UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/027
Judgment No.: UNDT/2016/022
Date: 14 March 2016
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY AND RELIEF

Counsel for the Applicant:
Alexandre Tavadian, OSLA

Counsel for the Respondent:
Cristiano Papile, ALS/OHRM
Susan Maddox, ALS/OHRM

Introduction

1. 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.

2. 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,.

3. The Applicant filed the present Application 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 Tribunal heard the Application from 5-8 October 2015.

Facts

4. 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.

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

6. 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.

7. 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.

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

9. 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.

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

11. 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.

12. 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.

13. 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.

14. 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".

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

16. 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.

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

18. 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).

19. 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.

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

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

The Evidence

Applicant

22. 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.

23. The Applicant had first met Georgette at an *nganda*[1] 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.

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

24. 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.

25. Pursuant to the agreement the Applicant gave the S family a goat and an amount of USD1, 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 USD400. 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 USD300.

26. 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.

27. 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 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.

28. 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.

29. 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. GN S

30. 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

31. 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

32. 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

33. 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."

34. 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.

35. 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.

36. 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[2] was a victim of false accusations expressed in an anonymous French email copying the OICs of the deciding sections to accuse him of having bad behavior. Consequently this…staff failed to sign his 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[3] 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 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 FCDO as per the training for Civil Society Members as he

[2] Name withheld.
[3] Name withheld.

> 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

37. 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.

38. 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.

39. 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.

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

41. 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".

42. 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.

43. 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".

44. 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.

45. 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.

46. 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).

47. 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.

48. 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.

49. 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.

The Applicant's submissions

50. In his Application, the Applicant requests that his name be redacted. He relies on the case of *Ahmed* Order No. 132 (NY/2013) and the case of *Applicant* 2012-UNAT-209 in support of his request.

51. The Applicant submits that the evidence in support of the charge is neither clear nor convincing. Regarding the identity of GS, the investigators conceded that she had no identity documents. The investigators took into account the following four elements: the alleged victim's own statement; the statement of the alleged victim's mother; the statement of the nurse and the clinic record as well as the statement of the Headmaster and the school record.

52. There was ample evidence before the investigators that in Dungu, DRC, the local population regularly made false accusations against United Nations staff members in order to elicit money from them.

53. If the Applicant was a victim of such a scheme, the alleged victim's statement that her name was GS cannot be sufficient to establish her identity because she would have been part of the extortion scheme.

54. An element taken into account by the investigators in support of their conclusion that GS did exist is the statement of the alleged victim's mother, DS.

55. DS contradicted herself and her daughter on numerous occasions. DS listed the names of her children which differed from the names that the alleged victim listed as her siblings.

56. DS also told the investigators that GS was born in 1994 (which would make her 17 years of age in 2011) whereas GS stated that she was 15 years of age in 2011. DS stated that GS miscarried after six months of pregnancy whereas the

nurse estimated the miscarriage to have occurred after four and a half months of pregnancy.

57. DS stated that GS miscarried at home whereas GS stated that she spent two nights in a clinic. DS stated that GS was treated by a nurse from the "Bopoto" clinic, whereas GS stated that she was treated by "l'Américain". DS stated that she never met the Applicant whereas GS stated that Applicant went to her mother's house.

58. There are numerous inconsistencies in DS' interview record. In light of so many contradictions and divergences, DS' statement cannot be taken into account to establish that GS actually did exist. In fact, DS' contradictory and inconsistent statement only reinforces the Applicant's argument that he was a victim of an extortion scheme.

59. In support of their conclusion that GS did exist, the investigators consulted the patient list from a clinic where GS was allegedly treated for miscarriage. The investigators conceded during their cross-examination that whatever name a patient gave to the clinic would be the name that would eventually appear in the records of that clinic. Thus according to the Applicant, the clinic's records are not an objective and independent source of information, at least for the purposes of establishing the identity of GS.

60. As to the school records, they do not show the name GS. They refer to GiS. In her interview statement, the alleged victim stated that her full name was GS and did not mention GiS. In addition, the name S is spelled differently in the school record. In particular, there are two letters that are different. Moreover, the alleged victim stated that she attended a school by the name "Belewete" whereas the investigators visited a school by the name of "Li Laka".

61. The investigators admitted that they did not visit the Belewete School. According to one of the investigators, this would have been a "goose chase" even though the alleged victim herself gave the name Belewete. Finally, the investigators conceded that they did not know for how long the alleged victim had been enrolled in the Li-Laka school. As far as they knew, she could have enrolled

into that school a month before the interview was conducted. This element cannot be taken into account to establish GS' identity.

62. The investigators relied on four elements to establish the age of GS: namely the statement of GS; the statement of DS; the statement of the nurse and the statement of the headmaster of the school.

63. With regard to GS' statement, on the assumption that this could have been an extortion scheme, GS had an interest in stating that she was a minor as this would incriminate the Applicant as part of her extortion scheme. But if it is assumed that this was not an extortion scheme, GS' statement is so vague that it cannot be taken into account for the purposes of establishing her age. In particular, when she was asked to provide her date of birth, she responded that she was approximately 15 years of age. This clearly means that the alleged victim did not know her own age and was simply guessing it. This is further corroborated by the inconsistency with the estimate provided by her mother according to whom the alleged victim was approximately 17 years of age in February 2012.

64. As to the assessment of the age by the nurse, the Applicant submits that even with scientific tests, it is almost impossible to accurately establish a person's age. The Applicant relies on a scientific article filed as Exhibit A-18, where medical experts state that: "Unfortunately, there is no 'scientific method' that can provide a precise assessment of chronological age in individuals between 15 and 20 years of age—the very group for whom the issue of age assessment is most salient". The nurse was simply speculating when he asserted that GS was approximately 13 or 14 years of age.

65. In regard to the assertion of the school Headmaster this is contained in a Note to the Case File and there is no record of an interview of the headmaster. That evidence cannot be relied upon.

66. Even in their investigation report, the investigators conclude that: "it is more likely than not that Ms. S was under the age of 18 at the time of her sexual relationship with [Applicant]". "More likely than not" refers to the balance of

probabilities whereas the alleged victim's age is a fact that had to be established on clear and convincing evidence.

67. The investigators failed to explain satisfactorily the reason for discarding the testimony of Mr. Sumahili Okongo who informed them that the Applicant was dating a waitress in the *nganda* bar who was approximately 24 years of age and who had a young daughter of three or four years of age.

68. The investigators failed to explore any exculpatory evidence. In particular, they did not interview the alleged victim's older sister J even though she allegedly worked in the *nganda* bar as a waitress and her name was mentioned several times by various people, including the alleged victim and her mother.

69. The investigators did not attempt to locate Georgette when they visited the *nganda* in February 2012. They did not interview either the manager or the owner. The Applicant produced a witness who testified that she employed a female in her 20s by the name Georgette. The Respondent was unable to discredit this witness or impeach her testimony.

70. The Respondent relies heavily on an email from Ms. Besong, where she summarized her conversation with the Applicant. According to the Respondent, this email contains an admission by the Applicant that he had a sexual relationship with GS. The email, however, contains no such admissions. The Respondent misconstrues the contents of this email by attributing words to the Applicant that he never proffered. The Applicant merely stated that the only name of a girl who is related to the allegations that were made against him was GS. The conversation between the Applicant and Ms. Besong took place in August 2011. In June 2011, the Applicant had already paid the S family a settlement. Therefore, it was entirely plausible for the Applicant to know the name GS and to be aware that she was making false accusations against him when he spoke with Ms. Besong. He disclosed her name to Ms. Besong without ever admitting that he had sex with GS.

71. The statements of the witnesses who were interviewed and who were not called at the hearing should not be relied upon as they do not satisfy the test laid down by UNAT in the case of *Nyambuza*[4]*:*

> 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 […]

Respondent's submissions

72. It was established, by clear and convincing evidence, that the Applicant had sexual intercourse with a minor.

73. On the identity of the alleged victim, the Respondent submits that the Applicant had sex with a girl named GS. The Applicant does not deny having had sex with member of the S family, but claims that her name was Georgette.

74. Prior to the investigation into this matter, the Applicant himself stated that the name of the girl was GS. He did so on 29 August 2011, during a meeting with Ms. Besong. Ms. Besong testified that, on that day, she met with the Applicant for the express purpose of establishing whether he could provide the name of the girl with whom he had been accused of having sex. She explained to the Applicant that MONUSCO had received an allegation that he had impregnated a girl, and she asked him whether he could provide the name of the girl. The Applicant told Ms. Besong that the girl's name was G. The Applicant never mentioned the name Georgette.

75. During his testimony, the Applicant gave various inconsistent explanations as to the reason for having given the name G to Ms. Besong. Initially, he appeared to state that the name "G" had been provided in the anonymous complaint submitted to MONUSCO. When it was pointed out to him that the anonymous complaint did not contain the name "G", he changed his story and claimed that Ms. Besong had simply sought confirmation from him that the name of the girl

[4] 2013-UNAT-364 at para. 35.

was "G". When further clarification was sought, he appeared to state that, before meeting with Ms. Besong, a colleague had told him that he had impregnated a girl named "G", which ostensibly accounted for his having provided that name to Ms. Besong.

76. GS herself stated that she had sexual intercourse with the Applicant. GS' statement is highly credible because she was able to positively identify the Applicant in a photographic array and she knew personal information about him, including his name, position and duty station.

77. Mr. CS confirmed that GS visited his clinic in connection with a miscarriage. He further stated that, at the time, GS told him that she had had sex with a MONUSCO staff member. Mr. CS positively identified the Applicant, through a photographic array, as the person who paid the bill for GS' treatment.

78. The testimony of Ms. GNS who claimed to be the owner of the *nganda* and claimed to have employed a woman named "Georgette", is unreliable on a number of fronts. The Applicant proffered her as a witness at the last possible moment despite having had ample opportunity to do so beforehand. Ms. GNS' testimony was directly inconsistent with the Applicant's own testimony; specifically, she testified that "Georgette" worked at the *nganda* from 2009 to 2014, whereas the Applicant testified that "Georgette" stopped working at the *nganda* in early 2011, before his departure from Dungu.

79. The Applicant's suggestion that the S family may have framed him is not plausible. The Applicant's willingness to enter into an informal agreement with the S family, whereby he agreed to pay them one goat and USD1, 250 – a sum greater than his monthly salary – cuts strongly against his assertion that this was a malicious complaint.

80. Regarding the age of the alleged victim, the Respondent submits that GS was less than 18 years of age at the material time that the Applicant had sexual intercourse with her.

81. GS herself stated that she was about 15 years old at the time of her interview (February 2012), meaning that she was about 14 years old when she had sex with the Applicant in early 2011.

82. Mr. CS stated that, when GS visited his clinic in June 2011 she was about 13 or 14 years old. Mr. CS' recollection was consistent with his record book, which bore an entry stating that GS was 14 years old at the time of her visit.

83. The Headmaster of the school, that GS attended, stated that she was about 15 years old at the time of his meeting with investigators in February 2012 meaning that she was about 14 years old when she had sex with the Applicant. The Headmaster's account was consistent with the school records, which showed that GS attended the sixth grade. The fact that the victim attended a grade in which students would normally be underage tends to support the inference that she was a minor.

84. On the issue of which school GS attended it was reasonable for the investigators to go to E.P Lilika School and not to Belewete School mentioned by GS as Mr. Uliana explained that the investigators found the E.P Lilika School by asking to be taken to the school attended by pupils under the age of 18.

85. The testimony of Mr. Okongo who testified on behalf of the Applicant that the Applicant had a relationship with a woman of age should be rejected. Mr. Okongo's testimony carries no probative value, because it derives entirely from what the Applicant told him.

86. In cross-examination, Mr. Okongo conceded that he did not know the woman's name; that he did not know where she lived; that he had never asked her how old she was; that he had never asked her mother how old she was; that he had never seen an identification document for the woman; and that it was the Applicant himself who had told him who the woman was on the same day that he was questioned by the police. His assessment of the age of the woman age was based exclusively on the fact that she had a child.

87. In regard to the scientific evidence relied on by the Applicant about age assessment the Respondent submits that the Applicant's argument is misguided.

First, in the present case there was reliable, firsthand evidence that the victim was a minor, in the form of her own statement. Second, the reality in many of the volatile environments where the Organization operates is that many children, especially those who are most vulnerable, do not have government-issued identification documents.

Considerations

88. The main issue in the case is whether the girl with whom the Applicant had sex was GS and whether she was a minor then or with Georgette who was of age.

89. The role of the Tribunal is to consider the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available, and draw its own conclusions. The Tribunal is no way bound by the conclusions reached by the investigators.

90. UNAT has held in *Abu-Hamda*[5] that in exercising judicial review in disciplinary cases, it considers: "(1) whether the facts on which the disciplinary measure was based have been established; (2) whether the established facts legally amount to misconduct under the […] Staff Regulations and Rules; and (3) whether the disciplinary measure applied was disproportionate to the offence". (See also *Masri* 2010-UNAT-022).

91. In *Sanwidi*[6] Judge Izuako held:

> The Tribunal is entitled to examine the entire case before it. In other words, the Tribunal may consider not only the administrative decision of the Secretary-General to impose a disciplinary measure but also examines the material placed before him on which he bases his decision in addition to other facts relevant to the said material. Such other facts may include the charge, the investigation report, memoranda and other texts and materials which contribute to the conclusions of the investigators and OHRM.

[5] 2010-UNAT-022 at para. 25.
[6] UNDT/2010/036, para. 7.1.4.

92. UNAT further observed in *Hallal*[7] that it is the duty of the Dispute Tribunal to determine whether a proper investigation into the allegations of misconduct has been conducted.

93. In *Diakite*[8] the Tribunal observed:

> The Tribunal has first to determine whether the evidence in support of the charge is credible and sufficient to be acted upon. Where there is an oral hearing and witnesses have been heard the exercise is easier in the sense that the Tribunal can use the oral testimony to evaluate the documentary evidence. Where there is no hearing or where there is no testimony that can assist the court in relation to the documentary evidence the task may be more arduous. It will be up to the Tribunal to carefully scrutinise the evidence in support of the charge and analyse it in the light of the response or defence put forward and conclude whether the evidence is capable of belief or not. In short the Tribunal should not evaluate the evidence as a monolithic structure which must be either accepted or rejected *en bloc*. The Tribunal should examine each piece of relevant evidence, evaluate its weight and seek to distinguish what may safely be accepted from what is tainted or doubtful.

94. Whether the Applicant made the statement that the Respondent submits he made to Ms. Besong on the name GS depends on the credibility of the Applicant on that statement.

95. As a trier of facts, a first instance judge has the means and power to assess the veracity and accuracy of a witness. There is no particular rule or formula that can be used in the assessment of credibility. In a jury trial, jurors are told to use their varied experiences in life to assess the credibility of witnesses. The same applies to a judge as a trier of facts. The judge should use his/her own varied experiences in life to engage in that exercise.

96. The findings of fact of a trial judge should rarely be reversed on appeal unless the findings are so perverse that no reasonable person would have come to the conclusions reached on the facts by the trial judge. Appellate courts in general will not disturb a finding of fact because they would have come to some other conclusion. In that connection the Tribunal refers to the following:

[7] 2012-UNAT-207, para. 27.
[8] UNDT/2010/024, para. 71.

> [A]ppellate courts have been repeatedly warned by recent cases at the highest level not to interfere with findings of fact by trial judges unless compelled to do so. This applies not only to findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach include the expertise of trial judges in determining what facts are relevant to the issues to be decided and what those facts are if they are disputed; that in making his decision the trial judge will have regard to the whole of the evidence presented to him whereas an appellate court can only consider aspects of that evidence; the atmosphere of the courtroom cannot be recreated by reference to documents; and duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court and will seldom lead to a different outcome in an individual case[9].

97. Very often the testimony of a witness can be counterchecked from other evidence, oral or documentary. In the absence of any documentary evidence the task becomes more arduous. In the present case, the Tribunal is confronted with two versions, that of the Applicant and that of Ms. Besong. The Tribunal had the benefit of listening to both and can only judge the credibility of each by their vocal demeanour as opposed to body language assessment as the testimony of the two was given and recorded by phone.

98. In an email Ms. Besong sent to Mr. Douglas Andrew Tremitière of the Conduct and Discipline Team on 29 August 2011 she wrote:

> Dear Duke
> Good morning once more.
> We called [Applicant] this morning and he has given us the girls (*sic*) name as, GS.

99. Ms. Besong called the Applicant following the complaint about a young girl. The Applicant, as submitted by the Respondent, stated that the name "G" had been provided in the anonymous complaint submitted to MONUSCO when in fact it was not. Then he stated that a colleague had told him that he had impregnated a girl named "G", which ostensibly accounted for his having provided that name to Ms. Besong. In court he explained that he gave the name of the girl he was accused of having impregnated.

[9] *Goyal v Goyal* [2014] EWCA Civ 523 (27 February 2014).

100. The Tribunal has carefully gone over the testimony of both the Applicant and Ms. Besong on that issue and has come to the conclusion that the Applicant did indeed mention the name G to Ms. Besong. The Applicant mentioned **a** G and from that statement taken solely no irresistible inference can or should be made that it was **the** G, subject of the misconduct that the Applicant was referring to (emphasis added). Whether that was the same G that the Applicant is alleged to have had sex with is another issue.

101. The other evidence on which the Respondent relies heavily on in his submission that the alleged victim was the minor GS is the following: the statements of GS and her mother DS, the statement of the nurse CS together with a document from the clinic where the nurse was posted; and a note on file which a record of a conversation that the investigators had with the headmaster of E. P. Lipika School.

102. None of the witnesses was called to give evidence in court. In regard to GS and DS, the Respondent states that they could not be located. The absence of CS and the Headmaster of E.P Lilika School was not explained.

103. In the case of *Applicant*[10] UNAT held,

> In the instant case, it proved impossible for the Administration to produce the Complainants to testify, and be cross-examined, before the Dispute Tribunal. This situation, while certainly regrettable, was not of the making of the Organization and should not be held against it. The United Nations operates globally and in situations which can prove highly transient or volatile. The Appeals Tribunal accepts that the Organization was unable to produce witnesses in the South Sudan almost five years after the complained-of incidents.

104. The same circumstances are present here. The witnesses could not be located following the interviews they gave to the investigators. The Tribunal is fully conscious of the fact that the region where the incident allegedly took place is a remote, impoverished and volatile area where neither the police nor the inhabitants were very cooperative with the investigation.

[10] UNAT-2013-302 at para. 38..

105. In *Diabagate*[11], UNAT held that statements of witnesses who were not placed on oath before being interviewed and which were not signed were considered as untrustworthy and unreliable. The relevant part of the judgment reads:

> The documentary evidence before the UNDT included various police and other reports, the OIOS Report and the typed statements of the witnesses' interviews taken during the OIOS investigation. The investigative interview of V01 was conducted in Swahili and subsequently transcribed into an English-language statement. V01 was not placed under oath before giving her interview and she did not sign the transcribed version of her interview statement. As such, V01's transcribed statement, in which she said that Mr. Diabagate had raped her and engaged in sex with her, was neither reliable nor trustworthy; it was solely hearsay and insufficient, by itself, to prove the charge that Mr. Diabagate engaged in sexual activity with a minor. Similarly, the other written documents were replete with hearsay and multiple hearsay and were neither trustworthy nor sufficient to prove that Mr. Diabagate had sex with a minor (V01).

106. In *Nyambuza*[12], UNAT held:

> 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.

107. In that case, UNAT found that the statements did not have any probative value and therefore could not constitute proof of misconduct. The operative part of the judgment reads:

> The written statements signed by Mssrs. Mahudi and Lievain during the SIU investigation are lacking indicia of reliability or truthfulness. First, the statements were written in French; but the averment of truthfulness was in English, and the witnesses may not have been able to read English. Second, under the English averment of truthfulness, each witness merely made the representations that the statement was "true to the best of [his] knowledge" and "if [he] intentionally reveal[ed] false information, [he] may become liable to administrative or disciplinary action".

[11] 2014-UNAT-403 at para. 34.
[12] 2013-UNAT-364 at paras. 35 and 36.

> These representations are significantly different than those required under Article 17(3) of the UNDT Rules of Procedure (UNDT Rules). The phrase "to the best of my knowledge" is problematic and, since neither Mr. Mahudi nor Mr. Lievan was a staff member at the time he gave the written statement, the possibility of administrative or disciplinary action offered little assurance of the witness's truthfulness.

108. GS, DS and CS gave their statements either in French or Congolese and these were translated into English. In the preamble to the statements of GS and DS, the requirement of speaking the truth appears as follows: "All staff members have a duty to cooperate with investigations, including participation in interviews. You are expected to answer questions completely and truthfully". Neither GS nor DS were staff members of the Organization at the material time.

109. In the preamble to the written statement of CS there is no requirement of speaking the truth at the start of the interview.

110. All three interviewees signed the following at the end of their respective statement:

> I, the undersigned declare that this is a true and accurate record of the interview and I acknowledge that it may be used in a disciplinary procedure.

111. As was stated in *Nyambuza*[13] the use of words like "to the best of one's knowledge" may be problematic. In the same way the use of the words "true and accurate record" may be problematic. In addition the interviews were conducted in French and Congolese and the averment that the respective statement was "a true and accurate record" was in English. There is no indication that the witnesses were able to read or understand English.

112. For the above reasons the Tribunal cannot act on the statements unless, since the statements were not made under oath, there are "some other indicia of reliability or truthfulness" that confer probative value on them.

[13] *Supra*, at para. 36.

113. It was submitted that indicia exist to render the statement of GS probative in that she identified the Applicant from a photographic array.

114. It is settled now that it is perfectly permissible to make use of a photographic array for the purpose of identifying a suspect in a criminal case or an individual involved in a case of misconduct. In the case of *Liyanarachchige*[14] the Tribunal held,

> It is not disputed that the use of the standard identification parade aligns the suspect with people of similar stature and origin as him. The witnesses are then asked whether they can pick him/her up. Such a procedure cannot be resorted to in all cases. This is so because the witnesses may not be available in the place or jurisdiction where the investigation is taking place or because the suspect may not be physically available or there is a need to protect witnesses as in the present case given the nature of the case under investigation.

115. The Tribunal in *Liyanarachchige* referred to the decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Fatmir Limaj et al*[15], Case No. IT-03-66-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), Trial Judgment, 30 November 2005 where the ICTY held:

> A particular concern with a photo spread identification is that the photograph used of the Accused may not be a typical likeness even though it accurately records the features of the Accused as they appeared at one particular moment. To this the Chamber would add, as other relevant factors, the clarity or quality of the photograph of the Accused used in the photo spread, and the limitations inherent in a small two-dimensional photograph by contrast with a three dimensional view of a live person. It is also a material factor whether the witness was previously familiar with the subject of the identification, i.e. whether he is "recognising" someone previously known or "identifying" a stranger.
>
> While the Chamber has not been prepared to disregard every identification made using a photo spread of one or more of the Accused in the present case, it has endeavoured to analyse all the circumstances as disclosed in the evidence, and potentially

[14] UNDT/2010/041 at para. 43.
[15] At para. 19.

> affecting such identifications, conscious of their limitations and potential unreliability, and has assessed the reliability of these identifications with considerable care and caution. Among the matters the Chamber regarded as being of particular relevance to this exercise was whether the photograph was clear enough and matched the description of the Accused at the time of the events, whether the Accused blended with or stood out among the foils, whether a long time had elapsed between the original sighting of the Accused and the photo spread identification, whether the identification was made immediately and with confidence, or otherwise, whether there were opportunities for the witness to become familiar with the appearance of the Accused after the events and before the identification, be it in person or through the media.

116. The observations in the *Fatmir Limaj et al* case were made in the course of criminal proceedings. The evidence in a criminal case including identification evidence must not be open to reasonable doubt. In disciplinary proceedings it is well settled now that the evidence must be clear and convincing and that would include identification evidence.

117. In considering whether the identification of the Applicant constitutes clear and convincing evidence, the Tribunal is mindful of the word of caution referred to by the ICTY. The questions that arise from the word of caution in the *Fatmir Limaj et al* case are the following: (a) Was the photographic array of good quality?; (b) Did it contain a sufficient number of males alongside the photo of the Applicant?; (c) The familiarity of GS with the Applicant; (d) The time that elapsed between the moment when GS saw the Applicant and the identification; (e) Whether the identification was made immediately and with confidence; and (f) Whether there were opportunities for GS to become familiar with the appearance of the Applicant after the events and before the identification was made and thus be prone to pick him.

118. The photographs used in the photographic array were the grounds passes of the Applicant and other MONUSCO staff members. They were what the ICTY calls small, two-dimensional photographs. There were seven such photographs that indicated clearly the participants were MONUSCO staff members with only the names being obliterated. From that photo array GS picked the Applicant who was third on the photo array.

119. One important question that now arises is the following: since GS had already stated to the investigators that the person who had a relationship with her was from MONUSCO was it proper and fair to use grounds passes where MONUSCO is written in bold letters? Was there not a danger that GS would more easily identify a man from MONUSCO? Was not that the danger that the ICTY would have been referring when it referred to "opportunities for the witness to become familiar with the appearance of the Accused after the events and before the identification, be it in person or through the media?"

120. Though it would have been better to have used photographs without the reference to MONUSCO, the issue is whether the identification exercise suffered from the flaws referred to by the ICTY. The Tribunal takes the view that the photographic array was of a fairly satisfactory quality; it contained seven photographs of males having almost similar features as the Applicant; the identification was done almost one year after the alleged act; GS may have been influenced by the fact that she saw MONUSCO on the photographs.

121. The time lag and the use of the MONUSCO grounds passes would make the identification unreliable. But even if that were not so the Tribunal is unable to act on the written statement of GS on the identification as it does not satisfy the test of written statements decided by UNAT in *Nyambuza*. The Tribunal is unable therefore to use that identification as indicia to add probative value to the statement of GS as to the relationship she alleges she had with the Applicant.

122. The statement of CS, the nurse, does not satisfy the *Nyambuza* test either. Are there any indicia that would it probative? Making exception to what is contained in the statement of CS, there are no independent indicia. His identification of GS and of the Applicant is contained in his own statement which is of no probative value. Even his identification of the Applicant as recorded by the investigation is open to serious doubt. He stated that he was not sure whether the person who had attended his clinic was the Applicant. "Peut-être c'est lui qui a visité mon hôpital et je pense que il (*sic*) il a payé la facture de GS (*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). On the identification of the Applicant his

statement following the identification reads: "Peut-être c'est le numéro 3" (Maybe it is number 3).

123. The Headmaster of the school allegedly attended by GS was not interviewed. All that the investigators presented by way of facts to the Tribunal was a "Note to the Case File" dated 28 February 2012 that describes a visit to the E.P. Lilika School where the investigators talked to the Headmaster who told them that a young girl called GS was a student in class 6B and was 15 years old. The Headmaster was shown a photograph of a girl whom he identified as GS. That statement is of no value to establish either the identity of GS or her age as it is pure hearsay and has not been tested by cross examination or contained in a statement satisfying the *Nyambuza* test.

124. In addition two names of schools were mentioned in the course of the investigation. The investigators went to E.P. Lipika School whereas GS mentioned Belewete School. Mr. Uliana explained that the name did not matter much to him. The Tribunal is unable to agree that it was reasonable for the investigators, having found independent evidence of GS' attendance at the E.P. Lilika school, not to search for further schools the more so as Mr. Uliana explained to the Tribunal that they found the E.P. Lilika School by asking to be taken to the school that served pupils under the age of 18. The Tribunal does not consider that evidence to be clear or convincing to establish the existence of one school. Nor can the Tribunal take judicial notice of such a fact. The matter should have been probed further by the investigators.

125. The CDT report about anonymous emails making false accusations against MONUSCO staff and which ultimately proved to be false cannot be brushed away lightly. This is a fact that needed to be investigated fully so as to dismiss any doubt about the complaint made against the Applicant. It is significant to note that in the report, after reciting a few instances, states that the same thing was happening to the Applicant. The Respondent submits that he "is and was mindful of the fact that not all complaints are well-founded and some may, indeed, be efforts to extort money on a false premise".

126. The Tribunal cannot agree. The practice of people making false accusations or allegations was not investigated. That issue was never canvassed when the witnesses were interviewed. Instead the investigator went on the premise that the Applicant was involved in the misconduct and the investigation followed that path.

127. The Respondent also submits that the payment of compensation to the S family is indicative of the guilt of the Applicant. 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. The Respondent has not rebutted that statement by clear and convincing evidence and the Tribunal cannot from that sole agreement infer irresistibly that this is a pointer towards the guilt of the Applicant.

Conclusions on the charge of misconduct

128. Evidence of misconduct must be clear and convincing. A person named GS may have existed. She may have been a minor. The evidence of this fact contained in the statements of witnesses GS, DS, CS and the Note on file about the visit to the school E.P. Lipika cannot be acted upon for the reasons given above.

129. In addition a report of the CDT itself referred to the possibility that the Applicant might have been guilty of malicious accusations. This aspect was not investigated. The Tribunal cannot speculate on what the conclusions would have been. But the Tribunal points out that if there was a suspicion of a malicious accusation and it was borne out there would have been no basis for an investigation of any misconduct on the part of the Applicant. But what happened is that the investigators proceeded on the basis that the report of misconduct consisted *prima facie* evidence of misconduct to the exclusion of the possibility of a malicious accusation.

130. In this regard the Tribunal will endorse what Judge Meeran stated in *Mmata*[16]

> It is of utmost importance that an internal disciplinary process complies with the principles of fairness and natural justice. Before a view is formed that a staff member may have committed misconduct, there had to have been an adequate evidential basis following a thorough investigation. In the absence of such an investigation, it would not be fair, reasonable or just to conclude that misconduct has occurred [original emphasis).

131. The rest of the evidence consists of the statement made to Ms. Besong by the Applicant about the name of the girl with whom he had a relationship as being G and in the agreement entered into by the Applicant with the S family, which do not constitute clear and convincing evidence of the alleged misconduct.

132. The Tribunal accordingly finds that the Respondent has failed to establish the charge against the Applicant by clear and convincing evidence. The Tribunal concludes that the disciplinary measure imposed on the Applicant was not justified.

Redaction of name

133. The Applicant has requested that his name be redacted as the facts of the case are sensitive, the Applicant is charged with impregnating a minor, a serious accusation. The Respondent opposes that request on the ground that it has been decided by UNAT that names of litigants are routinely included in judgments of the internal justice system in the interests of transparency and accountability and that the facts of the present case and the allegations do not justify redaction of the Applicant's name.

134. There is a long line of decisions of the UNAT that have held that it is only in exceptional and sensitive cases that the name of a litigant or a witness will be redacted because if "confidentiality attached (*sic*) in each case, there would be no transparency regarding the operations of the Organization, which would be

[16] UNDT/2010/053 at para. 45.

contrary to one of the General Assembly's purposes and goals for the internal justice system."[17]

135. The case law of UNAT indicates that redaction has been granted in rare cases. The Tribunal will here set out these decisions.

136. In different Orders issued by a UNAT Judge it has been held that

> The names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability[18].

137. In *Ahmed*[19], the UNAT Judge ruled that,

> The 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.

138. In *Finiss*[20], a case that concerned a complaint by a staff member about his non-selection for two posts on the ground that the decision was tainted with prejudice and was unlawful respectively, UNAT observed that the naming of witnesses in the UNDT judgment "was unfortunate and unnecessary. The names of the witnesses and the PCO [Programme Case Officer] shall be redacted from the impugned judgment". UNAT gave no reasons for the redaction except that the naming of the witnesses was "unfortunate".

139. The case was remanded for a *de novo* hearing before a different judge on the ground that the records in the first case were not available.

140. When the case was heard before Judge Shaw, a request was made not to name the witnesses who would testify on behalf of the Secretary-General. Counsel for the Secretary-General made that request on the ground that the Applicant, Mr. Finiss, was targeting one witness for public humiliation. Judge Shaw gave the following ruling:

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[17] *Williams v Secretary-General of the International Civil Aviation Organization*, UNAT Order No.146 (2014), at para5.
[18] *Servas*, Order No. 127 (2013), para. 5.
[19] Order No.132 (2013), para. 4.
[20] 2012-UNAT-210, para. 42.

> The General Assembly Resolution 63/253 reaffirmed that the new system of internal justice was to ensure respect for the rights and obligations of all staff members and the accountability of managers and staff members alike. The provisions of Article 9 of the Statue of the Dispute Tribunal provide for oral hearings to be held in public unless exceptional circumstances require them to be closed. Article 11.6 of the Statute provides that: "The judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal."
>
> The Tribunal must therefore balance the need for accountability with the protection of personal data in each case according to its circumstances.
>
> The statute does not define "personal data", but for the purposes of judgments, it is unlikely to include names. Applicants are routinely named by the UNDT and UNAT in the headings of published cases except in circumstances where anonymity is granted by the Tribunal.
>
> The Tribunal emphatically does not entertain the naming of any person in a judgment for the purpose of humiliation, although it is accepted that adverse findings against an individual may cause some embarrassment to that person.
>
> In the present case, the actions and behaviours of some staff members and managers have been called into serious question. In the circumstances of this case, having balanced the private effects of naming individuals against the public requirement for open justice and accountability, the Tribunal has decided to name all those individuals who appeared and gave evidence. Any person who did not give oral evidence before the Tribunal will be referred to in this judgment by their functional title at the time of the contested decision[21].

141. The learned Judge found for Mr. Finiss and mentioned the names of all those involved in the selection process. She even referred them to the Secretary-General for appropriate action to be taken to enforce accountability on account of their responsibility for the biased assessment and unlawful selection decision.

142. The Judgment of Judge Shaw was confirmed on appeal and UNAT did not redact the names mentioned in the first instance decision. The appeal against referral was rejected by UNAT and it endorsed the following conclusion of Judge Shaw who decided that the,

[21] *Finiss* UNDT/2012/200, paras. 15-19.

> [s]election exercise [that] was so seriously flawed beyond the admitted procedural error that it reflected badly on the Organization which is committed to ensuring and upholding the highest standards of efficiency, competence and integrity of its staff members in the discharge of their functions as international civil servant.

143. In *Pirnea*[22], UNAT held,

> Article 10(9) of the Statute provides that "[t]he judgements of the Appeals Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal". Article 20(2) of the Rules provides that "[t]he published judgements will normally include the names of the parties".
>
> The foregoing provisions make it clear that one of the purposes or goals of the new system of administration of justice is to assure that the judgments of the Appeals Tribunal are published and made available to the Organization's staff and the general public. Public dissemination of the appellate judgments helps to assure there is transparency in the operations of the Appeals Tribunal. It also means, sometimes fortunately and other times unfortunately, that the conduct of individuals who are identified in the published decisions, whether they are parties or not, becomes part of the public purview.

144. In *Lee*[23] it was held by UNAT that,

> [I]t is clear that one of the purposes or goals of the new internal justice system is to assure that the Appeals Tribunal judgments are public documents that are published and widely made available to the Organization's staff and the general public. Other purposes or goals of the new internal justice system are to promote transparency and accountability in the operations of the Organization, as well as the new internal justice system.

145. In *Utkina*[24], UNAT held that,

> The Statute of the UNDT provides for transparency in the work of the Dispute Tribunal and for the publication of judgments. Article 11 of the UNDT Statute provides that "the judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal". In addition, Practice Direction No. 6 (Practice Direction on Records of the Dispute Tribunal, 27 April 2012, para. 4).of the Dispute Tribunal provides, inter alia, that "the work of the tribunal

[22] 2014-UNAT-456, para. 17.
[23] 2014-UNAT-481, para. 34.
[24] 2015-UNAT-524, paras. 17 and 18.

> should be open and transparent, except insofar as the nature of any information that is deemed sensitive".

146. It was also held in the same case,

> The notion of transparency of, and access to, information, is very important in any Organization. It allows for openness, accountability and good governance, which indeed are the overarching principles of this Organization. It is therefore important that requests for the redaction of evidence be carefully examined within this context and only be permitted where it is necessary having considered the facts of each case. A request for redaction can only be permissible and/or permitted where it is necessary to protect information of a confidential and sensitive nature.

147. In the case of *Luvai*[25], the Applicant challenged his non selection for a position in the Department of Safety and Security (DSS) in the United Nations Office Nairobi (UNON). In the first instance judgment, the UNDT found for Mr. Luvai and in the judgment the learned Judge also determined that the Chief of UNON/DSS, the Assistant Chief of Security UNON and the Human Resources Officer, UNON, had abused their authority.

148. UNAT reversed the judgment of the UNDT. In his appeal the Secretary-General sought the redaction of the names of the Chief of UNON/DSS, the Assistant Chief of Security UNON and the Human Resources Officer, UNON and submitted that

> [T]he naming of the Chief of Security, Deputy Chief of Security and the Human Resources Officer in the UNDT Judgment was unnecessary and the particular circumstances of this case prejudicial to them, in light of the UNDT's finding of harassment and abuse of authority without due process being afforded to the individuals concerned.

149. UNAT held,

> The principle of openness and transparency, which must underpin an organization such as the United Nations, means that the Appeals Tribunal is not minded to grant the relief sought by the Secretary-General. However, comfort can be taken from the fact that this Tribunal has found the UNDT to have acted in excess of its

[25] 2014-UNAT-417, para. 66 and 67.

> jurisdiction and unfairly with regard to the harassment and abuse of authority findings it made against the individuals concerned.

150. It would appear from the *Luvai* decision that where individuals are cleared their names should be redacted notwithstanding the several pronouncements of UNAT that the paramount consideration in approaching a request for redaction of names should be the notions of transparency, access to information, openness, accountability and good governance. These considerations were apparently not in the forefront of UNAT in the *Finiss* decision in 2012 and it also appears that the 2012 and 2014 *Finiss* decisions on redaction of names are contradictory.

151. The only conclusion this Tribunal can draw from all the pronouncements that the general principles of transparency, access to information, openness, accountability and good governance militate against redaction. But if there is a requirement to protect sensitive information or if an individual is wrongly blamed or charged, then redaction would be permissible. It is all very well to prescribe general principles on the redaction of names. The more crucial question is how to apply the general principles to individual cases. The Tribunal takes the view that the general principles cannot be of universal application in an absolute manner. Each request for redaction should be decided having regard to the particular facts and circumstances of a case.

152. The nature of the charge against the Applicant is not only serious but also exposes sensitive materials affecting his personal conduct and possibly his private life. The Tribunal has cleared him of the charge for the reasons above and it would be most unfair even in the name of transparency, access to information, openness, accountability and good governance to allow his name to remain in the Judgment.

153. The Tribunal therefore decides to redact the name of the Applicant from that judgment.

Judgment

154. The Tribunal rescinds the decision to summarily dismiss the Applicant. In the alternative the Tribunal makes an award of 12 months net base salary in favour of the Applicant.

(Signed)

Judge Vinod Boolell

Dated this 14th day of March 2016

Entered in the Register on this 14th day of March 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi