



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

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

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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*

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.

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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

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 s surTr(t)73i1-0.0184 5 -0.00{rin6(008)w1(al u)-4(l u)-4(2vnl u)-t Is

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