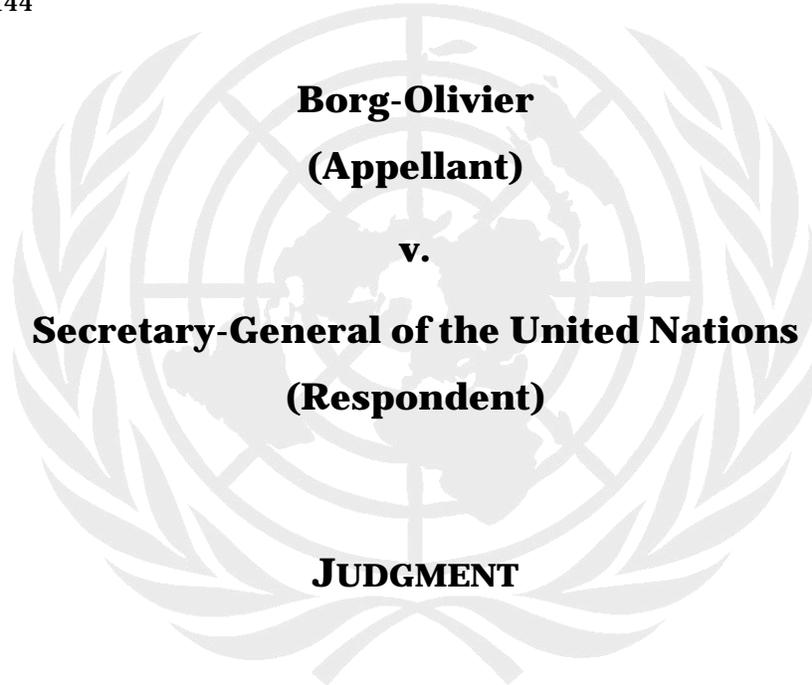




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-144



**Borg-Olivier
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Sophia Adinyira Judge Mary Faherty
Judgment No.:	2011-UNAT-146
Date:	8 July 2011
Registrar:	Weicheng Lin

Counsel for Appellant: George Irving

Counsel for Respondent: Melanie Shannon

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. Under Article 8(4) of the Statute of the United Nations Dispute Tribunal (Statute and UNDT or Dispute Tribunal, respectively), the UNDT cannot suspend or waive the time limit to file an appeal more than three years after the applicant's receipt of the contested administrative decision.

Facts and Procedure

2. From September 1997 to September 2000, Alexander Borg-Olivier (Borg-Olivier) served the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) under a fixed-term appointment as Legal Adviser (D-1) in Gaza.

3. On 26 September 2000, Borg-Olivier was appointed, on a one-year fixed-term appointment, to serve as Legal Adviser (D-2) in the United Nations Interim Mission in Kosovo (UNMIK), on a reimbursable loan from UNRWA. Since his salary was administered by UNRWA, he continued to receive the post adjustment payable for Gaza, as well as the applicable mobility and hardship allowance (MHA). His fixed-term appointment was successively extended on a yearly basis. In 2003, UNRWA agreed to extend Borg-Olivier's appointment one last time until 31 August 2004. It indicated that it would not extend the reimbursable loan arrangement beyond that date.

4. On 2 August 2004, the Assistant Secretary-General (ASG) for Human Resources Management informed the Director of Administration, UNMIK, that since UNRWA was not willing to extend the loan agreement further, the only option was to offer him a contract as a mission appointee with UNMIK. She asked the Director of Administration, UNMIK, to convey the decision to Borg-Olivier and to inform him that it had been taken after consultation with the Executive Office of the Secretary-General.

5. Upon the expiry of his appointment with UNRWA, on 31 August 2004, Borg-Olivier continued to serve as Legal Adviser in UNMIK pending receipt of an offer of appointment from the Department of Peacekeeping Operations (DPKO).

6. On 13 September 2004, following a request from the Special Representative of the Secretary-General in Kosovo, DPKO sent Borg-Olivier an offer for a fixed-term appointment (100 series) with UNMIK at the D-2 level. Pursuant to former Staff Rule 103.21, the offer provided for the payment of a mission subsistence allowance, but no post adjustment or MHA.

7. On 15 September 2004, Borg-Olivier requested DPKO to reconsider the terms of the offer to compensate for the loss of earnings resulting from the discontinuation of his post adjustment and MHA. On 1 October 2004, DPKO responded that “the entitlement to post adjustment [and MHA] does not exist if a person does not have a link to a parent duty station or UN Agency” and that, upon his separation from UNRWA, effective 1 September 2004, UNMIK could only retain his services as a mission appointee, in which case no post adjustment and MHA were payable.

8. On 11 October 2004, Borg-Olivier sought further assistance in this matter from the DPKO, the Chef de Cabinet of the Secretary-General and the Secretary-General. On 21 March 2005, DPKO informed Borg-Olivier that, after a consultation with the Office of Human Resources Management (OHRM), there was “no administrative mechanism to grant [him] the entitlements to post adjustment and [MHA]”. Thus, another offer of appointment was sent to Borg-Olivier. On 25 April 2005, the ASG for Human Resources Management informed Borg-Olivier that she had not been able to find an alternative arrangement for him and that he had until 30 April to accept the offer. On 27 April 2005, Borg-Olivier accepted the offer.

9. On 27 and 29 June 2005, respectively, Borg-Olivier signed his letters of appointment for the periods from 1 September 2004 to 31 August 2005 and from 1 September 2005 to 31 August 2006. He added on each letter the handwritten note “without prejudice”.

10. By letter dated 20 June 2005, Borg-Olivier requested that the Secretary-General review the 25 April 2005 decision.

11. On 4 October 2005, Borg-Olivier filed an appeal with the New York Joint Appeals Board (JAB). In its report issued on 2 October 2006, the JAB made no recommendation in support of the appeal. The Under-Secretary-General (USG) for Management took no

decision on the JAB report within the one-month period stipulated in former Staff Rule 111.2(p) and (q) and a copy of the JAB report was transmitted to Borg-Olivier on 2 November 2006. On 14 March 2007, the USG for Management notified Borg-Olivier of the Secretary-General's decision to accept the JAB conclusions and take no further actions in his case.

12. Borg-Olivier requested five extensions of time to file an application with the former Administrative Tribunal. All of his extension requests were granted, the last request being for a one month-extension until 31 January 2008.

13. On 20 January 2008, Borg-Olivier requested a suspension of time limits to file his application, on the basis that his case was still under negotiation. By letter dated 21 January 2008, the Executive Secretary of the former Administrative Tribunal notified Borg-Olivier that the President of the Tribunal had decided to suspend the time limits in the case until further notice.

14. On 30 June 2008, Borg-Olivier retired from service.

15. Under General Assembly resolution 63/253, the former Administrative Tribunal ceased to accept new cases as of 1 July 2009 and was abolished as of 31 December 2009.

16. On 26 March 2010, Borg-Olivier filed a request to the Dispute Tribunal for a time extension to file an application on the basis that he had retained new counsel who needed to obtain the necessary files. The Secretary-General objected to the extension request arguing that Borg-Olivier was already out of time.

17. By Order No. 46 (GVA/2010) of 16 April 2010, the UNDT ordered Borg-Olivier to file his application no later than 14 May 2010. It made the Order "without prejudice to the questions whether [Borg-Olivier was] correct in his understanding as to the expiry of the relevant time limit to file an application and whether the application [was] receivable". On 14 May 2010, Borg-Olivier filed his application with the UNDT.

18. On 30 August 2010, the UNDT issued Judgment No. 2010/155. It found that Borg-Olivier's application was time-barred, since it had not been filed within three years from his receipt of the contested administrative decision (Article 8(4) of the UNDT Statute). It then considered Article 2(7)(b) of the UNDT Statute and Section 4.2 of

ST/SGB/2009/11, under which cases not decided by the former Administrative Tribunal by 31 December 2009 would be transferred to the UNDT. The UNDT however concluded that Borg-Olivier had never filed an application with the former Administrative Tribunal, but had only filed requests for time extensions and eventually a request for a suspension of the time limits to file an application. It concluded that Borg-Olivier therefore had no case before the former Administrative Tribunal which could have been transferred to the UNDT.

19. The UNDT nevertheless went on to examine whether it would be in the interest of justice to declare the application receivable. It considered the circumstances in which the former Administrative Tribunal had accepted to suspend the time limits and concluded that Borg-Olivier “failed to act diligently at all material times in pursuing his claim and in so doing forfeited his rights to be heard”.

20. The UNDT also dismissed the substantive grounds of the application noting that there was no evidence of assurances that Borg-Olivier would continue to receive the post adjustment and MHA if his reimbursable loan arrangement was discontinued or that UNRWA would continue the reimbursable loan arrangement each time UNMIK extended Borg-Olivier’s assignment.

21. Borg-Olivier appeals the UNDT Judgment.

Submissions

Borg-Olivier’s Appeal

22. Borg-Olivier submits that the time limit for filing his application never expired and that he had a right to rely on the suspension of time limits granted by the former Administrative Tribunal for filing his application. The transitional measures for the introduction of the new internal justice system did not specifically provide for this situation and the procedural issues associated with the transition constitute extraordinary circumstances warranting a waiver of any filing impediments.

23. Borg-Olivier submits that the UNDT erred in concluding that the Secretary-General had no obligation to continue the terms of appointment that Borg-Olivier had maintained with UNRWA.

24. Borg-Olivier requests the reversal of the Judgment and payment of the difference in remuneration he had been receiving on the basis of his secondment and the remuneration he received from 1 September 2004 to 30 June 2008, with applicable interest and award of costs.

Secretary-General's Answer

25. The Secretary-General responds that the UNDT correctly concluded that Borg-Olivier did not file his application within the applicable time limit. He submits that the UNDT correctly concluded that there were no exceptional circumstances warranting a waiver of the time limits and that, even if there were "exceptional circumstances", the UNDT had no jurisdiction under the UNDT Statute to waive the time limits.

26. The Secretary-General submits that the UNDT correctly concluded that Borg-Olivier did not have a case before the former Administrative Tribunal which could have been transferred to it.

27. The Secretary-General contends that the UNDT correctly concluded that he had not committed to paying post adjustment and MHA if UNRWA decided not to renew Borg-Olivier's appointment and terminate the reimbursable loan.

Considerations

28. As part of the process of abolishing the former Administrative Tribunal, it ceased to receive cases after 30 June 2009 and the suspension granted to Borg-Olivier expired on that day.

29. For a case to be transferred it necessarily had to exist. The former Administrative Tribunal could not grant a suspension on behalf of the UNDT and the UNDT cannot hear a case transferred from the former Administrative Tribunal if that case had not been filed.

30. Furthermore, under Article 8(4) of the UNDT Statute, the UNDT cannot suspend or waive the time limit to file an appeal, more than three years after the applicant's receipt of the contested administrative decision. The administrative decision regarding Borg-Olivier's terms of appointment was received by him on 24 April 2005 and contested

on 20 June 2005. The UNDT started to operate in 2009, after more than three years had already elapsed.

31. This Tribunal has repeatedly held that it “has been strictly enforcing, and will continue to strictly enforce, the various time limits”.¹ In *Mezoui*, this Court also held that “the old system was perhaps too generous in extending or waiving time—we will not be. But this case was directly in the path of the changeover, and we grant some leeway here.”

32. This leeway cannot apply in this case seeing that more than three years have elapsed.

33. For these reasons, the appeal is not receivable.

Judgment

34. The appeal is dismissed.

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Faherty

Entered in the Register on this 29th day of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar

¹ *Mezoui v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-043, para. 21; *Ibrahim v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-069; *Harding v. Secretary-General*, Order No. 44 (2011); *Meron v. Secretary-General*, Order No. 42 (2011); *Islam v. Secretary-General of the United Nations*, Order No. 7 (2010).