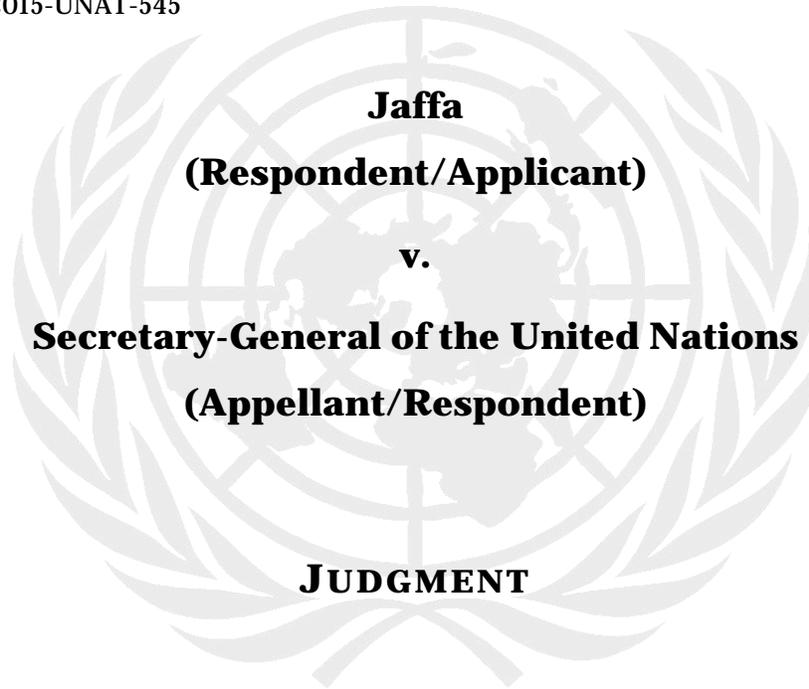




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2015-UNAT-545



**Jaffa
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Richard Lussick, Presiding Judge Luis María Simón Judge Deborah Thomas-Felix
Case No.:	2014-628
Date:	2 July 2015
Registrar:	Weicheng Lin

Counsel for Mr. Jaffa:	Self-represented
Counsel for Secretary-General:	Zarqaa Chohan

JUDGE RICHARD LUSSICK, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2014/052, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 14 May 2014 in the case of *Jaffa v. Secretary-General of the United Nations* (Impugned Judgment). The Secretary-General filed his appeal on 21 July 2014 and Mr. Abdul Jaffa filed an answer on 29 July 2014 and perfected and refiled it on 14 August 2014.

Facts and Procedure

2. The facts as established by the Dispute Tribunal read as follows:¹

... The Applicant worked in the Payroll Unit in Juba as a Finance Assistant from May 2007 until May 2010.

... The Payroll Unit in Juba used two software systems namely the ‘*SunSystem*’ and the ‘*Progen Payroll Unit*’ (“Payroll System Software”) to which the Applicant had login access in his position as a Finance Assistant.

... On 13 April 2010, Mr. Ricardo Ramirez-Garcon, Chief, Accounts Unit, and Mr. Joseph Brent, Chief, Payments Unit, of the then United Nations Mission in Sudan (UNMIS) conducted a review of the accounts payable and receivable. In the course of the review it was found that the Applicant had received three overpayments on 25 August 2009, 29 October 2009 and 13 March 2010, for a total of USD 4,500.

... At the time of the review, none of the overpayments had been recovered by the Organization. These concerns were forwarded to Mr. Abdul Wahab, Chief Finance Officer of UNMIS.

... Mr. Wahab contacted Mr. Nicolas Von Ruben, Director, Mission Support, on 26 April 2010 stating that he had spoken to both the Applicant, and his immediate supervisor, in regards to the overpayments.

... It was alleged that the Applicant admitted to having increased the payment in his favour without prior authorization from his supervisor or from the Human Resources Section. Secondly he had manually entered a “W” (for withheld) into the Payroll System Software. The effect of such an entry would be to prevent automatic recovery of the overpayment from his subsequent monthly remuneration, until it is removed manually.

¹ Impugned Judgment, paras. 4-23.

... Mr. Wahab recommended that a reprimand letter be placed in the Applicant's Official Status File. The Applicant was also transferred with immediate effect from the Payroll Unit to the Accounts Unit and his access to the *Progen Payroll System* and [*SunSystem*] was suspended.

... Before the discoveries came to light, it had been recommended that the Applicant be made an approving officer in the Payroll Unit and the request was being processed. Following the discovery of the overpayments, Mr. Wahab recommended that the Field Budget and Finance Division withdraw the processing of his delegation of approving authority.

... The Applicant was then reassigned from the Payroll Unit and served as Secretary to the Board of the Local Contracts Committee which oversaw procurement functions for the Mission.

... After about 9 months, following a review of the Applicant's performance, his access to [*SunSystem*] was restored and he was placed in charge of the Accounts Unit and the Archive Unit in Juba. He served in this capacity up until his separation from service in January 2013.

... On 18 May 2010 the Special Investigations Unit ("SIU") of UNMIS was instructed to conduct an investigation into allegations of financial irregularities and potential fraud involving the Applicant.

... The Applicant's First Reporting Officer, Mr. Shamsul Haque, on 21 September 2010, told investigators that his duties and responsibilities, as the Regional Finance Officer, included the supervision of the Payroll, Payments and Cash Units of the regional office in Juba; and the review and approval of expenditures, staff entitlements, monthly subsistence allowances, among other functions. He also told investigators that the Applicant was in charge and responsible for the payroll and payments including Month[ly] Payment Order ("MPO") reconciliations.

... The findings of the SIU investigator submitted on 13 February 2011 established that:

- a. During the period of July 2009 - February 2010, the Applicant made two unauthorized adjustments of the amounts of his local salary portion (August 2009 and February 2010) in the Payroll System which resulted in the occurrence of two overpayments of USD 1,000 and USD 2,000 respectively. For these two months, the investigation found and concluded that UNMIS Finance Section never received any Salary Distribution Form [(SDF)] F.248 from the Applicant which was a violation of the applicable rules.
- b. With respect to the month of October 2009, the investigation found and concluded that the amount of the Applicant's local salary portion was authorized through a duly approved Salary Distribution

Form but that the amount reflected in his UNMIS MPO was higher than the amount reflected in the UNHQ MPO and resulted in another overpayment of USD 2, 000 to his account.

- c. The Applicant intentionally excluded all the three overpayments aggregating to USD 4,500 from automatic recovery by placing a “W” remark against each of them.
- d. The Applicant never informed the Regional Finance Officer in Juba or anyone else in UNMIS Finance Section about the occurrence of the overpayments or his action of withholding their recovery.
- e. The manipulation of the finance payroll system by the Applicant consisted of deliberate and repetitive acts perpetrated with clear intention to temporarily misappropriate funds credited to his account through unauthorized Salary Distribution Form adjustments.
- f. There was a lack of direct supervision over the Applicant’s activities. The Regional Finance Officer failed to thoroughly analyse and scrutinize his activities and final work products before approving them for further processing.
- g. On three separate occasions the Applicant had created and received three overpayments and failed to report said overpayments to his supervisor. It was further ascertained that the Applicant had taken such steps as to prevent the subsequent automatic recovery of the overpayments from his next month salary.

... The report was then forwarded to the Office of Internal Oversight Services (“OIOS”) for a review of the SIU investigation.

... OIOS concluded that SIU had conducted a full and [thorough] investigation of the Applicant’s conduct. On 22 September 2011, Mr. Michael Stefanovic, Director, Investigations Division, OIOS, forwarded the SIU report to Ms. Susana Malcorra, Under-Secretary-General, Department of Field Support (USG/DFS).

... On 22 March 2012, Mr. Anthony Banbury, Assistant Secretary-General, DFS, referred the findings of the SIU investigation to Ms. Catherine Pollard, Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”) concluding that the Applicant violated the Staff Regulations of the United Nations and recommended that he face appropriate disciplinary action.

... On 6 September 2012, Ms. Martha Helena Lopez, Officer-in-Charge (OIC), OHRM charged the Applicant and invited him to respond to the allegations.

... The Applicant, through legal counsel, responded to the allegations on 7 November 2012. The Applicant expressed remorse for his actions and admitted that while serving as Finance Assistant and responsible for processing the monthly payroll in the *Progen Payroll System*, he made unauthorized entries into the Payroll System Software. The Applicant admitted to having placed a “W” against the figures, such action having the effect of preventing automatic recovery.

... By letter dated 18 January 2013, the ASG/OHRM informed the Applicant that there was sufficient evidence to indicate that he had on three occasions created overpayments.

... The ASG/OHRM concluded that there was clear evidence that he failed to inform his superiors of the overpayment and subsequently took steps to prevent the recovery of said overpayments. By said failure the Applicant clearly violated the rules relating to recovery of overpayments made to staff members and acted contrary to expected standards of integrity and conduct. The Under-Secretary-General for Management considered the established misconduct was serious in nature and gravity[.]

The disciplinary measure imposed on Mr. Jaffa was “separation from service, with compensation in lieu of notice and with termination indemnity”.

3. Mr. Jaffa appealed. In Judgment No. UNDT/2014/052, the Dispute Tribunal found that Mr. Jaffa had failed in his duty to make the Organization aware of the overpayments made to him, as he was required to do under Administrative Instruction ST/AI/2009/1, Section 2.4.² It also found that Mr. Jaffa had exhibited a “measure of dishonesty” in preventing the immediate recovery of the overpayments mistakenly made to him. He took illegal steps on at least one occasion leading his supervisor to believe that the August 2009 overpayment he had received had been recovered, and on at least three separate occasions entering a “W” into the Payroll System Software to delay the recovery of the overpayments he had received. The Dispute Tribunal concluded that Mr. Jaffa committed misconduct in violation of Staff Regulation 1.2 (b) and (g).

4. However, the Dispute Tribunal concluded that the sanction of termination in the present case was “excessive and disproportionate” in view of the following mitigating factors: i) as soon as the overpayments came to the attention of his supervisors, Mr. Jaffa immediately paid them back; ii) for about two years after the discovery of his actions,

² Administrative Instruction ST/AI/2009/1 entitled “Recovery of Overpayments Made to Staff Members”, in effect as of 30 November 2009.

Mr. Jaffa continued to work within the Finance Section and performed in a satisfactory manner; and iii) Mr. Jaffa's supervisors viewed his actions as "a mistake in judgment" and recommended a written reprimand. The Dispute Tribunal thus ordered that the sanction of termination be rescinded, Mr. Jaffa be reinstated and he be subject to the sanction of demotion with deferment of promotion. As an alternative to reinstatement and demotion, the Dispute Tribunal ordered that Mr. Jaffa be paid two years' net base salary at the FS-4 level.

Submissions

The Secretary-General's Appeal

5. The UNDT erred in failing to recognize the Secretary-General's broad discretion in disciplinary matters. It found Mr. Jaffa's actions legally amounted to misconduct and he had abused his position. It was thus reasonable for the Secretary-General to conclude that separation from service was the appropriate sanction, pursuant to the Appeals Tribunal's jurisprudence. Such a decision falls within the remit of the Secretary-General and the UNDT's role is limited to reviewing the legality, but not the level, of the sanction imposed, and the contested disciplinary measure may be reviewed only in cases of obvious absurdity or flagrant arbitrariness. That was not the case here.

6. The UNDT's characterization of Mr. Jaffa's actions as the granting of interest-free loans to himself was inconsistent with the record, which did not indicate that he had intended to return the overpayments, had his misconduct remained undetected. Neither is the UNDT's characterization of the sanction of termination as "an extreme measure applicable only in the most severe of cases" factually accurate. The disciplinary sanction of termination with termination indemnity and with compensation in lieu of notice is a less severe sanction than summary dismissal or termination without either the in-lieu compensation or termination indemnity. In the present case, the UNDT appears to have misapprehended the sanction imposed and this affected its consideration of the proportionality of the sanction.

7. The UNDT erred in finding that there were mitigating factors in the present case that rendered the sanction of termination against Mr. Jaffa disproportionate. In the opinion of the Secretary-General, Mr. Jaffa's supervisors' recommendations for leniency cannot constitute a mitigating factor. Similarly, his continued employment after the discovery of the

overpayments reflects nothing more than the Organization's compliance with the relevant legal framework governing disciplinary proceedings and should not be treated as a mitigating factor. Regarding the fact of Mr. Jaffa's reimbursement of all the overpayments, the Secretary-General agrees that it was a mitigating factor and that he took that factor into account, but did not consider that it had sufficient weight to warrant decreasing the sanction imposed on Mr. Jaffa. The Secretary-General believes that the facts of the present case are similar to those in *Jahnsen Lecca*,³ and in light of *Jahnsen Lecca* the Appeals Tribunal should affirm the proportionality of the sanction of termination with termination indemnity and in-lieu compensation.

Mr. Jaffa's Answer

8. The Dispute Tribunal carefully reviewed the allegations against all the supporting documents submitted, heard witness statements, weighed all the factors, including mitigating ones, and decided to impose a demotion on Mr. Jaffa. While it was a "bitter pill to accept", Mr. Jaffa believes that it was a very fair judgment which should be accepted by both parties.

9. Receiving payroll overpayments in the amount of USD 4,500 due to changes made to Mr. Jaffa's SDFs should not be understood as misconduct. Given that he was the only one charged with misconduct when all international staff members who had received overpayments and underpayments were not, one would question why there had not been allegations of misconduct filed against his direct supervisor, who had approved the payrolls that included overpayments.

10. In the first week of April 2010, the Chief of Payroll in Khartoum verbally approved Mr. Jaffa's request for a delay in the recovery of the overpayments. Mr. Jaffa then placed a withheld mark "W" against the figures in his account payable. However, as the MPO figure in his SDF of May 2010 was insufficient for the recovery of USD 4,500, "W" remained against the figures until they were detected by the Chief of Accounts Unit in Khartoum. He then borrowed funds from a colleague and refunded the entire amount of USD 4,500 on 21 April 2010.

³ *Jahnsen Lecca v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-408.

11. It is not clear why an allegation about obtaining an interest-free loan was made against Mr. Jaffa when it was never a practice in peace keeping missions to view the unsettled long standing receivables as loans or require staff members to repay with an interest. Mr. Jaffa wonders if the Organization suffered any financial loss in the present case.

12. Mr. Jaffa requests that the Appeals Tribunal dismiss the present appeal and affirm the Impugned Judgment.

Considerations

13. The Secretary-General challenges on appeal the UNDT's finding that the sanction imposed on Mr. Jaffa, that is, separation from service with compensation in lieu of notice and with termination indemnity, was excessive and disproportionate.

14. The UNDT found that Mr. Jaffa's actions "legally amount[ed] to misconduct".⁴ The UNDT held that as a Finance Assistant, Mr. Jaffa "was aware of the Organization's finance policies and practices [and] knew how overpayments were processed and who to report the said overpayments to within the Organization".⁵ Consequently, the UNDT found that Mr. Jaffa failed in his duty to make the Organization aware of overpayments made to him, as provided for in Section 2.4 of ST/AI/2009/1 (which states that when a staff member discovers that an overpayment has occurred, he or she shall advise the Organization immediately). The UNDT was also not in any doubt that Mr. Jaffa had "sought to delay the recovery of the overpayment he received in August 2009 by leading his supervisor to believe this overpayment had been recovered. Similarly, on at least three separate occasions, the Applicant without approval from his supervisors, took illegal steps to delay the recovery of the overpayments he had received."⁶ The UNDT found that Mr. Jaffa "failed to discharge his duty to inform his supervisors of having received overpayments. He also abused his position by taking unauthorized steps to prevent the immediate recovery of the said overpayments."⁷

⁴ Impugned Judgment, para. 115.

⁵ *Ibid.*, para. 78.

⁶ *Ibid.*, para. 110.

⁷ *Ibid.*, para. 128.

15. Notwithstanding these findings, the UNDT was of the view that the sanction imposed upon Mr. Jaffa, that is, separation from service with compensation in lieu of notice and with termination indemnity, was “excessive and disproportionate having regard to all the mitigating factors present”.⁸

16. One of the mitigating factors considered by the UNDT was the fact that Mr. Jaffa had reimbursed the Organization. The UNDT apparently overlooked that such a factor had already been taken into account by the Secretary-General when considering an appropriate sanction.

17. We think the UNDT fell into error in its assessment of mitigating factors. It considered as a mitigating factor the recommendation by Mr. Jaffa’s immediate supervisors that his actions merely warranted the placing in his file of a written reprimand. This Tribunal disagrees. The authority to impose disciplinary sanctions is not vested in Mr. Jaffa’s immediate supervisors and their opinion in this regard is not a mitigating factor.

18. Another circumstance considered by the UNDT to constitute a mitigating factor was that Mr. Jaffa continued to perform with the Finance Section for almost two years prior to his separation, during which period he received positive performance reviews. Again, this Tribunal disagrees. That Mr. Jaffa continued to work with the Finance Section for two years can be put down to a consequence of the procedure governing disciplinary proceedings. Mr. Jaffa’s positive performance reviews are not a factor that mitigates his dishonest conduct.

19. We also think that the UNDT erred in not attaching sufficient importance to the fact that Mr. Jaffa held a position of trust as a Finance Assistant, giving him access to the payroll system, which enabled him to commit the offences. Breach of trust is a consideration which impacts negatively against Mr. Jaffa on the issue of proportionality.⁹

20. The Secretary-General did not overlook the relevant mitigating factors in imposing the sanction of separation from service with compensation in lieu of notice and with termination indemnity. He took into account Mr. Jaffa’s reimbursement to the Organization,

⁸ *Ibid.*, para. 130.

⁹ *Abu Jarbou v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-292, para. 42.

his attested unblemished record, his sincere remorse and his conduct during the investigation.¹⁰

21. The jurisprudence of the Appeals Tribunal has been consistent and clear since its first session in 2010 establishing that:¹¹

... When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

...

... In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

...

... Keeping in mind the matters outlined above, we hold that the UNDT, in exercising judicial review, may interfere with the exercise of the Secretary-General's discretion in disciplinary proceedings against a staff member on the ground that the disciplinary measure is not proportionate to the misconduct. The UNDT is not bound by the jurisprudence of the former Administrative Tribunal, although in appropriate cases its judgments concerning disciplinary proceedings may have non-binding persuasive value. However, while exercising judicial review, due deference must be shown to the Secretary-General's administrative decisions because Article 101(3) of

¹⁰ Letter dated 18 January 2013 from the Assistant Secretary-General for OHRM; *see also* Impugned Judgment, para. 117.

¹¹ *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, paras. 40, 42 and 47.

the Charter requires the Secretary-General to hold staff members to the highest standards of integrity and he is accountable to the Member States of the United Nations in this regard.

22. The Secretary-General is vested with the authority to impose the sanction which he considers to be appropriate. In this case, the sanction imposed was not the most severe. It was not summary dismissal and Mr. Jaffa was granted compensation in lieu of notice together with termination indemnity. As determined in *Aqel*, the level of the sanction falls within the remit of the Administration and can only be reviewed in cases of “obvious absurdity or flagrant arbitrariness”,¹² which has not been demonstrated in the present case.

23. The Appeals Tribunal has consistently held that it will not substitute its own judgment for that of the competent decision-maker. Although perhaps the Secretary-General, in his discretion, could have come to a different conclusion, it cannot be said that the sanction of separation with compensation in lieu of notice and with termination indemnity was unfair or disproportionate to the seriousness of the offences.¹³

24. The sanction imposed on Mr. Jaffa was not unreasonable, absurd or disproportionate. As such, the Appeals Tribunal finds that it was a reasonable exercise of the Administration’s broad discretion in disciplinary matters; a discretion with which it will not lightly interfere. The UNDT has thus erred in finding the sanction disproportionate and in substituting its opinion for that of the Administration.¹⁴

Judgment

25. The Secretary-General’s appeal is allowed and the Judgment of the UNDT is vacated solely with respect to its findings regarding the sanction.

¹² *Aqel v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-040, para. 35.

¹³ See *Cabrera v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-089, para. 27.

¹⁴ See *Cobarrubias v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-510, paras. 20-21.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Simón

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar