UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2024/013
Judgment No.:	UNDT/2025/005
Date:	6 February 2025
Original:	English

Before: Judge Sean Wallace

Registry: Nairobi

Registrar: Wanda L. Carter

WAMARA TIBENDERANA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
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Introduction

1. On 10 March 2024, the Applicant, a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo ("MONUSCO") filed an application challenging his separation from service for sexually harassing two female members of the Canadian Armed Forces (CAF) supporting MONUSCO's activities.

2. An oral hearing was held between 11-14 November 2024. Nine witnesses testified over the four hearing days.

3. At the end of the hearing, the parties requested to file written closing submissions. The request was granted, and the parties subsequently filed their closing submissions. Thus, the case is ripe for ruling.

Facts

4. The Applicant originally joined the United Nations Common System on 7 December 2009. At the time of his separation on 19 December 2023, the Applicant held a fixed-term appointment with MONUSCO which was due to expire on 30 June 2024.

5. He was a G-5 Movement Control (MOVCON) Assistant and team leader of the MOVCON Air Cargo Services Unit at the Goma airfield. In this role he interacted with air crew using the Goma airfield, including members of the Canadian military who made periodic visits to the airfield in support of MONUSCO's activities.

6. On 18 February 2022, VO1 contacted the Conduct and Discipline Team in MONUSCO and reported that she had been the victim of sexual harassment. She provided a written account of her dealings with the Applicant, and described three incidents that took place while she was working at the Goma airport during her duties with the Canadian Armed Forces (CAF) supporting MONUSCO.

7. VO1 reported that:

a. On or about 12 February 2022, the Applicant looked at her breasts while talking to her. When she tried to cover her breasts with her arms, the Applicant turned his attention to her buttocks.

b. On 16 February 2022, she was in a United Nations vehicle with a male colleague from the Canadian military, along with a driver and the Applicant. At one point, the Applicant said words in French to the effect that "We are going to take [the male colleague] down there and you [indicating VO1] will go with me and I will take you to seventh heaven". The Applicant repeated "take her to seventh heaven" several times. The Applicant's conduct caused VO1 to fear that she would be kidnapped and raped.

c. On 17 February 2022, at about 12:45 pm, VO1 was on the airfield tarmac assisting in the loading of an aircraft. During that process, the Applicant tried to attract her attention, which made her feel uncomfortable, so she turned away from the Applicant. A few minutes later, a colleague told VO1 that the Applicant was taunting VO1 and following her around the loading area.

8. On 20 February 2022, VO1's report was referred to the Office of Internal Oversight Services (OIOS) for investigation. Over the next several weeks, OIOS interviewed VO1, the Applicant, and numerous other witnesses.

9. In the course of its investigation, OIOS interviewed another female Canadian military officer (VO2) who said the Applicant had also made sexually harassing comments to her. According to VO2, "the best I could describe is [the Applicant] treated the airfield as if it was like a bar where he was trying to pick up women because he seems to make comments to every female." VO2 ignored the Applicant's behaviour, thinking he was "creepy" and "inappropriate".

10. Ultimately, OIOS concluded that the allegations against the Applicant were established and referred the case to the Office of Human Resources (OHR) for appropriate action.[1]

11. OHR notified the Applicant of the allegations against him on 5 September 2023, specifically that:

a. Around 12 February 2022, while VO1 worked at the Goma airport, the Applicant "stared intensely at her breasts and, when she folded her arms to prevent [him] from staring, [he] turned to her side and stared intensely at her backside." VO1 found this behaviour to be degrading.

b. On 16 February 2022, while riding in a vehicle with VO1 and a male CAF colleague, the Applicant told VO1 that they would leave the male colleague at the airplane and then take VO1 "to seventh heaven", a comment which both VO1 and her colleague took as sexual in nature. The comment caused VO1 to fear for her safety.

c. On 17 February 2022, while VO1 was involved with loading a container into a plane, the Applicant tried to get her attention and followed her as she moved from one side of the container to another. In light of his previous behaviour, the Applicant's conduct made VO1 feel uncomfortable.

d. On multiple occasions between April 2021 and March 2022, the Applicant made comments to VO2 about her appearance and her name. These comments made VO2 feel as though the Applicant was "trying to hit on [her] as at a bar" and that they were completely inappropriate in the workplace.

12. OHR notified the Applicant of the allegations and invited him to respond. His response was received on 17 October 2023.

[1]Although the last interview by OIOS seems to have taken place on 13 April 2022, the Investigation Report and Referral Memorandum were not sent to OHR until 20 March 2023, nearly a year later.

13. On 19 December 2023, the Administration determined that the allegations were established by clear and convincing evidence, and that the Applicant's actions violated staff regulations 1.2(a) and 1.2(f), and staff rule 1.2(f) of ST/SGB/2023/1/Rev.1 (Staff Regulations and Staff Rules, including provisional Staff Rules, of the United Nations), and sections 1.3, 1.5 and 1.7 of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), and amounted to serious misconduct. It further determined that the Applicant was treated fairly and accorded due process throughout the disciplinary process, and that his conduct warranted separation from service, with compensation *in lieu* of notice, and without termination indemnity.

14. The Applicant filed a timely application with the Dispute Tribunal challenging the contested disciplinary decision.

Parties' Contentions

15. The Applicant challenges the contested decision on several grounds. Specifically, he argues in the application that:

a. there is no proof in the record that the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) made the contested decision;

b. his due process rights were violated because he is not conversant in English and the investigation was biased against him;

c. there is insufficient evidence of misconduct; and

d. the disciplinary measure imposed was disproportionate.

16. In his closing submission, the Applicant also argues that his due process rights were violated in the hearing before the Tribunal.

17. The Respondent argues that:

a. the decision was made by the USG/DMSPC, as borne out by the evidence;

b. the facts are established by clear and convincing evidence;

c. the established facts amount to misconduct;

d. the Applicant was afforded a fair process; and

e. the imposed sanction was proportionate.

Consideration

Standard of review in disciplinary cases

18. According to art. 9.4 of the Tribunal's Statute, in reviewing disciplinary cases,

> the Dispute Tribunal shall consider the record assembled by the Secretary-General and may admit other evidence to make an assessment on whether the facts on which the disciplinary measure was based have been established by evidence; whether the established facts legally amount to misconduct; whether the applicant's due process rights were observed; and whether the disciplinary measure imposed was proportionate to the offence.

19. The Statute generally reflects the jurisprudence of the United Nations Appeals Tribunal ("UNAT"), see e.g., *AAC* 2023-UNAT-1370, para. 38; *Mizyed* 2015-UNAT-550, para. 18; *Nyawa* 2020-UNAT-1024.

20. In *Sanwidi* 2010-UNAT-084, para. 40, the Appeals Tribunal clarified that:

> When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered and also examine whether the decision is absurd or perverse.

21. The Appeals Tribunal, however, underlined that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him", or otherwise "substitute its own decision for that of the Secretary-General". *Id.* at para.40. In this regard, "the Tribunal is not conducting a "merit-based review, but a judicial review", explaining that a "judicial review is more concerned with examining how

the decision-maker reached the impugned decision and not the merits of the decision-maker's decision". *Id.* at para. 42.

Whether the contested decision was made by the USG/DMSPC

22. Annex IV, Chapter X of ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules) provides that the authority to make a "decision on disciplinary sanctions based on recommendation from ASG/OHRM" is **expressly delegated to the USG/DMSPC** (at least with respect to sanctions imposed on staff members at grade level D-2 and below). The Applicant claims there is no evidence that the USG/DMSPC made the contested decision in this case.

23. The sanction letter in this case, dated 19 December 2023, bears the signature of the Assistant Secretary-General for Human Resources (ASG/OHRM) and not that of the USG/DMSPC. However, the letter recounts that the decision actually was made by the USG/DMSPC:

> [T]he USG/DMSPC has concluded that the allegations against you are established by clear and convincing evidence, and that your actions were in violation of staff regulations … and amounted to serious misconduct….The USG/DMSPC has noted that you were accorded a fair procedure…. In determining the appropriate sanction, the USG/DMSPC has considered the past practice of the Organization in matters of comparable misconduct, the nature and gravity of your misconduct, as well as any mitigating or aggravating factors…. The USG/DMSPC also considered that the Organization has a zero-tolerance policy for sexual harassment. On the basis of the foregoing considerations, the **USG/DMSPC** has decided to impose on you the disciplinary measure of separation from service, with compensation in lieu of notice, and without termination indemnity. (emphasis added)

24. The Applicant points out that the USG/DMSPC was not copied on either the sanction letter or the email by which the letter was sent to the Applicant. Thus, he argues that, "despite the references to the USG/DMSPC in the sanction letter authored by [the ASG/OHRM], absent any written proof that [the USG/DMSPC] took the highlighted actions attributed to her, the 19 December 2023 sanction must be ruled unlawful."

25. The Respondent argues that "the presumption of regularity avoids the need for proof absent a *prima facie* case, which was entirely absent here." This argument is entirely correct.

26. According to the Appeals Tribunal, "there is always a presumption that official acts have been regularly performed…. But this presumption is a rebuttable one." *Rolland* 2011-UNAT-122, para. 26. The presumption of regularity has been confirmed in *Ibekwe* 2011-UNAT-179, para. 30*; Landgraf* 2014-UNAT-471, para. 28; *Dhanjee* 2015-UNAT-527, para. 30; *Zhuang, Zhao & Zie* 2015-UNAT-536, para. 48; *Staedtler* 2015-UNAT-547, para. 27; *Survo* 2015-UNAT-595, para. 68; *Niedermayr* 2015-UNAT-603, para. 23; *Ngokeng* 2017-UNAT-747, para. 33-34; *Lemonnier* 2017-UNAT-762, paras. 37-39; *Krioutchkov* 2021-UNAT-1168; *Nastase* 2023-UNAT-1367; and *Koura* 2024-UNAT-1486, para. 50.

27. To rebut the presumption, the Applicant must present "clear and convincing evidence "that an irregularity was highly probable." *Ngokeng* para. 34. See also, *Lemonnier* 2017-UNAT-762, paras. 37-39.

28. While use of a sanction letter template signed by the ASG/OHRM is unfortunately and unnecessarily confusing, it does not amount to clear and convincing evidence that an irregularity (i.e., a decision taken by the ASG/OHRM, who lacks delegated authority to do so) was highly probable.

29. To remove all doubt on this issue, the Respondent has submitted email correspondence between the ASG/OHRM and the USG/DMSPC regarding this case. In that correspondence, the ASG/OHRM attaches her recommendation to impose a disciplinary sanction on the Applicant, along with a "detailed analysis in the body to the recommendation." In response, the USG/DMSPC writes "Recommendation approved."

30. The Tribunal is therefore convinced that the contested decision was made by the USG/DMSPC, to whom such decision-making authority has been delegated, and thus that the decision was lawful in that respect.

Whether the facts on which the disciplinary measure was based were established by clear and convincing evidence

Basic jurisprudence on the evidentiary burden and how to assess evidence in sexual misconduct cases

31. In disciplinary cases, "when termination is a possible outcome", the Administration must establish the alleged misconduct by "clear and convincing evidence", which "means that the truth of the facts asserted is highly probable." (*Negussie* 2020-UNAT-1033, para. 45). This is the evidentiary standard. UNAT clarified that clear and convincing evidence can either be "direct evidence of events" or may "be of evidential inferences that can be properly drawn from other direct evidence."

32. Regarding the examination of evidence of sexual misconduct, the Dispute Tribunal held in *Hallal* UNDT/2011/046, para. 55, affirmed by the Appeals Tribunal in *Hallal* 2012-UNAT-207, that:

> in sexual harassment cases, credible oral victim testimony alone may be fully sufficient to support a finding of serious misconduct, without further corroboration being required", because "[i]t is not always the situation in sexual harassment cases that corroboration exists in the form of notebook entries, email communications, or other similar documentary evidence, and the absence of such documents should not automatically render a complaining victim's version as being weak or meaningless.

33. In *Hallal*, the Dispute Tribunal also held that "[a]s is always the case, any witness testimony should be evaluated to determine whether it is believable and should be credited as establishing the true facts in a case." *Id; see also Mbaigolmem* 2018-UNAT-819, paras 31-32.

Analysis of the evidence

34. This case revolves around the credibility of the protagonists: VO1, VO2, and the Applicant. If VO1 and VO2's version of events is found to be credible, the Tribunal will uphold the Respondent's finding that the facts are established.. Conversely, if the Applicant's explanation is found to be credible, the Tribunal will rescind the Respondent's finding that the facts are established.

35. VO1's testimony can be summarized as follows: She has been with the Canadian Armed Forces (CAF) since 2018 and was deployed to assist MONUSCO in February 2022. She met several of the other CAF members involved in this case for the first time on that deployment and has had little or no contact with them since their return.

36. Regarding the first alleged incident, VO1 says she was at the Goma airport with some colleagues and was wearing the CAF uniform which included a tight-fitting jacket with a zipper to the neck. As the Canadians were talking with the Applicant,

> he looked at my breasts. I felt very uncomfortable, so I covered them in this way [demonstrating holding her arms against her breast area]. At that point he leaned over to the right and he made me understand that just covering my breast would not be enough to stop him.

37. VO1 had observed others behaving similar to the Applicant, but the Applicant's behaviour was much more obvious and less subtle. VO1 did not say anything to the Applicant but believed that closing her arms across her chest made it clear she was not at ease with his behaviour and did not consider his behaviour appropriate. VO2 and Cpl SD were present and told VO1 they had observed similar behaviour by the Applicant in the past that made them feel uncomfortable.

38. As to the second incident, in which the words "seventh heaven" were allegedly mentioned, VO1 testified that she remembered it very well because she was diagnosed with PTSD [Post Traumatic Stress Disorder] afterwards.

39. She was seated in the vehicle behind the Applicant and next to Cpl. SL, who was seated behind the driver. She did not remember the order in which they got in the vehicle.

40. At first the Applicant was speaking with the driver in Swahili so she did not know what they were saying. Then the Applicant turned towards the two CAF members and said to Cpl. SL, in French, "you, we will drop you off here; and we will take her to the seventh heaven."

41. VO1 said that she wanted to be sure she had heard the Applicant correctly so she had him repeat it. He said very clearly that he wanted to take her "to the seventh heaven." Cpl SL began to laugh nervously and then so did she.

42. VO1 tried to find a way to escape, checking her door but could not get out. She also could not lower the window. So she took out her pistol, screamed to be let out, and pointed her pistol at the back of the Applicant's head.

43. VO1 did not see what her colleague was doing. "All I remember is that I replaced the [side]arm in its pouch. I got out of the vehicle. I am not sure whether Cpl. SL did or not. I got out on the right-hand side of the vehicle and the vehicle drove off."

44. When asked who the first person was to leave the vehicle, VO1 said "I'm sorry, I do not remember. Given my condition of PTSD, there are some elements which I do not quite remember."

45. Regarding the third incident, which allegedly was the following day, VO1 saw the Applicant a few meters from her, and "he was trying to attract my attention. I turned away from him and tried to dismiss him. I don't know what the politically correct term for this would be, but I basically sent him to hell and then I just walked away and continued to work on the equipment." VO1 said that she used words and gestures to convey this because there was a plane starting up nearby which making it difficult to hear. She is sure the Applicant saw her and that her gestures were pretty clear.

46. At that time, the Applicant was down on the tarmac, a few meters from the plane, not in the key-loader machine. The pilots and the technicians were toward the back of the plane, Cpl. SD was inside the plane and Cpl. SL was on the tarmac. VO1 knew that Cpl. SD was able to see the Applicant but could not say whether others did as well.

47. VO1 confirmed that she identified the Applicant via a photograph shown to her by the investigator. The photograph was exchanged amongst the CAF group after the incident "in order to protect other people's security."

48. VO1 said that she did not report the first incident right away "because the first incident didn't threaten my life. It just threatened my integrity."

49. VO2's testimony is as follows: She was a captain in the CAF at the time of these incidents. She had been with the CAF since 2014 and was deployed several times to MONUSCO: in March-April 2021, November-December 2021, and January-February 2022.

50. VO2 was in the CAF hotel when VO1 reported to her an incident that occurred when going to the airfield outside of MOVCON with Cpl SL to pack pallets. VO1 reported that the Applicant told Cpl. SL he could take a van, and the Applicant would take VO1 into the building where he would "bring her to the ninth level of heaven". VO1 told VO2 that the Applicant's comment about a level of heaven is an expression in French used to describe having an orgasm, and thus sexually explicit.

51. The Applicant's comment made VO1 uncomfortable because he was suggesting that he would take her into the building to do sexual things to her. The incident occurred during the day, and VO1 reported it to VO2 when she returned from the airfield around supper time.

52. VO1 initially told Sgt. AH about the incident because they were good friends, and then they came to tell VO2 who was a officer. VO2 reported the incident immediately to her higher command, who in turn reported it to the United Nations.

53. VO2 said VO1 did not report the first incident to her and VO2 did not recall that incident herself. She did recall the third incident because there was a phone call made to their headquarters on the day after the second incident. As VO2 recalls, somebody on the aircraft called headquarters (HQ) and explained that again, inappropriate comments were being made to women working on the aircraft. The CAF Tactical Airlift Detachment Commander left the HQ, along with a CAF military police officer, and went to the aircraft to address the situation.

54. VO2 was at HQ when the call came in and the Commander left. VO2 remembers this because when the Commander leaves the headquarters there are certain steps required of the remaining officers in the HQ in order to take over.

55. VO2 said that she knows the Applicant, who was the equivalent of a traffic tech at MOVCON at the Goma airfield. "I can recognize him because he always was talking with the Canadians who were working there."

56. VO2 interacted with the Applicant on a few occasions during each of her deployments. "There was no big incident like with [VO1], but there were uncomfortable or unsuitable comments made."

57. One comment that stuck out in VO2's mind was that the Applicant "went on and on one day" about her name. "Why did my mother give me such a beautiful name?" VO2 felt that these were not appropriate comments in a workplace environment. She remembers the comment specifically, because it was persistent, as the Applicant said it multiple times. She had "never received comments from other MONUSCO workers of that nature."

58. VO2 did not report the Applicant's comments until the more serious comments were made in the incident that VO1 reported to her. Then, VO2 informed her chain of command that the Applicant had also made inappropriate comments made towards her.

59. VO2 said "most of the girls on the deployment from my knowledge have stated that they have felt uncomfortable with comments that were made by [the Applicant]." VO2, VO1 and Cpl SD were the three female CAF staff that worked predominantly at the airfield.

60. VO2 also said that, after the incident VO1 reported, there was a formal briefing for the CAF detachment so they were aware of the situation. The detachment discussed actions to be taken if something of this nature happened and how to appropriately respond. The CAF had always travelled in pairs. When in the work areas, there were always other people present but not necessarily right beside each other all the time.

61. VO2 said the Applicant "definitely did know me. I've worked with him on three episodes there…and dealt with him on multiple occasions." She and the Applicant communicated in English, as he could speak in English and understand her English.

62. VO2 could not recall during her testimony whether the Applicant commented on her appearance. When asked how often the Applicant made inappropriate comments to her, VO2 said "when I went to the airfield I always felt a little bit uncomfortable." She always tried to have a male colleague with her to avoid such comments being made by the Applicant because the Applicant did not make these comments in the presence of male colleagues. The Applicant made the comments about her name when her male colleague was about 20 feet away.

63. VO2 said that the Applicant gave her "the vibe" as if he were hitting on a woman or trying to pick up a woman at a bar, which was unsuitable for a workplace. Not every MOVCON staff made such comments, and she preferred working with those who did not cause such issues.

64. VO2 testified the Applicant never looked at her body. He had made comments to her during earlier deployments, but she tried to ignore them. She did not experience similar behaviour from other UN personnel during any of her deployments.

65. The Applicant testified as follows: He worked for the United Nations from 9 December 2009 until 19 December 2020. He was a team leader for MOVCON and had a direct supervisor. He told the Tribunal that he "can understand English but [he] cannot speak it."

66. The Applicant said it was completely false that he stared at VO1's breasts and backside. According to him, "how can one accuse me of having looked at it when we were working together as a team?"

67. This deployment was the first time he had met VO1, and he remembered having a professional conversation with her while other colleagues were around.

She was dressed in her army fatigues - trousers, long-sleeve top, sidearm and beret. Her shirt was completely closed, by which he meant that it was long-sleeved and it was zipped up. The Applicant claimed "you cannot stare at a woman's breasts if she is wearing a shirt that is close up to her chin."

68. When specifically asked if there was zipper on the shirt, the Applicant gave this reply:

> Well, they come from a powerful country and are not going to be sent in inappropriate garb. They were wearing a new model if you compare it to the FARDC (Armed Forces of Congo) it's a lot better.

69. According to the Applicant, he told the interviewer "we did not have time to look at one another."

70. The Applicant admitted knowing that looking at a woman's breasts, and then when she folds her arm, looking at her backside, is not acceptable. "I know that can be sexual harassment."

71. As to the second incident, the Applicant said that there were three people in the vehicle when he got in and sat in the front passenger seat. The man and lady were seated in the back, and they were armed. "They picked me up in the roadside, and they were in the car already."

72. Confronted with his interview in which he said that he was already in the vehicle before they picked up the CAF personnel, the Applicant testified "my memory is very clear; when I got into the car, they were already inside the car. Seems there were a lot of mistakes made in the interview."

73. According to the Applicant, when he got in the vehicle, he was wearing a mask positioned beneath his mouth, and he greeted everyone. The lady said "where are you going, *Sans Pression* (the [nick]name I was given by them)?"

> I said I was going to the Nyiragongo and then she said that she was getting down at the down ramp side. That led those in the car to start laughing. I thought that what we were laughing about was the pronunciation of Nyiragongo, but perhaps there was something else they were speaking about before which made them laugh.

74. The Applicant testified that the first time he heard the expression "*septieme ciel*" or "seventh heaven" was during his interview with the OIOS investigators. "I associated it with love because I had interpretation from one of the Canadians who was there during the interview."

75. According to the Applicant, he was only in the car for a short distance.

> They picked me up when I was already enroute and I was only in the car for about 20 meters. It might have been a bit more. I was asking for a lift because it was raining, a heavy rain.

He was going to take his motorbike and return to his house. When the vehicle dropped him, it was still raining "a bit and I waited until the rain had fully stopped before I took my motorbike and continued my journey."

76. The Applicant remembered a briefing by his supervisor occurred the next morning.

> He told us that we should be very careful because there had been an allegation of harassment and that we should abide by the code of conduct. The briefing was well understood, and then I asked him why he was telling these things in a group.

77. Later, the driver (MR) informed the Applicant that he had been invited for an interview. The Applicant testified that he was already aware of the allegation because he had been interviewed the day before. He said his answer to MR "was very very clear. I told him, you drove the car so just answer as things happened." Then the Applicant was called away for another task.

78. Regarding the third incident, the Applicant said that he was in the key-loader, wearing a mask.

> It was a military mask given me by the Indonesians. I was wearing it appropriately because it was airside and we had to make sure our masks were properly utilized when doing such operations.

79. The Applicant said he did not leave the cabin of the key-loader. "We're not allowed to do so." He testified that, if his supervisor said the Applicant had left the cabin to smoke against instructions, he could explain:

> I wanted to smoke and did so 300 meters away. Not even on the tarmac but near the crossroads where the Congo forces were located… What [he] is talking about happened before the incident on the seventeenth.

80. The Applicant testified that he did not speak to either of the two Canadians. At the beginning, he saw only "the master in charge of the loading operation," and later he saw the captain/pilot of the plane "who was taking of a photo of me."

81. He went on to say

> There are various types of staff at the United Nations. We are the national staff and others were individual contractors. We didn't answer or speak with all of the members of the CAF. We did interact with the pilots, with the loadmasters and so forth, but not everyone.

82. Asked about the alleged incident involving VO2, the Applicant denied it. "I don't remember the lady wearing the glasses in the photo (that [his] attorney showed me) - the medical officer. I never spoke to her and never suggested to her that she had a beautiful name."

83. The Applicant testified that working with the CAF was entirely different from working with other foreign military deployments.

> Right from the beginning we had problems with professional interactions […] Only the operator was allowed to approach the aircraft. They chased all my colleagues away. So in the end only me and the operator were allowed to be there to load the pallets and do the sanitization in the warehouse as everybody else had been chased away.

According to him, these restrictions were imposed before the alleged incidents.

84. He said there were no problems with the Americans and the Belgians - "they carried arms too but they didn't chase anybody away when I was working in Goma with them." Similarly, he worked with people from South Africa, Bangladesh, India, Malawi and Morocco, and had no issues at all with them.

85. The Applicant testified that he met with Cpl. SL before the end of the Canadian mission. "We said goodbye to each other and that's all we discussed. We

didn't discuss anything else." The Applicant was adamant that this exchange did not occur on 17 February but around the 20th as they were leaving.

> I approached him. I took advantage of that opportunity to approach him because they had been keeping their distance from us since the seventeenth of February. They weren't coming up towards us and so I took advantage of that opportunity to say goodbye to him because they were leaving on the 22nd of February.

86. When asked about Cpl. SL's testimony that he saw the Applicant looking at the backside of VO1 and whether Cpl. SL had any reason to lie, the Applicant said:

> I have reason to think he would lie because they are a team, they stayed in the same hotel, they could easily be plotting against me, they are a team.

87. The Applicant denied saying in his interview that "I am from Congo and don't know if something like this can happen in another country - to look at someone and that becomes a problem." However, he testified regarding his country that "we have problems with our connections and that is why everyone is just walking over us. We are the people who are always walked over by everyone."

88. In assessing the credibility of these witnesses, the Tribunal focusses initially on the second incident, involving the alleged comments in the vehicle.

89. Cpl. SL corroborates VO1 that the Applicant said he was going to take her to seventh heaven, an obvious sexual reference. Cpl. SL says he responded to the comment by saying "what the hell is that?" and then nervously laughed. VO1 is also corroborated by the so-called "outcry witnesses", Sgt. AH, VO2, and Capt. GD, who sayVO1 reported the comment promptly upon returning from the airport.

90. On the other hand, the Applicant denies he said anything about "heaven" and says he just asked the driver to drop him at "Nyiragongo." The driver MR confirms this. Both the Applicant and the driver agreed there was laughter after the Applicant spoke, although neither could say what was funny. (The Applicant assumed they were laughing at his pronunciation of "Nyiragongo".)

91. Observing the demeanour of these witnesses during their testimony, the Tribunal believes the testimony of Cpl. SL and VO1 that the Applicant made the

"seventh heaven" sexual comment. VO1 genuinely became emotional while recounting the incident, and both she and Cpl. SL seemed to be telling truth as they recalled it. Their testimony was consistent with each other, with the other evidence on record, and with their own prior statements.[2]

92. On the other hand, the Tribunal finds that the Applicant was not credible. His testimony, particularly during cross-examination, was evasive, non-responsive, and contradictory. Tthe same question had to be asked repeatedly to get a direct answer from him. Several examples of his unreliable testimony will be noted.

93. The Applicant engaged in a lengthy soliloquy about the Canadians, upon their arrival, informing the locals that their work methods would be different from other countries and restricting interactions with MONUSCO staff. He adamantly insists the restrictions were before the alleged incidents. However, later he testified that "they had been keeping their distance from us since the 17th of February."[3]

94. In another example, when shown a picture of VO2 by his counsel and asked if he recognised her, the Applicant said "Yes, I do remember. I believe she worked with the medical services." Later his counsel asked "Do you remember the lady whom I showed you in a photo? Who was wearing glasses? I would like to ask you a question about her. Now, do you remember her?" This time the Applicant first said "No", then said "the second photo, the medical officer." Yet when opposing counsel referenced this testimony, the Applicant said "you are mistaken. When [the attorney] showed me the photo I said I did not know her."

95. Similarly, when confronted with statements from his testimony that were inconsistent with his OIOS interview, the Applicant tried to explain them away.

> It's possible that the OIOS investigators, as they wrote up the interview, might have made a mistake because there seems to have

[2] The sole exception to this is addressed below in paras.103-105.

[3] The Tribunal also recalls the testimony of Capt. GD that "there were limits put in place [whereby] the Applicant was no longer allowed to be involved with Canadian personnel or interact with the detachment at all because, given the events of the 16th and then following on the 17th. My chain of command basically said that if you were to interact with us…we would have to withdraw our support and go back to Canada because we require our personnel to have a safe working space."

> been a lot of mistakes made and interference with the interview notes.

However, the record shows that the Applicant was provided copies of the audio recordings (and a transcript of the first interview) soon after the interviews in 2022. Yet for two and one-half years, he never claimed any mistakes were made. And the Tribunal listened to the interview recording and found no mistakes.

96. One very clear example of his inconsistent stories was about the weather while they were in the vehicle. The Applicant said he rode in the vehicle because of the heavy rain, but then he said "it was only raining a bit" when he was dropped off (having driven only 20 meters). It is simply unbelievable that "heavy rain" became a sprinkle in the moments it took the vehicle to drive that short distance. The Applicant's surmised explanation, that everyone laughed because of his pronunciation of "Nyiragongo", is inconsistent with the driver's testimony that he did not know why they were laughing.

97. Moreover, the Tribunal does not find the driver to be particularly credible either. In his testimony, MR repeatedly emphasized two points: that the "seventh heaven" comment was not made; and that he and the Applicant were both wearing seatbelts. This perseveration leads the Tribunal to believe that he was coached to say these things.

98. The likelihood of coaching is confirmed by his testimony that the day after the incident, MR's chief told him there was a complaint involving the Applicant while MR was the driver, that he may be interviewed, and that he should talk to the Applicant about it. This is direct evidence that, following the complaint, the driver and the Applicant were directed to speak about it. The obvious implication is that they should speak to get their stories straight. And both the Applicant and MR confirm that they did speak about the complaint.

99. Indeed, if nothing happened in the car as the Applicant claims, then why the commotion on the following day? The Canadian command was involved at the highest levels and threatened to withdraw their forces from MONUSCO. In response, CAF was assured that the Applicant would not interact with their

personnel. The MONUSCO team was also briefed regarding an incident of alleged harassment and on the need to adhere to the code of conduct. Clearly, something had happened involving the Applicant in the vehicle.

100. The Applicant argues that this was a large conspiracy to get him. "They are all on a team and could plot against me." Yet, he has no explanation as to why they would have it out for him. To the contrary, Cpl. SL directly implicates the Applicant, but he also expressed sympathy for the Applicant. Indeed, the Applicant went out of his way to say goodbye to Cpl. SL. This does not sound like someone who would plot against the Applicant, as the Applicant now claims.

101. The Applicant references documents from a lawsuit alleging racial bias within the CAF from 1985 to 2016. The Tribunal assumes this is to provide motive for this putative plot against him. The Applicant was not permitted to introduce those documents (for reasons that are discussed later in this judgment). He was allowed to ask questions of various CAF witnesses about their experience with Africans and those of African descent. These questions yielded no evidence of bias.

102. Even if there had been a scintilla of evidence of racial bias by the witnesses, the Applicant provides no explanation as to why the CAF "conspirators" would single him out from all of the other Congolese national staff at MONUSCO. Curiously, the Applicant asked about this during his interview. "I want to know why, of all those people working at MOVCON, they found only me." The only plausible answer is that his conduct differed from those of his MOVCON colleagues. In sum, the Tribunal finds the claim of racism is a red herring.

103. The Applicant also points to VO1's "delusions" (as he characterizes her testimony) that, after his seventh heaven comment, she pulled out her pistol to be released from the vehicle. The Tribunal agrees that this testimony was surprising as it is inconsistent with her initial reports to Sgt. AH and VO2, her interview, and the testimony of Cpl SL. Yet, during the hearing she was adamant this happened, and it appeared to the Tribunal that she truly believed that it had.

104. The explanation for this is found in the undisputed testimony that VO1 was diagnosed with post-traumatic stress syndrome as a result of the incident. It is

recognized that PTSD can cause memory aberrations, including spontaneous false memories. Scientific research into this phenomenon goes back decades.[4]

105. VO1's pistol-pulling memory may be false but caused by the true experience of being traumatized by the Applicant's conduct. The Tribunal will therefore disregard that false memory while accepting the rest of her testimony as credible.

106. Thus, based on all the evidence, the Tribunal finds that the Applicant made the "seventh heaven" comment to VO1.

107. The Tribunal also finds that the Applicant was harassing VO1 and trying to get her attention on the day after his comment in the vehicle. Cpl. SD and the pilot, Capt. GD, both confirm this occurred. Cpl. SD saw it and alerted the pilot who came to the back of the plane where this was taking place. Capt. GD observed the Applicant outside his key-loader at the tail of the plane and that, as VO1 was moving around from side to side of the cargo, the Applicant followed her "keeping his distance, but he would maintain sight lines." As Capt. GD noted, this was despite a meeting that morning in which the Canadians "were assured that that individual would not be present at the plane; not interact with Canadian personnel further." Even the Applicant corroborates this, in part, by admitting he saw the pilot at the back of the plane photographing him.

108. VO1's version of this incident is also consistent with Cpl. SL's statement that, after the MONUSCO briefing when the Applicant learned of the complaint, the Applicant told Cpl. SL he would apologize to VO1 if he could. The Tribunal finds it likely that the Applicant tried to get VO1's attention to apologize in an attempt to dissuade her from pursuing her complaint. The statement to Cpl. SL and the Applicant's subsequent conduct on the tarmac are effectively an admission of guilt for the "seventh heaven" comments.

109. The Applicant also claims that he never left the key-loader and so he could not have been moving around, following VO1. This is contradicted by the evidence

[4] See, e.g. Otgaar, et al. *What Drives False Memories in Psychopathology? A Case for Associative Activation,* 5(6) Clinical Psychological Science 1048-1069 (2017) and studies cited therein.

described above and by a photograph of him standing on the tarmac in front of the key-loader.[5]

110. Having found VO1 to be credible regarding these two incidents, the Tribunal also finds her testimony that the Applicant stared at her breasts and buttocks in the first incident to be credible.

111. As to VO2's allegation that the Applicant made unwelcome comments to her on multiple occasions, the Tribunal also finds her testimony about this to be credible. She was consistent in her testimony and did not try to embellish it in any way. The specific comments she recalled could be relatively innocuous, in and of themselves, except for the persistence with which the Applicant made them.

112. If VO2 was plotting to get the Applicant, one would expect her to create more salacious comments, but she did not. Her testimony is also supported by numerous other CAF members that say, before the mission VO2 briefed them about sexual harassment she experienced in previous deployments to Goma (albeit without identifying the harasser).

113. On the other hand, the Applicant's denial is not worthy of belief. His blanket denial ("I don't know her") is not consistent with his other statements noted above. It is also inconsistent with his claim that he only interacted with the Canadian managers. As a captain, VO2 was one of the few Canadian officers on site, and she had been to the airfield twice before for days-long deployments. It is inconceivable that the Applicant did not know her.

114. In sum, the Tribunal finds there is clear and convincing evidence that the Applicant committed each of the acts upon which the disciplinary measure was based.

[5] The Applicant ridicules the CAF witnesses as "Spartacus," claiming they each took the photograph. Of course, the identity of the photographer is irrelevant. The relevant issue is whether the photograph fairly and accurately depicts the Applicant as he appeared that day. The witnesses say that it does, and the Applicant does not specifically dispute it.

Whether the established facts amount to misconduct

115. The Applicant does not argue that the acts, if established, would legally amount to misconduct. Indeed, the Applicant confirmed in his testimony that he had completed the required UN training on sexual harassment and that he knew such conduct is "not acceptable" within the Organization. Thus, there is no need to analyse this factor further in the instant case.

Whether the disciplinary measure applied was proportionate

116. In his application, the Applicant explicitly did not claim the sanction was disproportionate:

> The Applicant also submits that the sanction was wholly inappropriate and unlawful (**not disproportionate**) because V01 and V02's allegations were not established to the standard of clear and convincing evidence. (emphasis added)

117. The Respondent argues that the Organization has a zero-tolerance policy for sexual harassment, citing ST/SGB/2019/8, sections 3.2(c) and 3.5(c), and that "UNAT case law confirms staff who sexually harass colleagues should expect to lose their employment." Citing *Mbaigolemem* 2018-UNAT-819, para. 33. *See also Adriantseheno* 2021-UNAT-1146/Corr. 1, para. 38; and *Szvetko* 2023-UNAT-1131, para. 55.

118. In his rejoinder, the Applicant says that he "does not contest the cited case law in para. 5 that '*staff who sexually harass colleagues should expect to lose their employment'*." This agreement, that the jurisprudence holds that sexual harassers should expect to lose their employment, should end any proportionality analysis.

119. In his closing submission, however, the Applicant claims that "the sanction was unduly harsh", citing recent comments in footnote 1 of the UNDT judgment in ATR UNDT/2024/100. The Applicant argues that he "was harshly sanctioned compared to senior managers and as a consequence, the Applicant submits that this is favouritism and is unfair."

120. In that footnote, which is *obiter dicta,* the undersigned observed that, "although sexual harassment most frequently results in termination of a UN staff

member," it appears higher level managers may receive lesser punishment. "Reduced punishment for higher-level workplace harassers is troubling in that it seems contrary to both common sense and to the Organization's professed zero-tolerance policy." *Id.* footnote 1.[6]

121. The intended implication of this language was that senior managers should be treated the same as lower-level staff and thus terminated for sexual harassment. However, in the instant case, the Applicant turns this observation upside down and argues he should get the same favourable treatment given to higher-level harassers by having his separation overturned and replaced with a lesser sanction. That is an incorrect application of the sentiments expressed in the *ATR* footnote.

122. Additionally, the Tribunal notes that the sanction letter in this case shows proportionality was analysed in significant detail to determine the appropriate sanction for the Applicant's established misconduct of sexual harassment. The Applicant does not challenge any aspect of this analysis.

123. On the basis of the record before it, the Tribunal finds that the disciplinary measure of separation from service with compensation *in lieu* of notice, and without termination indemnity is proportionate and appropriate.

Whether the Applicant's due process rights were respected

124. In his application, the Applicant argues that his due process rights were violated in two ways:

a. he was presumed guilty from the outset, so the investigator sought only inculpatory evidence, ignored exculpatory evidence, and made biased credibility assessments against him;[7] and

[6] The Tribunal notes that the Administration has challenged this footnote in a Motion for Correction of Judgment. That motion is still currently pending as the Tribunal analyzes the data provided on the issue. See, *ATR* Order No. 167 (NBI/2024)

[7] The Applicant filed as Annex 7 a 17 page "Report of possible misconduct and unsatisfactory conduct by [the investigator] and OIOS staff" which his counsel filed with the OIOS director. This appears to be a strategy of "investigate the investigators" which has been recently popular in high-profile investigations in the United States. It also seems to be a way of circumventing the page limits. As to the latter, the Tribunal directs counsel's attention to the recent amendment to Practice

b. he is a Francophone but was interviewed in English.

125. On the first argument, it is recalled that the Tribunal heard all relevant evidence, both inculpatory and exculpatory, and made its own credibility assessments which, for the most part, coincide with those made by the investigator. So the Tribunal disagrees with the Applicant's contention and argument.[8]

126. In his second argument, the Applicant claims that he is not conversant in English "beyond daily basic chat" so "it is questionable that interviews with him were conducted in English." The premise of this argument is not true.

127. The audio recording of the Applicant's interview reveals that the investigator began by saying "we are going to do the interview in English; are you happy with that?" The Applicant responded "yeah, I can answer in English and if some words I can have in French, if someone, maybe madame who knows French also…"

128. The investigator explained that the lady present can speak French and could assist if needed. He then asked the Applicant, "but your English is good enough that I can ask you questions in English?" and the Applicant said "you can go ahead." As a threshold matter, the Applicant's agreement to go forward with the interview in English amounts to a waiver of his new claim regarding the language in which the interview was conducted.

129. The interview itself lasted for 55 minutes, and only twice did the Applicant ask for a French translation. It is clear from the recording that the Applicant has a strong command of English. This is also clear from his testimony at the hearing during which the Applicant interrupted the interpreter and began answering a question put to him in English before the French translation had been given. The

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Direction para. 23 ("annexes are not to be used to submit additional argument or facts that could not be included in the application or reply").

[8] The Applicant also complains in Annex 7 that the investigation report was issued more than a year after the allegations were made and witnesses interviewed. The Tribunal agrees that this delay is not acceptable. See similar comments in *Bubega* Order No. 046 (NBI/2024), para. 29-35. However, the Tribunal notes that the Applicant did not raise this in any of his filings in the instant case and certainly has not demonstrated any prejudice caused by the delay. As such, the delay does not amount to a denial of due process.

Tribunal thus determines that the Applicant is very conversant in English and that OIOS conducting his interview in English did not prejudice the Applicant.

130. In addition, as part of his closing submission, the Applicant raises several issues which he claims denied him "fairness during the trial." These will be examined *seriatim*.

131. First, he complains that he was not permitted to call the investigator as a witness. The procedural context is important to examining this claim.

132. In his 10 March 2024 application, the Applicant requested a hearing to take the testimony of nine named witnesses, which did not include the investigator.

133. On 29 July 2024, during a case management discussion (CMD), the Tribunal discussed with counsel what witnesses would testify at the hearing. Again, the Applicant did not ask to call the investigator as a witness. The parties indicated their availability to hold the hearing during the weeks of 16 September or 23 September, and when counsel confirmed the witnesses were available, the Tribunal scheduled the hearing for 18-19 September 2024.

134. However, on 9 September 2024, the Applicant filed a request to call the investigator as an additional witness. The request stated that, at the time of the application, he "did not consider the testimony of [the investigator] to be necessary." However, he submitted that the subsequent judgment in *Bangambila* UNDT/2024/055 (issued on 4 September 2024) "proves that [the investigator's] investigations cannot be trusted."

135. As a result of that filing (and other last minute submissions), the Tribunal converted the 18 September 2024 hearing to another CMD, directed the Applicant to file a more detailed motion "clearly indicating the specific areas of inquiry for which the investigator is being called," and reset the hearing for 11-14 November 2024. *See* Order No. 127 (NBI/2024).

136. On 20 September 2024, the Applicant responded to Order No. 127, again citing the *Bangambila* judgment and reiterating his claim that the investigation was flawed because the investigator "failed to analyse evidence correctly, follow

exculpatory leads and conduct proper credibility assessments of the witnesses relied upon by the Respondent." The Applicant also said he had conducted "further deep analysis of all the witness testimony and by cross referencing their testimonies in preparation for trial, the Applicant has uncovered further concerning contradictions, omissions and plain falsehoods."

137. On 30 September 2024, the Tribunal issued Order No. 133 (NBI/2024) addressing the Applicant's request. Specifically, the Tribunal said in paras. 7-9 that:

> The Applicant should rest assured that the Tribunal will assess the credibility of those who testify before it to determine if Respondent has met its burden to prove the facts by clear and convincing evidence.
>
> To the extent that Counsel is correct, and the investigator's credibility assessments were wrong, that will be determined based on testimony from those witnesses and the evidence in the record. As Applicant notes, he may cross-examine the Canadian Armed Forces witnesses and others in an attempt to show that they were "economical with the truth" or "manufactured evidence".
>
> Examining the investigator about why he did not ask such questions or why he deemed any particular witness to be credible or not, will not add anything useful to the hearing. Any probative value of such testimony from the investigator will be substantially outweighed by considerations of undue delay and the presentation of cumulative but unnecessary evidence.

138. In closing submissions, the Applicant now raises several additional reasons attempting to bolster his claim that the investigator's testimony was important. The first relates to the timing of photo identifications, and the second relates to the metadata of a photograph. Given that neither of these issues was raised in this motion to add the investigator as a witness, he cannot now use them as a basis for complaining about the Tribunal decision to deny his motion. *Cahn* UNDT/2022/022 para. 19. Further, the timing of the photo identifications (which undisputedly was within weeks of the alleged incidents) and the metadata of the photograph has little or no relevance.

139. The third reason relates to an alleged failure to investigate whether the CAF personnel were armed. There is no dispute in this case that the CAF personnel were armed, as testified by numerous witnesses. Thus, no investigation of this fact is necessary. Moreover, this fact is not relevant to the inquiry before the Tribunal: whether the Applicant sexually harassed the victims. It is not impossible for harassment occur despite the victims carrying weapons.

140. The fourth reason relates to an alleged failure to investigate whether the Applicant was wearing a mask. Again, counsel was permitted to question all the witnesses on this topic, including the Applicant himself. The evidence showed that at times the Applicant was wearing a mask and at times he was not. Again, a fact of negligible relevance.

141. The final reason relates to the alleged failure to conduct unbiased credibility assessments of some witnesses. As promised by the Tribunal in Order No 133, the Tribunal conducted its independent credibility assessments. These assessments have been set out in this judgment in substantial detail. The Tribunal stands by its previous holding that examination of the investigator about his credibility assessments would not add anything of value to the Tribunal's inquiry. Even if it did, any probative value would be substantially outweighed by the considerations of undue delay and the presentation of cumulative evidence.

142. Article 18.1 of the Dispute Tribunal Rules of Procedure makes clear that the "Dispute Tribunal shall determine the admissibility of evidence." The Appeals Tribunal has long held that the UNDT has "broad discretion" under this provision to determine the admissibility of any evidence. See, e.g., *Larkin* 2012- UNAT-263, paras. 2 and 23; *Staedtler* 2015-UNAT-546, paras. 35 and 46; *Wu* 2015-UNAT-597, para. 35; *Malluh* 2016-UNAT-690, para. 35; and *Ross* 2020-UNAT-1054, para. 29. In exercising this discretion, the Tribunal may consider "judicial economy." *Loto* 2023-UNAT-1362, para. 88. The Tribunal obviously did so in denying the Applicant's late addition of the investigator to the witness list.

143. The next issue Applicant raises also deals with a pre-hearing order. The Applicant claims he "was denied the opportunity to introduce the new element of

racial bias within the Canadian Army." Once again, the Applicant ignores the context in which he raised this issue.

144. As noted above, largely due to his late-filed submission, the September hearing had to be reset to 11-14 November 2024. Then on Friday, 1 November 2024, the Applicant filed his Submission Regarding Racial Discrimination in Canadian Armed Forces. This was nearly seven months after the application was filed, more than six weeks after the hearing was reset, and just five working days before the second scheduled hearing date.

145. In this submission, the Applicant said that he had

> discovered extensive information regarding racial discrimination in the Canadian forces against black people. In order to establish foundation for some questions which shall be put to the Canadian personnel, the Applicant hereby provides [links to] the publicly available reports which shall be referenced.

Those links led to websites regarding a class action lawsuit filed in 2016 which alleged that the class members had suffered racial discrimination and/or harassment in connection with their military service dating back to 17 April 1985.

146. In reply to this late submission, the Respondent argued that:

i. the application did not raise alleged racism against him by the involved CAF members and the Applicant "raised the issue at the eleventh hour;"

ii. the UNDT Statute limits the Tribunal's competency to the application and that the Applicant had never sought to amend or supplement his application;

iii. the Applicant did not explain the relevance of this proffered evidence and there was no evidence of racial motive in the record; and

iv. the links provided by the Applicant contain no indication that the allegations of systemic racism had been judicially established.

147. The Tribunal's order on this submission recalled that the issue of racism was not raised in the application or in any other manner during the pendency of the case. "It is manifestly unfair to add allegations of racial discrimination on the eve of the hearing." Order No. 150 (NBI/2024).

148. The Order also noted that the alleged discrimination giving rise to the lawsuits was not committed by the Respondent, his agents, or any of the witnesses in the instant case. Canada disputed the allegations of racial discrimination, and a proposed settlement agreement expressly said "it is not to be construed as an admission of liability by Canada." To these observations, the Tribunal now adds that VO1, the primary witness against the Applicant in this case, joined the CAF in 2018 - two years after the lawsuit was filed and 33 years after the discrimination allegedly began.

149. Order No. 150 (NBI/2024) also noted that settlement discussions and related documents are inadmissible under article 15.7 of the Dispute Tribunal's Rules of Procedure.

150. Finally, in its Order, the Tribunal found that the proffered evidence was not relevant to the instant case. As Judge Colgan of the Appeals Tribunal has written, the test of admissibility of evidence is that "it must be relevant to the issue or issues to be decided." *Barud* 2020-UNAT-998, para. 24.

151. Order No. 150 further noted that

> It would be the height of discriminatory stereotyping to presume that all white members of the Canadian military are racist. Yet that presumption underlies the Applicant's argument regarding the use of this material. The Tribunal refuses to participate in that stereotyping.

152. Accordingly, the Tribunal rejected the Applicant's Submission Regarding Racial Discrimination in Canadian Armed Forces and the proposed use thereof. The Tribunal reiterates that ruling here.

153. In his closing submission, the Applicant does not address the merits of this ruling and merely complains that the order was made "without giving the Applicant any opportunity to respond to the arguments of the Respondent."

154. Of course, any denial of an opportunity to respond was caused by the Applicant's late filing of the submission itself. He filed it on Friday, 1 November; the Respondent replied on Tuesday, 5 November; the order was issued on Thursday, 7 November; and the hearing was scheduled for the following Monday, 11 November 2024. There was no time to permit further responses without causing a second postponement of the hearing.

155. Moreover, the Applicant did not ask for additional time to file a response, and the UNDT Statute, its Rules of Procedure, and its Practice Direction No. 5 do not recognize a "reply to a reply". More importantly, the Applicant gives no clue what such a response would have contained. The Respondent's opposition to the motion is indisputably true in every respect--the issue of alleged racism was not raised until the eve of the hearing; the UNDT Statute was quoted accurately; the Applicant's submission did not explain the relevance of this evidence; and the proffered documents contained no indication that allegations of systemic racism in the CAF had been proven.

156. In other words, there was nothing to which a response was needed, other than perhaps to fill in essential details that his skeletal submission lacked. Any such new assertions would have required a response, generating a spiral of rebuttals, and clearly imperilling the hearing date once again.

157. Additionally, the Tribunal permitted the Applicant to question the CAF witnesses about their prior personal experiences with Africans or people of African-descent and whether they had any negative experiences as a result. To a person, the witnesses answered that they had no such negative experiences. The record is devoid of any evidence that these witnesses were racist or motivated by racism.

158. In sum, the Tribunal again rejects the Applicant's arguments regarding the admissibility of alleged racism in the CAF.

159. Finally, the Applicant complains about the Tribunal noting time limits during the hearing. He claims his counsel was criticised for going over time, but the Respondent was not. He also complains that his counsel was criticised for examining the first witness using French "when that is exactly what Counsel for the Respondent had indicated the witness had requested." The Applicant also claims that his counsel "was cut off during the question of [Cpl. SD] without grounds." These claims are factually incorrect.

160. Here again, context is important. Prior to the hearing, counsel submitted a schedule for the four-day hearing, setting forth the order of witnesses and the time reserved for each party's examination of these witnesses. This schedule was important because the hearing required interpreters and was remote, with the witnesses, the Applicant and counsel all appearing online.

161. The hearing got off schedule immediately due to technical issues, causing witnesses to be rescheduled and the interpreters to work overtime. The Tribunal acknowledged at that time and still agrees that this was not the fault of Applicant or his counsel. But it was an unfortunate fact which the Tribunal faced.

162. The first witness was scheduled to be examined by counsel for 30 minutes each. The Respondent's examination took 20 minutes, but the Applicant's examination took over an hour. At that point, the Tribunal said "I just want to point out we are an hour behind. I know that 30 minutes of it were spent on logistics of getting the connection right, but we are now an hour behind." This was an accurate statement of fact, and no criticism of either side was mentioned.

163. The next witness was scheduled to be examined for 45 minutes by each counsel. The Applicant's examination took just over an hour. As that examination passed the allotted 45 minutes, the Tribunal noted that there were only 30 minutes left with the interpreters that day and that both cross-examination and the entire examination of a third witness were to be completed in that time.

164. Applicant's counsel said "interpretation has led to further delay in the way my examination has proceeded. I still have about 10 questions for the witness…. We can postpone the [third] witness for tomorrow." The Tribunal pointed out that

this would be a problem because "we are fully booked for the next several days and I don't know if the interpreters are available. So, I suggest you ask your questions directly, promptly and let's move on." Respondent's counsel offered to limit cross-examination to a few questions, and the Tribunal said "everybody try to be more prompt and direct with your questioning."

165. Fifty-seven minutes into the Applicant's examination of the second witness, the following exchange occurred:

> Applicant's counsel asked the witness "so the whole team saw what Mr. Wamara did?"
>
> The witness answered "No, I can tell you that the whole team was there. I don't know who witnessed what and who testified what."
>
> Applicant's counsel then said "to be more precise, you said you were towards the rear of the aircraft and you saw Mr. Wamara. Who else was towards the rear of the aircraft near you and saw the same thing?"

166. At that point the Tribunal interjected to say:

> Don't answer that. She has already told you the whole team was there. She's already told you she doesn't know what they all witnessed. Let's move on because this is repetitive and wasting time. Ask another question or we will move on to cross-examination…. Do not ask that question again. Move on to a different topic or I'll move on to [opposing counsel].

167. This exchange demonstrates the problem. After the witness testified that she did "not know who witnessed what", the Applicant's counsel asked her "…who saw the same thing?" This is a classic example of a question that had already been asked and answered. Repeating the question was unnecessary, repetitive and a waste of time, particularly where time had become a problem. Contrary to the

Applicant's claim, the grounds for the Tribunal's statement were both explicitly stated and valid.

168. At that point, the Applicant's counsel ended his examination. The Respondent's counsel took three minutes to ask eight questions, and the Applicant said he had no re-direct examination.

169. Then the Tribunal pointed out that the schedule submitted by counsel contemplated three hours per day (because of the time difference between Canada and Nairobi) and that the interpreters' availability is limited to three hours. As a result, the judge told both attorneys to check whether the witnesses were available for later in the trial when there may be additional time. "You gave me a schedule, you know the parameters; you need to stay within them."

170. The issue got worse when the third witness from Day One was moved to Day Two. Applicant examined this witness for 23 minutes, and the Respondent took 33 minutes, even though the schedule allotted 15 minutes each. Once again, the hearing was behind schedule.

171. The next witness was the Applicant, who was scheduled to be examined for 20 minutes by each counsel. The Applicant's counsel examined his client for 42 minutes. Towards the end, apparently even counsel felt the need to instruct his client to be brief in his answers. The Respondent then cross-examined the Applicant for an hour and 10 minutes.

172. The Tribunal did not intervene in either examination, even though they both exceeded the scheduled time. This was because the Applicant's testimony was central to the case, and the Applicant was extremely evasive, non-responsive, and verbose in his answers on cross-examination which added substantially to the length of the questioning. Contrary to the Applicant's claim that only he was chastised, at the end of cross-examination the Tribunal comment that Respondent's counsel had asked about 15 "last questions."

173. Then the Tribunal noted "we are, once again, an hour and a half behind" and asked counsel what would be done with the remaining 15 minutes of the day which

were available as "leeway" under the interpreters' contracts. Applicant's counsel said he needed the full 45 minutes allotted for VO1 and suggested that she be rescheduled to testify the following day. However, VO1 needed interpretation, the interpreters were not scheduled for the next day, and they were not available for either of the remaining two hearing days.

174. This was the culmination of the problem anticipated by the Tribunal and the reason for its emphasis on time. Ultimately, the interpreters agreed to stay late to accommodate the parties and the Tribunal, even in violation of their contracts. With this accommodation, and the Respondent's agreement to limit his examination to 5-10 minutes, testimony was taken from the final witness needing interpretation.

175. The Applicant's lengthy examinations, and his raising this issue in closing submission seem premised on the belief that the Tribunal, the interpreters, the Respondent, and the witnesses all have unlimited time for his leisurely questioning. This simply is untrue.

176. A trial judge's role includes keeping the case moving along. Carrying witnesses over to subsequent days is unfair to the witnesses, particularly in this case where most of them were not United Nations staff members and thus volunteered to interrupt their lives to provide testimony (at the Applicant's request). As the Tribunal pointed out, there are limits on the interpreters' availability, and we are fortunate that they agreed to stay late to accommodate everyone.

177. The Tribunal's pointing out the passage of time was initially not directed at the Applicant's counsel, even though his examinations were much longer than scheduled. Applicant's counsel then blamed his lengthy examinations on the interpretation. But he chose to examine Cpl. SL in French despite the witness giving his direct testimony in English and saying he was happy to testify in English for cross-examination by the Applicant's counsel. Thus, Applicant's counsel knowingly elected to have a lengthier examination.

178. Of course, counsel has a right to use interpretation as appropriate, but does not have a right to conduct unnecessarily long examinations. Being aware of the time problems, when counsel elected a method of examination that he knew would

take longer, he should have been more succinct in that examination by eliminating repetitive and unnecessary questions.

179. The Tribunal's comments about time were not picayune. Applicant's examination was substantially over the allotted time. Nor were these comments, and the single intervention, biased against the Applicant, as he implies in his closing submission. To the contrary, they were reasonable and appropriate under the circumstances.

180. Also, in his closing submission where he raises this issue, the Applicant also does not even attempt to indicate how, if at all, he was harmed by the Tribunal directing him not to ask that repetitive question. Indeed, when offered the chance to ask questions on any other topic, he declined. Hence, the claims about the Tribunal's handling of delays during the hearing lack merit.

181. In sum, the Tribunal finds that the Applicant's due process rights were respected during the investigation, the disciplinary process, and the hearing.

Conclusion

182. For the reasons set forth above, the Tribunal denies the application in its entirely.

(Signed)

Judge Sean Wallace
Dated this 6th day of February 2025

Entered in the Register on this 6th day of February 2025
(Signed)
Wanda L. Carter, Registrar, Nairobi