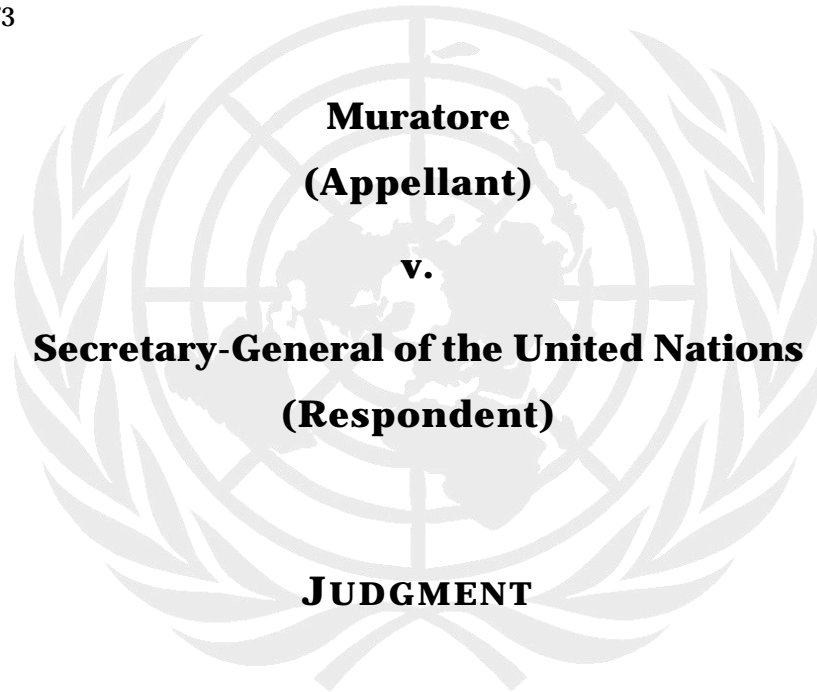




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Case No. 2010-173



**Muratore  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Mary Faherty, Presiding Judge Kamaljit Singh Garewal Judge Luis María Simón
Judgment No.:	2012-UNAT-191
Date:	16 March 2012
Registrar:	Weicheng Lin

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Counsel for Appellant: Self-Represented

Counsel for Respondent: Stéphanie Cartier

**JUDGE MARY FAHERTY**, Presiding.

**Synopsis**

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal by Mr. Enrico Muratore against Judgment No. UNDT/2010/139 rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 30 July 2010 in the case of *Muratore v. Secretary-General of the United Nations*.

2. Mr. Muratore appeals the decision of the UNDT which declared his application time-barred as he did not request review of the contested administrative decision within two months as required by Staff Rule 112.2(a) in force at the relevant time. Moreover, the Dispute Tribunal did not find any “exceptional circumstances” which, pursuant to Staff Rule 112(f), would have allowed for a waiver of the specified time limit set out in Staff Rule 112(2)(a).

3. In the context of the general principles to be applied in this case, the Appeals Tribunal reiterates its pronouncement in *Ajdini* that the issue of whether the UNDT has the authority to suspend or waive the deadline for administrative review “should now be considered as settled because the Appeals Tribunal in its judgment in *Costa*, and in other judgments such as *Mezoui*, *Samardzic*, and *Trajanovska* has consistently held that the UNDT has no jurisdiction to waive deadlines for management evaluation or administrative review”.<sup>1</sup> The aforesaid jurisprudence has for all intents and purposes rendered moot Mr. Muratore’s arguments on the existence of “exceptional circumstances”. We thus determine that the issue which the UNDT was required to consider, having regard to the provisions of Article 8(3) of the UNDT Statute, as interpreted in the aforementioned case law, was one which merited a dismissal of Mr. Muratore’s application. We note however that the UNDT Judgment did not address this particular point, concentrating instead on an analysis of the existing case law for the purpose of considering whether Mr. Muratore’s circumstances constituted “exceptional circumstances” which would have warranted a waiver of the time limits at issue.<sup>2</sup>

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<sup>1</sup> *Ajdini et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108.

<sup>2</sup> We note that the General Assembly in resolution 66/237 “[r]ecalls paragraph 54 of resolution 62/228, and decides that the time limit for completing management evaluations may be extended by

4. The Appeals Tribunal upholds in any event the reasoning of the UNDT for its dismissal of Mr. Muratore's application on the basis that it did not find that exceptional circumstances existed.

#### Facts and Procedure

5. Mr. Muratore joined the Office of the United Nations High Commissioner for Human Rights (OHCHR) at the P-3 Level on a short-term appointment in June 2004. His contract was extended on several occasions until it expired on 30 June 2006.

6. In 2005, in order to avoid the extended use of temporary and short term appointments for staff members performing core functions, OHCHR initiated a Post Regularization Exercise. As part of the procedures established for this exercise, in a document entitled "OHCHR Post Regularization Exercise – Guidelines" (Guidelines), it was decided that temporary staff members with at least two years of service at OHCHR would, similarly to internal candidates, be eligible for consideration at the 30-day mark rather than the 60-day mark. Between 22 June 2005 and 5 August 2005, Mr. Muratore applied to 21 posts being regularized.

7. On 9 December 2005, Mr. Muratore, in response to his request for information regarding the distinction between 30-day and 60-day candidates as applied during the Regularization Exercise, was sent a copy of the Guidelines as well as ST/AI/2002 by the Chairperson of the Steering Committee on Post Regularization (Chairperson).

8. On 6 February 2006, the Senior Adviser to the Deputy High Commissioner informed Mr. Muratore that the post regularization exercise had been completed and that it had not been possible to accommodate any of his 21 candidatures.

9. On 10 April 2006, Mr. Muratore was advised, in response to his new request for the agreement between the Office of Human Resources Management (OHRM) and OHCHR, that while the post regularization process had been extensively discussed with OHRM "there was in fact no one document called OHCHR-OHRM agreement". On 24 May 2006, Mr. Muratore requested administrative review of the decision not to consider any of his 21 applications during the post regularization process.

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the Dispute Tribunal for a period of up to fifteen days in exceptional circumstances when both parties to a dispute agree".

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10. On 29 September 2006, Mr. Muratore filed an appeal with the Joint Appeals Board (JAB) in Geneva which concluded on 8 January 2008 that his appeal was time-barred and that there were no exceptional circumstances that justified waiving any of the time limits. On 11 April 2008, the Secretary-General informed Mr. Muratore that he had decided to follow the JAB's recommendation that his appeal be rejected.

11. On 25 April 2008, Mr. Muratore appealed the Secretary-General's decision in front of the former Administrative Tribunal and, following its abolition on 31 December 2009, his case was transferred to the UNDT. On 30 July 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/139 in which it found that Mr. Muratore's application was not receivable.

12. Mr. Muratore appealed the UNDT's decision on 2 December 2010 and the Secretary-General provided his answer on 17 January 2011. On 24 August 2011, Mr. Muratore submitted a Motion for the Submission of Additional Evidence. The Secretary-General filed his observations on the motion on 23 September 2011.

### **Submissions**

#### **Mr. Muratore's Appeal**

13. Mr. Muratore submits that the UNDT erred in law and in fact when it rejected his application as time-barred and decided that there were no exceptional circumstances that justified waiving any of the applicable time limits.

14. Mr. Muratore submits that the time limit for filing an appeal can be waived "if the claim that motivate[d] the appeal was previously unknown by the Applicant". Mr. Muratore therefore contends that the UNDT erred when it stated that "the fact that [Mr. Muratore] initially thought that the decisions he is now contesting were lawful cannot be deemed to constitute [...] a circumstance" that would result in the waiver of the time-limits as the reliance on this belief hindered his right to appeal the contested decisions.

15. Mr. Muratore further submits that due to the fact that "the relevant evidence [was] solely in the hands of the Administration so that [he could] not even challenge the

presumption of regularity ... of what has actually occurred”<sup>3</sup> is further evidence of exceptional circumstances supporting the waiver of the applicable time limits.

16. Mr. Muratore also submits that in the interest of due process he “is not required to prove [his] case beyond reasonable doubt. [He] has only to present adequate evidence in support”<sup>4</sup> of his contention for the waiver of the time limits.

17. As part of his motion for the submission of additional evidence, Mr. Muratore requests that Judgment No. UNDT/2011/129, which is a separate judgment that found in his favour but is not part of the current appeal, be considered by the Appeals Tribunal as Mr. Muratore contends that it is based on a similar set of facts. Mr. Muratore further submits that the UNDT should have considered whether his application met the criteria that it itself had set in *Morsy*<sup>5</sup> regarding the waiver of time limits such as “the degree of lateness, the explanation therefore, the prospects of success on the merits, prejudice to either party and the importance of the case”.

18. Mr. Muratore, in his motion for the submission of additional evidence, also requests that the Appeals Tribunal take into account the fact that he is appealing the Judgment of a separate case<sup>6</sup> in which he claims to have been retaliated upon by OHCHR for reporting misconduct within that organization.

19. Mr. Muratore requests that the Appeals Tribunal find that the Organization’s recruitment process was flawed and that he be awarded compensation and damages as a result of the contested decisions. Furthermore, Mr. Muratore requests that the irregular recruitment process be cancelled and an inquiry be conducted by external auditors.

#### **Secretary-General’s Answer**

20. The Secretary-General submits that the UNDT correctly concluded that Mr. Muratore did not file his request within the prescribed two-month time limit and did not show any exceptional circumstances that would justify a waiver.

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<sup>3</sup> Former Administrative Tribunal Judgment No. 1302, *Hammond* (2006).

<sup>4</sup> Former Administrative Tribunal Judgment No. 1023, *Sergienko* (2001).

<sup>5</sup> *Morsy v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/036.

<sup>6</sup> *Gehr v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/125.

21. The Secretary-General further submits that in *Costa* the Appeals Tribunal interpreted the provision of Article 8(3) of the UNDT Statute to mean that “the Dispute Tribunal is not empowered to suspend or waive the deadlines for management evaluation and administrative review under any circumstances”,<sup>7</sup> which further supports the UNDT’s decision that it could not waive the applicable time limit.

22. The Secretary-General submits that Mr. Muratore had, as far back as 9 December 2005, received a detailed explanation of the Guidelines, the content of which never “purported to represent that there was a document entitled ‘OHCHR – OHRM Agreement’”. Consequently, there was not a discovery of any actual new fact that would justify a waiver of the requested time limit.

23. Moreover, the Secretary-General submits that in *El-Khatib*<sup>8</sup> the Appeals Tribunal emphasised that staff members are presumed to know the rules and regulations applicable to them. This is even more true when, as acknowledged by the JAB, the staff member in question, Mr. Muratore, has a legal background.

24. The Secretary-General contends that the arguments presented by Mr. Muratore in front of the Appeals Tribunal, including those concerning the validity of the 3 June 2005 memorandum, merely repeat those previously in front of the UNDT and that it is “not sufficient for [Mr. Muratore] to state that he [...] disagrees with the outcome of the case or repeat the arguments submitted before the Dispute Tribunal”.<sup>9</sup>

25. With regard to Mr. Muratore’s motion to submit additional evidence, the Secretary-General recognizes that the Appeals Tribunal can take any relevant jurisprudence into account but that, in this case, Mr. Muratore’s motion and the jurisprudence cited therein do not bear any relevance to the issue of whether his initial application was time-barred.

26. The Secretary-General also notes that Judgment No. UNDT/2011/125, which dismissed Mr. Muratore’s application against the conduct of his supervisor as time-barred, and which he intends to appeal, “relates to a different administrative decision, [and] was

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<sup>7</sup> *Costa v. Secretary-General of the United Nations*, Judgment 2010-UNAT-036.

<sup>8</sup> *El-Khatib v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment 2010-UNAT-029.

<sup>9</sup> *Ilic v. Secretary-General of the United Nations*, Judgment 2010-UNAT-051.

made by a different entity". Furthermore, aside from lacking relevancy and probative value, all the information contained in that separate application was known to Mr. Muratore at the time of his application in the present appeal.

27. The Secretary-General requests that the Appeals Tribunal deny Mr. Muratore's application for the submission of additional evidence and to find that the Dispute Tribunal correctly concluded that Mr. Muratore's application was time-barred.

### Considerations

28. Mr. Muratore appeals the decision of the UNDT which declared his application time-barred as he did not request review of the contested administrative decision within two months as required by Staff Rule 112.2(a) in force at the relevant time. Moreover, the Dispute Tribunal did not find any "exceptional circumstances" which, pursuant to Staff Rule 112.2(f), would have allowed for a waiver of the specified time limit set out in Staff Rule 112.2(a).

29. The decision in respect of which Mr. Muratore sought administrative review was communicated to him on 6 February 2006 when the Senior Advisor to the Deputy High Commissioner informed him as follows:

Given the sheer volume of applicants in this competitive exercise it was not manageable for the programme managers to review candidates at the 60 day mark except in very few cases where qualified 30 day candidates were not available. Consequently, should you have submitted an application; your candidature could not be accommodated at this time.

30. On 24 May 2006, Mr. Muratore wrote to the Secretary-General to request administrative review following his non-selection for the 21 posts at the P-3 and P-4 levels that he had applied for. This request was thus made some six weeks or so following the expiration of the time-limit applicable to the decision in respect of which he sought administrative review.

31. Before the Geneva JAB, the UNDT and this Tribunal, Mr. Muratore argued that notwithstanding that the time-limit for review had expired in the instant case, the administrative decision could still be appealed if the facts which motivated the appeal were previously unknown to the person filing the appeal. In this regard, Mr. Muratore, in his

submissions to the JAB, the UNDT and this Tribunal, maintained that the time limit for the purposes of his case should only run from 10 April 2006.

32. The background to Mr. Muratore's contentions in this regard is as follows:

33. On 9 December 2005, and prior to any decision having been issued to Mr. Muratore regarding his candidature for the 21 posts, he emailed the Chairperson requesting clarification of the criteria for the distinction between 30-day candidates and 60-day candidates in the context of the then ongoing post regularisation exercise. On that same day the Chairperson replied, *inter alia*, as follows:

...[the] 30 day status is recognised to "temporary staff members who have been continuously employed by OHCHR since 30 November 2003, regardless of whether they joined OHCHR under a UN or UNOPS letter of appointment", in addition of course to OHCHR regular staff who already enjoy such status based on the Staff Selection System rules.

Mr. Muratore was also advised that he was being sent a copy of the "Information Guidelines on the Post Regularization Exercise" issued at the commencement of the regularisation process together with a copy of the Staff Selection System rules (ST/AI/2002). Mr. Muratore was further advised that if he remained in doubt about his status he could write to a given e-mail address.

34. On 10 April 2006, some two months or so after receiving written confirmation on 6 February 2006 that his candidature for posts to which he had applied was not being considered, Mr. Muratore wrote again to the Chairperson with reference to the "Post regularization exercise-guidelines...", and quoting portion of those guidelines as follows: "The Office of Human Resources Management (OHRM) has agreed that the applications of all OHCHR temporary staff members with two years of service at OHCHR will be treated in a similar manner as those of internal candidates". Mr. Muratore advised the Chairperson that "since [he was] preparing a number of appeals concerning recruitment procedures in the frame of the regularization process" he required that she share with him a "...copy of the OHRM-OHCHR agreement".

35. The Chairperson replied on the same day stating that, to her knowledge, there was "...in fact no one document called OHCHR-OHRM agreement" and advised Mr. Muratore that "[t]he framework within which the post regularization could take place has been



discussed over a long period of time between OHCHR management and OHRM” and that the agreed result of which was reflected in the Guidelines.

36. In the course of his submissions to the Appeals Tribunal, Mr. Muratore maintains that he “had no reason to request any review of the [contested] decisions until 10 April 2006 when the Chairperson wrote to him advising that there was in fact no written agreement. However, we note that in his letter of 10 April 2006 he makes reference to “...preparing a number of appeals concerning several recruitment procedures in the frame of the regularization process”.

37. In its report of 8 January 2008, the JAB observed as follows:

Also, the Panel stressed that the Appellant had a legal background. Finally it noted with astonishment that it was only after the deadline had expired to submit the request for review the Appellant contacted again the Chair of the Standing Committee on post regularization to inquire about the OHCHR-OHRM agreement. Finally, the Panel found it also surprising that the Appellant after he assumed that there was no legal basis waited another six weeks before he sent a request for review to the Secretary General.

38. In the context of the general principles to be applied in this case, the Appeals Tribunal reiterates its pronouncement in *Ajdini* that the issue of whether the UNDT has authority to suspend or waive the deadline for administrative review “should now be considered as settled because the Appeals Tribunal in *Costa*, and in other judgments such as *Mezoui*, *Samardzic*, and *Trajanovska* has consistently held that the UNDT has no jurisdiction to waive deadlines for manage evaluation or administrative review”.<sup>10</sup> This Tribunal thus accepts the submission of the Respondent that the aforesaid jurisprudence has for all intents and purposes rendered moot Mr. Muratore’s arguments on the existence of “exceptional circumstances”. We thus determine that the issue which the UNDT was required to consider, having regard to the provisions of Article 8(3) of the UNDT Statute, as interpreted in the aforementioned case law, was one which merited a dismissal of Mr. Muratore’s application. We note however that the UNDT Judgment did not address this particular point, concentrating instead on an analysis of the existing case law for the purpose of considering whether Mr. Muratore’s circumstances constituted “exceptional circumstances” which would have warranted a waiver of the time limit at issue.

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<sup>10</sup> *Ajdini et al. v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-108.

39. To the extent that the UNDT did so, we observe as follows:

40. In the course of its considerations on the issue of whether the challenge to the Administration's decision on Mr. Muratore's candidature was time-barred, the UNDT reiterated the approach of the Appeals Tribunal in *El-Khatib*<sup>11</sup> which followed the jurisprudence of the former Administrative Tribunal according to which only circumstances "beyond his or her control that prevented the applicant from timely exercising the right of appeal" may be considered "exceptional circumstances" justifying a waiver of the statutory time limit. The Dispute Tribunal observed as follows: "The fact that the applicant initially thought that the decisions he is now contesting were lawful cannot be deemed to constitute such a circumstance, especially as he had every means of obtaining information from the Administration." Mr. Muratore takes issue with the UNDT's observation in this regard. However, this Tribunal is not persuaded by his arguments and we do not find any error in law or in fact in the Dispute Tribunal's finding that the information communicated to the Appellant on 10 April 2006 did not constitute an "exceptional circumstance" which would have allowed for the waiver of the two-month time limit as provided for by former Staff Rule 111.2(f). On the basis of the documentary evidence available to it, this Tribunal is satisfied that there was nothing which prevented Mr. Muratore, given his desire to know more about how the post regularization guidelines were agreed to, from making such an enquiry in the immediate aftermath of the communication of the decision of 6 February 2006.

41. Mr. Muratore further contends that it was "wrong and unacceptable" for the Dispute Tribunal to reject his pleas as not constituting "exceptional circumstances" on the basis that "candidates for public employment are presumed to know the rules applicable to the employing public corporation". The Appeals Tribunal is however satisfied that the UNDT pronouncement in this regard is in accordance with the established case law as set out in *El-Khatib, Diagne et al.*,<sup>12</sup> and the jurisprudence of the former Administrative Tribunal.

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<sup>11</sup> *El-Khatib v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment 2010-UNAT-029.

<sup>12</sup> *Diagne et al. v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-067.

42. The Appeals Tribunal upholds the reasoning of the UNDT for its dismissal of Mr. Muratore's application and concludes that in any event it was not open to the Dispute Tribunal as a matter of law to admit the application.

**Judgment**

43. The appeal is dismissed. The UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 16<sup>th</sup> day of March 2012 in New York, United States.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Garewal

*(Signed)*

Judge Simón

Entered in the Register on this 7<sup>th</sup> day of May 2012 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar