

# UNDT/2019/035/Corr. 1, Muftic

## 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 The Tribunal rescinded the contested decision but noted that it has no power to grant the Applicant a promotion to the P-5 level, notwithstanding the admitted flaws in the procedures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 noted 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 recalled that 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 his retirement and the one he may have obtained had he 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. Taking all of the circumstances into consideration including the fact that the Applicant did not have any further opportunity for promotion under the Promotions Policy and he retired before the new rank-in-person system took effect on 1 September 2017, the Tribunal set the payment of compensation in lieu of rescission at three months' net base salary at the time of the Applicant's date of retirement. In light of the Appeals Tribunal's jurisprudence, the Tribunal found that it had no power to award the Applicant the requested moral damages based solely on his oral testimony, without any corroborative evidence. The Applicant's claim for moral damages and punitive damages was rejected.

## Decision Contested or Judgment/Order Appealed

The Applicant contested the decision of the High Commissioner, notified on 16 November 2015, not to promote him from the P-4 to the P-5 level during the 2014 Promotions Session.

## Legal Principle(s)

The determination of "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, "there is no set way for a trial court to set damages for loss of chance of promotion and ... each case must turn on its facts" (Sprauten 2012UNAT-219 Niedermayr 2015-UNAT-603).

## Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Muftic

Entity

UNHCR

Case Number(s)

UNDT/GVA/2017/002

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  
2018-UNAT-874  
2015-UNAT-603  
2013-UNAT-309  
2012-UNAT-219  
2011-UNAT-110  
2010-UNAT-084  
2010-UNAT-033