



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

**Mebtouche
(Appellant)**

v.

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

JUDGMENT

[No. 2010-UNAT-033]

Before:	Judge Sophia Adinyira, Presiding Judge Kamaljit Singh Garewal Judge Rose Boyko
Case No.:	2010-045
Date:	30 March 2010
Registrar:	Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Phyllis Hwang

JUDGE SOPHIA ADINYIRA, Presiding Judge.

Synopsis

1. The Appellant, Larbi Mebtouche (Mebtouche), a retired staff member of the Office of the United Nations High Commissioner for Refugees (UNHCR), filed an application with the United Nations Dispute Tribunal (UNDT) against the High Commissioner's decision not to promote him to the D-1 level during a promotion session in 2007. The UNDT ordered the rescission of the decision not to promote Mebtouche or, in lieu of the rescission, the payment of compensation in the amount of 9,000 Swiss francs. Mebtouche appeals UNDT's order. The United Nations Appeals Tribunal (Appeals Tribunal) allows the appeal in part, and orders a variation of the compensation payment.

Facts and Procedure

2. Mebtouche challenged before the UNDT the High Commissioner's decision not to promote him to the D-1 level during a promotion session in 2007. His main contention concerned the "Methodological Approach" used by the Appointments, Postings, and Promotions Board (Board). In determining whether a staff member should be promoted, this approach places emphasis on a staff member's rotation history. Since "specialist" or "expert" staff members are exempt from rotation requirements, their cases are reviewed by the Board on a case by case basis in a promotion exercise. At the time Mebtouche was considered for a promotion, he was a "generalist" staff member and the rotation criterion applied to him. Mebtouche argued before the UNDT that he had a poor rotation history because he had previously served for seventeen years as a "specialist" staff, and that he consequently stood no chance of obtaining a promotion. He argued that the case by case approach should be extended to staff who had previously served on an expert basis; and accordingly the Board should have taken into account his professional history.

3. Having reviewed the Board's minutes, the UNDT was satisfied that the Board had considered Mebtouche's status as "generalist" staff; and that therefore there was no need to examine his specific situation. But the UNDT found irregularities in the promotion of three persons by the High Commissioner without prior consultation of the Board. It held that this irregularity vitiated the decision not to promote Mebtouche, since the number of promotion slots was limited. It also found that the Board did not follow the order established under the existing rules for the application of criteria when listing staff for promotion to a D-1 position. For these two reasons, the UNDT found that the contested

decision was vitiated and ordered its rescission, or in lieu of the rescission, a payment of compensation in the amount of 9,000 Swiss francs. The UNDT refused Mebtouche's claim for compensation for moral suffering caused by the decision on the grounds that in light of his performance appraisal and seniority, his chances of being promoted were rather slim.

4. On 3 February 2010, Mebtouche filed an appeal against the UNDT judgment.

Submissions

Mebtouche's Appeal

5. Mebtouche reiterates his arguments presented before the UNDT. He submits that the UNDT erred in fact by failing to consider his submissions regarding his former service on a "specialist" post.

6. Mebtouche submits that this issue was all the more relevant as the UNDT recognized that "the High Commissioner made irregular use of his prerogative to promote on the basis of executive decision *by promoting three staff members who were ineligible*" (emphasis in the original). Mebtouche argues that an appropriate use of the High Commissioner's prerogative to grant promotions on the basis of an executive decision would have been Mebtouche's case. He requests additional compensation for the alleged failure to take into account his prior service on a specialist post.

7. Mebtouche further contends that, having found a violation of his rights, the UNDT failed to order an adequate and effective remedy. In his opinion, given the UNDT's order to rescind the impugned decision or, in lieu of rescission, the payment of compensation in the amount of 9,000 Swiss francs, it was a foregone conclusion that the Administration would opt for payment of compensation. He therefore requests compensation "at a level which puts the Respondent before a real choice between specific performance and payment of compensation".

Secretary-General's Answer

8. The Secretary-General submits that at the time that Mebtouche was considered for a promotion, he was serving on a "generalist" post. Accordingly, the provision in the Methodological Approach allowing for a "case by case" review of staff members serving on "specialist" and "expert" posts did not apply to him. The Secretary-General further

contends that Mebtouche acknowledges that the “case by case” procedure does not apply to him. Rather, Mebtouche is advocating that the procedure should be extended to staff members who previously served on expert posts. The Secretary-General submits that the UNDT did not have the authority to introduce different procedures for the evaluation of candidates in a promotion session.

9. The Secretary-General further contends that the compensation ordered by the UNDT should not be enhanced as the level of compensation as ordered by the UNDT as an alternative to the rescission of a contested decision should be commensurate with the extent of the injury the staff member would suffer if the Organization opted not to rescind a decision.

Considerations

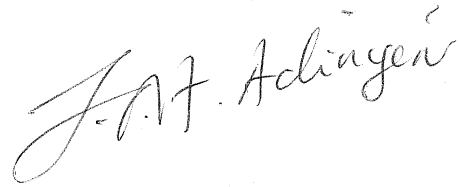
10. As a preliminary matter, the Appeals Tribunal rejects Mebtouche’s request for an oral hearing via teleconference. Mebtouche’s brief on appeal is sufficient and does not require further clarification.

11. The Tribunal finds that Mebtouche’s contention that the UNDT failed to consider his arguments regarding the former service on a “specialist” post is without merit. In fact, the issue was considered by the UNDT. Mebtouche requests that the “case by case” consideration applied to “specialist” staff members during promotion sessions should be applied not only to those currently serving on such posts, but to all those who have served on an expert post for substantial part of their career. However, neither the UNDT nor this Court has the authority to amend any regulation or rule of the Organization. At best, this Court may point out what it considers to be a deficiency in a regulation or rule and recommend a reform or revision. The circumstances of the present case do however not warrant such a recommendation.

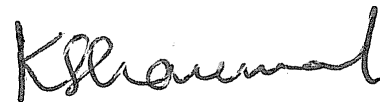
12. Turning to Mebtouche’s contention that the compensation in lieu of the rescission of the impugned decision was too low, we find that the compensation of 9,000 Swiss was inadequate having regard to the fact that the order was made on 16 October 2009, at a time when Mebtouche had already retired and therefore had no possibility of any further promotion.

Judgment

13. The Tribunal therefore allows the appeal in part, sets aside the UNDT's order for payment of 9,000 Swiss francs in lieu of rescission of the contested decision and orders that Mebtouche be paid the equivalent of 3 months net base salary at the time of his retirement.



Judge Adinyira, Presiding



Judge Garewal



Judge Boyko

Dated this 30th day of March 2010 in Geneva, Switzerland.

Original: English

Entered in the Register on this 26th day of April 2010 in New York, United States.



Weicheng Lin, Registrar, UNAT