



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2025-UNAT-1600

Hervé Wamara Tibenderana
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Katharine Mary Savage Judge Leslie F. Forbang
Case No.:	2025-2012
Date of Decision:	31 October 2025
Date of Publication:	9 December 2025
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Sètondji Roland Adjovi & Anthony Kreil Wilson
Counsel for Respondent:	Noam Wiener

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Mr. Hervé Wamara Tibenderana (Mr. Wamara Tibenderana or Appellant), a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) contested the decision to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity, for sexually harassing Vo1 and Vo2, two female members of the Canadian Armed Forces (CAF) (contested decision).

2. On 6 February 2025, by Judgment No. UNDT/2025/005 (impugned Judgment),¹ the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed the application. Mr. Wamara Tibenderana appeals.

3. For the reasons set out below, the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) grants the appeal and reverses the impugned Judgment.

Facts and Procedure

4. The Appellant joined the Organization in December 2009. At the relevant time of events, he was serving as a Movement and Control Assistant and Team Leader at the Air Cargo Services Unit at the Goma Airfield, Democratic Republic of the Congo (DRC).

Allegations of sexual harassment by Vo1

5. During the events in question, Vo1 was a Corporal in the CAF, working with the movements of military aircraft. In February 2022, Vo1 was deployed with the CAF contingent supporting MONUSCO at the Goma Airfield.²

6. Vo1 alleges that the Appellant sexually harassed her on three separate occasions in February 2022:

i) On 12 February 2022, she met the Appellant at the Goma airport. During their conversation, she noticed him staring at her breasts. In response, she folded her arms to cover herself and put her hand on her chin. The Appellant then leaned to his side and looked at her buttocks.³

¹ *Wamara Tibenderana v. Secretary-General of the United Nations*, Judgment No. UNDT/2025/005.

² Investigation Report, para. 15.

³ *Ibid.*, paras. 16-19.

ii) On 16 February 2022, while Vo1 was in a United Nations vehicle with the Appellant, her colleague (Corporal S.L.) and a driver (M.R.), the Appellant told her that he would take her to the “seventh heaven” after they dropped off Corporal S.L.⁴

iii) On 17 February 2022, while Vo1 was loading a container onto a military aircraft, she noticed the Appellant leave a loading vehicle he was operating, follow her around the work area, and attempt to attract her attention by looking at her and saying something she could not hear.⁵

7. On 18 February 2022, Vo1 lodged these allegations with the MONUSCO Conduct and Disciplinary Team (CDT).⁶

Misconduct investigation and Vo2’s subsequent allegations of sexual harassment

8. On 20 February 2022, the CDT referred the matter to the Office of Internal Oversight Services (OIOS), which opened an investigation into the allegations of misconduct.⁷ OIOS interviewed several witnesses, including the Appellant on 8 March 2022.⁸

9. OIOS also interviewed Vo2, a CAF Logistics Officer who had been deployed to the DRC on three occasions between March 2021 and March 2022. At the time, she was a Captain in the CAF. Vo2 stated that she knew the Appellant and that he had previously made comments about her appearance and name, such as “you’re beautiful” and “your name is beautiful”, particularly when they were alone. She described his behavior as akin to “somebody trying to hit on you at a bar”. She further stated that she did not report his conduct as she was accustomed to such behavior in the DRC.⁹

10. On 20 March 2023, OIOS issued its Investigation Report, in which it found that “the evidence was supportive of the reports that [the Appellant had] sexually harassed Vo1. OIOS also concluded that the Appellant had displayed similar conduct towards Vo2.¹⁰ Consequently, OIOS referred the case to the Office of Human Resources (OHR) for appropriate action.¹¹

⁴ *Ibid.*, paras. 23-24. Please note that the Appellant used the French expression “septième ciel”.

⁵ *Ibid.*, paras. 50-51.

⁶ *Ibid.*, para. 11.

⁷ *Ibid.*, paras. 1 and 13.

⁸ *Ibid.*, para. 21.

⁹ *Ibid.*, paras. 75-78.

¹⁰ *Ibid.*, para. 3.

¹¹ *Ibid.*, para. 4.

Disciplinary process and contested decision

11. On 5 September 2023, the Director, Administrative Law Division (ALD), OHR, informed the Appellant by memorandum that, based on evidence and findings contained in the Investigation Report, the following allegations of misconduct were issued against him:¹²

- a. around 12 February 2022, while Vo1 worked in her official capacity at the Goma airport, wearing a t-shirt, you stared intensely at her breasts and, when she folded her arms to prevent you from staring, you turned to her side and stared intensely at her backside;
- b. on 16 February 2022, aboard a MONUSCO vehicle at work at the Goma airport, you told Vo1 that you would leave her colleague, Corporal [S.L.], down at the airplane and would take her to carry her 'up to 7th Heaven', as in sexually satisfying Vo1; and
- c. on 17 February 2022, at work at the Goma airport, from your loading vehicle, you tried to wave at Vo1 and get her attention, making provocative smiles, and, after you got out of your vehicle, you started following Vo1 at a distance, as she moved from one side of the container to the other, waving and trying to maintain a line of sight with Vo1.

As regards Vo2 it is alleged that:

- a. Multiple times on unknown dates between April 2021 and March 2022, you made comments to Vo2 about her physical appearance, including 'you're beautiful', 'your name is so beautiful'.

12. The Appellant was invited to provide his written comments, which he did on 17 October 2023.¹³

13. By letter dated 19 December 2023, the Assistant Secretary-General for Human Resources (ASG/OHR) informed the Appellant of the contested decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) that the allegations against him had been substantiated by clear and convincing evidence and constituted misconduct pursuant to Staff Regulation 1.2(a) and (f) and Staff Rule 1.2(f), in respect of which the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity was imposed. His name was also included in the ClearCheck database.¹⁴

¹² Letter of allegations of misconduct dated 5 September 2023, para. 26.

¹³ Impugned Judgment, para. 12.

¹⁴ Sanction letter dated 19 December 2023.

Procedures before the Dispute Tribunal

14. On 10 March 2024, the Appellant filed an application with the Dispute Tribunal challenging the contested decision. His application included a list of nine witnesses he sought to call to testify; the OIOS investigator was not among them.

15. On 29 July 2024, the UNDT held a Case Management Discussion (CMD), during which the parties discussed, among other things, the schedule for witness testimony. During the CMD, the Appellant did not request to call the OIOS investigator to testify at the hearing.¹⁵

16. On 9 September 2024, the Appellant filed a request to call the OIOS investigator to testify, relying on the decision of *Bangambila*¹⁶ issued on 4 September 2024 which he argued proved that “investigations cannot be trusted”.¹⁷

17. On 18 September 2024, in Order No. 127 (NBI/2024), the UNDT directed the Appellant to file a motion by 20 September 2024 clearly identifying “the specific areas of inquiry” for which the investigator was being called.¹⁸ He complied on 20 September 2024.¹⁹

18. On 30 September 2024, the UNDT issued Order No. 133 (NBI/2024), rejecting the Appellant’s Motion.²⁰ It found that the Appellant’s general assertion – that he would ask the OIOS investigator questions about the Investigation Report and the issues raised in Annex 7 of his application – failed to meet the UNDT’s directive. The UNDT held that the Motion was based on his challenge to the credibility of some witnesses but that it would assess the credibility of the witnesses itself. It concluded that any probative value of the investigator’s testimony would be substantially outweighed by considerations of undue delay and the presentation of cumulative but unnecessary evidence.²¹

19. On 1 November 2024, the Appellant filed a “Submission regarding racial discrimination in [the] CAF”, alleging that he had “discovered extensive information regarding racial discrimination in the Canadian Forces against black people” (Submission). He included links to six websites, five

¹⁵ Impugned Judgment, para. 133.

¹⁶ *Bangambila v. Secretary-General of the United Nations*, Judgment No. UNDT/2024/055.

¹⁷ Mr. Wamara Tibenderana’s “Submission on witness availability and request for additional witness”.

¹⁸ *Wamara Tibenderana v. Secretary-General of the United Nations*, Order No. 127 (NBI/2024), paras. 7 and 10.

¹⁹ Mr. Wamara Tibenderana’s “Response to para. 10(a) of Order No. 127 (NBI/2024)”.

²⁰ *Wamara Tibenderana v. Secretary-General of the United Nations*, Order No. 133 (NBI/2024).

²¹ *Ibid.*, paras. 4-10.

of which referred to a class action filed in 2016 in the Federal Court of Canada, in which class members alleged racial discrimination in connection with their military service at any time since 17 April 1985.²²

20. On 7 November 2024, the UNDT issued Order No. 150 (NBI/2024), rejecting the Appellant's Submission on four grounds. First, it observed that the Appellant never raised any allegations of racial discrimination in his application before the UNDT. It further held that it was "manifestly unfair to add allegations of racial discrimination on the eve of the hearing".²³ Second, the UNDT noted that the alleged racial discrimination described in the lawsuit referred to by the Appellant did not relate to the Secretary-General, its agents or any of the witnesses and was disputed by Canada.²⁴ Third, it highlighted that pursuant to Article 15(7) of the Dispute Tribunal Rules of Procedure (UNDT Rules), documents and statements made in connection with any informal conflict-resolution process are confidential and may not be used before the UNDT.²⁵ Last, the UNDT found that the evidence was not relevant to the present case.

21. Between 11 and 14 November 2024, the UNDT held a hearing on the merits of the case, during which it heard oral evidence from eight witnesses, including the Appellant, VO1 and VO2.

Impugned Judgment

22. In the impugned Judgment, the UNDT dismissed the application.

23. The UNDT first rejected the Appellant's argument that there was no proof that the USG/DMSPC made the contested decision. The sanction letter dated 19 December 2023 explicitly stated that the contested decision was made by the USG/DMSPC, and the e-mail correspondence between the ASG/OHR and the USG/DMSPC confirmed that the ASG/OHR's recommendation to impose the disciplinary measure of separation from service on the Appellant had been approved by the USG/DMSPC.²⁶

²² Mr. Wamara Tibenderana's "Submission regarding racial discrimination in [the CAF]".

²³ *Wamara Tibenderana v. Secretary-General of the United Nations*, Order No. 150 (NBI/2024), para. 7.

²⁴ *Ibid.*, para. 8.

²⁵ *Ibid.*, para. 9.

²⁶ Impugned Judgment, paras. 22-30.

24. Turning to the merits of the case, the UNDT found that the case revolved around the credibility of Vo1, Vo2 and the Appellant.²⁷ It noted that it would initially focus on the 16 February 2022 incident in its assessment of the witnesses' credibility.

25. The UNDT held that it had been established that the Appellant made the "seventh heaven" sexual comment to Vo1. It found that Vo1 and Corporal S.L., who was also present in the vehicle when the incident occurred, "seemed to be telling truth", emphasizing that their testimonies were consistent with each other, with the other evidence on record, and with their prior statements.²⁸ With respect to Vo1's testimony that, following the "seventh heaven" comment, she pulled out her pistol to be released from the vehicle, the UNDT found this statement to be "surprising" and inconsistent with her initial reports. Nonetheless, it observed that Vo1 appeared to sincerely believe that the event had occurred.²⁹ In light of her "undisputed" testimony that she had been diagnosed with Post-Traumatic Stress Disorder (PTSD) as a result of the incident, the UNDT disregarded this "false memory" and accepted the remainder of her testimony as credible. In contrast, the UNDT found the Appellant's testimony to be "evasive, non-responsive, and contradictory". It noted that "the same question had to be asked repeatedly to get a direct answer from him".³⁰ The UNDT dismissed the Appellant's allegations of a conspiracy against him, noting that he provided no explanation as to why anyone would be motivated to target him. Similarly, the UNDT characterized the Appellant's claim of racism as a "red herring".³¹ The UNDT also found that M.R., the driver of the vehicle, lacked credibility because of the likelihood that he had been "coached" to testify as he did.³²

26. As to the 17 February 2022 incident, the UNDT concluded that it had been established that the Appellant harassed Vo1 and attempted to get her attention. The UNDT found that Vo1's account was corroborated by Corporal S.D., the pilot, Captain G.D., and even partially by the Appellant himself. The UNDT concluded that the Appellant likely attempted "to get Vo1's attention to apologize in an attempt to dissuade her from pursuing her complaint". This conduct, combined with Corporal S.L.'s statement that the Appellant told him that he would apologize to Vo1 after learning about her complaint, also constituted, in the UNDT's view, an "admission of guilt"

²⁷ *Ibid.*, para. 34.

²⁸ *Ibid.*, para. 91.

²⁹ *Ibid.*, para. 103.

³⁰ *Ibid.*, para. 92.

³¹ *Ibid.*, paras. 100-102.

³² *Ibid.*, paras. 97-98.

regarding the “seventh heaven” comment.³³ The UNDT rejected the Appellant’s assertion that he never left the key loader and, therefore, could not have followed VO1. It found this argument contradicted by a photograph showing him standing on the tarmac in front of the key loader (the photograph).³⁴

27. Regarding the 12 February 2022 incident, the UNDT held that “[h]aving found VO1 to be credible regarding these two incidents, the Tribunal also [found] her testimony that [the Appellant] stared at her breasts and buttocks in the first incident to be credible”.³⁵

28. Concerning allegations made by VO2, the UNDT similarly found that they were established by clear and convincing evidence. It held that VO2’s testimony – that the Appellant made unwelcome comments to her on multiple occasions – was credible. On the contrary, it found the Appellant’s “blanket denial” to be inconsistent with his previous statements, noting that it was “inconceivable” that he did not know who VO2 was.³⁶

29. Therefore, the UNDT concluded that there was clear and convincing evidence that the Appellant committed each of the acts underlying the contested decision, and that the established facts amounted to misconduct.³⁷

30. The UNDT further found that the sanction imposed on the Appellant was proportionate to his offence.³⁸

31. The UNDT held that the Appellant’s due process rights had been respected during both the investigation and the disciplinary process. It rejected his argument that he had been presumed guilty from the outset and that the OIOS investigators sought only inculpatory evidence, noting that its own credibility assessments aligned with those made by the investigators. It also found the Appellant to be “very conversant in English” and held that the use of English by OIOS during his interview did not prejudice him.³⁹

32. Turning to the Appellant’s various claims of unfairness during the hearing, first, the UNDT denied his claim that it was unfair that he was not permitted to call the OIOS investigator as a

³³ *Ibid.*, paras. 107-108.

³⁴ *Ibid.*, para. 109.

³⁵ *Ibid.*, para. 110.

³⁶ *Ibid.*, paras. 111-113.

³⁷ *Ibid.*, paras. 114-115.

³⁸ *Ibid.*, paras. 122-123.

³⁹ *Ibid.*, paras. 124-129.

witness, and his claim that he was denied the opportunity to introduce evidence of racial bias within the CAF. It emphasized its broad discretion under Article 18(1) of the UNDT Rules to determine the admissibility of evidence.⁴⁰

33. Second, in response to the Appellant's complaint about the time limits imposed during the hearing and that Appellant's counsel was "cut off" during cross-examination without grounds, the UNDT held that its comments were "reasonable and appropriate under the circumstances".⁴¹ It stressed that counsel do not have "a right to conduct unnecessarily long examinations" and that the role of a trial judge "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".⁴² The UNDT also noted that it had similarly criticized the Secretary-General's counsel for exceeding the allotted time.

Submissions

Mr. Wamara Tibenderana's Appeal

34. The Appellant requests the Appeals Tribunal to rescind the contested decision and reappoint him to a suitable position commensurate with his skills. He also requests the UNAT to award him compensation for the damage to his career and self-respect and to remove his name from the ClearCheck database. In the alternative, he requests the Appeals Tribunal to remand the case to the Dispute Tribunal for consideration by a different judge. If the UNAT were to consider that the UNDT did not err in concluding that he committed misconduct, the Appellant requests the Appeals Tribunal to determine that the sanction imposed was "irrationally harsh given the specific circumstances of the case and to change the sanction to a lesser sanction". Finally, if the UNAT were to consider that the misconduct still warranted separation from service, he requests the Appeals Tribunal to replace the sanction with a separation from service with compensation in lieu of notice and with termination indemnity.

⁴⁰ *Ibid.*, para. 142.

⁴¹ *Ibid.*, para. 179.

⁴² *Ibid.*, paras. 176 and 178.

35. First, the Appellant submits that the UNDT erred by excluding his arguments concerning racism within the CAF. He further contends that it was unfair for the UNDT to deny him this line of questioning, which he considers relevant to the present case.

36. Second, he contends that the UNDT erred in taking Vo1's claim of PTSD into account without medical evidence. He disputes the UNDT's reference, in footnote 4, to medical studies, which he claims was "totally inappropriate and an error of law as these studies were not in evidence and [he] had no opportunity to respond".

37. Third, the Appellant submits that the UNDT erred in procedure by denying his request to call the OIOS investigator to testify at the hearing. He reiterates that the investigator would have been "instrumental to understand some key confused aspects of the investigations, such as the photo identifications and how metadata of the photo were gathered" – evidence which, he claims, the UNDT misrepresented. He further contends that the UNDT erroneously concluded that he had failed to raise this argument earlier, when in fact, in his 20 September 2024 Motion, he explicitly stated that he intended to question the investigator about the Investigation Report, which referred to the photographs at paragraph 55. He adds that, given the UNDT's finding that the "photo on the tarmac in April 2021 taken by Vo2 undermined [his] credibility where he claimed he was not outside the plane on 17 February 2022 on the tarmac", it was essential to clarify this issue through the investigator's testimony.

38. Fourth, the Appellant alleges that the UNDT demonstrated biased treatment of his counsel in comparison to the Secretary-General's counsel. In this regard, he reiterates that the UNDT unjustifiably cut off his questioning of Corporal S.D. He also challenges the fact that "some of the critical evidence was heard in French, a language that the Judge failed to understand, while the interpretation was not failed by the technology and the transcripts were unreadable".

39. Fifth, the Appellant submits that the UNDT's assessment of witness credibility was biased against him and based on erroneous facts and conclusions. He argues that the UNDT's finding that if "Vo1 and Vo2's version of events [was] found to be credible, the Tribunal [would] uphold the [Secretary-General]'s finding that the facts [were] established" is erroneous and ignores numerous other witnesses who testified before it and were relied upon, despite lacking credibility.⁴³ With regard to Vo1 and Vo2's testimony, the Appellant argues that they were not credible and contradicted each other on key facts. He cites, for example, the fact that Vo1 testified

⁴³ *Ibid.*, para. 34.

that she pulled out her pistol to be released from the vehicle following the “seventh heaven” comment. Further, the Appellant submits that the UNDT mistakenly held that the photograph showing him standing on the tarmac in front of the key loader was taken on 17 February 2022, when, according to paragraph 55 of the Investigation Report, it is undisputed that the photo was taken by VO2 in April 2021.⁴⁴ Also, he contends that the UNDT erred by failing to assess that he was wearing a mask on 17 February 2022 while on the tarmac – a fact which contradicts the testimony of S.D., who claimed that he was making provocative smiles at VO1.

The Secretary-General’s Answer

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

41. First, the Secretary-General contends that the UNDT’s case management decisions were lawful. In this regard, he recalls the UNDT’s broad discretion in managing cases and assessing the credibility of the witnesses who testified before it. He notes that the Appeals Tribunal consistently held that it will not lightly interfere with the UNDT’s case management decisions and will give deference to its evaluation of the witness testimony.⁴⁵

42. The Secretary-General submits that the UNDT lawfully denied the Appellant’s claim of racism within the CAF. He highlights that the UNDT explained in “great detail” its reasons for denying the admission of the Canadian lawsuit documents into evidence. He adds that the Appellant failed to provide any persuasive reason in his appeal as to why the UNDT erred in doing so – aside from noting that some CAF members nicknamed him “Sans Pression”. In this regard, he clarifies that there is no evidence that the nickname carried negative connotations or that the Appellant found it objectionable.

43. The Secretary-General says that the UNDT lawfully denied the Appellant’s request to call the OIOS investigator to testify. He argues that the Appellant’s arguments in this regard merely repeat those that were unsuccessfully presented before the Dispute Tribunal, with “an emphasis” on the metadata of a photo related to the 17 February 2022 incident. The Secretary-General contends that calling the OIOS investigator to testify would have added no value to the Appellant’s

⁴⁴ *Ibid.*, paras. 109 (footnote 5) and 138. See also Investigation Report, para. 55.

⁴⁵ *Bertucci v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062, para. 23.

contentions, as there was no dispute between the parties that the photograph had been taken in April 2021.

44. The Secretary-General further argues that the UNDT was not prejudicial against the Appellant's counsel. He observes that the Appellant's contention that the UNDT had allegedly demonstrated bias against him by not permitting him to question witnesses beyond the time allotted had already been addressed in detail in paragraphs 159-180 of the impugned Judgment. He argues that the Appellant's counsel voluntarily chose to conclude his questioning and failed to demonstrate that "the UNDT Judge was biased against him, or that he suffered any prejudice because of being required to adhere to the time allotted to him to question the witnesses".

45. Second, the Secretary-General submits that the UNDT did not err on questions of facts resulting in a manifestly unreasonable decision. He specifically contends that the UNDT did not err in taking Vo1's claim of PTSD into consideration. He argues that the Appellant's arguments to the contrary confuses two separate issues, namely: i) the fact that the UNDT, in CMDs prior to the hearing, instructed the Secretary-General to provide medical documentation to show that Vo1 suffered PTSD if he wished to receive special measures for her testimony (before he ultimately decided not to submit such documentation and allowed Vo1 to testify without protective measures); and ii) the separate issue of Vo1's PTSD, which came up during her testimony. The Secretary-General clarifies that, contrary to the Appellant's argument, he was under no obligation to provide medical evidence in support of Vo1's PTSD for the UNDT to determine that the inconsistency in her testimony was caused by her PTSD.

46. Last, the Secretary-General contends that the UNDT's reference to a photograph taken in February 2022, instead of April 2021, although erroneous, did not result in a manifestly unreasonable decision. In this regard, the Secretary-General argues that the UNDT "had plenty of firsthand witness testimony on which to base its conclusion that [the Appellant] had stepped out of the loading vehicle and attempted to provoke Vo1 on 17 February 2022". Regarding the Appellant's statement that Corporal S.D. and Corporal S.L. lied that the photograph had been taken on 17 February 2022, the Secretary-General argues that this statement is incorrect, as both testified that they did not remember when the photograph was taken.

Considerations

47. The primary issue on appeal is whether the UNDT erred when it found that there was clear and convincing evidence that the Appellant sexually harassed VO1 and VO2, thereby warranting termination for misconduct. The Appellant denies the allegations against him.

48. In disciplinary cases, it is well established that the Dispute Tribunal must consider: (a) whether the facts on which the sanction is based have been established by the Secretary-General by clear and convincing evidence when termination is a possible outcome; (b) whether the established facts qualify as misconduct under the Staff Regulations and Rules; (c) whether the sanction is proportionate to the offence and the circumstances; and (d) whether the staff member's due process rights were observed.⁴⁶

49. The Appellant submits that the UNDT erred in finding that the facts underlying the misconduct allegations had been proven by clear and convincing evidence. Further, he says that the UNDT erred in procedure by conducting an unfair hearing.

Alleged errors in procedure

50. Article 2(1) (d) of the Appeals Tribunal Statute (Statute) provides that the Appeals Tribunal has jurisdiction to review a UNDT judgment in which it is asserted that the UNDT "[c]ommitted an error in procedure, such as to affect the decision of the case".

51. The Appellant submits that the UNDT committed errors in procedure in the conduct of the hearing when it excluded his arguments and evidence regarding racism in the CAF, denied his application to call the lead investigator of the misconduct investigation, and unfairly treated his counsel compared to the Secretary-General's counsel.

52. He argues that the UNDT was unfair to deny him the right to pursue the line of questioning on racism in the CAF, which he says is relevant to his case and to the credibility of the CAF witnesses. He says that some witnesses were racially biased and/or demonstrated lack of cultural sensitivity in the DRC, noting that he was called by the nickname "Sans Pression" – a popular Canadian rap artist of Congolese descent – by some of the CAF members, as if they could

⁴⁶ *Maguy Bamba v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1259, paras. 37 and 40 (internal footnotes omitted); *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, paras. 29-30 (internal footnotes omitted).

not remember his real name. He also observes that VO2 stated that “she was harassed by more or less every male she crossed in town during her deployment”. He says that discovering rampant racism in the Canadian military is a “reasonable explanation” as to why these Canadian soldiers were “constructing” a case against him.

53. The UNDT, as the first instance tribunal and trier of fact, has broad discretion in how it manages its hearings including the admission of evidence which requires determination of relevance and reliability of that evidence. This discretion, though broad, is not unfettered and the exercise of it must not be arbitrary, improper or unfair. In the absence of an error in the procedure by the UNDT which may render the hearing unfair, the Appeals Tribunal will not interfere with the discretion of the UNDT to manage its cases or the hearing.⁴⁷

54. We find no merit to the argument that the UNDT improperly exercised its discretion in excluding evidence or arguments on racism in the Canadian military. There is no evidence that findings of racism or bias in the Canadian military over time had any direct relevance to the specific events in question.

55. The UNDT carefully considered these arguments and rightfully held that their relevance was not proven. It properly considered and rejected the Appellant’s claim that he was denied the opportunity to introduce evidence of racial bias within the CAF. It provided adequate reasons for the rejection and recalled the procedural timeline of his request to introduce this evidence, which was submitted “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”.⁴⁸ The UNDT reiterated and affirmed the conclusions set out in Order No. 150 (NBI/2024), adding that VO1 “joined the CAF in 2018 – two years after the lawsuit was filed and 33 years after the discrimination allegedly began”.⁴⁹ It further rejected his contention that he was denied the opportunity to respond to the Secretary-General’s reply opposing his submission on racial discrimination, noting that there is no right to “reply to a reply” and that he was permitted to question witnesses about their personal experiences with Africans or people of African descent.⁵⁰

56. As for the argument that the Appellant’s counsel was treated unfairly during the hearing, we similarly find no merit to this argument. The UNDT has broad discretion to manage the hearing

⁴⁷ *Lee v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-583, para. 18.

⁴⁸ Impugned Judgment, para. 144.

⁴⁹ *Ibid.*, para. 148.

⁵⁰ *Ibid.*, paras. 153-157.

and the introduction of evidence and witness testimony, including the questioning of those witnesses. A review of the hearing recording shows that the UNDT Judge was attempting to keep the hearing on time while ensuring that the parties had adequate opportunity to present their case fairly.

57. As for the UNDT's denial of the Appellant's application to call the investigator as a witness to testify due to the timing of the photo identifications used to identify him⁵¹ and the metadata of a photograph, the UNDT held that: i) these arguments were not included in his initial Motion; and ii) the timing of the photo identifications, which undisputedly occurred within weeks after the alleged incidents, and their metadata, had little to no relevance. Similarly, the UNDT also found that his argument that the OIOS investigator failed to investigate whether he was wearing a mask at the time of the events was of "negligible relevance" and, in any event, held that he had the opportunity to examine the witnesses on that subject.⁵²

58. The denial of the request to call the investigator by the Appellant did not amount to an error in procedure that affected the outcome of the case as the UNDT heard from direct witnesses on all issues including the timing of the photograph and whether the Appellant was wearing a mask during one of the incidents alleged by Vo1.

59. Although we find that the UNDT did not commit these errors of procedure that affected the outcome of the case as argued by the Appellant, we find that there were other errors of hearing procedure that led to unfairness and did affect the outcome. We set out those errors below as part of our review of the merits of the contested decision and of the UNDT's credibility assessments.

Merits of the case: was there clear and convincing evidence to establish the facts underlying the allegations of misconduct?

60. The Administration has the burden of establishing the facts underlying the alleged misconduct. If the misconduct results in termination or separation from employment, the Administration must establish the underlying facts of the misconduct by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt; it means that the truth of the facts asserted is highly probable. To meet this standard, "[t]here must be very solid support for the finding",⁵³ including

⁵¹ During the investigation, Mr. Wamara Tibenderana was identified through a photo array.

⁵² Impugned Judgment, paras. 138-140.

⁵³ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1187, para. 64.

“direct evidence of events, or (...) evidential inferences that can be properly drawn from other direct evidence”.⁵⁴

61. In the impugned Judgment, the UNDT properly characterized the case as revolving around the credibility of the protagonists: VO1, VO2 and the Appellant.⁵⁵ Therefore, if VO1 and VO2’s version of events were held to be credible, the UNDT stated that the evidence would support the conclusion that it is highly probable that their version of events regarding the Appellant’s alleged misconduct occurred as alleged.

62. The UNDT conducted an oral hearing in which VO1, VO2, the Appellant, and witnesses (including a driver (M.R.), the Appellant’s supervisors, and members of the CAF military) were called to testify regarding the alleged incidents. In dismissing the application, the UNDT found VO1 and VO2’s testimony credible, and the Appellant’s testimony not credible.

63. Therefore, the central issue in the appeal is whether the UNDT erred in its findings and assessments on credibility.

64. Although the Appeals Tribunal has consistently held that deference should be given to the UNDT on findings of credibility,⁵⁶ we find, for the reasons set out below, that the UNDT erred both in procedure, which significantly affected the outcome of the case, and in fact, resulting in a manifestly unreasonable decision in making its findings of credibility.

VO1’s allegations of sexual harassment

65. The Administration alleged that the Appellant sexually harassed VO1 on three different occasions in February 2022.

The 12 February 2022 incident

66. Prior to the hearing, VO1 had stated that she was with Corporal S.L. at the Goma airport.⁵⁷ They were speaking to the Appellant. During the conversation, she says he was staring fixedly at

⁵⁴ *Sisay Negussie v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1033, para. 45.

⁵⁵ Impugned Judgment, para. 34.

⁵⁶ *Al Othman v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-972, para. 70.

⁵⁷ Investigation Report, para. 16.

her breasts, leading her to cross her arms. He then leaned over and looked at her backside. The Appellant denies this.

67. Despite the UNDT's finding of VO1's credibility, there are inconsistencies in her version of events and inconsistencies with other witness testimony. In the impugned Judgment, the UNDT held that Corporal S.L. confirmed VO1's testimony that the Appellant looked at VO1's backside. However, the UNDT mischaracterizes his testimony from the hearing. A review of the hearing recording and transcripts shows that Corporal S.L. was specifically asked about what occurred on 12 February 2022. When asked whether he was with VO1 that day, he testified that he could not remember, contrary to his statement to the investigators. What he did say was that generally "people" would look at VO1 and others inappropriately. But he could not say that the Appellant looked at VO1 inappropriately on that day.⁵⁸ Therefore, the UNDT's finding that Corporal S.L. testified that he saw the Appellant looking at the backside of VO1 is not accurate.⁵⁹

68. Further, at the hearing, VO1 testified that she was in the presence of VO2 and other members of the CAF during this incident.⁶⁰ At the hearing, VO2 said she was not present and did not witness this incident, contradicting VO1's testimony.⁶¹

69. The UNDT ignored these contradictions in the evidence. Although inconsistencies in evidence do not automatically lead to the conclusion that a witness is not credible, there must be a reasonable explanation for those inconsistencies. However, no explanation was provided for VO1's inconsistency about who was present during this incident.

70. Rather, the UNDT seemed to focus primarily on the second incident in the vehicle on 16 February 2022. By finding that VO1's version of events on the second incident was credible, it found her credible for all three incidents without specifically assessing the credibility and reliability of the totality of the evidence, including the first and third incidents. We also find the UNDT's assessment of the evidence concerning the second incident problematic.

⁵⁸ 11 November 2024 recording of the UNDT hearing, Corporal S.L.'s testimony, minute marks 1:02:50 to 1:03:25.

⁵⁹ Impugned Judgment, para. 86.

⁶⁰ 12 November 2024 recording of the UNDT hearing, VO1's testimony, minute marks 19:58 to 21:10.

⁶¹ 14 November 2024 recording of the UNDT hearing, VO2's testimony, minute marks 18:05 to 19:15.

The 16 February 2022 incident

71. Overall, the UNDT found the testimony of Vo1 and Corporal S.L. on this incident credible, based on the UNDT Judge's observations of their demeanour during their testimony, and specifically noted that Vo1 genuinely became emotional.⁶² Further, the UNDT held that their testimony was consistent with each other, with the other evidence on the record and with their own prior statements.⁶³ On the other hand, the UNDT found the Appellant not credible, as his testimony during cross-examination was "evasive, non-responsive, and contradictory" and that the same question had to be asked repeatedly to get a direct answer.⁶⁴ The UNDT referred to examples of inconsistencies by the Appellant, including whether he remembered Vo2 and the nature of the weather during the vehicle incident ("heavy rain" versus "raining a bit").⁶⁵ Further, the UNDT held the driver, M.R., not credible because he was "coached" due to the Appellant speaking with him the day after the vehicle incident.⁶⁶ The UNDT also speculated that if nothing happened in the vehicle, then why did the CAF become involved at the highest level.⁶⁷

72. Although the Appeals Tribunal typically gives deference to the UNDT on assessments of credibility,⁶⁸ we find the UNDT's assessment of credibility in the present case to be faulty and confusing.

73. The evidence is that during the vehicle ride, the occupants of the vehicle were the driver, M.R., and the Appellant in the front seats, and Corporal S.L. seated in the back behind the driver, and Vo1 seated in the back behind the Appellant. Vo1 says that the Appellant turned around and said to them in French: "toi on te débarque ici, et toi on va t'amener au septième ciel avec nous".⁶⁹ Vo1 and Corporal S.L. interpreted this to mean that they would take Corporal S.L. to the airplane, and the Appellant would then take Vo1 to "seventh heaven" (a sexual reference).

74. During the investigation interview, Vo1 said that she interpreted this as a threat to kidnap her, "chain" her up and "rape" her. She also stated that she was "really mad" and told the Appellant "that's not going to happen", though Corporal S.L. tried to make it more like a joke with everyone

⁶² Impugned Judgment, para. 91.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, para. 92.

⁶⁵ *Ibid.*, paras. 94-96.

⁶⁶ *Ibid.*, para. 98.

⁶⁷ *Ibid.*, para. 99.

⁶⁸ *Al Othman Judgment, op. cit.*

⁶⁹ "You, we will drop you off here, and we will take her to the seventh heaven" (informal English translation). 12 November 2024 recording of the UNDT hearing, Vo1's testimony, minute marks 28:54 to 30:05.

laughing uncomfortably. She stated that it “wasn’t a big, big incident, but still, it [was] kind of weird (...) It [was] kind of scary”.⁷⁰ Notably, Vo1 stated that the Appellant repeated the comment of “seventh heaven” a few times.⁷¹ Corporal S.L.’s evidence directly contradicts this. He testified that the comment was made once.⁷² The UNDT inexplicably does not address this discrepancy between Vo1’s and Corporal S.L.’s evidence.

75. Further, at the hearing, Vo1 dramatically changed her version of the events in the vehicle. She testified that, after the Appellant made the seventh heaven comment, she asked him to repeat it, which he did. They laughed nervously but she wanted to find an escape. She checked her door, but she could not get out or lower the window, so she took out her pistol and screamed to be let out. She pointed the pistol at the back of the Appellant’s head and got out of the vehicle.⁷³ She testified that she was diagnosed with PTSD after this incident.⁷⁴

76. Vo1’s pulling her gun and pointing it at the Appellant’s head is not referenced in her earlier evidence, in the Investigation Report, or by any other witness in the vehicle, including Corporal S.L., who was sitting next to her. Rather than this impugning her credibility, the UNDT accepted that this was “surprising” and inconsistent with her initial reports. Nonetheless, it observed that Vo1 appeared to sincerely believe that the event had occurred.⁷⁵ In light of her “undisputed” testimony that she had been diagnosed with PTSD as a result of the incident, the UNDT disregarded this “false memory” and accepted the remainder of her testimony as credible. Citing medical studies, the UNDT acknowledged that PTSD “can cause memory aberrations, including spontaneous false memories”.⁷⁶

77. Through this reasoning, the UNDT inexplicably attempted to explain away a critical inconsistency by relying on Vo1’s testimony that she had been diagnosed with PTSD as a result of the incident. Although PTSD is a medical diagnosis, there was no medical evidence before the UNDT to support such a diagnosis. Despite this lack of medical evidence and in order to explain Vo1’s inconsistency, the UNDT went further and found, on its own accord, that PTSD causes memory aberrations including spontaneous false memories. In making this finding, it relied on a

⁷⁰ Transcript of Vo1’s interview held on 22 February 2022, p. 7: 148-166; p. 22: 534-545.

⁷¹ Transcript of Vo1’s interview held on 22 February 2022, p. 24: 586-588.

⁷² 11 November 2024 recording of the UNDT hearing, Corporal S.L.’s testimony, minute marks 1:16:57 to 1:17:55.

⁷³ 12 November 2024 recording of the UNDT hearing, Vo1’s testimony, minute marks 32:39 to 35:57.

⁷⁴ 12 November 2024 recording of the UNDT hearing, Vo1’s testimony, minute marks 26:20 to 26:35.

⁷⁵ Impugned Judgment, para. 103.

⁷⁶ *Ibid.*, para. 104.

study, *What drives False Memories in Psychopathology? A Case for Associative Activation*, and studies cited therein.⁷⁷ This study was not in evidence before the UNDT, nor was it adduced by either party, but instead resulted from the UNDT's own research and investigation on PTSD.

78. Therefore, we agree with the Appellant's submissions that "there was no evidence of PTSD on file and the [Secretary-General] had failed to submit any claim of PTSD with medical evidence before closing arguments". Further, the UNDT Judge is not a trained psychologist and was not qualified to make a medical diagnosis and therefore could not make this finding without medical evidence that VO1 had been diagnosed with PTSD.

79. By doing so, the UNDT committed errors of fact and procedure that affected the decision of the case contrary to Article 2 of the Statute. The Appellant had no notice that the academic evidence on PTSD adverse to him was before the UNDT. Further, he was unaware that the UNDT intended to rely on this evidence to make a critical finding on VO1's credibility and, as a result, had no opportunity to respond to this evidence. This violated the principles of natural justice and procedural fairness, in particular the principle of *audi alteram partem*, which requires that no party should be judged or adversely affected by a decision without having a chance to be heard and that every party must be given the opportunity to challenge and rebut any adverse evidence presented against them. The purpose of a fair hearing is to give affected persons an opportunity to participate in the decisions that may adversely affect them and a chance to influence the ultimate outcome. The Appellant could not do so, as he was unaware of the evidence the UNDT procured on its own volition and relied upon to decide the case.

80. In addition, we find that the UNDT erred in its findings of fact based on a faulty and unsubstantiated assessment of credibility of the other witnesses. The UNDT failed to put any weight on the Appellant's and driver's denial that the Appellant made the remark in question. The Appellant stated that he only discussed the fact that he was "going up" and the Canadians were going to the tarmac.⁷⁸ At the hearing, he testified that when he entered the vehicle, he greeted everyone and then VO1 asked him where he was going, and he said he was going to the

⁷⁷ *Ibid.* Otgaar et al., *What drives False Memories in Psychopathology? A Case for Associative Activation*, 5(6) Clinical Psychological Science 1048-1069 (2017).

⁷⁸ Investigation Report, para. 49.

“Nyiragongo”, and she said she was getting down at the down ramp side, which made everyone laugh. He denied saying anything about “seventh heaven” or “septième ciel”.⁷⁹

81. The driver told the investigators that the Appellant simply asked him to drop him off at the MONUSCO gate, and VO1 said to him to drop her and her colleague off at ramp control. He denied that the Appellant made any comments about “seventh heaven”.⁸⁰ The UNDT held that the driver was not credible as he was probably coached because he and the Appellant talked before the investigation interviews. However, the driver and the Appellant readily admitted to speaking but only to the extent that they discussed that the investigators would question the driver, and the Appellant told the driver generally that he should tell the investigators what happened. There is no evidence that the driver was “coached”, and the fact that they spoke is not sufficient alone to completely disregard his testimony. Furthermore, the evidence is clear that VO1, VO2, Corporal S.D. and other CAF witnesses also spoke with each other about this incident prior to the investigation (for example on the evening of 16 February 2022, on 17 February 2022, and subsequently).⁸¹ The UNDT did not similarly consider this in assessing their credibility.

82. Further, in finding Corporal S.L. credible, the UNDT failed to consider that, at the hearing, Corporal S.L. inexplicably testified that there may have been three people in the back seat of the vehicle that day. The UNDT also failed to address the significant inconsistency between VO1 and Corporal S.L.’s testimonies about her reaction to the Appellant in the vehicle. At the hearing, VO1 stated that she was angry and so terrified that she pulled out her gun and pointed it at the

⁷⁹ 12 November 2024 recording of the UNDT hearing, Appellant’s testimony, minute marks 1:26:00 to 1:30:35.

⁸⁰ Investigation Report, paras. 34-36.

⁸¹ Specifically, the evidence on record demonstrates that: i) Captain G.D. told the investigators that VO1 told him about the incident in the vehicle that day and she appeared to be upset by it (Investigation Report, para. 40). Sergeant A.H. stated to the investigators that he stayed at the same hotel as VO1 and that he spoke to her about the incident and she was upset (Investigation Report, paras. 42-44). VO2 also stated that VO1 told her and Sergeant A.H. about the incident the day it occurred, but that VO1 did not appear upset and seemed “pretty neutral” about the situation (Investigation Report, paras. 45-46). The UNDT did not address this inconsistency between these witnesses’ evidence; ii) Sergeant A.H. testified at the hearing that VO1 told him about the incident that day, that she was scared and said that a man told her that he wanted to have intercourse with her until she passed away or something to that effect. He said that VO1 told him this alone in her room, while VO2 testified that she spoke with VO1 in the presence of Sergeant A.H. and VO1 told them about the incident (13 November 2024 recording of the UNDT hearing, Sergeant A.H.’s testimony, minute marks 10:45 to 13:05); and iii) VO2 told the investigators that VO1 told her later that day as well about the incident along with Sergeant A.H. who was there (14 November 2024 recording of the UNDT hearing, VO2’s testimony, minute marks 11:58 to 13:05). VO1 appeared to be “neutral” though uncomfortable (Investigation Report, para. 46). VO2 then reported the incident to their higher command (14 November 2024 recording of the UNDT hearing, VO2’s testimony, minute marks 17:15 to 17:25).

Appellant. On the other hand, Corporal S.L. testified that VO1 did not have a negative reaction to the comment and was not angry.⁸² He also confirmed that there was no force or weapon drawn during the incident.⁸³ He further testified that the comment was inappropriate but also stated that things were blown out of proportion and he was surprised there was a complaint.⁸⁴

83. The UNDT held that Corporal S.L. corroborated VO1's evidence at the hearing that the seventh heaven comment was made. However, we have a significant concern about how his evidence was adduced at the hearing. At the hearing, Corporal S.L. was treated as a witness called by the Secretary-General. Despite this, the Secretary-General's counsel proceeded to ask leading questions to Corporal S.L. throughout his direct examination, especially on the critical question of what the Appellant was alleged to have said to VO1 in the vehicle. The Secretary-General's counsel asked Corporal S.L. if the Appellant had said to VO1 that he would bring her to the seventh heaven and Corporal S.L. simply replied in the affirmative.⁸⁵ The Appellant's counsel attempted to object to the leading questions but by the time he was able to object (which the UNDT sustained), the testimony on the crucial point had already been adduced and admitted.

84. We take this moment to further comment on the UNDT's general conduct of the oral hearing process in disciplinary cases, in particular the process of adducing witness evidence. In doing so, we briefly review the UNDT's role in the legal framework for disciplinary matters.

85. The UNDT has been described as an "inquisitorial and not solely adversarial tribunal".⁸⁶ For example, in *AAK*, we held that the role of the UNDT is to decide whether the Secretary-General's decision on the merits is lawful and in accordance with the applicable standard of proof.⁸⁷ It is well settled that the onus is on the Secretary-General to prove either by clear and convincing evidence or a balance of probabilities (depending on the nature of the sanction) the facts underlying the alleged misconduct. Unfortunately, this is not always reflected in the oral hearing process. Although the UNDT has discretion in the conduct of hearings, that discretion must be exercised fairly and in accordance with the onus of proof on the parties. If the hearing is

⁸² 11 November 2024 recording of the UNDT hearing, Corporal S.L.'s testimony, minute marks 26:56 to 27:10.

⁸³ 11 November 2024 recording of the UNDT hearing, Corporal S.L.'s testimony, minute marks 1:25:15 to 1:25:55.

⁸⁴ 11 November 2024 recording of the UNDT hearing, Corporal S.L.'s testimony, minute marks 1:28:00 to 1:29:35.

⁸⁵ 11 November 2024 recording of the UNDT hearing, Corporal S.L.'s testimony, minute marks 16:50 to 17:50.

⁸⁶ *AAK v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1348, para. 71.

⁸⁷ *Ibid.*

conducted in a manner that impacts the onus on the Administration to establish the underlying facts, the onus can implicitly shift to the staff member, and the hearing becomes unfair. This is because it is not for the staff member to disprove the alleged facts but for the Administration to prove the facts underlying the alleged misconduct in accordance with the applicable standard of proof.

86. Therefore, although the role of the UNDT is not to run a purely adversarial process and the UNDT has broad discretion in the conduct of its proceedings, in disciplinary cases – where the Secretary-General has a clear onus to establish the facts and where those facts are disputed – he should normally adduce his evidence first at an oral hearing, including calling witnesses whom he wishes to rely upon beyond the investigation report.⁸⁸ This not only accords with the onus on the Secretary-General but avoids the necessity of the staff member (usually the appellant) having to call witnesses contrary to her/his interest and having to make a request to have them declared hostile witnesses so that she/he can cross-examine them. In the present case, it was largely the Appellant who called witnesses to testify at the hearing, including those that the Secretary-General relied upon in deciding the misconduct (VO1, VO2, Corporal S.D., etc.). He applied to have them declared hostile witnesses, but this was denied. As a result, the onus implicitly shifted to the Appellant to essentially try to disprove the evidence against him but in a manner that limited his ability to test the veracity of that evidence through cross-examination.

87. The UNDT usually canvasses the attendance of witnesses at an oral hearing during a CMD. In the CMD, the staff member should be able to request the attendance of witnesses (including the complainant) whom the Secretary-General intends to rely upon at the hearing. If they attend, they are the Secretary-General's witnesses, and the staff member should be able to properly cross-examine them. If parties do not call witnesses and the Secretary-General wishes to rely solely on the investigation report, in most cases, the investigator should be called to speak to the report. If the Secretary-General only relies on the investigation report as evidence to establish the underlying facts, the UNDT must decide whether the report should be given sufficient weight as hearsay evidence for the Secretary-General to meet his burden of proof. Depending on the circumstances, it may not be sufficient.⁸⁹ We accept that there may be instances where, due to

⁸⁸ *Flamur Kazazi v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1382, paras. 72-73.

⁸⁹ See *AAY v. Secretary-General of the United Nations*, Judgment No. 2024-UNAT-1493, para. 52, where the UNAT held that “[w]here the relevant evidence has been gathered by an investigator, such evidence has been put to the employee, who has been given an opportunity to respond to or rebut such

availability and scheduling issues, witnesses are called out of order. However, this ultimately should not result in the onus of proof implicitly shifting to the staff member to disprove the alleged facts.

88. In the present case, the UNDT tasked the Appellant with having to call witnesses contrary to his interests and then limited him to direct examination by denying his request to declare them hostile witnesses. On the other hand, the Secretary-General was allowed to ask Corporal S.L., as the Secretary-General's witness, highly leading questions throughout his direct examination, including on the crucial point of what was said in the vehicle. The consequence of how the witness testimony was adduced at the hearing was that the Appellant was tasked with essentially trying to disprove the alleged facts, contrary to the onus of proof on the Administration. As a result, the UNDT erred in the conduct and procedure of the hearing that affected the critical assessment of credibility of Corporal S.L.

The 17 February 2022 incident

89. We find that the UNDT engaged in faulty assessments of the credibility of the relevant witnesses of this incident as well.

90. The Administration alleges that the Appellant "at work at the Goma airport, from [his] loading vehicle (...) tried to wave at VO1 and get her attention, making provocative smiles, and, after [he] got out of [his] vehicle, [he] started following VO1 at a distance, as she moved from one side of the container to the other, waving and trying to maintain a line of sight with VO1".⁹⁰

91. The Appellant consistently denies this. He testified that he was operating the key loader that day to help loading/unloading an airplane on the tarmac. He stated that he did not leave the vehicle and did not interact with VO1 at all. The UNDT found this contradicted by a "photograph of him standing on the tarmac in front of the key loader" which it held "fairly and accurately depicts the Applicant as he appeared that day".⁹¹

92. We agree with the Appellant that the UNDT "manifestly erred in concluding that the photograph accurately depicted [him] as he appeared that day", when in fact it was taken over a year earlier. We also agree with his contention that, contrary to the UNDT's findings, the

evidence and provide an answer to it, the investigation process will usually have reached an acceptable threshold".

⁹⁰ Letter of allegations of misconduct dated 5 September 2023, para. 26.

⁹¹ Impugned Judgment, para. 109 and footnote 5.

“metadata of the photograph established that it was taken in April 2021 by VO2, not on 17 February 2022, which was extremely relevant to the fact that [he] was never outside of the cab of the K-loader”. Further, in his answer, the Secretary-General does not dispute that the photograph was taken in April 2021.

93. Also, the UNDT fails to address inconsistencies in the evidence about whether the Appellant was wearing a mask during this incident. In the investigation interview, Corporal S.D., who brought the incident to the attention of VO1 and other CAF witnesses, stated that the Appellant was “smiling defiantly” at VO1 and was “pointing at her and was trying to talk to her” on the tarmac.⁹² When she saw this, she went to see the Aircraft Commander. She also stated that the Appellant “began to follow” VO1 around the container.⁹³ At the hearing, she insisted that the Appellant was not wearing a mask that day and was smiling at VO1.⁹⁴ This is contradicted by VO1’s evidence and Captain G.D.’s evidence. Captain G.D. testified that he observed a masked individual who “followed” VO1 when she moved from side to side of the aircraft. However, when asked by the investigators, Captain G.D. was unable to identify this man as the Appellant by way of a photo array.⁹⁵ The UNDT failed to address this failure to identify the Appellant as the individual in question in its assessment of Captain G.D.’s credibility.

94. On the other hand, the UNDT essentially disregards the entirety of the evidence of Corporal G.B. and D.I. – two MONUSCO staff members – and M.R. that they did not witness the alleged misconduct despite being on the tarmac and observing the Appellant during the operation. Corporal G.B., the Appellant’s supervisor, confirmed to the investigators that the CAF military had complained that morning about the Appellant based on VO1’s allegation of the second incident. He therefore decided to attend the tarmac to observe the Appellant and the operations, which took about an hour. He, M.R., and D.I. were all present. They affirmed that the Appellant was in the cab of the key loader on the tarmac, and they did not see any interaction between him and VO1, nor did they witness the Appellant try to get the attention of VO1.⁹⁶ Corporal G.B. admitted that it was possible he might have missed seeing everything as there were a number of people on the tarmac⁹⁷, and D.I. admitted he was absent from the unloading for five to ten minutes at one point.⁹⁸

⁹² Transcript of Corporal S.D.’s interview held on 22 February 2022, p. 2: 8.

⁹³ Transcript of Corporal S.D.’s interview held on 22 February 2022, p. 2: 13.

⁹⁴ 11 November 2024 recording of the UNDT hearing, Corporal S.L.’s testimony, minute marks 2:32:20 to 2:32:45.

⁹⁵ Investigation Report, para. 62.

⁹⁶ Transcript of Corporal G.B.’s interview held on 9 March 2022, p. 7: 32.

⁹⁷ Transcript of Corporal G.B.’s interview held on 9 March 2022, p. 7: 33.

⁹⁸ Investigation Report, para. 66.

However, their evidence does not support the Administration's or VO1's version of events and is essentially disregarded by the UNDT.

95. In summary, the UNDT's findings of credibility of VO1 and the CAF witnesses, despite numerous inconsistencies with their prior statements and with each other on each of the allegations of misconduct, are difficult to justify.

96. The Secretary-General has the burden of establishing the facts clearly, convincingly and with a high probability. Regardless of the credibility of the Appellant, the inconsistent and contradictory evidence of VO1 and the CAF witnesses cannot be sufficient to meet the standard of clear and convincing proof of the alleged misconduct.

97. As we stated in *Negussie*, clear and convincing imports two high evidential standards: "clear" requires that the evidence of the misconduct must be unequivocal, and "convincing" requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegations against the staff member and in light of the severity of the consequence of its acceptance.⁹⁹ The evidence of the misconduct against the Appellant is not unequivocal. There are too many inconsistencies and contradictions in the evidence to prove unequivocally that misconduct as alleged occurred and this unequivocal evidence cannot be persuasive to a standard appropriate to sexual harassment allegations and termination of the Appellant's employment.

98. Therefore, in relation to the allegations by VO1, we find that the UNDT committed errors of fact that led to a manifestly unreasonable decision and errors in procedure that affected the outcome of the case.

VO2's allegations of sexual harassment

99. The Administration alleges that, multiple times on unknown dates between April 2021 and March 2022, the Appellant made comments to VO2 about her physical appearance. The Appellant denies these allegations and does not recall VO2.

100. VO2 alleged that the Appellant had previously made comments about her appearance, particularly when alone with him. For example, he called her "beautiful" and stated that her name was "beautiful". She stated that she was annoyed by these comments, which she thought were

⁹⁹ *Sisay Negussie* Judgment, *op. cit.*, para. 45.

inappropriate.¹⁰⁰ However, she could not recall exact phrases, words, or specific dates or times when the events occurred.¹⁰¹ Also, at the hearing, she was asked whether the Appellant commented on “any appearance of [hers], such as hair, face, body or [her] clothes outfit” and she stated that she did not recall.¹⁰² However, she described his conduct as someone trying to hit on you at a bar. She said this conduct happened on multiple occasions but was unable to provide specifics or details.¹⁰³

101. In the impugned Judgment, the UNDT found Vo2 credible as she was consistent and did not try to embellish her testimony. It recognized that the specific comments she recalled could be relatively innocuous in and of themselves, except for the “persistence with which the Applicant made them”.¹⁰⁴

102. However, there is no evidence of the Appellant’s “persistence” other than Vo2’s allegation of comments, which, at the hearing, she could not recall. Further, the UNDT’s finding that her testimony is supported by other CAF members who said that Vo2 briefed them about general sexual harassment she experienced previously in Goma (without identifying the harasser) is not sufficient to make a finding that the Appellant clearly and convincingly sexually harassed Vo2 as alleged.¹⁰⁵ Rather, Vo2’s allegations are vague and not specific. As she failed to provide specifics or details, it is difficult to make a proper determination on her credibility. She does not recall the exact phrases or words that were objectionable, nor the particular dates and times of the alleged comments made by the Appellant other than his “vibe” was as someone trying to hit on you at a bar.¹⁰⁶ This does not amount to clear and convincing evidence of sexual harassment that can support termination of employment.

103. The UNDT found the Appellant’s denial not “worthy of belief” and stated it is “inconceivable that the [Appellant] did not know her”.¹⁰⁷ However, the Appellant’s lack of credibility is not sufficient to make a positive determination that Vo2’s version of events occurred

¹⁰⁰ Informal hearing transcript, 14 November 2024, Vo2’s testimony, minute marks 53:43 to 54:19.

¹⁰¹ Transcript of Vo2’s interview held on 4 February 2022, p. 16.

¹⁰² Informal Hearing transcript, 14 November 2024, Vo2’s testimony, minute marks 56:06 to 56:20.

¹⁰³ Investigation Report, paras. 77 and 80.

¹⁰⁴ Impugned Judgment, para. 111.

¹⁰⁵ *Ibid.*, para. 112.

¹⁰⁶ *Ibid.*, para. 63.

¹⁰⁷ *Ibid.*, para. 113.

as alleged. We again recall that the onus is on the Administration to prove the facts underlying the misconduct through clear and convincing evidence, not on the staff member to disprove them.

Conclusion

104. In conclusion, we find that the UNDT erred in finding that the facts underlying the alleged misconduct involving VO1 and VO2 had been proven by the Administration by clear and convincing evidence. We also find that the UNDT erred in procedure in the conduct of its hearing that affected the outcome of the case.

105. As such, the appeal is granted and the contested decision set aside with an award for compensation in lieu of rescission. We find that, given the impact of the unlawful contested decision on the Appellant and his reputational harm, an award of two years' net base salary is an appropriate award for compensation in lieu. In addition, the Administration must expunge his name from the relevant registers, such as the ClearCheck database.

Judgment

106. Mr. Wamara Tibenderana's appeal is granted, and Judgment No. UNDT/2025/005 is hereby reversed.

107. The following orders are issued:

- i) The contested decision is rescinded;
- ii) The Secretary-General is directed to expunge the name of Mr. Wamara Tibenderana from the relevant registers, including the ClearCheck database;
- iii) Further to Article 9(1)(a) of the Statute, in the event of the Secretary-General electing not to rescind the contested decision, the Secretary-General is directed to pay Mr. Wamara Tibenderana in-lieu compensation in an amount equivalent to two years of his net base salary within 30 days of this Judgment. Interest on the late payment of this amount shall accrue at five per cent above the United States Prime Rate.

Original and Authoritative Version: English

Decision dated this 31st day of October 2025 in New York, United States.

(Signed)

Judge Sandhu, Presiding

(Signed)

Judge Savage

(Signed)

Judge Forbang

Judgment published and entered into the Register on this 9th day of December 2025 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar