methodology to the Joint Advisory Committee before putting it before the High Commissioner. The Director also announced that the distribution of promotions across grades would be different from that proposed by the Committee. The method used by the Appointments, Postings and Promotions Board for recommending promotions for the year 2007 was not known to the staff until a few days before the promotion session began, contrary to a recommendation from the Joint Appeals Board (JAB) that it should be published a year in advance.

5. The methods used by the Appointments, Postings and Promotions Board to enhance gender parity amounted in this case to a de facto gender-based quota system. That was not the intention of the 2007 Methodological Approach, and such a system was not within the Board's discretion. The system adopted by the Board was put into effect without prior consultation with staff representatives. It was applied in a disproportionate manner and was not justified by the situation with respect to the P-5 level within the Office of the High Commissioner for Refugees. Instead of being retained as an additional factor when selecting from among equally qualified individuals, the gender criterion became the principal one. The Appointments, Postings and Promotions Board drew up separate lists of men and women candidates and allotted a certain number of promotions to each list. This created a quota system, contrary to the Methodological Approach. Creating sub-groups undermines the right to equal treatment, and the Board did not have the authority to do so. The Board exceeded its authority by giving extra weight to performance in the case of women candidates, thus failing to adhere to the Methodological Approach.

6. It is possible to use a system for discriminating between the sexes, but this has to be justified by some existing inequality between them, and there is no information on this score in relation to the P-5 level.

7. The points accrued by the applicant (110.51) must be compared with those of the other candidates who received promotions in order to determine whether the Appointments, Postings and Promotions Board and the High Commissioner respected the principle of equal qualification of men and women. It has also to be ascertained whether he was considered in the light of the other non-weighted criteria, namely number of posts held and his performance appraisal reports, his knowledge of languages and the training courses he has taken.

Respondent's observations

8. The Methodological Approach did not change the rules governing promotion at UNHCR. It is merely a new tool for applying the same criteria, so there was no need to submit it to the Joint Advisory Committee. The recommendation made by the Joint Appeals Board that an interval of one year should be allowed to elapse before publishing the new method and putting it into practice is not binding on the Administration, which was not therefore required to observe this period before applying the new method.

9. According to paragraphs 141 and 152 of the Procedural Guidelines of the Appointments, Postings and Promotions Board, the Board must take gender parity into consideration. The UNHCR administrative instruction on gender parity asks the Board to ensure that, at the grade levels where parity has not been achieved, half of all promotions will be awarded to women, which is in line with the policy submitted by the Secretary-General to the General Assembly. In 2006 women made up only 30 per cent of UNHCR staff at the P-5 level and the approach applied in order to achieve the goal of parity is legitimate and falls within the discretionary authority of the High Commissioner, although he is expected to respect certain parameters in exercising that authority. For example, women may be given preference if they are overall as qualified as their male counterparts, which was the case in this instance with respect to promotions to the P-5 level. Women were given an advantage over men by increasing the weight given to the criterion of performance in comparison with seniority and rotation history, but that is among the steps taken in implementation of the parity policy. The respondent points out that women have less seniority and mobility than men, because of family demands and the particular nature of UNHCR work. Increasing the weight given to performance in the case of women is therefore in accordance with the Charter of the United Nations, which makes it a requirement to achieve parity between men and women.

10. A hearing was held on 24 September 2009, during which the applicant was heard in a telephone conference call and at which the Chief of the Legal Affairs Section of UNHCR represented the High Commissioner.

Judgment

11. In requesting rescission of the decision by which the High Commissioner refused to promote him to the P-5 level during the 2007 session, the applicant relies on the argument that an irregular procedure was used to draw up the list of staff to be promoted.

12. The applicant argues that the Methodological Approach, which was jointly decided by the UNHCR Administration and the Appointments, Postings and Promotions Board for the purpose of determining which staff members should be recommended for promotion to the P-5 level, could not be properly followed during the 2007 promotion session, because the Joint Advisory Committee had not been consulted. Staff regulation 8.1 provides that 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 their conditions of work, general conditions of life and other personnel policies. Regulation 8.2 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. Accordingly, the applicant is entitled to claim that the aforementioned provisions require the Joint Advisory Committee, a UNHCR body on which both the staff and the Administration are represented, to be informed of any changes in the rules that affect the staff.

13. The 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 managers, performance appraisals and seniority will be taken into consideration. The Methodological Approach provides that the Appointments, Postings and Promotions Board will review eligible candidates for promotion as per an initial ranked list based on the four main criteria, namely: performance, manager's recommendations, seniority in grade and rotation history. The Board will then assess candidates on the basis of other criteria relating to efficiency and competency. Lastly, additional criteria, such as gender parity and geographical diversity, will be taken into account.

14. It is clear from a comparison between the criteria laid down in the Procedural Guidelines and those laid down in the Methodological Approach that the latter merely defines a new working method for determining how much weight to give to criteria which themselves are unchanged, in order to ensure greater transparency when drawing up the promotion lists. Accordingly, the Administration was not under any obligation to obtain the consent of the Joint Advisory Committee before applying this new working method to evaluate eligible staff, as no change was made to the rules established by the Procedural Guidelines. Moreover, since the recommendations of the Joint Appeals Board are not themselves binding, there was no rule requiring the administration to observe an interval of one year before implementing the Methodological Approach.

15. Although article 141 of the Procedural Guidelines for appointments, postings and promotions provides that the number of promotions is decided by the High Commissioner on the advice of the Joint Advisory Committee, it is undisputed that the Joint Advisory Committee was consulted by the High Commissioner about the number of promotions to be awarded at each grade level, and there is no rule requiring the High Commissioner to follow the Committee's advice.

16. It is clear from the above-mentioned Procedural Guideline and Methodological Approach that the Appointments, Postings and Promotions Board, in drawing up the list of staff members to be recommended to the High Commissioner for promotion, was required first to determine which staff members were eligible for promotion, then to rank them according to the four main weighted criteria, then to evaluate

them on the basis of the non-weighted criteria and, lastly, where staff members were found to be equally deserving of promotion, to take into consideration gender parity and geographical diversity. However, the minutes of the first session held by the Appointments, Postings and Promotions Board for the 2007 exercise indicate that, after drawing up a single list of staff members eligible for promotion and ranking them according to points scored following the four main criteria, the Board divided them by gender and decided to recommend equal numbers of women and men for promotion and then separately assessed the merits of the candidates. Thus the Board, although it was attempting to achieve the goal of gender parity set by the High Commissioner, did not follow the order for the application of criteria established under the Procedural Guidelines or the rules that it had set itself under the Methodological Approach.

17. The High Commissioner recalls that, on the one hand, the provisions of the Charter of the United Nations setting out the principle of the equal rights of men and women and, on the other hand, the goals set by the Secretary-General in the General Assembly at its sixty-third session imposed on him an obligation to establish a policy for the achievement of gender parity in UNHCR, which he did in January 2007. He explains that the goal was to achieve gender parity at all grade levels by 2010 and notes that his instruction requested the Appointments, Postings and Promotions Board to ensure that, for all grade levels at which parity had not been achieved, the number of female staff recommended for promotion was equal to that of male staff, provided that the women had the required qualifications. Accordingly, the High Commissioner is justified in claiming that the system put in place, whereby equal numbers of women and men would be promoted to the P-5 level in order to achieve gender parity, was not in itself unlawful, since it was consistent with another principle enshrined in the Charter of the United Nations, namely merit-based promotion. Nevertheless, in seeking to achieve that goal, the High Commissioner had a duty to set clear rules for promotion, reconciling the two principles, and if that was not possible under the rules in force — as stated above — he had a duty to modify the rules before the annual promotion session. He could not merely request the Board, through the Division of Human Resources Management (DHRM), to apply such quotas.

18. The irregularity committed by the Appointments, Postings and Promotions Board by not following the order established under the existing rules for the application of criteria when listing staff to be recommended for promotion to P-5 inevitably altered the decisions taken by the High Commissioner on the basis of those recommendations. Hence, the High Commissioner's decisions with regard to P-5 promotions for 2007 were the result of an irregular procedure, and vitiated the entire promotion process in respect of that grade and, consequently, also vitiated the decision to deny the applicant a promotion, since there were a limited number of promotion slots.

19. It follows from the foregoing that the High Commissioner's decision not to promote the applicant to the P-5 level should be rescinded.

20. Pursuant to article 10, paragraph 5, of its 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 8,000 Swiss francs.

21. Although the refusal to grant a promotion to the applicant has thus been declared unlawful because of a procedural flaw and consequently rescinded, the judge is not authorized under the statute to substitute himself for the Administration and to declare that the applicant should be promoted to the higher grade. Thus, the applicant's claim in this regard must be rejected.

22. For these reasons, the Tribunal DECIDES:

Article 1: The High Commissioner's decision not to promote the applicant to the P-5 level during the 2007 promotion session is rescinded.

Article 2: If, instead of carrying out the rescission order, UNHCR elects to pay compensation, it must pay the applicant the sum of 8,000 Swiss francs, plus interest at an annual rate of 8 per cent, starting 90 days after notification of this judgment.

Article 3: The applicant's other requests are rejected.

Judge Jean-François Cousin

Dated this 16th day of October 2009

Entered in the Register on this 16th day of October 2009

Víctor Rodríguez, Registrar, UNDT, Geneva