



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

MUFTIC

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Elizabeth Brown, UNHCR

Jan Schrankel, UNHCR

Note: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the Dispute Tribunal.

Introduction

1. By application filed on 16 January 2016, the Applicant, a now retired staff member of the United Nations High Commissioner for Refugees (“UNHCR”), contests the decision of the High Commissioner, notified on 16 November 2015, not to promote him from the P-4 to the P-5 level during the 2014 Promotions Session.

2. The Respondent conceded that the Applicant’s candidacy for promotion to the P-5 level during the 2014 Promotions Session was not given full and fair consideration. The 2014 promotion exercise for candidates to the P-5 level was vitiated by the same procedural irregularities as those identified in this Tribunal’s Judgment *Rodriguez-Viquez* UNDT/2016/030 in respect of the 2013 promotion exercise. It is thus not disputed that the contested decision was unlawful.

3. Consequently, the Tribunal shall limit its considerations to the issue of remedies. A hearing in this respect was held on 4 December 2018, jointly with two other cases, namely Cases Nos. UNDT/GVA/2016/028 (*Tsoneva*) and UNDT/GVA/2017/003 (*Natta*), which also concern the 2014 Promotions Session and thus raise a number of common issues. The Applicant testified and presented oral submissions. By Order No. 203 (GVA/2018) of 7 December 2018, the parties were also allowed to file additional documents and submissions in respect of remedies. The Respondent and the Applicant filed additional evidence on 21 and 26 December 2018, respectively. The Applicant filed additional submissions on 8 January 2019 and the Respondent replied on 16 January 2018, as directed by the Tribunal.

Facts

4. The Applicant joined UNHCR in April 1993 as a Repatriation Officer at the P-3 level in Addis Ababa, Ethiopia under a short term appointment. This was followed by a further short term appointment and then by an appointment in September 1995 as a Programme Officer at the P-3 level in Jijiga, Ethiopia. The Applicant was subsequently reassigned to serve as a Repatriation Officer at the

same level. The Applicant was later reassigned in July 1999 to Pretoria, South Africa as a Regional Durable Solutions Officer, remaining at the P-3 level. In January 2000, the Applicant received an indefinite appointment. From July 2000 to August 2001, the Applicant acted as Assistant Representative in Pretoria at the P-4 level. He was in receipt of a Special Post Allowance (“SPA”) during this period. In November 2003, the Applicant was reassigned to Adjumani, Uganda as a Head of Sub-Office. He was in receipt of an SPA. He was promoted to the P-4 level in December 2004. From July 2005, he served as Head of Sub-Office in Moyo, Uganda at his substantive level of P-4. From January 2007 until his retirement on 31 July 2016, the Applicant served in a number of posts at the P-4 level. He was rehired in November 2016, until 1 February 2017, on a temporary basis as a Senior Administrative Officer at the P-4 level.

5. On 7 May 2015, the Applicant was advised that he was eligible for promotion to the P-5 level during the 2014 Promotions Session conducted under the Policy and Procedures for the Promotion of International Professional Staff Members (UNHCR/HCP/2014/2), promulgated by the High Commissioner on 5 February 2014 (“Promotions Policy”). The Applicant was also advised that he met the criteria for the First Round of evaluations as he had twice the minimum seniority in grade. He was thus automatically forwarded to the Second Round of evaluations by the Senior Promotions Panel (“SPP”). The Promotions Policy provided for three rounds of evaluations. The High Commissioner had decided that 46 slots would be available for promotion to the P-5 level, which were to be equally shared between female and male candidates.

6. During the Second Round of evaluations, the Applicant’s candidacy was subject to a comparative assessment by the six-member SPP. Male and female candidates were evaluated separately. The 160 male candidates were ranked by each of the SPP members based on criteria related to performance, managerial accountability and exemplary leadership qualities, determined based on a review of their fact sheets. As the Applicant was not ranked in the first 46 male candidates, being double the number of slots available for male candidates, his application did not proceed to the Third Round of evaluations.

7. By memorandum dated 13 November 2015, but distributed on 16 November 2015, the High Commissioner advised of the names of those promoted to the P-5 level. The Applicant was not promoted.

8. The Applicant requested some clarification concerning a number of matters, following which he submitted a recourse application on 23 December 2015. The Applicant was advised on 22 July 2016 that he was not successful in his recourse application.

9. On 19 September 2016, the Applicant requested management evaluation of the decision not to promote him to the P-5 level, to which he received a response on 6 December 2016. This letter, filed as Annex 9 to the application, was initially excluded from the case file by Order No. 12 (GVA/2017) of 17 January 2017, as it contained an offer of settlement that shall be kept confidential. However, upon review of the whole case file and further consideration, the Tribunal has decided to include it in the file, given that it is the only response that the Applicant received to his request for management evaluation and that applicants before the Tribunal are required to produce with their application the response to their request for management evaluation.

Parties' submissions

10. The Applicant's principal contentions are:

- a. He had anticipated that UNHCR management would have annulled the results of the 2013 and 2014 Promotions Sessions after the Tribunal had ruled against the Respondent in respect of the procedures used in the 2013 Promotions Session. Instead of doing this, UNHCR cancelled the 2015 Promotions Session, leaving him no possibility to apply for a promotion. On 1 July 2017, a new promotion framework was promulgated. However, this was of no assistance to him as he had retired in 2016. He was thus denied the opportunity to recover his position following the procedural errors made in the 2014 Promotions Session;

b. He has been deeply hurt by mistreatment he received during the Promotions Session. He was not recognised, validated or acknowledged for the amount and quality of his work. This failure violated his rights. Furthermore, offers were made to him to resolve the matter, but they were all of no effect as they were all work related and he had retired before they were made;

c. He was evaluated for the 2014 Promotions Session without his performance appraisal, also known as an “e-PAD”, being included for a four-month period in 2014 due to a change of supervisors for a part of the year. Had the relevant e-PAD been available for the 2014 Promotions Session, he would have been promoted;

d. The Applicant asked for higher compensation than the one he was awarded by this Tribunal in respect of the 2013 Promotions Session as he had no other chance for promotion;

e. In particular, he seeks the following remedies:

i. Rescission of the contested decision with a retroactive grant of promotion, including payment of increased salary and benefits;

ii. In the alternative, compensation equivalent to the difference in salary between his salary for the last month prior to his retirement and his salary on promotion, for two years from the time of the contested decision;

iii. Compensation for moral injury for grave breaches of staff rights and emotional distress pursuant to *Asariotis* 2013-UNAT-309;

iv. Maximum punitive damages plus pre-judgement interest upon the foregoing pecuniary damages with interest at the United States prime rate, accruing from the date each salary payment would have been made, compounded semi-annually;

v. Financial compensation for material damages taking into consideration his eligibility for promotion as of 2009 and “lack of recognition of merits for the wellbeing and prosperity of the [United Nations] and UNHCR for the last 23 years in different positions and functions, as well as complete disregard of the proper geographical distribution of the promotion slots”; and

vi. Post-judgement interest upon all of the foregoing amounts accruing at the United States prime rate from the date of judgement, and United States prime rate plus 5% through any period of unsuccessful appeal, compounded semi-annually.

11. The Respondent’s principal contentions are:

- a. Promotion is no longer possible as the Applicant has retired;
- b. The Tribunal’s judgments in respect of the 2013 Promotions Session were yet to be issued when the contested decision was taken. After the issuance of the judgments, the Respondent immediately took the necessary measures to review its promotions system, drawing lessons from the Tribunal’s holdings. This exercise resulted in the adoption of a new rank-in-person system following extensive consultations;
- c. The Tribunal does not have the power to grant the requested promotion as it is a discretionary matter in respect of which the Tribunal has no power to substitute its views for the discretion of others. The Respondent referred in this connection to *Muftic* UNDT/2016/031, paras. 156 and 164, citing *Sanwidi* 2010-UNAT-084 and *Abbassi* 2011-UNAT-110;
- d. Some compensation would be payable to the Applicant in lieu of rescission of the contested decision. This compensation must be assessed on a case-by-case basis. The Respondent referred to the judgments *RodriguezViquez* UNDT/2016/030, *Muftic* UNDT/2016/031, *Natta* UNDT/2016/033, *Spannuth Verma* UNDT/2016/043, *Tsoneva* UNDT/2016/049, *De la Varga Fito* UNDT/2016/055 and *Landgraf*

UNDT/2016/056, where the Tribunal set an alternative amount to rescission at CHF6,000 given the extreme difficulties in ascertaining the chances of promotion;

e. The Respondent acknowledged that the discontinuation of personal promotions and their replacement by a rank-in-post system may affect the quantum of compensation in lieu of rescission in the present case, as the Applicant has retired and was thus unable to compete for higher level positions under the new system. This should be balanced against the fact that the Applicant had never been selected for a P-5 position. The case of *Mebtouche* UNAT-2010-033, where the Appeals Tribunal set the amount of compensation to three months' net base salary in similar circumstances, is a relevant precedent. This would be more than the difference in salary for two years requested by the Applicant but the Respondent is prepared to pay it. The impact on the Applicant's pension would, in turn, require very complicated actuary calculations;

f. No material damages should be paid as the reasoning previously adopted by this Tribunal in *Muftic* applies *mutadis mutandis*;

g. In respect of moral damages, evidence needs to be submitted and no proper evidence has been submitted;

h. The Tribunal does not have the power to award punitive damages; and

i. The interests claimed by the Applicant would be excessive and unjustified.

Consideration

12. The Tribunal's power regarding the award of remedies is 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.

13. In *Rodriguez-Viquez*, the Tribunal examined the award of compensation for a candidate for promotion to the P-5 level in the 2013 Promotions Session, who was eliminated in the Second Round of evaluations. 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, in that case 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.

14. 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 were also repeated in the 2014 Promotions Session. It is, however, difficult to actually ascertain the precise chances that the Applicant had to be promoted but is uncontested that they were significant.

15. At the hearing, the Applicant asked the Respondent to advise of the number of people who had been promoted in the last two years before their retirement, as such promotions are given immediate effect, without the staff member having to await a posting at that level. An order of the Tribunal was made to give effect to the request. In response to the order, Counsel for the Respondent advised the Tribunal that there were eight staff members who were promoted within two years of their retirement age among those candidates who were promoted during the 2014 Promotions Session. These statistical data further sustain the position that the Applicant had a significant chance to be granted a promotion to the P-5 level, with immediate effect.

16. The Tribunal consequently rescinds the decision not to promote the Applicant to the P-5 level.

17. The Applicant has asked for “promotion through UNDT decision”. The Tribunal acknowledges that the Applicant was motivated in his challenge to the contested decision by a desire to have his work recognised at the end of his career and had hoped that his sustained efforts would lead to getting a promotion to the P-5 level prior to his retirement. He was highly disappointed by the outcome of his challenge to the 2013 Promotions Session, which resulted in a payment in his favour of CHF6,000. He did not even accept the payment he was entitled to, stressing that his purpose in initiating proceedings against the decision denying him a promotion was not to get financial compensation. That being said, it remains that the Tribunal has no power to grant the Applicant a promotion to the P-5 level, notwithstanding the admitted flaws in the procedures that resulted in an invalid decision. The granting of a promotion falls within the discretion of the Organization. The Tribunal has no power to exercise it.

18. 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. 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).

19. The Applicant requested in his application compensation equivalent to the difference in his salary at the last month prior to his retirement and that which he would have received had he been promoted, for a period of two years. According to the Respondent, this would amount to USD7,774. The Applicant also stated in his testimony that the contested decision impacted on his pension, although he is not in a position to calculate the actual impact. Counsel for the Respondent similarly acknowledged that assessing the impact of the loss of an opportunity for promotion on the Applicant’s pension would require complex actuarial calculations and stated that it was prepared to pay compensation in the amount of three months’ net base salary, based on the Appeals Tribunal’s jurisprudence in *Mebtouche*, even if this is more than what is asked by the Applicant.

20. The Tribunal 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). The Tribunal is mandated by its Statute to set an amount of compensation that the Respondent may elect to pay in lieu of rescinding the decision when the latter concerns, *inter alia*, a promotion. Even if the Applicant did not ask for any compensation in lieu under sec. 10.5(a), the Tribunal must set one. The Tribunal is therefore of the view that it is not bound by the request made by the Applicant and may award more, unlike compensation for harm under sec. 10.5(b). The concession made by Counsel for the Respondent in this case to pay more than what is actually requested by the Applicant under this heading of remedy also warrants consideration and further justifies the Tribunal not to limit itself to the Applicant’s claim.

21. The Tribunal also recalls that compensation in lieu seeks to compensate staff members for the fact that the Organization will not rescind, or in this case, cannot practically rescind a decision taken in violation of their terms and conditions of employment, as would otherwise be the case. It does not seek to compensate a specific harm which must be supported by evidence. In this respect, the difference

of salary between the level of the Applicant at the time of his retirement and the one he may have obtained had he been 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, including the Applicant, were awarded CHF6,000 as compensation in lieu of rescission (see *Rodriguez-Viquez; Natta; Muftic; De la Varga Fito; Landgraf; Spannuth Verma* and *Tsoneva*).

22. Notwithstanding the damages awarded to staff members in respect of the 2013 Promotions Session, the Applicant is in a different position from that which he was in following the 2013 Promotions Session, as he has now retired. The 2014 Promotions Session was the last one conducted under the Promotions Policy, which was abolished and replaced by a rank-in-post system. The Tribunal notes that the 2015 Promotions Session, initially planned for mid-2016, was cancelled. Therefore, the Applicant did not have any further opportunity for promotion under the Promotions Policy and he retired before the new rank-in-person system took effect on 1 September 2017.

23. The Tribunal is specifically guided in this case by the decision in *Mebtouche* UNAT-2010-033, which is substantially on point as it concerns the compensation awarded to a retired UNHCR staff member in lieu of the rescission of the decision not to promote him to the D-1 level during the 2007 Promotions Session. In that case, the reasoning of which demonstrates the difficulty in expressing the rationale behind the computation of damages in cases of this kind, the Appeals Tribunal made the following observations and conclusions:

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 [francs] 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.

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.

24. The Tribunal, taking all of the circumstances into consideration, sets the payment of compensation in lieu of rescission at three months' net base salary at the time of the Applicant's date of retirement, net salary being the gross salary less the staff assessment.

25. The Applicant has also requested financial compensation by way of material damages "taking into consideration the eligibility as of 2009 and the lack of recognition of merits for the well-being and prosperity of the UN and the UNHCR for the last 23 years in different positions and functions, as well as complete disregard of the proper geographical distribution of promotions slots".

26. The Tribunal emphasises that it can only entertain the Applicant's claim for material damages insofar as it relates to a prejudice stemming from the contested decision, namely the decision of 16 November 2015 not to promote him to the P-5 level. In this context, the only material damage that may be considered would relate to a loss of the additional salary he would have received had it not been for the contested decision.

27. Given the fact that the Applicant has now retired, the Respondent will necessarily have to pay him compensation in lieu of rescinding the contested decision. In line with previous jurisprudence, the amount awarded under art. 10.5(a) of the Statute as compensation in lieu of rescinding the decision must be considered as compensation for loss of salary, including pension, due to the denial of promotion (see *Tsoneva* UNDT-2010-178; para. 44; *Mutata* UNDT-2009-044; *Andersson* UNDT-2012-091, quoted in *Rodriguez-Viquez*, para. 174).

28. In any event, the chances of the Applicant getting a promotion are too difficult to assess in order to allow for the quantification of any material damage. The Tribunal recalls in this connection that the Applicant would not be entitled to

compensation for loss of salary but rather for the loss of an opportunity, which is assessed based on the staff member's chances to get promoted.

29. The Applicant also requested an award of compensation for moral damages, under sec. 10.5(b) of the Tribunal's Statute. As the Appeals Tribunal recently recalled in *Kebede* 2018-UNAT-874, "compensation for harm shall be supported by three elements: the harm itself; an illegality; and a *nexus* between both". The Appeals Tribunal further held in this judgment as to the nature of the evidence required that:

[G]enerally speaking, a staff member's testimony alone is not sufficient as evidence of harm warranting compensation under Article 10(5)(b) of the UNDT Statute. The testimony of an applicant in such circumstances needs the corroboration of independent evidence (expert or otherwise) to support the contention that non-pecuniary harm has occurred. Much will depend on the circumstances of the situation at hand, as the existence of moral damages shall be assessed on a case-by-case basis (references omitted).

30. It is very clear to the Tribunal that the Applicant was a hard working staff member of UNHCR. It appears from his e-PAD on the case file that, indeed, he has been an excellent international civil servant, who has shown very many years of significant dedication to his work. It is equally apparent from his testimony at the hearing that he has been greatly hurt by the procedural errors, which have had a very direct impact upon his ability to be promoted.

31. The Applicant testified that he started to work as a refugee and that his work was "something beyond employment". He served on several hardship duty stations, where he got malaria and put his life in danger. He was always told that he was performing well. He retired after 23 years of service, having been only promoted once. He explained how he felt unfulfilled at the end of his career and bitter. He felt that he was not an example for his children, including his daughter who had already reached a higher level at the age of 33. After his retirement, he stopped seeing all his colleagues as he did not feel well. He felt that he exited the Organization "through the small door". He also stated that the challenges he brought made him feel "unequal". He said that it was "difficult to quantify the shame of being told by

a D-1 colleague that he went to the Tribunal and did not get promoted” but got money. He did not take the compensation as this is not why he started this process, which had drained him to a point where he wonders why he was doing it. Ultimately, it was for the recognition of his work, which he still did not get. He concluded his submissions by saying:

At the end of this process, from the promotion sessions, appeal, Tribunal decision, and remedial actions, I leave with a feeling that the Organization for which I dedicated 23 years of life does not see me as human being. I am not recognized as a colleague to whom injustice was done, but rather as a “foot soldier” who was “collateral damage”.

32. The Applicant claims that the frustration and anguish caused by the contested decision led him to develop a high blood pressure condition, or at the very least, contributed to it. He acknowledged that it is difficult to identify the trigger for his condition but stated that he was stressed, particularly prior to his retirement when he realised that his hope that things may end up differently did not materialise.

33. The Applicant provided a medical report from a doctor he consulted at UNHCR attesting of a high blood pressure condition and frequent headaches for which he consulted starting in 2014. According to the report, the Applicant was diagnosed with “borderline hypertension throughout the years 2015 and 2016, and finally was started on antihypertensive therapy in October 2016 with a good control of his blood pressure since April 2017”. Given that the contested decision was taken in November 2015 and although it was the culmination of a long challenge process, the Tribunal is not able to establish a sufficient nexus between the Applicant’s high blood pressure and the contested decision.

34. The Tribunal, in turn, finds that the Applicant has credibly established through his testimony at the hearing that the contested decision caused him great stress and anguish. However, in light of the Appeals Tribunal’s jurisprudence, this Tribunal, unfortunately in this case, has no power to award the Applicant the requested moral damages based solely on his oral testimony, without any corroborative evidence.

35. The Applicant also seeks punitive damages. Article 10.7 of the Tribunal's Statute expressly prevents such damages being awarded, stating that "[t]he Dispute Tribunal shall not award exemplary or punitive damages." This claim must therefore be rejected.

Conclusion

36. In view of the foregoing, the Tribunal orders:

- a. The contested decision denying the Applicant a promotion to the P-5 level is hereby rescinded;
- b. Should the Respondent elect to pay financial compensation instead of effectively rescinding the decision, he shall pay the Applicant an amount equivalent to three months' net base salary, being the gross salary less staff assessment, at the time of the Applicant's retirement;
- 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;
- d. Paragraphs 32 and 33 hereof shall be redacted in the public version of this judgment so as not to disclose details of the medical evidence. The Respondent may only refer to the redacted material insofar as it may be necessary in respect of any appeal and shall not make such information publicly available;
- e. Annex 9 to the application shall be included in the case file; and
- f. All other claims are dismissed.

Case No. UNDT/GVA/2017/002

Judgment No. UNDT/2019/035/Corr.1

(Signed)

Judge Rowan Downing

Dated this 28th day of February 2019

Entered in the Register on this 28th day of February 2019

(Signed)

René M. Vargas M., Registrar, Geneva