



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

Case No. 2010-060



**Shakir
(Appellant)**

v.

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

JUDGMENT

Before: Judge Mark P. Painter, Presiding
Judge Inés Weinberg de Roca
Judge Kamaljit Singh Garewal

Judgment No.: 2010-UNAT-056

Date: 1 July 2010

Registrar: Weicheng Lin

Counsel for Appellant: Michael Wells-Greco

Counsel for Respondent: Cristián Gimenez Corte

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. After a late appeal to the Joint Appeals Board (JAB), the applicant appealed to the United Nations Dispute Tribunal (UNDT), which found her appeal time-barred. She then presented—as a reason why the time limit should be waived—evidence of her lengthy hospitalization. But she presented this evidence for the first time before this court; the UNDT had no opportunity to consider it. All evidence is to be submitted to the UNDT. Under Article 2(5) of the Appeals Tribunal’s Statute, we can, in exceptional circumstances, admit further evidence. But we will not admit evidence which was known to the party and could have, with due diligence, been presented to the UNDT. The UNDT is not a dress rehearsal. We affirm the UNDT’s decision that the case is time-barred.

Facts and Procedure

2. The Appellant, Khiloud Shakir (Shakir) was a staff member of the United Nations. On 24 June 2005, Shakir joined the United Nations Assistance Mission for Iraq (UNAMI) as a Political Affairs Officer at the P-3 level under a six-month appointment of limited duration under the 300 Series of the former Staff Rules. Her contract was extended several times until its expiry on 28 February 2007.

3. By letter to the Secretary-General in August 2007, Shakir requested administrative review of several actions linked to the non-renewal of her appointment and requested his intervention to “[allow] her to return to work”. In January 2008, Shakir received a letter from the Chief, Administrative Law Unit, in reply to her request for review. The reply stated that her request was considered to be time-barred, and that, in any event, the decision not to renew her appointment was in accordance with the applicable regulations and rules.

4. In March 2008, Shakir’s appeal to the JAB in New York was received. The Secretary-General filed a reply in June 2008. In September 2008, Shakir filed comments on the reply in which she addressed the question of the time bar of her request for administrative review. Shakir stated that she had been hospitalized for several months and that her daughter had been gravely ill, and referred to supporting medical documentation. She also mentioned that

she was grateful for the further time to file her comments on the reply.

5. The appeal was transferred to the UNDT in Geneva following the introduction of the new system of administration of justice from 1 July 2009. By letter to the parties dated 3 February 2010, the Registrar referred to the time limit to file an appeal to the JAB under former Staff Rule 111.2(a)(i) and stated that the Judge intended to decide the case by summary judgment under article 9 of the rules of procedure of the UNDT. The parties were requested to submit comments by 10 February 2010. Shakir stated that “[her] reply to the JAB was extended because [she] had had an accident few days before submitting her reply”. She added that “[she had] provided a report from the hospital [which was] in [her] file”. The Secretary-General submitted that the case was “non-receivable *ratione temporis*”. Thus Shakir had offered excuses for being late filing her original request for administrative review, and her late reply to the Administration’s JAB filing—but no reason for her late filing of her appeal to the JAB.

6. On 12 February 2010, the UNDT issued Judgment No. UNDT-2010-028. The application was rejected. Former Staff Rule 111.2(a)(i) provided that a staff member had one month from the receipt of a reply from the Secretary-General to appeal against the answer to the JAB. The UNDT found that Shakir had until 29 February 2008 to submit her appeal. Her appeal was received by the New York JAB on 31 March 2008 and was late. Further, the UNDT found that no exceptional circumstances within the meaning of former Staff Rule 111.2(f) existed which may justify a waiver of the time limit. In this respect, the UNDT observed that Shakir did not offer any explanation for that late filing.

Submissions

Shakir’s Appeal

7. Shakir submits that the circumstances leading up to and following the submission of her statement of appeal to the JAB fall within the definition of “exceptional circumstances” under former Staff Rule 111.2(f). Shakir relies upon a medical certificate, dated 7 April 2008, issued by the St. George Hospital in Kogarah, Australia, certifying that she was an inpatient from 16 January 2008 to 12 March 2008. She contends that she was hospitalized for severe stress and anxiety, and she did not have access to a

telephone or the internet while admitted to hospital. Shakir also required outpatient treatment following her release from hospital.

8. Shakir submits that it is in the interest of justice that her statement of appeal be receivable by the Appeals Tribunal. Shakir requests us to declare her case receivable and to remand the matter to the UNDT to consider the facts and circumstances of the case.

Secretary-General's Answer

9. The Secretary-General submits that the UNDT, based on the evidence before it, correctly found that Shakir's application before the JAB was time-barred. Shakir raised the issue of her hospitalization for the first time before the Appeals Tribunal. Shakir did not refer to her hospitalization in her appeal to the JAB in March 2008, her comments to the Secretary-General's reply submitted to the JAB in September 2008, or her submission to the UNDT in February 2010. The Secretary-General refers to Article 2(5) of the Statute of the Appeals Tribunal, which establishes that in exceptional circumstances the Tribunal may receive additional evidence, but that the "evidence received under this paragraph shall not include evidence that was known to either party and should have been presented at the level of the Dispute Tribunal". Thus the additional evidence presented by Shakir would not be consistent with Article 2(5) of the Statute.

10. Should the Appeals Tribunal accept the additional evidence, the Secretary-General submits that there is a discrepancy in the medical certificate regarding the date of Shakir's admission to hospital, and this discrepancy raises questions concerning the probative value of the document. Further fact-finding would be necessary in order to establish the date of admission. Therefore, the Secretary-General submits that Shakir's request for her case to be remanded to the UNDT for a consideration of the merits is premature, and any consideration of the case should be limited to the preliminary issue of the receivability of Shakir's application.

11. The Secretary-General requests the Appeals Tribunal hold that the UNDT correctly found that Shakir's application before the JAB was not receivable as out of time.

Considerations

12. This court concurs with the UNDT that the case was not receivable by the UNDT. Though she referred to an accident at some point, Shakir did not mention her lengthy hospitalization in her appeal to the JAB in March 2008, her comments to the Secretary-General's reply submitted to the JAB in September 2008, or her submission to the UNDT in February 2010. Shakir raised the lengthy hospitalization for the first time with this court. Under Article 2(5) of the Appeals Tribunal's Statute, we can, in exceptional circumstances, admit further evidence. But we will not admit evidence which was known to the party and could have been presented to the UNDT.

Judgment

13. We affirm the UNDT's judgment that the case is time-barred.

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

Original: English

(Signed)

Judge Painter, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Garewal

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

(Signed)

Weicheng Lin, Registrar
United Nations Appeals Tribunal