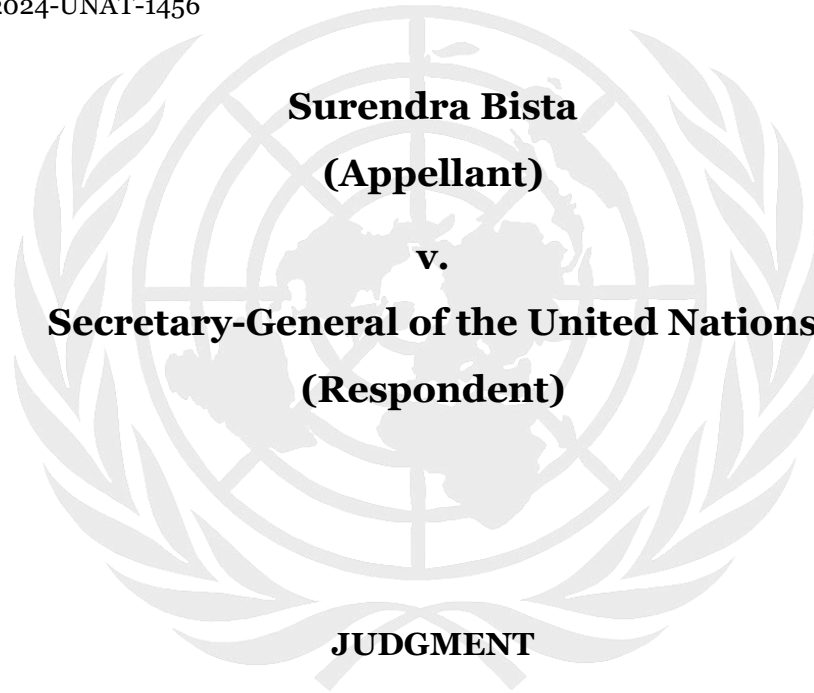




UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1456



Surendra Bista
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Graeme Colgan Presiding Judge Katharine Mary Savage Judge Kanwaldeep Sandhu
Case No.:	2023-1854
Date of Decision:	28 June 2024
Date of Publication:	25 July 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Manuel Calzada
Counsel for Respondent:	Christos Ravanidis

JUDGE GRAEME COLGAN, PRESIDING.

1. Surendra Bista, formerly a staff member with the United Nations Support Mission in Libya (UNSMIL), appeals against Judgment No. UNDT/2023/085 (impugned Judgment)¹ of the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissing his challenge to his separation from service for serious misconduct albeit with compensation in lieu of notice and with termination indemnity (contested decision).
2. Mr. Bista lodged an appeal against the impugned Judgment with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
3. For the reasons set out below, we grant the appeal and reverse the impugned Judgment. We grant Mr. Bista remedies including rescission of the contested decision, and compensation in lieu of rescission is set at two years' net-base salary, plus interest thereon.

Facts and Procedure

4. Mr. Bista is a Nepalese national. Mr. Bista and another individual who works for the United Nations, Mr. S.R.B., are what are sometimes called half-brothers: that is, they share the same biological father but not the same biological mother. Because of the similarity in their names and their frequent use throughout this Judgment, we will refer to Mr. Bista (or the Appellant) and Mr. S.R.B., his half-brother.
5. How Mr. Bista and Mr. S.R.B.'s relationship came about is important to the decision of this case. Mr. Bista was the child of a relationship, but which was not a *de jure* or even a *de facto* marriage. His father subsequently married another woman, and they had five children including Mr. S.R.B. Mr. Bista's father's relationships and the children of those relationships were subject to the laws of Nepal and to Nepalese societal mores.
6. Mr. Bista did not ever receive an official birth certificate although upon attaining the age of 16 years, he received a Nepalese citizenship certificate which bore his father's, but not his mother's, name.
7. In 2011, Mr. Bista became, first, a volunteer and, subsequently, a staff member of the United Nations. In 2012, Mr. S.R.B. also began work as a staff member for the Organization.

¹ *Bista v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/085.

Mr. Bista worked for a number of different United Nations missions in Africa, including the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) between June 2011 and June 2014 and between October 2015 and May 2018. At all material times, neither Mr. Bista nor Mr. S.R.B. was aware that the other worked for the United Nations. That mutual ignorance arose in the following circumstances.

8. Although Mr. Bista had been aware of Mr. S.R.B.'s existence, they had never met or communicated with each other for almost 30 years. That was until, in 2010, before either began working for the United Nations, when they met at their father's funeral. The only subsequent interaction or communication between Mr. Bista and Mr. S.R.B. was a brief telephone conversation in 2012, for the purpose of Mr. Bista congratulating Mr. S.R.B. on the news of the latter's impending marriage. Although by the time of that telephone call both were United Nations staff members, the nature of this brief communication related to the marriage and did not involve the disclosure or reference to their careers or occupations.

9. It was against this background that Mr. Bista, in 2015 and again in 2018, when applying for different roles with the United Nations, did not disclose what has subsequently been made known to him, i.e., that Mr. S.R.B. was then a current United Nations staff member.

10. In July 2017, the Special Investigations Unit (SIU) of MONUSCO for which Mr. Bista was then working, initiated an investigation into an allegation that he had falsely misrepresented his family status in relation to Mr. S.R.B. when he completed an online Personal History Profile (PHP) form in 2015 as part of his application for that role.

11. The screening questions included: "Are any of your relatives employed by the United Nations Secretariat?" The word "relatives" was not defined, although before the UNDT Mr. Bista asserted (and the Secretary-General did not suggest otherwise), that there was an electronic drop-down menu allowing for selection from various relationship types including, in this case, the only arguably applicable word "brother".² Mr. Bista answered the question in the negative. He subsequently confirmed by his signature that the information he had provided was true and correct. His application for the role he sought was successful.

12. It seems logical that the "relatives" question pertains to Staff Rule 4.7(a) headed "Family Relationships", which provides that "[a]n appointment shall not be granted to a person

² Impugned Judgment, para. 11 o).

who is the father, mother, son, daughter, brother or sister of a staff member”. This provision aims at preventing nepotism within the Organization by attempting to ensure that a person who is within one of those relationships with a current staff member cannot proceed with their application for United Nations employment. These listed relationships are close and immediate ones: they reflect what is sometimes called relationships within a “nuclear family” as opposed to those of a broader or extended family. The Staff Regulations and Rules do not refer to wider familial relationships or to the word “relatives” as appeared in the PHP form.

13. On 19 March 2018, the SIU issued its Investigation Report in which it concluded that Mr. Bista had knowingly made a false statement in support of his successful application in 2015. Therefore, it recommended that appropriate action be taken against him for that misrepresentation.

14. On 22 June 2022, the SIU of the United Nations Interim Force in Lebanon (UNIFIL) issued an additional Investigation Report stating that when applying for a position at UNSMIL in 2018, Mr. Bista also failed to disclose in his PHP form that Mr. S.R.B. had been working for the United Nations.

15. By memorandum dated 15 September 2022, the Assistant Secretary-General for Human Resources informed Mr. Bista of the allegations of misconduct issued against him, namely that he failed to disclose in his 2015 and 2018 PHP forms that Mr. S.R.B. had been working for the Organization at that time. Mr. Bista was requested to provide his written comments on the factual findings, which he did on 7 November 2022.

16. On 28 November 2022, the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) concluded that Mr. Bista’s misrepresentation had been proven by clear and convincing evidence and that this omission was serious misconduct in violation of Staff Regulation 1.2(b) and Staff Rule 1.5(a). Mr. Bista was therefore separated from service with compensation in lieu of notice and with termination indemnity.

17. On 12 December 2022, Mr. Bista filed an application before the UNDT challenging the contested decision.

Impugned Judgment

18. On 14 August 2023, the Dispute Tribunal issued the impugned Judgment, dismissing Mr. Bista's application. The UNDT first acknowledged, based on the Nepalese religious position presented by Mr. Bista, that the notion of half-brother was not recognized in Nepal. Consequently, the UNDT found that Mr. Bista could not "be held to have been dishonest not to have accepted that [Mr. S.R.B.] was his brother or half-brother if he applied strict Nepalese law and custom".³

19. However, notwithstanding this finding and although Mr. Bista, as the UNDT put it, "may want to raise his preferred belief that the law of Nepal should apply because he is Nepalese", the Dispute Tribunal determined that Nepalese law did not apply to the United Nations in employment matters. In such cases, the UNDT concluded that it was the Staff Regulations and Rules that constituted the applicable legal framework. According to these regulations, "brother and half-brother [are] subsumed under the definition of 'relatives' who should be disclosed on PHP forms if they happen to be employed by the United Nations".⁴

20. The UNDT further held that if Mr. Bista had doubts as to whether "brother" or "half-brother" applied to his relationship with Mr. S.R.B., he "could have asked for clarification from a senior officer who would have been able to clarify the position", but he failed to do so.⁵

21. The UNDT also concluded that there was sufficient evidence to determine that Mr. Bista and Mr. S.R.B. "had every opportunity to speak about the location of their employment and the fact that they were both employed by the United Nations".⁶ In this regard, the UNDT pointed out that Mr. Bista and Mr. S.R.B. were in communication with each other at the time of the latter's wedding.

22. Furthermore, relying on *S. Nourain & A. Nourain*,⁷ the UNDT noted that "where there is undisputed evidence that a staff member has responded untruthfully to a screening question in the PHP and then certified the truthfulness of the PHP, then the evidentiary standard of clear and convincing evidence is met, and serious misconduct is established".⁸ The UNDT also emphasised

³ *Ibid.*, para. 26.

⁴ *Ibid.*, paras. 27-28.

⁵ *Ibid.*, para. 30.

⁶ *Ibid.*, para. 33.

⁷ *S. Nourain & A. Nourain v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-362.

⁸ Impugned Judgment, para. 38.

that, following Appeals Tribunal jurisprudence,⁹ negligence alone is sufficient for a staff member to be held responsible for providing false information, without the need for the Administration to prove ill-intent.¹⁰

23. Turning to the proportionality of the sanction imposed on Mr. Bista, the UNDT found that the sanction was proportionate, particularly considering that his false declaration indicated a lack of integrity and fell short of the standards expected of a United Nations civil servant.¹¹

24. Finally, the UNDT determined that Mr. Bista's due process rights were respected throughout the investigative and disciplinary process.¹²

Submissions

Mr Bista's Appeal

25. Mr. Bista requests the Appeals Tribunal to rescind the contested decision and reinstate him in his position. He asks the Appeals Tribunal to award him "full salary and applicable allowances and benefits from the date of separation to the date of rescission of disciplinary measures" as well as "[a]ny other relief at [its] discretion". Mr. Bista also seeks an oral hearing before the Appeals Tribunal on the basis that the essence of the present case revolves around the credibility of himself and Mr. S.R.B.¹³

26. Mr. Bista submits that the UNDT failed to exercise jurisdiction vested in it when it overlooked that the Staff Regulations and Rules do not define all the relevant terms in Staff Rule 4.7, particularly the terms "relative" and "brother".

27. Mr. Bista contends that the UNDT erred by concluding that he was seeking to substitute Nepalese Law for that of the Organization (i.e., the Staff Regulations and Rules). However, Mr. Bista also asserts that the UNDT erred by disregarding Nepalese law when it was the "only applicable law that determines whether the two people concerned are relatives, brothers, or [hold] any other status". In support of his contentions, Mr. Bista cites Secretary-General's Bulletin

⁹ *Koffi Gilles Wilfried Amani v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1301; *Ahmad Shuaib Payenda v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1156.

¹⁰ Impugned Judgment, para. 39.

¹¹ *Ibid.*, paras. 42-45.

¹² *Ibid.*, para. 41.

¹³ Appeal form.

ST/SGB/2004/13 (Personal status for purposes of United Nations entitlements), which provides, in relevant parts, that:

... Requests relating to the determination of the personal status of staff members in connection with their entitlements will be submitted by the Secretariat for verification by the Permanent Mission to the United Nations of the country of nationality of the staff member concerned. Once the Mission has verified that the status in question is legally recognized under the law of that country for the purposes of granting benefits and entitlements, the Secretariat will take action in accordance with that verification.

28. Consequently, Mr. Bista argues that it was not open to the Organization to make a determination on his civil status, “a matter reserved to the national jurisdiction of staff members”. He contends that the Administration should have thus made “appropriate enquiries from the appropriate Member State as to [his] civil status (...) and his putative half-sibling”.

29. Mr. Bista submits that the UNDT, by finding that “he should have made efforts to establish from [Mr. S.R.B.] whether [Mr. S.R.B.], or any of [Mr. S.R.B.]’s siblings worked for the United Nations”, erroneously shifted the burden of proof onto him, imposing on him what he deems as an “unreasonable obligation”.

30. Mr. Bista challenges the Dispute Tribunal’s findings that he could or should have discussed with Mr. S.R.B. their employment situation at the time of Mr. S.R.B.’s wedding, or that if he had doubts about the qualification of his relationship with Mr. S.R.B., he could have sought clarification from a senior officer. He deems these findings speculative. According to Mr. Bista, neither he nor Mr. S.R.B. were aware of their respective employment with the United Nations. In this regard, he emphasises that “[n]o evidence was presented by the [Secretary-General] that they had discussed their employment, or that it was reasonable for them to raise the issue, or that they had an obligation to do so, regardless of whether they had the opportunity”.

31. Mr. Bista contends that the Dispute Tribunal’s reliance on *S. Nourain & A. Nourain* and *Ahmad Shuaib Payenda* is misplaced, as those cases were clearly distinguishable from his situation. Furthermore, Mr. Bista submits that his answers in his PHP forms were not “untruthful” and that although he may have made an “inaccurate statement in total innocence”, his conduct does not amount to “dishonesty, lack of integrity, or falsity, concepts that require a guilty mind or bad intention”. In this regard, Mr. Bista highlights the inconsistency within

the impugned Judgment, noting the contradiction between this finding and the UNDT's conclusion that he could not "be held to have been dishonest".¹⁴

32. Mr. Bista contends that the sanction imposed on him is disproportionate, highlighting the existence of other alternative sanctions that were not considered by the Administration.

33. Finally, Mr. Bista submits that his due process rights were violated as the investigators failed to investigate exculpatory evidence. He also argues that the disciplinary process only "focused on carrying the case to finding guilt on [his] part".

The Secretary-General's Answer

34. The Secretary-General requests the Appeals Tribunal to affirm the impugned Judgment and dismiss the appeal in its entirety.

35. The Secretary-General submits that the UNDT correctly found that the contested decision was lawful and argues that Mr. Bista failed to establish any error warranting the reversal of the impugned Judgment. On the contrary, the Secretary-General notes that Mr. Bista merely disagrees with the impugned Judgment.

36. First, the Secretary-General argues that Mr. Bista failed to demonstrate any error in the UNDT's finding that he and Mr. S.R.B. were relatives. The Secretary-General observes that Secretary-General's Bulletin ST/SGB/2004/13/Rev. 1 (Personal status for purposes of United Nations entitlements)¹⁵ is not applicable to the present case, as it pertains solely to the "personal status of staff members for the purposes of *entitlements under the Staff Rules and Staff Regulations*". Moreover, even if the Appeals Tribunal were to consider the Nepalese legal framework, the Secretary-General argues that Mr. Bista's contentions in this regard still lack merit, as it is evident that Mr. Bista and Mr. S.R.B. were considered "relatives", particularly under the Nepalese Children's Act of 1992.

37. Second, the Secretary-General contends that Mr. Bista failed to demonstrate that the UNDT erred by finding that he was responsible for not disclosing Mr. S.R.B.'s employment with the United Nations. The Secretary-General submits that Mr. Bista's attempt to

¹⁴ Impugned Judgment, para. 26.

¹⁵ The Secretary-General refers to ST/SGB/2004/13/Rev. 1, while Mr. Bista referred to ST/SGB/2004/13.

distinguish this case from *S. Nourain & A. Nourain* is irrelevant. On the contrary, the Secretary-General argues that the UNDT relied on appropriate Appeals Tribunal jurisprudence,¹⁶ which holds that the failure to disclose a relative's United Nations employment "amounts to serious misconduct *per se*; actual knowledge of the relative's [United Nations] employment is not an element of the misconduct".

38. Consequently, the Secretary-General asserts that it was not the Administration's burden of proof to demonstrate Mr. Bista's knowledge of Mr. S.R.B.'s employment with the United Nations.

39. Third, the Secretary-General maintains that the UNDT correctly determined the sanction imposed on Mr. Bista to be proportionate and fair. The Secretary-General observes that Mr. Bista's arguments in this regard merely repeat those already submitted before the Dispute Tribunal and should be rejected on this basis alone. Nevertheless, even if the Appeals Tribunal were to consider Mr. Bista's arguments, the Secretary-General contends that he still failed to demonstrate any error in the UNDT's findings regarding the proportionality of the sanction. On the contrary, the Secretary-General notes that the sanction imposed on Mr. Bista was fully consistent with Appeals Tribunal jurisprudence, which has deemed even more severe disciplinary measures, such as dismissal, to be proportionate for similar misconduct.¹⁷

40. Finally, the Secretary-General submits that Mr. Bista failed to demonstrate that the UNDT erred by concluding that his due process rights had been respected, "given that he was fully informed of the charges against him and was given the opportunity to contest them, submit his views, defend himself, and seek advice from the Office of Staff Legal Assistance or other counsel".

Considerations

41. We address first our reasons for refusing Mr. Bista's request for an oral hearing. His grounds were said to include that the case turns on his credibility and that of Mr. S.R.B. and

¹⁶ *Koffi Gilles Wilfried Amani* Judgment, *op. cit.*, para. 63.

¹⁷ *Ahmad Shuaib Payenda* Judgment, *op. cit.*

whether they genuinely considered themselves “brothers” under Nepalese law and custom and in particular on the contents of their telephone conversation.¹⁸

42. Pursuant to Article 16 of the Dispute Tribunal Rules of Procedure, in disciplinary cases before the UNDT, there will usually be an in-person hearing. Before the Appeals Tribunal, however, pursuant to Article 18 of the Appeals Tribunal Rules of Procedure, the default position is that appeals are dealt with on the papers, but that the Appeals Tribunal may allow a hearing in-person if it is satisfied that such hearing would assist in the expeditious and fair disposal of the case.

43. As will be seen, the appeal does not turn on these grounds asserted by Mr. Bista. The UNDT did not declare him to be a witness without, or even of dubious credibility, nor did it cast doubt on his account of events, including his telephone conversation with Mr. S.R.B. The UNDT decided the case on other grounds which do not depend on findings of disputed witness credibility. We would not have been assisted to decide the appeal by hearing directly from the parties: indeed, any additional evidence would probably have to be heard by the UNDT by remitting the case to it with directions. In these circumstances, we denied Mr. Bista’s request for an oral hearing.

44. The appeal raises three significant questions. The first is whether the misconduct of misrepresenting personal relationship information in the PHP forms required not only the provision of false information, but also evidence of the staff member’s intention to mislead. If that is so, the second question is whether it was established by clear and convincing evidence that Mr. Bista had that necessary intent to mislead – that is whether it was established that he was intentionally or purposely dishonest by failing to disclose his relationship with Mr. S.R.B. and thereby intended to mislead the Administration. The third question is whether, if Mr. Bista was guilty of making a misrepresentation about his family status, whether a half-sibling employed by the Organization was covered by the requirement of disclosure and, in particular, whether a half-brother relationship was encompassed by the word “relative” used as part of the question to which he responded.

45. For reasons we will elaborate upon, we conclude that the UNDT erred in several aspects of the impugned Judgment. We have reached this conclusion not based on the arguments primarily advanced by Mr. Bista relating to concepts of familial relationships under Nepalese

¹⁸ Appeal form.

law, but rather on his subsidiary arguments that the Dispute Tribunal failed to take into account the evidence of the nature and content of his and Mr. S.R.B.'s communications, shifted the onus and burden of proof from the Secretary-General to Mr. Bista, and erroneously concluded that there was clear and convincing evidence of Mr. Bista's knowledge that he was in a prohibited family relationship with another staff member.

46. We respectfully find that the impugned Judgment appears to attempt to establish grounds for upholding the Secretary-General's administrative decision that were not articulated by the Administration at the time of the contested decision and which are unsupported by the case law relied upon by the UNDT.

47. After setting out in extensive detail the parties' cases, the impugned Judgment's considerations begin at paragraph 19. There follow a number of well-established and general propositions of evidence and other law with which there can be no disagreement. Then, at paragraph 26, the UNDT records that Mr. Bista's relevant evidence about the nature of his relationship with Mr. S.R.B. was uncontradicted. It followed, in the Dispute Tribunal's view, that he "cannot be held to have been dishonest not to have accepted that [Mr. S.R.B.] was his brother or half-brother if he applied strict Nepalese law and custom".¹⁹

48. However, the UNDT considered that Nepalese law and custom were not applicable to internal United Nations employment matters: rather, it is that contained in the Staff Regulations and Rules. In doing so, the Dispute Tribunal may have been led to embark on a line of reasoning based on a false underlying premise.

49. While what it said about the origin of the applicable law is correct, the relevance of Nepalese law and custom lies not in interpreting or applying those Staff Regulations and Rules. Rather, even if Mr. Bista had turned his mind to whether he had a relative already employed by the Organization, its importance lies in his state of mind at the crucial times, particularly whether he had the requisite intention to mislead the Administration.

50. The UNDT then moved somewhat promptly, at paragraph 28, to the conclusion that Staff Regulations and Rules "includes brother and half-brother as subsumed under the definition of 'relatives' who should be disclosed on PHP forms if they happen to be employed

¹⁹ Impugned Judgment, para. 26.

with the United Nations”.²⁰ This is at least an arguable question of law, but one we do not need to determine in this case, given the undisputed and fundamental fact that Mr. Bista and Mr. S.R.B. never discussed the nature of each other’s employment during their communication on only two occasions over some 30 years.

51. Whether, as the UNDT concluded erroneously, Mr. Bista *should* have asked Mr. S.R.B. by whom he was employed on either of those occasions and was negligent not to have done so, is not the point. It seems entirely natural and understandable that Mr. Bista would not have questioned Mr. S.R.B. about the latter’s employment, either at their father’s funeral or during a subsequent relatively brief telephone call to wish Mr. S.R.B. well for the latter’s impending wedding.

52. Next, at paragraph 30, the UNDT concluded that if Mr. Bista may have experienced “some doubt” about whether Mr. S.R.B. was or was not his “brother”, he could, and perhaps should, have sought clarification from a senior United Nations official as to whether Mr. S.R.B. came within the definition of his “brother”.²¹ That conclusion is, however, contrary to the evidence: Mr. Bista not only did not harbour such doubt, but more pertinently did not know at relevant times that Mr. S.R.B. was employed by the United Nations. The UNDT’s reasoning also ignores that salient fact, as Mr. Bista affirmed and which was uncontested, that he did not know of Mr. S.R.B.’s occupation or employer. The UNDT should have considered the facts established by the evidence; therefore, it cannot be said that there was clear and convincing evidence that Mr. Bista was aware of those details and intentionally sought to mislead by suppressing those facts from disclosure in his PHP forms.

53. The UNDT did address that question of Mr. Bista’s knowledge at paragraphs 32 and following of its Judgment. However, the UNDT misapplied the law in dealing with it. At paragraph 33, it decided that Mr. Bista and Mr. S.R.B. “had every opportunity to be in contact with each other and were actually in contact with each other when [Mr. S.R.B.] got married”.²² It reiterated that they had “every opportunity” to speak about “the location of their employment and the fact that they were both employed by the United Nations”.²³ However, even if we accept that this assessment did not reflect the reality of their circumstances over the previous

²⁰ *Ibid.*, para. 28.

²¹ *Ibid.*, para. 30.

²² *Ibid.*, para. 33.

²³ *Ibid.*

30 or so years, what mattered was what was known to Mr. Bista and not whether he should have enquired about Mr. S.R.B.'s employment in that brief conversation to congratulate him on the latter's marriage. The UNDT's conclusion, suggesting that his failure to make that enquiry, amounting in effect to negligence, justifies a conclusion of such misconduct that warranted separation from service, cannot be correct in law.

54. Nevertheless, the UNDT did, at paragraph 34, acknowledge the possibility that Mr. Bista and Mr. S.R.B. may not have checked on each other's employment status because they did not feel the need to do so. However, the UNDT maintained that both were "required" (it did not say to do what) and that in these circumstances both could have sought advice about their obligations. This too imposes an unrealistically high and wrong legal test. The Dispute Tribunal's equivocal decision was further complicated by its ambiguous conclusion at paragraph 35 that it could conclude "comfortably (...) that no enquiries were made by the brothers about their mutual status in the United Nations (...) [and that they] (...) simply failed to seek advice about any doubts they may have had".²⁴

55. The foregoing conclusion was also erroneous in suggesting that Mr. S.R.B.'s failure to enquire with Mr. Bista or with the Organization about Mr. Bista's employment status with the United Nations established, or at least reinforced, Mr. Bista's culpability. These proceedings do not concern Mr. S.R.B.'s conduct and Mr. Bista cannot be held liable for any negligence of Mr. S.R.B. alone, even if he may have been culpable, as the UNDT seems to suggest.

56. Under a heading reading "Further evidence that gives rise to suspicion about the knowledge of each other's employment status", the UNDT held it significant that Mr. Bista had made two separate false declarations in relation to his family relationships after Mr. S.R.B. held a United Nations position.²⁵ Again, given the evidence about the nature of the interactions between Mr. Bista and Mr. S.R.B. over 30 years, we fail to see how this provided a degree of "suspicion" by the UNDT regarding the credibility of Mr. Bista's denial of knowledge of Mr. S.R.B.'s employment circumstances. We reiterate that Mr. Bista's account of the events dispelled any *prima facie* inference of guilty knowledge, and the evidential burden on the Administration was to establish guilty knowledge and intent to a clear and convincing standard. It did not do so and we are not convinced by this speculative UNDT reasoning.

²⁴ *Ibid.*, para. 35.

²⁵ *Ibid.*, para. 36.

57. Nor are we persuaded, as the UNDT held, that the Judgment of this Tribunal in *S. Nourain & A. Nourain*²⁶ is authority for the proposition that if a staff member misleads the United Nations in an answer to a screening question in his PHP form, the subsequent certification of the correctness of the information establishes that the clear and convincing evidential standard is met in relation to the false answer, and serious misconduct is thereby established. That case established the evidentiary requirement of guilty knowledge by the staff member who falsely declared the absence of a familial relationship in a PHP form. There was no evidence of such guilty knowledge by Mr. Bista. The cases are fundamentally distinguishable.

58. Nor do we agree with the next proposition of law relied on by the UNDT by reference to UNAT authority. At paragraph 39 of the impugned Judgment, the Dispute Tribunal held that the Administration was under no obligation to establish “the intent of a staff member” and that false information may be established by a staff member acting negligently. Authority for this proposition was said to emanate from the UNAT’s Judgments in *Payenda*²⁷ and *Amani*.²⁸

59. However, *Payenda* is clearly distinguishable on its facts from Mr. Bista’s case: in the former, there was clear and convincing evidence provided by the Administration that the staff member knew that the information he provided was false.²⁹ The converse was the position in relation to Mr. Bista.

60. In *Amani*, the UNAT stated that a failure to correctly respond to a clear and relevant question amounts to providing a false answer from which dishonesty “normally may be inferred”.³⁰ We do not disagree with this statement of principle but disagree that it includes what the UNDT in this case described as “negligence”. A “false” answer is an incorrect answer and, assuming that a half-brotherly relationship had to be disclosed as a brotherly one, in Mr. Bista’s case, the answer was false. However, *Amani* allows for cases in which knowledge and intention are unclear, as is the case for Mr. Bista. *Amani* distinguishes the element of dishonesty (the guilty knowledge and intention that this be acted upon) and allows that “generally” this may be inferred from the surrounding context and circumstances. It said that

²⁶ *S. Nourain & A. Nourain* Judgment, *op. cit.*, paras. 21-24.

²⁷ *Ahmad Shuaib Payenda* Judgment, *op. cit.*

²⁸ *Koffi Gilles Wilfried Amani* Judgment, *op. cit.*

²⁹ *Ahmad Shuaib Payenda* Judgment, *op. cit.*, para. 41.

³⁰ *Koffi Gilles Wilfried Amani* Judgment, *op. cit.*, para. 63.

this will be “*prima facie* proof of dishonesty”.³¹ In Mr. Bista’s case (which cannot be described as a “normal” one), the facts not only did not establish this element of deliberate falsity but indeed pointed away from it. The *prima facie* inference of dishonesty was well and truly dispelled by the unusual but undisputed evidence of the nature of the relationship between Mr. Bista and Mr. S.R.B.

61. We have recently had cause in another appeal to focus on what might be called the mental element of misconduct by a staff member. In *AAS*,³² we identified what we called the mental element of alleged misconduct as opposed to the physical act or omission which constitutes such misconduct. We identified two sub-elements of the mental element of misconduct, the first of which we described as “the conscious choice or the exercise of free will to do or not to do the act”.³³ This is not in issue in this case: Mr. Bista completed the PHP intending to do so in the manner he did and knowing what it was, its purpose, and its potential effect.

62. The second mental element we identified in *AAS* we called “the intention to attain a desired result of doing so, perhaps called the knowing intention”.³⁴ It is this essential element of committing misconduct that is squarely in issue in Mr. Bista’s case. This may be encapsulated by the question: knowing that someone to whom he was related was already working for the Organization, did he intend to mislead the Secretary-General and thereby obtain United Nations employment for himself contrary to the Organization’s rules?

63. It is clear that even if the information provided by Mr. Bista was false, he could not have intended to mislead the Organization by providing or omitting it. When he made his relevant applications, the evidence established that he did not know, and had no reason to know, that Mr. S.R.B. was employed by the United Nations. It is not a question of whether he ought to have known this fact or even whether he was careless or negligent when communicating with Mr. S.R.B. during their brief congratulatory telephone call after Mr. S.R.B. began work with the Organization, by not enquiring whether Mr. S.R.B. worked for the United Nations or even asking what he did for a job and by whom he was employed.

³¹ *Ibid.*

³² *AAS v. Secretary-General of the United Nations*, Judgment No. 2024-UNAT-1427.

³³ *Ibid.*, para. 49.

³⁴ *Ibid.*

64. It is very clear that it had not been, and could not have been, shown to a clear and convincing evidential standard, that Mr. Bista had either the knowledge or the intent to mislead the Secretary-General about his family relationship status. Indeed, it was a surprising conclusion reached on any standard of evidence, let alone the clear and convincing standard required, that the investigation and subsequently the decision-maker could have decided that Mr. Bista deliberately and falsely misled his employer about a fact of which he had no knowledge.

65. For this reason alone, Mr. Bista's appeal must succeed.

66. Nor are we satisfied that the prohibited family relationships specified in the Staff Regulations and Rules include what are known in some western societies as a "half-brother". While the Staff Rules are specific in naming some immediate nuclear family relationships, the question in the PHP refers only to "relatives", a potentially wider net than the more explicit relationship definitions in the legal framework. The PHP question is equivocal and its looseness contrasts, and is potentially inconsistent, with the Staff Rules' more specific and thereby tighter definition of prohibited family relationships. These differences also go to whether the necessary clarity and convincing nature of the misconduct is defined for staff or potential staff members and, thereby, to their states of mind and intention when answering these questions.

67. The Secretary-General may wish to reconsider the relevant Staff Rule 4.7 and the PHP question to ensure greater clarity is achieved and whether it is indeed intended that a relationship between two half-siblings who have effectively had no contact between themselves for 30 years may be one that prohibits the applicant later-in-time from working for the United Nations in any capacity and anywhere at all. We emphasise, however, that these are matters for determination by the Administration and not for judicial direction.

Judgment

68. The appeal is granted and Judgment No. UNDT/2023/085 is reversed. The contested decision to separate Mr. Bista from service is rescinded and in lieu compensation is set at two years' net-base salary. The amount of compensation shall be payable with interest at the United States Prime Rate accruing from the date of Mr. Bista's separation from service to the date of payment. An additional five per cent shall be applied to the United States prime rate if the amount is not paid within 60 days from the issuance of this Judgment.

Original and Authoritative Version: English

Decision dated this 28th day of June 2024 in New York, United States.

(Signed)

Judge Colgan Presiding

(Signed)

Judge Savage

(Signed)

Judge Sandhu

Judgment published and entered into the Register on this 25th day of July 2024 in New York, United States of America.

(Signed)

Juliet E. Johnson, Registrar