



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-448/Corr.1

Terragnolo
(Respondent/Applicant and Appellant on Cross-Appeal)

v.

Secretary-General of the United Nations
(Appellant/Respondent and Respondent
on Cross-Appeal)

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Mary Faherty
Judge Inés Weinberg de Roca

Case No.: 2013-517

Date: 27 June 2014

Registrar: Weicheng Lin

Counsel for Mr. Terragnolo: Self-represented

Counsel for Secretary-General: Paul Oertly

Reissued for technical reasons on 7 October 2014

JUDGE LUIS MARÍA SIMÓN, PRESIDING

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/093, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 28 June 2013 in the case of *Terragnolo v. Secretary-General of the United Nations*. The Secretary-General appealed on 27 August 2013 and Mr. Julien Terragnolo answered on 16 October 2013. Mr. Terragnolo filed a cross-appeal on 18 October 2013, and the Secretary-General filed his answer to the cross-appeal on 21 October 2013.

Facts and Procedure

2. On 29 June 2009, Mr. Terragnolo commenced service with the Department for General Assembly and Conference Management (DGACM).

3. On 28 August 2012, Mr. Terragnolo submitted his application to participate in the examinations held under the Young Professionals Programme (YPP) for a position in economic affairs. On 1 November 2012, the Office of Human Resources Management (OHRM) advised Mr. Terragnolo that the Central Examinations Board decided not to convoke him to the written YPP examination in economic affairs on the basis that his educational qualifications did not meet the prescribed requirements. Mr. Terragnolo requested reconsideration of the decision and, in support of his request, supplied a number of documents seeking to prove that he studied economics. The Examination and Tests Section informed Mr. Terragnolo that after reviewing the additional documents transmitted, it maintained the contested decision. Mr. Terragnolo requested management evaluation, and on 4 January 2013, his request was rejected.

4. On 28 June 2013, the UNDT delivered its Judgment holding that Mr. Terragnolo's educational qualifications entitled him to sit for the examination and that the decision to refuse his candidacy on this basis was manifestly erroneous and unlawful. The UNDT observed that given the number of steps a candidate for the YPP examination had to pass before being appointed to a P-2 post, it was difficult to determine what exactly Mr. Terragnolo's chances would have been had he been admitted to the examination. The UNDT nonetheless considered that the possibility of participating and ultimately being appointed constituted an opportunity for him to improve his status and career prospects in

the Organization. The UNDT, relying on the jurisprudence of the Appeals Tribunal in *Marsh*,¹ awarded USD 8,000 as compensation for pecuniary damages and USD 2,500 for moral damages.

Submissions

The Secretary-General's Appeal

5. The Secretary-General contends that the UNDT erred in law by applying the Appeals Tribunal's ruling in *Marsh* to the present case. In *Marsh*, the staff member who was one of three candidates interviewed was disadvantaged by the selection of a candidate who had been wrongfully included in the process despite ineligibility. Absent the ineligible candidate, Mr. Marsh would have had a "substantially increased" chance of being placed on the roster, as one of what would have been two candidates at the final interview stage. By contrast, in the present case, Mr. Terragnolo "would have had to overcome far many more hurdles than Mr. Marsh before being placed on a roster and appointed". ST/SGB/2011/10 (Young Professionals Programme) sets out eight sequential steps in the YPP selection and appointment process. Mr. Terragnolo was screened out at the very first step of this lengthy process and accordingly, his chances to be rostered at the time of the irregularity were "dramatically more remote in terms of connection to an ultimate appointment than the situation in *Marsh*".

6. The Secretary-General contends that in accordance with the jurisprudence of the Appeals Tribunal, compensation should not be awarded where a loss of chance becomes speculative. In the present case, the UNDT did not identify the actual loss of chance and there was no evidence on the record that could have substantiated a finding that Mr. Terragnolo would have had more than a ten per cent chance. The UNDT therefore erred in law and fact in awarding material damages.

7. The Secretary-General submits that, in accordance with the Appeals Tribunal's jurisprudence in *Farr*,² an Order directing that Mr. Terragnolo be permitted to undertake a YPP examination in economic affairs would constitute just satisfaction for all harm

¹ *Marsh v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-205.

² *Farr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-350.

suffered. He also notes that Mr. Terragnolo had an even more remote chance of being rostered than Ms. Farr since she had already passed the written examination.

8. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

Mr. Terragnolo's Answer

9. The remedy suggested by the Secretary-General would not place him in the situation he would have been in, had the irregularity not occurred. Allowing him to take the examination will not remedy the harm suffered.

10. The *Farr* case differs from the present case in that the harm suffered in *Farr* could be remedied by rectification of a procedural error, while in the present case, there was no procedural error. Given the eligibility criteria for the examination, including age limit and nationality, Mr. Terragnolo will no longer be able to take the examination at a later point in time. Furthermore, it is not certain that any examinations will be held in the near future in circumstances where the General Assembly could decide to order a hiring freeze. Mr. Terragnolo also submits that in light of his problematic relationship with the Administration, it would be unlikely that he would be able to pass the examination "under fair circumstances".

11. On the facts, the Secretary-General submits in bad faith that Mr. Terragnolo's chances to succeed were very low. While the Secretary-General submits that Mr. Terragnolo would need to take a large number of steps in order to be admitted to an oral examination, these steps are largely redundant.

Mr. Terragnolo's Cross-Appeal

12. Mr. Terragnolo asserts that the UNDT erred in failing to find that the contested decision was made in retaliation against him for serving as a staff representative. He requests an increase in the amount of compensation on that basis. Mr. Terragnolo argues that the UNDT erred in law by applying an incorrect standard and burden of proof to his claim of improper motive. He submits that the UNDT erred by finding that he had not established any retaliation in the decision not to convoke him to the written examination.

13. Mr. Terragnolo contends that the UNDT erred by implicitly rejecting his request for compensation for the payment of his tuition fees for higher education. By failing to recognize the value of his diploma, the Administration violated his right to have all his qualifications taken into account in an equitable manner. Having been denied the effective right to pursue a career within the Organization at a level corresponding to his qualifications, he has lost the investment into his education. He therefore requests that the Organization reimburse the costs for his education.

The Secretary-General's Answer to Cross-Appeal

14. The UNDT correctly concluded that Mr. Terragnolo did not establish that the contested decision was based on improper motives. The UNDT applied the correct standard and burden of proof in accordance with the jurisprudence of the Appeals Tribunal. Mr. Terragnolo has not established that the UNDT erred by finding that he had not established any retaliation on the part of the Administration.

15. Mr. Terragnolo has not established any other error by the UNDT warranting an increase in the amount of compensation. The Secretary-General requests that the Appeals Tribunal reject the cross-appeal in its entirety.

Considerations

Amicus Curiae Brief

16. The former chairperson of the 44th Staff Council of the United Nations Staff Union applied on 28 February 2014 to file a friend-of-the-court brief. On 27 March 2014, the Secretary-General objected on the ground that the applicant has no legal or other expertise that would assist the Appeals Tribunal in its deliberations.

17. Article 17 of the Rules of Procedure of the Appeals Tribunal establishes that “[t]he President or the panel hearing the case may grant the application if it considers that the filing of the brief would assist the Appeals Tribunal in its deliberations. The decision will be communicated to the applicant and the parties by the Registrar.”

18. As stated in *Masri*,³

... the application will only be granted if the proposed brief would assist the Appeals Tribunal in its deliberations.

The purpose of a friend-of-the-court brief will generally be to address matters other than the law. The Appeals Tribunal is composed of experienced, professional Judges who are able to ensure that proper deliberations are held concerning the general principles of law that are applicable in the case with the benefit of the parties' submissions, the UNDT Judgment and the judicial work of the Tribunal itself, without the need for additional contributions from friends-of-the-court.

If the issues in a case raise very specific or particular questions of law which are not generally within the expertise of counsel or the Judges, an application to file a friend-of-the-court brief may be granted. ...

19. In the present case, the applicant, who is a former Chairperson of the Staff Council of the Organization's Staff Union and who, it is noted, has no legal background, offers his assistance with respect to matters involving the facts, evidence and law of the case, mainly in relation to the alleged retaliation said to have tainted the relationship between the Administration and the staff member.

20. With due respect to the view contained in the application, this kind of assistance would be no more than the expression of the opinion of a private person related to a party about how the issues involved in a lawsuit should be decided by the Court. This cannot be considered to be the real meaning and utility of a friend-of-the-court submission.

21. Therefore, the Tribunal considered that the application would not assist it in its task.

Appeal and Cross-Appeal

22. Turning to the merits of the case, it must be pointed out that the UNDT's conclusion that Mr. Terragnolo was unlawfully denied his participation in the examination related to his application under the Young Professionals Programme is uncontested. Only the compensation awarded by the UNDT is before this Court, challenged by both parties.

³ *Masri v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-098, paras. 25 - 27.

23. This Tribunal holds that, contrary to the argument put forward by the Administration, the specific remedy consisting of allowing the staff member to take the examination is not available for the claimant and therefore, the subsidiary compensation is the appropriate remedy to be ordered.

24. Given the particular circumstances of the case, it does not appear possible that the claimant would be placed in the same situation he was in at the time the illegality occurred, even if the possibility of his taking the examination in economic affairs was assured. We so find because the Programme and examinations involved, when advertised, would not guarantee the same circumstances, competitors, availability of positions or other factors that must be considered when deciding if specific performance constitutes an adequate remedy for an administrative wrongdoing. That finding distinguishes the current case from the jurisprudence of *Farr* quoted by the Administration in its appeal, and allows for a different solution, namely compensation, awarded in the impugned judgment.

25. The Court is not persuaded by the Appellant's arguments of alleged error by the UNDT in assessing the loss of chance suffered by the staff member. With respect to this issue, the impugned Judgment followed the jurisprudence of this Court, and its estimation of the loss of chance does not appear to be absurd or contrary to the evidence and particular circumstances of the case. Hence, due respect must be shown to the trial court's assessment of the quantum of damages and the Appeals Court should not lightly interfere with the exercise of that discretion.⁴

26. The same reasoning leads us to find no merit on the cross-appeal filed by Mr. Terragnolo. Without ignoring the fact that he was deprived of the opportunity to pursue the competitive process for which he had applied, given his young age and his career within the Organization, that loss does not have the relevance he attributes to it.

27. Furthermore, the amount of compensation for moral damages cannot be increased on the basis of a finding of retaliation, because there is no evidence in the record that this was what caused the administrative illegality.

⁴ Cf. *Sprauten v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-219, para. 5.

28. The Tribunal concurs with the UNDT that the circumstances of the case do not necessarily lead to attribute the unlawful exclusion of the claimant to his activity as a staff representative, where no supporting evidence was provided. Mr. Terragnolo has failed to establish any error in the UNDT's conclusions about this issue, which could warrant a reversal.

29. Mere allegations, speculations, justified or unjustified fears or suspicions of persecution, or the sole circumstance of serving as a Staff Union representative who experiences an administrative illegality do not allow for a conclusion of retaliation.

30. Finally, the Appeals Tribunal finds no merit in Mr. Terragnolo's claim for reimbursement of the cost of his studies. Certainly, he did not suffer the loss of his investment into his own education as a professional, a benefit that he acquired irrespective of any examinations or competing processes that he could have attended or actually attended. The illegality that took place with respect to his application does not deprive him of that benefit. Moreover, the cost of the investment was not determined by the Administration.

31. Thus, the absolute absence of any link between the illegality and the alleged damage precludes any compensation.

Judgment

32. The appeal and the cross-appeal are dismissed in their entirety and the UNDT's Judgment is affirmed.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Faherty

(Signed)

Judge Weinberg de Roca

Entered in the Register on 29th day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar