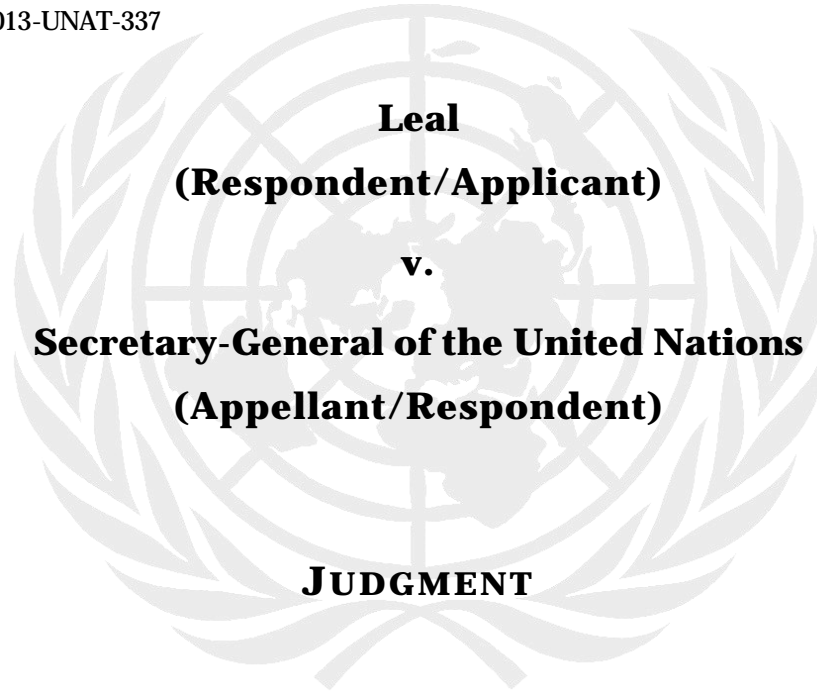




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2013-UNAT-337



**Leal  
(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Inés Weinberg de Roca, Presiding Judge Richard Lussick Judge Rosalyn Chapman
Case No.:	2012-374
Date:	21 June 2013
Registrar:	Weicheng Lin

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Counsel for Respondent/Applicant: Seth Levine

Counsel for Appellant/Respondent: Rupa Mitra

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General against Judgment No. UNDT/2012/101, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 29 June 2012 in the case of *Leal v. Secretary-General of the United Nations*. The Secretary-General appealed on 31 August 2012, and Mr. Fernando Menoita Leal answered on 8 November 2012.

### **Facts and Procedure**

2. Mr. Leal joined the Office of the United Nations Security Coordinator (UNSECOORD) as a field security officer under an appointment with the United Nations Development Programme (UNDP) in June 2000. He was reassigned to the Department of Safety and Security (UNDSS) with its Security Office in Maputo, Mozambique, as a field security advisor at the L-4 level in November 2003.

3. Following a complaint lodged in November 2007 by a national of Mozambique, Mr. Vas, alleging that Mr. Leal had hired him to work in the UNDSS Maputo security office for two months without a contract and had promised to give him permanent employment, the UNDP Office of Audit and Investigation (OAI) conducted a field investigation in Mozambique during the period 20-29 February 2008. However, Mr. Leal had already left Mozambique earlier in February 2008 on assignment to Juba, South Sudan. He was not made aware of the investigation.

4. On 28 February 2008, the OAI sent Mr. Leal a notice of investigation. Mr. Leal contends not to have received this notice. He responded to OAI's third notice of investigation on 9 May 2008, which advised Mr. Leal that he was being investigated for having "abused [his] authority and misappropriated certain property belonging to UNDSS and UNDP". The notice of investigation gave no further detail about the nature of the said investigation. On 5 June 2008, OAI instructed Mr. Leal to travel to Johannesburg, South Africa, for an interview but did not inform the latter that he could bring an observer to the interview as per the OAI guidelines. Mr. Leal's interview with the OAI investigators took place on 19 June 2008, without the presence of any observer.

5. On 16 December 2008, Mr. Leal received the investigation report of the OAI for comments, which he provided. In April 2009, he was charged with permitting Mr. Vas to work in the Maputo security office without a contract, instructing the workers engaged in cleaning and washing vehicles to be locked inside a warehouse without an exit or a bathroom, and receiving, storing and distributing pornography through his UNDP computer and his UNDP e-mail account. Mr. Leal replied to the charge letter.

6. In August 2009, UNDP informed Mr. Leal that he was to be separated from service as part of the disciplinary measure with payment in lieu of notice, but without termination indemnity.

7. Mr. Leal applied to the Dispute Tribunal. In Judgment No. 2012/UNDT/101, the UNDT determined that Mr. Leal had been afforded little opportunity to prepare for the interview, and that he should have been advised that he could request the presence of a third party to observe the interview. However, Mr. Leal's conduct in respect of Mr. Vas was irresponsible and reckless beyond the scope of unsatisfactory work performance, and his storage and distribution of pornography constituted misconduct. However, the UNDT did not consider Mr. Leal's locking of workers in a warehouse to constitute abuse of authority or misconduct. The UNDT found the sanction of separation without termination indemnity to be disproportionate to the offence. Considering that the Administration had violated Mr. Leal's due process rights, the UNDT ordered that impugned decision be changed to separation with termination indemnity. Mr. Leal's other requests – reinstatement, compensation, removal of adverse material from his personnel file – were denied.

### **Submissions**

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

8. The UNDT erred on questions of law and of fact by concluding that Mr. Leal's instructions to lock workers in a warehouse did not amount to misconduct. This conclusion was not supported by the evidence on record. By instructing that workers be locked in a warehouse, Mr. Leal exhibited more than a lack of managerial competence; he engaged in misconduct.

9. The UNDT also erred on a question of law in finding that Mr. Leal's due process rights were violated in the investigation phase. The first notice of formal investigation was sent on 28 February 2008 to Mr. Leal's UNDP work e-mail. Mr. Leal was apprised of the existence of the allegations against him and was afforded a reasonable opportunity to counter those allegations. There was no legal requirement to inform Mr. Leal that he could have an observer at his interview.

10. Furthermore, the UNDT erred in concluding that the sanction imposed was disproportionate to the offence. The UNDT considered each act of Mr. Leal's in a piecemeal fashion rather than in their totality. Moreover, it failed to consider the aggravating factors of Mr. Leal's seniority and his supervisory position.

11. Lastly, the UNDT erred in law in ordering that the sanction against Mr. Leal be adjusted to include a termination indemnity. Mr. Leal has not provided any evidence of having suffered actual harm as a result of any violation of his due process rights.

**Mr. Leal's Answer**

12. The UNDT's fact-findings and conclusions in respect of the warehouse incident and its ruling on the sanction should be affirmed. The UNDT had the advantage of listening to sworn testimony, gauging the demeanour and consistency of witnesses and assessing the oral evidence. The Appeals Tribunal has no such advantage. The Appeals Tribunal should therefore be slow in interfering with UNDT's findings of fact.

13. The UNDT concluded correctly that Mr. Leal's due process rights were violated, as the notice of investigation was neither adequate in its form nor served it in a timely fashion. It is a fundamental principle of natural justice that a person against whom allegations of wrongdoing are asserted is entitled to timeously know the nature of those allegations.

14. The UNDT did not err when it found the sanction disproportionate. There was no evidence to suggest that the UNDT failed to take a holistic approach on the question of proportionality of the sanction. The two findings of misconduct, as unrelated as they were, did not sufficiently aggravate each other as to justify a greater sanction than they would individually.

**Considerations**

15. The Dispute Tribunal rejected Mr. Leal's claim for reinstatement, compensation and removal of the adverse material from his personnel file.

16. Nonetheless, the Dispute Tribunal considered that Mr. Leal's due process rights were violated and that the sanction was disproportionate.

17. In *Mahdi*,<sup>1</sup> this Tribunal held:

In reviewing disciplinary cases this Court has to examine the following: i. Whether the facts on which the disciplinary measure was based have been established; ii. Whether the established facts legally amount to misconduct under the Regulations and Rules; and iii. Whether the disciplinary measure applied is proportionate to the offence.

18. The Appeals Tribunal 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.<sup>2</sup> However, while exercising judicial review, due deference must be shown to the Secretary-General's administrative decisions because Article 101(3) of 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.

18. In the instant case, Mr. Leal conceded that the distribution and storage of pornographic material using the UNDP equipment constituted misconduct.<sup>3</sup>

19. He also conceded that the workers assigned to clean vehicles before an auction were locked in the warehouse under his watch.<sup>4</sup>

20. In light of the fact that this Tribunal finds that grounds exist to discharge Mr. Leal on grounds of misconduct, we do not consider it necessary to address the issue of the alleged circumvention of the recruitment process for the purposes of hiring. Although the Dispute Tribunal does not accept the Secretary-General's position in respect of hiring, the first two established facts amount to misconduct and the disciplinary measure of

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<sup>1</sup> *Mahdi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-018, para. 27.

<sup>2</sup> *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.

<sup>3</sup> Judgment No. UNDT/2012/101, para. 140.

<sup>4</sup> *Ibid*, para. 142.

dismissal falls within the discretion of the Secretary-General and cannot be seen as disproportionate to the offences, unless it is the result of the proven abuse or arbitrary exercise of that discretion.

23. “Under the circumstances we agree with the UNDT that the conduct was established and that it was serious. Though perhaps the Secretary-General, in his discretion, could have come to a different conclusion, we cannot say that the sanction of summary dismissal was unfair or disproportionate to the seriousness of the offences.”<sup>5</sup>

24. The Appeals Tribunal is also satisfied that the key elements of Mr. Leal’s due process were met. We are of the view that, since the requirements of due process were not disregarded in this case, given that Mr. Leal was informed of the charges against him and was given the opportunity to contest them, it is satisfied that the interests of justice were served.<sup>6</sup>

25. This Tribunal reaffirms its disapproval for the awarding of compensation in the absence of actual prejudice. There are no legal grounds that can justify such a decision when no actual prejudice was found.<sup>7</sup>

### **Judgment**

26. The appeal by the Secretary-General is upheld and the UNDT Judgment ordering adjustment of the sanction and the payment of termination indemnity is vacated.

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<sup>5</sup> *Cabrera v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-089, para. 27.

<sup>6</sup> *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302.

<sup>7</sup> *Applicant v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-209, para. 48.

Original and Authoritative Version: English

Done in New York, United States.

*(Signed)*

Judge Weinberg de Roca,  
Presiding  
21 June 2013

*(Signed)*

Judge Lussick  
28 June 2013

*(Signed)*

Judge Chapman  
28 June 2013

Entered in the Register on this 26<sup>th</sup> day of August 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar