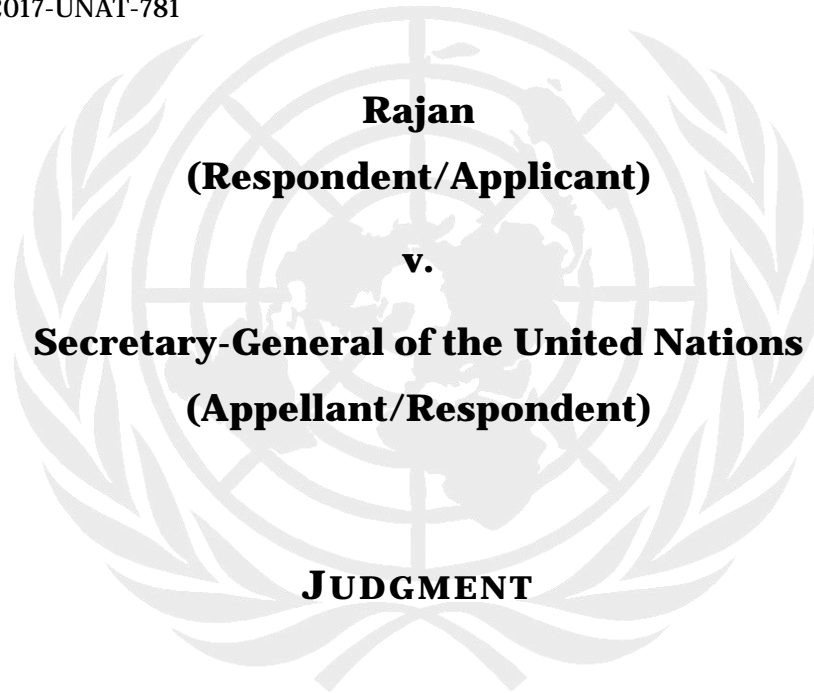




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-781



**Rajan
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge John Murphy, Presiding Judge Richard Lussick Judge Sabine Knierim
Case No.:	2017-1065
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Mr. Rajan:	Daniel Trup, OSLA
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE JOHN MURPHY, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2016/221, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 22 December 2016, in the case of *Rajan v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 20 February 2017, and Mr. Ananthanarayanan Rajan filed his answer on 2 March 2017.

Facts and Procedure

2. Mr. Rajan was separated from service as a disciplinary measure on the grounds that he had made a material misrepresentation on a personal history form (P.11) at the commencement of his employment with the Organization, and in several Personal History Profile forms (PHP) during the course of his employment, in that he failed to disclose that his brother was employed by the United Nations Office at Geneva (UNOG). It is common cause that Mr. Rajan's brother was employed by UNOG at the time of Mr. Rajan's initial appointment in 2001. Mr. Rajan's brother was employed by UNOG from 5 April 1976 until 8 December 2008, when he retired.

3. In August 2001, Mr. Rajan was selected for the position of a P-3 level Transport Officer with the Department of Peacekeeping Operations. He received an e-mail on 15 August 2001 from a human resources officer regarding a P.11 form that the Organization apparently held on file, which stated:

... Upon review of our records, we note that your P.11 [form,] while indicating that you had a BA [Bachelor of Arts degree] in English History in 1985, does not include the Masters in Cost Accounting from the University of Bombay.

4. On 16 August 2001, Mr. Rajan sent a facsimile transmission with copies of his education certificates, in which he stated:

I had applied for the post via e[-]mail and hence have not completed any P.11 document of the U.N. Please let me know if you need any further information, and [sic] will try and provide it as soon as possible.

Mr. Rajan also sent an e-mail referring to the facsimile and stating that he had applied for the job via the internet, and hence had not personally completed a P.11. He clarified that his bachelor degree was a B.Com in Accounting and not a B.A. On the same day, an internal

e-mail was circulated among the persons dealing with Mr. Rajan's recruitment confirming that he should be sent an offer of appointment. By e-mail dated 16 August 2001, the human resources officer handling his recruitment requested Mr. Rajan to complete an attached P.11 form. One day later, on 17 August 2001, he was again asked to complete and return a P.11 form. He replied that he would try to send the P.11 form as soon as possible. On the same day, a series of e-mails were also exchanged between Mr. Rajan and the human resources officer regarding his nationality for the purposes of employment with the Organization. On 22 August 2001, Mr. Rajan sent an e-mail stating that it was his understanding that the human resources officer would be making changes to his P.11 form and was not expecting him to forward another document.

5. A decision having been taken to proceed with Mr. Rajan's appointment, the responsible human resources officer sent him an e-mail on 5 September 2001 informing him that all relevant information had been received except the P.11 which he would be required to complete upon arrival at Headquarters to take up employment. By e-mail dated 3 October 2001, Mr. Rajan was informed of the details of his arrival and induction process. He replied by e-mail on 14 October 2001, and attached his "completed P.11 form, to mirror [his] application sent in January 2001". He was appointed with the effective date of 17 October 2001.

6. An unsigned P.11 form was submitted as evidence to the UNDT by the parties. Although dated "January 2001", the UNDT found that it was in fact submitted in or around October 2001. The form records Mr. Rajan's personal details, educational qualifications, and work history. Paragraph 18 of the form poses the question: "Are any of your relatives employed by a public international organization?" The relevant part of the form records the answer to this question as: "No" and the part of the form requesting details in the event of an affirmative answer is blank.

7. Paragraph 33 of the P. 11 form comprises a certification, which reads:

I certify that the statements made by me in answer to the foregoing questions are true, complete and correct to the best of my knowledge and belief. I understand that any misrepresentation or material omission made on a Personal History form or other document requested by the United Nations renders a staff member of the United Nations liable to termination or dismissal.

This part of the form is marked with the typed date but is not signed. The evidence is to the effect that this form was completed on-line and was finalised by Mr. Rajan with the assistance of staff of the Office of Human Resources Management (OHRM) in October 2001. Mr. Rajan has not contended that the absence of signature signifies that he did not complete the form.

8. After his appointment, Mr. Rajan applied for several job openings in the Organization between 2001 and 2008, during the time his brother was employed by the Organization and without disclosing that fact. Notably, in 2003, he submitted a Personal History Profile via the then new Galaxy e-recruitment system for a position of Information System Officer and failed to indicate that his brother was employed by UNOG.

9 In 2004, Mr. Rajan's wife began employment with the Office of the United Nations Security Coordinator in New York. In 2005, he applied and was selected for the position of Programme Budget Officer. Again he failed to indicate in his application that his brother was employed by UNOG or that his wife was employed by the Organization in New York. In 2007, Mr. Rajan applied and was selected for a position of Finance and Budget Officer, Capital Master Plan. He, once again, failed to indicate that his brother and his wife were employed by the Organization. In his personal history forms in both applications in which he was successful, he again answered "No" to the question of whether he had relatives employed by a public international organization. In response to the request to disclose in the event of an affirmative answer, Mr. Rajan did not list any relatives employed by the United Nations or its specialized agencies. Mr. Rajan's brother retired from the Organization some 21 months after his application of 2007.

10. In August 2010, the new online recruitment system known as "Inspira" replaced Galaxy. On 10 August 2010, Mr. Rajan submitted a personal history form in Inspira for the position of Chief of Finance, P-5 level, Administrative Services Branch, Executive Office, Office for the Coordination of Humanitarian Affairs (OCHA). In response to a question regarding relatives employed by the United Nations Secretariat, Mr. Rajan answered in the affirmative and listed his spouse. Mr. Rajan was selected for the position and was promoted with effect from 29 June 2011.

11. On 10 May 2013, almost two years after Mr. Rajan's promotion in 2011 and 12 years after his entry into service, the Director, Investigations Division, Office of Internal Oversight Services (OIOS), wrote to the Under-Secretary-General, OCHA (USG/OCHA) reporting that OIOS had information indicating that Mr. Rajan had falsely stated in his 2001 application for employment that he did not have any relatives working for the Organization. The Executive Officer, Administrative Services Branch, OCHA, wrote to Mr. Rajan, on 19 June 2013, to inform him of the information received from OIOS. Mr. Rajan was asked to state whether he had a brother working at the United Nations in 2001 and, if he did, why he had indicated in his Personal History form that he did not have any relatives employed by a public international organization. Mr. Rajan responded on 24 June 2013 confirming that his brother had been working at UNOG in 2001. He maintained that his initial application for a position in the Department of Peacekeeping Operations had not required him to submit a Personal History form. He had submitted an application through an online recruitment system. However, he acknowledged that after receiving an appointment letter he had filled out a Personal History form. He explained that he was an external candidate and not familiar with United Nations rules, regulations and procedures. He averred that he had not intended to make any misrepresentation or to omit any material and relevant information.

12. A decision was taken to further investigate the matter and on 24 April 2014, a fact-finding investigation panel interviewed Mr. Rajan personally and his brother via telephone. By interoffice memorandum dated 28 November 2014, the Head of the Capacity Development Office, Department of Economic and Social Affairs, and the Acting Executive Officer, Office of Legal Affairs, forwarded a copy of the fact-finding investigation report on possible misconduct to the USG/OCHA. The key findings of the report were that Mr. Rajan had not disclosed in job application forms in 2001 and 2003 that he had any relatives employed in the United Nations system, although his brother was employed at UNOG at that time; and likewise in job application forms in 2005, 2007, and 2008, Mr. Rajan had not disclosed that he had any relatives employed in the United Nations system, although in addition to his brother, who remained employed at UNOG, his wife was also employed in the Organization. However, in job application forms in 2010, 2013, and 2014, Mr. Rajan had disclosed that his spouse was employed in the Organization, by which time his brother had retired therefrom.

13. By interoffice memorandum dated 18 February 2015, the Chief of the Human Resources Policy Service, OHRM, informed Mr. Rajan that the Assistant Secretary-General, OHRM (ASG/OHRM), had decided to issue formal allegations of misconduct against him. In particular, it was alleged that he had engaged in misconduct between 2001 and 2008 by making a material misrepresentation on personal history forms by falsely stating that he did not have a relative employed by a public international organization. On 22 April 2015, the Office of Staff Legal Assistance submitted a written response to the allegations on behalf of Mr. Rajan.

14. After the ASG/OHRM reviewed the dossier, a decision was taken not to proceed against Mr. Rajan in relation to his failure to disclose his spouse's employment with the Organization. However, in a letter dated 15 July 2015, the ASG/OHRM informed Mr. Rajan that it had been established by clear and convincing evidence that, knowing that his brother was employed by the Organization, he had falsely stated that he did not have a relative employed by a public international organization. The letter stated:

With respect to your comments on the allegations of misconduct, the Under-Secretary-General for Management, on behalf of the Secretary-General, considered, among other things, the following:

- (a) There is no ambiguity in the question regarding employment of relatives since the United Nations is clearly a "public international organization". You also indicated that, without due enquiry, you decided that the purpose of the question was directed at detecting possible conflicts of interest. This contention, however, provides no justification for your not providing a truthful answer to the question and certifying the truthfulness of the false information you submitted.
- (b) In 2003, you created your PHP anew in the newly-introduced online platform (Galaxy), as the automatic electronic transfer of information previously submitted on P.11s was not possible in Galaxy. Further, at the time you completed your PHP in Galaxy, you had already served the Organization for almost two years at the P-3 level, and it is not credible that you still did not understand that your brother worked for a public international organization, as you knew he was working for the United Nations at that time.

- (c) With respect to making false statements in PHPs, the Appeals Tribunal held that the Organization is under no obligation to prove *mens rea*, and that the applicant is obliged to ensure that his candidacy is premised on accurate information.
- (d) As your dishonesty is at the heart of the case, the question of whether you benefited from the non-disclosure is not relevant. In any event, given the narrow exceptional circumstances where fraternal employment was allowed under the applicable Staff Rules, disclosure of your brother's employment may have led to additional scrutiny being given to your job applications.

15. The letter of 15 July 2015 concluded as follows:

In determining the appropriate sanction, the Under-Secretary-General for Management, on behalf of the Secretary-General, took into account the past practice of the Organization in similar cases, which showed that making false statements on application forms normally resulted in disciplinary measures at the stricter end of the spectrum (e.g., separation or dismissal).

With respect to aggravating factors, the Under-Secretary-General for Management, on behalf of the Secretary-General, considered that you had a number of opportunities to submit truthful information over a period of time.

With respect to mitigating circumstances, the Under-Secretary-General for Management, on behalf of the Secretary-General, considered that you showed remorse and apologized for your conduct, and that you have a record of long service with positive performance evaluations.

In light of the above, the Under-Secretary-General for Management, on behalf of the Secretary-General, has decided to impose on you the disciplinary measure of separation from service with compensation in lieu of notice, and with termination indemnity in accordance with staff rule 10.2(a)(viii), effective upon your receipt of this letter.

16. Mr. Rajan was separated from service with effect from 16 July 2015, with three months' compensation in lieu of notice and termination indemnity.

17. The UNDT rendered its Judgment on 22 December 2016, in which it held that the decision to separate Mr. Rajan was unlawful on the grounds that the established facts did not amount to misconduct. Although the UNDT concluded that Mr. Rajan had acted with a degree of carelessness regarding the completion of the PHP forms, it found that his actions

did not fall within the realm of misconduct because he did not act with dishonesty or with an intention to mislead the Organisation.

18. The UNDT reached its conclusion on the basis that: i) the original unsigned P.11 form appeared to have been completed with guidance and input from OHRM; ii) the erroneous data was probably an oversight and misunderstanding on the part of Mr. Rajan and a lack of thoroughness on the part of the Administration; iii) Mr. Rajan probably did not understand the meaning of the term “public international organization” on the original personal history form—the meaning of the term not being self-evident; iv) disclosure of his brother’s position would not automatically have excluded Mr. Rajan from employment; v) Mr. Rajan provided a plausible explanation of how his initial error was duplicated in subsequent personal history forms, being that he had used the fields in his original form as a basis for the later forms; and, vi) the subsequent change of text under the new Inspira recruitment process provided Mr. Rajan with a clear and unambiguous question, which he answered truthfully in relation to his spouse.

19. The UNDT accordingly held that the Administration had not established by clear and convincing evidence that Mr. Rajan had acted dishonestly with the intent to mislead the Organization. It ordered rescission of the termination decision, retroactive reinstatement in service and, alternatively, in-lieu compensation in the amount of two years’ net base salary minus the termination indemnity and payment in lieu of notice paid upon Mr. Rajan’s separation. It also ordered that the record of investigation and disciplinary sanction, along with any related adverse material, be removed from Mr. Rajan’s official personnel files.

20. As noted above, the Secretary-General filed the appeal on 20 February 2017, and Mr. Rajan filed his answer on 2 March 2017.

21. On 3 March 2017, Mr. Rajan filed a motion seeking that the appeal be heard on an expedited basis, and on 10 March 2017, the Secretary-General submitted his observations thereto.

Submissions

The Secretary-General's Appeal

22. The Secretary-General submits that the UNDT erred in law and in fact when it found that the established facts did not amount to misconduct. Specifically, the UNDT (i) erred in law by holding that Mr. Rajan's conduct did not amount to misconduct despite accepting that he had failed to abide by the requirement of truthfulness in all matters in Staff Rule 1.2(b); (ii) erred in law by deciding that the Secretary-General was required to prove that Mr. Rajan intended to mislead the Organization; (iii) erred in law and in fact by finding that Mr. Rajan had provided plausible explanations for the non-disclosures despite the consequences of an incorrect answer on a job application being clearly stated and the duty of a staff member to ensure the veracity of any information; (iv) erred in law in attaching weight to the lack of a conflict of interest as such was irrelevant to the allegation of furnishing false information; and, (v) erred in finding that the Secretary-General was required to show that the non-disclosure would have had a negative effect on the recruitment of Mr. Rajan, as such is irrelevant to the question of observance of the standard of conduct expected of international civil servants.

23. The Secretary-General requests the Appeals Tribunal to vacate the impugned Judgment in its entirety and affirm the disciplinary measure of separation from service imposed.

Mr. Rajan's Answer

24. Mr. Rajan submits that the UNDT did not err in law or in fact resulting in a manifestly unreasonable decision. Since the misconduct was predicated upon the Administration's determination of Mr. Rajan's alleged dishonesty, it was open to the UNDT to review this finding; it thus did not substitute its judgment for that of the Secretary-General. The UNDT did not err in requiring proof of intent to mislead, as strict liability is not the applicable standard. A strict liability approach would inappropriately limit the scope of judicial review. Hence, the UNDT did not err in determining the absence of intent by (i) finding that Mr. Rajan had provided a plausible explanation which had not been given sufficient weight, particularly given that the meaning of "public international organization" is not "self-evident"; (ii) examining the existence of a potential or perceived conflict of interest for Mr. Rajan and his brother to be employed by the Organization; and, (iii) determining that there was no reason for Mr. Rajan not to disclose his brother's employment as it would not have had a negative effect on his recruitment.

25. Mr. Rajan requests the appeal be dismissed in its entirety.

Considerations

26. Mr. Rajan's motion for his appeal to be heard on an expedited basis has become moot as the ordinary case management constraints meant it could not have been heard any earlier. It is accordingly dismissed.

27. This Tribunal has consistently held that the role of the UNDT in reviewing a disciplinary case is to examine whether the facts on which the disciplinary measure was based had been established; whether the established facts legally amount to misconduct under the Staff Regulations and Rules; and whether the disciplinary measure applied was proportionate to the misconduct.¹

28. Staff Regulation 1.2(b), which was in effect at the time of Mr. Rajan's initial appointment in ST/SGB/1999/5 (Staff Regulations and Rules), and which has since remained in effect and unchanged by ST/SGB/2014/1 (Staff Regulations and Rules), provides:

... Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

29. Former Staff Rule 104.4, in effect at the time of Mr. Rajan's initial appointment in 2001, dealt with staff members' obligations to supply information in relation to appointments. It stated:

Notification by staff members and obligation to supply information

(a) Staff members shall be responsible on appointment for supplying the Secretary-General with whatever information may be required for the purpose of determining their status under the Staff Regulations and Staff Rules or of completing administrative arrangements in connection with their appointments.

(b) Staff members shall also be responsible for promptly notifying the Secretary-General, in writing, of any subsequent changes affecting their status under the Staff Regulations or Staff Rules.

¹ *Ouriques v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-745, para. 15, citing *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302, para. 29.

30. This rule was amended in 2009 by ST/SGB/2009/7 (Staff Regulations and Rules) which substituted it with Staff Rule 1.5, which stated:

Notification by staff members and obligation to supply information

(a) Staff members shall be responsible for supplying the Secretary-General with relevant information, as required, both during the application process and on subsequent employment, for the purpose of determining their status under the Staff Regulations and Staff Rules as well as for the purpose of completing administrative arrangements in connection with their employment. Staff members shall be held personally accountable for the accuracy and completeness of the information they provide.

(b) Staff members shall also be responsible for promptly notifying the Secretary-General, in writing, of any subsequent changes affecting their status under the Staff Regulations or Staff Rules.

31. The two versions of the rule governing the supply of information are in substance virtually the same, but with the important difference that Staff Rule 1.5(a) introduced the additional element that staff members shall be held “personally accountable” for the accuracy and completeness of the information they provide.

32. Former Staff Rule 104.10 governed family relationships in the appointment of staff. It stated:

(a) Except where another person equally well qualified cannot be recruited, appointment shall not be granted to a person who bears any of the following relationships to a staff member: father, mother, son, daughter, brother or sister.

(b) The husband or wife of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.

(c) A staff member who bears to another staff member any of the relationships specified in (a) and (b) above:

(i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;

(ii) Shall disqualify himself or herself from participating in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

33. This rule was substituted by a new rule, Staff Rule 4.7, which was identical until its amendment by ST/SGB/2010/6 (Staff Regulations and Rules) with effect from 2 September 2010, to remove from paragraph (a) the phrase “unless another person equally well qualified cannot be recruited”. Staff Rule 4.7(a) has since remained in force, and now states:

(a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member.

(b) The spouse of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.

(c) A staff member who bears to another staff member any of the relationships specified in paragraphs (a) and (b) above:

(i) Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;

(ii) Shall not participate in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

The rule is not an absolute bar on fraternal appointments, but establishes clear conditions upon which such may be made. Consequently, the provision of accurate, complete and truthful information regarding family relationships is essential for the Organization to assess the merits and appropriateness of an appointment.

34. Staff Rule 10.1 provides that a failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct. Staff Rule 10.2(b) provides that any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

35. The essential question for consideration in this appeal is whether the Secretary-General is obliged to establish dishonesty and an intention to mislead on the part of Mr. Rajan in failing to disclose in various job applications that his brother was employed

by UNOG. The UNDT found that Mr. Rajan failed in 2001, 2005 and 2007 to indicate in his job applications that he had relatives employed by a public international organization, even though his brother was employed by the United Nations until 8 December 2008. The fact that he failed to disclose relevant information when he should have is essentially not in dispute. As stated already, the UNDT held the failures to disclose not to be misconduct because the Secretary-General had not shown that the non-disclosures were intentional.

36. The judicial review of decisions regarding dishonesty and the non-disclosure of material information dictates that due deference be given to the duty of the Secretary-General to hold staff members to the highest standards of integrity and the standard of conduct preferred by the Administration in the exercise of its rule-making discretion. The Administration is better placed to understand the nature of the work, the circumstances of the work environment and what rules are warranted by its operational requirements. The Administration is required to consider a wide range of often conflicting factors in giving effect to the recruitment policy of the Organization, including ensuring that the highest standards of efficiency, competence and integrity are paramount in the employment of staff with due regard to the principles of equitable geographical distribution and fair recruitment. A strict rule in relation to probity and honesty in the disclosure of recruitment information is justified by the unusual and often remote process by which international recruitment occurs within the Organization. However, due deference does not eradicate the role of the UNDT in reviewing decisions of the Administration relating to misconduct. Due deference does not mean that the UNDT cannot review whether the Administration has met its evidential burden to prove misconduct on the basis of facts that are clear and convincing and to substitute its judgment accordingly.

37. A failure by a staff member to comply with his or her disclosure of information obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances, or to observe the standard of conduct expected of an international civil servant, is undeniably misconduct. Staff Regulation 1.2(b) makes it clear that, as a “core value” of the Organization, staff members shall uphold the highest standards of integrity. This concept includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status. As a general rule, any form of dishonest conduct compromises the necessary relationship of trust between employer and employee and will generally warrant dismissal.

38. Dishonest conduct by definition implies an element of intent or some element of deception. Deliberate false statements, misrepresentations and a failure to disclose required information are invariably dishonest. And, importantly, the failure to reply correctly to a prominent and very relevant question in an application form amounts to a false answer from which dishonesty normally may be inferred. Hence, a false answer in an application form is *prima facie* proof of dishonesty, shifting the evidentiary burden to the maker of the false statement to adduce sufficient evidence of innocence. The UNDT in effect held that Mr. Rajan met the evidentiary burden by way of the explanations he gave. As stated earlier, the absence of proven intent, in its view, took the conduct outside the realm of misconduct.

39. This Tribunal held in *Ainte*² that when submitting an application for an appointment it is the candidate's responsibility to ensure that his application did not contain any inaccuracies and the Organization is under no obligation to prove that a candidate intended to mislead the Organization in his or her answers to the questions of the applications forms. The reason for that is evident from an analysis of the scope and object of the policy of the Organization and the language in which it is formulated in the various instruments giving effect to it.

40. Moreover, the contract of employment is specifically entered into in good faith on a supposition of the accuracy of the information provided. In the event that the information proves to be false, the requisite consensus underpinning the contract may well be absent. The provision of accurate information is made material and essential by the warrant of certification in the personal history form and hence the failure to provide correct information ordinarily will go to the root of the contract permitting cancellation.

41. The main submission of the Secretary-General is the assertion that in this kind of misconduct strict liability is sufficient. Strict liability defines the circumstances in which an offender is held liable for wrongful conduct (*actus reus*) regardless of his or her mental state. Statutory or contractual instruments rarely expressly exclude *mens rea* (a blameworthy state of mind) as an element of prohibited conduct. The existence or otherwise of such a requirement is ordinarily a matter of interpretation. Courts and tribunals usually presume that the law maker did not intend to exclude *mens rea* as an ingredient of the misconduct, unless there are clear and convincing indications to the contrary. Such indications may be

² *Ainte v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-388, para. 28.

found in: i) the language and context of the provision; ii) the scope and object of the provision; iii) the ease with which liability may be evaded if *mens rea* is required; iv) the gravity of the sanction for non-compliance; and, v) how reasonable it is to hold that *mens rea* is not required.

42. The rules of disclosure in the various statutory and contractual provisions set out above provide that staff members shall be responsible on appointment for supplying the Secretary-General with whatever information may be required for the purpose of determining their status under the Staff Regulations and Staff Rules or of completing administrative arrangements in connection with their appointments. Staff Rule 1.5, introduced by ST/SGB/2009/7, provides that staff members shall be held personally accountable for the accuracy and completeness of the information they provide. Added to that, the certification in paragraph 33 of the P.11 form requires the staff member to certify the truth, completeness and correctness of the information and warrants that *any* misrepresentation or material omission made on the form renders the staff member liable to termination or dismissal. The use of the general word “any” is a clear indication in the language that all false statements will be liable to the sanction of dismissal, be they intentional or negligent. The formulation of the certification is consistent with the responsibilities of probity, honesty and truthfulness in all matters affecting employment status. The provision places an onus on applicants for appointment to do what is required to ensure the veracity of the information supplied.

43. Given its size, the nature and scope of its activities, its operational requirements, and the manner in which it is obliged to recruit staff members, the Organization is extraordinarily dependent on the probity and honesty of those applying for appointments. Its objectives in securing quality staff members will be undermined if the standards of conduct in recruitment are evaded too easily by imposing an arduous evidentiary burden on the Secretary-General to prove the historical state of mind of staff members recruited from locations distant from United Nations Headquarters.

44. In the circumstances, deference must be shown to the Secretary-General’s need for strict liability in relation to the disclosure of information by potential recruits. In so far as strict liability works a hardship in punishing less blameworthy states of mind, protection exists for the staff member in the requirement that any sanction should be proportionate.

45. The UNDT accordingly made an error of law in holding that the Secretary-General was obliged to prove that Mr. Rajan had the intention to mislead the Organization.

46. There is no doubt that Mr. Rajan misrepresented the true situation more than once. Moreover, in completing each application for appointment, Mr. Rajan certified that the statements he made in answer to the questions in the application forms were true, complete and correct to the best of his knowledge and belief. He further certified that he understood that *any* misrepresentation or material omission made on a personal history form rendered him liable to termination or dismissal. Thus, if Mr. Rajan was genuinely uncertain about the meaning of the term “public international organization”, which seems improbable, it was incumbent upon him to ascertain its ambit before answering the relevant question. It was his responsibility to ascertain that he was providing accurate information to the Organization. In not doing so, he violated his obligation under Staff Rule 1.2(b) to uphold the highest standard of integrity in all matters relating to his work and his status and in contravention of the certification. Such violations constitute misconduct on the part of Mr. Rajan, whatever his state of mind at the time. In view of that, the UNDT also erred on a question of law in finding that the Secretary-General failed to show that Mr. Rajan was guilty of misconduct.

47. The question remaining is whether the termination of Mr. Rajan’s appointment was a proportional response. The Organization has a variety of disciplinary sanctions at its disposal ranging from different types of warnings and reprimands through to the termination of employment. The requirement of proportionality asks whether termination is the appropriate and necessary sanction for the proven misconduct or whether some other alternative sanction will be more suitable in the circumstances. In this regard, it must be kept in mind that termination is the ultimate sanction and should not be imposed automatically. The question to be answered in the final analysis is whether the staff member’s conduct has led to the employment relationship (based on mutual trust and confidence) being seriously damaged so as to render its continuation intolerable.

48. A decision on the appropriate sanction for misconduct, therefore, involves a value-judgment and the consideration of a range of factors. The sanction prescribed by the relevant staff rules or governing contractual provisions is normally the primary signifier of the appropriateness of a sanction, but the Tribunal remains vested with the authority to overturn a prescribed penalty if it is regarded as too excessive in the circumstances of

the case.³ The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee and his past conduct, the context of the violation and employer consistency.

49. Although, Mr. Rajan had more than 10 years' service, a clean employment record and no evident harm was caused to the Organization by the misconduct, the misrepresentations went to the root of the contract and were in violation of the policy of zero-tolerance implied by the certification requirement in paragraph 33 of the application forms. Although a graduated system of progressive discipline is normally to be preferred, a single incident of dishonesty or material non-disclosure in some circumstances may justify separation from service. In this case, the conduct was repeated. The Secretary-General must be afforded an appropriate margin of appreciation in setting a high standard of probity. In the premises, the termination of Mr. Rajan's employment was within the reasonable range of responses.

³ See, e.g., *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700, para. 28; *Ogorondikov v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-549, paras. 30-35 and citations therein.

Judgment

50. The appeal is upheld and Judgment UNDT/2016/221 is vacated.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Knierim

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar