

# UNDT/2016/055, De La Varga Fito

## UNAT Held or UNDT Pronouncements

UNDT held that the separation of female and male candidates for their comparative assessment and ranking at the Second Round constituted a fundamental error in the implementation of the Promotions Policy, and could not be justified by the High Commissioner's decision to award an equal number of promotions to female and male staff members which was, in any event, announced towards the end of said Round. UNDT held that the exclusion of the e-PADs from the Panel members' comparative assessment of the candidates during the Second Round constituted another fundamental procedural error in the implementation of the Promotions Policy. The exclusion of the candidates' numeric ratings, which were central to the appraisal system from 2009 to 2013, deprived the Panel members of essential information for their consideration of the performance and managerial achievements criteria under sec. 5.9.1 of the Promotions Policy. It also prevented them from personally assessing whether the minimum performance standard set forth in sec. 5.9.1(i) was met, as they were required to do. Furthermore, the inclusion of candidates who did not meet the minimum performance requirement among those who advanced to the Third Round constituted, in itself, another error in the implementation of the Promotions Policy. UNDT held that in advising the Panel members to take into account the suitability of the candidates for appointment in positions at a higher level, the DHRM introduced an extraneous criterion for consideration during the Second Round which had the potential to subvert the whole promotion exercise, shifting from a merit-based consideration to an operational one. UNDT held that, irrespective of whether or not the Panel members actually used information that was not reflected in the candidates' fact sheet, the DHRM's advice to take into account information not reflected in the documents submitted to the collegial review of the Panel was improper and constituted a procedural irregularity in the implementation of the Promotions Policy. UNDT held that the random application of a grouping methodology by the Panel members, upon suggestion from the DHRM, had no basis in the Promotions Policy and constituted a procedural error in its implementation. UNDT held that the Respondent failed to demonstrate, even

minimally, that the Applicant was fully and fairly considered for promotion. UNDT was not convinced by the Respondent's argument that taking an arithmetic mean of the eight individual rankings cured all significant imperfections in the selection process. UNDT held that the Administration's lack of consistency in disclosing the rankings, coupled with the opacity in the procedures followed by the DHRM and the Panel, may have caused the Applicant not to fully understand the decision reached and the overall process. UNDT held that the Applicant was eligible for consideration for promotion in the 2014 Promotions Session, which it understood was in its final stage. UNDT held that the errors in the implementation of the Promotions Policy were so significant that their impact on the Applicant's chance for promotion could not be measured. Most certainly, the Applicant had a real chance for promotion. UNDT accordingly rescinded the decision to not promote the Applicant. UNDT rejected the Applicant's request for specific performance, noting that it does not have the authority to amend the Promotions Policy, and it is not its role to redesign it so as to depart from the system currently in place. UNDT set the amount of compensation in lieu of rescission to CHF6,000. UNDT held that any possible loss of salary for the year following 20 October 2014 was too speculative to justify or permit the award of material damages. UNDT also rejected the Applicant's claim for moral damages, holding that the Applicant did not adduce evidence of moral injury during the hearing.

## Decision Contested or Judgment/Order Appealed

The Applicant contested the decision by the High Commissioner not to promote her from the P-3 to the P-4 level during the 2013 Promotions Session.

## Legal Principle(s)

It is well established that the Secretary-General has broad discretion in matters of appointment and promotions. When reviewing such decisions, the Dispute Tribunal shall examine: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (2) whether the staff member was given fair and adequate consideration. The standard of review for decisions in the context of downsizing exercises is substantially the same as that for appointments and promotions. It is not UNDT's role to engage in a review of the Promotions Policy unless it is alleged that it does not comply with a higher norm. UNDT can only rescind the decision not

to grant a promotion if the procedural irregularities uncovered had deprived the applicant of a significant chance for promotion. UNDT does not have the authority to amend the Promotions Policy, and it is not its role to redesign it so as to depart from the system currently in place. Determination of “compensation in lieu” must be done on a case-by-case basis and carries a certain degree of empiricism. In respect of decisions denying promotions, 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. When a staff member seeks recourse, the High Commissioner’s decision on his or her promotion becomes final only after such recourse has been considered. It is necessary that a moral injury be established, by inference or direct evidence, for a Tribunal to award compensation for moral damages. Changes in law may not be retroactively applied.

## Outcome

Judgment entered for Applicant in full or in part

## Full judgment

[Full judgment](#)

## Applicants/Appellants

De La Varga Fito

## Entity

UNHCR

## Case Number(s)

UNDT/GVA/2015/157

## Tribunal

UNDT

## Registry

Geneva

## Date of Judgement

6 May 2016

## Duty Judge

Judge Downing

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Compensation

In-lieu compensation

Remedies

Rescission

Staff selection (non-selection/non-promotion)

Full and fair consideration

Selection decision

## Applicable Law

GA Resolutions

- A/RES/69/203

UNDT Statute

- Article 10.5

## Related Judgments and Orders

UNDT/2016/030

UNDT/2016/056