



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

AYLARA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Mohamed Abdou, OSLA

Counsel for Respondent:

Elizabeth Brown, UNHCR

Jan Schrankel, UNHCR

Introduction

1. By application filed on 10 September 2015, the Applicant, a staff member of the United Nations High Commissioner for Refugees (“UNHCR”), contests the decision issued by the High Commissioner on 20 October 2014 not to promote her from the P-5 to the D-1 level during the 2013 Promotions Session.

2. The Respondent concedes that the Applicant’s candidacy for promotion to the D-1 level during the 2013 Promotions Session was not given full and fair consideration. The promotion exercise for candidates to the D-1 level was vitiated by the same procedural irregularities as those identified in this Tribunal’s Judgment *Rodriguez-Viquez* UNDT/2016/030, which concerns the same promotion exercise but for candidates to the P-5 level. It is thus not disputed that the contested decision was unlawful.

3. The parties made several attempts to resolve the matter amicably through mediation under the auspices of the Office of the Ombudsman and inter-party negotiations. They were not able to reach a settlement and seek a ruling from this Tribunal in respect of the remedies to which the Applicant is entitled. They both produced additional submissions on remedies and they have agreed that the matter be decided on the papers.

Facts

4. The Applicant joined UNHCR in April 1993 as an Associate Liaison Officer (P-2) in Geneva. In December 1993, she was assigned as an Associate Programme Officer (P-2) in Bukavu, then Zaire. In June 1994, she was assigned as Programme Officer (L-3) in Bukavu, and received a special post allowance. From March to September 1996, the Applicant served on a mission to Bamako, Mali, as Programme Officer (L-4), and was promoted to the personal grade level of L-3 in July 1996. In October 1996, she was assigned as Programme Officer (L-3) in Ouagadougou, Burkina Faso, and she subsequently served on a mission to Niamey, Niger, from April to July 1998. In October 1998, the Applicant was assigned as a

Senior Programme Officer (P-4) in Dakar, Senegal, and was promoted to the personal grade level of L-4 in July 1999.

5. From October 1999, the Applicant served at UNHCR Headquarters in Geneva. She was initially assigned as a Senior Change Management Officer (P-4). Following several changes to the title of her position, she assumed temporary functions as Senior Food Aid Coordinator and First Officer between January 2004 and June 2005, when she was assigned as Senior Desk Officer. In November 2007, the Applicant was promoted to the P-5 grade level. She continued to serve as Senior Desk Officer (P-4) until December 2010. Following temporary assignments as Senior Change Management Officer (P-4) and Operations Manager (P-5) and a brief period of paid leave of absence pending posting, she was selected for the position of Senior Resource Manager (P-5) in December 2011. Between May 2014 and August 2015, she assumed temporary functions as a Senior Inspection Coordinator (P-5) at the UNHCR Inspector General's Office in Geneva.

6. On 4 April 2014, the Applicant was informed that she was eligible for promotion to the D-1 level during the 2013 Promotions Session conducted under the Policy and Procedures for the Promotion of International Professional Staff Members (UNHCR/HCP/2014/2), promulgated by the High Commission on 5 February 2014 ("Promotions Policy").

7. Pursuant to the Promotions Policy, the exercise involved three rounds of review. The High Commissioner had decided that 26 slots would be available for promotion to the D-1 level, which were to be equally shared between female and male candidates.

8. On 2 May 2014, the Applicant was informed that she had advanced to the Second Round of review as she satisfied at least three out of five of the evaluation criteria.

9. During the Second Round, the Applicant's candidacy was subject to a comparative assessment by a Senior Promotions Panel ("SPP") composed of six members. Male and female candidates were evaluated separately. The 49 female candidates were ranked by each of the SPP members based on the criteria of

performance, managerial accountability and exemplary leadership qualities, determined from a review of their fact sheets. The Applicant received the following individual rankings among the female candidates for promotion to the D—1 level: 2, 4, 27, 35, 40 and 46, which resulted in a consolidated ranking of 25 out of 49 female candidates. As one of the first 26 female candidates, the Applicant advanced to the Third Round of evaluation. In total, 26 female and 26 male candidates advanced to this round, together representing 200% of the number of allocated D-1 promotions slots.

10. During the Third Round of review, the SPP conducted collectively a comparative assessment of the male and female candidates, again separately and based on the same evaluations criteria as those applicable in the Second Round. The SPP did not recommend the Applicant for promotion “based on the comparative analysis with other staff members retained for the Third Round, and the limited number of slots available”. The minutes of the SPP’s meeting recorded that the Applicant “had received lower overall Second Round rankings from the SPP members, [the] majority of whom have ranked her below the 200% range of the allocated promotion slots”. The minutes also recorded that the Applicant’s “appraisal documents in the period under review show significant experience in program and resources management, but do not make references to opportunities for demonstration of exemplary leadership qualities and broader management skills”.

11. On 20 October 2014, the decisions of the High Commissioner concerning the promotion to the P-4, P-5 and D-1 levels were announced in an all-staff message. The Applicant was not among the successful candidates.

12. The Applicant submitted an application for recourse on 21 November 2014, pursuant to sec. 5.13 of the Promotions Policy. In January 2015, the SPP met in a recourse session and “unanimously agreed that [the Applicant’s recourse application] did not contain any information in relation to the period under review that was not previously available to and reviewed by the Promotions Panel at the time of the original review in the annual Promotions Session.” The decisions of the

High Commissioner concerning the recourse session were announced in an all-staff message of 3 March 2015.

Parties' submissions

13. The Applicant's principal contentions are:

- a. The only adequate remedy is the rescission of the contested decision by the Respondent, as no financial compensation can eliminate the moral and material damages caused by the serious flaws identified in the 2013 Promotions Session;
- b. The present case deserves an amount of compensation in lieu of rescission higher than that awarded in *Rodriguez-Viquez*, as the Applicant advanced to the Third Round, she was a female candidate and close to retirement;
- c. The Applicant suffered material damages in the form of loss of additional salary, namely the difference between D-1 and P-5 salary, as it is very likely that she would have been placed on a higher position, at least by now, had she been successful in the 2013 Promotions Session; and
- d. She is entitled to moral damages as the contested decision constitutes a fundamental breach of her due process rights and her right to be treated fairly, justly and transparently. The Administration's unlawful actions are a source of anguish and mental suffering for the Applicant.

14. The Respondent's principal contentions are:

- a. The Respondent concedes that the Applicant had a significant chance to be promoted if the procedural irregularities in the Promotions Session had not been committed;
- b. Even if the Applicant had been promoted at the time of the contested decision, her grade and corresponding entitlements would not have been affected until 1 September 2017, when the High Commissioner adjusted the

grade and corresponding entitlements of staff members whose promotion under the Promotions Policy remained unimplemented in the absence of an assignment to a position at the higher grade;

c. Consequently, any award of compensation for harm under art. 10.5(b) of the Dispute Tribunal's Statute should be limited to the difference in salary between 1 September 2017 and the date of the judgment, which is equivalent to USD193,67 per month;

d. In the alternative, the Applicant should not be awarded compensation in excess of the compensation awarded in *Rodriguez-Viquez*, namely CHF6,000, even if she advanced to the Third Round of review. In this connection, the Applicant cannot rely on the findings of the Tribunal that the Second Round of review was procedurally flawed and, at the same time, argue on the basis of her retention following that flawed round of review that she had a significantly higher change of promotion than Mr. Rodriguez-Viquez; and

e. The Applicant did not adduce any evidence of moral damages.

Consideration

15. The Tribunal's power regarding the award of remedies are delineated in art. 10.5 of its Statute, which states:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision.

16. In *Rodriguez-Viquez*, the Tribunal examined the award of compensation for a candidate for promotion to the P-5 level in the same Promotions Session, who was eliminated in the Second Round by the same SPP. Having identified several procedural flaws in the Second Round, the Tribunal found that the errors in the implementation of the Promotions Policy were so significant that their impact on Mr. Rodriguez-Viquez's chances for promotion could not be measured. However, the Tribunal found that the Applicant had a real chance for promotion. The Tribunal therefore rescinded the decision not to promote Mr. Rodriguez-Viquez to the P-5 level. In accordance with art. 10.5(a) of its Statute, the Tribunal determined an amount that the Respondent may elect to pay as an alternative to the rescission of the contested decision, which it established as follows:

Considering the extreme difficulties in ascertaining the Applicant's chances for promotion, the fact that he was eligible again for promotion in the 2014 session, and the previous determinations of the Appeals Tribunal and this Tribunal on the matter, the Tribunal considers, on balance, that it is fair and appropriate to set the amount of compensation in lieu of rescission to CHF6,000.

17. The Tribunal, in turn, rejected the Applicant's claim for material damages under art. 10.5(b) of the Tribunal's Statute. In line with previous jurisprudence, it found that if the Respondent chose to pay compensation in lieu of rescinding the decision, the amount awarded under art. 10.5(a) of the Statute would be considered as compensation for loss of salary due to the denial of promotion. The Tribunal acknowledged however that if the Respondent chose to rescind the contested decision, such rescission would not entail a retroactive grant of promotion and, accordingly, compensate any loss of salary, given that the Promotions Policy provided that the promotion would be only effective when the staff member is appointed to a post at the higher level (see secs. 5.12.1 and 5.12.3 of the Promotions Policy). Taking into account that Mr. Rodriguez-Viquez had been appointed to a P-5 position on 1 November 2015, that it was uncertain that he would have been granted a promotion, that it was equally uncertain that he would have been

appointed to a post at the P-5 level in the next vacancies' compendium, and that the appointment process would have, in any event, taken some time, the Tribunal found that any possible loss of salary for the period between 20 October 2014 and 1 November 2015 was too speculative to justify or permit the award of material damages.

18. The Tribunal reached the same conclusion on the award of material damages in other similar cases where staff members had different personal circumstances, some of whom were in a position similar to the Applicant since they had not been appointed to a position at the higher level between the 2013 and the 2014 Promotions Sessions (see *Natta* UNDT-2016-033, *Muftic* UNDT-2016-031, *De la Varga Fito* UNDT-2016-055, *Landgraf* UNDT-2016-056, *Verma* UNDT-2016-043 and *Tsoneva* UNDT-2016-049). In each of these cases, the Tribunal found that it was too uncertain that the staff members would be promoted and appointed to a more senior position before the next promotion session takes place to award them material damages.

19. It is not disputed that the procedural flaws identified in *Rodriguez-Viquez* in respect of the Second Round of the 2013 Promotions Session for candidates for promotion to the P-5 level also vitiated the consideration of candidates to the D-1 level and thus impacted on the Applicant's chances to be promoted. Again, it is difficult to ascertain the chances that the Applicant had to be promoted but it is uncontested that they were significant. The Tribunal thus rescinds the contested decision.

20. Pursuant to art. 10.5(a) of its Statute, the Tribunal must set an amount that the Organization may elect to pay in lieu of rescinding the decision since it concerns a promotion. The Tribunal is aware that the Applicant's objective in challenging the decision not to promote her was not to obtain money but rather to obtain justice and a fair chance to be considered for promotion, as she clearly explained during a case management discussion held on 20 February 2018. However, the Tribunal does not have the power to force the Organization to rescind a decision when it concerns a promotion and it must set an amount that the Organization may elect to pay in the

alternative. Neither can the Tribunal grant a promotion itself, as this type of decision falls within the discretion of the Organization.

21. In calculating the *quantum*, the Appeals Tribunal has stressed that the determination of the “compensation in lieu” must be done on a case-by-case basis and carries a certain degree of empiricism (see *Mwamsaku* 2011-UNAT-265). In respect of decisions denying promotions, it further held that “there is no set way for a trial court to set damages for loss of chance of promotion and that each case must turn on its facts” (see *Sprauten* 2012-UNAT-219, para. 22; *Niedermayr* 2015-UNAT-603).

22. The Tribunal also stresses that setting the amount of compensation in lieu under sec. 10.5(a) of its Statute is different from calculating material damages under sec. 10.5(b). Compensation in lieu seeks to compensate staff members for the fact that the Organization will not rescind a decision taken in violation of their terms and conditions of employment, as would otherwise be the case, and not to compensate a specific harm which must be supported by evidence. In this respect, the difference of salary between the current level of the Applicant and the one she would obtain if promoted is relevant in calculating the quantum but not determinative. Indeed, the quantum of the compensation in lieu in *Rodriguez-Viquez* was established based on compensation awarded in similar cases by the Appeals Tribunal and the Dispute Tribunal, and not by a mere calculation of the difference of salary. It is further noted that all staff members who challenged the decision not to promote them during the 2013 Promotions Session were awarded CHF6,000 as compensation in lieu of rescission.

23. Having reviewed the arguments presented by the parties, the Tribunal sees no cogent reason to depart from the approach adopted in *Rodriguez-Viquez*, nor to set a different amount of compensation in lieu in the present case, which involves similar circumstances. Given the numerous and fundamental errors committed in the Second Round of review, the Applicant’s progression to the Third Round does not entail that she had better chances of being promoted in the course of this comparative assessment. Her individual rankings by the SPP during the Second Round, which were also used in the Third Round, go from one end of the spectrum

to the other, as one panel member ranked her 2^d out of 49 female candidates and another ranked her 46th. For the same reasons that they cannot be used to justify the decision not to select her for promotion, these ratings cannot be used either to substantiate the Applicant's argument that she had better chances to be promoted as she advanced to the Third Round.

24. Also, akin to Mr. Rodriguez-Viquez, the Applicant was eligible for promotion the following year, as the Promotions Policy was still in force at the time. Thus, the contested decision had an effect on her career prospects limited to one year. In this connection, the Tribunal finds the Applicant's argument that the effects of the unlawful decision are amplified due to the fact that she is close to retirement unpersuasive. The Applicant, born on 18 December 1960, was 54 years old at the time of the contested decision, thus she still had 6 years before she could retire (at the normal retirement age of 62) or 9 years before the mandatory age of separation, which is 65. Her ability to compete again for a promotion to the D-1 level in the next promotions session, at the end of 2015, was thus not affected by any forthcoming retirement.

25. The Applicant's argument that she had a better chance of promotion as a female candidate is also unpersuasive. Although the Tribunal found in *Rodriguez-Viquez* that the High Commissioner erred in limiting the number of promotion slots awarded to women to 50% and in dividing the candidates by gender, it has not been established that more than 50% of the promotions slots to the D-1 level should have been awarded to women and thus, that women had more chances than male candidates of being promoted. As pointed out by the Respondent, the Tribunal made no difference between male and female candidates in its previous awards of compensation in lieu.

26. As to the Applicant's request to be awarded material damages equivalent to the difference of her salary at the P-5 level and the one she would have received at the D-1 level, the Tribunal finds that the reasoning developed in *Rodriguez-Viquez* and other similar cases equally applies to the present case. If the Respondent elects not to rescind the contested decision, any loss of salary during the one-year period

from the contested decision to the following promotions session will be compensated by the payment of the compensation in lieu.

27. In turn, it is acknowledged that the rescission of the contested decision, if the Respondent chooses to do so, would not compensate the Applicant's alleged loss of salary, as any promotion would become effective only at the time of appointment to a position at the higher level. However, the Tribunal finds, as it previously did in similar cases, that any possible loss of salary is too speculative to justify the award of material damages, considering that it is uncertain that the Applicant would have been granted a promotion. It is also uncertain that she would have been appointed to a D-1 position before the next promotions session, and that the appointment process would have, in any event, taken some time. In this respect, the Tribunal has no evidence before it to support the Applicant's assertion that it is "very likely" that she would have been placed, at least by now, on a higher position had she been successful in the 2013 Promotions Session. Firstly, the Tribunal is only concerned with a placement at the higher level until the 2014 Promotions Session, which gives a new chance to be promoted and, secondly, the evidence shows that the Applicant has not been appointed to a D-1 position before the 2014 Promotions Session, nor until now. There is no objective element that would allow this Tribunal to conclude that the Applicant had a particular chance to be appointed to a D-1 position between the 2013 and 2014 Promotions Sessions.

28. As to the Applicant's claim for moral damages, the Tribunal notes that she has provided no evidence of harm, as required by art. 10.5(b) of the Tribunal's Statute. Thus, her claim must be rejected.

Conclusion

29. In view of the foregoing, the Tribunal DECIDES:

- a. The contested decision denying the Applicant a promotion to the D-1 level is hereby rescinded;
- b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant CHF6,000;

- c. The aforementioned compensation in lieu of rescission shall bear interest at the United States prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and
- d. All other claims are rejected.

(Signed)

Judge Rowan Downing

Dated this 28th day of August 2018

Entered in the Register on this 28th day of August 2018

(Signed)

René M. Vargas M., Registrar, Geneva