



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

Judgment No. 2023-UNAT-1375

**Mihai-Tudor Stefan
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2022-1743
Date of Decision:	30 June 2023
Date of Publication:	7 August 2023
Registrar:	Juliet Johnson

Counsel for Appellant:	George G. Irving
Counsel for Respondent:	Patricia C. Aragonés

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Mr. Mihai-Tudor Stefan, a former Close Protection Officer, contested the decision to impose on him the disciplinary measures of separation from service, with compensation in lieu of notice and without termination indemnity, with a fine of one month's salary recovery action and inclusion of his name in the ClearCheck database, for serious misconduct. He sought compensation for what he says was an unlawful disciplinary decision. In Judgment No. UNDT/2022/083 (impugned Judgment), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) dismissed his application for lack of merit.

2. Mr. Stefan appeals to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) and says that the Dispute Tribunal erred in fact and law in its findings on the two counts of alleged misconduct: i) sexual exploitation, and ii) misrepresentation to and misappropriation of assets of the Organization regarding family emergency leave.

3. For the following reasons, we allow the appeal, in part, and modify the impugned Judgment by rescinding the contested decision, setting in-lieu compensation of one year's salary, and ordering the Administration to delete Mr. Stefan's name from the ClearCheck database. However, Mr. Stefan's requests for an award for compensation for harm and for costs for abuse of process are dismissed.

Facts and Procedure

4. Mr. Stefan served as a Close Protection Officer to the Special Representative of the Secretary-General at the United Nations Mission in the Republic of South Sudan (UNMISS).

5. In 2017, at UNMISS, he became acquainted with VO1, a United Nations Volunteer serving as medical doctor in the HIV unit at UNMISS. In January 2019, they commenced a consensual sexual relationship.¹ Both were married to other partners at the time.

6. Two incidents resulted in VO1 making complaints against Mr. Stefan with two separate investigations.

7. On 27 June 2019, the Investigations Division of the Office of Internal Oversight Services (OIOS) received a report of possible misconduct implicating Mr. Stefan. It was reported that

¹ UNDT transcript, testimony of VO1, 28 July 2022, 0:3:28.250 --> 0:3:40.160.

during an argument on 23 June 2019, Mr. Stefan assaulted VO1 by pushing her down some stairs outside his accommodation. She further alleged assault, sexual abuse, racism, and threats to kill her by Mr. Stefan. After her interview with the investigators on 13 August 2019, she further alleged rape, coercion to withdraw her complaint, drunk driving, drinking on duty, UMOJA sick leave fraud and deliberately infecting her with a Sexually Transmitted Infection (STI).

8. On 26 November 2019, OIOS received from VO1 a report that on 28 June 2019, Mr. Stefan raped VO1. She reported spending the night of 27 June 2019 with Mr. Stefan, and early the next morning she alleged that he forcefully removed her clothes and engaged in sexual intercourse to which she did not consent.

9. On 25 August 2019, OIOS was informed that on 24 August 2019, VO1 broke into Mr. Stefan's accommodation. VO1 claimed she had permission to enter, but Mr. Stefan threatened to shoot her, causing her to jump from a window and injure herself.

10. On 27 August 2019, VO1 left the mission on sick leave and was placed on Administrative Leave with Pay on 14 October 2019 in relation to one of the ongoing investigations.

The Relationship and the Investigated Incidents

11. The relationship between Mr. Stefan and VO1 was undisputedly volatile. On 3 March 2019, the evidence shows an incident where they attended a party after which VO1 alleges he assaulted her. However, the OIOS Investigation Report (Case No. 0774/19) found no evidence to corroborate an assault by Mr. Stefan but had evidence that VO1 poured a drink over Mr. Stefan and cut his shirt.

12. Mr. Stefan testified that he saw pills at VO1's home in early March 2019,² but never saw her ingesting or taking pills.³ He also stated that one day in early March 2019 he observed VO1 as a "zombie" and "like a dead walking".⁴ He had a "suspicion" that VO1 was taking medications, but she told him the pills were for someone else.⁵ He stated he wanted to end the relationship due to VO1's alcohol use and jealousy.⁶

² UNDT transcript, testimony of Mr. Stefan, 27 July 2022, 1:14:24.650 --> 1:14:33.980.

³ *Ibid.*, at 1:17:27.720 --> 1:17:31.30.

⁴ *Ibid.*, at 1:16:34.290 --> 1:16:55.690.

⁵ *Ibid.*, at 1:17:32.510 --> 1:18:41.170.

⁶ *Ibid.*, at 1:18:56.360 --> 1:19:56.420.

13. In April 2019, Mr. Stefan was on leave, as was VO1 who returned to UNMISS on 21 May 2019 after a period of annual leave and sick leave.⁷

14. In the UNDT hearing, VO1 testified that she received medical treatment in March or April 2019 and was prescribed two prescription medications for anxiety and depressive disorder from her psychiatrist back home.⁸ She had previously received treatment for anxiety, depressive disorder for PTSD a “long time ago”, but was not on medication until April 2019.⁹

15. She testified that she told Mr. Stefan she was taking the medications and he had seen her take them.¹⁰

16. VO1 also testified that from January to August 2019, she continued to perform her functions and was never unable to perform her professional functions due to any kind of substance abuse. She also testified that she would not describe herself as an alcoholic, had never been treated for alcoholism, and did not consider herself as having a drinking problem.¹¹

17. On 9 May 2019, VO1 e-mailed Mr. Stefan after he e-mailed her a happy birthday message. In the e-mail, she mentions being on “antidepressants and relaxants” and suggests that he report her for that and “it will be fun”. She attached photographs of blisters of pills to the e-mail.

18. In the UNDT hearing, Mr. Stefan testified that at the beginning of June 2019, he wanted to end the relationship with VO1 because of her “self-medicating” and combining taking pills with alcohol.¹²

19. On 27 June 2019, VO1 reported in person to OIOS a verbal and physical altercation with Mr. Stefan where she alleged that on 23 June 2019, during a party at which both consumed alcohol, they argued and left together in a United Nations vehicle driven by Mr. Stefan who was drunk. They continued to argue, VO1 exited the vehicle and Mr. Stefan left her. She then walked to his accommodation where she says he assaulted her. She then either fell or was pushed down three steps at the entrance to the house. She lost consciousness for several minutes and attended the clinic the following day.

⁷ *Ibid.*, at 1:19:58.50 --> 1:20:32.30.

⁸ UNDT transcript, testimony of VO1, 28 July 2022, 0:4:15.500 --> 0:7:37.900.

⁹ *Ibid.*, at 0:7:38.820 --> 0:8:23.270.

¹⁰ *Ibid.*, at 0:23:30.300 --> 0:24:23.140.

¹¹ *Ibid.*, at 0:6:19.180 --> 0:6:32.330.

¹² UNDT transcript, testimony of Mr. Stefan, 27 July 2022, 1:25:32.330 --> 1:26:3.180.

20. With respect to this same incident, VO1 testified before the UNDT that on the night of 22 June 2019, she had mixed pills with alcohol.¹³ Mr. Stefan confirmed in his testimony that he smelled alcohol on her and that she told him that she had taken pills.¹⁴ They eventually went to a party where VO1 consumed alcohol but he was sober as confirmed later that evening when he was tested for alcohol by security.¹⁵ While driving home, there was an argument resulting in VO1 exiting the vehicle and Mr. Stefan driving to his home. In the early morning of 23 June 2019, VO1 arrived at Mr. Stefan's accommodation where there was a violent argument. Mr. Stefan videotaped this argument. The investigation found VO1 "appeared to be the aggressor" and the video evidence showed VO1 "lunge aggressively at Mr. Stefan while he was standing on the stairs of his accommodation, apparently causing a fall".¹⁶

21. VO1 attended the medical clinic or UN Medical Services that night. The Clinic Visit Progress Notes of that visit record that VO1 stated "she ha[d] fallen down" and was injured. It records that "she is not taking any medication regular [sic] and also she doesn't have any chronic problem" and "no history of any chronic medical condition".

22. On 24 June 2019, VO1 entered Mr. Stefan's veranda of his accommodation and damaged his bicycle and poured water on the veranda.¹⁷

23. On 27 June 2019, VO1 asked Mr. Stefan to come to her accommodation to discuss their issues, but Mr. Stefan declined. VO1 went to his accommodation and stayed overnight. Mr. Stefan made a covert audio-recording of the conversations that he gave investigators in which VO1 discussed making complaints against him. VO1 advised Mr. Stefan that she had taken something as "this was the only way I can talk to you". However, in the recording, she makes statements to Mr. Stefan in which she expressed her hurt at being "left" by him and his not checking on her after she fell. During the recorded conversation she expresses her intellectual superiority to Mr. Stefan and to his wife, for example, she states that she was "a highly intelligent person",¹⁸ and "you are not as smart as me".¹⁹ She discusses how she can ruin his job and life during which she states that she was fighting herself "not to put you through sh**"; when Mr. Stefan asks how he abused her, she explains that "there are ways to explain abuse on paper, I know how to write about it", and he

¹³ UNDT transcript, testimony of VO1, 28 July 2022, 0:22:25.750 --> 0:22:54.160.

¹⁴ UNDT transcript, testimony of Mr. Stefan, 27 July 2022, 1:30:46.770 -->1:31:28.820.

¹⁵ *Ibid.*, at 1:34:20.160 --> 1:34:29.410.

¹⁶ OIOS investigation report (Case No. 0774/19), para. 98.

¹⁷ UNDT transcript, testimony of Mr. Stefan, 27 July 2022, 1:36:51.830 --> 1:37:0.890.

¹⁸ Audio-recording, 27 June 2019, 15:44.

¹⁹ *Ibid.*, at 15:52.

was not aware “how much things I can put on that paper ..a white woman”,²⁰ and asks “will they believe you or me”.²¹

24. On the morning of 28 June 2019, Mr. Stefan and VO1 had sexual intercourse. VO1 testified at the UNDT hearing that the sexual intercourse was not consensual as she was “drugged” and told him “no, no, no”. Mr. Stefan testified that VO1 was sober, initiated the sex, and denied raping VO1. The audio-recording presented by Mr. Stefan recorded the sex. At no time during the audio-recording can she be heard telling Mr. Stefan “no” or refusing consent.

25. Also in June 2019, Mr. Stefan’s chief of unit advised Mr. Stefan not to have contact with VO1 as she had made a complaint against him.²²

26. On 28 June 2019, VO1 informed OIOS that she did not wish to complain. She then sent Mr. Stefan WhatsApp messages asking to spend time with him before going on holiday and attaching a copy of her withdrawal message to OIOS. This is the same date that VO1 alleged that Mr. Stefan raped her in his accommodation in the morning and which is the subject of her 26 November 2019 complaint.

27. On 29 June 2019, Mr. Stefan went with VO1 to a restaurant and stayed the night with VO1 where VO1 performed oral sex on him the following morning.²³

28. In an e-mail to OIOS on 2 July 2019, VO1 reiterated her withdrawal of complaint of the 23 June 2019 incident.

29. On 13 July 2019, VO1 e-mailed OIOS and confirmed her wish to complain against Mr. Stefan for “physical violence/assaults, enormous psychological & emotional distress, occasional sexual harassment & abuse, repetitive discriminatory statements against different races, nationalities, LGBT and religions and firm/serious threatening statements to my wellbeing and my life”. She repeated he had assaulted her on 23 June 2019 and that she withdrew the complaint after Mr. Stefan threatened to kill her.

²⁰ *Ibid.*, at 40:30.

²¹ *Ibid.*, at 42:30.

²² UNDT transcript, testimony of Mr. Stefan, 27 July 2022, 0:40:57.100 --> 0:41:20.610.

²³ *Ibid.*, at 1:41:25.160 -->1:41:34.450.

30. On 23 July 2019, VO1 e-mailed OIOS saying she did not wish to pursue a complaint against Mr. Stefan, but later, on 28 July 2019, she said she wished to make a formal report and alleged Mr. Stefan threatened to kill her if she reported him.

The Investigations

31. In the OIOS investigation report (Case No. 0774/19) on the 23 June 2019 incident, OIOS found that VO1 made multiple allegations against Mr. Stefan that were not always specific and could not be corroborated. However, the investigation found that VO1 and Mr. Stefan were engaged in an “extremely volatile and visible relationship” that, “by her own account”, had a deleterious effect on VO1’s mental health, which had operational implications for the mission. The investigation found no evidence to corroborate VO1’s allegations of assault by Mr. Stefan on 3 March 2019, 23 June 2019, and 24 August 2019, of drinking on duty and drunk driving, of threats to harm, of racist statements by Mr. Stefan, and of rape and sexual assault. Further, the investigation found VO1’s allegation lacked credibility and she displayed a “strong motivation to cause professional and personal harm to Mr. Stefan which she considered had wronged her in respect of their relationship”.

32. The investigation also found that Mr. Stefan took five days of family emergency leave in July 2019 which he intended to take in advance due to his advanced flight booking. He failed to record his absence in UMOJA at the time but recorded it on 16 October 2019 after the matter was reported.

33. In conclusion, the investigation found that there were “reasonable grounds to conclude” that Mr. Stefan had “failed to observe the standards of conduct expected of a United Nations staff member”.

34. In the OIOS investigation report (Case No. 1305/19) on the 28 June 2019 allegation of rape against Mr. Stefan, VO1 declined to participate in an interview citing a “psychological condition (PTSD)” but returned to UNMISS on 14 January 2020. She participated in interviews for another investigation wherein she provided an account of the 28 June 2019 allegation of rape.

35. Based on the interviews of both Mr. Stefan and VO1 and the audio-recordings made by Mr. Stefan the night from 27 to 28 June 2019, the investigation found that VO1 and Mr. Stefan had sexual intercourse on the morning of 28 June 2019 in Mr. Stefan’s accommodation. The audio-recordings do not corroborate VO1’s allegation of rape and suggest that the sexual activity was

consensual although the recordings are not always clear. Further, the investigation noted that Mr. Stefan confirmed to OIOS his knowledge that VO1 was taking medication and alcohol, but she was not under the influence on 28 June 2019.²⁴ Further, the investigation noted that, despite other allegations made against Mr. Stefan by VO1, she did not mention the alleged rape until 24 September 2019.²⁵ It was also noted that Mr. Stefan was aware that VO1 discussed suffering mental and emotional trauma and was taking medication for these conditions but continued sexual relations with VO1.

36. The investigation concluded there were “reasonable grounds to conclude” that Mr. Stefan “failed to observe the standard of conduct expected of a United Nations staff member”.

Appellant’s Family Emergency Leave

37. On 26 June 2019, Mr. Stefan purchased an airline ticket with a return on 29 July 2019.

38. On 3 July 2019, Mr. Stefan left UNMISS, taking annual leave from 4 to 15 July 2019 and rest and recuperation leave (R&R) from 15 to 20 July 2019, which was recorded in Umoja. He had no more annual or R&R leave days to cover the rest of his planned absence.

39. On 20 July 2019, Mr. Stefan e-mailed UNMISS Human Resources and colleagues to say that he had to take five days of family emergency leave from 22 to 27 July 2019. Mr. Stefan informed the Organization on 20 July 2019 that he was requesting this emergency leave for “personal family matters”. However, he spent these five days on holiday without his family, not for a family emergency. On 25 October 2019, notwithstanding the foregoing, he formally recorded these days as family emergency leave.

Disciplinary process

40. By memorandum dated 29 April 2021, Mr. Stefan was informed by the Office of Human Resources (OHR) that formal allegations of misconduct had been issued against him. Specifically, it was alleged that he had: 1) sexually exploited VO1 in the period of March until the end of June 2019 by *inter alia* having a sexual relationship with VO1, who he knew to be dependent on alcohol and medication and was, thus, vulnerable; and 2) engaged in a misrepresentation to the

²⁴ OIOS investigation report (Case No. 1305/19), para. 56(v).

²⁵ *Ibid.*, para. 20.

Organization and a misappropriation of assets from the Organization regarding family emergency leave from 22 to 27 July 2019.

41. Mr. Stefan was informed *inter alia* that, if established, his conduct would constitute a violation of various Staff Regulations and Rules.

42. On 27 May 2021, Mr. Stefan submitted to OHR his comments in response to the allegations.

43. By letter dated 3 December 2021 (the contested decision), the Assistant Secretary-General for Human Resources (ASG/HR) informed Mr. Stefan of the decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) to impose upon him the disciplinary measures of separation from service, with compensation in lieu of notice and without termination indemnity, with a fine of one month's salary recovery action and inclusion of his name in the ClearCheck database, having found that the charges against him had been established by clear and convincing evidence and that his conduct violated Staff Rule 1.2(e) as further specified in Secretary-General's Bulletin ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) (SEA policy).

The Dispute Tribunal

44. On 31 December 2021, Mr. Stefan filed an application before the Dispute Tribunal challenging the decision. On 27 and 28 July 2022, following admission into evidence of two witness statements filed by Mr. Stefan, the Dispute Tribunal held a hearing at which Mr. Stefan and VO1 testified.

45. In the impugned Judgment, the Dispute Tribunal found that the Administration had established that, at the material time, (i) VO1 had been vulnerable due to *inter alia* alcohol and drug problems, that Mr. Stefan had been aware of her vulnerability, and that he had exploited her vulnerability for sexual purposes; and (ii) Mr. Stefan had engaged in a pre-planned misrepresentation regarding family emergency leave and had misappropriated the Organization's assets. The Dispute Tribunal also found that the established facts constituted serious misconduct, that Mr. Stefan's due process rights had been respected, and that the disciplinary measures imposed were proportionate. Accordingly, the Dispute Tribunal dismissed the application.

Submissions

Mr. Stefan's Appeal

46. Mr. Stefan claims that the Dispute Tribunal erred in law and in fact when it concluded that the Administration had established that he had sexually exploited VO1. He says this resulted in an unjust outcome and an expansion of the Organization's SEA policy to private consensual conduct between staff members, where one later makes a claim of vulnerability. In support thereof, Mr. Stefan advances various arguments.

47. Mr. Stefan submits that the Dispute Tribunal erred in law in its application of Staff Rule 1.2(e) by overlooking the Appeals Tribunal's jurisprudence (specifically, *Lucchini*²⁶) and thereby incorrectly concluding that Staff Rule 1.2(e) and the Organization's SEA policy applied to the present case.

48. Mr. Stefan claims that the Dispute Tribunal erred in failing to take into consideration relevant evidence and in introducing extraneous considerations with no convincing evidence that he had sexually abused VO1's vulnerability. Specifically, the Dispute Tribunal erred when (i) finding that VO1 was vulnerable, in the absence of medical reports and by conducting its own medical analysis; (ii) citing "incorrect" facts when finding that he was aware of VO1's vulnerability; (iii) relying on his initial statements to OIOS, contending they "are not determinative for various reasons"; (iv) finding that there was a power imbalance that negated a consensual relationship, which was an unwarranted finding; and (v) failing to consider VO1's credibility, OIOS' related conclusions and other evidence, including VO1's behaviour.

49. Mr. Stefan also submits that the Dispute Tribunal failed to consider whether VO1's complaints and testimony were coherent, detailed and consistent; the possibility that her complaint against him could have been retaliatory; and other evidence regarding VO1's medical condition on 23 June 2019, her suspension from UNMISS, and how she was the victim of her own improper behavior.

50. Further, Mr. Stefan contends that the Dispute Tribunal erred in concluding that the Administration had established on clear and convincing evidence that he had engaged in a willful misrepresentation and a misappropriation of the Organization's assets regarding family

²⁶ *Alex Lucchini v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1121.

emergency leave, by submitting false information that he had a family emergency. Mr. Stefan claims that his use of family emergency leave from 22 to 27 July 2019 did not breach any rule. The Dispute Tribunal's conclusion, he submits, is erroneous for several reasons, in particular, because the Dispute Tribunal ignored his reasons for needing to extend his leave; there is no definition or restriction on what "family emergency" entails; and the charge against him regarding his use of family emergency leave was "one of [VO1's] unfounded allegations".

51. Finally, Mr. Stefan quotes jurisprudence regarding proportionality without, however, explaining how this jurisprudence applies to the sanction imposed on him in the present case.

52. Mr. Stefan asks that the Appeals Tribunal grant the appeal and reverse the impugned Judgment. He asks that he be awarded two years' net base pay in compensation for harm to his career and professional reputation, as well as USD 5,000 as costs for abuse of process.

The Secretary-General's Answer

53. The Secretary-General submits that the Dispute Tribunal did not err in law in its application of Staff Rule 1.2(e) by "overlooking" jurisprudence (specifically *Lucchini*) and thereby incorrectly concluding that Staff Rule 1.2(e) and the Organization's SEA policy applied to the present case. Rather, the Dispute Tribunal specifically referred to *Lucchini* when reviewing the legal framework and correctly rejecting Mr. Stefan's claim. Neither Staff Rule 1.2(e) nor ST/SGB/2003/13 exclude sexual exploitation and abuse arising within intra-staff relationships. The Dispute Tribunal correctly found that the Appeals Tribunal in *Lucchini* did not make a finding that Staff Rule 1.2(e) was only applicable to non-staff/United Nations staff sexual exploitation complaints.

54. Furthermore, the Dispute Tribunal did not err, and its approach was consistent with that taken in *Lucchini*. Unlike *Lucchini* where the UNDT found that there was no clear and convincing evidence to support the Administration's finding of sexual exploitation, the Dispute Tribunal in the present case found that Mr. Stefan's misconduct was established by clear and convincing evidence.

55. The Secretary-General submits that the Dispute Tribunal also properly assessed the evidence when it held that VO1 had been vulnerable due to her alcohol and drug problems, that Mr. Stefan had been aware of her vulnerability, and that he had exploited her vulnerability for sexual purposes. Because the Dispute Tribunal found the facts to be established by Mr. Stefan's

own statements, testimony and undisputed conduct, Mr. Stefan failed to convince the Dispute Tribunal that the charges against him had not been established by clear and convincing evidence. Furthermore, the Dispute Tribunal is not obliged to explicitly address each claim made by Mr. Stefan or evidence presented.

56. The Secretary-General avers that the Dispute Tribunal did not err in its consideration of whether VO1 was vulnerable and did not conduct a “medical analysis”. Mr. Stefan ignores the weight of his own admissions regarding his knowledge and belief of VO1’s alcohol and drug use and conduct, in the face of which there was no relevant “absence” of a medical report as there was no need for further corroboration by a medical report. The Dispute Tribunal did not err in relying on Mr. Stefan’s initial statements made to OIOS when it found that he was aware of VO1’s vulnerability, finding them to be plausible and preferred to his explanations during the hearing “at which he had an impending judgment in mind”.

57. As to the Dispute Tribunal’s alleged failure to consider VO1’s credibility and other evidence, the Dispute Tribunal considered extensive documentary evidence and heard the testimony of both Mr. Stefan and VO1. It found the facts to be established by Mr. Stefan’s own statements, testimony and undisputed conduct. By his own admissions, VO1 was manifestly under the influence of alcohol, drugs and emotional distress, and had told him *inter alia* that her psychological issues had worsened during their relationship. Mr. Stefan was under an obligation not to engage in sexual exploitation. He nonetheless continued to engage in sexual activity with VO1, even when he specifically knew that she had taken drugs and alcohol the night before.

58. In view of the foregoing, Mr. Stefan has failed to establish that the Dispute Tribunal committed any reversible error when it concluded that the Administration had established on clear and convincing evidence that Mr. Stefan had sexually exploited VO1’s vulnerability and on that basis had committed serious misconduct of sexual exploitation.

59. The Secretary-General also submits that Mr. Stefan fails to establish that the Dispute Tribunal committed any reversible error when it concluded that the Administration had established by clear and convincing evidence that Mr. Stefan had unduly taken family emergency leave and on that basis had committed the serious misconduct of misrepresentation and misappropriation of the Organization’s assets regarding family emergency leave, by submitting false information that he had a family emergency. Contrary to Mr. Stefan’s claim,

the Dispute Tribunal did not ignore his reasons for needing to extend his leave, but rather it found them lacking in credibility. It was undisputed that he purchased an airline ticket on 26 June 2019 with a scheduled return flight on 29 July 2019, although he had insufficient annual leave or R&R at the time beyond 20 July 2019, and that he spent 22 to 27 July 2019 on holiday without his family. Thus, there was no error by the Dispute Tribunal when it found that Mr. Stefan had “pre-planned” to be away from the mission from 3 to 29 July, negating any family emergency for which he had sought emergency family leave.

60. Furthermore, Mr. Stefan’s claim that his use of family emergency leave for 22 to 27 July 2019 did not breach any rule, claiming that there was “no definition or restriction on what family emergency” entails is without merit, and the Dispute Tribunal correctly rejected his submission in this regard. In addition, misrepresenting information to cover a preplanned absence was manifestly dishonest and a violation of Staff Regulation 1.2(b), which requires that staff members uphold the highest standards of inter alia integrity.

61. The Secretary-General contends that Mr. Stefan has failed to establish that the Dispute Tribunal committed any reversible error when it found that separation from service was proportionate to Mr. Stefan’s serious misconduct of sexually exploiting VO1’s vulnerability and of engaging in a misrepresentation regarding emergency family leave and a misappropriation of the Organization’s assets.

62. The Secretary-General requests that the Appeals Tribunal affirm the impugned Judgment and dismiss the appeal.

Considerations

63. In disciplinary cases, the Dispute Tribunal must establish: “ i) whether the facts on which the sanction is based have been established, ii) whether the established facts qualify as misconduct under the Staff Regulations and Rules, iii) whether the sanction is proportionate to the offence, and iv) whether the staff member’s due process rights were observed in the investigation and the disciplinary process.”²⁷ Furthermore, “when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and

²⁷ *Maguy Bamba v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1259, para. 37 (internal footnote omitted).

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.”²⁸

64. Mr. Stefan submits that the Dispute Tribunal erred in law and in fact when it concluded that the Administration had established on clear and convincing evidence that he had sexually exploited VO1, resulting in an unjust outcome and an expansion of the Organization’s SEA policy to private consensual conduct between staff members, where one later makes a claim of vulnerability. Further, Mr. Stefan submits that the Dispute Tribunal erred in concluding that the Administration had established on clear and convincing evidence that he had engaged in a willful misrepresentation and a misappropriation of the Organization’s assets regarding family emergency leave, by submitting false information that he had a family emergency,

Whether the facts on which the sanction is based have been established by clear and convincing evidence

Count 1: Allegations of Sexual Exploitation

65. In accordance with the Appeals Tribunal’s previous jurisprudence, the Administration has the onus to prove with clear and convincing evidence that Mr. Stefan was guilty of sexual exploitation and abuse as contemplated in Staff Rule 1.2(e).²⁹

66. Staff Rule 1.2(e) provides that: “Both sexual exploitation and sexual abuse are prohibited. (...) The exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. United Nations staff members are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse.”

67. Section 1 of ST/SGB/2003/13 defines sexual exploitation as “any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another”.

68. Section 3.2(a) and (d) of ST/SGB/2003/13 provides that in order to protect the most vulnerable populations, especially women and children, “[s]exual exploitation and sexual abuse constitute acts of serious misconduct and are therefore grounds for disciplinary measures,

²⁸ *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 30.

²⁹ *Lucchini, op. cit.*, para. 45.

including summary dismissal”, and further, “[s]exual relationships between United Nations staff and beneficiaries of assistance, since they are based on inherently unequal power dynamics undermine the credibility and integrity of the work of the United Nations and are strongly discouraged”.

69. We agree with Mr. Stefan’s view that the jurisprudence in *Lucchini* applies directly to this case and is not limited to situations of United Nations staff and non-United Nations staff only. In *Lucchini*, the Appeals Tribunal held that:³⁰

For the Secretary-General to succeed (...), it is incumbent upon him in terms of Staff Rule 1.2(e) and Section 1 of ST/SGB/2003/13 to show that [the staff member] misconducted himself in one of five possible ways. It must be shown on clear and convincing evidence that [the staff member]: (i) abused a position of vulnerability for sexual purposes; (ii) abused a position of differential power for sexual purposes; (iii) abused trust for sexual purposes; (iv) exchanged money, employment, goods or services for sex; or (v) engaged in some form of humiliating, degrading or exploitative sexual behaviour.

70. The issue in the case is whether there is clear and convincing evidence that Mr. Stefan’s conduct fell within one of the five categories of sexual exploitation. In the impugned Judgment, the Dispute Tribunal seems to have focused its determinations on whether VO1 was a vulnerable person, whether Mr. Stefan was aware of her vulnerability, and whether he sexually exploited that vulnerability.

71. Mr. Stefan says that the Dispute Tribunal erred in fact because no evidence was adduced to support any of the *Lucchini* factors, while the Secretary-General submits that the UNDT’s approach in its Judgment was consistent with *Lucchini* and as Mr. Stefan had been sanctioned for having abused VO1’s vulnerability for sexual purposes, the UNDT properly focused its analysis on this aspect.

72. First, we find the Dispute Tribunal erred in law by failing to determine if the facts supporting the alleged sexual exploitation were established on the evidentiary standard of clear and convincing evidence. The Dispute Tribunal found that VO1 was a vulnerable person, that Mr. Stefan was aware that she was vulnerable, and that he sexually exploited VO1’s vulnerability, leading to its conclusion that “the facts on which the sanction was based have been established”, but not whether the facts have been established on the required evidentiary standard. While at

³⁰ *Ibid.*

the outset, the UNDT properly set out the applicable evidentiary standard of clear and convincing evidence, there is no analysis or finding by the Dispute Tribunal on whether the Administration had met the onus of proving the facts on which the sanction was based by *clear and convincing evidence* as required by our jurisprudence.

73. Second, the Dispute Tribunal erred in its factual findings that led to a manifestly unreasonable decision when it found VO1 was a vulnerable person, that Mr. Stefan was aware that she was vulnerable, and that he sexually exploited VO1's vulnerability.

74. In the impugned Judgment, the Dispute Tribunal held that VO1 was vulnerable and that "she was laboring under a disability, and was at risk of abuse. She was therefore, in need of special care, support or protection, the textbook definition of vulnerable."³¹

75. The Dispute Tribunal made this finding with no independent or medical evidence in support. Other than VO1's testimony that her psychiatrist had diagnosed her with anxiety and depressive disorder, there is no corroborative medical evidence diagnosing VO1 with a medical or psychological condition and certainly no medical evidence that would support a conclusion that VO1 was "laboring under a disability" or "in need of special care, support or protection".

76. The Dispute Tribunal, instead, relied on "research-based clarification"³² from the internet about the nature of depression and anxiety and the effect of the drugs (Eglonyl and Xanax) that VO1 was taking. By doing so, the Dispute Tribunal obtained its own evidence with no notice to the parties and no opportunity for them to respond to it. This amounts to a violation of procedural fairness. Therefore, not only did the Dispute Tribunal err in fact by making a finding that VO1 was labouring under a "disability" or in "need of special care and support" without supporting and corroborating evidence, but it also committed an error in procedure, pursuant to Article 2(1)(d) of the UNAT Statute that affected the central issue in the case, namely the question of VO1's vulnerability.

77. Generally, a person can be vulnerable due to an inherent characteristic or to their situation. Although not exhaustive, a vulnerable person can be someone who is unable to protect themselves

³¹ Impugned Judgment, para. 40.

³² *Ibid.*, para. 28.

from harm or exploitation, and/or may be unable to give consent or sufficiently understand decisions or exercise their legal rights due to:³³

- a) a developmental, physical, medical, or psychological condition,
- b) an unequal relationship with a person in a position of trust, authority or support,
- c) chronic intoxication or drug use that results in incapacity or patterns of behaviour that may pose a danger to themselves, or
- d) circumstances such as gender, orientation, ethnicity, economic or social status that put them in a state of dependency or risk.

78. We find that the evidence is not clear and convincing that VO1 suffered from any of these factors, such as a condition, a power imbalance, or chronic intoxication or drug use that made her vulnerable. Mr. Stefan and VO1 have both made allegations of violence, threats, and volatility, and provided examples of heated arguments, in public and private, corroborated by witnesses. The relationship was volatile and unhealthy. At times, VO1 was the aggressor and unstable. But this does not mean she was a vulnerable person or that there was sexual exploitation.

79. In determining VO1 was vulnerable, the Dispute Tribunal relied on Mr. Stefan's and VO1's statements to the investigators and at the Dispute Tribunal hearing, such as VO1's self-destructive and unreasonable behaviour, her being "visibly drowsy" on one occasion or like a "zombie" on another, and her testimony about Mr. Stefan's "violence" and "manipulation".

80. However, the Dispute Tribunal did not properly assess the credibility or reliability of either Mr. Stefan's or VO1's testimonies. The investigation reports found that VO1's allegations against Mr. Stefan of rapes, assaults, racism, drunk driving or on duty, infecting her with a STI, and threats were uncorroborated. Further, they found her allegations "lack credibility and she displayed a strong motivation to cause professional and personal harm to Mr. Stefan, whom she considered wronged her in respect of their relationship". In the audio-recording of 27 June 2023, she explains how she will ruin Mr. Stefan's job and life with well-crafted statements in "paper". None of this contrary evidence was considered or dealt with by the Dispute Tribunal in the impugned Judgment.

81. Also, in its Judgment, the Dispute Tribunal fails to consider and assess inconsistencies within VO1's testimony and with other evidence. For example, at the Dispute Tribunal hearing,

³³ See generally, United Nations Office on Drugs and Crime, Issue Paper: Abuse of a position of vulnerability and other "means" within the definition of trafficking in persons, 2013.

VO1 testified that, from January to August 2019, she continued to perform her functions and was never unable to perform her professional functions due to any kind of substance abuse. She also testified that she would not describe herself as an alcoholic, has never been treated for alcoholism, and did not consider herself as having a drinking problem.³⁴ However, the Dispute Tribunal held that there was evidence that “she had alcohol and drug problems”.³⁵ Although there is evidence that VO1 drank alcohol and took prescription medication (at times together), the evidence does not clearly and convincingly support a finding that her alcohol and medication use constituted a chronic or consistent impairment of judgment such that she was vulnerable.

82. The Dispute Tribunal made findings with no evidentiary support; for example, it found that “she was labouring under a compromised sense of judgment”³⁶ with no supporting evidence or explanation.

83. In the impugned Judgment, the Dispute Tribunal also makes findings that are inconsistent. For example, the Tribunal held that certain of VO1’s statements “suggest that VO1 viewed herself as vulnerable and exploited”³⁷ by Mr. Stefan, but then also finds that the argument that VO1 did *not* feel vulnerable and exploited “ignores the fact that she was labouring under a compromised sense of judgment”.³⁸

84. There is also no evidentiary basis for the Dispute Tribunal’s finding that there was a power imbalance between Mr. Stefan and VO1. The Dispute Tribunal made this finding solely on the basis that Mr. Stefan was sober at all material times while VO1 was, at times, under the influence. Although VO1 may have been drunk and on medication at times, there is no evidence, other than her statements, that she was impaired at material times such that she was in a vulnerable state. Also, Mr. Stefan was not VO1’s superior and in fact they did not work together, as he was a Protection Officer and VO1 a medical doctor. There is insufficient evidence to conclude that Mr. Stefan had any authority over VO1 or was in a position to exploit their relationship.

85. Therefore, we find the Dispute Tribunal failed to properly assess the evidence, failed to make required findings on credibility or made factual findings without corroborating evidence. We

³⁴ UNDT transcript, testimony of VO1, 0:6:19.180 --> 0:6:32.330.

³⁵ Impugned Judgment, para. 41(a).

³⁶ *Ibid.*, para. 38.

³⁷ *Ibid.*, para. 39.

³⁸ *Ibid.*, para. 38.

find the facts of sexual exploitation have not been established by the evidentiary standard of clear and convincing evidence.

Count 2: Allegations of Misappropriation and Misrepresentation of Family Emergency Leave taken from 22 to 27 July 2019

86. Staff Rule 6.2(b)(ii) provides that “[u]nder conditions established by the Secretary-General, sick leave shall be granted as ... [u]ncertified sick leave ... [i]f staff members are unable to perform their duties by reason of a personal or family emergency”.

87. On 20 July 2019, Mr. Stefan requested leave for a family emergency until 27 July 2019 due to “personal family matters” when he was already on Annual Leave and R&R. However, on 26 June 2019, Mr. Stefan had purchased an airline ticket with a return date on 29 July 2019, well in advance of requesting emergency family leave. In addition, the evidence shows that he was not with his family during the leave period.

88. In its Judgment, the Dispute Tribunal correctly held that the fact that he had purchased, in advance, an airline ticket with a return date of 29 July 2019 can only mean that he pre-planned to be away until 29 July 2019, and the fact that he spent those five days on holiday was evidence that he had no emergency that required immediate action so that he was unable to attend his work.

89. Further, Mr. Stefan did not record this leave in UMOJA until October 2019 after Vo1 had raised the allegation regarding fraudulently taking leave to OIOS.

90. Accordingly, with respect to the emergency family leave, we conclude that the Dispute Tribunal did not err in finding that Mr. Stefan had engaged in a misrepresentation to the Organization and a misappropriation of assets of the Organization.

Remedies

91. In the contested decision, the Administration determined that the appropriate disciplinary sanction for serious misconduct such as sexual exploitation is towards the severest end of the spectrum of disciplinary measures, namely separation from service, with compensation in lieu of notice and without termination indemnity. However, regarding the emergency family leave, the Administration determined that, in view of the circumstances, a sanction at the lighter end of the spectrum may be appropriate but given they imposed separation for sexual exploitation,

a demotion with deferment, deferment or written censure was no longer appropriate (although they imposed a fine of one month's salary in accordance with Staff Rule 10.2(a)(v)).

92. As we have found that the Dispute Tribunal erred in its Judgment when it found that the facts for the disciplinary measure of separation were established by clear and convincing evidence, we reverse the impugned Judgment and rescind the contested decision which includes both counts of misconduct. We do note that because we have found sufficient evidence of misconduct on misrepresentation and misappropriation regarding emergency family leave, the Administration is free to take another administrative decision on that count.

93. Given our findings and the circumstances where Mr. Stefan and VO1 were both complicit in a volatile relationship, we set in-lieu compensation of one year's salary for Mr. Stefan, and we also order the Administration to delete Mr. Stefan's name from the ClearCheck database.

94. Mr. Stefan seeks compensation for harm to his career and professional reputation. There is insufficient evidence to support this claim, either in terms of harm that he suffered to career and reputation (most of which was as a result of his own actions) or harm for which the Administration was responsible. It was VO1 who publicized her allegations against Mr. Stefan. Further, we find that Mr. Stefan is not entitled to costs against the Administration for abuse of process. There is no evidence that the Administration manifestly abused the process, including the appeals process. The Administration received VO1's allegations and conducted thorough investigations which they were obligated to do. The Administration acted within its obligations and duties as required under ST/SGB/2003/13.

Judgment

95. Mr. Stefan's appeal is granted in part, and Judgment No. UNDT/2022/083 is hereby modified. The contested decision is rescinded. We set in-lieu compensation of one year's salary and order the Administration to delete Mr. Stefan's name from the ClearCheck database. Mr. Stefan's request for compensation for harm to his career and professional reputation as well as his request for costs for abuse of process is dismissed.

Original and Authoritative Version: English

Decision dated this 30th day of June 2023 in New York, United States.

(Signed)

Judge Sandhu, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Knierim

Judgment published and entered into the Register on this 7th day of August 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar