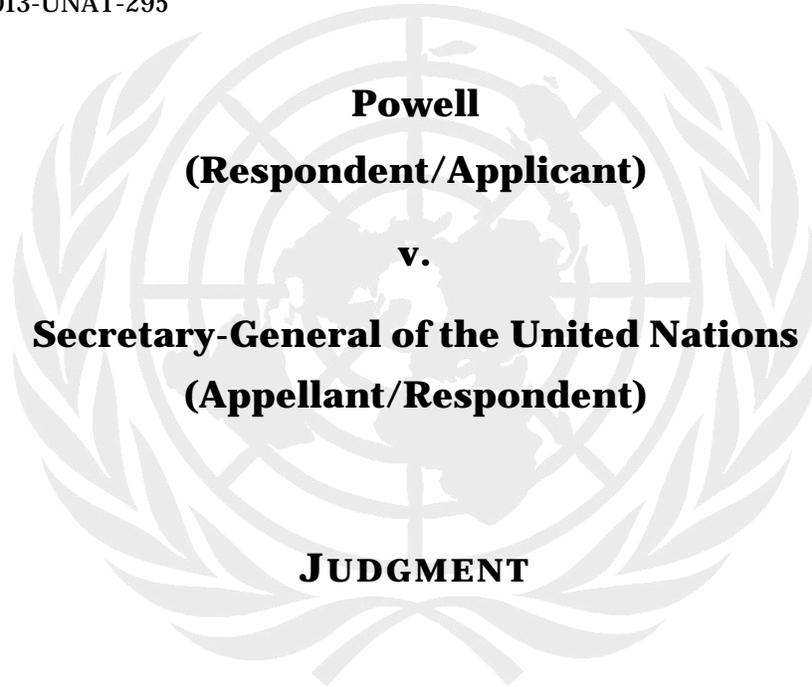




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2013-UNAT-295



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**Before:** Judge Richard Lussick, Presiding  
Judge Luis María Simón  
Judge Rosalyn Chapman

**Case No.:** 2012-327

**Date of Judgment:** 28 March 2013

**Registrar:** Weicheng Lin

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**Counsel for Respondent/Applicant:** Seth Levine/Brian Gorlick

**Counsel for Appellant/Respondent:** Paul Oertly/John Stompor

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations on 23 May 2012 against Judgment No. UNDT/2012/039, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 28 March 2012.

### **Facts and Procedure**

2. Mr. Robert Powell joined the then United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) on 25 January 2002 as a Movement Control Assistant at the FS-5 level on an appointment of limited duration under the 300 series of the United Nations Staff Rules, applicable at the time. In January 2004, Mr. Powell was appointed Officer-in-Charge (OiC) in the Movement Control Section (MovCon) in Kisangani.

3. On 22 November 2004, the MONUC Special Representative of the Secretary-General convened a Board of Inquiry (BOI) in order to investigate and report on serious allegations of misconduct by Mr. Powell in Kisangani in March 2004. The BOI was asked to investigate and report on four incidents of alleged misconduct, but it also considered ten other incidents. The BOI concluded that Mr. Powell should be held accountable for serious misconduct in fourteen incidents of alleged misconduct which included sexual exploitation of a casual worker.

4. The Director of Administration (DOA), MONUC, transmitted the BOI report to the Chief of the Personnel Management Support Section (PMSS), Department of Peacekeeping Operations (DPKO), to allow for disciplinary proceedings to be initiated in accordance with the findings of the BOI. Additionally, the DOA referred the allegation of sexual exploitation and abuse (SEA) against Mr. Powell to a MONUC SEA Investigation Team.

5. The SEA Investigation Team, which conducted its investigation in February 2005, found that Mr. Powell had a sexual relationship with a daily casual worker and that, despite her lack of relevant experience, he hired her for a position in MONUC's MovCon section. The Assistant Secretary-General (ASG) for Peacekeeping Operations transmitted both the BOI report and the report of the MONUC SEA Investigation Team to the ASG, Office of Human Resources Management (OHRM).

6. On 28 March 2005, the Director, Division for Organizational Development (DOD), OHRM, sent a memorandum to Mr. Powell transmitting the BOI report as well as the report of the MONUC SEA Investigation Team. The DOD, OHRM, charged Mr. Powell with four instances

of alleged misconduct, including "engaging in an ongoing sexual relationship with a local daily worker, and employing her in a position in MovCon under [his] direct supervision". Also on 28 March 2005, the DOD, OHRM, notified Mr. Powell that he was being suspended from duty with full pay for a period of three months or until the end of the disciplinary proceedings, whichever came earlier.

7. Mr. Powell responded to the allegations of misconduct by memorandum dated 22 April 2005.

8. By memorandum dated 20 January 2006, the ASG, OHRM, referred Mr. Powell's case to the Joint Disciplinary Committee (JDC) in order to advise the Secretary-General as to what disciplinary measures, if any, should be taken against Mr. Powell in connection with the allegations of misconduct. On 11 June 2007, the JDC unanimously concluded that three of the charges did not rise to the level of misconduct and recommended that they be dropped. With respect to the fourth charge, the JDC unanimously concluded that the relationship between Mr. Powell and the daily casual worker did not amount to SEA and recommended that the SEA component of this charge be dropped. However, the majority of the JDC found that the preponderance of the evidence suggested that the staff member had engaged in a sexual relationship with the daily casual worker and that, as a result, he favoured her by actively seeking her transfer to MovCon. Consequently, it recommended that Mr. Powell receive the disciplinary measure of a loss of two steps in grade for favouritism.

9. In a dissenting opinion, the minority member of the JDC recommended that all charges against Mr. Powell be dropped and no sanction be imposed. The minority member opined that "what was mostly contradictory evidence" had not shown that a sexual relationship existed. Accordingly, the minority was not convinced that Mr. Powell had shown favouritism.

10. By letter dated 20 August 2007, the ASG/OHRM transmitted the JDC Report to Mr. Powell and informed him that the Secretary-General had accepted the unanimous findings of the JDC with respect to three of the charges. With respect to the fourth charge, Mr. Powell was informed that the Secretary-General had accepted the unanimous finding of the JDC that the relationship between Mr. Powell and the daily casual worker did not amount to SEA and that the SEA component of this charge be dropped. Mr. Powell was also informed that the Secretary-General had decided to accept the finding of the JDC majority that he had engaged in a sexual relationship with the daily casual worker and had favoured her by actively seeking

her transfer to MovCon. However, the Secretary-General declined to accept the recommendation of the majority to impose the disciplinary measure of a loss of two steps in grade for favouritism, and decided, due to the severity of his misconduct, to demote Mr. Powell by one level with no possibility of promotion for two years. On 5 September 2007, Mr. Powell was demoted to the FS-4 level.

11. Mr. Powell filed an application with the former United Nations Administrative Tribunal, contesting the decision to demote him by one level with no possibility of promotion for two years. The case was subsequently transferred to the UNDT which issued its Judgment on 28 March 2012.

12. The UNDT found that the facts on which the impugned decision was based were not established and ordered its rescission. The UNDT awarded Mr. Powell the difference between the salary and entitlements of an FS-4 and an FS-5 post staff member from 20 August 2007 to the date of the Judgment.

13. In addition, the UNDT found that there were several material procedural irregularities. The UNDT found that the two purportedly preliminary investigations carried out by the BOI and the SEA Investigation Team amounted in fact to formal investigations and that the Organization breached Mr. Powell's due process rights by not affording him the due process rights that apply at the formal investigation stage. For material breaches of Mr. Powell's due process rights, the UNDT awarded him compensation in the amount of one year's net base salary at the FS-5 level.

14. The UNDT also awarded compensation for moral injury in the amount of USD 15,000 .

15. On 23 May 2012, the Secretary-General appealed the UNDT Judgment. On 26 July 2012, Mr. Powell filed an answer and cross-appeal as well as a motion for waiver of the time-limits for these filings. By Order No. 96 (2012) dated 9 August 2012, the President of the Appeals Tribunal dismissed the motion. By Order No. 104 (2012) dated 20 September 2012, the President dismissed Mr. Powell's request for revision of Order No. 96 (2012). Accordingly, Mr. Powell's answer and cross-appeal were not considered by the Appeals Tribunal.

## **Submissions**

### **Secretary-General's Appeal**

16. The Secretary-General requests this Tribunal to:

- (a) vacate the UNDT's findings that the investigations conducted by the BOI and the SEA Investigation Team amounted, in fact and law, to formal investigations attracting formal due process rights; and
- (b) vacate the award of specific damages for due process violations or, in the alternative, to reduce the quantum of the award to a sum proportionate to any injury actually suffered.

17. The Secretary-General submits that the UNDT erred by concluding that the Organization breached Mr. Powell's due process rights during the preliminary investigation. The due process rights enumerated by the UNDT attach only once disciplinary proceedings have been initiated and the staff member has been charged with misconduct. In the present case, Mr. Powell was charged with misconduct after the preliminary investigations had been concluded. At the preliminary investigation stage, only limited due process rights apply, which in the present case, were respected. The UNDT therefore erred in law in determining that the investigations conducted by the BOI and SEA Investigation Team amounted to formal investigations attracting due process rights. The award of compensation for violations of Mr. Powell's due process rights is therefore flawed.

18. The Secretary-General further submits that the UNDT erred in ordering compensation on the separate ground of "material breaches" of Mr. Powell's due process rights. The UNDT made Mr. Powell whole by rescinding his demotion and awarding the difference in salary and entitlements between the FS-4 and FS-5 level until the date of the Judgment. He was fully compensated for any economic loss suffered. Similarly, the UNDT fully remedied all of the harm Mr. Powell suffered by awarding him USD 15,000 in compensation of moral injury. There is no further possible harm that could warrant the additional, separate award of compensation under the head of material breaches of due process rights. Furthermore, Mr. Powell presented no evidence to demonstrate that he suffered any moral injury from the material breaches of his due process rights and the UNDT failed to make a finding to that effect.

In addition, the Secretary-General recognizes that there were deficiencies in the investigations conducted by the BOI and the SEA Investigation Team, but asserts that they were mitigated at later stages of the disciplinary process. The UNDT therefore erred in law and exceeded its competence in awarding separate compensation for material breaches of Mr. Powell's due process rights.

19. In the alternative, the Secretary-General submits that the UNDT erred in ordering an amount of compensation that is disproportionate to other cases in which due process violations were established.

### **Considerations**

20. The due process rights of a staff member applicable at the time in question were reflected in former Staff Rule 110.4 and ST/AI/371 ("Revised Disciplinary Measures and Procedures").

21. Former Staff Rule 110.4(a) provides: "No disciplinary proceedings may be instituted against a staff member unless he or she has been notified, in writing, of the allegations against him or her and of the right to seek the assistance of counsel in his or her defence at his or her own expense, and has been given a reasonable opportunity to respond to those allegations."

22. ST/AI/371 provides:

...

3. If the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management ...

...

5. On the basis of the evidence presented, the Assistant Secretary-General, on behalf of the Secretary-General, shall decide whether the matter should be pursued ...

6. If the case is to be pursued, the appropriate official in the administration at headquarters duty stations, and the head of office or mission at duty stations away from headquarters, shall:

(a) Inform the staff member in writing of the allegations and his or her right to respond;

(b) Provide him or her with a copy of documentary evidence of the alleged misconduct;

(c) Notify the staff member of his or her right to the advice of another staff member or retired staff member to assist in his or her responses; and offer information on how to obtain such assistance.

If the Secretary-General authorizes suspension, the staff member shall be informed of the reason for the suspension and its probable duration ...

7. The staff member should be given a specified time to answer the allegations and produce countervailing evidence, if any. The amount of time allowed shall take account of the seriousness and complexity of the matter. If more time is required, it shall be granted upon the staff member's written request for an extension, giving cogent reasons why he or she is unable to comply with the deadline. If no response is submitted within the time-limit, the matter shall nevertheless proceed.

23. Obviously, all of the due process rights provided in former Staff Rule 110.4 and ST/AI/371 cannot apply during the preliminary investigation because they would hinder it. These provisions only apply in their entirety once disciplinary proceedings have been initiated.<sup>1</sup>

24. During the preliminary investigation stage, only limited due process rights apply. In the present case, the UNDT was correct in finding that there was no breach of Mr. Powell's due process rights at the preliminary investigation stage in that, by 21 December 2004, Mr. Powell had been apprised of the allegations against him and had been given the opportunity to respond.<sup>2</sup>

25. However, the UNDT then fell into error in finding that the BOI and SEA investigations were final investigations. The BOI, after completing its investigation, delivered its report on 13 January 2005. The SEA report, after completion of the investigation, was delivered on 26 February 2005. Mr. Powell was not charged with four instances of alleged misconduct until 28 March 2005. The two investigations therefore preceded the bringing of disciplinary charges, and were thus preliminary investigations.

26. Consequently, we find that the UNDT manifestly erred in fact and in law by finding that the investigations conducted by the BOI and the SEA Investigation Team were final investigations and by then attaching due process rights that were pertinent only after the initiation of disciplinary proceedings.

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<sup>1</sup> *Applicant v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-209.

<sup>2</sup> UNDT Judgment, para. 92.

27. It follows that the UNDT's decision awarding Mr. Powell compensation of one year's net base salary at the FS-5 level for material breaches of his due process rights cannot be allowed to stand.

**Judgment**

28. The appeal is allowed. The findings in paragraphs 86 and 106 of the UNDT's Judgment that the investigations conducted by the BOI and the SEA Investigation Team constituted final investigations attaching the due process rights enumerated by the UNDT are set aside. The UNDT's award of compensation in paragraph 131 of its Judgment of one year's net base salary at the FS-5 level for breaches of Mr. Powell's due process rights is also set aside.

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of March 2013 in New York, United States.

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Chapman

Entered in the Register on this 24<sup>th</sup> day of May 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar