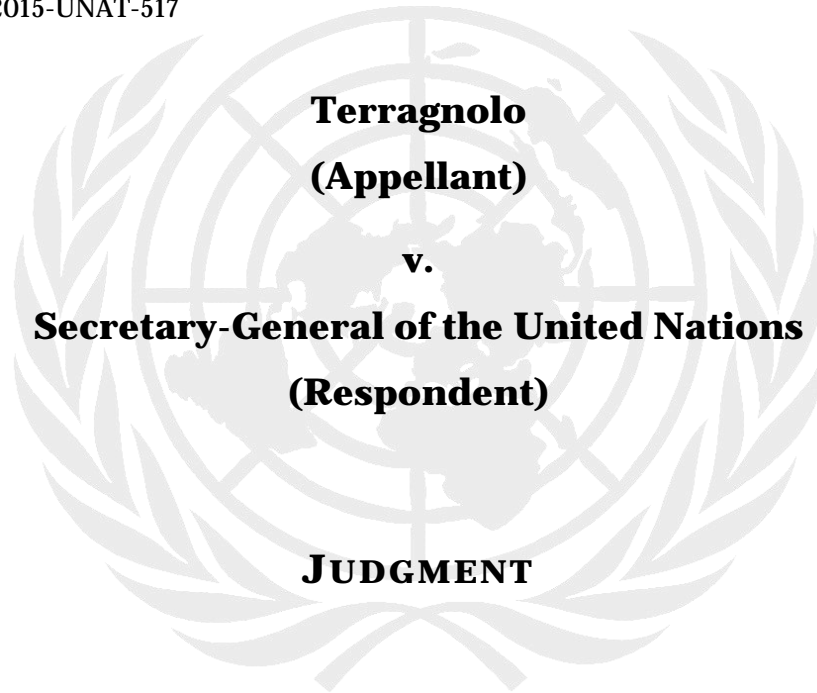




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-517



**Terragnolo
(Appellant)**

v.

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

JUDGMENT

Before: Judge Deborah Thomas-Felix, Presiding
Judge Sophia Adinyira
Judge Luis María Simón

Case No.: 2014-591

Date: 26 February 2015

Registrar: Weicheng Lin

Counsel for Mr. Terragnolo: Self-represented

Counsel for Secretary-General: Zarqaa Chohan/Phyllis Hwang

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2014/005, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 20 January 2014 in the case of *Terragnolo v. Secretary-General of the United Nations*. On 13 March 2014, Mr. Julien Terragnolo filed his appeal and the Secretary-General filed his answer on 15 May 2014.

Facts and Procedure

2. In December 2012, elections were conducted for the United Nations Staff Pension Committee (UNSPC). The results were announced on 20 December 2012. Mr. Terragnolo, a candidate in the elections, was ranked seventh, behind four candidates elected as members and two candidates elected as alternate members of the UNSPC.

3. On 17 January 2013, Mr. Terragnolo wrote to the Chief Executive Officer (CEO) of the United Nations Joint Staff Pension Fund (UNJSPF or Pension Fund) claiming one of the elected candidates had a conflict of interest and requesting that his complaint be submitted to the UNSPC and UNJSPF's Standing Committee.

4. On 23 January 2013, Mr. Terragnolo lodged a complaint with the Arbitration Committee of the United Nations Staff Union (UNSU) raising alleged electoral violations, the afore-mentioned conflict of interest and claiming three candidates were ineligible to serve in light of the four-year term limit set by General Assembly resolution 51/226. The same day he also raised his concerns about the eligibility of certain candidates with the Polling Officer.

5. On 7 May 2013, Mr. Terragnolo wrote to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) and raised the same issues. He requested a response by 14 May 2013, failing which he would submit a request for management evaluation.

6. On 15 May 2013, not having received a response, Mr. Terragnolo submitted a request for management evaluation of the decision of the OHRM/Office of the ASG (OASG) to, inter alia, decline to enforce the four-year term limit against those elected in December 2012.

7. On 30 May 2013, the Assistant of the ASG/OHRM responded to Mr. Terragnolo's request of 7 May 2013, clarifying that the four-year term limit outlined in General Assembly resolution 51/226 was not applicable as the matter was regulated by UNJSPF Regulations.

8. On 7 June 2013, Mr. Terragnolo was informed by the Management Evaluation Unit that his request was not receivable as there was no contestable administrative decision.

9. On 17 June 2013, Mr. Terragnolo filed an application with the Dispute Tribunal which, upon the Tribunal Registry's request, he resubmitted on 25 June 2013. Mr. Terragnolo contested the decision to grant time release and related administrative assistance to staff representatives who he alleged were ineligible to serve on the UNSPC by reason of the term limits outlined in General Assembly resolution 51/226, and the refusal to take action against the member he claimed had a conflict of interest, and to look into the violation of the electoral regulations during the polls.

10. On 10 July 2013, the New York Registry of the Dispute Tribunal transferred the case to the Geneva Registry,¹ where it was registered under Case No. UNDT/GVA/2013/035.

11. On 19 July 2013, the Secretary-General filed a motion for leave to have receivability considered as a preliminary matter, which the Geneva Dispute Tribunal granted on 24 July 2013.²

12. On 20 January 2014, the Dispute Tribunal rendered its Judgment. The UNDT found that Mr. Terragnolo's first claim was not receivable as Mr. Terragnolo did not have standing to challenge the Administration's decision to grant time release and other assistance to those staff representatives of the UNJSPF whom Mr. Terragnolo considered ineligible. It found that Mr. Terragnolo's second claim concerning the Administration's refusal to take action despite being notified that one elected member had a conflict of interest and breached electoral regulations was receivable, but that on its merits, the Secretary-General correctly declined to take action because he had no authority over the substance of these complaints. Accordingly, the UNDT rejected Mr. Terragnolo's application.

¹ By Order No. 168 (NY/2013).

² By Order No. 104 (GVA/2013).

Submissions

Mr. Terragnolo's Appeal

13. Mr. Terragnolo contends that the UNDT erred in finding that the Secretary-General had no authority to intervene or take action on the alleged irregularities Mr. Terragnolo identified. Mr. Terragnolo submits that the Secretary-General, as Chief Administrative Officer of the United Nations and highest ranking fiduciary of the UNJSPF, is ultimately responsible for managing conflicts of interest and term limits when his subordinates, who are primarily responsible for doing so, are unwilling to do so. This obligation is reflected in Staff Regulation 6.2 of ST/SGB/2002/13 (Status, basic staff rights and duties) and the Code of Conduct of the International Civil Service (ST/SGB/2002/13, sect. V, paras. 21-22). The Secretary-General shoulders a number of obligations in the administration of the UNJSPF and he breached his fiduciary obligation in failing to react to Mr. Terragnolo's complaints of electoral violations and conflict of interest.

14. The UNDT erred in law in finding that the UNJSPF is a self-contained regime, with which the Secretary-General cannot interfere. The UNJSPF regime is subject to General Assembly resolutions and American legislation which provide for fiduciary obligations towards the Fund's beneficiaries. The Secretary-General's failure to take reasonable preventive action on known facts, and to prevent foreseen or foreseeable risks amounts to negligence and fiduciary breach with serious consequences given UNJSPF's current underfunded status. An American court reviewing claims against the UNJSPF or the UNSPC under American legislation would be bound to recognize the term limits enacted by General Assembly resolution 51/226, having regard to Art. III, Sect. 7(d) of the Headquarters Agreement, and find the Secretary-General negligent by reason of his unwillingness to enforce them, and infer improper purposes. The UNDT also erred in law in not enforcing the four-year time limit against the elected staff representatives.

15. The UNDT also erred in law in relying on this Tribunal's judgment in *Pellet*.³ Mr. Terragnolo has a vested interest in UNJSPF's management as an ordinary staff member and a pension plan participant, as well as an interest as an aspiring member seeking to become a designated staff representative in the UNSPC. Mr. Terragnolo claims he lost the opportunity to

³ *Pellet v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-073.

gain experience allowing him to meet the requirements to become a Chartered Financial Analyst (CFA) Charterholder.

16. The Dispute Tribunal overlooked the preponderance of evidence showing that the Department of Management's (DM) Office of Information and Communication Technology (OICT) and Office of Human Resources Management (OHRM) obstructed the election process, by OICT's use of firewalls, and OHRM's failure to note the ineligibility of the four candidates who were subsequently elected. He alleges that there is evidence that the Department of Management routinely interferes by granting or denying time release and administrative assistance opportunistically to select staff representatives amenable to its agenda. The Dispute Tribunal also erred in failing to have regard to relevant evidence, namely the investigation report prepared by the Office of Internal Oversight Services (OIOS) into the elections and the minutes of the UNSPC meeting of April 2013. Mr. Terragnolo had unsuccessfully sought to order the production of these documents and now moves this Tribunal to order their production.

The Secretary-General's Answer

17. The Secretary-General contends that Mr. Terragnolo failed to establish any error on the part of the UNDT that warrants reversal. The UNDT correctly concluded that Mr. Terragnolo did not have standing with respect to his first claim as the UNSPC is not a staff representative body established in accordance with the United Nations Staff Regulations and Rules, but an entity established pursuant to UNJSPF Regulations. Consequently, the term limits in General Assembly resolution 51/226 do not apply to the members of the UNSPC, and Mr. Terragnolo cannot claim to have any vested interest in the enforcement of this resolution.

18. With respect to the second claim that the Administration improperly refused to investigate a reported conflict of interest involving an UNSPC member and breached electoral regulations, the UNDT also correctly concluded that the Secretary-General had no power to interfere in the contested elections as UNJSPF Regulations and Rules are a "self-contained regime" and elections are exclusively governed by UNJSPF Regulations. The UNJSPF Regulations and Administrative Rules make clear that the exclusive authority to administer the UNJSPF is vested in UNJSPF's Board and that the Secretary-General has no role in the administration of the UNJSPF.

19. There is also nothing in the Charter of the United Nations or the Staff Regulations and Rules granting the Secretary-General broad ranging responsibilities to manage conflict of interests or making him “the highest ranking fiduciary of the Pension Fund”. Insofar as Mr. Terragnolo contends that a decision of the UNSU Arbitration Committee creates an “unequivocal obligation” on the Secretary-General to enforce General Assembly resolution 51/226, this resolution is not relevant to the question of term-limits of UNSPC members.

20. Mr. Terragnolo otherwise failed to submit any evidence to substantiate his allegations that the Administration made “deliberate” attempts to interfere in the election. He should also not be permitted to raise this claim on appeal given he failed to raise it before the UNDT. Mr. Terragnolo’s requests to this Tribunal to seek production of the OIOS Report and Minutes of a UNSPC meeting repeat his arguments and requests before the UNDT and should also be rejected. Mr. Terragnolo also failed to provide any legal basis for his claim that he has a right under his terms of appointment or contract of employment to augment his professional experience with activities outside of the Organization in order to qualify as a CFA Charterholder.

21. The Secretary-General requests this Tribunal to dismiss Mr. Terragnolo’s appeal in its entirety.

Considerations

22. As a preliminary matter, Mr. Terragnolo has requested an oral hearing. Oral hearings are governed by Article 8(3) of the Appeals Tribunal’s Statute and Article 18(1) of the Appeals Tribunal’s Rules of Procedure (Rules). The factual and legal issues arising from this appeal have already been clearly defined by the parties and there is no need for further clarification. We do not find that an oral hearing would “assist in the expeditious and fair disposal of the case”, as required by Article 18(1) of the Rules. Thus, the request is denied.

23. We now examine the merits of his appeal. Mr. Terragnolo contends that the UNDT erred in finding that the Secretary-General had no authority to intervene or take action on the alleged irregularities of which Mr. Terragnolo complained, as the UNJSPF is a self-contained regime with which the Secretary-General cannot interfere.

24. The UNJSPF Regulations, Rules and Pension Adjustment System (UNJSPF Regulations) provide inter alia:

Article 2 Interpretation

The [UNJSPF] Board shall, to the extent required to give effect thereto, interpret these Regulations and the Administrative Rules.

...

Article 4 Administration of the Fund

(a) The Fund shall be administered by the United Nations Joint Staff Pension Board, *a staff pension committee for each member organization*, and a secretariat to the Board and to each such committee. (emphasis added)

(b) *The administration of the Fund shall be in accordance with these Regulations and with Administrative Rules*, including Financial Rules for the operation of the Fund, consistent therewith which shall be made by the Board and reported to the General Assembly and the member organizations. (emphasis added)

(c) The Board may appoint a Standing Committee which shall have the power to act on behalf of the Board when it is not in session and may, subject to article 7, delegate its powers under these Regulations to the staff pension committees of the member organizations.

25. Article 6 of the UNJSPF Regulations sets out the composition and manner of election of members to the various staff pension committees that represent the interests of the United Nations and other member organizations participating in the UNJSPF.

26. Section C of Annex II of the UNJSPF's Rules of Procedure concerning "Staff Pension Committees" also provides that the composition of the staff pension committee of each member organization shall be in accordance with the provisions of article 6 of the UNJSPF Regulations.

27. Accordingly, as was explained in *Terragnolo*:⁴

The UN Joint Staff Pension Fund (UNJSPF) is not part of the UN Secretariat. It was established by the UN General Assembly as an inter-agency body, administered and managed not by the Secretary-General but by the Chief Executive Officer (CEO) of the UNJSPF, who in turn is directly responsible to the United Nations Joint Staff Pension Board (UNJSPB) and ultimately to the United Nations General Assembly. ... Neither

⁴ *Terragnolo v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-447, para. 27.

the Secretary-General, nor the executive head of any other member organization, has authority over the management of the [Pension] Fund or the independence of the CEO of the [Pension] Fund in the administration of its staff.

28. We see no reason to depart from our prior analysis. For the same reason, we agree with the UNDT that the Secretary-General has no power to interfere or intervene in the election of members to the UNJSPF's staff pension committees; these elections are governed exclusively by UNJSPF Regulations. The UNJSPF Regulations and Administrative Rules clearly state that the exclusive authority to administer the UNJSPF is vested in UNJSPF's Board and, as such, the Secretary-General has no role in UNJSPF's administration.

29. Mr. Terragnolo also submits that the UNDT erred in not enforcing the four-year time limit set out in General Assembly resolution 51/226 against the elected staff representatives. The UNDT held that "the actual eligibility of candidates to represent participants at the UNSPC, including any potential conflict of interest or length of term, is to be determined exclusively under the [UNJSPF's] Regulations and Rules".⁵ The UNJSPF's staff pension committees, including the UNSPC, are established pursuant to UNJSPF Regulations and are separate and distinct from United Nations staff representative bodies established pursuant to Staff Regulation 8.1 of the United Nations Staff Rules and Regulations, which are intended to facilitate contact and communication between the Secretary-General and United Nations staff. General Assembly resolution 51/226 concerns the election of staff members to United Nations staff representative bodies, and is thus irrelevant to the election and duration of terms of United Nations staff members elected to the UNJSPF's UNSPC. In this regard, Article 6(b) of the UNJSPF Regulations provides that:

The elected members and alternate members of the United Nations Staff Pension Committee *shall hold office for four years or until the election of their successors, and they shall be eligible for re-election.* (emphasis added)

We thus see no error in the finding of the UNDT and reject Mr. Terragnolo's claim.

30. This Tribunal also decided to consider *sua sponte* the UNDT's finding that Mr. Terragnolo had legal standing to contest the Secretary-General's failure to take action against the alleged illegalities. We are of the view that the UNDT erred in this regard.

⁵ Impugned Judgment, para. 41.

31. The Appeals Tribunal has consistently held that the key characteristic of an administrative decision which is subject to judicial review is that the decision must “produce direct legal consequences” affecting a staff member’s terms and conditions of appointment. As stated in *Andronov*:⁶

It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

32. Central to this issue is whether or not the UNDT was correct to find that Staff Regulation 6.1 conferred on Mr. Terragnolo a right to proper representation in the UNJSPF’s governance structure. Staff Regulation 6.1 of the United Nations Staff Rules and Regulations provides that:

Provision shall be made for the participation of staff members in the United Nations Joint Staff Pension Fund in accordance with the regulations of that Fund.

33. As already set out, the legal frameworks governing the composition and election of staff pension committees, including the UNSPC, are separate and distinct from the United Nations Staff Rules and Regulations. In view of this, we do not agree with the UNDT that the right conferred on United Nations staff members pursuant to Staff Regulation 6.1 to participate in the UNJSPF encompasses “a right to proper representation [...] in the Fund’s governance structure”,⁷ which is separately governed by UNJSPF Regulations. Consequently, the decision of the Secretary-General not to investigate the illegalities which Mr. Terragnolo contests does not directly impact on Mr. Terragnolo’s terms of appointment and/or his contract of employment, and is not an appealable administrative decision falling within the Dispute Tribunal’s jurisdiction.

⁶ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

⁷ Impugned Judgment, para. 40.

34. We find that the UNDT erred in law in finding that Mr. Terragnolo's second claim wherein he contested the failure of the Administration to look into the alleged improprieties he raised was receivable; this finding of the UNDT Judgment is reversed.

35. We nevertheless uphold the decision of the UNDT that Mr. Terragnolo's challenge to the Administration's decision to grant time release and other assistance to the staff representatives on the United Nations Staff Pension Committee whom he considered ineligible was not receivable, as Mr. Terragnolo did not have standing to challenge the release of other staff members.

36. The Appeals Tribunal finds that the remainder of Mr. Terragnolo's submissions is without merit and they are dismissed.

Judgment

37. The appeal is hereby dismissed in its entirety. The portion of the UNDT Judgment that finds that Mr. Terragnolo's second challenge is receivable *ratione materiae* is reversed.

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Thomas-Felix, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar