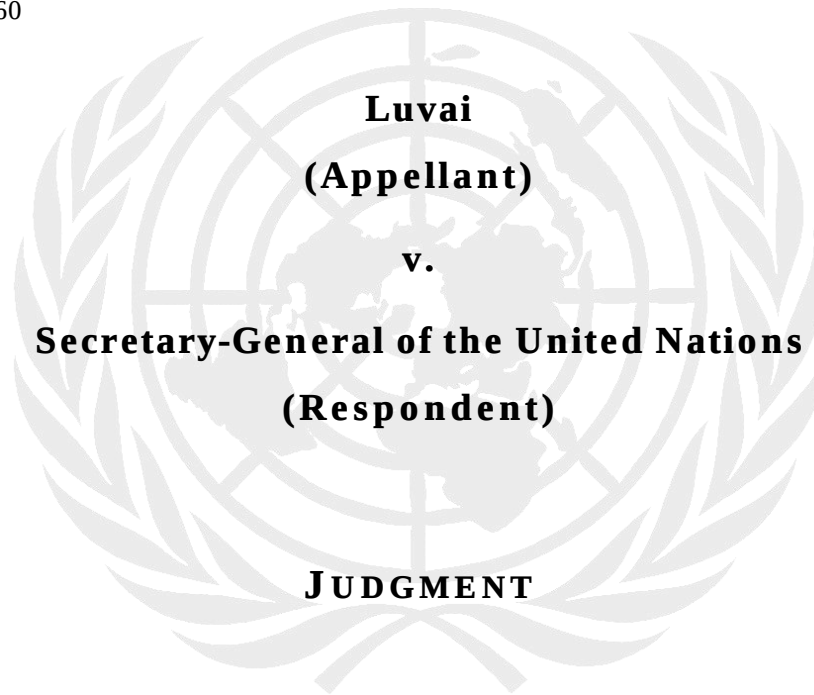




UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2010-160



Luvai
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Mark P. Painter Presiding Judge Kamaljit Singh Garewal Judge Jean Courtial
Judgment No.:	2011-UNAT-167
Date:	21 October 2011
Registrar:	Weicheng Lin

Counsel for Appellant: David Andati-Amwayi

Counsel for Respondent: Wambui Mwangi

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. Mr. Moses Jaika Luvai asks us to review a judgment of the former Administrative Tribunal. As the United Nations Appeals Tribunal (Appeals Tribunal) has consistently held, this Court lacks statutory authority to revise judgments of the former Administrative Tribunal.¹ This appeal is thus not receivable.

Facts and Procedure

2. Mr. Luvai joined the United Nations Office in Nairobi (UNON) as a Security Officer at the G-3 level in May 1996. In August 1999, Mr. Luvai went on an assignment with the United Nations Mission in Kosovo (UNMIK), where he remained until May 2003. In October 2004 his title was changed to Security Sergeant and in January 2005 he was promoted to the G-5 level.

3. In September 2002, while on leave from UNMIK, Mr. Luvai visited UNON during which time he was provided with a locker in which he claims to have left certain personal items and valuables prior to returning to UNMIK on 12 October 2002. Mr. Luvai later learned that during his absence his locker was opened without his consent by the Security and Safety Section, as the lockers were needed for newly recruited security officers.

4. On 1 April 2003, Mr. Luvai returned from UNMIK and went to retrieve the items that he had left behind in his locker, only to discover that the locker and the items were missing. On 28 August 2003, after approaching the Chief, Security and Safety Section, UNON, for assistance, Mr. Luvai filed a statement of loss with UNON, which was forwarded to the Deputy Chief, Security and Safety Section on 15 September 2003 for further action. On 29 November 2004, Mr. Luvai reported the matter to the Kenyan authorities and, on 16 December 2004, he submitted a request for administrative review.

5. In February 2005, Mr. Luvai submitted an appeal to the Joint Appeals Board (JAB) seeking compensation for the lost items. In its March 2006 report, the JAB concluded that it did not have jurisdiction over Mr. Luvai's appeal. In May 2006 the Secretary-General

¹ *Lesar v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-126, para. 13.

rejected Mr. Luvai's appeal but took no action on the JAB's recommendation that the case be referred to the Compensation Claims Committee (CCC).

6. In August 2006, Mr. Luvai applied to the former Administrative Tribunal requesting that the Secretary-General's decision be set aside and that he be awarded compensation.

7. On 30 January 2009, the former Administrative Tribunal issued Judgment No. 1421 and held that the proper venue for this action was the CCC. Mr. Luvai filed a request for revision of the former Administrative Tribunal's decision on 27 February 2009.

8. Following the former Administrative Tribunal's abolishment on 31 December 2009, the case was transferred to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) which, on 20 September 2010, ruled that it lacked jurisdiction to revise No. Judgment 1421, resulting in Mr. Luvai's application being deemed not receivable.

9. On 8 November 2010, Mr. Luvai appealed to this Court.

Submissions

Mr. Luvai's Appeal

10. Mr. Luvai contends that by establishing the Dispute Tribunal and the Appeals Tribunal, the United Nations General Assembly implemented a two-tier judicial system whereby the UNDT replaced the JAB and the Appeals Tribunal replaced the former Administrative Tribunal.

11. Mr. Luvai submits that the review of the former Administrative Tribunal's Judgment could not be transferred to the UNDT seeing that the former, similarly to this Tribunal, had appellate jurisdiction whereas the mandate of the latter is that of a "subordinate tribunal".

12. Mr. Luvai submits that, as stated in *Gomes*,² the transfer of a case from the former Administrative Tribunal to the UNDT amounts to seeking "another bite at the proverbial litigation apple". Mr. Luvai submits that he "had already argued his case before both the defunct Joint Appeals Board (now UNDT), and the defunct [former] Administrative

² Former Administrative Tribunal Judgment No. 1228, *Gomes* (2005).

Tribunal (now UNAT). In the interest of justice, UNAT should be [the] appropriate Tribunal to entertain this case for Judicial Review. Not [the] UNDT.”

13. Mr. Luvai further contends that the United Nations General Assembly erred in fact and in law in not considering the jurisprudence from *Gomes* when adopting paragraph 45 of General Resolution 63/253 of 23 February 2009 regarding the transfer of cases, thereby rendering the transfer of cases from the former Administrative Tribunal illegal.

14. Mr. Luvai requests that the 8 November 2010 delayed submission of his appeal, after the 4 November 2010 deadline, be considered timely because of his counsel’s certified three-day medical leave of absence, which started on 3 November 2010.

15. Mr. Luvai requests that his appeal be considered receivable; that this Tribunal set aside Judgment UNDT/2010/166; declare that the UNDT lacks jurisdiction and competence to review decisions from the former Administrative Tribunal; and that his case be transferred to, and heard by, the Appeals Tribunal.

Secretary-General’s Answer

16. The Secretary-General contends that Mr. Luvai, by filing on 8 November 2010 rather than by 4 November 2010, did not file his appeal within 45 days of the receipt of the UNDT Judgment. Seeing that Mr. Luvai did not seek an extension of time to file his appeal and that the Appeals Tribunal has been “strictly enforcing, and will continue to strictly enforce, the various time limits”,³ Mr. Luvai’s appeal should be considered time-barred.

17. The Secretary-General also submits that under the Statute of the Dispute Tribunal and in accordance with its jurisprudence in *Lesar*⁴ and *Fagundes*⁵, as upheld by the Appeals Tribunal, the UNDT correctly decided that it does not have jurisdiction to review judgments from the former Administrative Tribunal.

18. The Secretary-General submits that Mr. Luvai does not identify one or more of the five defects required to successfully challenge a UNDT judgment, but rather agrees with the

³ *Mezoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-049.

⁴ *Lesar v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/023.

⁵ *Fagundes v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/022; *Fagundes v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-057.

UNDT's decision that it lacks jurisdiction. Mr. Luvai focuses his argument on the fact that "the General Assembly, [the Secretary-General] and the Secretary of the Administrative Tribunal" committed errors of law and fact and further claims that the Appeals Tribunal is the appropriate venue for the judicial review of a decision by the former Administrative Tribunal.

19. The Secretary-General submits that, under paragraph 28 of resolution 63/253 of the General Assembly, the Appeals Tribunal has no powers other than those conferred to it by its Statute. Further, Article 2 of the Statute of the Appeals Tribunal does not confer upon the Appeals Tribunal any jurisdiction to review a judgment issued by the former Administrative Tribunal. Accordingly, such a review falls outside the jurisdiction of the Appeals Tribunal.

Considerations

20. This Court may not hold, as Mr. Luvai requests, that "the United Nations General Assembly erred in fact and in law" by legislating that cases from the old system be transferred to the UNDT.

21. We have consistently held that, "this Court is not competent to revise ... judgment[s] of the former Administrative Tribunal."⁶

⁶ *Lesar v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-126, para. 13.

Judgment

22. This appeal is thus not receivable.

Original and authoritative version: English

Dated this 21st day of October 2011 in New York, United States.

(Signed)

Judge Painter, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Courtial

Entered in the Register on this 2nd day of December 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar