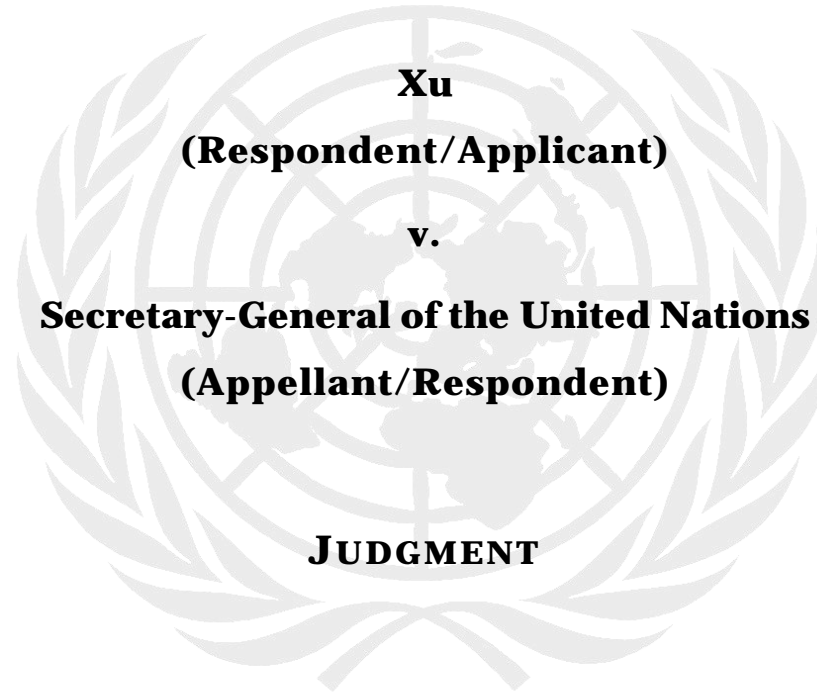




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-056



Xu

(Respondent/Applicant)

v.

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

JUDGMENT

Before: Judge Kamaljit Singh Garewal, Presiding
Judge Rose Boyko
Judge Luis María Simón

Judgment No.: 2010-UNAT-053

Date: 1 July 2010

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Ming Wu

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. On account of a technical defect in sending the e-mail notifying the counsel representing the Secretary-General before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) about the date of the trial, the Secretary-General was denied an opportunity of a hearing. The UNDT Judgment is set aside on this preliminary ground, without going into the merits of the case. The case is remanded back to the UNDT for a re-trial and an expeditious decision according to law. The parties are directed to appear, either personally or through counsel, before the Registrar, UNDT, Nairobi, on Monday, 19 July 2010, for further proceedings.

Facts and Procedure

2. Zhengfang Xu (Xu) is a staff member of the United Nations Office at Nairobi. While holding the post of Chinese Reviser at the P-4 level, Xu applied for the post of Chinese Reviser at the P-4 level in New York (Vacancy Announcement No. 08-CON-DGACM-418629-R-New York). Xu was eligible to be considered for the post at the 15-day mark with another candidate, who subsequently withdrew his name from consideration. Xu was not considered to be a suitable candidate at this stage, and was later included in the list of candidates eligible at the 30-day mark. Xu and eight other candidates were interviewed. The decision was taken to select another candidate for the post.

3. By letter dated 12 February 2009, Xu requested an administrative review of the decision. On 5 May 2009, and following confirmation of the contested decision, Xu filed an appeal with the Nairobi Joint Appeals Board (JAB). The appeal was transferred to the Dispute Tribunal following the introduction of the new system of administration of justice on 1 July 2009.

4. On 13 October 2009, the Secretary-General filed a motion for an extension of the time limit to file and serve a reply. On 23 October 2009, the UNDT granted the motion. A status conference was held on 4 November 2009. However counsel for the Secretary-General did not attend due to a miscalculation of the time difference between New York and

Nairobi. By e-mail dated 19 November 2009, the UNDT Registry informed the parties that a hearing had been tentatively scheduled for 18 December 2009. By letter mistakenly dated 3 November 2009, attached to an e-mail dated 2 December 2009, the hearing date was confirmed by the Registry. Counsel for the Secretary-General, Mr. Margetts (Margetts), did not receive those e-mails and he was unable to be contacted during the course of the hearing on 18 December 2009. After hearing the submissions of Xu, the UNDT contacted another lawyer from the Administrative Law Unit (ALU) in New York, Ms. Maddox. She was given time to retrieve the case file and she made submissions on a number of issues.

5. On 18 December 2009, the Secretary-General filed an application for a retrial on the ground that the Secretary-General was not notified of the hearing date. On 7 January 2010, the UNDT issued Judgment No. 2010/2. It refused the application for a retrial and, on the merits of the case, awarded compensation to Xu as her rights were injured during the course of the selection process.

6. In considering the application for a retrial, the UNDT found that the UNDT Registrar had complied with the duty to serve a notice of the hearing on the parties. Although Mr. Margetts did not receive the notice of the hearing by e-mail due to a technical error, the ALU received the same e-mail. The UNDT concluded that a retrial would be unduly wasteful of time and resources. It also found that the Secretary-General was adequately represented as no oral evidence was tendered by Xu and the issue of cross-examination of a witness did not arise. Full equality was accorded to the parties in the circumstances.

7. The Secretary-General filed an appeal on 22 February 2010. Xu filed an answer to the appeal on 12 April 2010.

Submissions

Secretary-General's Appeal

8. The Secretary-General submits that the UNDT's denial of the Secretary-General's application for a retrial was unreasonable and based on errors of fact and law. By allowing the hearing to proceed without the effective representation of the Secretary-General, the UNDT also committed an error in procedure. First, the Secretary-General argues that the UNDT made an error of fact resulting in a manifestly unreasonable decision in asserting that

the effectiveness of service was not contested. It is contended that the technical error in the e-mails sent by the Registry meant that the guarantee of notification of a hearing, as provided by Article 16(3) of the rules of procedure of the UNDT, was not accorded to the Secretary-General. Second, the Secretary-General argues that the UNDT was unreasonable in determining that, by copying the e-mails in question to the ALU, there was effective service. In effect, the ALU was expected to rectify a mistake made by the Registry of the UNDT. Further, the Secretary-General contends that the UNDT has shown some degree of flexibility in determining the effectiveness of service in other cases, and the same flexibility is warranted in this case.

9. Third, the Secretary-General argues that the UNDT erred on a question of law in determining that the Secretary-General was adequately represented and that full equality was accorded to the parties. It is contended that the participation of Ms. Maddox at the hearing on 18 December 2009 was not consistent with the right of the Secretary-General to effective representation as she was not familiar with the details of the case and was not prepared to make substantive submissions. It is also contended that the UNDT made an error of law in its interpretation of “full equality” of treatment of the parties, and reference is made to Article 14 of the International Covenant on Civil and Political Rights.¹ Only Xu was given an opportunity to provide oral testimony at the hearing. The Secretary-General planned to present oral testimony of the Programme Case Officer. The UNDT did not take into account the fact that the Secretary-General was denied an opportunity to present oral testimony and the UNDT proceeded to draw adverse conclusions from the absence of evidence. It is argued that, by allowing the hearing to proceed without the effective representation of the Secretary-General, the UNDT also committed an error in procedure, affecting the decision of the case.

Xu’s Answer

10. Xu submits that the application for retrial was brought in bad faith and constitutes an abuse of process. Xu contends that the submission that the Secretary-General intended to

¹ United Nations, *Treaty Series*, vol. 999, p. 171.

present testimony at the hearing was “an after-thought to construct an argument to validate his request for re-trial”.

Considerations

11. Has man truly mastered the machine and its grammar or is the machine capable of producing technical howlers, with altogether unintended results, by omitting to put a punctuation mark at the proper place.

12. Xu's case was being heard by the UNDT at Nairobi. After pleadings had been completed the stage was set for trial and a status conference was scheduled for 4 November 2009. When the status conference was held on the specified date, the counsel for the Secretary-General did not attend due to a miscalculation of the time difference between Nairobi and New York. This led to a Legal Officer in the Registry of the UNDT sending an e-mail to all concerned on 19 November 2009, providing notification that the tentative hearing date was Friday, 18 December 2009. He further informed that the venue and time of the hearing would be confirmed in the formal hearing notice. This was presumably done by the e-mail of 2 December, which attached the hearing notice.

13. We have seen copies of the e-mails of 19 November and 2 December. Both e-mails were addressed to the two counsel for the parties, Ming Wu and Margetts. Copies were also sent to the parties, Xu, the ALU, and Jean-Pelé Fomété, Registrar of the UNDT at Nairobi. When an e-mail is sent to two or more addresses, the addresses have to be separated by a comma. If this is not done, the e-mail only goes to the first address and not to the second. In both e-mails commas were missing between Ming Wu's address and Margetts's. No comma, no e-mail. We have confirmed that this minor flaw led Margetts forever remaining ignorant of the date of the hearing - 18 December 2009 - and remaining a non-recipient of the two e-mails, his copies being lost in cyberspace. This is unlike a letter sent by regular post, which would ordinarily not be lost even if addressed incorrectly. Such a letter would return to the sender, who would then learn the reason for its non-delivery.

14. At the hearing on 18 December Margetts was not present at Nairobi. He could not even be located in New York. Ultimately, the telephone was answered at the ALU by Susan Maddox who participated in the proceedings (through teleconference) and was heard but obviously her submissions were without proper preparation.

15. The UNDT was presented an application on 18 December itself for a retrial of the case. The application was moved by Margetts on the ground that he had not been notified of the dates. It was pleaded that the notice of hearing was not received by him due to a technical defect (as has been demonstrated above) although the notice had been received by the ALU. The position was the same with respect to the earlier e-mail of 19 November. It was submitted that service of notice of hearing on the ALU was not adequate as Margetts who had been assigned to the case had to be served personally. Due to this, the Secretary-General's defence was seriously prejudiced. But the UNDT held otherwise. In its view, the ALU being the lawful agent of the Respondent, service on the ALU was good service.

16. We consider that the nature of the technical error, the missing comma, has made a huge difference in this case. The e-mails were addressed to Margetts and copied to the ALU and others. Margetts did not receive the ones addressed to him, but the ALU could reasonably presume that Margetts got both the e-mails, as they had also been addressed to him by name. For these reasons, no one in the ALU tried to inform Margetts of the hearing date. They remained under the illusion that the e-mails addressed to Margetts were, as a matter of fact, received by him. And everyone went on with business as usual. The two e-mails meant for Margetts never reached their destination, due to a clerical error by the UNDT Registry. They simply vanished into thin air.

17. We are of the considered opinion that this is a fit case in which the Judgment deserves to be set aside and the matter retried afresh. We are not entering the arena of controversy regarding the merits of the case for fear of prejudicing the trial judge.

Judgment

18. The appeal is allowed on the ground that the Secretary-General's counsel was not served with the hearing notice for 18 December 2009 and therefore could not present his case. The matter is remanded back to the UNDT to be heard afresh. The UNDT shall endeavor to dispose of the case within three months from the date of receipt of the written Judgment. The parties are directed to appear, either personally or through counsel, before Registrar, UNDT, Nairobi, on Monday, 19 July 2010, for further proceedings.

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

Original: English

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Boyko

(Signed)

Judge Simón

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

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal