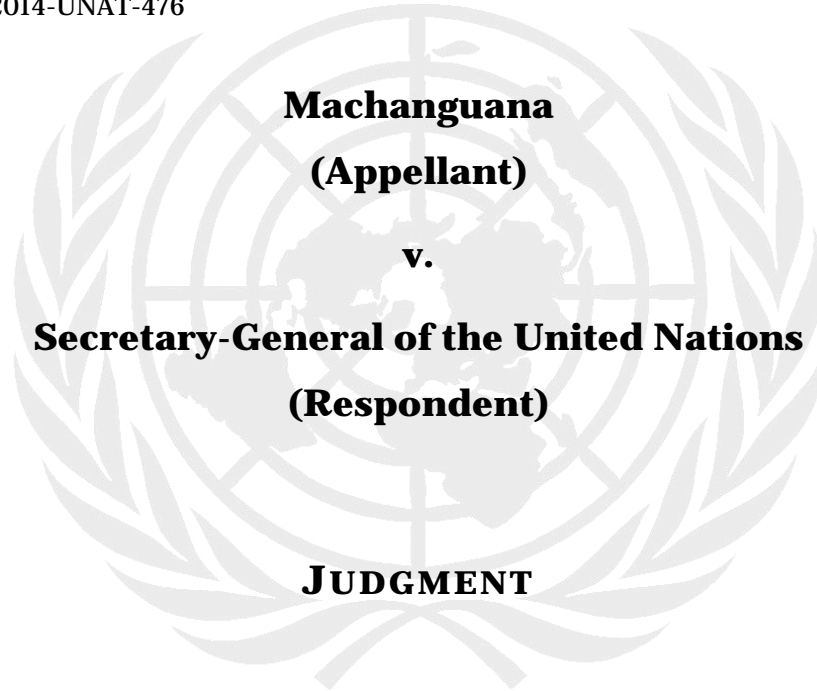




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2014-UNAT-476



**Machanguana  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Richard Lussick, Presiding Judge Luis María Simón Judge Mary Faherty
Case No.:	2013-549
Date:	17 October 2014
Registrar:	Weicheng Lin

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Counsel for Mr. Machanguana: Alexandre Tavadian/OSLA

Counsel for Secretary-General: John Stompor

**JUDGE RICHARD LUSSICK, PRESIDING.**

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Agostino Anisio Mendes Machanguana against Judgment No. UNDT/2013/149, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 28 November 2013. Mr. Machanguana appealed on 20 December 2013 and the Secretary-General answered on 18 February 2014.

**Facts and Procedure**

2. The following facts are uncontested:<sup>1</sup>

... The Applicant joined [the United Nations Children's Fund (UNICEF)] on 1 March 1999 and up until the time of the impugned decision held the position of Senior [Information, Communication and Technology (ICT)] Assistant at the GS-7 Step 10 level at the Maputo, Mozambique duty station. He is currently on a fixed-term appointment which is due to expire on 31 December 2013.

... In the UNICEF Mozambique Country Office (MCO), there existed an unwritten understanding that the three Information Technology (IT) staff would rotate working weekend overtime amongst themselves in order to deal with the management of the IT systems. Usually, IT staff would work from 7:00 a.m. or 8:00 a.m. and finishing at around 10:00 a.m. or 11:00 a.m.

... The Applicant worked on Saturday, 1 October 2011, Sunday, 2 October 2011, Saturday, 15 October 2011 and Sunday, 16 October 2011 and submitted his claims for overtime to Mr. Hezborne Onyango, the Applicant's supervisor, for approval. He subsequently altered the number of hours on the overtime claim as follows:

Saturday	- 1 October 2011	- 07:00-16[0] (9 hours)
Sunday	- 2 October 2011	- 07:30-14[:]:00 (6 hours, 30 minutes)
Saturday	- 15 October 2011	- 07:30-16[:]:00 (8 hours, 30 minutes)
Sunday	- 16 October 2011	- 08[:]:00-14:00 (6 hours)
Total overtime - 30 hours		

... On or around 20 October 2011, when processing the Applicant's overtime claim forms relating to the hours worked overtime on 15 and 16 October 2011, Mr. Onyango noticed that the number of hours on the overtime claim forms differed from the number of hours he had earlier approved in his function as the authorized official. When Mr. Onyango confronted the Applicant with these findings, he offered

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<sup>1</sup> Impugned Judgment, paras. 4-16.

his apologies and admitted to altering the overtime claim forms relating to hours worked overtime on 1 and 2 October 2011.

... Upon Mr. Onyango's request, the Applicant sent a memorandum to Ms. Monique Linder, Chief of Operations of the Country Office, in which he again expressed remorse and explained that he had forgotten to record all the hours worked as overtime prior to his supervisor's approval.

... When he was interviewed on 6 January 2012 by the Office of Internal Audit (OIA), the Applicant again explained that after submitting the forms, he remembered that he had failed to record some of the overtime hours he had worked. Once again he apologised for making the changes on the forms without having been authorised to do so.

... On 24 January 2012, the OIA investigation concluded, based on the Applicant's statements, that the Applicant had altered two overtime claim forms.

... On 19 March 2012, the Applicant was charged with fraud, as defined in UNICEF Executive Directive 2006-2009, Anti-Fraud Policy, section 4, by knowingly submitting two fraudulently altered overtime claim forms for his personal benefit.

... On 10 April 2012, the Applicant responded to the charges and stated that, after submitting the forms, he remembered that he had failed to record some of the overtime he had worked.

... On 19 April 2012, Mr. Martin Mogwanja, the UNICEF Deputy Executive Director, found the Applicant guilty of misconduct and sanctioned him with a censure and demotion from GS-7 to GS-6.

... On 6 August 2013 he filed the present Application challenging the administrative decision to demote him from G-7 to G-6.

... The Respondent filed a Reply on 6 August 2013.

... The Tribunal heard this case on 14 May 2013 and 15 May 2013 during which time live evidence from Mr. Hezborne Onyango, ICT specialist, UNICEF Mozambique, and Ms. Monique Linder, former UNICEF Chief of Operations were provided for the Respondent while the Applicant testified for himself.

3. On 28 November 2013, the UNDT issued its Judgment, dismissing the application in its entirety. The UNDT found that the facts on which the disciplinary sanction was based were established as they were not disputed; that the facts amounted to misconduct; and that the sanction was not disproportionate to the offence. The UNDT further found that the Mr. Machanguana's application constituted an abuse of process and awarded costs in the amount of USD 300 against him.

### **Submissions**

#### **Mr. Machanguana's Appeal**

4. Mr. Machanguana contends that the UNDT summarily ordered costs without providing any reasoning in support of the award. Citing the case law of the Appeals Tribunal, the UNDT and the Administrative Tribunal of the International Labour Organization, Mr. Machanguana contends that “an award of costs is a truly exceptional measure which requires bad faith or a blatant and intentional disregard of procedural rules”.

5. Mr. Machanguana refers to the Appeals Tribunal's reasoning in the *Balogun* case,<sup>2</sup> where the Appeals Tribunal reversed an award of costs. While noting that the staff member had filed a “manifestly unfounded and severely time-barred application”, the Appeals Tribunal recalled that principles of good faith and due process of law granting access to justice entitle staff members to exercise their right without worrying about a potential award of costs. Mr. Machanguana contends that this reasoning applies *a fortiori* to disciplinary cases where a staff member challenges the disciplinary measure.

6. In the present case, the UNDT did not identify any reprehensible conduct on the part of Mr. Machanguana. The latter had cogent reasons to appeal the disciplinary sanction and merely exercised his statutory right to do so.

7. Mr. Machanguana requests that the Appeals Tribunal set aside the award of costs.

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

8. The Secretary-General submits that the UNDT had sufficient grounds to find that Mr. Machanguana's application was frivolous and constituted an abuse of process. The facts on which the disciplinary case was based were not disputed. The UNDT found Mr. Machanguana's explanations for his alternations unsustainable and concluded that there was clear and convincing evidence that his actions amounted to misconduct. Further, his arguments regarding the disproportionality of the disciplinary measure were groundless, since UNICEF had already taken into account the assumption that he did work all the additional hours claimed on the altered forms. The UNDT therefore reasonably exercised its

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<sup>2</sup> *Balogun v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-278.

discretionary authority in determining that Mr. Machanguana abused the proceedings by pursuing this matter when he was aware of the weakness of his case.

9. The Secretary-General requests that the Appeals Tribunal uphold the UNDT Judgment and dismiss the appeal in its entirety.

### **Considerations**

10. The sole issue on appeal is whether the UNDT erred in awarding costs against Mr. Machanguana.

11. Article 10(6) of the UNDT Statute states: “Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.”

12. Thus, the jurisdiction of a Tribunal to award costs is narrowly restricted by statute to cases in which it determines that a party has manifestly abused the proceedings before it. In view of this limited discretion, it is incumbent on a Tribunal awarding costs to state the reasons on which its award of costs is based.<sup>3</sup>

13. In the present case, the UNDT gave no reasons for its determination that Mr. Machanguana had manifestly abused the proceedings before it. It did not cite any evidence establishing that Mr. Machanguana’s application was frivolous or vexatious, or that he had deliberately delayed the proceedings, or had disobeyed an order of the UNDT or had, in any other way, abused the UNDT’s proceedings. Nor were any reasons for the UNDT’s order for costs apparent from the facts.

14. It was clear from Mr. Machanguana’s application that he was challenging the sanction of demotion and censure as being disproportionate. The Appeals Tribunal, while agreeing with the UNDT that Mr. Machanguana’s case was not a strong one, is of the view that it fell

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<sup>3</sup> See *Bi Bea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-370; *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-457; *Tadonki v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-400; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-328; *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-333; *Balogun v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-278; *Mezoui v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-220; *Kamunyi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-194; *Ishak v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-152; *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058.

well short of amounting to an abuse of process. Mr. Machanguana claimed that he “merely exercised his statutory right by appealing”. His application may well have been encouraged by the letter dated 19 April 2012 from the UNICEF Deputy Executive Director (which was in evidence before the Dispute Tribunal) advising Mr. Machanguana that “you have the right to submit an application to the United Nations Dispute Tribunal, challenging the imposition of this measure”.

15. The Appeals Tribunal finds, in the circumstances, that the UNDT had no grounds for its finding that Mr. Machanguana’s application was an abuse of process, and therefore it erred in law in making the impugned order for costs.

### **Judgment**

16. The appeal is allowed and the UNDT’s order for costs is vacated.

Original and Authoritative Version: English

Dated this 17<sup>th</sup> day of October 2014 in New York, United States.

*(Signed)*

Judge Lussick, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Faherty

Entered in the Register on this 22<sup>nd</sup> day of December 2014 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar