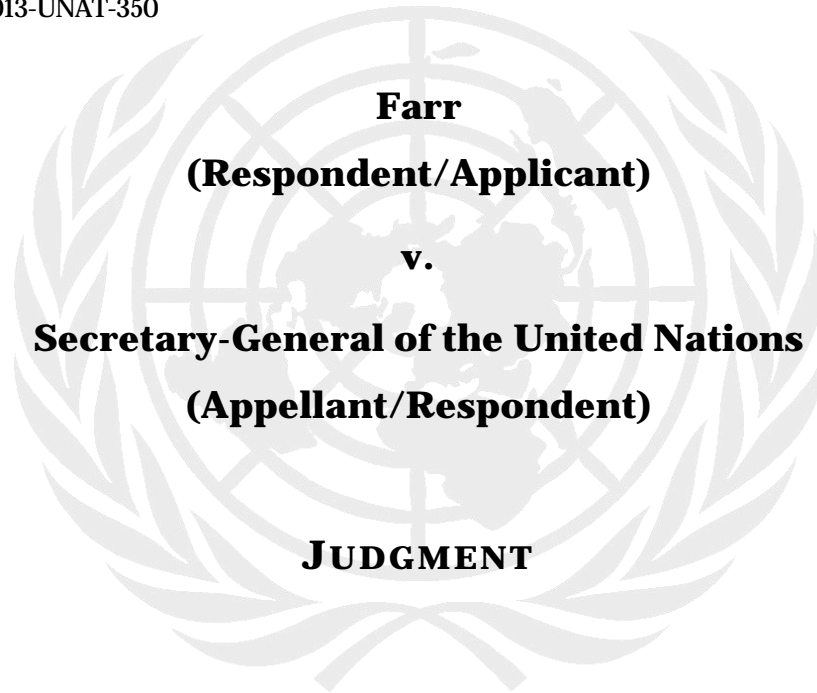




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-350



**Farr
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

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

Case No.: 2012-340

Date: 21 June 2013

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Annelise Godber/Alexandre Tavadian

Counsel for Appellant/Respondent: Stéphanie Cartier/Paul Oertly

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General against Judgment No. UNDT/2012/065, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 8 May 2012 in the case of *Farr v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 5 July 2012, and Ms. Badiha Farr filed her answer on 29 August 2012.

Facts and Procedure

2. Ms. Farr joined the Organization in 1981 and currently holds a G-6 post at the United Nations Office in Vienna (UNOV).

3. In August 2010, she applied for the “G to P” examination (recruitment to the professional service category) in the occupational group “human rights”. Her application was initially rejected but, following the intervention of the Ombudsman, admitted.

4. By letter dated 25 May 2011, the Chair of the Central Examinations Board (Board) informed Ms. Farr that she was the only candidate from the general service category who had been admitted to an oral exam in her occupational group.

5. By e-mail dated 31 May 2011, the Office of Human Resources Management (OHRM) at Headquarters inquired whether she wanted to take the oral exam in English or French. The e-mail specified that in the absence of a response, English would be used by default. On 1 June 2010, Ms. Farr advised that she would like to take the exam in French, but that she would be willing to answer additional questions in English, should the Board like her to do so.

6. By e-mail dated 9 June 2011, Ms. Farr was informed of the date and time of her exam which was going to take place in Geneva. She was asked again to advise in which language she would like to take the oral exam and that in the absence of a response, English would be used by default. That same day, Ms. Farr advised that she wanted to take the exam in French. By e-mail to OHRM dated 10 June 2011, Ms. Farr reiterated that she wanted to take the oral exam in French.

7. The day of the exam, and just a few minutes prior to the interview, the non-voting member of the Board inquired whether she still wanted to take the exam in French and Ms. Farr answered in the affirmative. She was then advised that some of the Board members

did not have sufficient command of the French language and would therefore like to ask the questions in English, to which she could respond in French.

8. According to Ms. Farr, the three members of the Board asked all their questions, except for one, in English and no additional questions were asked.

9. By e-mail dated 18 July 2011, Ms. Farr was informed that she had failed the exam since she had not obtained the required number of points for the occupational group she had applied for and that she would therefore not be placed on the roster.

10. On 16 September 2011, Ms. Farr requested management evaluation of the above decision. On 23 November 2011, she was advised that the Secretary-General had decided to maintain the contested decision. The letter noted, in particular, that the only reason she had been admitted to the oral exam was that the Board had decided to lower the performance standard for admission. Had the performance standard been used that was applied for the national competitive recruitment examination, as required by Section 5.4 of ST/AI/2010/7, no candidate would have been admitted to the oral exam.

11. On 21 November 2011, Ms. Farr contested the decision before the UNDT and the UNDT disposed of her application by Judgment No. UNDT/2012/065 on 8 May 2012.

12. The UNDT first took note of Section 6.3 of ST/AI/2010/7, "Competitive examination for recruitment to the Professional Category of staff members of other categories", which provides that "staff members who have complaints with respect to the procedures and arrangements for the examination should contact the [Board] in writing within ten working days of the event that gave rise to the complaint". The UNDT however decided not to address the receivability issue, considering that requiring a staff member to present a complaint to the Board before addressing the UNDT would mean that the staff member would need to present his or her complaint before knowing the outcome of the exam.

13. The UNDT noted that Ms. Farr had repeatedly indicated that she wanted to take her oral exam in French, and the Board had therefore committed a procedural irregularity in not allowing Ms. Farr to take her exam in French, in violation of Section 5.6 of ST/AI/2010/7. The UNDT found that Ms. Farr had a very good chance of being placed on the roster had the procedural irregularity not taken place. The UNDT therefore granted the application in part and ordered that Ms. Farr be placed on the roster for

the occasional group “human rights”. The UNDT rejected Ms. Farr’s request for compensation.

The Secretary-General’s Appeal

14. The Secretary-General submits that the UNDT erred in evaluating Ms. Farr’s qualifications and exceeded its competence by directly ordering that Ms. Farr’s name be placed on the roster. The UNDT erred in substituting its own findings for those of the Administration in an appointment-related matter.

15. The UNDT erred in evaluating the chances that Ms. Farr would have had, had the procedural irregularity not occurred. By doing so, the UNDT excluded the oral exam from an evaluation.

16. The Secretary-General acknowledges that Ms. Farr was denied the opportunity to take her oral exam in French. He suggests that, in order to remedy this irregularity, Ms. Farr be given the opportunity to take the oral exam again, in French and before a Board composed of members who have command of the French language. Should she obtain sufficient points and succeed the exam, her name will be placed on the roster with retroactive effect to 14 July 2011, the date of the letter that informed her that she had failed the exam.

17. The Secretary-General requests that the Appeals Tribunal grant his appeal and annul the order to place Ms. Farr’s name on the roster.

Ms. Farr’s Answer

18. Ms. Farr contends that the UNDT committed no error in reaching its conclusion that she would have had a very high chance to be placed on the roster had the procedural irregularity not occurred. Contrary to the Secretary-General’s contention, the UNDT considered several factors related to the oral exam, such as the specific competencies that the Board evaluated, the competencies with respect to which she did not obtain the required points, as well as the related conduct of the exam. The UNDT based its findings on both witness testimony and documentary evidence and it had sufficient evidence before it to make an informed decision.

19. Contrary to the Secretary-General's contention, the UNDT was entitled to order the placement of Ms. Farr's name on the roster. Article 10(5) provides that in cases of appointment, promotion, or termination, the Dispute Tribunal must order an amount of compensation to be paid as an alternative to the rescission of the contested administrative decision. Placing a staff member's name on the roster for a potential promotion does not fall under these exceptions.

20. Ms. Farr submits that the remedy suggested by the Secretary-General is not in compliance with the provisions of ST/AI/2010/7, which require full anonymity of candidates. Since she has been informed that she would be the only candidate to undergo the exam on an ad hoc basis and the members of the Board know Ms. Farr, as well as the facts of her case, Ms. Farr contends that she will not be granted a selection process guaranteeing her anonymity. She also submits that she has reasonable concerns about the impartiality of the Board members.

21. Ms. Farr requests that the Appeals Tribunal dismiss the Secretary-General's appeal and confirm the UNDT Judgment.

Considerations

22. It is noted that there is no discussion before this Tribunal about the part of the UNDT Judgment which declares the illegality of the oral examination procedure followed in the case of Ms. Farr, the appeal only refers to the UNDT's competency with regard to the nature of the redress granted to Ms. Farr.

23. The Appeals Tribunal holds that the UNDT exceeded its competence in ordering that Ms. Farr's name be placed on the roster because the legal consequence of the annulment of the selection procedure is restricted to placing the staff member in the same position she would have been in if the illegality had not occurred.

24. Therefore, to afford Ms. Farr proper redress, what is required is to allow her to take a second oral exam in French, with adequate assurances concerning the impartiality of the Board members, their command of French, and a fair treatment of the staff member.

25. There was no legal basis to include Ms. Farr's name on the roster, given that she had not obtained the required number of points. Awarding her more than she is entitled to constitutes a benefit to her far beyond what is lawful. It must be considered that her candidacy has already been endorsed by allowing her to take an oral examination, despite the fact that she would have failed the written exam had the Board not lowered the applicable standard. This is also an advantage to her, due to the administrative decision to lower the performance standard or else no candidate would be admitted to the oral examination.

26. Compared with similar situations within the Organization, and to ensure consistency in standards, the Appeals Tribunal considers it inadvisable that those charged with assessing the necessary requirements for professional service positions would follow so lenient a policy as that adopted in the present case.

27. Moreover, this Tribunal finds no actual merit in Ms. Farr's submissions about a potential lack of anonymity or fair treatment if she were not to be directly placed on the roster, because there are no valid reasons for her to assume that the Administration would not be able to adopt adequate measures in order to grant her an appropriate oral exam, respecting both the rights of the staff member and the needs of the Organization.

Judgment

28. The appeal is allowed, the UNDT Judgment is vacated with regard to the order that Ms. Farr's name be placed on the roster. The Tribunal orders the Administration to set a new oral exam in French to be taken by Ms. Farr and to take all the necessary appropriate measures, without delay, to afford her fair treatment.

Original and Authoritative Version: English

Done in New York, United States.

(Signed)

Judge Simón, Presiding
28 June 2013

(Signed)

Judge Weinberg de Roca
21 June 2013

(Signed)

Judge Faherty
28 June 2013

Entered in the Register on this 26th day of August 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar