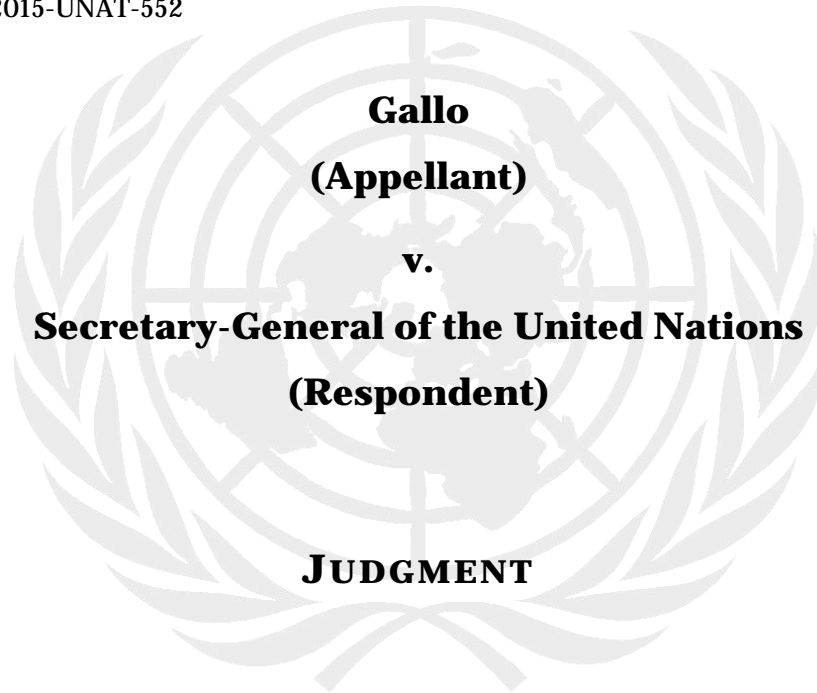




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2015-UNAT-552



**Gallo  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Inés Weinberg de Roca, Presiding Judge Rosalyn Chapman Judge Sophia Adinyira
Case No.:	2014-636
Date:	2 July 2015
Registrar:	Weicheng Lin

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Counsel for Mr. Gallo: Paul Harris

Counsel for Secretary-General: Noam Wiener

**JUDGE INÉS WEINBERG DE ROCA, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2014/070, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 19 June 2014 in the case of *Gallo v. Secretary-General of the United Nations*. Mr. Peter Anthony Gallo appealed on 14 August 2014 and the Secretary-General answered on 2 October 2014.

**Facts and Procedure**

2. The following facts are uncontested:<sup>1</sup>

... On 23 July 2013, the Applicant [a staff member of the Office of Internal Oversight Services (OIOS) based in New York] submitted a rebuttal of his annual appraisal report for the year ending on 31 March 2013. On 23 September 2013, he received the report of the Rebuttal Panel which found “that the procedure prescribed in [... ST/AI/2010/5 (Performance Management and Development System)] regarding identifying and addressing performance shortcomings were generally complied with”.

... On 30 September 2013, in compliance with the applicable deadline, the Applicant requested management evaluation of the findings of the Rebuttal Panel.

[On 29 October 2013, the day before the Management Evaluation Unit (MEU) should have responded to Mr. Gallo’s request, the MEU notified Mr. Gallo that there would be a delay in responding to his request, due to a page missing from his original submission and due to lack of response from OIOS. The MEU further notified Mr. Gallo on 2 December 2013, 22 January 2014, and 5 February 2014 of expected delays in its response to his request for management evaluation].

... On 21 February 2014, the [MEU], Department of Management, responded to the Applicant’s request by stating that it was not receivable as it did not constitute a reviewable administrative decision.

... On 22 May 2014, the Applicant filed his application with the [Dispute] Tribunal and, on 5 June 2014, the Respondent filed a motion for leave to file a reply limited to receivability. As part of his motion, the Respondent submitted that the Applicant was not contesting a reviewable administrative decision and that he did not meet the 90-day time limit to file an appeal in accordance with art. 8.1(d) of the Dispute Tribunal’s Statute.

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<sup>1</sup> Impugned Judgment, paras. 2-6.

... On 13 June 2014, [pursuant to Order No. 135 (NY/2014) of 6 June 2014] the Applicant filed [a] response in relation to the two issues identified [in the UNDT's Order], namely: [w]hether his claim concerned an administrative decision [and] [w]hether his application is time-barred.

3. On 19 June 2014, the UNDT issued its Judgment and dismissed the Appellant's application, finding that it was not receivable given that the deadline for filing his application with the Dispute Tribunal expired on 28 January 2014. Further, it found that the belated MEU response of February 2014 did not re-set the clock for filing his UNDT application as it was delivered after the 90-day period provided for in the UNDT Statute. For this reason, the matter was distinguishable from the facts in *Neault*.<sup>2</sup> The UNDT further found that the Appellant had not filed any request for a suspension or waiver of the applicable filing time-limits, and that he had not put forth any exceptional circumstances that may warrant a suspension or waiver of the time-limits. Accordingly, the UNDT considered it had no jurisdiction to consider the claim.

### **Submissions**

#### **Mr. Gallo's Appeal**

4. The UNDT erred in its restrictive interpretation of the Appeals Tribunal's ruling in *Neault*. In that case, the Appeals Tribunal ruled that Neault's application, being filed within 90 days of having received an MEU response, was timely filed. To hold otherwise would penalize staff members for the dilatory actions of the MEU, a result which the Dispute Tribunal rejected as untenable in *Mohammed*.<sup>3</sup>

5. Further, *Neault* does not address the question of what should happen in situations where the MEU responds *after* the deadline of 90 days for seeking judicial review. The Appeals Tribunal in *Faraj* established that in such cases the 90-day deadline for submitting an application to the UNDT was re-set upon receipt of the MEU response.<sup>4</sup> By repeatedly communicating with the Appellant and informing him that the MEU would issue a decision imminently, the MEU itself extended the time limit for the Appellant to file with the Tribunal, as the Appeals Tribunal established in *Faraj*. In Mr. Gallo's case, the deadline was re-set on 21 February 2014, being the date the MEU responded to his request, and the

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<sup>2</sup> *Neault v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-345.

<sup>3</sup> *Mohammed v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/100.

<sup>4</sup> *Faraj v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-331.

Appellant filed his UNDT application within 90 days of 21 February 2014, therefore making his application timely. The UNDT's interpretation is both illogical and inequitable as it determines whether an application is receivable by the UNDT according to whether a belated MEU response is issued before or after the 90-day period in which a UNDT application is to be filed.

6. The UNDT also erred in referring to Article 7(5) of the UNDT Rules of Procedure, as this article only applies when an applicant has already received a decision from the MEU and wishes to seek an extension to 90 days because of exceptional circumstances. It was not applicable to the Appellant's matter, where the MEU was simply late in its response.

7. This case is of material importance to the Appellant who has been left with an official poor performance rating, which he considers unwarranted and retaliatory. As a consequence of his poor performance appraisal, the Appellant has been ineligible for promotion and has had to search for jobs in the private sector. Further, the case is of importance to the Organization and all potential future applicants since the import of the UNDT's Judgment means that the MEU would be able to defeat any evaluation request by resorting to delay tactics. Staff members would also be compelled to apply to the UNDT for an extension of time to file an application with the UNDT immediately after the expected MEU response date passes, because they would be unable to rely on any assurance from the MEU that an evaluation will ever be issued. This would represent an unnecessary burden on both applicants', and the UNDT's, resources, and would be contrary to the desire of the General Assembly as expressed in resolution 68/254, that the administration of justice at the United Nations be conducted in an efficient and cost-effective manner.<sup>5</sup>

8. The Appellant requests that this Tribunal vacate the UNDT Judgment and remand the matter to the UNDT for consideration.

### **The Secretary-General's Answer**

9. The Dispute Tribunal correctly concluded that the Appellant's application was not receivable as it had been filed late. The UNDT was also correct in noting that the Appellant's failure to submit a prior request to waive the deadline for filing an application rendered the UNDT unable to consider his application, in accordance with *Cooke*,<sup>6</sup> and correct in distinguishing *Neault* on its facts. The Appellant's interpretation of *Neault* is incorrect and

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<sup>5</sup> General Assembly Resolution 68/254, "Administration of justice at the United Nations", 27 December 2013.

<sup>6</sup> *Cooke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275.

contrary to the guidance of the Appeals Tribunal in that judgment. Further, the Appellant's reliance on *Faraj* is misplaced since in the present matter there was no continued engagement between the Administration and the Appellant on the issue of the contested decision.

10. The Secretary-General requests that this Tribunal dismiss the Appellant's appeal in its entirety and affirm the UNDT Judgment.

### **Considerations**

11. Article 8(1) of the UNDT Statute reads, in part, as follows:

An application shall be receivable if:

[...]

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices[.]

12. Article 8(3) of the UNDT Statute provides that:

The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

13. Article 7(5) of the UNDT Rules of Procedure further provides that:

In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the time limits referred to in article 7.1 [concerning the filing of applications]. Such request shall succinctly set out the exceptional circumstances that, in the view of the applicant, justify the request.

14. The Appeals Tribunal has consistently emphasized that the appeals procedure is of a corrective nature and is not an opportunity for a dissatisfied party to reargue his or her case. Further, “[a] party cannot merely repeat on appeal arguments that did not succeed in the lower court. Rather, he or she must demonstrate that the court below has committed an error of fact or law warranting intervention by the Appeals Tribunal.”<sup>7</sup>

15. Having reviewed the UNDT Judgment, we can discern no error in the UNDT’s computation of the applicable time limits. We agree that, once the MEU failed to provide its response within the prescribed 30-day period, pursuant to Article 8(1)(d)(i)(b) of the Dispute Tribunal’s Statute, Mr. Gallo was required to file his application for judicial review with the UNDT within 90 days thereafter, being by 28 January 2014 at the latest. However, Mr. Gallo did not file his application until 22 May 2014, well beyond the deadline prescribed by the Dispute Tribunal’s Statute.

16. While Article 8(3) of the UNDT Statute empowers the UNDT to suspend or waive any deadlines, except those for management evaluation, that power must be exercised with caution and under the discretion of the UNDT Judge. The exercise of discretion by the UNDT Judge may be overturned on appeal only if the decision taken appears to be clearly unreasonable.<sup>8</sup> Lastly, as the text of Article 8(3) states, such power can only be exercised upon the written request of an applicant.<sup>9</sup>

17. In the present case, the UNDT noted that the Appellant “did not file a written request that the applicable time limits be suspended pending his receipt of a response from the MEU, nor did he, upon receiving the MEU’s response and prior to filing his appeal, file a request that the time limits be waived”.<sup>10</sup> As such, the UNDT concluded that it had no jurisdiction to consider the merits of the Appellant’s claim. This Tribunal considers that the UNDT’s decision was reasonable and there are no grounds for overturning it.

### **Judgment**

18. The appeal is dismissed and the UNDT Judgment is affirmed.

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<sup>7</sup> *Azzouz v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-432.

<sup>8</sup> *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118, para. 30.

<sup>9</sup> *Cooke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275.

<sup>10</sup> Impugned Judgment, para. 17.

Original and Authoritative Version: English

Dated this 2<sup>nd</sup> day of July 2015 in Geneva, Switzerland.

*(Signed)*

Judge Weinberg de Roca,  
Presiding

*(Signed)*

Judge Chapman

*(Signed)*

Judge Adinyira

Entered in the Register on this 20<sup>th</sup> day of August 2015 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar