

UNDT/2019/034, Tsoneva

UNAT Held or UNDT Pronouncements

It was not disputed that the contested decision was unlawful because 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. Therefore, the Tribunal limited its consideration to the issue of remedies. The Tribunal rescinded the contested decision but noted that it has no power to grant the Applicant a promotion to the P-5 level, notwithstanding the admitted flaws in the procedures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 recalled that 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. The Tribunal stressed 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. The Tribunal considered that 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. It also noted that 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. Guided by the Appeals Tribunal's Judgment in Mebtouche, the Tribunal found it appropriate to set the amount of compensation in lieu of rescission to three months' net base salary. The Tribunal found that the medical report submitted by the Applicant corroborated her 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 found that the Applicant

provided sufficient evidence of her moral damages and considers it appropriate to award her the amount of CHF3,000. The Tribunal rejected the Applicant's claim for payment of her flight ticket to attend the hearing in person.

Decision Contested or Judgment/Order Appealed

The Applicant contested 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.

Legal Principle(s)

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 (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" (Sprauten 2012-UNAT-219 Niedermayr 2015-UNAT-603).

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Tsoneva

Entity

UNHCR

Case Number(s)

UNDT/GVA/2016/028

Tribunal

UNDT

Registry

Geneva

Date of Judgement

28 Feb 2019

Duty Judge

Judge Downing

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Compensation

In-lieu compensation

Remedies

Staff selection (non-selection/non-promotion)

Applicable Law

UNDT Statute

- Article 10.5

Related Judgments and Orders

UNDT/2016/030

UNDT/2016/031
UNDT/2016/033
UNDT/2016/043
UNDT/2016/049
UNDT/2016/055
UNDT/2016/056
UNDT/2010/178
UNDT/2009/044
UNDT/2012/091
2010-UNAT-084
2010-UNAT-033
2012-UNAT-219
2015-UNAT-603