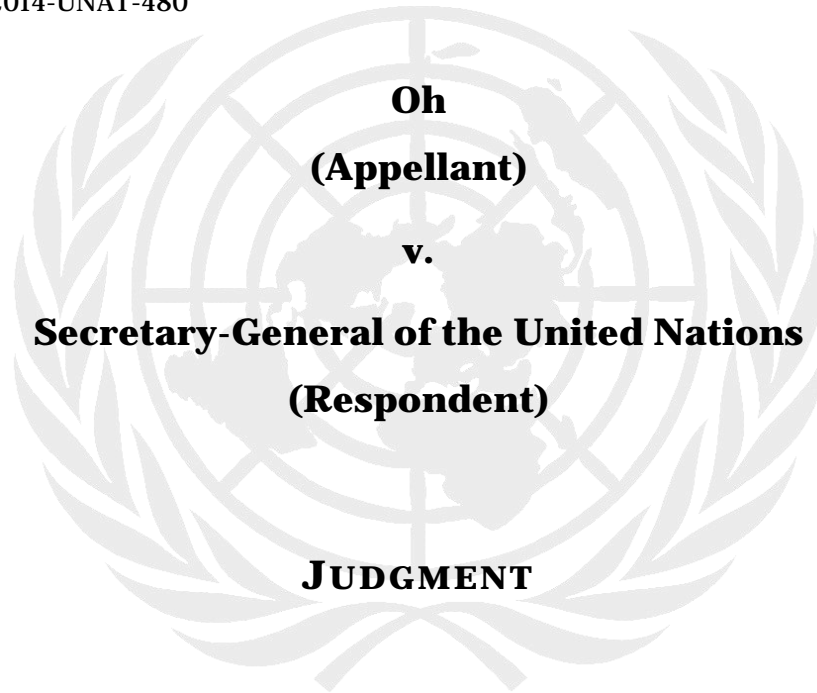




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2014-UNAT-480



Before:	Judge Sophia Adinyira, Presiding Judge Rosalyn Chapman Judge Luis María Simón
Case No.:	2014-554
Date:	17 October 2014
Registrar:	Weicheng Lin

Counsel for Appellant:	Christine S. Dahl
Counsel for Secretary-General:	Rupa Mitra

JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Byeong Kil Oh¹ against Judgment No. UNDT/2013/131 in the case of *Applicant v. Secretary-General of the United Nations*, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 29 October 2013. Mr. Oh appealed on 6 January 2014, and the Secretary-General of the United Nations answered on 10 March 2014.

Facts and Procedure

2. The following facts are uncontested:²

... The Applicant entered into service with [the United Nations Operation in Côte d'Ivoire (UNOCI)] on 22 June 2004 as an Engineer at the P-3 level. He was then appointed Head of the Electrical and Mechanical Unit of the Engineering Section. Subsequently, he was selected for a temporary position at United Nations Headquarters in New York as an Engineer at the P-4 level in the Logistic Support Division, Department of Field Support (LSD/DFS). He served in this position until his separation from service on 3 August 2010.

... Between 21 and 23 February 2007, the *Police criminelle d'Abidjan* in Côte d'Ivoire raided five local businesses suspected of operating illegal brothels. The raids resulted in the apprehension of suspected procurers and a number of women suspected of being prostitutes. Among the women apprehended, four were from a bar called Bar Lido and were identified as VO1, VO2, VO3 and VO4 (Victims) who all claimed to have been trafficked and compelled to work as prostitutes.

... On 5 March 2007, [the Office of Internal Oversight Services (OIOS)] received a Code Cable, issued by the Special Representative of the Secretary-General (SRSG), UNOCI, reporting that three of the Victims claimed that UNOCI staff members were among their customers.

... On 6 March 2007, OIOS initiated an investigation into the report made by the SRSG/UNOCI.

... On 7 and 8 March 2007, OIOS gained access to the Victims who were at the time housed in an International Organization for Migration (IOM) shelter in Abidjan. IOM advised OIOS that due to the anguished state of the Victims they were to be repatriated to their country of origin at the earliest possible opportunity thus OIOS had a very limited time to conduct the interviews. The four Victims were interviewed separately and they stated that they had been approached by a woman in the

¹ Confidentiality is lifted as explained in Considerations below, paras. 19-24.

² Impugned Judgment, paras. 5-18.

Philippines and were offered employment as waitresses in a bar or restaurant in Paris, France, but ended up in Abidjan. The Victims stated that upon their arrival their passports were confiscated and they were taken to Bar Lido where they were housed and required to work as waitresses and prostitutes.

... VO1, VO3 and VO4 stated to the investigators that they had been paid for sexual services by UNOCI staff. VO3 mentioned one SL whom she identified from a photo array. She also mentioned another UNOCI staff member who had paid her for sexual services. According to VO3 the man was of half-Japanese and half-Korean ethnicity. The version of VO3 was corroborated by VO4. VO3 identified the half-Japanese and half-Korean individual as the Applicant from a photo spread.

... On three occasions OIOS interviewed a police officer, AB, working in the Department dealing with human trafficking in Abidjan. AB told the investigators that the raids carried out in the bars were prompted by a report he received from Interpol in February 2007 alleging that women were being trafficked from the Philippines for the purpose of working as prostitutes in Bar Lido and other bars in Abidjan. On 21 and 22 February 2007 he raided five establishments with a view to identifying prostitutes and the owners of these establishments. He was not in a position to provide any evidence leading to the identification of any UNOCI members suspected of using the services of prostitutes.

... OIOS interviewed the Applicant on 23 July 2007.

... On the basis of the statements of VO3, VO4 and the Applicant, OIOS concluded in a report dated 15 July 2008 that the Applicant had paid for sexual services, including from VO3 and VO4. In this respect, OIOS concluded that the Applicant paid VO3 for sexual services at his residence on several occasions between October 2006 and December 2006 and that he paid VO4 for sexual intercourse on the premises of Bar Lido in February 2007. Additionally, OIOS concluded that the Applicant transported unauthorized passengers on multiple occasions in a United Nations vehicle that was assigned to him.

... The Under-Secretary-General for Field Support (USG/DFS) referred the Applicant's case to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) on 8 August 2008 for "appropriate action".

... On 10 October 2008, the Applicant received the allegations of misconduct, dated 27 August 2008, from OHRM charging him with, *inter alia*, sexual exploitation and abuse in contravention of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) and the improper use of United Nations property for transporting unauthorized passengers in a United Nations vehicle.

... The Applicant submitted a response to the allegations of misconduct on 15 December 2008. On 31 March 2009, the ASG/OHRM referred the matter to the Joint Disciplinary Committee (JDC) for advice on whether misconduct had occurred

and, if so, the appropriate sanctions to be imposed. The Applicant submitted comments to the JDC by a memorandum dated 18 May 2009.

... The JDC was unable to consider the Applicant's case prior to the expiration of its mandate on 30 June 2009 thus the matter was referred to the Secretary-General, in accordance with ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice), for further action.

... On 3 August 2010, the Applicant received a memorandum dated 29 July 2010 from the ASG/OHRM informing him that the USG/DM, on behalf of the Secretary-General, had decided to dismiss him from service with immediate effect from the date of his receipt of the memorandum.

3. On 29 October 2013, the UNDT issued its Judgment. The UNDT held that there was sufficient proof that Mr. Oh had engaged in sexual exploitation and abuse, in light of the totality of the evidence on record. In making this finding, the UNDT relied on Mr. Oh's statements to OIOS; the statements of two anonymous witnesses VO3 and VO4 to OIOS; the testimony of the lead investigator, Ms. Sabina Blaskovic; and the identification of Mr. Oh by VO3 and VO4 in a photographic array.

4. In assessing the reliability of Mr. Oh's statements to OIOS that he had paid the women he met at Bar Lido for sexual services, the UNDT rejected his assertion that these statements were entirely fabricated by OIOS. The UNDT stated that Mr. Oh, whom Ms. Blaskovic interrogated, was "searchingly examined and cross examined" as to the circumstances in which he made the admission and that he was given "full opportunity and latitude of giving his side of the story to the [Dispute] Tribunal and of confronting [Ms. Blaskovic]". Based on the evidence, the UNDT was satisfied that the allegation of fabrication was unsubstantiated. The UNDT concluded that there was "no compelling evidence or otherwise that would cast any doubt" on the reliability of the evidence.

5. The UNDT further rejected Mr. Oh's contentions that the testimony of VO3 and VO4 was inadmissible because it was anonymous and constituted hearsay evidence. The UNDT was satisfied that the statements of VO3 and VO4 were admissible and reliable and that their substance was corroborated by Mr. Oh's own statements to OIOS as well as by their identification of him in a photographic array. The UNDT considered the jurisprudence of the Appeals Tribunal in *Liyanarachchige*³ and *Applicant*⁴ and concluded that the right to cross-examination was not

³ *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087.

⁴ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-302.

an absolute right and that “the requirements of due process rights will [have] been met in relation to witness statements ... if the witness[...] statements have been provided to the staff member and the staff member has had an opportunity to comment on, and respond to, the statements”.⁵

6. The UNDT concluded that the facts of the misconduct had been established, that Mr. Oh’s due process rights had been respected, and that summary dismissal was proportionate to the offence. Accordingly, the UNDT dismissed Mr. Oh’s application.

Submissions

Mr. Oh’s Appeal

7. Mr. Oh contends that the UNDT erred in law by concluding that due process was satisfied because he was given the opportunity to comment on the anonymous witness statements providing evidence against him. The UNDT’s finding cannot be reconciled with the ruling of the Appeals Tribunal in the *Liyanarachchige* case where the Appeals Tribunal held that a disciplinary measure cannot be founded solely upon anonymous statements without violating the requirements of adversary procedure. Furthermore, the UNDT erred by finding that the Appeals Tribunal’s ruling in the *Applicant* case was applicable because in that case, the identities of the complainants were known to the staff member and the witness statements were signed by the complainants, which was not the case here.

8. Mr. Oh further contends that the UNDT erred in ruling that the witness identification procedure produced clear and convincing evidence of misconduct to justify his summary dismissal. There is no record of the identification procedures followed. The Secretary-General failed to call the investigator who conducted the photographic identification and presented no evidence on which the UNDT could have reasonably concluded that the identification evidence was clear and convincing. Furthermore, the photographic array was unfairly suggestive because it was “composed with only one Korean individual” and disclosed Mr. Oh’s employment status.

9. Mr. Oh contends that the UNDT erred in sustaining the Secretary-General’s decision based on the record of the interview that he contested. He denies making any admission to OIOS that he paid prostitutes for sexual services and contests the record of the interview. He

⁵ Impugned Judgment, para. 47.

claims that Ms. Blaskovic's handwritten notes of the interview with him differed materially from the typewritten version which was provided to him when he was charged, and which was relied upon by the Administration when it summarily dismissed him. Mr. Oh contends that the handwritten notes corroborate his version of what he said during the interview and undermine the reliability of the typed narrative. He claims that Ms. Blaskovic improperly "treated these statements [that he made during the interview] as euphemisms for having solicited prostitution and paid for sexual activity" and drew erroneous inferences.

10. Mr. Oh further challenges the record of his statements to OIOS by claiming that the "investigators did not follow procedures that would have improved the reliability and trustworthiness of the investigation". He contends that the investigators failed to record the interview or to prepare the report in "question asked - answer received" format. He alleges that there was a "lack of clarity in what [he] was asked and what he understood" during his interview with OIOS. Furthermore, he was not asked to read and sign the statement.

11. Mr. Oh asks that the Appeals Tribunal reverse the UNDT Judgment, rescind the Secretary-General's decision of 29 July 2010 to summarily dismiss him, order his reinstatement, and award him unspecified moral and material damages.

The Secretary-General's Answer

12. The Secretary-General contends that the UNDT correctly rejected Mr. Oh's allegations that the record of his statements to OIOS had been entirely fabricated. The UNDT had an opportunity to assess the credibility of both Mr. Oh and the OIOS investigator during the oral hearing and was satisfied that the investigator's testimony was credible. Since Mr. Oh merely reiterates that he did not make any admission to OIOS without providing any evidence to support his allegation, the Appeals Tribunal should defer to the UNDT factual findings.

13. Mr. Oh has not established any error by the UNDT in accepting the reliability of the typewritten record of his statements to OIOS. Contrary to his contention, a comparison of the handwritten and typewritten notes shows that the typed notes are almost identical to the handwritten notes. Furthermore, the record demonstrates that the OIOS interview with Mr. Oh was conducted in full compliance with the procedures prescribed in the OIOS Investigation Manual.

14. The UNDT properly found that the conditions for admissibility of anonymous statements set out by the Appeals Tribunal in *Liyanarchhige* were met in the present case: The circumstances of the case demonstrate that it was an exceptional case warranting the use of anonymous witness statements. The statements of the anonymous witnesses VO3 and VO4 were corroborated by the statements that Mr. Oh himself made to OIOS. He was provided with sufficient information about the nature of the allegations against him and was afforded the opportunity to effectively challenge the statements of VO3 and VO4. He did have the opportunity to cross-examine the investigator about the circumstances in which the statements of VO3 and VO4 were taken. Finally, the disciplinary measure was not based solely on the statements of VO3 and VO4.

15. The Secretary-General further contends that the UNDT correctly applied the Appeals Tribunal's ruling in *Applicant*. That ruling does not require that statements of witnesses must be signed when their cross-examination is not possible. Rather, the due process rights of a staff member are complied with as long as he had a meaningful opportunity to mount a defense and question the veracity of the statements against him, which in the instant case, Mr. Oh did. Finally, Mr. Oh's allegation that the Administration offered no justification for withholding the identity of the witnesses and not producing them at the hearing is without merit. This information was contained in the OIOS report which was sent to him.

16. Turning to the photographic identification of Mr. Oh by VO3 and VO4, the Secretary-General rebuts his claims as follows: The UNDT did not, as suggested by Mr. Oh, base its decision to dismiss him on the photographic identification alone, but found that the totality of the evidence constituted sufficient proof that he had engaged in sexual exploitation and abuse. Furthermore, the Administration informed the UNDT that the OIOS investigator who conducted the photo identification was reluctant to testify in light of her experience in a similar case; and therefore he did not propose to call her but would do so if the UNDT considered it necessary. The UNDT had discretion to make this decision and found that it was not necessary to call the second investigator.

17. Finally, the Secretary-General submits that Mr. Oh did not stand out in the photographic array by virtue of his race or ethnicity nor his employment. The investigators showed the victims six "men of mixed-Asian race", who were all staff members, for the identification exercise. Mr. Oh has not demonstrated that the investigators violated a

particular procedure prescribed in the OIOS Investigation Manual or elsewhere. His identification from a set of six photographs, by each of the two victims, independently and separately from each other, constituted evidence that was reasonably considered by both the Administration and the UNDT to support his misconduct.

18. The Secretary-General therefore requests that the Appeals Tribunal reject the appeal in its entirety.

Considerations

Preliminary issue: Application for Confidentiality

19. We observe that in footnote 1 of his brief Mr. Oh states: “The UNDT kept the Applicant’s name confidential. The Applicant requests the UNAT to maintain his confidentiality.” This Tribunal could have ignored the footnote as this request should have been made by a formal motion. However, to avoid addressing the matter after the publication of this Judgment, we must deal with it in this Judgment.

20. Article 20(2) of the Rules of Procedure of the Appeals Tribunal (Rules) provides that: “[t]he published judgements will normally include the names of the parties”.

21. In *Lee*, seized of a request for confidentiality, the Appeals Tribunal in considering Article 20(2) of the Rules, expressed that:

it is clear that one of the purposes or goals of the new internal justice system is to assure that the Appeals Tribunal judgments are public documents that are published and widely made available to the Organization’s staff and the general public. Other purposes or goals of the new internal justice system are to promote transparency and accountability in the operations of the Organization, as well as the new internal justice system. ... As we have stated, “[t]he names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability.⁶

22. Mr. Oh merely asks for confidentiality because the UNDT granted it. He has not demonstrated any substantive reason to justify anonymity.

⁶ *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 34 (internal citation omitted).

23. On the contrary, we think it is the victims of misconduct who need anonymity. As the purpose of anonymity is to protect the privacy of victims of misconduct, and also to ensure their safety as in this case where VO3 and VO4 and others were rescued from a kidnapping and prostitution ring. This is not the situation for Mr. Oh.

24. Mr. Oh's application for confidentiality is denied.

Merits

25. Judicial review of a disciplinary sanction 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".⁷

26. The UNDT held that there was sufficient proof that Mr. Oh had engaged in sexual exploitation and abuse of women, in light of the totality of the evidence on record, to warrant his dismissal. In making this finding, the UNDT relied on Mr. Oh's statements to OIOS; the statements of two anonymous witnesses VO3 and VO4 to OIOS; the testimony of the investigator Ms. Blaskovic; and the identification of Mr. Oh by victims VO3 and VO4 in a photographic array.

27. Mr. Oh appeals on the grounds that "[t]he Dispute Tribunal erred in law in upholding the administrative decision to summarily dismiss [him] for serious misconduct taken in violation of the requirements of adversarial proceedings and due process. The administration failed to establish misconduct by clear and convincing evidence. The decision dismissing [him] should have been rescinded and [he should have been] reinstated to his post."

28. His grounds of appeal can be summarised as follows:

- i. the UNDT erred in law by concluding that due process was satisfied if the staff member could comment on anonymous witness statements providing evidence against him;

⁷ *Jahnsen Lecca v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-408, para. 22.

- ii. the UNDT erred in relying on the photographic identification by VO3 and VO4; and
- iii. the UNDT erred in upholding the Secretary-General's decision based on the record of his interview which he contested.

Did the UNDT err in law by concluding that due process was satisfied if the staff member could comment on anonymous witness statements providing evidence against him?

29. The OIOS investigation upon which Mr. Oh was dismissed stemmed from occurrences between 21 and 23 February 2007, in Côte d'Ivoire where the *Police criminelle* d'Abidjan raided five local businesses suspected of operating illegal brothels. The raids resulted in the apprehension of suspected procurers and a number of women suspected of being prostitutes. Among the women apprehended, four were from a bar called Bar Lido and were identified as VO1, VO2, VO3 and VO4 (Victims), who all claimed to have been trafficked and compelled to work as prostitutes. Three of them claimed to have been paid for sexual services by UNOCI staff. Two of the victims, VO3 and VO4, identified Mr. Oh as one of their patrons from an array of photographs.

30. Mr. Oh did not have the chance to confront the victims as they were repatriated shortly after their statements were taken. He was only able to challenge their statements through the OIOS investigators.

31. Mr. Oh contends that the broad language of the Dispute Tribunal that due process was satisfied as long as the staff member could comment upon anonymous statements cannot be reconciled with the ruling in *Liyanarachchige*.

32. *Liyanarachchige* arose from the same incidents as the present one, and Mr. Liyanarachchige's dismissal which was based on the anonymous witness statements of VO1 and VO3, was set aside by the Appeals Tribunal holding:

The use of statements gathered in the course of the investigation from witnesses who remained anonymous throughout the proceedings, including before the Tribunal, cannot be excluded as a matter of principle from disciplinary matters, even though anonymity does not permit confrontation with the witnesses themselves but only with the person who recorded the statements of the anonymous witnesses. However, such statements may be used as evidence only in exceptional cases because of the difficulties in establishing the facts, if such facts are seriously prejudicial to the work, functioning and reputation of the Organization, and if maintaining anonymity is really

necessary for the protection of the witness. Furthermore, it should be possible to verify the circumstances surrounding anonymous witness statements and to allow the accused staff member to effectively challenge such statements.⁸

33. Although the above conditions were met in the *Liyanarachchige* case, the Appeals Tribunal went on to hold:

It should be recalled, however, that even assuming that the above-mentioned conditions were met, a disciplinary measure may not be founded solely on anonymous statements. In disciplinary matters as in criminal matters, the need to combat misconduct must be reconciled with the interests of the defence and the requirements of adversary procedure. In this case, the charges are based solely on statements made to the OIOS investigator by anonymous witnesses.⁹

34. In the circumstances of the *Liyanarachchige* case, the Appeals Tribunal held:

It follows from the above that the UNDT erred in law by finding that the Secretary-General had not violated the requirements of adversarial proceedings and the rights of the defence in taking the decision to summarily dismiss Mr. Liyanarachchige solely on the basis of the statements of anonymous witnesses.¹⁰

35. As this Tribunal noted above, the circumstances of this case were the same as in *Liyanarachchige*. It was an exceptional case warranting the use of anonymous witness statements. The purpose of anonymity was to protect the privacy of the victims of misconduct, and also to safeguard their safety as they had been removed from a human trafficking ring. Also from the record, the non-governmental organization that had custody of the women granted limited time for interviews before the witnesses were removed from Côte d'Ivoire.

36. The reasons for withholding the identities of the victims and for not producing them at the trial were contained in the OIOS Investigation Report that was sent to Mr. Oh.

37. Accordingly, the UNDT in Mr. Oh's case properly found that the conditions for the admissibility of anonymous statements set out by the Appeals Tribunal in *Liyanarachchige* were met.

⁸ *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087, para. 19.

⁹ *Id.*, para. 20.

¹⁰ *Id.*, para. 21.

38. It should be noted that this is where the similarity between the two cases ends. Mr. Oh's case is clearly distinguished from *Liyanarachchige* for the following reasons. In *Liyanarachchige*, the staff member denied all allegations against him during the interview with OIOS, so that disciplinary measure was solely based on the anonymous witness statements of VO1 and VO3. In Mr. Oh's case, the disciplinary measure was founded not only on anonymous witness statements, but also on statements made by Mr. Oh to OIOS that corroborated the witness statements as well as on photographic identification.

39. Mr. Oh further argues that the UNDT misapplied the Appeals Tribunal's ruling in *Applicant*,¹¹ contending that in that case the identities of the complainants who were alleging sexual harassment were known to the defendant staff member and the witness statements were signed by the complainants.

40. As the Secretary-General asserts, *Applicant* does not require that statements of witnesses must be signed when their cross-examination is not possible. Rather, the due process rights of a staff member are complied with as long as he has a meaningful opportunity to mount a defense and question the veracity of the statements against him, which, in the instant case, Mr. Oh did. For clarity, we reproduce portions of the *Applicant* Judgment:

... As a general principle, the importance of confrontation, and cross-examination, of witnesses is well-established. ...

... Under certain circumstances, however, denial of this right does not necessarily fatally flaw the entire process.

...

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

¹¹ *Applicant v. Secretary-General of the United Nation*, Judgment No. 2013-UNAT-302.

... The Tribunal is satisfied that the key elements of the Applicant's rights of due process were met: he was fully informed of the charges against him, the identity of his accusers and their testimony; as such, he was able to mount a defense and to call into question the veracity of their statements. This Tribunal is, therefore, satisfied that the interests of justice were served in this case, despite his inability to confront the persons who had given evidence against him during the initial investigation.¹²

41. Accordingly, this ground of the appeal fails.

Did the UNDT err in upholding the Secretary-General's decision based on the record of Mr. Oh's interview that he contested?

42. The UNDT, in assessing the reliability of Mr. Oh's statements to OIOS that he had paid the women he had met at the Bar Lido for sexual services, rejected his allegation that his statement had been fabricated by OIOS.

43. Mr. Oh challenges the record of his statements to OIOS by claiming that the "investigators did not follow procedures that would have improved the reliability and trustworthiness of the investigation". He contends that the investigators failed to record the interview and to prepare the report in "question asked-answer received" format. He alleges that there was a "lack of clarity in what [he] was asked and what he understood" during his interview with OIOS. Furthermore, he was not asked to read and sign the statement.

44. The Secretary-General submits that OIOS followed all the required procedures that were applicable at the time of the investigation. The Secretary-General referred to paragraphs 19, 52 and 53, of the OIOS Manual of Investigation Practices and Policies (OIOS Investigation Manual) in force at that time.

45. Paragraph 19 of the OIOS Investigation Manual provides:

When interviewing staff or others, every effort will be made to have two investigators participate to ensure that proper procedures are followed. The investigators will take careful notes and will document the conversation in the case file promptly upon completion of the interview. There is no requirement for a witness or the OIOS Investigators to sign a statement because OIOS undertakes administrative fact-finding rather than criminal investigations and consequently has no law enforcement powers. However, the Investigator may ask for a signed statement such as in cases where a critical witness who is not UN staff may not be available later. Where special

¹² *Id.*, paras. 33-34 and 38-39.

protections are sought by the interviewee, such as in cases of reasonable fear of retaliation or other danger, the investigators will shield the identity of the witness in the files.

46. Paragraph 66 provides:

An investigation report that recommends disciplinary or judicial action will set out the facts that have been established by OIOS and demonstrate how those facts led OIOS to reasonably conclude that the staff member had engaged in misconduct. The report will present an account of the views of the staff member against whom evidence of misconduct has been obtained and of the evidence that is relied upon by OIOS and that staff member. It must be emphasized that the OIOS investigation is not a criminal investigation and that OIOS must demonstrate only that its conclusions and recommendations reasonably follow from the facts. It will then be for the Programme Manager to review the report and decide whether to conclude that “the report of misconduct is well founded” (ST/AI/371, *Revised Disciplinary Measures and Procedures*, paragraph 3) and, on that basis, to report the matter to the Assistant Secretary-General for Human Resources Management (ASG/OHRM) who has the authority to decide whether the matter shall be pursued. (Italics in original.)

47. Paragraphs 52 and 53 require OIOS to make a staff member aware of the allegation against him or her and to give the staff member a reasonable opportunity to put forward his or her version of the facts and to present evidence or witnesses in his or her favour.

48. We have examined the handwritten notes and the narrative of the interview of Mr. Oh by the OIOS investigators. It is clear that the OIOS investigators complied with the OIOS Investigation Manual. Mr. Oh was made aware of the allegations against him and given an opportunity to comment on them. The fact that he did not sign the written or typed notes does not amount to an irregularity as it is not a requirement under the OIOS Investigation Manual as the OIOS investigation was not criminal in nature.

49. We therefore hold that Mr. Oh has failed to establish any procedural irregularity that would undermine the reliability of the record of his statements to OIOS.

50. Mr. Oh further denies making any admission to the OIOS investigators that he paid prostitutes for sexual services and contests the record of the interview. He claims his OIOS statements were fabricated. The burden of proving improper motivation lies with the staff member raising such claims.¹³ Mr. Oh presented no evidence to support this allegation.

51. In comparing the handwritten and typed notes of Mr. Oh's statements to OIOS we do not find any material difference. It is also not evident that OIOS misconstrued innocent statements by Mr. Oh as euphemisms for prostitution and drew erroneous inferences.

52. During the oral hearing, Mr. Oh had the opportunity to cross-examine one of the OIOS investigators who had interviewed him. The UNDT also had an opportunity to assess the credibility of both Mr. Oh and the OIOS investigator. It was satisfied that Ms. Blaskovic's denials of his allegations were credible and that the allegation of fabrication was unsubstantiated.

53. This Tribunal has emphasized:

... some degree of deference must be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard. The UNDT has the advantage of assessing the demeanour of each witness while he or she is giving evidence and this is critical for assessing the credibility of the witness and the persuasiveness of his or her evidence.¹⁴

54. In light of the foregoing, we uphold the UNDT's decision to reject Mr. Oh's allegation that his statement as recorded by OIOS had been entirely fabricated. We also hold that the UNDT properly relied on the record of Mr. Oh's statement to the OIOS investigators, which corroborates the statements of VO3 and VO4 that he had paid them for sexual services.

55. This ground of the appeal fails.

Did the UNDT err in relying on the photo identification by VO3 and VO4?

56. Mr. Oh, however, challenges the reliance of the UNDT on the evidence of the photo identification on the grounds that the photo array was unfairly suggestive as it included only

¹³ *Asaad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2010-UNAT-021, para. 10.

¹⁴ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 36.

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

Conclusion

57. We affirm the UNDT decision that the facts of misconduct have been established in that Mr. Oh had engaged in sexual exploitation and abuse in the light of the totality of the evidence, based on his statements to OIOS, the statements of the two victims, VO3 and VO4, to OIOS, and the identification by VO3 and VO4 of him in a photographic array.

58. From the foregoing, the appeal fails.

Judgment

59. The appeal is dismissed and the UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Simón

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar