



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1461

Hassan Makeen
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before:	Judge Leslie F. Forbang, Presiding Judge Gao Xiaoli Judge Katharine Mary Savage
Case No.:	2023-1853
Date of Decision:	28 June 2024
Date of Publication:	30 July 2024
Registrar:	Juliet E. Johnson

Counsel for Hassan Makeen: Non-represented

Counsel for Secretary-General: Francisca Lagos Pola and Angélique Trouche

JUDGE LESLIE F. FORBANG, PRESIDING.

1. Hassan Makeen (Mr. Makeen), 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, in accordance with Staff Rule 10.2(a)(viii) for sexually exploiting a young and vulnerable woman (VO1) (contested decision).
2. By Judgment No. UNDT/2023/071 (impugned Judgment),¹ the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) granted Mr. Makeen's application, rescinded the contested decision, and set the compensation in lieu at two years' net base salary.
3. The Secretary-General lodged an appeal against the impugned Judgment with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
4. For the reasons set out below, the Appeals Tribunal grants the appeal and reverses the impugned Judgment.

Facts and Procedure

5. Mr. Makeen joined the Organization in 2010. At the relevant time of events, he was employed as a Team Assistant, on a fixed-term appointment at the G-4 level until 31 March 2022, with UNMISS in the Aweil Field Office, South Sudan.² His date of birth recorded in his personnel file is 1 January 1968.³
6. Mr. Makeen met VO1 in March 2020, while she was living with her aunt and uncle in Aweil, South Sudan. They were Mr. Makeen's neighbors. VO1 had no job, but occasionally performed some domestic tasks at Mr. Makeen's place when his wife was absent. While VO1's age cannot be definitely determined as she had no birth certificate and did not know how old she was, she was a young and economically-disadvantaged person.⁴

¹ *Makeen v. Secretary-General of the United Nations*, Judgment No. UNDT/2023/071.

² Investigation Report, para. 6.

³ *Ibid.*

⁴ Impugned Judgment, para. 24. In South Sudan, the legal age of consent is set at 18 years old.

7. In March 2021, Mr. Makeen engaged in sexual relations with VO1, resulting in her pregnancy. After becoming pregnant, VO1 had to either marry Mr. Makeen or be taken to her paternal village, where she would have lived in even greater poverty.⁵

8. On 26 April 2021, VO1's uncle filed a formal complaint against Mr. Makeen with the local police for the rape of a minor, as VO1 believed she was approximately 17 years old at the time of the events.⁶ Mr. Makeen was arrested by the local police on the same date.⁷

9. On 28 April 2021, the Office of Internal Oversight Services (OIOS) received a report of possible misconduct involving Mr. Makeen. Specifically, it was reported that, on 26 April 2021, Mr. Makeen had been arrested on suspicion of raping VO1, a young local woman who was reported to be two months pregnant by him.⁸

10. In the days following the reception of the report of possible misconduct, OIOS opened an investigation. Several witnesses were interviewed, including VO1 and Mr. Makeen, respectively on 6 May and 2 June 2021.⁹

11. On 11 May 2021, Mr. Makeen was placed on administrative leave with pay (ALWP).¹⁰

12. On 25 June 2021, a marriage agreement was reached, and the payment of a dowry consisting of 31 cows and 5 bulls was made to VO1's family.¹¹

13. On 30 June 2021, the Aweil High Court closed the case on the basis of the marriage agreement.¹²

14. On 19 August 2021, OIOS issued its Investigation Report in which it found, *inter alia*, that VO1's "account of her relationship with Mr. Makeen and the sexual activity [was] credible".¹³ On the contrary, assessing the credibility of Mr. Makeen, OIOS found that he provided "vague

⁵ *Ibid.*, para. 50.

⁶ *Ibid.*, para. 14.

⁷ Investigation Report, para. 19. On 30 April 2021, Mr. Makeen was released from custody. However, he was rearrested on 5 May 2021, charged with rape, and released on bail on 20 May 2021.

⁸ *Ibid.*, paras. 1-2.

⁹ *Ibid.*, paras. 23 and 94.

¹⁰ *Ibid.*, para. 8.

¹¹ Impugned Judgment, paras. 34 and 41. See also annex 1 to the sanction letter dated 21 July 2022, paras. 5 and 14.

¹² *Ibid.*, paras. 20 and 41. See also annex 1 to the sanction letter dated 21 July 2022, para. 15.

¹³ Investigation Report, para. 141.

and contradictory statements” as well as “dishonest information on interview, including [that] the numbers stored in his telephone that he called prior to his interview did not relate to VO1 and even regarding his own age”.¹⁴ OIOS further found that the following facts were established and constituted reasonable grounds to conclude that Mr. Makeen had failed to observe the standards of conduct expected of a United Nations civil servant:¹⁵

- i. Mr. Makeen had sexual intercourse with VO1 on at least one occasion, around March 2021. Mr. Makeen admitted this but said it was on one occasion, whereas VO1 said there were four separate sexual encounters;
- ii. Mr. Makeen provided an unsupported account that his relationship with VO1 was legitimate and with the intention of marriage. Multiple witness accounts and Mr. Makeen’s own interview indicate sexual encounters conducted in secrecy and indicate marriage was only considered following his arrest. Mr. Makeen’s claim to have asked VO1 to tell her mother of her planned marriage was refuted by VO1 and WO4;
- iii. VO1’s age cannot be definitively stated, however OIOS notes a likelihood that she was a juvenile when she had sexual intercourse with Mr. Makeen. Mr. Makeen was vague on his knowledge of United Nations rules on Sexual Exploitation and Abuse; however, he is likely to have been aware that VO1 may have been a juvenile and that he is significantly older than VO1. OIOS notes the discrepancy in VO1’s age recorded by her last school and found no corroboration for this;
- iv. Mr. Makeen exploited his status in the community as a United Nations employee, a man of comparative wealth and what VO1 described as his being an ‘elder’ and ‘big person’ to engage in sexual activity with VO1; conduct he would be aware was potentially contrary to United Nations rules;
- v. VO1 performed menial domestic tasks for Mr. Makeen on an informal basis for which he offered her money. VO1 claimed that Mr. Makeen offered her money after his arrest and reportedly changed key aspects of her account after this;
- vi. There was a notable power and status differential between Mr. Makeen and VO1, emanating from their comparative ages, maturity, wealth and status, as well as Mr. Makeen’s United Nations position;
- vii. Mr. Makeen used his position and money to influence VO1 and her family after his arrest in order to have the criminal case against him discontinued in exchange for an offer of marriage to VO1 and the payment of a substantial dowry; and

¹⁴ *Ibid.*, paras. 142-143.

¹⁵ *Ibid.*, paras. 152-153.

viii. The local court discontinued its prosecution of Mr. Makeen upon agreement of a settlement including the payment of a substantial dowry.

15. OIOS referred the matter to the Office of Human Resources (OHR) and the Office of Legal Affairs (OLA) for appropriate action.¹⁶

16. On 30 September 2021, the Assistant Secretary-General for Human Resources (ASG/OHR) informed Mr. Makeen by memorandum that, on the basis of the evidence and findings contained in the Investigation Report, the following allegations of misconduct were issued against him:¹⁷

[I]t is alleged that, in or around March 2021, you engaged in a sexual relationship with and impregnated VO1. VO1 was a child at the material time (under 18 years old), and could not explain how she found herself engaging in sexual intercourse with you. VO1 was from an impoverished and considerably underprivileged background, who would provide unpaid domestic help to you. It is further alleged that you only agreed to marry VO1 and to pay 31 cows and 5 bulls to VO1's family, after you had been arrested for the alleged rape of VO1, in order for the criminal case against you to be dropped, for which pressure was exercised on VO1 and her family. It is further alleged that after your arrest, in addition to suggesting marriage with VO1, you started paying various sums of money to VO1 and providing her with gifts.

17. The ASG/OHR also specified that if established, Mr. Makeen's conduct would amount to sexual exploitation and/or abuse. Mr. Makeen was requested to provide his written comments on the factual findings, which he did on 29 October 2021.¹⁸

18. On 12 December 2021, VO1 gave birth to a child, whom Mr. Makeen acknowledged as his son.¹⁹

19. In April 2022, at the request of OHR, OIOS conducted an additional fact-finding investigation into Mr. Makeen's case, which included further witness interviews, including Mr. Makeen. On 13 April 2022, OIOS submitted its additional findings to OHR. On 29 April 2022, Mr. Makeen provided his written comments on the additional findings.²⁰

¹⁶ *Ibid.*, para. 157.

¹⁷ Memorandum of allegations of misconduct dated 30 September 2021, para. 34.

¹⁸ *Ibid.*, para. 37. See also impugned Judgment, paras. 23-25. Mr. Makeen also submitted additional comments on 3 December 2021, 6 January 2022, and 7 March 2022.

¹⁹ Impugned Judgment, para. 24.

²⁰ *Ibid.*, paras. 26-28.

20. On 21 July 2022, Mr. Makeen was informed by letter from the ASG/OHR of the decision of the Under-Secretary-General for Management Strategy, Policy and Compliance (USG/DMSPC) that the allegations against him had been established by clear and convincing evidence and that his actions constituted serious misconduct pursuant to Staff Regulation 1.2(a) and (b), Staff Rule 1.2(e), and Sections 1, 3.1, 3.2(a), (c), and (f) and 3.3 of the Secretary-General's Bulletin ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) and in respect of which the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity, was imposed. The letter also provided that:²¹

After a thorough review of the entire dossier, and on the basis of the considerations set out in the Annex to this letter, I dropped the aspect of the allegations against you regarding VO1 being under 18 years of age. However, the USG/DMSPC concluded that the remaining allegations against you, that you engaged in sexual relations with VO1, who was a member of the local population without independent financial means and who occasionally provided unpaid domestic help to you, that you impregnated VO1 and that you agreed to marry VO1 and pay a dowry to her family only after your arrest and in the hope that you would not face a possible trial concerning rape charges, are established by clear and convincing evidence. (...)

In determining the appropriate sanction, the USG/DMSPC considered the nature of your actions, the past practice of the Organization in matters of comparable misconduct, as well as whether any mitigating or aggravating factors apply to your case.

The USG/DMSPC considered that your trying to conceal evidence from the investigators, by deleting calls and text messages from your phone, during your interview, after having just been told that OIOS would like to examine your messages and calls for communications to/from VO1, constitutes an aggravating factor in your case.

The USG/DMSPC considered that your over 10 years of service in a hardship duty station constitute a mitigating factor.

21. On 24 August 2022, Mr. Makeen filed an application with the Dispute Tribunal challenging the contested decision.

²¹ Sanction letter dated 21 July 2022.

Impugned Judgment

22. On 12 July 2023, the Dispute Tribunal issued its impugned Judgment, granting Mr. Makeen’s application.

23. The UNDT first found that the facts were not disputed between the parties and had been established by clear and convincing evidence.²²

24. With regard to the relationship between VO1 and Mr. Makeen, the UNDT observed that VO1 “was vulnerable and less powerful than [Mr. Makeen] and that [his] actions regarding [VO1] had a sexual connotation”.²³ Nevertheless, the UNDT concluded that the facts, although established, did not constitute sexual exploitation or abuse and, therefore, did not amount to misconduct. The UNDT also highlighted that the Secretary-General’s reliance on *Erefa*²⁴ and *AAA*²⁵ was misplaced as the underlying facts in those judgments were “completely different” from the present case.²⁶

25. The UNDT found that the sexual intercourse between VO1 and Mr. Makeen was “fully consensual”.²⁷ Indeed, the UNDT observed that pursuant to Section 1 of ST/SGB/2003/13, sexual exploitation required “undue advantages (even only the sexual act in itself)”.²⁸ However, in the present case, the UNDT concluded that the sexual intercourse between VO1 and Mr. Makeen produced no “‘moral, social and political’ benefits to [Mr. Makeen], and instead a lot of unpredicted disadvantages to him”.²⁹ In this regard, the UNDT also concluded that the Secretary-General wrongly speculated that Mr. Makeen’s motive to marry VO1 was to be cleared of the charges against him. Furthermore, the UNDT also found that VO1 had not been offered or promised any advantage from her sexual activity with Mr. Makeen.

26. The UNDT determined that the “fortuity” of a pregnancy, the birth of a child, and a marriage were only facts relating to the parties’ private life and had no link to Mr. Makeen’s status as a United Nations staff member. Consequently, the Dispute Tribunal concluded that Mr. Makeen did not exploit his “stronger position, unless one would adventure him/herself in

²² Impugned Judgment, para. 40.

²³ *Ibid.*, para. 58.

²⁴ *Erefa v. Secretary-General of the United Nations*, Judgment No. UNDT/2021/109.

²⁵ *AAA v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1280.

²⁶ Impugned Judgment, paras. 73-75.

²⁷ *Ibid.*, para. 70.

²⁸ *Ibid.*, para. 68.

²⁹ *Ibid.*, para. 64.

assuming that a consensual sexual intercourse in the private life (with no connection with the working position of the person and his/her functions) with a poorer or less important person would entail sexual exploitation in itself (with no other benefit, given or promised, out of the sexual act)".³⁰

27. The UNDT also concluded that Mr. Makeen's behavior did not constitute a breach of his duty to uphold the highest standards of integrity required by a staff member, since the sexual intercourse between VO1 and him resulted in their marriage. Therefore, the facts that the UNDT had to examine were "facts of private life with no connection with the position of [Mr. Makeen] at the United Nations".³¹

28. The UNDT rescinded the contested decision. Furthermore, relying on Appeals Tribunal jurisprudence and on Article 10(5) of the Dispute Tribunal Statute,³² the UNDT recalled that compensation in lieu "is not compensatory damages based on economic loss, but only the amount the Administration may decide to pay as an alternative to rescinding the challenged decision".³³ Therefore, taking into account "the seniority of [Mr. Makeen], the type of contract held, and the facts", the UNDT set the amount of compensation in lieu at two years' net base salary on the date of his separation from service.³⁴

Procedure before the Appeals Tribunal

29. On 11 September 2023, the Secretary-General filed an appeal against the impugned Judgment before the Appeals Tribunal. Mr. Makeen did not file an answer to the appeal.

Submissions

The Secretary-General's Appeal

30. The Secretary-General requests the Appeals Tribunal to reverse the UNDT's finding that the established facts of the present case did not amount to misconduct and to uphold the contested decision. Alternatively, the Secretary-General requests the Appeals Tribunal to reduce the compensation in lieu awarded to Mr. Makeen.

³⁰ *Ibid.*, para. 67.

³¹ *Ibid.*, paras. 76-78.

³² *Eissa v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-469.

³³ Impugned Judgment, para. 83.

³⁴ *Ibid.*, paras. 84-85.

31. The Secretary-General contends that the UNDT erred in law by finding that the established facts did not amount to misconduct, particularly by asserting that Mr. Makeen had not committed sexual exploitation and had not breached his duty of integrity as a United Nations staff member.

32. In this regard, the Secretary-General first submits that the UNDT erred in concluding that undue advantage was a requirement for sexual exploitation. On the contrary, the Secretary-General highlights that pursuant to Section 1 of ST/SGB/2003/13 and Appeals Tribunal jurisprudence,³⁵ an undue benefit from a sexual act is not necessary for sexual exploitation to occur. Section 1 of ST/SGB/2003/13 merely specifies that “profiting monetarily, socially or politically from the sexual exploitation of another” constitutes only one form that sexual exploitation may take.

33. The Secretary-General contends that in the present case, all the requirements for sexual exploitation outlined in Section 1 of ST/SGB/2003/13 were met, as Mr. Makeen abused the position of vulnerability of VO1 for sexual purposes. The Secretary-General emphasizes that the UNDT itself acknowledged VO1’s vulnerability and recognized the sexual connotation of Mr. Makeen’s actions.³⁶

34. Second, the Secretary-General submits that the UNDT also erred in law by finding that the established facts did not amount to a breach of Mr. Makeen’s duty of integrity, as outlined in Staff Regulation 1.2(a) and (b), on the grounds that the facts pertained solely to his private life. The Secretary-General observes that the legal framework mandates staff members to respect the dignity and worth of every human person, uphold the highest standards of integrity, and conduct themselves in a manner befitting their status of international civil servants at all times, whether inside or outside the workplace.³⁷ Therefore, the Secretary-General argues that, especially given the fact that sexual misconduct typically occurs in private,³⁸ the duty to act with integrity applied to Mr. Makeen’s private actions and that “[b]y distinguishing private acts from other acts, the UNDT impermissibly amended the legal framework”.

³⁵ *Mihai-Tudor Stefan v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1375, para. 69; *Alex Lucchini v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1121, paras. 48 and 50.

³⁶ Impugned Judgment, para. 58.

³⁷ The Secretary-General also relies on Staff Regulation 1.2(f).

³⁸ *AAE v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1332, para. 103.

35. Consequently, the Secretary-General submits that the disciplinary measure imposed on Mr. Makeen was lawful, especially since sexual exploitation amounts to serious misconduct pursuant to Staff Regulation 10.1(b).

36. Last, the Secretary-General asserts that since the contested decision was lawful, no compensation should be granted to Mr. Makeen. Nevertheless, even if the UNAT were to determine that the contested decision should be rescinded, the Secretary-General maintains that the UNDT erred in law by concluding that compensation in lieu is not based on economic loss and by setting the amount of such compensation at two years' net base salary "without any justification under the legal framework".

37. In this regard, relying on Appeals Tribunal jurisprudence, the Secretary-General notes that the UNDT must consider economic loss incurred by the staff member when determining the compensation in lieu, which includes, among other things, "the term of the contract and the remainder of the said term, if any, at the time of any alleged breach".³⁹

38. The Secretary-General contends that the UNDT failed to consider these elements, particularly the fact that Mr. Makeen had only eight months remaining on his fixed-term appointment from the date of the contested decision until the expiration of his appointment on 31 March 2023. The Secretary-General argues that the UNDT did not provide any rationale for awarding Mr. Makeen the maximum compensation in lieu.

Mr. Makeen's Answer

39. Mr. Makeen did not file an answer to the Secretary-General's appeal.

Considerations

40. We reiterate our jurisprudence that the role of the Dispute Tribunal when reviewing a disciplinary sanction imposed by the Administration is to examine: i) whether the facts on which the sanction is based have been established according to the evidentiary standard of clear and convincing evidence; ii) whether the established facts qualify as misconduct; iii) whether the

³⁹ *Andreyev v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-501, para. 31.

sanction is proportionate to the offence and; iv) whether the staff member's due process rights were respected.⁴⁰

41. In that vein, the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred.⁴¹ Moreover, when termination is a possible outcome, such misconduct must be established by clear and convincing evidence. In this regard, as we stated in *Molari*, “[c]lear 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”.⁴²

42. In the case at bar, the Dispute Tribunal found that the “[f]acts [were] not disputed between the parties, and they result[ed] from the records by clear and convincing evidence”.⁴³ Yet, the UNDT concluded that the facts, although established, did not constitute sexual exploitation or abuse and consequently did not amount to misconduct. As Mr. Makeen filed no answer in response to the Secretary-General's appeal before us, these facts remain unchallenged.

43. Therefore, following the UNDT's conclusion that the Administration had established the facts on which the disciplinary measure is based to the required standard, the issues for consideration in the present appeal are: i) whether the UNDT erred in finding that the established facts did not amount to misconduct; ii) whether the disciplinary sanction was proportionate to Mr. Makeen's misconduct; and iii) whether Mr. Makeen's due process rights were respected. We shall examine these issues in turn.

Whether the UNDT erred in finding that the established facts did not amount to misconduct

44. In summary, the established facts in this case are that Mr. Makeen engaged in at least four acts of sexual intercourse with an economically-disadvantaged girl, VO1, allegedly a minor. He impregnated her and she gave birth to a son. After being arrested twice on charges of raping VO1 and released on bail, Mr. Makeen married VO1 in a marriage agreement that entailed the

⁴⁰ *AAC v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1370, para. 38; *Kamara v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-398, para. 29.

⁴¹ *Hallal v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-207, para. 28; *Liyanarachchige v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-087, para. 17.

⁴² *Molari v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-164, para. 30.

⁴³ Impugned Judgment, para. 40.

payment of 31 cows and 5 bulls to VO1's family. This marriage formed the basis for discontinuing the criminal prosecution of Mr. Makeen at the Aweil High Court.

45. Having found these facts as established by clear and convincing evidence, we disagree with the UNDT's conclusion that they did not constitute sexual exploitation or abuse on the grounds that sexual exploitation requires "undue advantages (even only the sexual act in itself)".⁴⁴

46. We recall that Section 1 of ST/SGB/2003/13 provides that:⁴⁵

(...) [T]he term 'sexual exploitation' means *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.* Similarly, the term 'sexual abuse' means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.

47. This Tribunal notes that while Section 1 of ST/SGB/2003/13 does not provide an exhaustive list of all types of sexual exploitation, it captures some common forms. The phrase "but not limited to" is used expansively to indicate that the list is by far non-exhaustive. By parity of reasoning, undue benefit from the sexual act is not a cardinal requirement for the existence of sexual exploitation under Section 1 of ST/SGB/2003/13. Therefore, we agree with the Secretary-General's submission that the Dispute Tribunal erred in concluding that undue advantage is a requirement for sexual exploitation to occur.

48. In *Alex Lucchini*,⁴⁶ we held that for the Secretary-General to establish that a staff member committed misconduct under Staff Rule 1.2(e) and Section 1 of ST/SGB/2003/13, there must be 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 behavior.

49. Therefore, it is sufficient that Mr. Makeen's conduct fell within one of the five categories of sexual exploitation stated in *Alex Lucchini* for the offence to be established. Consequently, we find that the Dispute Tribunal, having conceded in the impugned Judgment that "[VO1

⁴⁴ *Ibid.*, para. 68.

⁴⁵ Emphasis added.

⁴⁶ *Alex Lucchini* Judgment, *op. cit.*, para. 45.

was vulnerable and less powerful than [Mr. Makeen] and that [his] actions regarding [VO1] had a sexual connotation”, erred in concluding at the same time that Mr. Makeen’s acts did not constitute sexual exploitation and abuse and, therefore, did not amount to misconduct.⁴⁷

50. Consent is immaterial to the offence of sexual exploitation and abuse. In this regard, we previously held in *Mihai-Tudor Stefan* that:⁴⁸

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

- 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 behavior 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.

51. In this context, we do not agree with the UNDT’s conclusion that the sexual intercourse between VO1 and Mr. Makeen was “fully consensual”, as stated in paragraph 70 of the impugned Judgment. In *AAE*, we held that:⁴⁹

... (...) The law cannot take silence, passive or ambiguous conduct as consent in these circumstances. Further, consent in sexual assault and rape cases is not simply the ‘perception’ of behaviour by a ‘reasonable person’ because consent must be more than perception.

... Rather, consent must be defined as a voluntary agreement of an individual to engage in the sexual activity in question in the form of actual statements, actions or other evidence. Whether there is consent to the sexual activity will depend on the circumstances of each case and the totality of the evidence. However, there are circumstances where there clearly can be no consent in law, including but not limited to, 1) when there has been no attempt to obtain consent and the activity is clearly forced, 2) where an individual not involved in the activity expresses consent on behalf of the complainant, 3) where the complainant lacks capacity to provide consent, 4) where the individual induces the complainant to engage in the activity by abusing a position of trust, power, or authority, and 5) where the complainant communicates, by words or conduct, an express lack of agreement to engage in or continue the activity.

⁴⁷ Impugned Judgment, para. 58.

⁴⁸ *Mihai-Tudor Stefan* Judgment, *op. cit.*, para. 77.

⁴⁹ *AAE* Judgment, *op. cit.*, paras. 130-131.

52. Consequently, we find that VO1 was unable to fully consent due to the unequal relationship and power imbalance that existed between her and Mr. Makeen. Mr. Makeen held a position of trust and support, and VO1's economic and social status put her in a state of dependency. This view is consistent with our decision in *AKK*,⁵⁰ where we held that the sexual relationship between a staff member and a local citizen, whom the staff member supported financially and otherwise, constituted sexual exploitation and abuse due to the significant disparate levels of power and vulnerability that the staff member exploited to his advantage. Therefore, we agree with the Secretary-General's contention that Mr. Makeen abused the position of vulnerability of VO1 for sexual purposes.

53. We equally disagree with the reasoning of the Dispute Tribunal that the established facts did not amount to a breach of Mr. Makeen's duty of integrity, as outlined in Staff Regulation 1.2(a) and (b), on the grounds that the facts pertained solely to his private life. Indeed, this type of misconduct typically occurs in private, often with little or no direct, independent evidence.⁵¹

54. Moreover, the duty of staff members to act with integrity as international civil servants extends to their conduct both within and outside the workplace due to the potential reputational damage their adverse actions or inactions may cause to the Organization. In *Al Saleh*,⁵² we emphasized the obligation of staff members to conduct themselves in a manner befitting their status of United Nations staff members, especially when engaging in outside activities.

55. Furthermore, as international civil servants, staff members are also bound by the Standards of Conduct for the International Civil Service (2013), which provides, in paragraph 42, that:⁵³

... The private life of international civil servants is their own concern and organizations should not intrude upon it. There may be situations, however, in which the behaviour of an international civil servant may reflect on the organization. *International civil servants must therefore bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organizations. (...)*

⁵⁰ *AAK v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1348.

⁵¹ *AAE* Judgment, *op. cit.*, para. 103, citing *Ali Hussein Haidar v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1076, para. 43.

⁵² *Al Saleh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2018-UNAT-888, para. 22.

⁵³ Emphasis added.

56. Further, we recall the corroborative effects of Staff Regulation 1.2(f), which, in relevant part, provides that:⁵⁴

[Staff members] shall conduct themselves *at all times* in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. (...)

57. The phrase “at all times” contained in Staff Regulation 1.2(f) above, clearly indicates that the duty of a staff member to uphold the highest standards of efficiency, competence, and integrity, as spelled out in the Staff Regulations and Rules, extends beyond the workplace.

58. Therefore, for as long as a person is a current staff member of the Organization, any unlawful or inappropriate conduct within or outside the workplace is capable of constituting misconduct which may attract sanctions. For instance, in *Pierre Paris*,⁵⁵ the Appeals Tribunal affirmed the Administration’s decision to dismiss a former staff member who was off-duty and drove under the influence of alcohol while in possession of an unauthorized weapon, in addition to travelling without insurance.

59. This Tribunal also notes that the decision of the Aweil High Court to discontinue prosecution of Mr. Makeen based on a subsequent marriage settlement has no bearing on the finding of misconduct against him in the present case. Disciplinary cases are not criminal and liberty is not at stake; as such, different standards apply.⁵⁶ Therefore, the Administration is empowered by the legal framework to take disciplinary measures against its staff members in cases of misconduct, irrespective of whether the conduct in question is referred to a local court or whether the accused person is convicted or acquitted in such proceedings.⁵⁷

60. Again, we held in *Abu Ghali* that:⁵⁸

... Misconduct based on underlying criminal act does not depend upon the staff member being convicted of a crime in a national court. As the former United Nations Administrative Tribunal concluded ‘different onuses and burdens of proof arise in the ...domestic criminal proceedings than would arise under an investigation for misconduct under the [Agency’s] appropriate Regulations and Rules’. Thus, UNRWA could properly

⁵⁴ Emphasis added.

⁵⁵ *Pierre Paris v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1182, para. 49.

⁵⁶ *Majut v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-862, para. 74.

⁵⁷ *Toukolon v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-407, para. 23.

⁵⁸ *Abu Ghali v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-366, para. 43 (internal footnote omitted).

determine that Mr. Abu Ghali's actions constituted misconduct despite his acquittal of the criminal charges brought against him.

61. It can thus be deduced from the established facts that Mr. Makeen's activities qualified as misconduct. Therefore, the decision of the Dispute Tribunal in the impugned Judgment was made *per incuriam*.

62. Accordingly, we find that the UNDT erred in finding that the established facts did not amount to misconduct.

Whether the disciplinary measure was proportionate to the offence

63. Staff Rule 2.1(e) provides that:

Sexual exploitation and abuse is prohibited. Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or the age of consent locally, except where a staff member is legally married to a person who is under the age of 18 but over the age of majority or consent in his or her country of citizenship. Mistaken belief in the age of a child is not a defence. 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.

64. The Administration has "wide discretion in applying sanctions for misconduct but at all relevant times must adhere to the principle of proportionality".⁵⁹

65. The most important factors to be taken into account in assessing the proportionality of a sanction include, among other things, the seriousness of the offence, the length of service, and the disciplinary record of the employee.⁶⁰

66. With regard to the seriousness of the offence, the United Nations has repeatedly stated that any form of sexual exploitation and abuse is unacceptable. Resolutions of the Security Council and General Assembly have consistently supported a zero-tolerance policy for sexual exploitation and abuse and urged the Secretary-General to take various actions in this respect. Furthermore, separation from service is one of the disciplinary measures available under Staff Rule 10.2.

⁵⁹ *Applicant v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-280, para. 120.

⁶⁰ *Rajan v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-781, para. 48.

67. In addition, Staff Regulation 10.1(b) and Section 3.2(a) of ST/SGB/2003/13 provide that sexual exploitation and abuse constitute serious misconduct. Section 3.1 of this Secretary-General's Bulletin further stipulates that such actions violate universally recognized international legal norms and standards and have always been unacceptable behavior and prohibited conduct for United Nations staff members. Section 3.2(a) of ST/SGB/2003/13 also stipulates that sexual exploitation and sexual abuse are grounds for disciplinary measures, including summary dismissal – a significantly more severe sanction than the one imposed on Mr. Makeen. For instance, in *Oh*,⁶¹ the UNAT upheld the dismissal of a staff member who engaged in sexual exploitation and abuse of local women.

68. In the present case, having determined that the facts on which the disciplinary measure is based are established by clear and convincing evidence, and having concluded that the established facts qualify as misconduct, we find that the sanction of separation from service with compensation in lieu of notice and without termination indemnity imposed on Mr. Makeen is proportionate to his sexual exploitation and abuse of VO1.

69. Consequently, we conclude that the sanction imposed on Mr. Makeen was lawful and proportionate.

Whether Mr. Makeen's due process rights were respected

70. The Administration, in imposing a disciplinary measure, has a duty to respect the due process rights of the staff member in the course of the investigative process (albeit to a limited extent) 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.⁶²

71. In this case, a few days after receiving the report of Mr. Makeen's possible misconduct, OIOS opened an investigation during which several witnesses, including Mr. Makeen, were interviewed. Hence, he was provided with an opportunity to respond to the allegations of misconduct at the preliminary investigation stage.

⁶¹ *Oh v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-480.

⁶² *Powell v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-295, paras. 23-24; *Akello v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-336, para. 36.

72. Furthermore, in the course of the disciplinary proceedings, the ASG/OHR, by memorandum dated 30 September 2022, informed Mr. Makeen of the allegations of misconduct raised against him and requested him to provide his written comments on the factual findings of OIOS. Additionally, in April 2022, at the request of the ASG/OHR, OIOS conducted an additional fact-finding investigation into Mr. Makeen's case, which included further interviews with him before reaching a decision to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity. Therefore, Mr. Makeen was given another chance to assess and respond to the allegations against him.

73. Consequently, we find that Mr. Makeen's due process rights were respected in the preliminary investigation stage and in the course of the disciplinary proceedings.

74. Since it has been established by clear and convincing evidence that the disciplinary measure imposed on Mr. Makeen is lawful, there is hence no illegality warranting any compensation.

Judgment

75. The Secretary General's appeal is granted, and Judgment No. UNDT/2023/071 is hereby reversed.

Original and Authoritative Version: English

Decision dated this 28th day of June 2024 in New York, United States.

(Signed)

Judge Forbang, Presiding

(Signed)

Judge Gao

(Signed)

Judge Savage

Judgment published and entered into the Register on this 30th day of July 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar