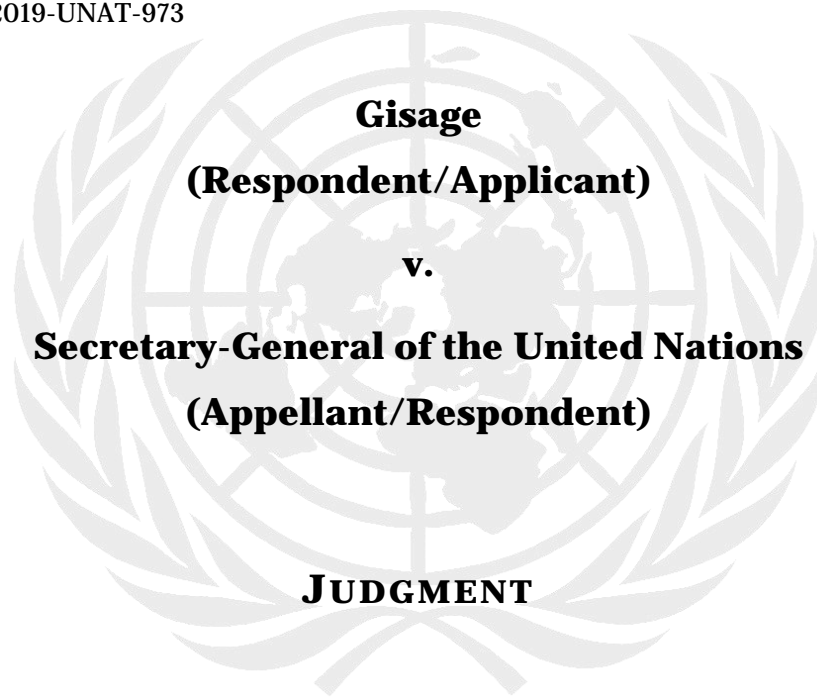




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-973



**Gisage
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Dimitrios Raikos Judge Graeme Colgan
Case No.:	2019-1274
Date:	25 October 2019
Registrar:	Weicheng Lin

Counsel for Mr. Gisage: Abbe Jolles

Counsel for Secretary-General: Nathalie Defrasne

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. This case arose from the placement of Mr. Didier Gisage on Administrative Leave Without Pay (ALWOP) pending the completion of an investigation into allegations of misconduct and the ensuing disciplinary process. In Judgment No. UNDT/2019/059, the United Nations Dispute Tribunal (UNDT) found that Mr. Gisage's placement on ALWOP for 12 months was unlawful and ordered payment of the salary that had been unlawfully withheld. We vacate the UNDT Judgment for the reasons set out below.

Facts and Procedure

2. At the time of the events giving rise to this case, Mr. Gisage was a Security Officer with the United Nations Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

3. On 16 January 2017, the Under-Secretary-General for Field Support (USG/DFS), on behalf of the Under-Secretary-General for Management (USG/DM) and the Secretary-General, informed Mr. Gisage that MONUSCO had received a report implicating him in allegations of sexual exploitation and abuse in that it was alleged that he had engaged in sexual relations with three Congolese sex workers in exchange for the promise of a specified amount of money and that the matter had been referred to the Office of Internal Oversight Services (OIOS) for investigation. He was further informed that the USG/DM, pursuant to Staff Rule 10.4, had decided to place him on ALWOP from the date of his notification for a period of three months or until the completion of the investigation and disciplinary process, if any.

4. The letter stated that the reason for his placement on ALWOP was that there was "sufficient *prima facie* evidence" that he engaged in the alleged misconduct. Accordingly, in the view of the Organization his continued service could pose a threat to the reputation of the Organization's ability to carry out its mandate. The alleged conduct was perceived as striking at the core of the Organization's zero tolerance policy regarding sexual exploitation and the exploitation of a vulnerable population. Such conduct is prohibited conduct under both Section 3 of Secretary-General's Bulletin ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) and the MONUSCO Code of conduct. Mr. Gisage was notified of the decision on 28 January 2017.

5. The record indicates that the decision of 16 January 2017 was based on: i) allegations made on 10 December 2016 by three Congolese women to the Head of the MONUSCO Office in Matadi, Democratic Republic of the Congo (DRC) that Mr. Gisage had engaged in multiple sexual acts and had refused to make payment; ii) a letter dated 12 December 2016 from the counsel of one or more of the Congolese women to the office of a prosecutor of the DRC describing the allegations; iii) a letter dated 13 December 2016, from Mr. Gisage to the Chief Security Officer, MONUSCO, by which he denied having solicited sex from any of the women; and iv) a letter dated 19 December 2016 from a prosecutor of the DRC requesting Mr. Gisage to report to his office for questioning on the matter.

6. On 3 April 2017, the MONUSCO Special Investigation Unit (SIU) completed its investigation report.

7. By letter dated 28 April 2017, Mr. Gisage was notified of the decision to extend his ALWOP for an additional three months from 28 April 2017, pending the completion of the investigation and disciplinary process. This letter repeated that there was *prima facie* evidence of the misconduct and stated that the reason for the extension of the ALWOP was “that the considerations warranting your placement on ALWOP continue to exist”.

8. On 22 May 2017, the Assistant Secretary-General for Field Support (ASG/DFS), referred the disciplinary matter concerning Mr. Gisage to the Office of Human Resources Management (OHRM).

9. By letter dated 27 July 2017, Mr. Gisage was notified of the decision to extend the ALWOP for a further three months pending the completion of the investigation and the disciplinary process, if any. In this letter, the USG/DFS stated that the reason for the extension of the ALWOP was “that there are reasonable grounds on which it may be concluded that you engaged in misconduct. Specifically, the MONUSCO investigation revealed that there are signed and sworn consistent statements of three sex workers about the matter, as well as your confirmation that you eventually paid the women through an intermediary.”

10. By a memorandum dated 17 August 2017, Mr. Gisage was presented with the allegations of misconduct, based on the outcome of the investigation report. The allegations read that between 7 and 9 December 2016, Mr. Gisage:

- a) [...] transported up to five Congolese women in [his] service vehicle UN 24342, after having consumed alcohol;
- b) [...] had sexual intercourse with up to three of these women; and
- c) [...] eventually paid each woman 40,000 Francs Congolese (FC) (approximately US\$ 25) through an intermediary.

The memorandum requested that within two weeks of its receipt, Mr. Gisage provide a written statement or explanations in response to the allegations.

11. It is not clear from the appeal record whether Mr. Gisage furnished a response to the allegations denying the misconduct. However, it is not contested that Mr. Gisage confirmed during the MONUSCO investigation that he eventually paid the sex workers through an intermediary. Moreover, in his answer to the appeal, Mr. Gisage essentially limited his defence to a contention that the alleged misconduct was not sufficient grounds for the termination of his employment and that the Organization should play no role in regulating voluntary sexual conduct between consenting adults. He added that “patronizing a sex worker working legally is not sexual abuse and cannot be used as a basis to fire a staff member”. Thus, on appeal, Mr. Gisage, despite earlier denials, does not specifically contest the allegations of transactional sexual intercourse.

12. On 23 August 2017, Mr. Gisage requested management evaluation of the decision to place him on ALWOP without further justification or explanation. On 20 September 2017, he submitted a supplemental management evaluation request and attached a copy of the letter of 27 July 2017 informing him of the decision to extend his ALWOP from 28 July 2017, or until completion of the disciplinary process, whichever was earlier. Mr. Gisage stated, *inter alia*, that the extension was without explanation and that he had not been given any notice. He accordingly asked for immediate reinstatement with back pay and benefits.

13. On 19 October 2017, Mr. Gisage received a combined response from the Management Evaluation Unit (MEU), regarding his requests of 23 August 2017 and 20 September 2017, respectively. The MEU noted that Mr. Gisage had failed to challenge his initial placement on ALWOP and the first extension thereof within the applicable time limits set out in Staff Rule 11.2(c) and, as such, the initial request of 23 August 2017 for review of the decision to

place him on ALWOP was time-barred and therefore not receivable. The MEU further stated that only the supplemental request of 20 September 2017 for review of the decision to extend Mr. Gisage's ALWOP from 28 July 2017 was receivable. The MEU then concluded that the decision to extend the Applicant's placement on ALWOP for three months from 28 July 2017 was appropriate in the circumstances.

14. On 26 October 2017, Mr. Gisage was notified that his ALWOP had again been extended.

15. On 7 December 2017, Mr. Gisage filed an application with the UNDT contesting the decisions of the USG/DM dated 16 January 2017 to place him on ALWOP and to extend the ALWOP for three months each, on 28 April 2017 and 27 July 2017. He sought the restoration of his back salary and the resumption of payment of his salary.

16. On 17 April 2019, the UNDT issued Judgment No. UNDT/2019/059. The UNDT found that the ALWOP on which Mr. Gisage had been placed in January 2017 and its subsequent extensions were all part of a "coherent whole, continuing and not fully implemented at the time that it was challenged in August 2017".¹ Accordingly, the UNDT found the application receivable. On the merits, the UNDT found that at the time Mr. Gisage was placed on ALWOP for the first time, no evidence had been collected and reviewed and no *prima facie* case had been made against him. It further found that the seriousness of the allegations against Mr. Gisage alone did not constitute exceptional circumstances warranting his placement on ALWOP and that therefore, the initial decision was unlawful. Moreover, since the entire 12-month period of ALWOP was a continuum which could not be broken into parts, the unlawfulness from the beginning of the ALWOP in January 2017 tainted the entire continuum.

17. Additionally, the UNDT found that the decision to place Mr. Gisage on ALWOP for 12 months contravened the spirit of Staff Rule 10.4(b), as set out in ST/SGB/2016/1, which provides that placement on Administrative Leave should, as far as practicable, not exceed three months and that, accordingly, the placement on ALWOP for twelve months was "unjust and unlawful".² The UNDT, therefore, granted the application and ordered the Secretary-General to pay Mr. Gisage his salary that had been withheld during the period of his ALWOP from 28 January to December 2017.

¹ Impugned Judgment, para. 37.

² *Ibid.*, para. 67.

18. The Secretary-General filed an appeal with the United Nations Appeals Tribunal (Appeals Tribunal) on 17 June 2019, and Mr. Gisage filed his answer on 9 August 2019.

Submissions

The Secretary-General's Appeal

19. The UNDT erred in finding that Mr. Gisage's application was receivable in its entirety. The UNDT's conclusion that the contested decisions formed one coherent decision ignores the fact that each of the decisions was taken at different stages of the process and were based on a fresh assessment of different sets of facts as they existed at the relevant time.

20. The first decision to place Mr. Gisage on ALWOP, of which he was informed in the 16 January 2017 letter, was based on credible allegations. The subsequent decisions to extend Mr. Gisage's placement on ALWOP followed the completion of the investigation by the MONUSCO SIU and the submission of its investigation report. The facts taken into consideration when extending the ALWOP were different from the allegations and other evidence relied on in January 2017. Accordingly, the decisions were distinct from each other and did not constitute a single decision placing Mr. Gisage on ALWOP. Since he failed to seek management evaluation with respect to the decision to place him on ALWOP and the first decision to extend his ALWOP, his application was not receivable in respect of those decisions. The UNDT therefore erred in concluding that the application was receivable in its entirety.

21. The UNDT also erred in concluding that no exceptional circumstances existed to support Mr. Gisage's placement on ALWOP. The applicable standard of proof to determine whether exceptional circumstances exist is that of probable cause. Reasonable grounds to believe that sexual misconduct had occurred is a circumstance that may reasonably be considered as exceptional. The complaints, surrounding circumstances and Mr. Gisage's confirmation that he paid the women through an intermediary provided reasonable grounds to believe that he committed prohibited conduct.

22. The UNDT further erred in concluding that Mr. Gisage's placement on ALWOP for 12 consecutive months was unjust and unlawful. There is no time limit on the period for which ALWOP may endure. ALWOP is not a disciplinary measure but an administrative measure. The investigation into allegations of sexual exploitation against a staff member and the disciplinary process can be complex and time-consuming, especially in certain duty stations

such as MONUSCO. The Administration must also ensure that the due process rights of the staff member under any such investigation have been respected. The duration of the investigation in this case and the subsequent disciplinary process was not unreasonable. To the extent that an ALWOP possibly infringes upon the presumption of innocence, the negative impact of the decision on an individual staff member is ameliorated by Staff Rule 10.4(d) which requires withheld pay to be restored without delay where the allegations of misconduct are not sustained.

23. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment in its entirety.

Mr. Gisage's Answer

24. The UNDT correctly found that his application was receivable in its entirety. The UNDT relied, *inter alia*, on the *Kompass* case,³ where the UNDT held that placing a staff member on administrative leave produces continuous legal effects during the entire leave period and is only fully implemented upon its completion. Applying the applicable legal framework and common sense, notwithstanding the legal requirement of time limits to challenge administrative decisions, it is "ridiculous" to argue that each periodic time extension of the same administrative decision must be challenged first before the MEU and then before the UNDT. There is no merit in the Secretary-General's claim that only the challenge of the 27 July 2017 decision can be entertained. Mr. Gisage's application before the UNDT was therefore receivable.

25. The Secretary-General's appeal on receivability is frivolous. It is intended to delay payment of Mr. Gisage's back salary which causes "much unnecessary suffering". Moreover, frivolous appeals divert increasingly scarce resources from meritorious appeals and inflict unnecessary expense and burden on those who must defend against them. The UNDT's Judgment was a solid legal decision based on law and fact. The Secretary-General waited 60 days and refused to talk to Mr. Gisage's counsel and then filed the frivolous appeal. Mr. Gisage requests that the Appeals Tribunal award, pursuant to Article 9(2) of the Appeals Tribunal Statute, costs against the Secretary-General for filing a frivolous appeal and manifestly abusing the appeals process.

³ *Kompass v. Secretary-General of the United Nations*, Order No. 99 (GVA/2015).

26. Mr. Gisage's placement on ALWOP was unlawful. For placement on ALWOP to be lawful, the Secretary-General must find exceptional circumstances. The existence of exceptional circumstances cannot be determined until surrounding circumstances have been considered. Such consideration must happen before ALWOP becomes operational. Although Mr. Gisage was informed on 16 January 2017 that there was sufficient *prima facie* evidence to place him on ALWOP, no such evidence existed at the time. Absent a *prima facie* case and investigative findings, Mr. Gisage's placement on ALWOP was unlawful. The Secretary-General's reliance on *Muteeganda*⁴ in support of his contention that Mr. Gisage's placement on ALWOP was lawful is misplaced, since a finding of probable cause requires some evidence. The standard established in *Muteeganda* supports the requirement that at the time of the decision to place Mr. Gisage on ALWOP, the Secretary-General must have acted in a fair and justifiable manner by moving beyond mere allegations and by considering surrounding circumstances before choosing the option of ALWOP.

27. The suspension without pay in Mr. Gisage's case operated as a disciplinary measure. It took the Organization seven months to investigate and advise Mr. Gisage of the charges against him. Multiple extensions brought Mr. Gisage's ALWOP up to twelve months during which time he was barred from engaging in paid work. Pursuant to the letter and spirit of the Staff Rules, when a staff member is placed on ALWOP, the process must be treated with reasonable dispatch. Staff members on administrative leave, who are forbidden to work, need money to live. Keeping Mr. Gisage on ALWOP for 12 months does in fact constitute a disciplinary measure.

28. Mr. Gisage requests that the Appeals Tribunal dismiss the appeal in its entirety and order the Secretary-General to pay Mr. Gisage, within ten days of the date of its Judgment, the salary he unlawfully withheld with interest in compliance with the UNDT Judgment; as well as USD 15,000 in costs which Mr. Gisage incurred due to the Secretary-General's frivolous appeal. Mr. Gisage also asks that the Appeals Tribunal order an additional five per cent interest in addition to the US Prime Rate should the Secretary-General fail to make payment within ten days.

⁴ *Muteeganda v. Secretary-General of the United Nations*, Judgment NO. 2018-UNAT-689.

Considerations

29. Staff Rule 11.2(c) requires a staff member to seek management evaluation within 60 calendar days from the date on which the staff member received notification of the contested administrative decision. It is not disputed that Mr. Gisage did not seek management evaluation of the decisions of 17 January 2017 or 28 April 2017. He waited until the third decision of 27 July 2017 before seeking management evaluation.

30. The first decision of 16 January 2017 was based mainly on the reports received from the sex workers and their representative and the intervention of the DRC prosecutor. If not probable cause, this evidence gave rise to at least a *prima facie* case justifying the commencement of an investigation. The subsequent decision of 28 April 2017 followed the completion of the investigation by the MONUSCO SIU and the submission of its report. The facts taken into consideration at that stage were different. As such, the decision to extend the ALWOP was based on a fresh assessment and constituted a separate decision. The decision of 27 July 2017 was based on even more cogent evidence which followed the preliminary review of the investigation report and supporting material by the Department of Field Support and the referral of the matter to OHRM on the basis that there was clear and convincing evidence that Mr. Gisage had engaged in serious misconduct. In addition to the sworn statements of the three sex workers, there was Mr. Gisage's confirmation that he eventually paid the women through an intermediary. This decision was therefore also based on a fresh assessment by the decision-maker of the specific circumstances as they existed at the time and consequently constituted a distinct administrative decision.

31. Accordingly, the three decisions were distinct from each other and did not constitute a single decision placing Mr. Gisage on ALWOP. Since Mr. Gisage failed to seek management evaluation with respect to the first two decisions, the application was receivable *ratione materiae* only in respect of the decision of 27 July 2017 to extend the ALWOP from that date.

32. The UNDT's conclusion that the contested decisions formed one coherent decision ignores the fact that each decision was taken at different stages of the process and on a fresh assessment of different sets of facts as they existed at the relevant time. The UNDT accordingly erred in concluding that the application was receivable in its entirety. It was receivable only in respect of the decision of 27 July 2017.

33. Staff Rule 10.4 as set out in ST/SGB/2016/1 was replaced by ST/SGB/2017/1 with effect from 1 January 2017. It reads:

(a) A staff member may be placed on administrative leave, subject to conditions specified by the Secretary-General, at any time after an allegation of misconduct and pending the initiation of an investigation. Administrative leave may continue throughout an investigation and until the completion of the disciplinary process.

(b) A staff member placed on administrative leave pursuant to paragraph (a) above shall be given a written statement of the reason(s) for such leave and its probable duration.

(c) Administrative leave shall be with full pay except when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay.

(d) Placement on administrative leave shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure. If administrative leave is without pay and either the allegations of misconduct are subsequently not sustained or it is subsequently found that the conduct at issue does not warrant dismissal or separation, any pay withheld shall be restored without delay.

(e) A staff member who has been placed on administrative leave may challenge the decision to place him or her on such leave in accordance with chapter XI of the Staff Rules.

34. A staff member therefore may only be placed on ALWOP in exceptional circumstances. The UNDT held that no exceptional circumstances existed to support Mr. Gisage's placement on ALWOP because no evidence had been collected and reviewed before doing so in January 2017 and there had been no *prima facie* evidence of serious misconduct at the time.

35. In *Muteeganda*,⁵ the Appeals Tribunal held that the applicable standard of proof to determine whether exceptional circumstances warranting the placement of a staff member on ALWOP existed is that of probable cause. Accepting the legitimate policy of the Organization in relation to sexual misconduct cases, it held that reasonable grounds to believe that sexual misconduct had occurred is a circumstance that may reasonably be considered as exceptional.

⁵ *Muteeganda v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-869.

36. As set out above, Mr. Gisage was placed on ALWOP initially in January 2017 upon receipt, by the Head of the MONUSCO Office in Matadi, DRC, of allegations of solicitation of sex in exchange for payment by the three Congolese women. In addition to these allegations, MONUSCO had received copies of a letter from the counsel of one or more of the Congolese women to the office of a prosecutor of the DRC describing the allegations, a letter from Mr. Gisage to the Chief Security Officer, MONUSCO as well as a letter of a prosecutor of the DRC requesting Mr. Gisage to report to his office for questioning on the matter. These led the MONUSCO SIU to conclude that there was sufficient credible evidence of misconduct. In addition, Mr. Gisage later confirmed that he had paid the women through an intermediary.

37. There was thus undoubtedly probable cause or reasonable grounds to believe on 27 July 2017 that Mr. Gisage had committed prohibited conduct under Section 3 of Secretary-General's Bulletin ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse). That alone constituted an exceptional circumstance, especially considering the reputational damage such conduct is likely to cause to the Organization. Section 4 of ST/AI/371 (Revised Disciplinary Measures) applicable at the time specifically provides that ALWOP may be contemplated if the conduct in question might pose a danger to the Organization, including, in our view, the reputational harm to the Organization caused by its staff members engaging in exploitative conduct in disadvantaged communities subject to the protective mandate of the Organization.

38. The UNDT's conclusion that the decision to place Mr. Gisage on ALWOP was initially based on mere allegations of misconduct is hence incorrect considering the evidence that was before the decision-maker at the time. But in any event, the UNDT was required to determine whether probable cause existed when the ALWOP was extended (the only receivable contested decision) on 27 July 2017, which by then clearly it did. Any challenge to the sufficiency of the evidence in relation to the earlier decisions, as already concluded, was not receivable since Mr. Gisage did not timeously seek management evaluation in relation to those decisions.

39. To reiterate the essential point, when Mr. Gisage's ALWOP was extended on 27 July 2017, the Organization was in possession of the MONUSCO SIU investigation report containing sufficient evidence supporting an assessment that there were reasonable grounds to believe (probable cause) that Mr. Gisage had engaged in sexual exploitation warranting his continued placement on ALWOP. Hence, there were exceptional circumstances most likely warranting Mr. Gisage's placement on ALWOP from 28 January 2017 to December 2017, but certainly

justifying the decision to extend the ALWOP on 27 July 2017. The UNDT's finding that no exceptional circumstances existed to extend Mr. Gisage's ALWOP is a material error of law.

40. The UNDT further erred in concluding that Mr. Gisage's placement on ALWOP for 12 consecutive months was unjust and unlawful because of its duration. Staff Rule 10.4(b) was amended by ST/SGB/2017/1, superseding ST/SGB/2016/1 with effect from 1 January 2017. It no longer includes a provision limiting the duration of ALWOP to three months. The UNDT misdirected itself by assuming that the legislator intended to limit ALWOP to three months. However, any decision to extend ALWOP must be reasonable and proportional. A decision to extend ALWOP is a drastic administrative measure and normally should be of short duration. That said, there was no basis for the UNDT to set an arbitrary time limit of three months to complete the investigation and the disciplinary process. Much will depend on the circumstances, including any practical challenges at the duty station, the nature of the allegations, the complexity of the investigation and the need to follow due process. In the present case, the length of time required for the investigation and the subsequent disciplinary process was not unreasonable. The investigation was completed within three months and it established cogent reasons to believe that the prohibited conduct had occurred. The further delays related to the completion of the disciplinary process. Moreover, the UNDT exceeded its jurisdiction in reviewing the decision to extend the ALWOP on 26 October 2017, when such decision had not been challenged by Mr. Gisage.

41. Despite its potentially burdensome effects, Mr. Gisage's placement on ALWOP should not be regarded as a disciplinary measure infringing on the presumption of innocence. Staff Rule 10.2(b)(iii) specifically provides that administrative leave with full or partial pay or without pay pursuant to Staff Rule 10.4 is not a disciplinary measure but an administrative measure. To the extent that an ALWOP possibly infringes upon the presumption of innocence, the negative impact of the decision on an individual staff member is ameliorated by Staff Rule 10.4(d) which requires withheld pay to be restored without delay where the allegations of misconduct are not sustained. Additionally, where there is evidence supporting a contention that a decision to place a staff member on ALWOP, or to extend ALWOP, is *prima facie* unlawful, it is always open to the staff member to apply in terms of Articles 13 and 14 of the UNDT's Rules of Procedure for suspension of action pending management evaluation or the UNDT proceedings. Adequate safeguards exist for ensuring legality and proportionality for staff members subject to decisions to place them on ALWOP.

42. For these reasons, the appeal must be upheld and the decision of the UNDT be vacated.

Judgment

43. The appeal of the Secretary-General is upheld and Judgment No. UNDT/2019/059 is vacated.

Original and Authoritative Version: English

Dated this 25th day of October 2019 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Colgan

Entered in the Register on this 20th day of December 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar