

United Nations Appeals Tribunal Tribunal d'Appel des Nations Unies

Case No. 2010-062

Fagundes (Appellant)

v.

Secretary-General of the United Nations (Respondent)

JUDGMENT

Before: Judge Rose Boyko, Presiding

Judge Sophia Adinyira

Judge Kamaljit Singh Garewal

Judgment No.: 2010-UNAT-057

Date: 1 July 2010

Registrar: Weicheng Lin

Counsel for Appellant: Joseph Grinblat

Counsel for Respondent: Guillaume Lemenez

JUDGE ROSE BOYKO, Presiding.

Synopsis

1. Mayara Fagundes (Fagundes) appeals from a decision of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) refusing to hear her appeal against a judgment of the former Administrative Tribunal. The UNDT found that the decision of the former Administrative Tribunal was final and that the UNDT statute did not confer upon it review or appeals powers with respect to judgments of the former Administrative Tribunal. The UNDT correctly held that when the new internal justice system was created, the UNDT was not given powers to review or hear appeals from judgments of the former Administrative Tribunal. The Appeals Tribunal dismisses the appeal.

Facts and Procedure

- 2. Fagundes was a staff member of the United Nations. She joined the United Nations in November 2000 on a fixed-term appointment at the P-3 level as a Radio Producer in the Department of Public Information. On 26 October 2004, she joined the United Nations Environment Programme in The Hague on a fixed-term appointment as a P-3 Programme Officer.
- 3. Fagundes was on sick leave from 8 August 2005 to 17 November 2005, and there was a disagreement between Fagundes and the Administration on the certification of the sick leave. Fagundes was separated from service, effective 31 December 2005. On 7 January 2006, Fagundes submitted a request that a Medical Board be convened to review her sick leave entitlements from 8 August 2005 to 17 November 2005. On 27 April 2006, Fagundes was notified that the Medical Board had certified the period of sick leave from 8 August to 7 September 2005, but that the balance, from 8 September to 17 November 2005, had not been certified. On 17 August 2006, Fagundes requested a copy of the report of the Medical Board. But the Administration denied the request.
- 4. On 20 September 2006, Fagundes requested administrative review of the "violation of due process and harassment" against her. Fagundes later filed an appeal to the Nairobi Joint Appeals Board (JAB). On 30 January 2007, the JAB advised her counsel that it was

not competent to review decisions of the Medical Board and suggested that she appeal to the former Administrative Tribunal.

- 5. On 22 February 2007, Fagundes filed an application with the former Administrative Tribunal. On 31 July 2009, the former Administrative Tribunal issued Judgment No. 1466, rejecting the application in its entirety as time-barred.
- 6. On 12 November 2009, Fagundes filed an application with the UNDT. On 5 February 2010, the UNDT issued Judgment No. UNDT/2010/022. The application was rejected in its entirety. The UNDT found that the contested decision was a judicial decision, as opposed to an administrative one, and, as such, did not fall within the competence of the UNDT, as defined in Article 2(1) of the UNDT statute. It considered that the competence of the UNDT under the transitional measures relating to the introduction of the new system of administration of justice, as set out in Article 2(7) of the UNDT statute and Section 4.2 of the Secretary-General's Bulletin ST/SGB/2009/11 extended to cases pending before the former Administrative Tribunal at the time of its abolishment on 31 December 2009, but not to those on which judgment had already been passed at that point. Accordingly, the UNDT found that it was not competent to examine the application.
- 7. Article 12 of the UNDT statute allows applicants to apply to the UNDT for a revision of a judgment. The UNDT considered that its mandate, defined by the General Assembly in its resolution 63/253 and the UNDT statute, did not include the power to revise judgments of the former Administrative Tribunal. The UNDT further found that it could not infer additional competences from the statute of the former Administrative Tribunal.
- 8. Fagundes filed an appeal on 11 March 2010. Following receipt of the appeal on 17 March 2010, the Secretary-General filed an answer to the appeal on 27 April 2010.

Submissions

Fagundes's Appeal

9. Fagundes reiterates the submissions made before the UNDT. In addition, she contends that under Article 2(7)(b) of its statute, the UNDT is competent to revise the judgment of the former Administrative Tribunal. She argues that the request to the UNDT to

revise the judgment was made when the former Administrative Tribunal still existed, but that the transitional measures required that the request be sent directly to the UNDT. Further, under Article(2)(6) of its statute, the UNDT may determine whether it has competence.

10. Fagundes requests the Appeals Tribunal to find the appeal receivable and to consider the merits of her case.

Secretary-General's Answer

- 11. The Secretary-General responds that the UNDT correctly determined that it did not have jurisdiction to revise the judgments of the former Administrative Tribunal.
- 12. Should the Appeals Tribunal decide that the UNDT has jurisdiction to revise the judgments of the former Administrative Tribunal pursuant to Article 12 of the statute of the former Administrative Tribunal, the Secretary-General submits that Fagundes's requests lie outside the scope of Article 12 of the statute, which provides that a judgment may be revised in two instances, and neither of them applies. Fagundes seeks to appeal the judgment rendered by the former Administrative Tribunal, on the ground that the former Administrative Tribunal allegedly failed to review her application challenging the decision of the Administration not to provide her with a copy of the report of the Medical Board.
- 13. The Secretary-General requests the Appeals Tribunal to reject the appeal in its entirety.

Considerations

- 14. At issue is whether the Appeals Tribunal has jurisdiction to hear this appeal. The UNDT refused to hear Fagundes's appeal on the grounds that a decision had been made by the former Administrative Tribunal and that the UNDT statute did not confer any appeal or revision powers on the UNDT from decisions made by the former Administrative Tribunal.
- 15. Apparently Fagundes failed to file a completed, perfected appeal in a timely manner in her earlier appeal brought before the former Administrative Tribunal and her appeal was rejected as being time-barred. We agree that when the new system was created, the UNDT was not given powers to hear a matter already finally decided by the former Administrative

Tribunal. Consequently, Fagundes has exhausted her avenues of appeal and the UNDT correctly held that it had no jurisdiction to hear another appeal. This Tribunal agrees with the UNDT and finds that there was no reversible error. The UNDT is also correct in holding that it does not have the power to review the decision of the former Administrative Tribunal.

- 16. The administrative decision originally sought to be reviewed was the 2006 decision of a Medical Board which did not certify the entire period of Fagundes's illness when she was absent from work. The three-member Medical Board consisted of one member nominated by the Administration, one member whom Fagundes nominated, and a third member agreed to by each of the first two members. Apparently Fagundes wished to pursue administrative review of the Medical Board's decision and to this end requested a copy of the Board's report which the Board allegedly refused to produce. The only information before this Tribunal is that her appeal to the former Administrative Tribunal was incomplete and out of time.
- 17. Fagundes attempted to appeal, but the JAB in Nairobi declined to hear her appeal on the grounds that it was not competent to do so. What is known is that in 2007, the former Administrative Tribunal held that her appeal was not made within the permitted deadline and was therefore time-barred. As the matter had reached its final level of appeal possible at that time, her avenues of appeal were exhausted.
- 18. When the UNDT and the Appeals Tribunal were created, Fagundes tried again to appeal the former Administrative Tribunal's decision before the UNDT. The UNDT in a carefully considered decision declined to hear the appeal on the grounds that it had no jurisdiction to hear such appeal.

Judgment

		Judgment		
19.	The decision of the UND	The decision of the UNDT is upheld and the appeal is dismissed.		
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(Signed)		(Signed)	(Signed)	
Ju	dge Boyko, Presiding	Judge Adinyira	Judge Garewal	
Enter	red in the Register on this	16 th day of August 2010 in No	ew York, United States.	
	(Signed)			
	heng Lin, Registrar ed Nations Appeals Tribur	nal		