



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

TSONEVA
(now Angelova)

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Elizabeth Brown, UNHCR

Jan Schrankel, UNHCR

Introduction

1. By application filed on 2 May 2016, the Applicant, now a retired staff member of the United Nations High Commissioner for Refugees (“UNHCR”), contests the decision issued by the High Commissioner on 16 November 2015 not to promote her 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 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/2017/002 (*Muftic*) 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 at the hearing. By Order No. 202 (GVA/2018) of 7 December 2018, the parties were also allowed to file additional documents and submissions in respect of remedies. The Applicant filed evidence on 4 and 10 December 2018, as did the Respondent on 21 December 2018. The Respondent filed additional submissions on 16 January 2018 and 27 February 2018, as directed by the Tribunal.

Facts

4. The Applicant joined UNHCR in September 2000 as a Protection Officer at the P-3 level. In December 2007 the Applicant was appointed to the position of Senior Contracts Officer, UNHCR, at the P-4 level. Her promotion to this level was effective 1 November 2009. The Applicant’s post was discontinued in August 2012. In the same month she was temporarily assigned as a Senior Contracts Officer to the Regional Bureau for Asia and the Pacific, UNHCR, based in Geneva. In March 2014 she was temporarily assigned as Senior Legal Officer to the UNHCR Staff Council in Geneva. From January to July 2015 the Applicant was temporarily

assigned as Policy Officer within the Division of Human Resources Management, UNHCR, in Geneva, returning in August of that year to a temporary assignment as Senior Legal Officer with the UNHCR Staff Council. The Applicant retired from UNHCR on 31 October 2018.

5. On 7 May 2015, the Applicant was advised that she 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 Commission on 5 February 2014 (“Promotions Policy”). 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. On 3 July 2015, the Applicant was advised that she fulfilled the requirements to advance from the First Round to the Second Round of evaluations.

7. 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 161 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. As the Applicant was not ranked amongst the first 46 female candidates, there being double the number of slots available for female candidates, her application did not proceed to the Third Round of evaluations.

8. On 16 November 2015, the decisions of the High Commissioner concerning the 2014 promotion exercise 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.

9. The Applicant submitted an application for recourse on 30 November 2015, pursuant to sec. 5.13 of the Promotions Policy. On 9 January 2016, she submitted a request for management evaluation of the decision not to promote her to the P-5 level.

10. On 18 March 2016, the Applicant was advised that her request for management evaluation was untimely as she should have waited the result of the recourse application. By an all-staff broadcast of 22 July 2016, the Applicant was informed that her recourse application had not been successful.

Receivability

11. The Respondent initially objected in his reply to the receivability of the application. However, at a case management discussion held on 5 October 2018 and through written submissions filed on 16 November 2018, the Respondent informed the Tribunal that he no longer challenged the receivability of the application. The Respondent again accepted liability, noting that the matter now only concerned consideration of an appropriate remedy.

12. The Tribunal is thus no longer concerned with the receivability of the application nor with the specific complaints of the Applicant as to the procedural flaws in the implementation of the Promotions Policy during the 2014 promotion exercise. It will therefore proceed to consider the remedies alone.

Parties' submissions

13. The Applicant's principal contentions in respect of remedies are:

- a. She requests rescission of the contested decision and an order from the Tribunal promoting her to the P-5 level. She claims that promotion through a decision from the Tribunal is the only solution given that the Promotions Policy had proven to be inefficient for two consecutive sessions. At the time of her application before the Tribunal, she was due to retire as of 1 March 2018 and thus her chances to be granted a promotion under the then applicable Promotions Policy were reduced to zero. In additional submissions filed at a later stage, she added that her chances to be promoted under the new rank in post system are even less, since the granting of promotions to all staff members occupying positions at the P-5 level on 15 August 2017, when the system was changed, left very few available positions at the P-5 level;

b. She also requests financial compensation for material damages considering her “eligibility as of 2012 and the lack of recognition of (her) merits for the wellbeing and prosperity of [the United Nations] and UNHCR for the last 25 years in different positions”;

c. In addition, she requests compensation for moral damages (frustration and denigration), including compensation for discrimination;

d. Although the Applicant initially asked the Tribunal not to set an amount of compensation that the Organization may elect to pay instead of rescinding the decision, she nevertheless argues that if the Tribunal decides to set such amount, the present case deserves an amount of compensation in lieu of rescission higher than that awarded in *Rodriguez-Viquez* as she has retired and is thus not able to seek promotion again; and

e. The Applicant further claims reimbursement for the costs of her trip from Warsaw to Geneva, being CHF304.12, to attend the hearing and the cost of her return trip from Geneva to Sofia in the amount of CHF 137.99.

14. The Respondent’s principal contentions are:

a. Promotion is no longer possible, as the Applicant has retired;

b. In any event, 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 refers in this connection to *Tsoneva* UNDT/2016/049, paras. 193-197 and *Sanwidi* 2010-UNAT-084;

c. The Respondent referred to judgments *Rodriguez-Viquez* 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 difficulty in ascertaining the chances of promotion. The sum set in compensation should not exceed that set in *Tsoneva*;

d. No material damages should be paid in light of the Tribunal's previous finding in *Tsoneva*, 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";

e. 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; and

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

Consideration

15. 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.

16. 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.

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. It is, however, difficult to actually ascertain the chances that the Applicant had to be promoted but 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 has no power to make such an order, notwithstanding the admitted flaws in the procedures that resulted in an invalid decision. The grant of a promotion itself falls within the discretion of the Organization. The Tribunal has no power to exercise it.

19. 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).

20. 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. In this respect, the difference of salary between the level of the Applicant at the time of her retirement and the one she may have obtained had she 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*).

21. Notwithstanding the damages awarded to staff members in respect of the 2013 Promotions Session, the Applicant is in a different position from that which she was in following the 2013 Promotions Session, as she 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 was cancelled so no Promotions Session was held in 2016. This further reduced the Applicant’s opportunity to be promoted.

22. Following the change of promotion system, the Applicant could apply and compete for positions at the P-5 level from 1 September 2017. This left her a very short window of 14 months before her retirement to apply for promotion after a new promotions framework entered into force on 1 September 2017. The Applicant stated that she did make a number of applications for positions at the P-5 level, but was not successful in getting an interview. The reality is that given her imminent retirement, it was unlikely she would have been promoted within the selection period for these positions, even if she had been interviewed.

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 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. Guided by the Appeals Tribunal's Judgment in *Mebtouche*, the Tribunal finds it appropriate to set the amount of compensation in lieu of rescission to three months' net base salary.

25. The Applicant has requested an award of material damages. She stated that due to her advanced step at the P-4 level, step 14, her promotion to the P-5 level would not have led to an increase of salary. She claims, however, that it would affect "in a long term" the amount of her pension. Given the fact that the Applicant

has now retired, the Respondent will necessarily have to pay her 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).

26. As to the Applicant's claim for moral damages, the Applicant credibly testified at the hearing held partly *in camera* of her ongoing frustration about repeated flaws in the implementation of the Promotions Policy, for two consecutive years, and the lack of effective remedies following her successful challenge to the decision not to promote her during the 2013 Promotions Session. As part of UNHCR Staff Council, she was at the centre of the staff members' grievances and actively took part in long-standing efforts to ensure fairness in the promotion process. She explained how she felt stressed and distressed about her lack of career prospects, the lack of recognition of her 16 years of work with UNHCR and the unfairness resulting from seeing colleagues being promoted under a flawed system. She stated that she decided to retire after having been at home in between assignments, given her lack of prospect to be appointed to a position.

27. The Applicant provided a medical report from a doctor she consulted at the UNHCR medical service [REDACTED]

[REDACTED]

28. The Tribunal notes that the period where the Applicant sought medial support post-dates the contested decision and the announcement of her unsuccessful recourse. It also corresponds to the moment where active discussions were held to revisit the promotions system given the significant flaws that had been identified

by the Tribunal in its judgments concerning the 2013 Promotions Session, delivered between 14 April 2016 and 6 May 2016, and their reoccurrence in the 2014 Promotions Session. The Applicant was actively engaged in this whole process, as a litigant in the 2013 and 2014 Promotions Sessions, and as a member of UNHCR Staff Council. The Tribunal finds that this medical evidence corroborates the Applicant's testimony about the stress and distress that she claims having suffered as a result of the decision not to promote her during the 2014 Promotions Session, which represented her last chance for promotion before she retired. The Tribunal therefore finds that the Applicant provided sufficient evidence of her moral damages and considers it appropriate to award her the amount of CHF3,000.

29. Additionally, the Applicant provided the Tribunal with details of a claim for the cost of her return flights from her home to Geneva in the sum of CHF442.11. The Tribunal notes that it did not order the Applicant to attend in person and that her appearance could have been efficiently undertaken through a video link. The Applicant elected to come in person and this is a matter at her expense.

Conclusion

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

- 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 Applicant shall also be paid moral damages in the amount of CHF3,000;

- d. The aforementioned compensation in lieu of rescission and the sum ordered to be paid for moral damages 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 30 days from the date this Judgment becomes executable;
- e. Paragraph 27 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; and
- f. All other claims are rejected.

(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