

2024-UNAT-1461, Hassan Makeen

UNAT Held or UNDT Pronouncements

The UNAT held that the UNDT erred in finding that ST/SGB/2003/13 imposes a requirement of “undue advantage” for sexual exploitation to occur. The UNAT further found that the former staff member abused the position of vulnerability of V01 for sexual purposes (i.e., engaging in at least four acts of sexual intercourse), which constitutes sexual exploitation and abuse. The UNAT emphasized that the UNDT itself acknowledged that V01, allegedly a minor, was vulnerable and less powerful than the former staff member, and that his actions had a sexual connotation. Therefore, the UNAT held that the UNDT erred in concluding at the same time that his acts did not constitute sexual exploitation and abuse.

The UNAT found that the UNDT also erred in determining that the sexual intercourse between V01 and the former staff member was consensual. It held that V01 was unable to fully consent due to the unequal relationship and power imbalance that existed between them.

The UNAT held that the former staff member’s conduct constituted a breach of his duty of integrity and his obligation to conduct himself at all times in a manner befitting his status as an international civil servant. In this regard, the UNAT highlighted that the decision of the Aweil High Court to discontinue the prosecution of the former staff member had no bearing on the finding of misconduct in the present case.

The UNAT held that the sanction imposed on the former staff member was lawful and proportionate given his serious misconduct and the Organization’s zero-tolerance policy towards sexual exploitation and abuse. Last, the UNAT found that his due process rights were respected during the preliminary investigation stage and in the course of the disciplinary proceedings.

The UNAT granted the appeal and reversed Judgment No. UNDT/2023/071.

Decision Contested or Judgment/Order Appealed

A former staff member of the United Nations Mission in South Sudan (UNMISS) contested the decision of the Administration to impose on him the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity for sexually exploiting a young and vulnerable woman in the local community (V01).

In its Judgment No. UNDT/2023/071, the UNDT granted the former staff member's application, concluding that although the facts were established, they did not constitute sexual exploitation or abuse, which requires that the staff member receive undue advantages. The UNDT also found that the sexual intercourse between V01 and the former staff member was fully consensual. The UNDT highlighted that the facts to be examined were related to private life and had no connection with the position of the former staff member at the United Nations.

The Secretary-General appealed.

Legal Principle(s)

In disciplinary cases, when termination is a possible outcome, the Administration must establish the misconduct by clear and convincing evidence. Disciplinary cases are not criminal and liberty is not at stake; as such, different standards apply. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond reasonable doubt – it means that the truth of the facts asserted is highly probable. In cases of sexual exploitation and abuse, this entails demonstrating 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 behavior.

Section 1 of ST/SGB/2003/13 does not provide an exhaustive list of all types of sexual exploitation. Undue benefit from the sexual act is not a cardinal requirement for the existence of sexual exploitation.

Consent is immaterial to the offence of sexual exploitation and abuse.

As long as a person is a current staff member, any unlawful or inappropriate conduct within or outside the workplace is capable of constituting misconduct and attract sanctions.

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The duty of staff members to act with integrity extends to their conduct both within and outside the workplace. This principle applies to sexual exploitation and abuse, which typically occurs in private, with often little or no direct, independent evidence.

The Administration has wide discretion in applying sanctions for misconduct but must adhere to the principle of proportionality.

In imposing a disciplinary measure, the Administration has a duty to respect the due process rights of the staff member in the course of the investigative process and during the disciplinary proceedings. Although only limited due process rights apply during the preliminary investigation stage, the allegations need to be appraised and an opportunity to respond given.

Outcome

Appeal granted

Full judgment

[Full judgment](#)

Applicants/Appellants

Hassan Makeen

Entity

UNMISS

Case Number(s)

2023-1853

Tribunal

UNAT

Registry

New York

Date of Judgement

30 Jul 2024

President Judge

Judge Forbang

Judge Gao

Judge Savage

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Proportionality of sanction

Sexual exploitation and abuse

Disciplinary matters / misconduct

Applicable Law

Other UN issuances (guidelines, policies etc.)

- ICSC Standards of Conduct for the International Civil Service

Secretary-General's bulletins

- ST/SGB/2003/13

Staff Regulations

- Regulation 1.2(f)
- Regulation 10.1

Staff Rules

- Rule 1.2(e)
- Rule 10.2(a)(viii)
- Rule 2.1

Related Judgments and Orders

UNDT/2023/071

2015-UNAT-501

2023-UNAT-1370

2014-UNAT-398

2012-UNAT-207

2010-UNAT-087

2011-UNAT-164

2021-UNAT-1121

2023-UNAT-1375

2023-UNAT-1332

2023-UNAT-1348

2018-UNAT-888

2021-UNAT-1182

2018-UNAT-862

2014-UNAT-407

2013-UNAT-366

2013-UNAT-280

2017-UNAT-781

2014-UNAT-480

2013-UNAT-295

2013-UNAT-336