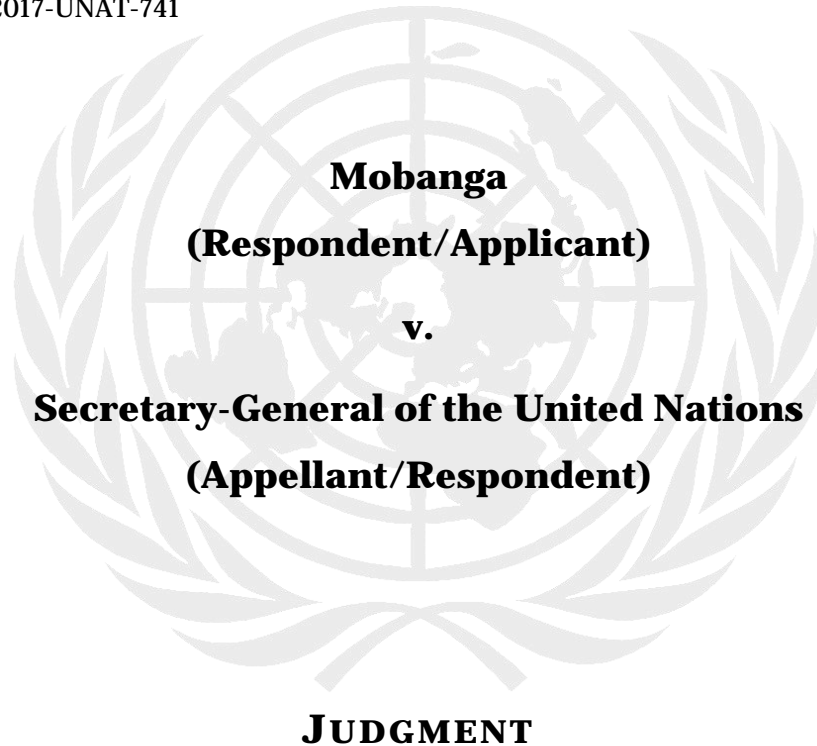




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2017-UNAT-741



Before: Judge Deborah Thomas-Felix, Presiding
Judge John Murphy
Judge Sabine Knierim

Case No.: 2016-929

Date: 28 October 2016

Registrar: Weicheng Lin

Counsel for Mr. Mobanga: Michael Brazao, OSLA

Counsel for Secretary-General: Nathalie Defrasne

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations of Judgment No. UNDT/2016/022, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 14 March 2016, in the case of *Applicant v. Secretary-General of the United Nations*.¹ The Secretary-General filed his appeal on 13 May 2016, and Mr. Batilangandi Mobanga filed his answer to the appeal on 15 July 2016.

Facts and Procedure

2. Before the Dispute Tribunal, Mr. Mobanga contested the decision to summarily dismiss him from the Organization for misconduct.

3. The following facts and procedural history are taken from the UNDT Judgment:²

Introduction

... The Applicant is a national of the Democratic Republic of Congo (DRC). He joined the Organization in 2006 as a security guard with the former United Nations Organization Mission in DRC (MONUC), now known as the United Nations Organization Stabilization Mission in DRC (MONUSCO) and was deployed in the Kpandroma region of the DRC. In 2009 he was reassigned to Dungu and thereafter in August 2011 to Bunia[,]DRC.

... The Applicant was dismissed following an investigation by the Office of Internal Oversight Services (OIOS) into a report of his having allegedly had a sexual relationship with a minor[.].

... The Applicant filed the [application before the UNDT] on 7 April 2014 challenging the decision to dismiss him as there was no clear and convincing evidence to establish the act of misconduct. He requests that he be reinstated or be compensated as an alternative. The [Dispute] Tribunal heard the Application from 5-8 October 2015.

Facts

... In early March 2011, a member of the S family reported to the Police Nationale Congolaise (PNC) in Dungu, DRC, that the Applicant had engaged in a sexual relationship with one Ms. GS, a minor, and that she had become pregnant as a result.

¹ The Dispute Tribunal granted Mr. Mobanga's request for anonymity.

² Impugned Judgment, paras. 1-49 (emphases in original).

... The PNC spoke to GS and on a Sunday in May 2011 and [sic] sent a text message to the Applicant requesting him to attend the police station.

... On the same Sunday, the Applicant informed his colleague, Mr. Sumaili Okongo, a MONUSCO security guard that he had been asked to appear at the police station. Mr. Okongo informed the supervisor Mr. Eric Osei, a security officer in MONUSCO, Dungu.

... Both Messrs. Okongo and Osei attended the police station separately. There they saw the Applicant talking to the PNC captain who assured both Messrs. Okongo and Osei that there was no problem and that the Applicant would join them soon.

... Both Messrs. Okongo and Osei told OIOS that the Applicant was invited to the police station for an informal conversation but was not arrested.

... Mr. Osei talked to the Applicant who told him that he used to go to the place of "the girl" and used to give her money to buy beer. Following their enquiry, the PNC submitted a file on the case to the Office of the Prosecutor in Isiro and at the material time the matter was still pending.

... No police report or any documents related to the alleged misconduct by the Applicant were transmitted to OIOS or MONUSCO by the PNC.

... This was confirmed by the Applicant who told OIOS that no formal statement about the alleged misconduct was taken from him and that the police did not compile any formal documents related to the matter.

... The Applicant was kept in custody for 48 hours and released. The police explained that they did not have any means to transfer the Applicant to the Office of the Prosecutor in Isiro, DRC, some 210 kilometers from Dungu.

... On that same Sunday, Mr. Osei mentioned the report of misconduct to the Applicant who denied same and told Mr. Osei that the woman with whom he had a relationship was 24 years of age.

... On 27 May 2011, an anonymous email was sent to the MONUSCO Conduct and Discipline Team (CDT) and to other MONUSCO personnel, including the Applicant, with a complaint that "three months had already passed since [the Applicant] had raped a 13-year girl, without MONUSCO taking any action".

... On 29 August 2011, OIOS received from MONUSCO CDT a report of possible misconduct involving the Applicant.

... Specifically, it was reported that the Applicant, a security guard with the MONUSCO Security Section in Dungu, DRC, had a sexual relationship with one Ms. GS, a 13-year old Congolese girl which resulted in her becoming pregnant at some point in 2011.

... The investigation was initiated in 2011 and finalized in February 2013.

... By letter of 13 March 2013, Mr. Anthony Branbury, Assistant Secretary-General for Field Support (ASG/DFS), referred the matter to the Office of Human Resources and Management (OHRM).

... By letter of 3 May 2013, the Applicant was charged with having had a sexual relationship with a minor in 2011 and he was invited to submit his response to the charge.

... The Applicant denied the charge in a memorandum dated 22 May 2013.

... By letter of 7 January 2014, the Applicant was informed that he was dismissed from the Organization.

The Evidence

Applicant

... The Applicant stated to the OIOS investigators that he had been in a sexual relationship with a girl from the S family in Dungu for eight months during 2010 and 2011. Her name was Georgette S (same family name as GS but not the same person) and she was 24 years old and had a three[-]year old daughter. He gathered her age from her electoral card.

... The Applicant had first met Georgette at an *nganda*³ situated at Eighth Avenue in Dungu where she worked as a waitress. Georgette never told the Applicant she was pregnant and he was not aware whether Georgette gave birth to a child as a result of their relationship.

... The Applicant provided MONUSCO CDT a written agreement dated 12 June 2011. The agreement was signed by the Applicant, Mr. Okongo, as well as by one MB and one AB, allegedly family representatives of the S family.

... Pursuant to the agreement the Applicant gave the S family a goat and an amount of USD 1,250 to be paid in installments. A receipt dated 2 July 2011 signed by MD, (the same person as DS) and IS for the family and by the Applicant and Mr. Okongo, indicates that the Applicant paid USD 400. A receipt dated 8 August 2011 and signed by MD as well as by the Applicant and Mr. Okongo shows that the Applicant paid another USD 300.

... The Applicant explained that it was Georgette who asked him to compensate the family because she had spent a lot of time with him. Georgette added that it was her older brother Richard who suggested that the Applicant compensate the family.

... In the course of a meeting with Ms. Christine Besong, Conduct and Discipline Officer based in Bunia, Ms. Besong asked the Applicant the name of the girl with whom he had a relationship. According to Ms. Besong, he gave the name G but not the family name as he was not aware of it. The Applicant never mentioned the name Georgette to

³ A place where beers are stocked and purchased by the public and serves as a bar.

Ms. Besong. Ms. Besong stated at the hearing that she asked the Applicant about impregnating a girl but the Applicant never mentioned he got GS pregnant.

... When asked during his examination in court about the name G he gave to Ms. Besong the Applicant explained that he did not give the name G but gave the name of the girl he was accused of having impregnated. According to him, Ms. Besong must have heard the name G from her colleagues. At first he stated that he had heard the name G because it was in the anonymous email sent to MONUSCO CDT. When told that the name was never mentioned in the anonymous email he stated that he had heard the name G from colleagues before his meeting with Ms. Besong.

... The Applicant also stated that at the signing of the agreement with the S family, the family gave him the name of the girl who got pregnant as Georgette. When asked why he compensated the S family when he was not aware that Georgette came from the S family, he replied that since the S family asked for compensation he concluded that Georgette came from the S family.

Ms. GNS

... Ms. GNS stated that she used to work in an *nganda* at Eight Avenue in Dungu where she sold liquor. Since then she moved to Third Avenue. She knew a girl by the name of Georgette who used to work for her between 2009 and 2014. She left with the “militaries” in 2014.

Sumahili Okongo

... At the hearing, Mr. Okongo stated that the Applicant was “frequenting a lady” in Dungu. The lady was of age. He came to that conclusion as she had a daughter of about two and half years. He also added that he could make out her age from her demeanour. He did not know the name of the lady but he called her *semeki* meaning the wife of a friend or brother. The lady was a waitress in an *nganda* and was always at that *nganda* at Eighth Avenue. The Applicant asked him to accompany him to the S family home and he signed the agreement in June 2011. The Applicant admitted that he had got that 24 year old girl pregnant and that he had to compensate the family on account of that.

Eric Osei

... The Applicant told Mr. Osei that the girl was 24 years old. And that she was “skinny and very small”. Mr. Osei was not given the name of the girl and he did not know her name.

Anonymous Emails

... Both Messrs. Osei and Okongo referred to anonymous emails against United Nations staff. Mr. Osei stated in his interview to the investigators: “In Dungu we get random emails from people unknown making false allegations against staff members of which we suspect people. One person was caught posting posters in

the toilet”. Mr. Okongo also told the investigators: “I can only say that in Dungu we had at least four false accusations against UN staff just because people want to get some money. All these accusations come from anonymous emails.”

... In an undated CDT report titled “Allegation Report From Dungu”, it is stated that the report was being compiled in connection with an unidentified email sent to “cdumonuc@un.org” accusing the Applicant of having impregnated a 13-year old girl in Dungu, his duty station. It was also mentioned in the undated report that after a meeting with some informants the following was reported:

The girl is aged more than 18 years old, after the incident she was shifted to her village (24 Km from Dungu) and cannot be found anymore.

... The report also mentions that the Applicant and the girl’s family had an amicable settlement and went to the police station to withdraw the case.

... The report refers to the habit prevailing in the region of people sending malicious messages. This is what the report mentions:

It is important to mention that some malicious people have now the habit of sending anonymous emails to the higher MONUSCO hierarchy in order to spoil the reputation of other staff. This was reported by the MONUSCO Administration Office in Dungu:

In 2010 Mr. X[] was a victim of false accusations expressed in an anonymous French email copying the [Officers-in-charge(OICs)] of the deciding sections to accuse him of having bad behavior. Consequently this...staff failed to sign his [Assignment of limited duration (ALD)] contract and was dismissed.

On 26/06/2010, through the address daily@yahoo.com, another anonymous email falsely alleged practicing conditionality: sex for work in French. After investigation, it was concluded that the allegation was not true.

In 02/2011, Mr. Y[] received a mail urging him to report to security office (Logbase) ASP while in Dungu town (HQ) because he was transporting staff members who had to go back home after duties at Logbase. When he reported, Mr.[] Eric the OIC Security [sic] did not recognize having written the mail.

On 25/05/2011, [Applicant] was then accused in the same way (liokomakan@yahoo.fr). The person who accused was not trained by the [Field Conduct and Discipline Office (FCDO)] as per the training for Civil Society Members as he pretended. Because a non-MONUSCO staff cannot have the e-mail addresses of the people copied at all levels (emphasis added).

Testimony of Mr. Jason Uliana, Chief of Investigations Section, OIOS

... Mr. Uliana went to investigate the allegation in Bunia and was assisted by a United Nations Police (UNPOL) officer. He stated that the Applicant had admitted he was in a relationship with a girl called G. He added that during the first encounter with the Applicant he did not mention the name he had given to CDT and later gave the name Georgette.

... Mr. Uliana travelled to Dungu and proceeded to the *nganda* on Eighth Avenue. There he attempted to locate the alleged victim GS and her mother. After some fruitless efforts he managed to talk to the chief of the village who helped him to meet GS and her mother.

... Mr. Uliana interviewed GS with her mother's consent, DS in the presence of an independent witness. Mr. Uliana stated that he impressed on both GS and her mother that they should speak the truth.

... The mother DS too was interviewed with both interviews being conducted in French "but primarily in Congolese" with the help of an interpreter.

... In her interview GS mentioned the name of the Applicant though in his statement to Mr. Uliana said she mentioned the Applicant as being the man from the United Nations who had a relationship with her. She never worked at the *nganda* on Eighth Avenue but she did live there with her sister J, a fact confirmed by DS, the mother of GS who added however that JS was not her daughter. GS had a miscarriage and went to the hospital with her mother DS. DS was asked the following "Did you receive any benefit from [Applicant] because of your pregnancy? She answered "He gave some money but do not know to whom in the family".

... GS also identified the Applicant from a photo array that was shown to her with the names hidden by stating "Oui j'ai reconnu" (Yes I have identified). The only photographs available were those on the MONUSCO grounds passes that staff use.

... DS told the investigators that she had never seen the Applicant and therefore could not identify him. When she saw that her daughter GS was pregnant she asked her about it and GS told her that "she had sex with [Applicant] of MONUSCO". She never received anything from the Applicant and the document dated 12 June 2011 that she signed was brought to her by a person who asked her to sign it. She added "I signed but was not told what it was for".

... Mr. Uliana could not get the birth certificate or the identity card of GS as she had none. The mother gave the age of GS as being 15 on the day of the interview which was 21 February 2012.

... Mr. Uliana was also present when Mr. Jana Ramsey, an OIOS investigator interviewed one Mr. CS, a nurse working in a polyclinic in Dungu where GS was treated for a miscarriage. The nurse identified GS from a photograph shown to him. The age of GS was assessed as 14 years by the nurse.

... Mr. Uliana also showed a photo array consisting of MONUSCO ground passes to the nurse with a view to identifying the Applicant as the latter had allegedly been to the polyclinic to settle a bill. In relation to the payment by the Applicant the nurse stated “Peut-être c’est lui qui a visité mon hôpital et je pense que il (*sic*) il a payé la facture de Germain (*sic*). Mais je ne suis pas sur (May be it is him that visited my hospital and I think that he settled the bill of GS. But I am not sure). The nurse purportedly identified the person on photograph 3 as the Applicant. His statement following the identification reads: “Peut-être c’est le numéro 3” (Maybe it is number 3).

... Mr. Uliana was also shown a document that purports to be the records of the polyclinic that indicate that GS attended the polyclinic on 12 June 2011.

... Mr. Uliana also went to a school that GS attended with the purpose of finding out her age. The headmaster of the school confirmed her attendance at the school on being shown her picture. Though GS mentioned the name of the school as Belewete, the school where Mr. Uliana went was named Li-Laka and Mr. Uliana explained that the name did not matter much to him. Mr. Uliana was shown a register at the school where the name of GS also called GiS appears.

... Regarding the witness Ghislaine S, Mr. Uliana stated that he did attempt to locate her without any success. GS told Mr. Uliana that she did not have a sister named Georgette.

4. In its Judgment, the Dispute Tribunal found that the disciplinary measure was unlawful. The main issue in the case was whether “the girl with whom [Mr. Mobanga] had sex was GS and whether she was a minor then or with Georgette who was of age”.⁴ The Dispute Tribunal concluded that the Secretary-General had failed to establish the charge of misconduct by clear and convincing evidence.

5. The Dispute Tribunal ruled that the statements of three witnesses obtained during the investigation (the complainant (GS), her mother (DS), and a nurse (CS)) did not have probative value as they did not meet the indicia of reliability or truthfulness in accordance with the Appeals Tribunal jurisprudence in *Nyambuza*.⁵ The interviews were conducted in French and Congolese, and were translated into English. The averment in each signed statement that the statement was “a true and accurate record” was in English, and there was no indication that the witnesses were able to read or understand English.

⁴ Impugned Judgment, para. 88.

⁵ *Nyambuza v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-364, paras. 35 and 36.

6. The Dispute Tribunal also ruled that the identification of Mr. Mobanga in a photographic array by the complainant and the nurse was not probative. The identification by the complainant was not reliable due to the time lag between the alleged act and identification, and the use of MONUSCO grounds passes in the array may have influenced the complainant. Also, the complainant's witness statement naming Mr. Mobanga was not probative. The witness statement from the nurse was of no probative value and his identification of Mr. Mobanga was tentative. The Dispute Tribunal also found that the investigators' note to file recording their visit to Lilika school could not be acted upon.⁶

7. The Dispute Tribunal found that the possibility that Mr. Mobanga was the subject of a malicious accusation had not been investigated. It concluded that evidence from the Conduct and Discipline Officer that Mr. Mobanga had named the person who he had a relationship with as "G", and the evidence of Mr. Mobanga's agreement to compensate the S family did not constitute clear and convincing evidence of misconduct. The Dispute Tribunal rescinded the decision to summarily dismiss Mr. Mobanga. In the alternative, the Dispute Tribunal awarded compensation of 12 months' net base salary.

Submissions

The Secretary-General's Appeal

8. The Secretary-General argues that the Dispute Tribunal erred on a question of law and fact in finding that the identification of Mr. Mobanga by the complainant, GS, and the nurse, CS, by photographic array was unreliable. The Dispute Tribunal erred in law in applying the standard for identification by photographic array under international criminal law. Disciplinary cases are not criminal cases and the standard of proof is less than proof beyond reasonable doubt.⁷ In this case, the Dispute Tribunal erred by considering the time lag of one year underdermined the complainant's ability to recognize Mr. Mobanga. It was also an error to consider that the mention of MONUSCO in the photos may have influenced her: she had already told investigators that the person she had sexual intercourse with was from MONUSCO and all of the photos used in the array were marked "MONUSCO". With regard to the nurse's identification of Mr. Mobanga, the Dispute Tribunal also failed

⁶ For the purposes of consistency, the Appeals Tribunal adopts the following spelling of the school visited by the investigators: Lilika school.

⁷ *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 30.

to consider the identification by the nurse as evidence by itself and as corroboration of other evidence.

9. The Dispute Tribunal also erred when it concluded that the identifications of Mr. Mobanga by the complainant and the nurse were included in their written statements and could not be relied upon. This was an error as the identifications by the complainant and the nurse were recorded in separate written statements that were drafted in French and signed.

10. The Secretary-General contends that the Dispute Tribunal erred in law by not considering relevant documentary evidence. First, the clinic's medical records were not considered. The medical records established that the complainant was 14 years old on the date that she received treatment for a miscarriage at the clinic. Second, the note to case file summarizing the investigators' visit to the *nganda* was not considered. The visit confirmed the identity of the complainant and provided other corroborating evidence. Lastly, the Dispute Tribunal did not examine the records of Lilika school, which established that the complainant had attended the school in the sixth grade in 2011/2012, thereby confirming that she was a minor at the material time.

11. The Secretary-General submits that the Dispute Tribunal erred in law in excluding the hearsay evidence contained in the note to case file that summarized the investigators' visit to Lilika school and their conversation with the Headmaster. The Appeals Tribunal jurisprudence does not prohibit the use of hearsay evidence if there is other corroborating evidence of misconduct.⁸ The Dispute Tribunal failed to properly consider the probative value of the note to case file, in particular the school register, which confirmed the attendance of the complainant at the school and her age at the material time, and the Headmaster's confirmation of the same.

12. The Secretary-General argues that the Dispute Tribunal erred in law in finding that the statements of the complainant and nurse did not have probative value as there were no other indicia of their reliability or truthfulness. With regard to the nurse's statement, the Dispute Tribunal failed to take into account the nurse's identification of Mr. Mobanga and the clinic's medical records. The nurse's evidence concerning the complainant's age was corroborated by the note to the case file recording the investigators' visit to Lilika school. With regard to the complainant's statement, there were numerous indicia of its reliability and

⁸ *Diabagate v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-403, para. 34.

truthfulness, including its consistency with evidence gathered from the nurse, clinic, and Lilika school, and other evidence gathered during the investigation.

13. Lastly, the Secretary-General contends that the Dispute Tribunal erred in not finding that misconduct was established by clear and convincing evidence. First, the Dispute Tribunal erred in finding that the Administration had not fully investigated the possibility that the allegations against Mr. Mobanga were false. That was the very purpose of the investigation. Second, the Dispute Tribunal erred in determining the central issue of whether the complainant's evidence or Mr. Mobanga's evidence was credible and reliable. The evidence on the record established that Mr. Mobanga had admitted that he was in a sexual relationship with a woman from the S family, and that he had entered into an agreement to compensate the S family. Mr. Mobanga's evidence regarding his alleged relationship with "Georgette" was not corroborated. However, the complainant's statement was corroborated by several independent pieces of evidence, including the nurse's statement and the records obtained from the clinic and Lilika school. Based on all of the evidence obtained by OIOS in its investigation, it was reasonable to conclude that there was clear and convincing evidence of Mr. Mobanga's misconduct.

14. The Secretary-General requests that the Appeals Tribunal vacate the Judgment, affirm the decision to summarily dismiss Mr. Mobanga, and, if the dismissal is affirmed, name Mr. Mobanga in its Judgment.

Mr. Mobanga's Answer

15. Mr. Mobanga contends that the Dispute Tribunal properly found that there was no clear and convincing evidence of misconduct. Mr. Mobanga recalls the Appeals Tribunal jurisprudence which establishes that an appeal is not a *de novo* hearing of the case before the Dispute Tribunal and that deference should be given to the Dispute Tribunal's findings of fact.⁹

16. Mr. Mobanga argues that the Dispute Tribunal properly exercised its discretion when it found that the identification evidence from the complainant, GS, and the nurse, CS, was unreliable. The identification of Mr. Mobanga as the alleged perpetrator of the misconduct is

⁹ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, paras. 33 and 36; *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051, para. 29.

based on unsworn out-of-court hearsay statements. The Dispute Tribunal applied the relevant jurisprudence, and properly found that the witness statements of the complainant and the nurse had no probative value.

17. In addition, the Dispute Tribunal correctly found that the identification of Mr. Mobanga from a photographic array by the complainant and the nurse was flawed. The Dispute Tribunal applied the correct standard of proof for disciplinary cases, and took into account relevant criteria in evaluating whether the photographic array was properly conducted. In particular, the Dispute Tribunal properly determined that the time lag of one year indicated that the identification was not reliable. The Secretary-General has not established that the Dispute Tribunal's finding that the use of MONUSCO grounds passes tainted the process was unreasonable.

18. Mr. Mobanga submits that the Dispute Tribunal did not make an error of law by failing to consider relevant documentary evidence. The Dispute Tribunal has the discretion to select which aspects of the evidence merit a detailed reasoned analysis in writing. With regard to the clinic's medical records, the Secretary-General has not demonstrated how this hearsay evidence would have altered the Dispute Tribunal's finding regarding the complainant's age. The Dispute Tribunal analyzed in detail the evidence given by investigators at the hearing on the merits concerning their visit to the *nganda* and the investigators' note to the case file regarding the visit did not constitute additional probative evidence. The records of Lilika school were considered by the Dispute Tribunal, but rejected as probative evidence of the complainant's age. The Secretary-General has not demonstrated how this evidence would have altered the Dispute Tribunal's findings regarding the complainant's age. Finally, the Dispute Tribunal properly found that the investigators' note to file recording their interview of the headmaster of Lilika school was hearsay evidence and there was no credible or reliable evidence to corroborate it.

19. Mr. Mobanga argues that the Secretary-General has not established that the Dispute Tribunal incorrectly excluded the statements of the complainant and the nurse. The Secretary-General merely repeats the arguments that he made before the Dispute Tribunal.

20. Finally, Mr. Mobanga submits that the Dispute Tribunal reasonably concluded that a proper investigation had not been carried out. The Dispute Tribunal properly considered that the investigators had failed to investigate the discrepancy regarding the name of the school

that the complainant attended and the credible evidence of a scheme to make false allegations against MONUSCO staff.

21. Mr. Mobanga requests the Appeals Tribunal to dismiss the appeal. He further asks for his name to remain redacted in the Appeals Tribunal Judgment and notes in this regard that the Secretary-General's request for publication of his name is "contingent upon the [a]ppeal being successful" – an approach with which he "concur".

Considerations

Preliminary matter: redaction of name

22. The Secretary-General requests that Mr. Mobanga be named in the Appeals Tribunal Judgment if the appeal is granted. Mr. Mobanga requests that his name remain redacted should the appeal be dismissed. Both parties, therefore, essentially agree that a redaction of his name is only justified if the UNDT's Judgment - clearing Mr. Mobanga of the charges and rescinding his summary dismissal - is affirmed. This approach is in line with the Appeals Tribunal's established jurisprudence holding that "[t]he principles of transparency and accountability, which are enshrined in the system of administration of justice at the United Nations, require that names should be redacted in only the most sensitive of cases".¹⁰ Considering that this Tribunal grants the appeal and vacates the UNDT's Judgment, there is no justification for Mr. Mobanga's name to remain redacted.

Merits of the case

Did the UNDT err in fact and/or law by finding that the identification of Mr. Mobanga by the complainant (GS) and the nurse from a photographic array was unreliable?

23. We want to say at the outset that we are mindful that at some duty stations the conduct of investigations is more challenging than at others due to the local conditions and the circumstances. These factors ought to be borne in mind when due consideration is given to the conduct of investigations and the evidence gathered.

¹⁰ See *Ahmed v. Secretary-General of the United Nations*, Order No. 132 (2013), para. 4.

24. We wish to also emphasise that a disciplinary investigation is not a criminal trial and while we expect that the process and the methodology adopted throughout the investigation be fair, transparent and in accordance with the relevant Staff Regulations and Rules, the standard of proof is not beyond reasonable doubt.¹¹ The standard to be applied in these cases is clear and convincing evidence which is the medium standard. This means that based on the evidence presented by a party to the Dispute Tribunal during the trial, it must be highly and substantially probable that the factual contentions are true.¹²

25. In this case, the Dispute Tribunal ruled that the identification of Mr. Mobanga by the complainant, GS, and the nurse, CS, by the photographic array was unreliable. The Dispute Tribunal also held that the time lag of one year undermined the complainant's ability to recognize Mr. Mobanga. Moreover, the Dispute Tribunal found that the mention of MONUSCO in the photos may have influenced the complainant, GS, although she had previously told investigators that the person she had sexual intercourse with was from MONUSCO and all of the photos used in the array were marked "MONUSCO".

26. We refer to the case of *Oh*.¹³ In this case, the staff member was summarily dismissed for engaging in sexual exploitation and abuse of women in Côte D'Ivoire. The evidence of misconduct was based on witness statements from four anonymous victims, admissions made by the staff member that corroborated the victims' witness statements, and the identification of the staff member by two of the victims from a photo array. The UNDT upheld the disciplinary measure and the Appeals Tribunal affirmed the UNDT Judgment.

27. In *Oh*, the Appeals Tribunal stated:¹⁴

... Mr. Oh, however, challenges the reliance of the UNDT on the evidence of the photo identification on the grounds that the photo array was unfairly suggestive as it included only one photograph of a Korean man. This Tribunal has viewed the array of six photographs and is of the view that Mr. Oh did not stand out as all the photographs were of Asian men. Accordingly, we find that the identification of Mr. Oh from six photographs by each of the two victims, independently and separately from each other, constitutes evidence that was reasonably considered by the Administration and the UNDT as supporting the finding of his misconduct. Accordingly, this ground of the appeal also fails.

¹¹ *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 30.

¹² *Diabagate v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-403, para. 30.

¹³ *Oh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-480.

¹⁴ *Ibid.*, para. 56.

28. In the instant appeal, it is our finding that the UNDT erred when it considered that the the identification of Mr. Mobanga by the complainant in the photo array was not reliable on the basis that the use of MONUSCO grounds passes in the array may have influenced the complainant. All the photographs were marked “MONUSCO” and, indeed, she had informed the investigators before the identification that the person whom she had sexual intercourse with was from MONUSCO. This is not a case where there was only one photograph with the word “MONUSCO” among an array of unmarked photographs, so that one photograph could stand out and possibly influence someone. Therefore, the photographs constitute evidence that was reasonably considered by the Administration.

Did the UNDT otherwise err in finding that there was no clear and convincing evidence of Mr. Mobanga's misconduct?

29. An examination of the evidence reveals that there are certain facts which Mr. Mobanga admits and which are confirmed by the complainant's statements, namely:

1. Mr. Mobanga was a security officer with MONUSCO;
2. Mr. Mobanga visited the *nganda*; the complainant and her sister lived at the *nganda* during the material time of his visits;
3. Mr. Mobanga admitted that he had sexual intercourse with a woman who became pregnant and who subsequently suffered a miscarriage;
4. Mr. Mobanga admitted that he spoke to the police and no formal charges were filed;
5. Mr. Mobanga admitted that he paid compensation to the complainant's family;
6. Mr. Mobanga gave different versions of the name of the person with whom he had sexual intercourse.

30. Based on an examination of the evidence, we find that there are several similarities between Mr. Mobanga's evidence and that of the investigators; indeed the main difference in the facts is that Mr. Mobanga alleges that the person with whom he had sexual intercourse was an adult and that her name was Georgette (which was not corroborated). We have examined the evidence presented to the Dispute Tribunal in its totality, and find that there was clear and convincing evidence presented by the Secretary-General to the Dispute Tribunal

to support the charge of misconduct. The nurse's statement and the records obtained from the clinic and the school were important pieces of evidence presented to the Dispute Tribunal for it to have an understanding of the factual matrix which the Secretary-General relied on in making its decision and also for the Dispute Tribunal to determine what weight should be ascribed to this evidence. The Dispute Tribunal erred when it rejected this evidence.

31. In *Nyambuza*,¹⁵ the staff member challenged her separation for misconduct for allegedly soliciting and receiving monies in exchange for hiring and continuing service with the United Nations. The only evidence against Ms. Nyambuza were written witness statements signed by three witnesses during the investigation, summaries of the oral testimony of two witnesses before the Joint Disciplinary Committee and the testimony of one witness before the UNDT. We held as follows:¹⁶

... The UNDT determined that the [witnesses'] evidence ... had "little probative value" because these witnesses did not appear before the UNDT and were not subject to cross-examination. This rationale is not correct as a matter of law under our jurisprudence in *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302 (full bench). Nevertheless, the UNDT's determination that the evidence had "little probative value" is correct, for the reasons discussed below.

... Written witness statements taken under oath can be sufficient to establish by clear and convincing evidence the facts underlying the charges of misconduct to support the dismissal of a staff member. When a statement is not made under oath or affirmation, however, there must be some other indicia of reliability or truthfulness for the statement to have probative value.

32. We find that the UNDT erred in not concluding, on the totality and preponderance of the evidence, that there was sufficient evidence against Mr. Mobanga of a clear and convincing nature for the charge of misconduct.

Judgment

33. The appeal is upheld and Judgment No. UNDT/2016/022 is vacated in its entirety.

¹⁵ *Nyambuza v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-364.

¹⁶ *Ibid.*, paras. 34 and 35 (internal footnotes omitted).

Original and Authoritative Version: English

Dated this 28th day of October 2016 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Murphy

(Signed)

Judge Knierim

Entered in the Register on this 22nd day of June 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar