UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/119
Judgment No.: UNDT/2023/085
Date: 14 August 2023
Original: English

**Before:** Judge Francis Belle

**Registry:** Nairobi

**Registrar:** Eric Muli, Officer-in-Charge

BISTA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**
Manuel Calzada

**Counsel for the Respondent:**
Isavella Maria Vasilogeorgi, DAS/ALD/OHR, UN Secretariat
Maazatu Umar-Sadiq, DAS/ALD/OHR, UN Secretariat

## Introduction

1. By an application dated 12 December 2022, the Applicant is contesting the disciplinary measure imposed on him of separation from service with compensation *in lieu* of notice and with termination indemnity, in accordance with staff rule 10.2(a)(viii) ("contested decision").

2. The Respondent filed a reply on 10 January 2023 urging the Tribunal to reject the Applicant's arguments and dismiss the application in its entirety.

## Facts

3. Between 22 June 2011 and 30 June 2014, the Applicant served with the United Nations Volunteer ("UNV") at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO").[1]

4. In September 2011, the Applicant's brother started working as a United Nations Secretariat staff member in the former United Nations Integrated Peacebuilding Office in the Central African Republic ("BINUCA"), now the United Nations Multidimensional Integrated Stabilizations Mission in the Central African Republic ("MINUSCA").[2]

5. From 12 October 2015 to 14 May 2018, the Applicant was recruited and served at the P-3 level with MONUSCO as an Engineer. He was laterally transferred to the United Nations Support Mission in Libya ("UNSMIL") on 15 May 2018, where he served until his separation on 28 November 2022.[3]

6. On 31 July 2017, the MONUSCO Conduct and Discipline Team ("CDT"), Goma, requested the MONUSCO Special Investigations Unit ("SIU") to initiate investigations into allegations of misconduct regarding a possible misrepresentation

[1] Application, para. VII(1).
[2] Reply, para. III(8).
[3] Application, para. VII(3); reply, para. 13.

involving the Applicant when he created his Profile and Application Form ("PAF") in 2015. This was when the Applicant applied for the international post of an Engineer with MONUSCO.[4]

7. SIU investigated the matter, and, on 19 March 2018, an SIU Mission Security Officer transmitted the findings and recommendations to the Chief Security Officer of MONUSCO in Goma.[5] SIU concluded that the Applicant knowingly made a false statement when he established his PAF which led to the creation of an erroneous contract and recommended for appropriate actions to be taken against the Applicant for misrepresentation.[6] The SIU found that in 2015 when applying for a position in MONUSCO, the Applicant submitted a Personal History Profile ("PHP") form without indicating that he had a family relative employed by the United Nations.

8. By memorandum dated 15 September 2022, the Director, Administrative Law Division ("ALD") transmitted to the Applicant a Code Cable, dated 23 February 2021, from the Deputy Special Representative in MONUSCO and United Nations Resident Coordinator, to the Department of Management Strategy, Policy and Compliance ("DMSPC"), and through it to the Office of Human Resources ("OHR"), referring his case for appropriate action. The referral was based on the SIU investigation report dated 19 March 2018.[7] The Applicant was requested to provide his response to the memorandum.

9. The Applicant provided the required response on 7 November 2022.[8]

10. Following a review of the entire dossier, on 28 November 2022, the Under-Secretary-General ("USG")/DMSPC concluded that the allegations against the Applicant had been established by clear and convincing evidence. The USG/DMSPC further concluded that the Applicant's actions constituted serious misconduct in

[4] Application, annex 3.1 (SIU Investigation Report), at paras. 1 and 2.
[5] *Ibid.*
[6] *Ibid.*, at page 6, paras. 13(a) and (b).
[7] Application, annex 3.3; reply, annex R/5.
[8] Application, annex 3.4; reply, annex R/6.

violation of staff regulations 1.2(b) and staff rule 1.5(a) and decided to impose on him the contested decision.[9]

**Submissions**

***The Applicant's case***

11. The Applicant's case is summarized below.

a. He is the biological half-brother of SRB. They have the same biological father but different biological mothers. SRB joined BINUCA in 2012.

b. The Applicant admits that he failed to disclose in his PHP that SRB was a relative for the 2015 and 2018 job openings he applied for.

c. The relevant issue for determination is whether the Applicant's mother and his biological father ever constituted a family in any substantial understanding of the term, and concurrently whether the Applicant and any of the other children of his father ever formed part of a nuclear or extended concept of a family.

d. The Applicant submits that he never intended to mislead, he did not act with any form of negligence, and was guided by two honestly held beliefs: that he was not aware that SRB was working with the United Nations; and that even if he had been aware, he may not have thought that he needed to declare the link, given the estranged and alienated nature of the filial relationship.

e. Although he and SRB share a biological father, the circumstances of their birth are different and contrasting in terms of Nepalese customary and civil law and corresponding concepts in Nepalese Society as to who is

[9] Application, annex 2; reply, annex R/7.

considered a son or a brother. SRB is the son from a legally binding marriage between his father and his mother. As such he has enjoyed unquestioned legal and social recognition from birth. On the other hand, the Applicant is the child of an out-of-wedlock relationship between the biological father he shares with SRB and his mother who never married the father, or had anything resembling a marriage, whether *de facto* or *de jure*. The Applicant has never been issued with a birth certificate confirming his parentage. At the age of 16, he was issued with a citizenship certificate that mentions the putative father's name but not the mother's.

f. Until the promulgation of the Nepalese Civil Code (2018), the Applicant had no official status or recognition as a son of his putative biological father, and conversely SRB and the Applicant did not consider each other as brothers in the sense intended in the United Nations Staff Regulations and Rules which take a clearly western concept of the term. SRB confirmed to the investigators that he did not think of the Applicant as his brother and that he also had not included the Applicant as his brother in his own PHP. SRB also confirmed that he was unaware of the Applicant working with the United Nations until SIU investigators approached him to be interviewed.

g. Neither Nepalese society, nor the respective families, or Nepalese law considered them as brothers as generally understood in western terms. This conceptualization is key to the applicability of the intent of staff rule 4.7 which is meant to prevent nepotism within the Organization, and which specifies the kind of family members that are intended to be prevented from working for the Organization simultaneously.

h. Time demands prevented the Applicant from engaging cultural consultants to inform the Tribunal of expert advice. The Administration, however, was not hampered by time constraints but failed to reach out to cultural consultants to get expert advice on this matter. No attempt was made

to verify the veracity of the information provided by the Applicant and SRB as to the status of children born out of wedlock relationships.

i. The Applicant submits that he was not required to disclose SRB as a brother or half-brother on the basis that within the context of Nepal law and customary practice, there was an honestly held belief by both the Applicant and SRB that they were not brothers, notwithstanding their blood links via their common putative father.

j. There is a distinction in the English language differentiating the terms 'brother' and 'half-brother'.

> The Oxford English Dictionary defines the word 'brother' as a noun, A. in family 1. 'a boy or man who has the same parents as another person'. It also defines the term ′half-brother' 2 as: 'a person's half-brother is a boy or a man with either the same mother or father as they have'. The term 'sibling' 3 is restricted to 'brother' or 'sister', with no meaning attached to the term 'half-sibling'. The Oxford dictionary also defined the term 'step-brother' 4 as the son from an earlier marriage of one's stepmother or stepfather.

In the absence of a marriage between the Applicant's mother and his biological father, the Applicant and SRB cannot be considered stepbrothers, nor do they fall under the definition of 'siblings', or 'brothers'.

k. The Applicant and SRB had known of each other's existence and blood links for approximately 30 years, but they had no contact at all during most of that period, and only met once, in 2010 at the funeral of their common biological father. At the time, neither was engaged in any capacity by the United Nations. Since then, they spoke again only once, briefly on the telephone in 2012 when SRB made a protocolary telephone call to the Applicant on the occasion of his marriage. Neither of these occasions were calls for extensive getting to know each other, or to develop any form of relationship between the two. The same applies to the four other children of their biological father with SRB's mother. These four biological half-siblings

of the Applicant have also not had any contact whatsoever with the Applicant except during the funeral. None of them considered the Applicant their brother. Nepalese society did not consider the Applicant as brother to the five other children of his putative biological father.

l. Whilst family members are generally aware of the careers of their siblings, this was not the case of the Applicant and any of his biological half-brothers or half-sisters. In fact, the Applicant was not aware of the careers or employment of any of these people, not having had anything resembling a family relationship. There have been no meetings of the half-siblings over their entire lifetimes, except in the context of the 2010 funeral ceremony. This was 12 months before SRB was employed by the United Nations, and one year before the Applicant was engaged as a UNV.

m. The half-siblings did not engage in any communication during the time they were engaged by the United Nations, and the investigators have not uncovered any such exchanges.

n. During exchanges with United Nations investigators and officers from OHR, the Applicant was not assisted by legal counsel. This placed him in a highly prejudicial position vis-à-vis experienced legal officers of the Organization tasked with building a disciplinary case against him. Much of the exchanges seen were clearly intended to entrap him into extracting contradictions. The Applicant submits that OHR officers do not operate with a mandate to obtain a balanced and objective outcome but, on the contrary, seek to obtain basis for disciplinary action. Their enquiries were inquisitorial.

o. Regardless of whether the Applicant and SRB consider themselves as brothers under the United Nations Staff Regulations and Rules, the issue arises whether in fact the Staff Regulations and Rules provide or require the disclosure of half-siblings, and assuming that there is awareness of actual United Nations employment. There is no definition or clarification as to what

is meant to be a brother. This is the case both in the applicable Staff Regulations and Rules, or in the PHP form itself. When applicants seek to complete the United Nations' PHP form dealing with family members to be disclosed, an automatic drop-down menu appears which, *inter alia*, includes the term 'brother', but not the forms 'half-brother', 'biological-brother', 'step-brother', 'adopted-brother' or 'cultural-brother'. There are a multitude of possible permutations of the term brother that are not found in other forms of family relationships. In the absence of a specific requirement in the drop-down menu of the term 'half-brother', or a clarification that the term 'brother' is to include also 'half-brother', the Applicant was not required to name SRB as his 'brother'.

p. This proposition is consistent with the provisions of staff rule 4.7(a) of then applicable ST/SGB/2018/1 (Staff Regulations and Rules of the United Nations) that specifically refers only to the term 'brother', disregarding any other possible format such as half-brother, or brother-in-law. If the legislator had intended to include half-brothers in the category under rule 4.7, then it should have done so with clarity, and not leave it to staff members to second guess its intentions in this respect.

q. The absence of a common set of parents brings uncertainty to the question. The Applicant would clearly be required to disclose either of his parents, and vice versa without need for a definition. One cannot be a half-father or mother, or a half-son or daughter; but one can certainly be a half-brother or sister, or be unaware of their existence, or given the Applicant's Nepal circumstances, not be legally or culturally considered a brother, or a son on account of birth arising from an out of wedlock relationship which is not sanctioned by the law, or society.

r. The Administration chooses to judge the Applicant as having acted with gross negligence. It imputes on the Applicant *mala fides* without basis. This includes the fact that investigators could not locate a birth certificate in

> the Applicant's official files, disregarding the fact that he was never issued one such certificate by virtue of his out-of-wedlock birth circumstances. The Administration alleges that the Applicant tried to avoid disciplinary measures by quickly seeking and obtaining recruitment with UNSMIL. It is unbecoming of the investigators to seek to link a regular recruitment process let alone the timing being in any way within the control of a staff member. Processes that in any case are not known for their fast pace, and which in any case can not in any way avoid a centralized disciplinary processes.

12. The Applicant prays for rescission of the contested decision, reinstatement, the reversal of any break in service that may have been implemented by the Administration and compensation for stress and damage to his reputation

***The Respondent's case***

13. The Respondent submits that there is clear and convincing evidence that the Applicant engaged in serious misconduct in violation of staff regulation 1.2(b) and staff rule 1.5(a).

a. The record contains clear and convincing evidence that, on at least two occasions, in 2015 and in 2018, the Applicant failed to disclose in his PHP forms that his half-brother, SRB, had been working for the Organization at the time when the Applicant was first recruited to MONUSCO and subsequently in his application to a job opening in UNSMIL.

b. It is undisputed that both Applicant's PHP forms in support of his respective applications to MONUSCO and to UNSMIL do not include any reference to SRB as a relative who was already employed by the Organization. Not only do the documents speak for themselves, but the Applicant so admitted in his 2018 SIU interview statement, in his 2022 SIU interview statement and in the application.

c. It is equally undisputed that when submitting both applications through Inspira, the Applicant certified the completeness and accurateness of both his 2015 and 2018 PHP forms and acknowledged that false or inaccurate information can lead to the termination of his appointment.

d. The fact that SRB commenced employment as a Secretariat staff member before the Applicant is also undisputed. Consequently, the Applicant's responses in the negative to the screening question "Are any of your relatives employed by the United Nations Secretariat?" In his 2015 and 2018 PHP forms were objectively inaccurate, and the corresponding certification incorrect.

e. 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.

14. The Applicant's counterarguments are without merit

a. The Applicant raises three principal arguments in defence: (i) that he and SRB are not recognized as relatives, despite their shared biological ties, either culturally or legally in their native Nepal; (ii) that staff rule 4.7(a) is not applicable in his case; and (iii) that there was no *mens rea* or *mala fides* in his actions.

b. As far as cultural recognition is concerned, the estrangement between the two half-brothers does not alter the fact that they are related. As far as the applicability of Nepalese law on the United Nations is concerned, it is common cause that the Organization is not bound by the domestic law of any of its Member States. This is a direct result of art. 105(1) of the United Nations Charter.

c. Throughout the investigation and the disciplinary process, the Applicant only referred to cultural reasons as to why he did not consider SRB as his relative, even though they are biological half-brothers. The issue of Nepal's "civil and customary law" has only been raised for the first time before the Tribunal. Consequently, this is the first instance that the Respondent has been afforded an opportunity to engage with the issue. Notwithstanding the fact that domestic legislation of individual Member States is immaterial for the determination of staff members' obligations towards the Organization, the Respondent notes that the Applicant has not provided any authority to substantiate his arguments about lack of legal recognition of his familial relationship with SRB. The Applicant's claim that time demands prevented him from engaging cultural consultants to inform the Court on this issue is misleading. Pursuant to staff rule 11.4(b), the Applicant had 90 days at his disposal to prepare and file a fully substantiated application. The Applicant chose to file the application, as is, within 14 days from the date of receipt of the Sanction Letter. Consequently, his lack of evidentiary support is the result of his own decision regarding when to file.

d. The Respondent reviewed the Applicant's argument that "until the promulgation of the Nepalese Civil Code (2018), [the Applicant] had no official status or recognition as a son of his putative biological father". The Applicant omitted to inform the Tribunal of the Children's Act, 2048 (1992), published with royal seal on 20 May 1992, which provided in relevant part that contrary to the Applicant's argument, in the eyes of the law in Nepal, the Applicant was not distinguished from any of his biological half-siblings.

e. The Applicant erroneously argues that staff rule 4.7(a) does not apply in his case, because he was not a "brother", but a "half-brother" to a serving staff member. The Applicant's argumentation is based on a narrow interpretation of the concept of brother, which the Applicant limits only to biological children who share both parents. This argument is unsustainable.

Children/individuals are considered siblings, whether they share both parents or only one parent. Children/individuals are also siblings when adopted, in which case they may not share any biological bond between themselves or between themselves and the adopting parents. The Organization has not placed any distinction on the biological bonds required for a person to be considered a sibling, in the legal sense of the word, to another person.

f. In any event, whether staff rule 4.7(a) applies to the Applicant or not was not for the Applicant to decide. The Applicant's only obligation was to provide a truthful response to a simple question, in accordance with the plain meaning of the terms used to formulate it. The Applicant's response was untruthful. Further, he was required to certify the truthfulness of his statements and thus it was incumbent upon him not to simply answer the question but to take steps to ensure the truthfulness of his statements.

g. The Applicant additionally argues that the purpose of staff rule 4.7(a) is "to allow the Organization to make an informed and considered decision as to whether any such relationship constitutes a bar to the employment of a subsequent relative" and notes that, given the estrangement, different functional areas, and different duty stations, the Organization could have allowed his employment. The Applicant misses the point that the pertinent disclosure needed to have happened before the Applicant was first employed, not after, and that the only person able to provide it but failed to do so, was the Applicant himself. Instead, the Applicant deprived the Organization of the opportunity to make a fully informed decision and put himself in a situation which could result, as he had been forewarned, and as indeed happened, in the termination of his employment.

h. The Applicant's argument suggests the existence of an exception to staff rule 4.7(a), such that might allow for the concurrent employment of siblings if certain criteria applied (presumably, at least different functions and duty stations). However, staff rule 4.7(a) contains no exceptions. In response

to a 2019 proposal by the Secretary-General to insert an exception to staff rule 4.7(a), to enable the recruitment of a close family member in the event that no other equally well qualified person could be recruited, the General Assembly's Advisory Committee on Administrative and Budgetary Questions did not consider that there is sufficient justification for reverting to a prior practice that was discontinued in 2011 and therefore recommended against the proposed amendment to staff rule 4.7(a). Consequently, the General Assembly did not issue any resolution approving the suggested change to staff rule 4.7(a), thereby leaving untouched the current categorical prohibition on the appointment of staff members' siblings.

i. The Applicant's contention was that there was no *mens rea* or *mala fides* on his part when responding incorrectly to the screening question and that the Administration has failed to prove *mens rea* or *mala fides* on his part. However, the Administration is under no obligation to establish the intent of a staff member – a staff member may be held responsible for providing false information even when due to negligence.

j. The Applicant's argument that he did not know and could not have known that SRB was already a serving staff member when he submitted either of his applications because he was not on speaking terms with SRB is contradicted by the record. The record shows that the Applicant and SRB spoke with one another before either's employment with the United Nations, in 2010, at their father's funeral. A second communication followed in 2012, when SRB "made a protocolary telephone call to [the Applicant] on the occasion of [the Applicant's] marriage." At the time of that phone call, SRB was already employed by the Organization and working in the Central African Republic and the Applicant was serving in MONUSCO as a UNV. These examples prove that obtaining information on major life events was possible, even if the half-brothers were infrequently in direct contact. Had he shown the appropriate diligence in making inquiries, the Applicant could have known, if

he wanted to, whether any of his biological half-siblings worked for the United Nations at the time that he was applying for two different positions, before certifying that none did.

k. The Applicant's email and United Nations identification handle, while serving in the United Nations, was "bistra2". A handle showing a number is typically provided to distinguish staff members who share the same last name. Being "[…]2" should have alerted the Applicant that there was another "[…]" in the Secretariat. Even if the Applicant was unaware of SRB's employment with the United Nations, before his 2015 recruitment, a look at his United Nations email address thereafter would have sufficed for the Applicant to inquire whether that first "[…]" was a relative or a simple case of synonymy and alert the Organization accordingly. The Applicant would not even have needed to contact anyone in Nepal to do so; he could have simply checked the United Nations staff members' directory. There is no justification as to why the Applicant did not make reasonable enquiries, before wrongly certifying the accurateness of his 2018 PHP form.

15. The Applicant's actions amounted to serious misconduct. By engaging in the actions described above, the Applicant violated staff regulation 1.2(b) and staff rule 1.5(a). The Applicant's conduct constituted serious misconduct under Chapter X of the Staff Rules. Failure by a staff member to comply with his or her disclosure of information obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances, or to observe the standard of conduct expected of an international civil servant, is undeniably misconduct. Any form of dishonest conduct compromises the necessary relationship of trust between employer and employee and will generally warrant dismissal.

16. The imposed sanction fell within the Administration's discretion and was proportionate.

a. The sanction imposed on the Applicant was not blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity.

b. The sanctions most frequently imposed on staff members in cases of providing false/inaccurate information on a PHP and for false certification of United Nations documents tend towards the severe end of the spectrum, including dismissal and separation. The disciplinary measure imposed on the Applicant is in line with what was imposed in comparable cases and adequately reflects the severity of the Applicant's misconduct. Where a misconduct occurs at the very start of a selection exercise, by virtue of the misrepresentation of substantial information in the application process, there is no way to circumvent or fix this wrongdoing. In view of the Applicant's conduct and its effects, i.e., the tarnishing of the applications and consequent selection exercises, the sanction imposed conforms with the requirements of proportionality set out in the United Nations Appeals Tribunal ("UNAT") jurisprudence.

c. All applicable mitigating and aggravating factors were considered. The Sanction Letter sets forth an analysis of the Applicant's conduct, against relevant factors.

17. The Applicant's fairness rights were respected throughout the process. For the first time in his application, the Applicant raises a series of issues as alleged due process violations which are without merit.

a. The Applicant argues that he was placed in a "highly prejudicial position" because he was not represented by counsel during the investigation and during the disciplinary process. It is settled law that staff members have only limited due process rights during the investigation, which do not include being represented by legal counsel. This right is triggered with the initiation of the disciplinary process, i.e., once the staff member concerned receives the

Allegations Memorandum. Despite being informed of his right to have legal representation, including by availing himself of the Office of Staff Legal Assistance's ("OSLA") free-of-charge services, the Applicant elected to proceed through the disciplinary process without being assisted by legal counsel. This does not constitute a due process violation.

b. The Applicant argues that the mandate of the Assistant Secretary-General ("ASG")/OHR is not to obtain a balanced and objective outcome, but to act inquisitorially with an aim of taking disciplinary action. The Applicant misrepresents the mandate of the ASG/OHR. As section 8.2 of ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) provides, once an investigation report has been received, the ASG/OHR is mandated to do one of the following: (i) initiate a disciplinary process; (ii) take managerial actions and/or administrative measures; or (iii) close the matter. Not every investigation report that is transmitted to the ASG/OHR results in the initiation of a disciplinary process or proceeds to a sanction decision.

c. The Applicant argues that the investigators sought to adduce ill-intent from the timing of the Applicant's reassignment to UNSMIL. Section 8.1 of ST/AI/2017/1 clearly sets out that "the Assistant Secretary-General for Human Resources Management and the Under-Secretary-General for Management shall not be constrained by the factual findings of the investigation." While the MONUSCO SIU investigator reached his own conclusions about the Applicant's intent, such conclusions were immaterial to the formulation of the allegations of misconduct against the Applicant. Additionally, the Applicant was reinterviewed by the UNSMIL SIU; thus, even if the MONUSCO investigation was flawed, such flaws were cured by the second interview. It is undisputed that no conclusions regarding the Applicant's intent were included in the UNSMIL report. Further, the Allegations Memorandum does not contain any reference to the Applicant's

> intent with regards to "deliberately" failing to disclose information or seeking reassignment to evade a possible disciplinary process.

18. The sanction imposed by the Respondent was taken in compliance with applicable legal norms. was not unreasonable or disproportionate. The established facts constitute serious misconduct, and the sanction imposed was proportionate. Since the imposition of the disciplinary measure was lawful, its rescission and the reversal of its consequent effects are not warranted. The Respondent requests the Tribunal to reject the Applicant's arguments and dismiss the application in its entirety.

**Considerations**

19. In disciplinary cases, this Tribunal is called upon to examine the following: (i) whether the facts on which the disciplinary measure is based have been established (ii) whether the established facts amount to misconduct; (iii) whether the staff member's due process rights were respected and (iv) whether the sanction is proportionate to the offence. The Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred. Where termination is the possible outcome such as in this case, the standard of proof of clear and convincing evidence meaning that the probability that the misconduct occurred is very high[10]. This is captured in *Turkey*, quoting *Mizyed* and others[11] that:

> Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". And, of course, "the Administration

[10] *Suleiman* 2020-UNAT-1006, para. 10, also see *Nadasan* 2019-UNAT-918, para.38; *Siddiqi* 2019-UNAT-913, para. 28.
[11] *Mizyed* 2015-UNAT-550, para. 18, citing *Applicant* 2013-UNAT-302, para. 29, which in turn quoted *Molari* 2011-UNAT-164.

> bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred". "[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence", which "means that the truth of the facts asserted is highly probable".[12]

20. The Applicant argues that he should not have been separated from service for making a false declaration in his PHP form. He states that he has a brother, SRB, who joined the Organization with BINUCA in 2011. He claims that while this was going on he worked as a UNV in MONUSCO.

*The first objection, lack of knowledge.*

21. The Applicant argues that the brothers were not aware of each other's employment with the United Nations because they had no contact for a period of about 30 years with the only exception being attendance at their father's funeral in 2010. This was before either of them had become employed by the United Nations.

22. The Applicant further explained that the two brothers were not close because he (the Applicant) was a child born out -of- wedlock and this meant that he was estranged from the family of the married father, his wife and their children. The Applicant was of the view that the out-of- wedlock circumstance was responsible for him not having a birth certificate and being discriminated against due to the Government policy in Nepal. His second ground for arguing that he would not have to disclose that SRB was his brother and entering this information in the PHP form was that he was not considered a brother of SRB's under Nepalese law.

*Motion to adduce further evidence.*

23. The Applicant filed a motion to adduce further evidence. In this motion, the Applicant quoted the position of a High Priest who argued that on religious grounds, the Applicant could not be seen as a brother of his otherwise half -brother and the western notion of a half-brother was not accepted in Nepal. This motion, therefore,

[12] *Turkey* 2019- UNAT-955, para. 32.

addressed the very subjective view and beliefs of the Nepalese religious community, and recognised legal authorities on the subject matter that in Nepal there was no such thing as a half-brother and therefore, the Applicant would not recognise SRB as his half- brother either.

24. The Respondent in his response to the motion argued that the new evidence was irrelevant because the issue before the Tribunal was not Nepalese law but the United Nations law and regulations pursuant to which the Applicant would be seen as a relative and brother, even if he was a biological half-brother.

25. The Tribunal decided to allow the motion since it was found to be of some relevance to support the Applicant's argument that he would not have recognised SRB as his relative or half-brother. Having decided to allow this evidence, the Tribunal considers that it allowed the Applicant every opportunity to explain his behaviour which is being characterised as dishonest. It would therefore, have been inappropriate to disregard evidence which goes directly to his honesty when applied to his acceptance or rejection of SRB as his brother or half -brother.

26. Based on the religious position in Nepal, for which we have only the evidence of the Applicant, the Tribunal finds that there is no evidence from the Respondent based on the record to date which contradicts that of the Applicant. The Applicant, therefore, cannot be held to have been dishonest not to have accepted that SRB was his brother or half-brother if he applied strict Nepalese law and custom. But this is not the end of the matter.

27. While Nepalese law and custom may be relevant based on the Applicant's reluctance to culturally accept this designation of half-brother as applicable to him, Nepalese law cannot be deemed the applicable law of the United Nations when referring to employment matters within the Organization. The applicable law of the United Nations is seen and accepted as is promulgated in the Staff Regulations and Rules of the United Nations. The latter applies to employment matters.

28. While the Applicant may want to raise his preferred belief that the law of Nepal should apply because he is Nepalese and so is his half-brother SRB, it would not be possible to call upon staff members of the United Nations to adhere to the rules of the Organization if they were permitted to argue that the law of their respective country of birth is different. The Tribunal is, therefore, persuaded that it is presumed that the applicable law in the cases before the Tribunal is the law of the United Nations. The law of the United Nations 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 by the United Nations.

29. The Tribunal is not persuaded that, if one accepts that the Staff Regulations and Rules of the United Nations apply in these circumstances, that the term brother or half- brother would not apply to a person whose fathers are the same even though they may have different mothers.

*Could there be doubt about the status of the Applicant's half-brother?*

30. The Tribunal has considered the issue of doubt in this case and proceeds to assess whether there may have been some doubt in applying the definition of "relative" applicable in this case along with the understanding of the terms, "brother" and "half-brother". It is accepted that the Applicant may have found himself experiencing some doubt about whether the term brother or half-brother applied to SRB and whether he should have been disclosed as such in the PHP form. The Applicant could have been of the view that since he and SRB were not close, there should not be any suspicion that they would be involved in any behaviour which could be embarrassing to the United Nations. However, if there was such doubt, he could have asked for clarification from a senior officer who would have been able to clarify the position. The senior officer would have been able to explain that even though he may have seen no harm in the two brothers possibly being employed by the United Nations, it was not his views which were important, but the factual and legal situation gleaned from the evidence and the relevant United Nations Regulations and Rules.

31. This brings us back then to the difference between the subjective feelings about the status of the brothers rather than the reality that they may have been both employed by the United Nations at the same time. The United Nations was interested in knowing the latter.

*Whether the brothers knew that they were both employed by the United Nations.*

32. This issue is of some importance. The Tribunal is called upon to consider whether the evidence is sufficient to lead to the conclusion that the two half-brothers would have known that they were both employed by the United Nations. To determine this the Tribunal would have to consider whether the brothers had any opportunity to exchange the information about their whereabouts and where they worked during the operative period when they were both employed by the United Nations.

33. The facts show that the Applicant became a UNV and SRB became a United Nations employee. Firstly, it was made clear by the evidence that the brother/half-brothers had every opportunity to be in contact with each other and were actually in contact with each other when SRB got married. At the time that SRB got married they were both in contact with each other and would have had every opportunity to speak about the location of their employment and the fact that they were both employed by the United Nations.

34. It is possible also that parties could both have felt that there was no need to disclose the fact they were both employed by the United Nations. But again, the doubts that they had would not affect the requirement and indeed it would mean that they both could have asked for advice on the matter.

35. Neither brother has said that he sought advice and were either refused advice by senior staff or told that they did not have to disclose the presence of a relative as United Nations staff. The Tribunal can, therefore, comfortably conclude that no enquires were made by the brothers about their mutual status in the United Nations.

The Tribunal holds that the brothers simply failed to seek advice about any doubts they may have had.

*Further evidence that gives rise to suspicion about the knowledge of each other's employment status.*

36. Importantly, the Respondent submits that the record contains clear and convincing evidence that on at least two occasions in 2015 and 2018 the Applicant failed to disclose in his PHP forms that his SRB had been working for the Organization at the time when the Applicant was first recruited to the United Nations (with MONUSCO) and subsequently in his application to a job opening in UNSMIL.

37. The Respondent also submits that the fact that SRB commenced employment as a secretariat staff member before the Applicant is also undisputed. Consequently, the Applicant's responses in the negative to the screening question "Are any of your relatives employed by the United Nations Secretariat?" In his 2015 and 2018 PHP forms were objectively inaccurate and the corresponding certification incorrect.

38. In *S. Nourain & A. Nourain*[13], UNAT held 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. We agree with this submission.

39. UNAT has held that the Administration is under no obligation to establish the intent of a staff member - a staff member may be held responsible for providing false information when there is negligence. This principle has been affirmed in *Payenda*[14] and most recently in *Amani* where the UNAT held.

[13] 2013-UNAT-362, paras. 21 – 24.
[14] 2021-UNAT-1156.

> Deliberate false statements, misrepresentations and a failure to disclose required information are invariably dishonest. And, importantly, the failure to reply correctly to a prominent and very relevant question in an application form amounts to a false answer from which dishonesty normally may be inferred. Hence, a false answer in an application form is *prima facie* proof of dishonesty, shifting the evidentiary burden to the maker of the false statement to adduce evidence of innocence.[15]

40. The imposed sanction is not disproportionate. The false declaration shows a lack of integrity, and disregard for the standards of conduct expected of an international civil servant by the Organization. It is, therefore, appropriate to treat the false declaration as a serious disciplinary breach which in turn requires a strict punishment from the Administration.

41. It is also important to note that the Applicant's rights were always respected. The Applicant was given a fair opportunity to explain his action. He was told of his rights at the time of the investigation and was informed of the charge against him. He was given his right to respond to the charges against him and when the investigation had an adverse result, he was given an opportunity to file the application before the Tribunal.

*The Regulatory Framework*

42. Staff regulation 1.2 (b) stipulates that staff members shall uphold the highest standards of efficiency competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

43. Staff rule 1.5 adds to the above. It is headed "Notification by staff members and obligation to supply information".

> (a) Staff members shall supply the Secretary-General with relevant information, as required, both during the application process and

[15] 2022-UNAT-1301, para. 63.

> on subsequent employment, for the purpose of determining their status under the Staff Regulations and Rules as well as for the purpose of completing administrative arrangements in connection with their employment. Staff members shall be held personally accountable for the accuracy and completeness of the information they provide.

44. In the latter context staff rule 4.7 states:

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

45. Finally, staff rule 10.1 states:

> Misconduct.
>
> (a). Failure by a staff member to comply with their obligation under the Charter of United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and imposition of disciplinary measures for misconduct.

**Conclusion**

46. In light of the facts emerging from the submissions of the parties and the applicable law, the Tribunal is unable to find a reason to deem the disciplinary measure imposed of dismissal unlawful. The dismissal was proportionate, fair and by no means irregular in the circumstances.

47. The Tribunal, therefore, decides to dismiss the application and no remedy is granted in the circumstances.

*(Signed)*
Judge Francis Belle
Dated this 14th day of August 2023

Entered in the Register on this 14th day of August 2023

*(Signed)*

Eric Muli, Officer-in-Charge, Nairobi