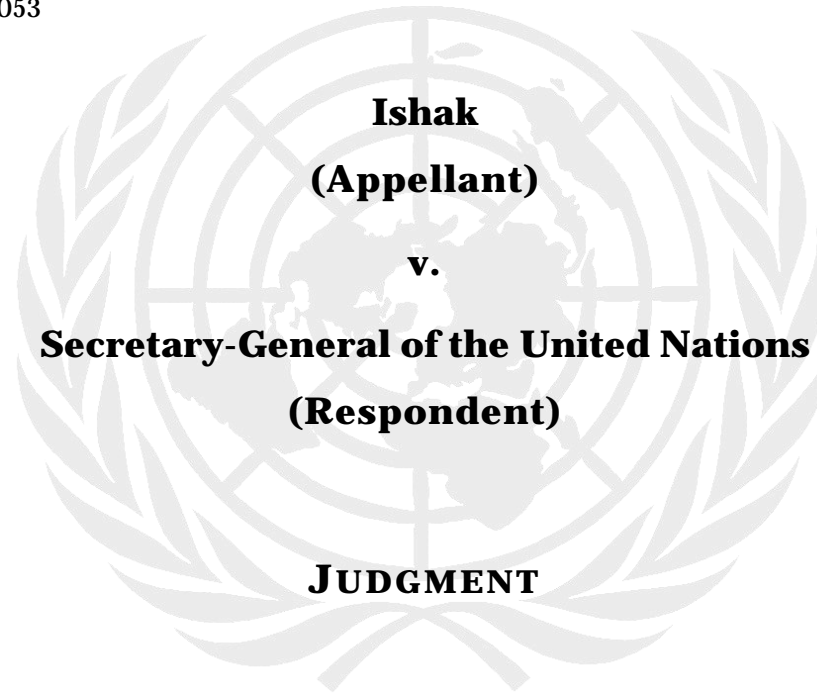




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-053



**Ishak
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Rose Boyko, Presiding Judge Inés Weinberg de Roca Judge Jean Courtial
Judgment No.:	2010-UNAT-050
Date:	1 July 2010
Registrar:	Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Phyllis Hwang

JUDGE ROSE BOYKO, Presiding.

Synopsis

1. During the promotion session undertaken by the Office of the United Nations High Commissioner for Refugees (UNHCR) in 2007 (2007 Promotion Session), Nasr Ishak (Ishak) was not promoted to the P-5 level. His request for administrative review of the decision was denied. Despite several extensions of time to file his appeal to the Geneva Joint Appeals Board (JAB), he filed his appeal late, missing the final deadline by three days. The appeal was subsequently transferred to the UNDT which found that it was time-barred and rejected it.

2. We find that the appeal to the Appeals Tribunal is time-barred and therefore not receivable. We also agree with the UNDT that it had no jurisdiction to hear this matter. The appeal is dismissed in its entirety.

Facts and Procedure

3. Ishak is a staff member of the Office of the UNHCR who was denied a promotion to the P-5 level during the 2007 Promotion Session. On 22 August 2008, Ishak submitted a request to the Secretary-General for review of 11 administrative decisions. By letter dated 6 October 2008, the Officer-in-Charge of the Administrative Law Unit (ALU) informed Ishak that the UNHCR had satisfactorily addressed the issues raised by Ishak in his request for administrative review. In accordance with former Staff Rule 111.2 (a)(i), the one-month deadline for Ishak to file an appeal with the JAB expired on 9 November 2008.

4. On 28 October 2008, Ishak requested an extension of time to file an appeal with the JAB. By e-mail dated 5 November 2008, the Secretary of the JAB stated that the request would be treated as an incomplete statement of appeal and that Ishak had until 10 December 2008 to file a complete statement of appeal. By e-mail dated 10 December 2008, Ishak requested a further extension of the deadline, and he was granted a second extension until 17 December 2008. Ishak did not meet the second deadline on the grounds that he was ill. By e-mail dated 18 December 2008, the JAB granted Ishak a final extension until 19 December 2008 to submit a statement of appeal in full. Ishak responded and indicated that a colleague would deliver his appeal to the JAB. By e-mail dated Friday

19 December 2008, Ishak informed the JAB Secretary that his colleague was not able to deliver the statement and that it would be delivered on Monday, 22 December. Ishak also stated that a copy was sent by internal mail. The complete statement of appeal was received by the JAB on 22 December 2008.

5. Following the abolition of the JAB on 1 July 2009, Ishak's appeal was transferred to the UNDT. The UNDT summoned the parties and scheduled a hearing on 24 September 2009. On several occasions, Ishak requested a postponement of the hearing due to illness. The UNDT nevertheless proceeded with the hearing.

6. On 16 October 2009, Judge Cousin of the UNDT rendered Judgment No. UNDT/2009/042. The UNDT rejected Ishak's application. Judge Cousin found that Ishak did not request a further extension of the deadline of 19 December 2008 for filing the full statement of appeal. Judge Cousin therefore considered that the appeal was abandoned under Article 10 of the rules of procedure of the JAB, and that it had to be removed from the list of appeals pending before the JAB. Pursuant to General Assembly resolution 63/253, the UNDT was competent to rule on appeals submitted to the JAB only if they were pending as at 1 July 2009, which was not the case in this instance. Judge Cousin also considered that, as the appeal was inadmissible, Ishak's presence at the hearing would not have contributed to the settlement of the dispute. The application was dismissed as having been erroneously submitted to a tribunal lacking jurisdiction in the matter.

7. After receiving a translation of Judgment No. UNDT/2009/042 on 23 December 2009, Ishak filed an appeal and a "Request for Oral Hearing and Leave to File Further Allegations of Malfeasance by the Registrar of the Geneva UNDT" on 16 February 2010. The appeal was sent to the Secretary-General on 22 February 2010, and the Secretary-General filed an answer to the appeal on 7 April 2010.

Submissions

Ishak's Appeal

8. Ishak submits that the UNDT erred on questions of fact and law resulting in a manifestly unreasonable decision. He refers to correspondence regarding conciliation proceedings before the JAB in June 2009, which came to an end when the JAB Conciliation

Officer concluded that the dispute could not be resolved amicably. Ishak also refers to correspondence with the Secretary of the JAB dated June and July 2009, regarding the transfer of his appeal from the JAB to the UNDT, the deadline for submitting his final observations, and his requests for disclosure of information and documents pursuant to Articles 18(3) and 19 of the UNDT rules of procedure. Ishak argues that Judge Cousin confused a procedural issue relating to transitional measures, as set out in General Assembly resolution 63/235, paragraph 44, with the substantive issue of the competence of the UNDT, as set out in Article 2(7) of the UNDT's statute. Ishak argues that the UNDT lacked competence to look into procedural issues or to pass judgment on whether or not a case that had been transferred from the JAB to the UNDT was validly pending before the JAB. In this regard, Ishak refers to Article 10(4) of the UNDT statute. Ishak also submits that the UNDT erred in fact, as the case before the JAB was not only "pending" but also "active" by virtue of the conciliation procedure which concluded on 30 June 2009.

9. Ishak further submits that the UNDT erred in proceeding to decide the case in his absence. The UNDT was required to decide whether an oral hearing was required before requesting Ishak to attend the hearing on 24 September 2009, and not after Ishak declined to attend on medical grounds. Ishak argues that he was not given an opportunity to comment on the issue of alleged abandonment of the appeal, nor was he granted a delay of the hearing. Further, Ishak contends that the order to attend an oral hearing on 24 September 2009 was a "sham".

10. Ishak alleges malfeasance on the part of the UNDT Registrar. He contends that the Registrar failed to disclose to Judge Cousin the communications that the Registrar had received from Ishak regarding his complete statement of appeal. Ishak also contends that "the idea of using the argument of abandonment of the Appeal was developed during *ex parte* communication which Mr. Rodriguez had with the UNHCR Director of DHRM (Mr. Pitterman)". Further, Ishak refers to his prior challenges regarding the conduct of the Registrar during the course of other cases before the JAB (the Registrar of UNDT/Geneva was Secretary of the former JAB/Geneva), and the Order for a Change of Venue in another case before the former Administrative Tribunal. Ishak requests that the Appeals Tribunal call the Registrar and Mr. Pitterman to give testimony before the Appeals Tribunal regarding the allegations of malfeasance.

11. Ishak makes submissions relating to the merits of his appeal against the decision not to promote him during the 2007 Promotion Session. He argues that the findings in Judgment No. UNDT/2009/040¹ with regard to the irregularities in the procedure followed during the 2007 Promotion Session should be followed by the Appeals Tribunal.

12. Ishak requests an oral hearing of the appeal given the complexity and sensitivity of the issues involved. He seeks to provide confidential testimony regarding the retaliatory action against him. Ishak requests the Appeals Tribunal to find that he was entitled to a promotion to the P-5 level during the 2007 Promotion Session; and to order specific performance and an award of compensation for actual, consequential, and moral damages. He also requests the Appeals Tribunal to “appropriately address the blatant disregard of due process rights including the issue of conflict of interest that had been identified in the present case”.

Secretary-General’s Answer

13. The Secretary-General submits that the appeal is not receivable as it was not filed within 45 calendar days of receipt of the UNDT Judgment. No request for suspension or waiver of the deadline to file the appeal had been made under Article 7(2) of the Appeals Tribunal’s Rules of Procedure and the Appeals Tribunal has not suspended or waived the deadline. Accordingly, the Secretary-General contends that the appeal is time-barred and should be dismissed.

14. In the event that the Appeals Tribunal receives the appeal, the Secretary-General makes several submissions regarding the merits of the appeal. He submits that Ishak does not identify any errors that would require a reversal of the UNDT’s finding that the application was irreceivable. He contends that the evidence relating to the conciliation procedure, instituted pursuant to former Staff Rule 111.2(b), does not support the claim that the appeal was pending before the JAB.

15. The Secretary-General further contends that, should the Appeals Tribunal find that the UNDT erred as a matter of fact in determining that Ishak’s appeal should not have been treated as “pending” before the JAB, the error of fact does not result in a manifestly

¹ *Ardisson v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/040.

unreasonable decision under Article 2(1)(e) of the Statute of the Appeals Tribunal. It was for the UNDT to determine if the appeal to the JAB was abandoned or, alternatively, time-barred. The UNDT correctly found that the application was irreceivable on the grounds that the Ishak's appeal to the JAB was not timely.

16. The Secretary-General submits that Ishak's due process rights were not violated by the decision of the UNDT not to hold an oral hearing. There was no requirement under Article 16 of the UNDT rules of procedure to hold an oral hearing. Under human rights treaties and case law, the right to a fair and public hearing does not require an oral hearing. The UNDT limited itself to reviewing the issue of receivability, which was a matter that could be resolved on the basis of the case file.

17. The Secretary-General submits that Ishak's allegations of malfeasance are not properly before the Appeals Tribunal. The Appeals Tribunal's mandate, as set out in its Statute, extends only to reviewing errors made by the UNDT. The allegations of malfeasance are new claims. The Secretary-General refers to Articles 2(4)(b) and 2(5) of the Statute, and contends that the Appeals Tribunal does not have the mandate to make new findings of fact regarding matters that were not considered by the UNDT.

18. The Secretary-General requests that the Appeals Tribunal remand the case to the UNDT for a determination on the merits, should it determine that the UNDT erred in finding the application not receivable.

Considerations

19. As a preliminary matter, the Appeals Tribunal rejects Ishak's request for an oral hearing because there is no need for further clarification.

20. This appeal is not receivable by the Appeals Tribunal as it was not filed by Ishak within 45 calendar days of receipt of the Judgment of the UNDT. No request for suspension or waiver of the deadline to file the appeal was made in accordance with Article 7(2) of the Rules of Procedure of the Appeals Tribunal and this Tribunal has not suspended or waived the deadline. Accordingly, Ishak's appeal is dismissed on the grounds of not being filed in a timely way.

21. In any event, this Tribunal agrees that the UNDT correctly concluded that it had no jurisdiction to receive Ishak's appeal before the JAB.

22. During the 2007 Promotion Session Ishak was not promoted to the P-5 level. On 22 August 2008, he sought administrative review of the decision. Subsequently, Ishak received three extensions of time to file a complete appeal to the JAB and filed his appeal late, missing the final deadline of 19 December 2008 by three days.

23. The jurisdiction of the JAB over appeals pending before it was thereafter transferred to the new UNDT. The UNDT found that it only had jurisdiction to hear pending matters, but not matters that had already been decided by the JAB or had been abandoned while pending a JAB hearing.

24. It was open to the UNDT to determine whether Ishak's appeal was deemed to have been abandoned under Article 10 of the rules of procedure of the JAB. Pursuant to General Assembly resolution 63/253, the UNDT was competent to rule on the issue of whether appeals submitted to the JAB were pending as at 1 July 2009, which the UNDT ruled was not the case in this instance. Judge Cousin determined that since the appeal was not receivable, Ishak's presence at the hearing would not have contributed to the settlement of the dispute. The application was dismissed as having been erroneously submitted to a tribunal lacking jurisdiction in the matter.

25. The Appeals Tribunal agrees with the UNDT that it had no jurisdiction to hear Ishak's appeal. The UNDT correctly held that the appeal was time-barred and not receivable by the JAB, regardless of whether the deadline was missed or under the JAB rules the case could be deemed to have been abandoned. Therefore, not being a pending matter before the JAB, it was not a case transferred to the UNDT.

26. The Appeals Tribunal further finds that Ishak has not advanced any cogent evidence to raise a prima facie case of malfeasance of the Registrar.

Judgment

27. The Appeals Tribunal finds that the appeal is time-barred, and not receivable, and is therefore dismissed in its entirety.

Dated this 1st day of July 2010 in New York, United States.

Original: English

(Signed)

Judge Boyko, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Courtial

Entered in the Register on this 16th day of August 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal