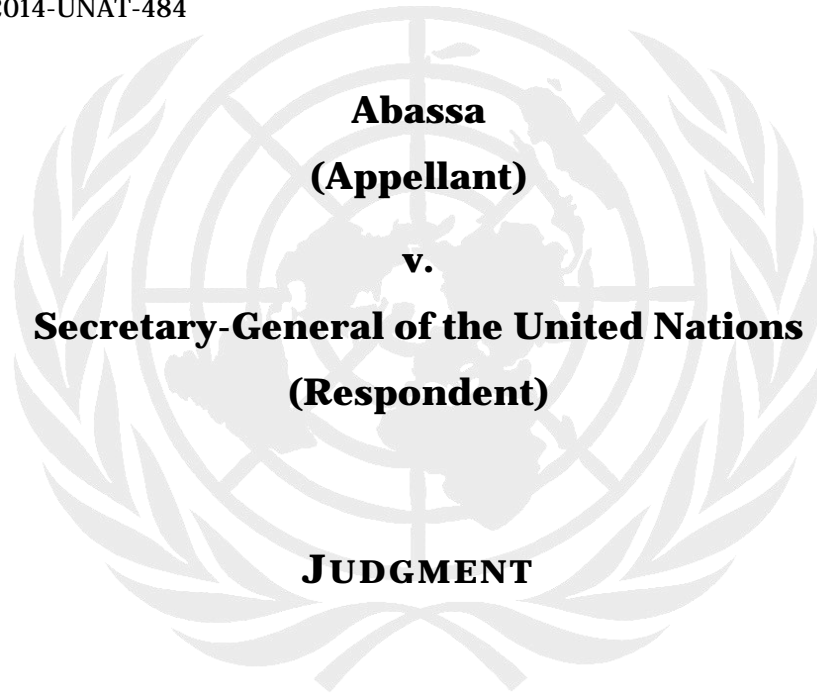




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-484



**Abassa
(Appellant)**

v.

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

JUDGMENT

Before: Judge Mary Faherty, Presiding
Judge Inés Weinberg de Roca
Judge Sophia Adinyira

Case Nos.: 2014-558

Date: 17 October 2014

Registrar: Weicheng Lin

Counsel for Mr. Abassa: Self-represented

Counsel for Secretary-General: Noam Wiener

JUDGE MARY FAHERTY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Kodjo Abassa against Judgment on an Application for Revision No. UNDT/2013/145, rendered by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Nairobi on 20 November 2013 in the case of *Abassa v. Secretary-General of the United Nations*. Mr. Abassa appealed on 16 January 2014, and the Secretary-General of the United Nations answered on 18 March 2014.

Facts and Procedure

2. Mr. Abassa was a staff member of the United Nations Economic Commission for Africa (UNECA), working as an Agricultural Advisor in the Food Security and Sustainability Development Department (FSSDD) in Addis Ababa, Ethiopia.

3. In October 2010, he requested management evaluation of the decision not to select him for the position of Chief, Agricultural Production Systems Section (APSS), FSSDD/UNECA. He was advised in December 2010 that his management evaluation request was not receivable as it was not sent within sixty days from the date on which he received notification of the administrative decision.

4. Mr. Abassa subsequently filed two requests with the Dispute Tribunal in Nairobi for extension of time to file an application, stating that he was involved in a mediation process with the participation of the Office of the Ombudsman. The Registry of the Dispute Tribunal, on 15 May 2011 and 29 November 2011, sent two e-mails to Mr. Abassa to inquire about the status of his mediation efforts. According to the Dispute Tribunal, Mr. Abassa did not respond to UNDT's 15 May 2011 e-mail. However, on 2 December 2011, Mr. Abassa responded to UNDT's 29 November 2011 e-mail by stating that the mediation efforts had produced no results as of 2 December 2011 and that he was ready to file his application.

5. Mr. Abassa retired from UNECA on 31 January 2012. On 2 March 2012, he submitted his application with the Dispute Tribunal in Nairobi.

6. In an e-mail dated 21 March 2012 to the Registry of the Dispute Tribunal, Mr. Abassa advised that he would no longer use his UNECA e-mail address and asked that all future correspondences be directed to his personal e-mail address.

7. On 28 March 2012, the Secretary-General filed a “Reply Limited to Receivability and for Consideration of Receivability as a Preliminary Issue”. The Registry of the Dispute Tribunal forwarded the Secretary-General’s Reply on Receivability to Mr. Abassa and gave him until 24 April 2012 to file a response thereto. Mr. Abassa states that he did not receive that message or any subsequent messages from the UNDT Registry at his personal e-mail address, after his UNECA e-mail account was closed on 30 March 2012. He did not file any response to the Respondent’s receivability challenge.

8. On 6 June 2012, the Dispute Tribunal rendered Judgment No. UNDT/2012/086, rejecting Mr. Abassa’s application as not receivable *ratione temporis*. In respect of the events subsequent to the filing of the Respondent’s Reply on Receivability, the Dispute Tribunal made the following findings and conclusions:

... When the Respondent filed the Reply on Receivability, the Applicant was given until 24 April 2012 to challenge it. The Applicant has not done so. The Tribunal went further and sent an email to both parties on 24 May 2012, seeking a clarification as to when the Applicant was officially notified that the mediation was futile. The Tribunal gave both parties until close of business on 25 May 2012 to respond. The Applicant has responded and the Respondent responded after the deadline, and this is most regrettable.

... The Tribunal will accept the Respondent’s Reply on Receivability at face value as there has been no objection from the Applicant and find that the discussions ended on 22 July 2011.

... There was a formal Reply filed by the Respondent, and the Applicant was given a chance to challenge it. The Applicant has failed to do so. The Tribunal finds that it has given the Applicant ample time and latitude to give information regarding whether the mediation process took place and when it became futile. The Respondent informed the Tribunal that he was not aware of any on-going mediation process. It is not for the Tribunal to probe further into that statement. However, the Tribunal wants to emphasize that given the strict guidelines for filing of Applications provided for in the Statute, and bearing in mind that mediation suspends the running of time to file an Application, it becomes highly relevant to the Tribunal to be informed on request when mediation has started and when it ended.¹

¹ Judgment No. UNDT/2012/086, paras. 47-49.

9. On 30 June 2012, Mr. Abassa filed with the Dispute Tribunal an application for revision of Judgment No. UNDT/2012/086, on the grounds that he did not receive the Dispute Tribunal's e-mail correspondence seeking his comments on the Respondent's Reply on Receivability.

10. In Judgment on an Application for Revision No. UNDT/2013/145, the Dispute Tribunal rejected Mr. Abassa's revision application. In its view, Article 12(1) of the UNDT Statute permitted an application for revision of "an executable judgement". However, "[a] judgment on receivability is based on a procedural issue. ... It was therefore *not* an executable judgment within the meaning [of] article 12.1 of the [UNDT] Statute."² Consequently, Mr. Abassa's revision application was not receivable as the underlying Judgment was not an executable judgment.

Mr. Abassa's Appeal

11. The Dispute Tribunal failed to consider the "root cause" of his failure to observe the time limits. The UNDT committed an error in procedure as it used a wrong e-mail address to transmit to him the Respondent's Reply limited to receivability as a preliminary issue. The fact that the UNDT was "procedurally estopped" from considering the substantive issues raised results from a procedural error committed by the UNDT, not by him. Had it used the right e-mail address, the UNDT would have never arrived at the impugned Judgment.

12. Mr. Abassa requests that the Appeals Tribunal vacate the Judgment and remand the case to the Dispute Tribunal for a retrial.

The Secretary-General's Answer

13. The UNDT correctly rejected Mr. Abassa's revision application as it failed to conform to the requirements of Article 12(1) of the UNDT Statute. His inability to access his UNECA e-mail account was neither a new fact that was unknown to him at the time when the Judgment was rendered nor was it of a decisive nature affecting the UNDT's considerations on the receivability of his application. Mr. Abassa at all relevant times had access through the Court Case Management System (CCMS) to the case orders and materials relating to his case.

² Judgment No. UNDT/2013/145, para. 19 (emphasis in original).

14. The filing of a revision application was not an appropriate mechanism for raising issues about the UNDT Judgment on Receivability. If he had wished to challenge any procedural errors, he would have needed to file an appeal with the Appeals Tribunal. He never appealed the UNDT Judgment on Receivability.

15. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Abassa's revision application in its entirety.

Considerations

16. In his appeal papers, Mr. Abassa does not address the basis for the Dispute Tribunal's rejection of his revision application, namely its determination that his application for revision did not relate to an "executable judgement" of the UNDT, as interpreted by the Dispute Tribunal.

17. The thrust of Mr. Abassa's appeal is a request that the Appeals Tribunal vacate the Dispute Tribunal Judgment on his revision application and remand the matter to the Dispute Tribunal for retrial for that Tribunal to reconsider his application challenging the Administration's refusal to appoint him to the post of Chief, APSS, FSSDD/UNECA.

18. Mr. Abassa submits that the UNDT, in rejecting his application for revision, erred because it "has not covered the root cause of [his] failure to observe the underlying timelines", namely the Dispute Tribunal's own procedural failure in using a wrong e-mail address to communicate to him "vital information". This error, according to Mr. Abassa, led the UNDT to erroneously conclude that his application contesting the decision not to appoint him was time-barred.

19. In his answer to the appeal, the Secretary-General maintains that there is no merit in the appeal and submits that the UNDT correctly rejected Mr. Abassa's application for revision "since it failed to conform to the requirements of Article 12(1) of the UNDT Statute". The Secretary-General does not otherwise elaborate on the Dispute Tribunal's rationale for deeming the revision application not receivable.

20. It is contended by the Secretary-General that Mr. Abassa's "inability to access his UN e-mail was neither a new fact that was unknown to him at the time the judgment was rendered nor was it of a decisive nature affecting the UNDT's considerations on the receivability of his Application on the Merits".

21. The Secretary-General further argues that the UNDT's ruling³ that Mr. Abassa's challenge to his non-appointment was not receivable *ratione temporis* was based on the fact that he had submitted his application seven months after attempts at mediation had concluded in July 2011 and some ten months after the extension of his deadline to file an application with the Dispute Tribunal had expired. His claim that he had not received the UNDT's request for his comments on receivability issues does not establish any new fact which was relevant to the UNDT's conclusion in the Judgment on Receivability.

22. Furthermore, the Secretary-General argues that Mr. Abassa's complaint of alleged procedural errors on the part of the UNDT is not properly before the Appeals Tribunal in this appeal of the UNDT Revision Judgment. He submits that Mr. Abassa's remedy lay in an appeal to the Appeals Tribunal within sixty days of Judgment No. UNDT/2012/086 having been rendered, a course Mr. Abassa did not take.

23. Having reviewed the UNDT Judgment under appeal in this case, it falls to the Appeals Tribunal, in the first instance, to decide whether the UNDT erred in law in not receiving Mr. Abassa's application for revision of Judgment No. UNDT/2012/086.

24. Reviewing Mr. Abassa's application for revision of its Judgment on Receivability (Judgment No. UNDT/ 2012/086), the Dispute Tribunal stated:⁴

... A judgment on receivability is not an executable judgment. It is not a judgment on the merits of the case where all the issues have been adjudicated upon. An executable judgment is one in which the court determines on the substantive issues of the case having heard and deliberated on the evidence and arguments submitted by the parties.

... A judgment on receivability is based on a procedural issue. In the present case, the procedural issue had to do with the timeliness of the application and scope of the court's jurisdiction where the statutory timelines have not been observed. In other words, the court never got to consider the merits because it was procedurally *estopped*

³ Judgment No. UNDT/2012/086,

⁴ Judgment No. UNDT/2013/145, paras. 18 and 19 (emphasis in original).

from considering the substantive issues raised. It was therefore *not* an executable judgment within the meaning [of] article 12.1 of the Statute.

25. The Appeals Tribunal is satisfied that, in arriving at its conclusion in the above regard, the Dispute Tribunal erred in law.

26. We so find for the following reasons. Firstly, while Article 12(1) of the UNDT Statute refers to an “executable judgment”, these words must be construed having regard to what is contained in the immediately preceding article of that Statute. Article 11(3) provides as follows: “The judgements of the Dispute Tribunal shall be binding upon the parties, but are subject to appeal in accordance with the statute of the United Nations Appeals Tribunal. In the absence of such appeal, they shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal.”

27. The import of the above-quoted article, when viewed together with Article 12(1), allows for a reading of the latter as meaning not that the range of Dispute Tribunal judgments open to an application for revision is limited to judgments dealing with the “substantive issues” of the case, but rather that there should be a (final) judgment capable of being the subject of a revision application.

28. Furthermore, to constrain the limited entitlement of a party to seek revision of a Dispute Tribunal judgment to a judgment on substantive issues, as outlined in paragraphs 18 and 19 of the Dispute Tribunal Judgment, would, in the view of the Appeals Tribunal, unduly circumscribe the right of access of staff members to the Dispute Tribunal. The discovery of a decisive fact within the timeframe permitted by Article 12(1), hitherto unknown to the staff member and to the Dispute Tribunal and where there is no negligence on the part of a staff member, could be the basis of rendering an application receivable where previously that application had been rejected as not receivable. If this course were not open to a staff member, he or she would never reach the stage of an executable judgment, as defined by the UNDT in the present case.

29. To import into Article 12(1) of the UNDT Statute the limitations advocated by the Dispute Tribunal in the present case merely because of the inclusion therein of the word “executable” is unduly restrictive and tantamount to a denial of an already narrowly constructed remedy. Accordingly, we find that the UNDT erred in law in refusing to receive

Mr. Abassa's application for revision. Thus, the Appeals Tribunal finds that Mr. Abassa's application for revision was receivable by the Dispute Tribunal.

30. Turning now to the merits of the application for revision: the Appeals Tribunal sees no reason to remand this issue to the Dispute Tribunal, being satisfied that there is sufficient information on the record for the Appeals Tribunal to determine whether Mr. Abassa's application for revision met the requirements set out in Article 12(1) of the UNDT Statute.

31. That article provides as follows:

Either party may apply to the Dispute Tribunal for a revision of an executable judgement on the basis of the discovery of a decisive fact which was, at the time the judgement was rendered, unknown to the Dispute Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence. The application must be made within 30 calendar days of the discovery of the fact and within one year of the date of the judgement.

32. Central to the question of whether a UNDT Judgment should be open to revision is the discovery of a decisive fact, "*unknown to the Dispute Tribunal and to the party applying for revision*".⁵

33. The Appeals Tribunal's jurisprudence on the issue of revision applications which come before it emphasises that an application is receivable if it fulfils the strict and exceptional criteria set down in its Statute.⁶ This principle also applies to revision cases before the Dispute Tribunal, in light of the similarity of its statutory provisions on revision to those of the Appeals Tribunal.

34. Having given due consideration to the parties' submissions in this case (including the submissions before the Dispute Tribunal), we agree with the Secretary-General that the "fact" upon which Mr. Abassa grounds his application for revision does not meet the strict test set out in Article 12(1), quoted above. We are satisfied that Mr. Abassa's inability to access his UNECA e-mail account cannot be said to have been unknown to him at the time the UNDT Judgment was rendered. Nor can it be said that the "fact" that the Dispute Tribunal sent an e-mail giving Mr. Abassa a period of time to respond to the Secretary-General's Reply on the

⁵ Emphasis added.

⁶ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-393, citing *Beaudry v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-129, para. 16.

issue of receivability was unknown to the Dispute Tribunal, although it may have been unknown to Mr. Abassa.

35. In light of the above, Mr. Abassa has not satisfied the strict requirements of Article 12(1) of the UNDT Statute.

36. With regard to Mr. Abassa's submission in this appeal claiming procedural error on the part of the UNDT, the Appeals Tribunal will not embark on a consideration of the latter complaint because the Appeals Tribunal is not competent to do so, in the absence of Mr. Abassa having sought a timely appeal of Judgment No. UNDT/2012/086. Mr. Abassa cannot use his appeal against the rejection of the application for revision to litigate this issue.

37. In all the circumstances, we find no merit in the application for revision and, accordingly, Mr. Abassa's appeal against Judgment No. UNDT/2013/145 is dismissed, save to the extent that the Appeals Tribunal finds that the Dispute Tribunal should have received the revision application.

Judgment

38. Mr. Abassa's application for revision is receivable, but dismissed on its merits.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Adinyira

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar