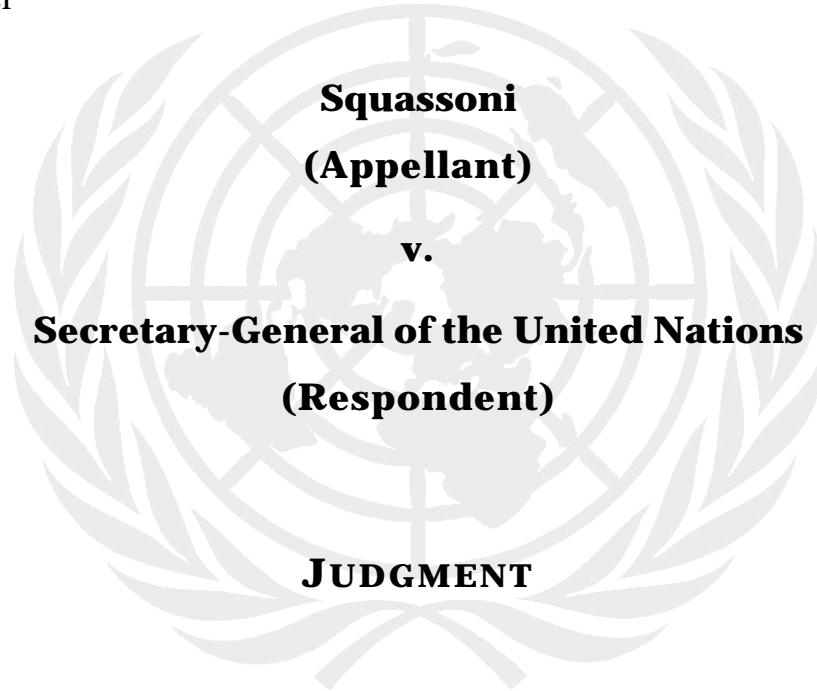




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-221



Before: Judge Luis María Simón, Presiding
Judge Inés Weinberg de Roca
Judge Jean Courtial

Judgment No.: 2012-UNAT-213

Date: 16 March 2012

Registrar: Weicheng Lin

Counsel for Appellant: François Lorient

Counsel for Respondent: John Stompor

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal by Ms. Susan Squassoni against Judgment No. UNDT/2011/070 and Order No. 315 (NY/2010) rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 13 April 2011 and 2 December 2010, respectively, in the case of *Squassoni v. Secretary-General of the United Nations*.

2. It was determined in this case that without regard to the procedural regularity or irregularity of the UNDT's Orders related to the scope of the parties' submissions with respect to the appeal filed by the staff member, as the final Judgment did not rely only on those orders to dispose of the case, but also examined ex officio all the issues, there are no grounds to consider that the claimant's right to due process was violated by a judgment by default or for not considering her arguments.

3. This Tribunal holds that the UNDT did not err when it concluded that there was no administrative decision concerning the return to the blocked post at the G4 level occupied by the staff member that could be judicially reviewed under Article 2(1) of the UNDT Statute, because that return constituted the predictable and logical outcome of the non-selection of the claimant for two G-5 posts she had applied for, which were filled up, causing the end of the temporary assignment.

Facts and Procedure

4. Ms. Squassoni joined the Organization at the G-2 level in June 1979, and advanced to the G-3 level in 1981 and the G-4 level in 1984. At the time of the events, Ms. Squassoni worked for the Department of Political Affairs (DPA).

5. Effective 28 May 2003, Ms. Squassoni was reassigned within DPA from the Electoral Assistance Division (EAD) to the Asia Pacific Division (APD) as a maternity leave replacement, encumbering the post of Social Sciences Assistant at the G-5 level. Her reassignment was approved by her parent office, EAD, so that her post there was blocked (liened) for her return. Ms. Squassoni was subsequently reassigned to another G-5 temporary vacant position within APD, always with EAD's concurrence.

6. As the incumbent of the second vacant position did not return, the post was advertised under VA# 403331 at the G-5 level. Ms. Squassoni applied, along with 25 others. She was interviewed, but her name was not included in the recommended list.

7. Before the selection for VA# 403331 was completed, Ms. Squassoni applied for another G-5 vacancy of Social Sciences Assistant also within EAD (VA# 407297), along with 13 others. Of the 14 candidates, eight including Ms. Squassoni were interviewed, and three of those interviewed not including Ms. Squassoni were recommended.

8. On 30 November 2005, Ms. Squassoni was informed that she had not been selected for either VA#403331 or VA#407279. She was also informed that she would be returning to her G-4 post at EAD.

9. On 8 April 2006, Ms. Squassoni requested administrative review of her non-selection for either of the two G-5 posts and of the decision to return her to her former G-4 post at EAD. On 20 June 2006, she filed an appeal with the Joint Appeals Board (JAB) in New York.

10. On 31 January 2008, the JAB submitted its report to the Secretary-General. The JAB found that the selection process for the two G-5 vacancies was seriously flawed resulting in consequences that were injurious to Ms. Squassoni. The JAB also found that the Administration showed a lack of both management skills and sensitivity by returning Ms. Squassoni to EAD. The JAB recommended that Ms. Squassoni be placed on a roster at the G-5 level and be considered for a G-5 level post at the earliest opportunity; that Ms. Squassoni be paid six months' net base salary at the rate in effect on 1 December 2004 as compensation for the Administration's failure to accord her due process during the selection exercises for the two G-5 vacancies; and that she also be paid six months' net base salary for the aggravation of her emotional state caused by the decision to return her to EAD without considering the implication and consequences for her and the workplace environment.

11. In a letter dated 4 June 2008, the Deputy Secretary-General conveyed to Ms. Squassoni the Secretary-General's decision in light of the JAB report. The Secretary-General agreed with the JAB that Ms. Squassoni's right to full and fair consideration for the two G-5 vacancies had been violated and decided to pay her six months' net base salary at the rate in effect on 30 November 2005. But the Secretary-General did not

accept the JAB's recommendation to place Ms. Squassoni on a roster at the G-5 level. Neither did the Secretary-General accept the JAB's finding with regard to Ms. Squassoni's return to EAD. He noted that Ms. Squassoni had been temporarily assigned to APD while maintaining a lien on her G-4 post at EAD. Ms. Squassoni was supposed to return to her EAD post at the end of her temporary assignment at APD, and there was no justification for the JAB's finding that "there was an element of harassment in returning [Ms. Squassoni] to her former post".

12. Ms. Squassoni filed an application with the former Administrative Tribunal on 28 January 2009. She requested inter alia the rescission of her non-selection for either of the two G-5 vacancies and the rescission of the decision "compelling [her] to return to work at the Electoral Assistance Division". The Secretary-General filed an answer on 24 July 2009, in which he inter alia questioned the receivability of Ms. Squassoni's application concerning her return to EAD, as that action "[did] not constitute an administrative decision".

13. The former Administrative Tribunal did not have an opportunity to review Ms. Squassoni's case before its abolition at the end of 2009. The case was transferred to the UNDT on 1 January 2010.

14. On 20 April 2010, the UNDT issued Order No. 090 (NY/2010). The parties were ordered to file a joint submission identifying areas of agreement and disagreement on certain outstanding issues. The UNDT stressed: "Where an item is disagreed, the disagreement and the parties' respective positions shall be identified clearly in the response. Parties shall avoid the simple repetition of information that is already before the Tribunal."

15. On 14 June 2010, the parties filed a joint statement pursuant to Order No. 090 (NY/2010). In response to the UNDT's question as to whether the parties agreed on the legal issues in the case, the parties stated that they did not reach any agreement. They then laid out their respective positions. In Ms. Squassoni's view, the compensation that she had received for the Administration's failure to give her full and fair consideration in the selection for the G-5 positions was inadequate. She also requested "moral, psychological and physical damages" for the decision to return her to EAD. According to the Respondent, the issues in this case were i) whether Ms. Squassoni was adequately compensated for the procedural irregularities in relation to her applications for

the two G-5 posts; ii) whether her return to EAD constituted an appealable administrative decision; and iii) whether her workplace safety was endangered upon her return to EAD.

16. On 4 October 2010, the UNDT issued Order No. 262 (NY/2010), in which it ordered Ms. Squassoni to file, by 15 October 2010, “[a] listing of all specific administrative decision(s)”¹ that she was appealing. Moreover, the UNDT ordered Ms. Squassoni to “file and serve a written submission responding to any receivability arguments the respondent may have made”, by 29 October 2010.

17. On 15 October 2010, Ms. Squassoni filed a response to the UNDT Order No. 262(NY/2010). She listed as contested administrative decisions her non-selection to either of the two G-5 posts; her return to EAD; the decision to maintain her at EAD; and the decision to only award her compensation in the amount of six months’ net base salary.

18. On 22 October 2010, the Respondent filed a response to the UNDT Order No. 262 (NY/2010). The Respondent maintained inter alia that the six months’ net base salary awarded to Ms. Squassoni represented “adequate compensation” in connection with the two G-5 posts, but that Ms. Squassoni’s contentions in respect of her return to EAD were “not receivable, *ratione materiae* as there is no appealable administrative decision”.

19. In Order No. 315 (NY/2010) dated 2 December 2010, the UNDT found that, by failing to respond to the Respondent’s receivability challenge, Ms. Squassoni agreed with the Respondent. Her appeal regarding her return to EAD was therefore not receivable, and accordingly, the only remaining issue before the UNDT was the adequacy of the compensation already awarded to Ms. Squassoni.

20. On 20 December 2010, Ms. Squassoni filed a motion seeking revision of the UNDT Order No. 315 (NY/2010). She apologized for her misinterpretation of the Order, as she thought that “[a]s [her] contentions on receivability were already argued and on record..., counsel chose to strictly comply with her Honor’s instruction, and to [avoid] repeating [her] earlier contentions on this issue of receivability”. She denied agreeing to the Respondent’s non-receivability contentions. Ms. Squassoni asked the UNDT to review the issue of her return to EAD.

¹ Emphasis in original.

21. In Judgment No. UNDT/2011/070, the UNDT dismissed Ms. Squassoni's application. The UNDT found that Ms. Squassoni's return to EAD was the "logical, direct consequence of her not being selected for the two G-5 positions..., which resulted in the end of her temporary assignment with the APD; thus her return to her liened post in EAD was not the result of any other administrative decision(s) and did not have any direct impact on her terms of appointment or contract of employment". On the issue of compensation, the UNDT concluded that the six months' net base salary already awarded to Ms. Squassoni was adequate.

22. On 31 May 2011, Ms. Squassoni appealed both Judgment No. UNDT/2011/070 and Order No. 315 (NY/2010). The Secretary-General answered on 18 July 2011.

23. On 14 February 2012, Ms. Squassoni filed a motion seeking leave to introduce additional written evidence. The Secretary-General filed an answer on 29 February 2012.

Submissions

Ms. Squassoni's Appeal

24. The additional written evidence that Ms. Squassoni seeks to introduce are the Code of Conduct for the Judges of the UNDT and this Tribunal, which was issued on 13 January 2012,² and an email dated 20 December 2011 from a legal officer of the Administrative Law Unit (ALU). Ms. Squassoni contends that the Code of Conduct shows that the UNDT failed to comply with its duties to respect the principle of *audi alteram partem* ("hear the other side") and to publish reasons for any decision. Ms. Squassoni also contends that the ALU email supports her grievance of harassment which she had suffered at EAD.

25. Ms. Squassoni states that she had raised the issue of her return to EAD from the beginning of the administrative/judicial proceedings. It was included in the parties' joint submission of 14 June 2010 to the UNDT. The Secretary-General at that time did not raise any receivability issue.

26. While the UNDT ordered the parties to resubmit a listing of the contested decisions and prohibited them from repeating any contentions made in connection with those decisions, it did not warn Ms. Squassoni that failure to address the issue of receivability again

² Document No. A/RES/66/106.

would result in a judgment by default against her. Ms. Squassoni was not aware that non-compliance with the UNDT Order could entail rejection of her contentions regarding retaliation and harassment on the basis of a single procedural incident.

27. The UNDT did not respond to Ms. Squassoni's motion for revision of Order No. 315 (NY/2010). The UNDT rendered the contested Judgment without affording due process to Ms. Squassoni. Ms. Squassoni stresses that a judgment by default requires prior due process and the right to be heard.

28. The UNDT Judge placed herself in a conflict of interest, in that she decided to simultaneously hear Ms. Squassoni's case and the case of Ms. Perelli, former EAD Director, against whom Ms. Squassoni had made accusations of retaliation and harassment. Ms. Squassoni was not informed of that conflict of interest and would have objected had she been so informed.

29. After the contested UNDT Judgment had been published, a "key witness" (Witness X) contacted Ms. Squassoni's counsel. He is ready and willing to testify before the Appeals Tribunal to confirm discrimination and retaliation prevailing against Ms. Squassoni. Ms. Squassoni requests that this witness be allowed to depose before the Appeals Tribunal.

30. Contrary to the UNDT's finding, Ms. Squassoni's return to EAD was motivated by retaliation and harassment.

Secretary-General's Answer

31. Regarding the additional written evidence, the Secretary-General requests that the Appeals Tribunal deny Ms. Squassoni's motion as she was seeking to make additional arguments supplementary to those that she had already made in her appeal. With respect to the Code of Conduct, the Secretary-General maintained that the document had been publicly available since 2010, and the subsequent adoption by the General Assembly of the Code of Conduct did not alter those circumstances. As for the 20 December 2011 e-mail, the Secretary-General notes that Ms. Squassoni had been engaged since 2006 in discussions with the Administration about her participation in the proceedings involving Ms. Perelli.

32. The Secretary-General submits that the UNDT correctly determined that Ms. Squassoni's claims regarding her return to EAD were not receivable because her return

did not constitute an administrative decision; it was merely the logical and direct consequence of her not being selected for either of the two G-5 posts and the end of her temporary assignment with APD. The UNDT's determination on this issue is consistent with the determination by the Appeals Tribunal in *Zhang*.³

33. Ms. Squassoni's assertions that the UNDT exceeded its jurisdiction and committed procedural errors are without merit. The UNDT did not enter a default judgment against Ms. Squassoni, as she was given an opportunity to address the issue of receivability at the hearing and her submissions were taken into account by the UNDT before it decided on the matter. Ms. Squassoni's assertion that the judgment of the Appeals Tribunal in *Bertucci*⁴ prohibits the UNDT from drawing negative inferences from a failure to comply with its order is contradicted by the text of that judgment itself.

34. The Secretary-General maintains that Ms. Squassoni offers no proof of the alleged conflict of interest of the UNDT Judge.

35. Ms. Squassoni's request to allow her to depose a witness before this Tribunal fails to satisfy the requirements of the Statute of the Appeals Tribunal. If the Appeals Tribunal determines that such additional evidence is necessary, the case must be remanded to the UNDT for a review on the merits.

Considerations

36. The present case can be decided upon a strict matter of law, without regard to the procedural regularity or irregularity of the UNDT's orders related to the scope of the parties' submissions, because in its Judgment the UNDT did not rely only on commenting on the receivability of the issue of Ms. Squassoni's return to the liened post that she held at EAD, but also examined it ex officio. Prudently, the UNDT addressed this issue in paragraphs 39 to 42 of the Judgment under appeal. Therefore, there are no grounds to consider that the Appellant's right to due process was violated by a judgment by default or by not considering her arguments. Also there is no substance in the allegation of conflict of interest for hearing another case while the present appeal was under her charge, because the two cases were independent of each other.

³ *Zhang v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-078.

⁴ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-121.

37. Taking into account that the UNDT indeed examined the issue related to Ms. Squassoni's situation after she was not selected for either of the two G-5 posts that she had applied for, this Tribunal holds that the UNDT did not err in concluding that there was no administrative decision concerning her return to the liened post, capable of judicial review under Article 2(1) of the Statute of the Dispute Tribunal, as that return constituted the predictable and logical consequence of Ms. Squassoni's non-selection for those two posts.

38. When those positions were filled permanently by the selected candidates, naturally Ms. Squassoni had to return to her G-4 post at EAD, because her assignment at APD was temporary as a replacement and the filling of the temporarily vacant post ended the need for Ms. Squassoni's continued reassignment.

39. Hence, it was correctly determined that Ms. Squassoni's claims regarding her return to EAD were not receivable, as stated by this Tribunal in *Zhang*.

40. That conclusion renders moot the Appellant's petition to produce new evidence, which was not in compliance with the strict statutory limits to allow that kind of applications before this Tribunal. Since there is no appealable decision to seize the jurisdiction of this Court, there is no need to hear that evidence. About the Code of Conduct for Judges, similar irrelevance can be pointed out. Besides that, as it is a corpus concerning law, it does not constitute a matter of evidence but of law, known to the Tribunal, without the need for illustration of its content.

41. About the remaining matter to be examined, concerning the adequacy of the compensation already collected by Ms. Squassoni, the Appellant's argumentation becomes so untenable that it can not affect the correct assessment exposed in the Judgment on appeal.

Judgment

42. For the foregoing reasons, the appeal is dismissed in its entirety. The UNDT Judgment is affirmed.

Original and Authoritative Version: English

Done this 16th day of March 2012 in New York, United States.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Courtial

Entered in the Register on this 7th day of May 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar