

UNDT/2016/031, Muftic

UNAT Held or UNDT Pronouncements

Standard of review: In the context of a promotion exercise conducted under a specific policy, the Tribunal's review is essentially focused on the implementation of the policy. It is not the Tribunal's role to examine whether a policy adopted by the Organization is well-founded or appropriate. However, a decision may be rescinded if it is taken pursuant to a policy which does not comply with a higher norm and the irregularity results in a staff member not being given full and fair consideration for promotion. The Tribunal cannot amend a policy adopted by the Organization but may "point out what it considers to be a deficiency" and "recommend a reform or revision" (Mebtouche 2010-UNAT-045, para. 11).

Gender: The separate consideration of male and female candidates for promotion at a stage prior to what is envisaged in the Promotions Policy constitutes a procedural error in the implementation of the Policy, irrespective of the fact that the Organization sought to achieve gender parity, which is in itself a legitimate objective. In providing that "[a]t grade levels where gender parity had not yet been achieved, at least 50% of the promotion slots will be awarded to substantially equally meritorious female staff", sec. 5.10.2 of the Promotions Policy did not set quotas for promotions to be equally shared between male and female candidates but provided for a minimum of 50% of the available slots for promotion to be awarded to women staff members if they were found to be "substantially equally meritorious" among the whole pool of candidates. Any effort towards achieving gender parity must comply with the requirement of the UN Charter that promotions be based on merit and materialize through the adoption of clear rules on promotions that reconcile these two principles before the annual promotion session, rather than through a request to the Division of Human Resources Management ("DHRM") to apply quotas.

Performance evaluations: The reference to "e-PADs" in the Promotions Policy must be read in the light of the performance appraisal system in force during the years under review, namely 2009 to 2013, which was the Policy for the UNHCR Performance Management & Appraisal System (IOM/087/2008-FOM/089/2008) ("PAMS"). The DHRM had no authority to decide that part of the e-PADs, namely the ratings provided by the supervisors,

would not be provided to the Senior Promotions Panel members, even if it considered that these may not be reliable. Extraneous factor: Given the DHRM's role in providing "technical advice and guidance on rules, regulations, policy and methodology" to the Senior Promotions Panel, its advice to the panel to take into consideration an extraneous factor for their assessment of the candidates constitutes an error in the implementation of the Promotions Policy, irrespective of whether or not the panel did actually consider this criterion. Ranking methodology: Where the Promotions Policy provides for a "comparative assessment and ranking" of the candidates for promotion, the DHRM could not introduce a ranking methodology that allowed the panel members to rank more than one candidate equally without considering the impact of such on the overall ranking of the candidates and setting out the methodology in an administrative. The instructions from the DHRM to the Senior Promotions Panel cannot be considered as binding absent any administrative issuance. Arbitrary process: Significant disparities between rankings provided by the six Senior Promotions Panel members to the same candidate without any enquiry by the DHRM and satisfactory explanation, coupled with the intrinsic difficulty and complexity of the task the panel members were asked to accomplish, are indicative of an arbitrary process, and entail that the presumption of regularity attached to the acts of the Administration is rebutted. Reasons for decision: The Administration satisfies its legal obligation to provide reasons for its decisions, as per *Obdeijn 2012-UNAT-201*, if such are provided in the course of a formal review process, unless a specific obligation arises from the relevant rules or administrative issuances. Rescission: The Tribunal may rescind a decision on promotion where the applicant meets the eligibility criteria but the errors in the review of his candidacy makes it impossible to evaluate his actual chance to be promoted in the context of a comparative assessment involving a large pool of candidates. Specific performance: Where the judicial review concerns the exercise of discretion, the Tribunal can order specific performance, such as granting a promotion, solely in the rare hypothesis where the result of the exercise of discretion is narrowed down in such a way that there is only one legally correct outcome. Moral damages: With the amendment to art. 10.5 of its Statute, the Tribunal can no longer draw an inference of moral injury from a fundamental breach of entitlements or due process rights, as was previously possible under *Asariotis 2013-UNAT-309*. The Tribunal may only award compensation for moral injury if the applicant sufficiently substantiates the moral harm suffered as a result of the contested decision. However, it is not compulsory to submit viva voce evidence of harm; such fact can be gathered and/or inferred from the pleadings and documents

produced by a party (Dahan UNDT/2015/053; Gueben et al. UNDT/2016/026). Applications filed after 21 January 2015 are governed by the amended version of art. 10.5 of the Tribunal's Statute, even if the contested decision was issued before, as the amendment does not affect substantive rights but rather entails a change to a procedural rule.

Decision Contested or Judgment/Order Appealed

The Applicant appealed the decision by the High Commissioner for Refugees not to promote him from the P-4 to the P-5 level during the 2013 Promotions Session. The UNDT found that the contested decision was unlawful on the grounds that 1) the Organization committed several procedural errors in the implementation of the UNHCR Policy and Procedures for the Promotion of International Professional Staff Members (UNHCR/HCP/2014/2) ("Promotions Policy"), some of which resulted in a failure to take into account relevant information or to take into account irrelevant considerations; and 2) the Organization failed to minimally show that the Applicant's candidacy for promotion received fair and full consideration. Consequently, the Tribunal rescinded the contested decision and set the amount of compensation in lieu of rescission at CHF6,000. The Tribunal rejected the Applicant's request for retroactive grant of promotion and his alternative request for the case to be remanded to the Organization with specific instructions, as well as his claim for material and moral damages.

Legal Principle(s)

N/A

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

Only spec. perform. (incl. rescission with \$ alt.)

Full judgment

[Full judgment](#)

Applicants/Appellants

Muftic

Entity

UNHCR

Case Number(s)

UNDT/GVA/2015/166

Tribunal

UNDT

Registry

Geneva

Date of Judgement

15 Apr 2016

Duty Judge

Judge Downing

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Compensation

Non-pecuniary (moral) damages

Discrimination and other improper motives

Gender

Staff selection (non-selection/non-promotion)

Selection decision

Standard of review (judicial)

Applicable Law

Other UN issuances (guidelines, policies etc.)

- UNHCR IOM 087/2008-FOM 089/2008 (Policy for the Performance Management
□ Appraisal System)
- UNHCR IOM 018/2007—FOM 019/2007 (Policy on Achieving Gender Equity in
UNHCR staffing)

Laws of other entities (rules, regulations etc.)

- UNHCR/HCP/2014/2 (Policy and Procedures for the Promotion of International
Professional Staff Members)
- UNHCR/HCP/2014/12 (UNHCR Policy on Performance Management)

Staff Regulations

- Regulation 1.1(d)

Staff Rules

- Rule 11.2

UN Charter

- Article 101.3

UNDT Statute

- Article 10.5
- Article 8.1(d)(i)(b)

Related Judgments and Orders

UNDT/2015/110
2011-UNAT-110
2012-UNAT-200
UNDT/2009/039
UNDT/2015/115
UNDT/2010/178
UNDT/2009/044
UNDT/2012/091
UNDT/2015/053
UNDT/2016/026
2011-UNAT-122
2014-UNAT-433
UNDT/2012/118
2013-UNAT-283
2012-UNAT-225
2012-UNAT-201
2011-UNAT-172
2011-UNAT-174
2011-UNAT-175
2010-UNAT-084
2012-UNAT-219
2015-UNAT-603
2010-UNAT-070
2010-UNAT-036
2010-UNAT-072
2011-UNAT-108
2013-UNAT-309
2014-UNAT-396
2014-UNAT-409
2014-UNAT-444