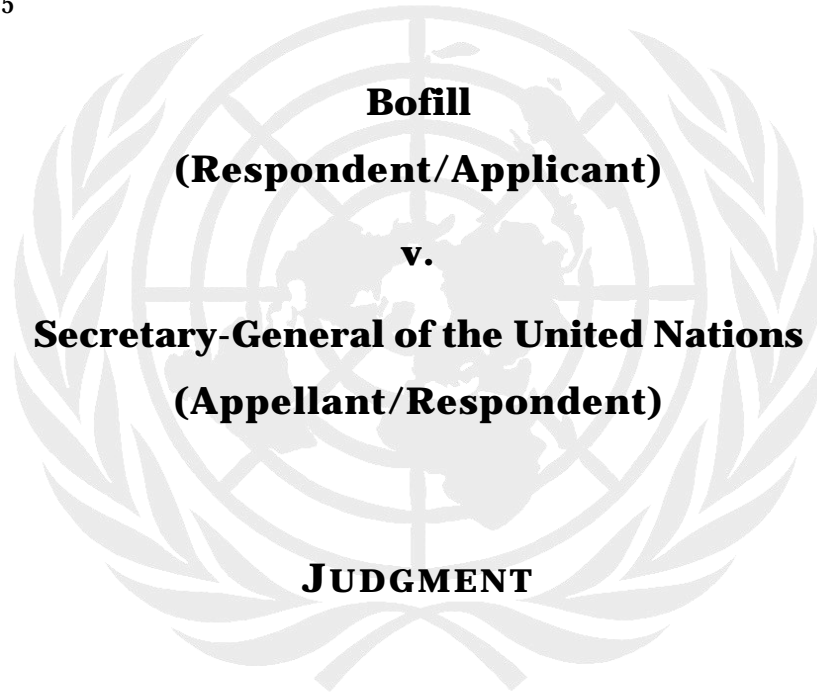




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-175



**Bofill
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Inés Weinberg de Roca, Presiding
Judge Sophia Adinyira
Judge Mark P. Painter

Judgment No.: 2011-UNAT-174

Date: 21 October 2011

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Claudio A. Realini

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. An irregularity in promotion procedures will only result in the rescission of the decision not to promote an appellant when he or she would have had a significant chance for promotion. Thus, where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.

Facts and Procedure

2. Ms. Marie-José Bofill joined the Office of the United Nations High Commissioner for Refugees (UNHCR) in 2001 and was considered for a promotion from the P-5 to the D-1 level during the promotion session conducted by UNHCR in 2008 (2008 session).

3. By memorandum dated 3 February 2009, the Director of the Division of Human Resources Management (DHRM) informed all UNHCR staff members that the 2008 annual promotion session would be held in March 2009 and that 10 promotion slots were available for the 102 eligible candidates for promotion from the P-5 to the D-1 level.

4. By email dated 10 March 2009, the Director, DHRM, sent the promotions methodology for the 2008 session, as developed by the Appointments, Postings and Promotions Board (APPB) to all the staff members, and the APPB subsequently convened from 15 March 2009 to 21 March 2009 for the 2008 promotion session.

5. On 28 April 2009, UNHCR published a list of staff members who had been promoted as a result of the 2008 promotion session. Ms. Bofill was not among those promoted to the D-1 level.

6. On 8 May 2009, Ms. Bofill initiated a recourse before the APPB. The APPB reviewed Ms. Bofill's application during its recourse session, which took place from 22 June 2009 to 26 June 2009.

7. On 28 July 2009, the High Commissioner announced the results of the recourse session. Ms. Bofill was not among the staff members promoted after the recourse session.

8. On 20 September 2009, Ms. Bofill submitted a request for management evaluation, and was informed on 18 May 2010 that the management evaluation had determined that her non-promotion was taken in conformity with the rules and procedures of the Organization. On 15 June 2010, Ms. Bofill filed an application with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal).

9. The UNDT issued Judgment No. UNDT/2010/190 on 19 October 2010. While the UNDT rejected Ms. Bofill's claims that: (i) the promotion process lacked transparency; (ii) the delays in providing the promotions methodology resulted in procedural flaws; (iii) the methodology failed to take into consideration the situation of staff members on expert posts; (iv) the number of available promotion slots for each grade was not set in a transparent manner and was modified during the course of the procedure; and (v) the APPB applied a discriminatory system which resulted in more men than women being promoted.

10. The UNDT found that the High Commissioner had committed a procedural irregularity by promoting two staff members to the D-1 level who had not been subject to prior review by the APPB. The UNDT concluded that such irregularity "vitiat[e] necessarily the legality of the decision to deny [Ms. Bofill] a promotion, since there were a limited number of promotion slots". The UNDT rescinded the decision and ordered, as an alternative to the rescission of the contested decision, that the High Commissioner pay compensation in the amount of 10,000 Swiss Francs.

11. The UNDT rejected Ms. Bofill's claim for material damages noting that its order to rescind the contested decision or, in the alternative, to pay compensation, sufficiently addressed any material losses suffered by Ms. Bofill. The UNDT further rejected Ms. Bofill's claim for moral damages, finding that

[t]he minutes of the 2008 promotion and recourse sessions show that [Ms. Bofill] obtained 47 points and was ranked in the fifth group, while at least 78 staff members at the P-5 level received more points than her and that only 19 staff members were promoted to the D-1 level. Thus, the irregularity committed by the High Commissioner in promoting two non-eligible candidates did not deprive [Ms. Bofill] of a chance of being promoted. The Tribunal considers that her chances for promotion at the 2008 session were close to zero and that there is no need therefore to compensate her for any moral damage she may have suffered.

12. The Secretary-General filed an appeal against the UNDT Judgment on 2 December 2010. Ms. Bofill filed her answer on 20 January 2011.

Submissions

Secretary-General's Appeal

13. The Secretary-General submits that the UNDT erred in law and exceeded its competence in awarding compensation in lieu of the rescission of the non-promotion decision.

14. The Secretary-General recalls that the United Nations Appeals Tribunal (Appeals Tribunal) established a two-pronged test to determine whether compensation should be awarded, the first element being the nature of the irregularity which led to the rescission of the contested administrative decision, and the second element being the chance that the staff member would have been recommended for promotion had the correct procedure been followed.

15. The Secretary-General submits that the UNDT explicitly noted this test when explaining why it had rejected Ms. Bofill's claim for moral damages. However, the same reasoning that led the UNDT to conclude that moral damages could not be awarded compels the conclusion that no compensation can be awarded even as an alternative to the rescission of the contested decision.

16. The Secretary-General submits that not every procedural irregularity will lead to the conclusion that an administrative decision is unlawful and warrants compensation. The award of compensation is appropriate where the UNDT found that the staff member suffered actual damage. The very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations. Ms. Bofill suffered no loss as a result of the procedural irregularity committed by UNHCR.

17. The Secretary-General next submits that the UNDT erred in law in finding that the procedural irregularity it identified rendered the contested administrative decision unlawful, thereby compelling the Dispute Tribunal to apply Article 10(5) of the UNDT Statute and order the rescission of the decision and compensation in lieu of rescission.

18. The UNDT failed to examine the nature, severity, and relevance of the impugned administrative decision, as well as by concluding that, on the basis of such an irregularity, the decision not to promote Ms. Bofill was unlawful. Where a procedural irregularity is not of such gravity as to adversely affect the contested administrative decision, the unlawfulness of the contested administrative decision is not vitiated by the procedural irregularity. Therefore, the contested administrative decision need not be rescinded.

19. Finally, the Secretary-General points out that the recognition of an entitlement to rescission and compensation in lieu of rescission “would not only hold the Organization to a standard of procedural perfection, but would hold the Organization financially liable in every case where any procedural irregularity can be identified even if such procedural irregularity had no effect on the contested decision”. The Secretary-General requests that the Appeals Tribunal consider the implications of holding the Organization financially liable even in cases where a procedural irregularity has not adversely affected the administrative decision or resulted in any loss to the staff member.

Ms. Bofill’s Answer

20. Ms. Bofill contends that the Secretary-General is misstating the facts when he claims that the number of available slots was determined at the outset seeing that 19, rather than 10, staff members were promoted, and that the UNDT Judgment recognizes that the DHRM could modify the number of promotions.

21. Ms. Bofill submits that UNHCR never established that she would not have had any chances of being promoted had the promotion process not been flawed by irregularities. Rather, Ms. Bofill states that she lost chances of being promoted.

22. Ms. Bofill contends that it is false to say that allowing her to receive compensation for the irregularities in the promotion process would be akin to setting a standard of procedural perfection. To the contrary, the Appeals Tribunal should recognize the deficiencies of the current process and the financial consequences that resulted from the promotion of non-eligible staff members. Furthermore, Ms. Bofill’s compensation award should be maintained as she suffered financially from the vitiated promotion process and her case should serve as an example so that the Organization ceases to promote non-eligible staff members.

23. Ms. Bofill requests that the Appeals Tribunal dismiss the Secretary-General's appeal in its entirety or, in the alternative, confirm Judgment No. UNDT/2010/190 or remand the case back to the UNDT. Should the Appeals Tribunal uphold the Secretary-General's appeal and reverse Judgment No. UNDT/2010/190, Ms. Bofill requests that the case be remanded to the UNDT.

24. Regardless of the Judgment issued by the Appeals Tribunal, Ms. Bofill requests that the Secretary-General be ordered to compensate her for the expenses incurred from responding to this appeal.

Considerations

25. The UNDT did not sustain Ms. Bofill's contentions regarding the promotion process, the promotions methodology, the basis of the contested decision, nor the promotion of the candidates who had obtained lower scores than she had. However, The UNDT did find merit in Ms. Bofill's claim that UNHCR promoted to the D-1 level two staff members who were not eligible and whose candidacy had not been examined by the APPB. Those findings have not been appealed.

26. Ms. Bofill was not promoted as a result of the fact that at least 78 candidates had obtained a higher score than she had during the evaluation process. Even if the non-eligible candidates had not been promoted, she would not have been promoted during the 2008 session. The procedural irregularity had no impact on her non-promotion. There is consequently no link between the irregularity in the procedure and her non-promotion.

27. The UNDT may order that the decision not to promote Ms. Bofill be rescinded, and in that event it must set an amount to be paid by the Secretary-General in lieu of the rescission. But a chance of promotion must exist.

28. The direct effect of an irregularity will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. Where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation. That was the case here.

29. Although there was a flaw in the procedure to select non-eligible candidates, there was none in not promoting Ms. Bofill. For this reason, an award of compensation in lieu of rescission is reversed.

30. The UNDT should not have rescinded the decision not to promote Ms. Bofill, nor awarded compensation.

Judgment

31. We grant the appeal and reverse the UNDT Judgment.

Original and authoritative version: English

Dated this 21st day of October 2011 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Painter

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar