



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

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Judgment No. 2023-UNAT-1406

**Kamal Karki  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Nassib G. Ziadé, Presiding Judge Graeme Colgan Judge Abdelmohsen Sheha
Case No.:	2022-1750
Date of Decision:	27 October 2023
Date of Publication:	19 December 2023
Registrar:	Juliet E. Johnson

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Counsel for Appellant: Self-represented

Counsel for Respondent: Francisca Lagos Pola

**JUDGE NASSIB G. ZIADÉ, PRESIDING.**

1. Mr. Kamal Karki (Mr. Karki or Appellant), a former staff member of the Office of the United Nations High Commissioner for Refugees (UNHCR) contested the decision of the Administration to impose on him the disciplinary measure of dismissal (contested decision).
2. By Judgment No. UNDT/2022/104 (impugned Judgment),<sup>1</sup> the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) rejected Mr. Karki's application as not receivable *ratione temporis*.
3. Mr. Karki lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

**Facts and Procedure**

5. In March 2014, Mr. Karki joined the Organization. At the time of his dismissal, he was employed as a Resettlement and Complementary Pathways Officer, at the P-3 level, in the Office of UNHCR in Nyamata, Rwanda.
6. On 17 June 2022, after conducting an investigation and a disciplinary process, the Director of the Division of Human Resources, UNHCR, informed Mr. Karki by letter dated 14 June 2022 that the High Commissioner had determined that his actions constituted misconduct in respect of which the disciplinary measure of dismissal was imposed in accordance with Staff Rule 10.2(a)(ix).<sup>2</sup> On that same date, Mr. Karki acknowledged receipt of the letter of dismissal.<sup>3</sup>
7. On 18 September 2022, Mr. Karki filed an application with the Dispute Tribunal, dated 13 September 2022, contesting the Administration's decision to impose on him the disciplinary measure of dismissal.<sup>4</sup>

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<sup>1</sup> *Karki v. Secretary-General of the United Nations*, Judgment No. UNDT/2022/104.

<sup>2</sup> Secretary-General's Bulletin ST/SGB/2018/1/Rev. 2 (Staff Regulations and Rules of the United Nations).

<sup>3</sup> E-mail exchange of 17 June 2022 between the Administration and Mr. Karki.

<sup>4</sup> Screenshot of the Court Case Management System (CCMS) of 18 September 2022.

8. On 20 September 2022, the Secretary-General filed a Motion for summary judgment submitting that Mr. Karki's application was not receivable *ratione temporis* because, pursuant to Article 8(1)(d)(ii) of the Dispute Tribunal Statute, he did not file it within the 90-day statutory deadline.

9. On 21 September 2022, the UNDT instructed Mr. Karki to submit his response to the Secretary-General's Motion for summary judgment by 28 September 2022.

10. On 28 September 2022, Mr. Karki, through his counsel, filed a Motion for extension of time to comply with directions of the UNDT. Requesting an additional delay of seven days, Mr. Karki further submitted that he had not been able "to provide to his [c]ounsel all the factual and/or documentary evidence that he wishe[d] to rely on for the purposes of fully demonstrating the exceptional circumstances under which a suspension, waiver or extension of time with regard to the filing of his [a]pplication should be granted". Furthermore, Mr. Karki submitted that communications with his counsel were difficult because of time zone issues and as they were both living in rural areas. He also contended that he had been undergoing "serious medical evaluation and would need to share proof that [could] be used to further demonstrate exceptional circumstances".<sup>5</sup>

11. On 30 September 2022, by Order No. 139 (NBI/2022), the UNDT granted Mr. Karki's Motion for extension of time and ordered that he submit his response to the Secretary-General's Motion for summary judgment by 5 October 2022.

12. On 5 October 2022, through his counsel, Mr. Karki filed his response to the Secretary-General's Motion for summary judgment. He requested the UNDT to waive the 90-day deadline in light of his "serious medical condition". He submitted that the medical professionals following him were of the opinion that he "should distance himself as much as possible from the facts and events surrounding the said work-related incident(s)". Mr. Karki also submitted "the time difference between his location and that of his [c]ounsel (...) coupled with difficulties in internet connectivity and professional constraints [had] further hampered his effective work on the [a]pplication". In support of his request, Mr. Karki attached medical reports and records.<sup>6</sup>

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<sup>5</sup> UNDT Motion for extension of time dated 28 September 2022.

<sup>6</sup> UNDT Response to the Secretary-General's Motion for summary judgment dated 5 October 2022.

13. On that same date, Mr. Karki also filed a Motion for anonymity requesting the UNDT “to keep the content and proceedings of this [a]pplication private and confidential (...) so that he [may] continue on his path to recovery from the described serious medical conditions and maintain his personal and professional reputation and standing even as he [sought] justice”. In support of his request, Mr. Karki submitted the same arguments and evidence as the ones that he submitted in his response to the Secretary-General’s Motion for summary judgment.<sup>7</sup>

#### *Impugned Judgment*

14. On 10 October 2022, the Dispute Tribunal issued the impugned Judgment, dismissing Mr. Karki’s application on the grounds that it was not receivable *ratione temporis*.

15. First, the UNDT rejected Mr. Karki’s Motion for anonymity. It further concluded that “its contents and attachments [were] not relevant to the issues raised in the summary judgment motion”.<sup>8</sup>

16. Second, relying on Article 8(1)(d)(ii) of the Dispute Tribunal Statute, the UNDT observed that Mr. Karki had to file his application before the UNDT within 90 calendar days of his receipt of the administrative decision. Indeed, having analysed the records of the Court Case Management System (CCMS), the UNDT concluded that he acknowledged receipt of the dismissal letter on 17 June 2022. Therefore, the deadline to file his application before the Dispute Tribunal was 90 days from 17 June 2022 and expired on 15 September 2022. As he filed his application only on 18 September 2022, the UNDT found that his application was consequently not receivable *ratione temporis*.<sup>9</sup>

17. Last, with regard to Mr. Karki’s request to waive the 90-day deadline, the UNDT recalled that, pursuant to Article 8(3) of the Dispute Tribunal Statute, it may, in exceptional cases, suspend or waive the deadlines for the filing of an application. However, referring to Appeals Tribunal jurisprudence, it observed that a request for waiver must “ordinarily [...] be filed before the application is filed and not afterwards”, and that Mr. Karki did not “request a waiver of the deadline

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<sup>7</sup> UNDT Motion for anonymity dated 5 October 2022.

<sup>8</sup> Impugned Judgment, para. 9.

<sup>9</sup> *Ibid.*, paras. 10-12.

before filing his late application or in the application itself". Consequently, the UNDT concluded that Mr. Karki's application was time-barred.<sup>10</sup>

*Procedures before the Appeals Tribunal*

18. On 15 November 2022, Mr. Karki filed a request for suspension, waiver or extension of time limit to file his appeal before the Appeals Tribunal stating that he had suffered adverse consequences to his mental health as a result of both the summary dismissal of his case by the UNDT and the publication of his identity in the impugned Judgment.

19. On 21 November 2022, the Appeals Tribunal issued Order No. 492 (2022), granting Mr. Karki's request and extending his time to file an appeal by two weeks. The UNAT also issued an interim order anonymizing Mr. Karki's identity until the present Judgment.<sup>11</sup>

20. On 22 December 2022, Mr. Karki filed another Motion with the Appeals Tribunal requesting that his name be anonymized in all further proceedings as well as in the previous Orders and Judgments issued by the Dispute Tribunal.

21. On 23 December 2022, Mr. Karki filed an appeal against the impugned Judgment with the Appeals Tribunal, which was transmitted to the Secretary-General on 9 January 2023. On 10 March 2023, the Secretary-General filed his answer.

22. On 19 January 2023, the Secretary-General replied to Mr. Karki's Motion for anonymity. In his response, the Secretary-General did not oppose the Motion but observed that Mr. Karki had not demonstrated circumstances justifying anonymity:<sup>12</sup>

... (...) AAH's medical documents [did] not demonstrate that his medical condition would worsen should the proceedings remain public. He also [had] not made a showing that he [was] in greater need than any other litigant for confidentiality. There is no reason to shield appellants from the consequences of their own actions.

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<sup>10</sup> *Ibid.*, paras. 13-14 citing *Khisa v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-883, para. 17; *Cooke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275, para. 30.

<sup>11</sup> In *AAH v. Secretary-General of the United Nations*, Order No. 492 (2022), the then-President of the Appeals Tribunal held that: "I make an interim or temporary order anonymising the Appellant's identity in this Order by substituting for his name a three-letter acronym to be assigned by the Registrar. This Order will remain in force only until the judgment of his substantive appeal (in which case it will be reviewed) or its earlier dismissal if the Appellant fails to comply with these or any further directions by the UNAT".

<sup>12</sup> *AAH v. Secretary-General of the United Nations*, Order No. 504 (2023), para. 4.

23. On 30 January 2023, the Appeals Tribunal issued Order No. 504 (2023), denying Mr. Karki's Motion on the basis that it was redundant, as it had already been decided in Order No. 492 (2022) to temporarily anonymize his identity. With regard to his request for anonymity of the Dispute Tribunal's previous Orders and Judgments, the UNAT found that it would be more appropriate to review them with the final disposition of his request for anonymity, as ordered in Order No. 492 (2022).

### **Submissions**

#### **Mr. Karki's Appeal**

24. Mr. Karki requests the Appeals Tribunal to vacate the impugned Judgment and to "provide [him] time of at least one month to review and submit the appeal with the help of a new private lawyer". However, if the Appeals Tribunal "rejects [his] [M]otion to provide time to file a new appeal, [he] respectfully [requests] the [Appeals] Tribunal that the case be remanded to the UNDT for determination on its merits".

25. Mr. Karki also requests an oral hearing before the Appeals Tribunal to "ask" one of his UNHCR colleagues, M.M., "to shed light on the relationship of trust with [his] former counsel and how he abused [him]".

26. With regard to the impugned Judgment, Mr. Karki submits that the Dispute Tribunal erred in law in dismissing his application.

27. Relying on *Gergo Gelsei*,<sup>13</sup> Mr. Karki contends that the UNDT erred in concluding that his application was time-barred *because* a waiver was not filed before his application.<sup>14</sup>

28. Moreover, Mr. Karki argues that two exceptional circumstances explained the delay in submitting his application: i) his counsel "broke the trust and abused his authority"; and ii) he was "medically incapacitated to act on his own". With regard to his medical condition, Mr. Karki further attaches the same documentation that he submitted before the UNDT, which, he contends, prevented him from getting involved in "past work-related issues to avoid getting triggered again".<sup>15</sup>

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<sup>13</sup> *Gergo Gelsei v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1035.

<sup>14</sup> Emphasis added.

<sup>15</sup> UNDT Response to the Secretary-General's Motion for summary judgment dated 5 October 2022.

29. Mr. Karki argues that he followed up with his counsel several times by WhatsApp and e-mail to ensure that he was working on his appeal and to remind him of the deadline of 15 September 2022.<sup>16</sup> Mr. Karki further contends that due to his doctors' advice, he then requested M.M. to discuss with his counsel on his behalf.

30. Mr. Karki submits that his counsel was negligent and did not update him at any time except on 19 September 2022, when he notified him that he filed his application within the statutory time limit.

31. Mr. Karki argues that when he was finally informed of Order No. 139 (NBI/2022) and of the impugned Judgment, he panicked. He further argues that his "medical situation worsened after reading the [impugned] [J]udgment".

32. Therefore, Mr. Karki contends that he completely relied on his counsel, who "broke the trust and abused his authority" by failing to update him on the status of his application and by not filing it on time. Mr. Karki notes that on 18 October 2022, he filed a formal complaint of misconduct against his counsel to the Law Society of Kenya.

### **The Secretary-General's Answer**

33. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

34. With regard to Mr. Karki's request for an oral hearing, the Secretary-General does not submit any argument.

35. With regard to the impugned Judgment, the Secretary-General submits that the UNDT correctly held that Mr. Karki's application was not receivable *ratione temporis* because, pursuant to Article 8(1)(d)(ii) of the Dispute Tribunal Statute, he had 90 days from his receipt of the administrative decision on 17 June 2022 to file an application to the UNDT, but he failed to do so as he filed his application on 18 September 2022, three days after the statutory time limit.

36. The Secretary-General recalls that the Appeals Tribunal has consistently held that a strict adherence to time limits is one of the goals of our internal system of the administration of justice

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<sup>16</sup> Mr. Karki contends that he followed up with his counsel on 15 and 31 August 2022 as well as on 13 September 2022, but he did not submit copies of the WhatsApp exchange or of the e-mail.

and that, pursuant to Article 8(3) of the Dispute Tribunal Statute, the UNDT may decide to waive such statutory deadlines only in exceptional circumstances.<sup>17</sup>

37. Consequently, the Secretary-General submits that, contrary to Mr. Karki's contention, the UNDT did not conclude that his application was not receivable *because* a waiver was not filed before the application, but rather because he did not file it within the statutory time limit.<sup>18</sup>

38. Moreover, in the present case, the Secretary-General contends that the UNDT correctly rejected Mr. Karki's request for a waiver of the deadline to file his application. Indeed, the Secretary-General observes that, contrary to Appeals Tribunal consistent jurisprudence, Mr. Karki failed to submit his request for a waiver before filing his application.<sup>19</sup>

39. The Secretary-General further contends that Mr. Karki's reliance on *Gergo Gelsei* in support of his argument that requests for waivers may be filed after the deadline expired is misplaced.<sup>20</sup> Indeed, the Secretary-General observes that *Gergo Gelsei* is an "exceptional case", in which the staff member submitted a request for a waiver after the expiry of the deadline due to "unique factual circumstances", i.e. a failure of the electronic filing system on the day of the deadline.<sup>21</sup>

40. In the present case, the Secretary-General submits that Mr. Karki did not present any exceptional circumstances which would have justified a waiver of the 90-day time limit. The Secretary-General observes that what constitutes an exceptional circumstance have been interpreted restrictively by the Appeals Tribunal.<sup>22</sup> The Secretary-General further notes that the

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<sup>17</sup> *Lolo Mkhabela v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1289, para. 34; *Langa Dorji v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1278, para. 29; *Sylvester v. Secretary General of the International Civil Aviation Organization*, Judgment No. 2018-UNAT-872, para. 36.

<sup>18</sup> Emphasis added.

<sup>19</sup> *Hoyce Temu v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1174, para. 40; *Khisa* Judgment, *op. cit.*, para. 17; *Cooke* Judgment, *op. cit.*, para. 30; *Nikwigize v. Secretary-general of the United Nations*, Judgment No. 2017-UNAT-731, para. 20; *Thiam v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-144, para. 18.

<sup>20</sup> *Gelsi* Judgment, *op. cit.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Christensen v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-218, para. 39; *Osman v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-147, para. 17; *Ibrahim v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-069.



UNAT “has regularly found exceptional circumstances to be those circumstances beyond the applicant’s control”.<sup>23</sup>

41. Referring to Mr. Karki’s response to his Motion for summary judgment, where he argued that the delay in filing his application was due to “the mental and physical distress he suffered as a result of the investigation into his misconduct together with the logistical/communication and time zone issues between [him] and his counsel”, the Secretary-General submits that Mr. Karki failed to provide “adequate evidence” as to how these circumstances were exceptional and led him to miss the deadline by three days.

42. Moreover, the Secretary-General contends that Mr. Karki also failed to explain why he did not ask for such a waiver at the “earliest opportunity”, but rather waited “months later” in his response to the Secretary-General’s Motion for summary judgment.

43. With regard to Mr. Karki’s arguments that “his medical condition was such that he could only rely on his counsel and that his counsel broke the trust and abused his authority”, the Secretary-General submits that these arguments were not presented before the Dispute Tribunal and, therefore, cannot be raised for the first time before the Appeals Tribunal. Furthermore, even if the UNAT were to admit these new arguments, the Secretary-General submits that they do not amount to “exceptional circumstances” in accordance with Article 8(3) of the Dispute Tribunal Statute.

44. Finally, regarding Mr. Karki’s request for an extension of time to file an appeal assisted by a new private counsel, the Secretary-General argues that “[i]t is unclear whether [Mr. Karki] is requesting an extension of time to file another appeal or whether he is asking for an extension of time to file a new application”. The Secretary-General submits that either way, Mr. Karki’s arguments should be rejected as the legal framework does not allow a party to submit another application challenging the same contested decision for which a judgment had already been issued or to submit a second appeal to relitigate a first appeal filed before the UNAT.

45. Moreover, if the UNAT were to consider Mr. Karki’s request for an extension of time to file an appeal assisted by a new private counsel as a request for additional pleadings, the Secretary-General contends that the arguments raised by Mr. Karki do not amount to exceptional circumstances, in accordance with Article 31(1) of the Appeals Tribunal Rules of Procedure. More

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<sup>23</sup> *Bofill v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-478, para. 19.

specifically, the Secretary-General observes that negligence does not constitute an exceptional circumstance and that, therefore, “any alleged malpractice by a counsel is an issue between the client and counsel, which does not affect the proceedings”.<sup>24</sup>

46. As to Mr. Karki’s submission about his mental and physical distress, the Secretary-General, relying on *Sylvester*,<sup>25</sup> notes that Mr. Karki was not in “an absolute impossibility (...) to file within the statutory time limi[t]” because his counsel was still capable and responsible to submit his appeal.

47. Therefore, the Secretary-General submits that Mr. Karki has failed to establish any reversible error by the UNDT and, thus, to satisfy the requirements of Article 2(1) of the Appeals Tribunal Statute.

### Considerations

48. The fundamental issue presented for this Tribunal’s review is whether the UNDT erred in denying Appellant’s request to waive the deadline for his application to the UNDT.

49. An application to the UNDT is not receivable unless it is filed, “[i]n cases where a management evaluation of the contested decision is not required, within 90 calendar days of the applicant’s receipt of the administrative decision”.<sup>26</sup>

50. Appellant concedes that his application to the UNDT was not filed within the required 90 calendar days but was instead filed 93 days after his receipt of the challenged administrative decision. His application was thus not receivable, absent waiver of the deadline by the UNDT.

51. Appellant argues that the UNDT erred in not waiving the deadline. Article 8(3) of the UNDT Statute provides that “[t]he Dispute Tribunal may decide (...) upon written request by the applicant, to (...) waive the deadlines for a limited period of time and only in exceptional cases”. The UNDT Rules of Procedure emphasize that such relief is permitted only in “exceptional circumstances”.<sup>27</sup>

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<sup>24</sup> *McCluskey v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-384, para. 20.

<sup>25</sup> *Sylvester* Judgment, *op. cit.*, para. 36.

<sup>26</sup> Article 8(1)(d)(ii) of the UNDT Statute.

<sup>27</sup> Article 7(5) of the UNDT Rules of Procedure.

52. Because the UNDT has discretion in deciding whether to waive the deadline for applications, this Tribunal's role is confined to determining whether, based on the record, the UNDT acted within, or otherwise abused, that discretion. This Tribunal does not review the issue *de novo*. Rather, the "function of this Tribunal is to consider whether the Dispute Tribunal erred in law or fact".<sup>28</sup>

53. We find no such error here. Appellant contends that the delay was caused by the negligence of his retained counsel, and that his own medical condition prevented him from ensuring a timely filing. The UNDT was well within its discretion to reject the argument related to medical condition when it was raised.

54. With respect to the retained counsel, it is well settled that "[o]versight by counsel does not justify a waiver of statutory time limits".<sup>29</sup> As the Appeals Tribunal has held, "the actions and omissions of counsel legally reflect the persons they represent. (...) The determination of the eventual responsibility of the counsel for that circumstance is only relevant to the relationship between the client and his counsel, and does not affect the case before the UNDT".<sup>30</sup>

55. With respect to Appellant's medical condition, the Appeals Tribunal has held that:<sup>31</sup>

... In light of our jurisprudence, [Appellant] bore the burden to prove any circumstances beyond his control that would have the effect of preventing him from acting within the statutory time limits. This construction must be rigorously interpreted, as strict adherence to time limits is one of the cornerstones of the internal justice system. In other words, there will be exceptional circumstances when there is an absolute impossibility for the filing party to file within the statutory time limits.

56. Appellant did not meet that burden before the UNDT nor does he meet it on appeal. The medical records submitted by him are mainly remote in time from the briefing deadline and in any event do not establish that timely filing was an "absolute impossibility" because of any medical condition.

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<sup>28</sup> *Scheepers v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-211, para. 44.

<sup>29</sup> *Powell v. Secretary-General of the United Nations*, Order No. 96 (2012), para. 9.

<sup>30</sup> *McCluskey* Judgment, *op. cit.*, para. 20.

<sup>31</sup> *Sylvester* Judgment, *op. cit.*, para. 36 (internal citations omitted).

57. Appellant takes issue with what he views as the UNDT’s conclusion that he was prohibited from seeking a waiver once the deadline for filing had passed. The UNDT correctly observed, and Appellant concedes, that he “did not request a waiver of the deadline before filing his late application or in the late application itself”.<sup>32</sup> This Tribunal has ruled on more than one occasion that when, as here, a “request for waiver [is] not filed before the statutory time limit for filing [an] application had lapsed, the UNDT ha[s] no jurisdiction or [is] not competent to consider whether there were exceptional circumstances to waive the deadline within the meaning of Article 8(3) of the UNDT Statute”.<sup>33</sup> Likewise, this Tribunal has upheld the UNDT’s ruling that a request for waiver of deadline filed after the application was untimely.<sup>34</sup> This approach is essential to the good administration of justice. “Strict adherence to filing deadlines assures one of the goals of our new system of administration of justice: the timely hearing of cases and rendering of judgments”.<sup>35</sup> To broadly hold otherwise would open the door to abuse of the United Nations’ internal justice system.

58. Appellant does correctly observe, and we acknowledge, that this Tribunal has in one instance also held that “the Statute (and the UNDT’s Rules of Procedure which must and do follow it), make no reference to such a restriction on the power expressly provided. (...) [T]he words of the Statute tend strongly to suggest that an application to extend time which has already expired, was indeed contemplated and allowed for”.<sup>36</sup> Given the centrality of deadlines to the orderly administration of justice, and to give proper respect to the integrity of the Dispute Tribunal Statute, any such exception must be reserved for the rarest and most compelling circumstances. Appellant’s belated request to waive the expired deadline does not meet this high bar. He did not seek a waiver along with his late application, but instead waited until after the Secretary-General had moved for summary judgment. Moreover, his claimed reasons for seeking a waiver (his medical condition and the alleged failings of his chosen counsel) do not, as discussed above, establish exceptional circumstances for a waiver, much less fall within the rare and compelling circumstances necessary for the UNDT to even consider such a request. We therefore affirm the impugned Judgment.

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<sup>32</sup> Impugned Judgment, para. 13.

<sup>33</sup> *Nikwigize* Judgment, *op. cit.*, para. 20. See also *Thiam* Judgment, *op. cit.*, para. 18.

<sup>34</sup> *Khisa* Judgment, *op. cit.*, para. 17.

<sup>35</sup> *Cooke* Judgment, *op. cit.*, para. 26.

<sup>36</sup> *Gelsei* Judgment, *op. cit.*, para. 20.

59. Regardless of our ruling on the merits, Appellant has moved for an order preserving his anonymity. On 21 November 2022, the Appeals Tribunal made an interim order anonymizing Appellant's identity, on grounds relating to his health, until the issuance of this Judgment.<sup>37</sup>

60. With regard to anonymity, the Appeals Tribunal Statute requires that "[t]he judgements of the Appeals Tribunal shall be published, while protecting personal data", and the UNAT Rules of Procedure specifically provide that "[t]he published judgements will normally include the names of the parties".<sup>38</sup> The Appeals Tribunal's case law confirms these basic rules:<sup>39</sup>

... (...) Our jurisprudence shows that the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality.

61. Appellant has not provided grounds which would overcome this strong presumption. The issue presented in this appeal is purely procedural and jurisdictional and does not involve any "personal data" which must be protected. As this Tribunal has previously held, "[t]he principles of transparency and accountability, which are enshrined in the system of administration of justice at the United Nations, require that names should be redacted in only the most sensitive of cases".<sup>40</sup> Upon review of the record, and the arguments of both parties, Appellant's request for anonymity is denied.

62. Finally, Appellant requests an oral hearing to present testimony regarding the alleged negligence of his former counsel. For the reasons discussed above, such evidence would not be relevant and would thus not assist in the expeditious and fair disposal of the case.<sup>41</sup> The request for an oral hearing is therefore denied.

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<sup>37</sup> *AAH v. Secretary-General of the United Nations*, Order No. 492 (2022).

<sup>38</sup> Article 10(9) of the UNAT Statute and Article 20(2) of the UNAT Rules of Procedure.

<sup>39</sup> *Buff v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-639, para. 21.

<sup>40</sup> *Mobanga v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-741, para. 22 (internal citation omitted).

<sup>41</sup> See Article 18(1) of the UNAT Rules of Procedure.

**Judgment**

63. Mr. Karki's appeal is dismissed by majority with Judge Colgan dissenting, and Judgment No. UNDT/2022/104 is hereby affirmed.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of October 2023 in New York, United States.

*(Signed)*

Judge Ziadé, Presiding

*(Signed)*

Judge Sheha

Judgment published and entered into the Register on this 19<sup>th</sup> day of December 2023 in New York, United States.

*(Signed)*

Juliet E. Johnson, Registrar

**Judge Colgan’s Dissenting Opinion**

1. I respectfully dissent from the decision of the majority that the UNDT did not err in impliedly determining that the Appellant’s period for challenging his dismissal should not have been extended by some three days and that the Appellant should not have enjoyed anonymity at an interim stage of his proceeding.

2. Although the circumstances, let alone the merits, of the situation that led the Appellant to appeal to the UNDT are not before us, it is clear that he was dismissed from service with the United Nations as a result of these. That sanction is the most serious that can be imposed for misconduct and to prevent an appeal being considered on its merits by the UNDT is a significant decision.

3. The uncontested facts show that: i) the Appellant signed his application with the UNDT on 13 September 2022, i.e., two days before the expiry of the 90-day statutory deadline; ii) he entrusted his counsel to file his application on time; iii) he had reminded his counsel of the expiry date, perhaps more than once; iv) his application was filed by his counsel three days late, on 18 September 2022; v) on 5 October 2022, the Appellant requested the UNDT to waive the 90-day deadline to file his application to legitimise the late filing; vi) during the 90-day period, the Appellant was suffering from both physical and psychological/psychiatric ill health; vii) his professional medical advice, which he attempted to follow, had been to avoid as much as possible revisiting the events that had brought about his dismissal; and viii) in his request to waive the 90-day deadline, he also referred to the difficulties of communication with his counsel who was located in another time zone, internet connectivity problems and what he described as “professional constraints” as the reasons for his late filing of his application. I understand that to be a reference to the breakdown of his professional relationship with his counsel which the Appellant sought to elaborate on in more detail before us on appeal.

4. In the very brief impugned Judgment, the UNDT allowed expressly the Secretary-General’s Motion for summary judgment and, thereby impliedly, denied the Appellant’s request to extend time by three days as well as his request for anonymity. The UNDT’s reasons are brief and contained exclusively in paragraphs 13 and 14 of the impugned Judgment which provide that:<sup>42</sup>

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<sup>42</sup> Impugned Judgment, paras. 13-14.

... Article 8.3 of the UNDT Statute allows the UNDT to waive the deadline for the filing of an application in exceptional cases. However, in terms of the jurisprudence of the [UNAT], an application for waiver ordinarily must be filed before the application is filed and not afterwards. In the current case, the [Appellant] did not request a waiver of the deadline before filing his late application or in the late application itself.

... This application is time-barred and cannot be considered further by this Tribunal.

5. First, I conclude that the UNDT misapplied, and so committed an error of, the law. While requests for waiver should *ordinarily* be made before the expiry of the limitation period but they may, in some circumstances, be made after its expiry.<sup>43</sup> In the present case, there was no analysis of why this was an “ordinary” and not an “out of the ordinary” case.

6. Second, the UNDT failed to consider the Appellant’s request on its merits. That required a consideration of whether the circumstances he invoked were “extraordinary” and by failing to do so, the UNDT committed another error of law that reinforces the wrongfulness of the impugned Judgment.

7. Before expressing my conclusions about whether that statutory test was met in the present case, I wish to explain how I consider such cases should be approached. While it is desirable to have an established and known jurisprudence, repetition and consistency must not be slaves to progressive and enlightened concepts of justice. While changes should be incremental and soundly reasoned rather than sudden and radical, laws are not fixed immutably by their antiquity and an overwhelming wish for certainty and order. Change for sound reasons of doing principled justice is the lifeblood of the law that ensures the maintenance by litigants (winners and losers) of their trust and confidence in it.

8. In weighing the balance between strict adherence to procedural gatekeeping rules, and the justice of allowing a staff member to preserve a first opportunity for an independent judicial consideration of how that most serious of consequences was justified in law, I have no doubt that, in this case, the former must yield to the latter.

9. With regard to the jurisprudence touching on breaches of time limitations to bringing appeals to the UNDT and applications to extend those time limits, what I consider to be the most scholarly and certainly comprehensive analysis of the position written shortly after the

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<sup>43</sup> Emphasis added.



new internal justice regime began, was expressed by Judge Ebrahim-Carstens in *Morsy*.<sup>44</sup> I commend its reading, but to summarise, the UNDT held that:<sup>45</sup>

... (...) Exceptional simply means something out of the ordinary, quite unusual, special, or uncommon. To be exceptional, a circumstance or reason need not be unique or unprecedented or very rare, but it cannot be one which is regular, or routinely or normally encountered. What constitutes exceptional reasons in one case may not do so in another; each case must be decided on its own merits.

10. It is necessary, of course, to analyse subsequent judgments, especially those of the Appeals Tribunal. The first is *Diagne et al.*,<sup>46</sup> also an early case under the new regime. Applying the former Staff Rules and following the jurisprudence of the former Administrative Tribunal, the Appeals Tribunal interpreted and applied the phrase “exceptional circumstances” to be circumstances “beyond the staff member’s control”.<sup>47</sup>

11. The *Morsy* and *Diagne et al.* cases are significantly distinguishable: the latter looked back to a previous interpretation under a different regime, but the former looked currently and forward to the new regime now in its 15th year.

12. The UNDT considered the question again in *Bofill*.<sup>48</sup> The phrase for consideration, albeit under the current regime, was “only in exceptional circumstances”. Citing *Diagne et al.* as “established jurisprudence”, the UNDT reiterated that the test was the establishment of circumstances beyond the staff member’s control.<sup>49</sup> On appeal, the UNAT affirmed its holding in *El-Khatib* and held that:<sup>50</sup>

... This Tribunal has repeatedly held that it ‘has been strictly enforcing, and will continue to strictly enforce, the various time limits’. The Appeals Tribunal has followed the jurisprudence of the former Administrative Tribunal according to which only

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<sup>44</sup> *Morsy v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/036.

<sup>45</sup> *Ibid.*, para. 60. Because the UNDT had also analysed the phrase “exceptional reasons” which is not in issue, in this case, I note that it equated it with “exceptional circumstances” so far as the meaning of “exceptional was concerned”. I also note also the apparent discrepancy between the nouns qualified by the same word “exceptional” in the Statute and Rules as set out in the majority’s Judgment. The former noun is “circumstances” while the latter noun is “case”. The decision of this appeal does not turn on this distinction, if any, so I will simply note that if there is a conflict, the Statute trumps the Rules.

<sup>46</sup> *Diagne et al v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-067.

<sup>47</sup> *Ibid.*, paras. 20-23.

<sup>48</sup> *Bofill v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/141.

<sup>49</sup> *Ibid.*, para. 17.

<sup>50</sup> *Bofill v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-478, para. 19 (quoting *El-Khatib v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-029, para. 14) (other internal citation omitted).

circumstances ‘beyond his or her control that prevented the applicant from exercising the right of appeal in a timely manner’ may be considered ‘exceptional circumstances’ justifying a waiver of the statutory time limit.

13. However, *El-Khatib* does not appear to do more than repeat the requirement for the existence of circumstances beyond the staff member’s control. Even if correct, that test begs several theoretical questions that may arise in such cases. Is the neglect of counsel who has been entrusted to file an appeal timeously but failed to do so, “beyond the control” of the staff member? Is a debilitating illness that inhibits a staff member from attending to timely filing beyond that person’s control? The answers to these hypothetical questions will, I consider, depend on the particular facts of each case so that a “within the staff member’s control” test will not be decisive or even perhaps particularly helpful, in determining the statutory test of whether the circumstances are “exceptional”. Even if this control test is applicable, it must, I consider, take account of human realities and fallibilities, and not be based on unrealistic expectations of legal knowledge, self-interest, and perfection in all things.

14. There have been further cases decided by the UNAT affecting these questions which have followed what I respectfully consider to be this flawed jurisprudence.<sup>51</sup>

15. I also note the references in this jurisprudence to the need for “strict enforcement” of time limits. That administrative imperative must, nevertheless, also take account of the statutory scheme permitting, in just cases, waivers or extensions of time limits. It must also respect the associated law-making of the General Assembly in framing the legislation to leave it to the Tribunals to determine not only what are exceptional circumstances in any particular case but also to determine whether it is in the overall interests of justice to allow an exception to the usual requirement of time limit compliance. This discretion allows the Tribunals to consider, for example, whether an extension or a waiver of time will prejudice others, including the Secretary-General or other staff members. These cases are not simply “open or shut” mechanical exercises but should involve a balancing of rights, obligations and interests in determining where the justice of the case lies. In short, each case will depend on its merits.

16. This issue is one of access to justice for a dismissed staff member. The Tribunals, while acknowledging and applying the statutory time limits, should also not be too keen to close the

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<sup>51</sup> *Sylvester* Judgment, *op. cit.*, para. 36; *Rüger v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-693, para. 18.

door to merits-based justice by ignoring (as the UNDT did in this case) or applying too narrowly the statutory exemption criteria.

17. Exceptional circumstances are just that, relevant circumstances which are the exception rather than the rule. Although the control over filing an appeal is a relevant factor, success is not necessarily always restricted, as the Secretary-General submits in this case, to circumstances beyond the staff member's control. That phrase is not in the Statute which is the primary and binding source of our jurisprudence.

18. Nor do I agree that in cases where counsel neglect to file timeously, a staff member's only remedy should be against the counsel in a professional negligence context and in a national jurisdiction. The Appellant relied on his counsel to file his appeal within time but for reasons that are not apparent, his counsel did not do so until it was three days late. While a complaint of professional negligence has apparently been made, the outcome of this is unknown to us and, whichever way it goes, will not restore the Appellant's ability to have the merits of his dismissal examined and determined in the only forum available to him.

19. If exceptional circumstances are established, the exercise of the UNDT's discretion to extend time will depend on the weighing of a number of factors including the reasons for the delay, whether the Secretary-General or other staff members have been prejudiced by the delay, the extent of the delay and the overall justice of the situation. I note that there is no suggestion of prejudice to the Secretary-General or to others as a result of the Appellant's three-day delay. Indeed, it is difficult to imagine in the circumstances how any real prejudice could have arisen.

20. I disagree with the Secretary-General's submission that it should be fatal to the appeal that the Appellant did not raise, until this appeal, his difficulties with his counsel. He is now unrepresented and some modest and reasonable latitude should be accorded to him in these circumstances. In any event, I interpret his reference to "professional constraints" that he put before the UNDT to probably be a cryptic reference to these circumstances on which he has now expanded. They add to the exceptional circumstances in which the Appellant was at the relevant time. A lawyer's negligence in respect of the lawyer's client's affairs is, in my view and experience, an exceptional circumstance: most lawyers do not deal with their clients' affairs negligently, including especially missing time limits that have been pointed out to them by their clients.

21. Nor do I agree that it could have only been “an absolute impossibility” for the Appellant to deal with these matters as he should have, that will amount to an exceptional circumstance. That sets the bar far too high and indeed at a level that is near impossible to attain, and is contrary to the statutory word, at least as I have interpreted it, “exceptional”.

22. In addition to concluding that the UNDT erred in law in both applying the legal test wrongly and in failing to decide the Appellant’s request on the statutory grounds, I also conclude that the Appellant did establish exceptional circumstances and should have had the extension to the statutory period that he sought.

23. Finally, I will address briefly the non-anonymization decision of the majority given that I respectfully disagree with the majority’s conclusion and consider that the case should not yet be regarded as concluded on its merits.

24. An interim anonymization Order was made by the UNAT when the appeal was filed and this should continue in effect at least until the final stage of the Appellant’s case when it can be re-considered on its merits in light of all relevant circumstances.<sup>52</sup> I would likewise set aside the impugned Judgment on this point and would make a further interim anonymization order.

Original and Authoritative Version: English

Decision dated this 27<sup>th</sup> day of October 2023 in New York, United States.

*(Signed)*

Judge Colgan

Judgment published and entered into the Register on this 19<sup>th</sup> day of December 2023 in New York, United States.

*(Signed)*

Juliet E. Johnson, Registrar

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<sup>52</sup> *AAH v. Secretary-General of the United Nations*, Order No. 492 (2022).