



**Before:** Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

NATTA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Elizabeth Brown, UNHCR

Jan Schrankel, UNHCR

## **Introduction**

1. By application submitted by email on 15 January 2017 and filed through the Tribunal's e-filing system on 19 January 2017, the Applicant, a 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. The Tribunal shall thus limit its consideration 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/2017/002 (*Muftic*), 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. 204 (GVA/2018) of 7 December 2018, the parties were also allowed to file additional documents and submissions in respect of remedies. The Respondent filed additional evidence on 21 December 2018, as directed by the Tribunal.

## **Facts**

4. The Applicant joined UNHCR in July 1988, as an Assistant Program Officer in Kuala Terengganu, Malaysia, at the P-1 level. He then had a number of promotions and was relocated on several occasions. He was appointed to different positions at the P-4 level from September 1997 and was promoted to that level on 1 January 2000.

5. After a short period of paid leave of absence pending posting, he was temporarily assigned in February 2013 as Assistant Representative (Protection) at the P-5 level in Kabul, Afghanistan. In April 2013, he was confirmed in the position

and remunerated at the level of the post. In September 2015, the Applicant was temporarily assigned as Senior Protection Officer at the P-4 level in Geneva. From October 2016 to January 2017, the Applicant performed the functions of Senior Protection Coordinator (Emergencies) at the P-5 level. As of the time of the Respondent's reply in February 2017, the Applicant was on paid leave of absence pending posting since January 2017.

6. 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 moved on 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.

7. 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.

8. 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. On 30 December 2015, the Applicant submitted a recourse application. The Applicant was advised on 22 July 2016 that he was not successful in his recourse application.

9. The Applicant filed a request for management evaluation on 19 September 2016, to which he never received a response.

**Parties' submissions on remedies**

10. The Applicant's principal contentions are:

- a. He expected 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. He also expected that the High Commissioner would grant him a promotion following the outcome of his application to the Tribunal in respect of the 2013 session as he was one of those who demonstrated that the system was flawed;
- b. He did not take the amount awarded to him in respect of the 2013 Promotions Session and any award by way of remedy this time should be high enough to prevent the perpetuation of unlawful acts;
- c. He suffered emotional distress when seeing colleagues promoted while he was serving for two and a half years at the P-5 level in Afghanistan; and
- d. He requested in his application rescission of the decision or compensation for the loss of opportunity, together with moral and material damages. In his final submissions to the Tribunal, he requested that the Tribunal grant him the promotion he was denied due to the faulty processes of the Respondent.

11. The Respondent's principal contentions are:

- a. 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;
- b. Some compensation would be payable to the Applicant in lieu of rescission of the contested decision. Since the Applicant will have the opportunity to compete for positions at the P-5 level under the new

rank-in-post system, the compensation should be similar to that granted to the Applicant and other colleagues in respect of the 2013 Promotions Session, namely CHF6,000, or at most the difference of the Applicant's current salary and that he would receive at the P-5 level, for two years, which would be around CHF7,000;

c. No material damages should be paid in light of the Tribunal's previous finding in *Rodriguez-Viquez* that "the only damages that may be considered would relate to a loss of the additional salary [the Applicant] would have received had it not been for the contested decision" and that its computation was dependent upon whether and when any such promotion would take place, leading to the conclusion that "any possible loss of salary for the year following [the date of the Decision] is too speculative to justify or permit the award of material damages"; and

d. In respect of moral damages, evidence needs to be submitted and none has been submitted.

### **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. The Tribunal rejected the Applicant's claim in *Rodriguez-Viquez* 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 only be 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).

15. 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.

16. 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 in the present case since they had not been appointed to a position at the higher level between the 2013 and the 2014 Promotions Sessions (see *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 those 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 took place to award them material damages.

17. 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. Whilst it is difficult to actually ascertain the chances that the Applicant had to be promoted, it is uncontested that they were significant. The Tribunal consequently rescinds the decision not to promote the Applicant to the P-5 level.

18. 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 towards the end of his career and had hoped that his sustained efforts would lead to getting a promotion to the P-5 level. 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 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.

19. The above 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.

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. 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).

21. 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, 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.

22. In this respect, the difference of salary between that of the Applicant at his current level and the one he would have had 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*).



23. Having reviewed the arguments presented by the parties, the Tribunal sees no cogent reason to depart from the general approach adopted in *Rodriguez-Viquez*, noting that the Applicant is in a position where he can still apply for positions at the P-5 level and thus get a promotion through the new rank-in-post system. However, the Tribunal also notes that the Applicant was denied the opportunity to be promoted for effectively two years, as the 2015 Promotions Session was cancelled and the new system was not introduced until September 2017. Thus, the Tribunal sets the amount of compensation at CHF12,000 clear of any deductions. The Tribunal also takes notice of the statement by Counsel for the Respondent that she would raise the Applicant's situation with senior management.

24. The Applicant requested an award of material damages. However, he did not substantiate his claim nor produced any evidence. In any event, such an award would be limited to compensation for a loss of opportunity to receive a salary at the higher level, for the period between the contested decision and the commencement of the new rank-in-post system, pursuant to which the Applicant could be selected to a position at the P-5 level and thus be promoted. In this context, the reasoning developed in *Rodriguez-Viquez* and other similar cases recalled at paras. 14 to 16 above would equally apply to the present case and no award of material damages could be granted as these are too speculative.

25. The Applicant also requested an award of moral damages for emotional distress. He explained in his testimony at the hearing how he felt humiliated when seeing colleagues being promoted without having served at the higher level, whilst he had done so for two years and a half in Afghanistan, in a mission that was awarded the "operation of the year" in 2015. He explained his despair as his long-serving work in difficult field conditions was not recognised, and being asked by colleagues why he had not been promoted. He felt that he was retaliated or discriminated against for having filed an application in respect of the 2013 Promotions Session since, after that, he was no longer allowed to serve at the P-5 level, except for one month.

26. He concluded that "all these facts have also affected [his] wife, daughter and son which have suffered the consequences. They have now lost confidence in the

United Nations”. This is unfortunate, as the Tribunal has formed a view that the Applicant is an international civil servant who has demonstrated adherence to the mission of the Organization in a most dedicated and ethical manner.

27. The Tribunal appreciates the frustrations of the Applicant in respect of his non-promotion, given his commitment to the Organization over many years and two successful challenges before the Tribunal. However, art. 10.5(b) of the Tribunal’s Statute requires that any compensation for harm be supported by evidence. The Appeals Tribunal has additionally determined that the Tribunal cannot award moral damages solely based on an applicant’s testimony, and required “corroboration of independent evidence (expert or otherwise) to support the contention that non-pecuniary harm has occurred” (*Kebede* 2018-UNAT-874). No such corroboration has been provided. The Tribunal is thus not in a position to make an award in respect of the moral damage asserted by the Applicant.

### **Conclusion**

28. 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 of CHF12,000;
- 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

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d. All other claims are rejected.

*(Signed)*

Judge Rowan Downing

Dated this 7<sup>th</sup> day of March 2019

Entered in the Register on this 7<sup>th</sup> day of March 2019

*(Signed)*

René M. Vargas M., Registrar, Geneva