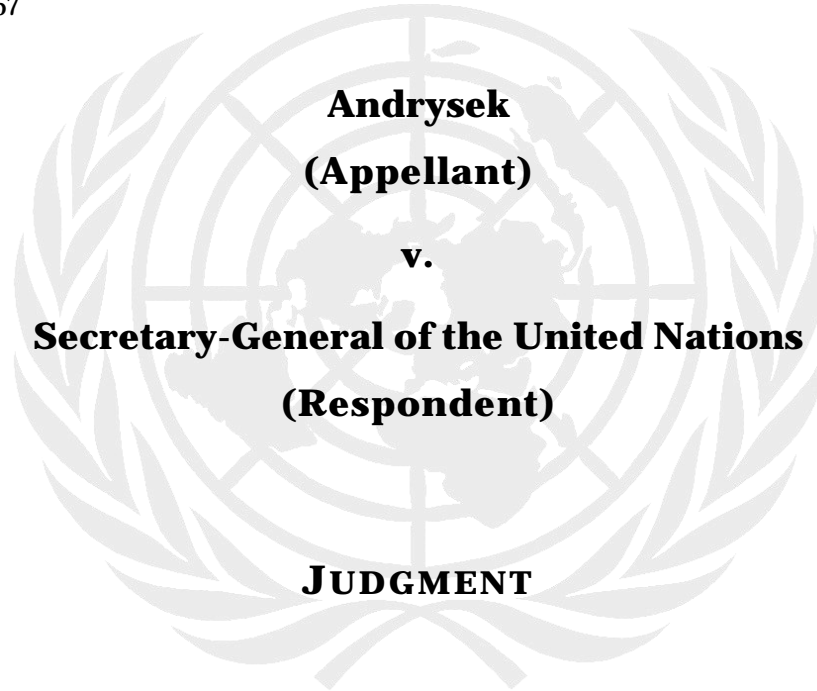




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-057



**Andrysek
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Kamaljit Singh Garewal, Presiding Judge Mark P. Painter Judge Rose Boyko
Judgment No.:	2010-UNAT-070
Date:	27 October 2010
Registrar:	Weicheng Lin

Counsel for Appellant: Anne-Marie Demmer

Counsel for Respondent: Cristián Gimenez Corte

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. Oldrich Andrysek (Andrysek), a staff member at the P-5 level in the Office of the United Nations High Commissioner for Refugees (UNHCR), participated unsuccessfully in the promotion exercise conducted by the Appointments, Postings and Promotions Board (APPB), UNHCR, for promotion to the D-1 level. He is not entitled to an increase in compensation to three months' net base pay in accordance with *Mebtouche*,¹ because the facts of that case were different and distinguishable. The appeal is dismissed.

Facts and Procedure

2. Andrysek was one of many staff members at the P-5 level who were considered for promotion to the D-1 level during the 2007 annual promotion session (2007 promotion session) of UNHCR. That session was held between 27 January and 2 February 2008, and the results were announced on 29 February 2008. Andrysek was not recommended for a promotion.

3. Andrysek's recourse application with the APPB dated 16 April 2008, submitted under the UNHCR Procedural Guidelines for Appointments, Postings and Promotions (Procedural Guidelines), was rejected on 24 June 2008.

4. On 22 August 2008, Andrysek sought administrative review of the High Commissioner's decision not to promote him. He was informed by memorandum dated 6 October 2008 from the Administrative Law Unit that the decision not to promote him had been properly taken.

5. On 19 December 2008, Andrysek appealed to the Geneva Joint Appeals Board (JAB), seeking rescission of the decision not to promote him. He argued that the 2007 promotion session and the High Commissioner's decision violated the United Nations Staff Regulations and Rules. He also sought an award of compensation.

¹ *Mebtouche v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-033.

6. Andrysek's appeal before the JAB was transferred to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva. The UNDT rendered Judgment No. UNDT/2009/038 on 16 October 2009. It rescinded the High Commissioner's decision not to promote Andrysek to the D-1 level during the 2007 promotion session. Alternatively, in lieu of rescission, the UNDT ordered UNHCR to pay 9,000 Swiss francs to Andrysek as compensation.

Submissions

Andrysek's Appeal

7. Although the UNDT found in his favour, Andrysek submits that the facts and his arguments were not properly considered or fairly assessed and the UNDT erred on questions of fact and law. He argues that the UNDT failed to find that there were additional irregularities during the 2007 promotion session. Andrysek's main contention is that the Methodological Approach was seriously flawed, that the merits of his application for promotion were overlooked, and that staff members who were less meritorious than him were promoted.

8. According to Andrysek, the Methodological Approach was ultra vires because the APPB Procedural Guidelines and Rules of Procedure did not permit the introduction of a new procedure; the weighted criterion was a departure from the Procedural Guidelines; and the Methodological Approach should have been submitted to the Joint Advisory Committee (JAC). Selection on the basis of gender violated the United Nations Charter and the Staff Regulations and Rules. The Secretary-General's directions regarding transparency of procedures were not followed. Lastly, Andrysek's due process rights were breached.

9. Andrysek argues that, though seemingly in his favour, the UNDT Judgment offers no effective remedy against the consequences of the High Commissioner's successive breaches of the Staff Regulations and Rules, and offers no prospect of a revision of the UNHCR promotions system to guarantee that he will be fully and fairly considered for a promotion in the future. Andrysek contends that the compensation awarded by the UNDT as an alternative to rescission of the decision not to promote him does not compensate him for his loss as a result of the delay in his promotion to the D-1 level.

10. Andrysek requests that the Appeals Tribunal make various findings regarding the unlawfulness of the 2007 promotion session, increase the award of alternative compensation to two years' net base salary, and award costs in his favour and one year salary as compensation for harm suffered.

Secretary-General's Answer

11. According to the Secretary-General, the UNDT correctly determined that the Methodological Approach did not modify the Procedural Guidelines, and that consultation with the JAC was therefore not required. The Procedural Guidelines provide that after a staff member's minimum seniority requirement for promotion has been determined, the recommendations from managers, performance appraisals, and seniority are considered. The Methodological Approach requires the APPB to review eligible candidates for promotion on the basis of four main criteria: performance, recommendations from managers, seniority, and rotation history. The APPB then assesses candidates on the basis of the other criteria relating to efficiency and competency. Lastly, additional criteria, such as gender parity and geographical diversity, are taken into account.

12. The Secretary-General submits that the UNDT correctly found that "the Methodological Approach merely defined a new way of determining the weight to be given to criteria which remained the same, so as to ensure greater transparency in drawing up the promotion lists".

13. The Secretary-General contends that Andrysek's entire career was taken into account during the promotion exercise. The UNDT rightly found that Andrysek's most recent performance appraisal report (PAR) was not before the APPB; if this had been considered his rank would have improved a bit, but he still would not have made it. Andrysek would have then been ranked 55 out of 117 staff members eligible for promotion, against only 41 positions at the D-1 level for 2007. Consequently, the UNDT held that "[Andrysek] had little possibility of being promoted".

14. The Secretary-General also relies on the UNDT's finding that it could not substitute itself for the Administration. This was perfectly in accordance with the established jurisprudence of the former Administrative Tribunal that "the Tribunal is

neither the General Assembly nor the Secretary-General, and therefore it is not in a position to substitute its judgment for policy decisions on personnel matters”.² The Secretary-General also relies on the Appeals Tribunal’s Judgment in *Mebtouche* that “neither the UNDT nor this Court has the authority to amend any regulation or rule of the Organization”.³

15. According to the Secretary-General, the UNDT correctly established the amount of compensation of 9,000 Swiss francs, as an alternative to the rescission order. Andrysek’s claim for compensation for moral suffering is untenable because he had little chance of promotion even if no irregularity had been found. Therefore, the claim for moral damages has no foundation.

Considerations

16. The UNDT decided a similar case on 16 October 2009 (*Mebtouche*⁴), also relating to the 2007 promotion session of UNHCR, regarding promotions of staff members at the P-5 to the D-1 level. Like Andrysek, Mebtouche had not been selected and was awarded 9,000 Swiss francs as compensation, on the same parity of reasoning that three persons had been wrongly promoted by the High Commissioner and the APPB had not followed the order established under the Procedural Guidelines and Methodological Approach for the application of criteria when listing staff recommended for promotion. On appeal before us, we increased the compensation to the equivalent of three months’ net base salary. The issue in the present case is whether, following the above ruling, Andrysek should also be awarded the enhanced compensation of three months’ net base salary.

17. In a promotion exercise within the UNHCR, the APPB does not decide in favor of, or against, a particular candidate. The APPB merely recommends a certain number of candidates for promotion. The promotion list depends on the number of available vacancies. As an unsuccessful candidate he cannot merely complain about the promotion procedure, guidelines, or criteria. He must show how he was prejudiced or denied promotion because a procedure, guideline, or criterion was applied in such a way as to

² UNAT Judgment No. 1419 (2008), para. V.

³ *Mebtouche v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-033, para. 11.

⁴ *Mebtouche v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/039.

unfairly deprive him of a promotion. He has a right to full and fair consideration, not to a promotion.

18. The contentions raised by Andrysek regarding the Methodological Approach before the UNDT were rightly rejected. The UNDT held:

A comparison of the criteria established in the Procedural Guidelines and those established in the Methodological Approach reveals that the Methodological Approach merely defined a new way of determining the weight to be given to criteria which remained the same, so as to ensure greater transparency in drawing up the promotion lists. Hence, there was no rule obliging the Administration to obtain the agreement of JAC before applying this new working method for evaluating candidates, which did not change the rules in the Procedural Guidelines. Moreover, since JAB recommendations are not binding in themselves, no rule required the Administration to wait one year before implementing the Methodological Approach.⁵

19. The UNDT's decision rejecting the other arguments raised by Andrysek concerning alleged procedural irregularities during the 2007 promotion session and the consideration of his application for promotion is well considered and well founded.

20. The UNDT rescinded the decision not to promote Andrysek due to the irregularities committed during the 2007 promotion session. Andrysek was awarded 9,000 Swiss francs as alternative compensation should the UNHCR elect not to implement the order for rescission. Andrysek now seeks an enhancement of the award of alternative compensation to two years' base salary and additional compensation for harm suffered of one year salary. The UNDT found that Andrysek's name was too low in the list and he would not have in any case made it to the promotion list, even if there were no irregularities in the assessment of his application for promotion. Accordingly his request for compensation for moral suffering was rejected. We find that the UNDT did not make a reversible error in declining to award compensation for moral suffering.

21. What remains to be considered is whether the *Mebtouche* Judgment is applicable to Andrysek's case such that the award of alternative compensation should be increased. We feel that the two cases are clearly distinguishable. Mebtouche had already retired when his case was decided by the UNDT and had no further chances to be promoted. Therefore, there were adequate reasons to enhance the compensation that was awarded to him. No such relief can be given to Andrysek in this case.

⁵ *Andrysek v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/038, para. 26.

Judgment

22. The appeal is dismissed. The Judgment of the Dispute Tribunal is affirmed.

Dated this 27th day of October 2010 in New York, United States.

Original and authoritative version: English

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Painter

(Signed)

Judge Boyko

Entered in the Register on this 31st day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar