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

[redacted]

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.
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> … 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

… 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 OfficenS3.3(u)NMay o8.57ll Uni frAppD .3-5.urfoh"9-1.8

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> … 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.

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

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

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 disp

Original and Authoritative Version: English

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

(Signed)	*(Signed)*	*(Signed)*
Judge Lussick, Presiding	Judge Simón	Judge Thomas-Felix

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

(Signed)

Weicheng Lin, Registrar