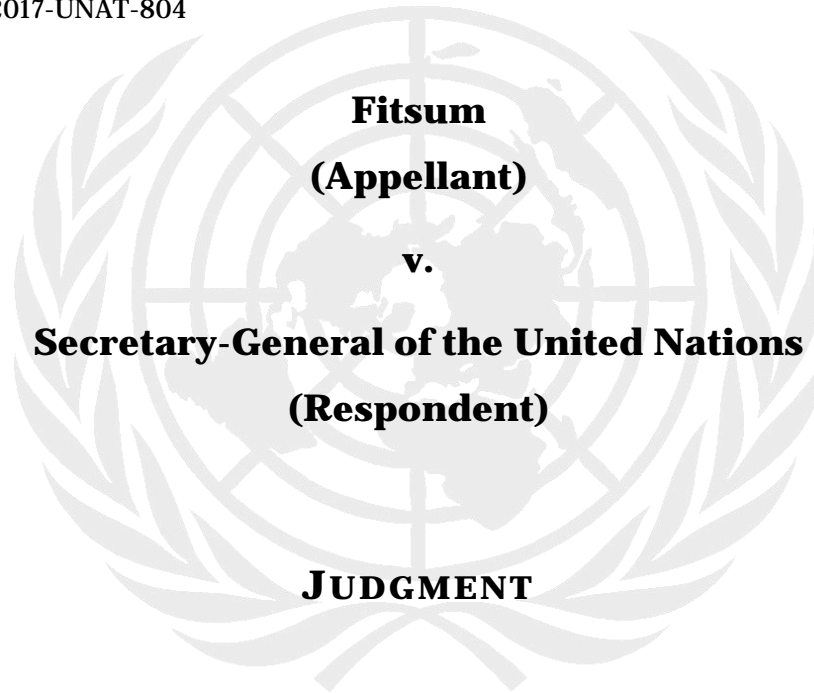




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-804



Before: Judge Martha Halfeld, Presiding
Judge Deborah Thomas-Felix
Judge John Murphy

Case No.: 2017-1089

Date: 27 October 2017

Registrar: Weicheng Lin

Counsel for Ms. Fitsum: Self-represented

Counsel for Secretary-General: Francisca Lagos-Pola

JUDGE MARTHA HALFELD, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2017/028, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 26 April 2017, in the case of *Fitsum v. Secretary-General of the United Nations*. Ms. Temnit Fitsum Wereta filed her appeal on 28 June 2017, and the Secretary-General filed an answer on 21 August 2017.

Facts and Procedure

2. The following facts are uncontested:¹

... Ms. Fitsum joined the [Economic Commission for Africa (ECA)] in 1997 as a Human Resources Assistant, at the G-3 level. She was promoted several times and became a Senior Human Resources Assistant at the G-7 level in 2008. She is currently a Human Resources Officer on a National Officer post in the Human Resources Services Section (HRSS).

... On 10 May 2009, Ms. Arthi Gounder, who was then a Human Resources Officer in HRSS at ECA, went on maternity leave/annual leave. During an HRSS meeting that took place prior to Ms. Gounder's departure, Ms. Fitsum was asked by Ms. Susan Mokonyana, then-Chief, HRSS, to perform all of the duties of a human resources officer in HRSS. These duties, which commenced on 11 May 2009, included *inter alia*, acting as team leader within HRSS and exercising certifying authority for one of HRSS's sub-units through the end of 2009.

... In light of the higher level responsibilities that Ms. Fitsum assumed, on 18 August 2009, Ms. Mokonyana wrote to the Office of Human Resources Management (OHRM) to request that Ms. Fitsum be placed on a P-level post for the purpose of granting her [a Special Post Allowance (SPA)] at the P-2 level.

... On 4 October 2010, OHRM approved the SPA for Ms. Fitsum at the P-2 level for the period of 11 May 2009 to 30 November 2009, that is, the period of Ms. Gounder's absence.

... On 1 June 2011, Ms. Fitsum went on Special Leave Without Pay (SLWOP). While Ms. Fitsum was on SLWOP, the P-3 post against which her SPA had been charged was filled. Upon Ms. Fitsum's return from SLWOP, the higher level functions that she had been performing were discontinued.

¹ Impugned Judgment, paras. 7-16.

... On 5 September 2011, Ms. Fitsum wrote an interoffice memorandum to Mr. Amaresarwa Rao, Chief of HRSS, copying Ms. Doreen Bongoy-Mawalla, then Director of Administration, requesting an extension of her SPA at the P-2 level from 1 December 2009 to the then-present time to account for the additional functions that she had been performing.

... On 15 January and 18 February 2014, on behalf of Ms. Fitsum, the Office of Staff Legal Assistance (OSLA) wrote an interoffice memorandum to Mr. Rao requesting an extension of Ms. Fitsum's SPA for the period from 1 December 2009 to 10 May 2011.

... On 16 April 2014, Mr. Rao sent an email to Ms. Fitsum's OSLA counsel rejecting Ms. Fitsum's request for an extension of her SPA.

... On 16 April 2014, Ms. Fitsum filed a management evaluation request contesting the Administration's decision not to grant her SPA for the period of 1 December 2009 to 10 May 2011.

... On 30 July 2014, Ms. Fitsum received the management evaluation, upholding the Administration's decision.

3. The UNDT found that pursuant to Staff Rule 3.17(ii), Ms. Fitsum was required to make a written request for retroactive SPA payments within one year following the date on which she would have been entitled to the initial payment. Accordingly, her request should have been made within one year of 1 December 2009, which is by or before 1 December 2010. Ms. Fitsum, however, only wrote a request for extension of her SPA on 5 September 2011. As a consequence, the UNDT held that she had submitted her claim for retroactive SPA payments outside of the statutory time limit. In addition, the UNDT noted that Section 7.3 of the Administrative Instruction on special post allowance (ST/AI/1999/17) permitting an extension of an SPA by the relevant department or office without reference to the SPA panel required a supervisor to certify that the staff member continued to satisfactorily perform at the higher level, and the evidence before the UNDT did not support Ms. Fitsum's claim that she had been asked to perform higher level functions. The UNDT also took note of the e-mail from OHRM stressing that "approvals of SPA had been given on a one-time exceptional basis on the understanding that future requests of [that] nature [would] not be entertained under any circumstances". The UNDT ultimately held that Ms. Fitsum failed to comply with Staff Rule 3.17(ii) by failing to make a claim seeking retroactive payment of SPA in a timely manner.

4. As noted above, Ms. Fitsum filed the instant appeal on 28 June 2017, and the Secretary-General filed his answer on 21 August 2017.

Submissions

Ms. Fitsum's Appeal

5. Ms. Fitsum states in the "relief claimed" section of the appeals form that she contests "the decision not to pay her SPA payment". Ms. Fitsum did not submit an appeal brief with the appeal form.

The Secretary-General's Answer

6. The Secretary-General requests the Appeals Tribunal to affirm the UNDT's Judgment and reject the appeal in its entirety. The Secretary-General argues that the UNDT correctly upheld the Administration's dismissal of Ms. Fitsum's request for SPA. The Secretary-General also argues that Ms. Fitsum has not established any errors warranting a reversal of the Judgment as the appeal is a one-sentence submission indicating that she is contesting the decision not to pay her SPA. Article 2(1) of the Statute of the Appeals Tribunal (Statute) delineates appellate jurisdiction over judgments by the UNDT and enumerates limited grounds of appeal. The Appeals Tribunal is limited to determining, if the UNDT has made any errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction. Ms. Fitsum has the burden of satisfying the Appeals Tribunal that the judgment rendered by the UNDT is defective. For an appeal to succeed, an appellant must persuade the Appeals Tribunal that the contested decision fulfills the objective criteria of its competence. As Ms. Fitsum has not specified a statutory ground of appeal, the appeal should be dismissed on this ground alone in its entirety.

Considerations

7. Ms. Fitsum requests being paid SPA for the period from 1 December 2009 to 10 May 2011, when she performed additional duties, before taking SLWOP. Her first claim was submitted on 5 September 2011 and further memoranda were written on 15 January and 18 February 2014.

8. The UNDT declared the application not receivable because of Ms. Fitsum's failure to submit a written claim seeking retroactive payment of SPA in a timely manner, but the UNDT nonetheless addressed the merits of the case, stating that Ms. Fitsum had not given evidence

to show that she continued to perform all of the higher level functions required to be entitled to such a payment.²

9. Ms. Fitsum filed an appeal form, in which she “contested the decision not to pay her SPA payment” (*sic*). No appeal brief was filed.

10. Article 8 of the Rules of Procedure of the Appeals Tribunal (Rules) requires that

1. Appeals shall be submitted on a prescribed form.

2. The appeal form shall be accompanied by:

(a) A brief that explains the legal basis of any of the five grounds for appeal set out in article 2.1 of the statute of the Appeals Tribunal that is relied upon or, in the case of an appeal against a decision of the Standing Committee acting on behalf of the United Nations Joint Staff Pension Board, a brief containing pleas and an explanatory statement. The brief shall not exceed 15 pages;

...

11. In turn, the Statute, in relevant part, reads as follows:

Article 2(1):

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

Article 7(1):

An appeal shall be receivable if:

- (a) The Appeals Tribunal is competent to hear and pass judgement on the appeal, pursuant to article 2, paragraph 1, of the present statute[.]

² *Ibid.*, para. 27: “The evidence tendered to the [Dispute] Tribunal by the Applicant’s supervisors does not support the Applicant’s contentions that she was asked to perform higher level functions. The Applicant has not tendered any documentation nor is there any paper trail to justify such a claim and payment.”

12. This Tribunal has consistently held that it is the appellant's burden to demonstrate that the impugned judgment erred on a question of law or fact, resulting in a manifestly unreasonable decision. In failing to file an appeal brief contesting the decision taken against her, Ms. Fitsum has not discharged this burden. In the circumstance, the decision would normally be subject to the review of this Tribunal if any blatant mistakes were detected in the decision of the UNDT, regardless of any argument or interpretation. This is not the case.

13. In *Musleh*, in a situation where the appellant had failed to file an appeal brief despite the Registry's request, we stated:³

... We recall that the Appeals Tribunal's function is to determine whether the [Dispute Tribunal of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)] has made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that the appellant must identify the alleged defects in the judgment and state the grounds relied upon in asserting that the judgment is defective.

14. In *Mizyed*, we found:⁴

... Being the Appellant, Mr. Mizyed has the burden of satisfying the Appeals Tribunal that the Judgment rendered by the Dispute Tribunal is defective. The Appeals Tribunal finds that Mr. Mizyed has failed to meet that obligation in that he has not established any errors of law, fact or procedure warranting a reversal of the UNDT Judgment.

15. In *El-Khalek*, we found:⁵

... The appellant bears the burden of satisfying the Appeals Tribunal that the judgment rendered by the Dispute Tribunal is defective.

³ *Musleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-596, para. 20.

⁴ *Mizyed v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-550, para. 41.

⁵ *El-Khalek v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-442, para. 21.

16. In *Gallo*, we found:⁶

... 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.

17. It naturally follows that the appeal should be dismissed.

18. Notwithstanding the above, we note that there is a clerical mistake in paragraph 22 of the impugned Judgment. Ms. Fitsum made her claim for SPA for the period in question, namely 1 December 2009 to 10 May 2011, for the first time on 5 September 2011. In accordance with Staff Rule 3.17(ii), her written claim was due within one year following the date on which she would have been entitled to the initial payment, which means her claim was due by 1 December 2010. Paragraph 22 of the impugned Judgment erroneously indicates that Ms. Fitsum filed her claim more than 20 months after the date “when she ought to have requested for SPA as per the provisions of [S]taff [R]ule 3.17(ii)”. Ms. Fitsum’s claim was actually filed nine months, not 20 months, after the deadline. This clerical slip, however, does not have any bearing on the outcome, insofar as the initial administrative claim was time-barred in any event.

19. We finally note that it appears that an implied administrative decision occurred, when Ms. Fitsum did not receive any decision on her first written demand in 2011, which constitutes a negative response.⁷ Since there was no request for management evaluation of that denial, this application seems to be also not receivable *ratione materiae*.

⁶ *Gallo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-552, para. 14.

⁷ *Rosana v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-273, para. 19, which states: “The date of an administrative decision is based on objective elements that both parties (Administration and staff member) can accurately determine”.

Judgment

20. The appeal is dismissed and Judgment No. UNDT/2017/028 is affirmed.

Original and Authoritative Version: English

Dated this 27th day of October 2017 in New York, United States.

(Signed)

Judge Halfeld, Presiding

(Signed)

Judge Thomas-Felix

(Signed)

Judge Murphy

Entered in the Register on this 8th day of December 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar