

UNDT/2016/049, Tsoneva

UNAT Held or UNDT Pronouncements

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. 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 However, a decision may be rescinded if it is taken pursuant to a policy which does not comply with a higher norm and the irregularity results in a staff member not being given full and fair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” (Mehtouche 2010-UNAT-045, para. 11). Principle of non-retroactive application of the law: The Administration can validly change its promotions policy and apply a new one for promotions sessions to be conducted after its adoption without violating the principle of non-retroactive application of the law. There is no legal entitlement to promotion based on set criteria stemming from the applicable rules or the staff members’ contract of employment. 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. The setting of quotas for promotion to be equally shared between male and female staff members unlawfully limit the number of promotion slots to be awarded to women to 50%. 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.

Conflict of interest: In accordance with General Assembly resolution 62/228 (Administration of justice at the United Nations), management evaluations must be conducted with impartiality and objectivity. The role of the Deputy High Commissioner for Refugees envisaged in the Promotions Policy to advise the High Commissioner on the award of promotions may compromise his ability to review requests for management evaluation submitted by staff members who had not been promoted with the requisite standards of impartiality and objectivity.

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 does not satisfy its legal obligation to provide reasons for its decisions, as per Obdeijn 2012-UNAT-201, when it fails to divulge the reasons for its decision to one staff member who had specifically requested it through a formal process but provides it to others. This difference in treatment, if unexplained, is also in breach of the Administration's duty to act fairly, justly and transparently in dealing with its staff members. However, there is no prejudice for the applicant if her or she is being provided with the reasons in the course of the proceedings before the Tribunal and her or she is not ultimately prevented from meaningfully challenging the contested decision. When the Senior Promotions Panel hold meetings not specifically envisaged in the Promotions Policy or receive advice from the Legal Affairs Service or an Ex Officio member designated by the DHRM, these must be recorded in minutes, in accordance with secs. 4.2.5 and 5.11.1 of the Promotions Policy. Rescission: The Tribunal may rescind a decision on promotion where the applicant meets the eligibility criteria but the errors in the review of her candidacy makes it impossible to evaluate her 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: In application of the well-settled principle that changes in law may not be retroactively applied, the amendment to art. 10.5 of the Dispute Tribunal's Statute, which introduces a change to a procedural rule, does not apply to applications filed prior to its entry into force, namely 21 January 2015. Under Asariotis 2013-UNAT-309, the Tribunal may draw an inference of moral injury from a fundamental breach of entitlements or due process rights.

Decision Contested or Judgment/Order Appealed

The Applicant appealed the decision by the High Commissioner for Refugees not to promote her from the P-4 to the P-5 level during the 2013 Promotions Session.

Outcome

Judgment entered for Applicant in full or in part

Outcome Extra Text

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 her alternative request for the case to be remanded to the Organization with specific instructions, as well as her claim for material damages. The Tribunal granted the Applicant's claim for moral damages, for which it set the quantum at CHF3,000.

Full judgment

[Full judgment](#)

Applicants/Appellants

Tsoneva

Entity

UNHCR

Case Number(s)

UNDT/GVA/2015/76

Tribunal

UNDT

Registry

Geneva

Date of Judgement

3 May 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 101.3
- Rule 11.2

UN Charter

UNDT Statute

- Article 10.5
- Article 8.1(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/2016/030

UNDT/2014/020

2011-UNAT-122

2013-UNAT-283

2010-UNAT-045

2012-UNAT-225

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

2010-UNAT-074

2011-UNAT-108

2013-UNAT-309

2014-UNAT-396

2014-UNAT-409

2014-UNAT-444