



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/001

Judgment No.: UNDT/2022/083

Date: 20 September 2022

Original: English

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**Before:** Judge Margaret Tibulya

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

STEFAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

George G. Irving

**Counsel for the Respondent:**

Jacob B. van de Velden, AAS/ALD/OHR, UN Secretariat

Andrea Ernst, AAS/ALD/OHR, UN Secretariat

## **Introduction**

1. The Applicant is a former Close Protection Officer to the Special Representative of the Secretary-General (“SRSG”) at the United Nations Mission in the Republic of South Sudan (“UNMISS”). He filed an application with the United Nations Dispute Tribunal in Nairobi on 31 December 2021 to contest the decision to impose on him the disciplinary measure of separation from service, with compensation in lieu of notice and without termination indemnity; together with a fine of one month’s salary recovery action; and inclusion of his name in the Clear Check database.<sup>1</sup>

2. The Respondent filed a reply on 3 February 2022 and requests the Tribunal to reject the application.

3. The Tribunal held a hearing on the merits on 27-28 July 2022 at which the evidence of two witnesses was taken.

## **Facts**

4. The contested decision, taken by the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”), was conveyed to the Applicant by a letter dated 3 December 2021 from the Assistant-Secretary-General for Human Resources (“ASG/HR”). In this letter, it was stated that,

based on a review of the entirety of the record, and on the basis of the considerations set out in Annex 1 to this letter, the USG/DMSPC has concluded that the allegations against you [Applicant] have been established by clear and convincing evidence and that your conduct violated staff rule 1.2(e) as further specified in sections 1, 3.2 and 3.3 of the ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse), and/or staff regulation 1.2(f) and staff regulations 1.2(b) and 1.2(q).<sup>2</sup>

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<sup>1</sup> Application, annex 2.

<sup>2</sup> Reply, annex 5 (Sanction letter).

5. Regarding the factual background for the contested decision, the ASG/HR indicated that based on the memorandum of allegations, the Applicant had,

(a) sexually exploited V01 in the period of March until the end of June 2019 by: (i) having a sexual relationship with V01 who he knew to be dependent on alcohol and medication and who was, therefore, vulnerable; and (ii) continuing his sexual relationship with V01 while he knew that the relationship exacerbated V01's psychological problems and despite being instructed to leave V01 alone by his chief of unit in the mission.

(b) engaged in a misrepresentation to the Organization and a misappropriation of assets from the Organization regarding family emergency leave from 22 until 27 July 2019 by: (i) submitting false information to the Organization on 20 July 2019 that he had a family emergency that required him to take family emergency leave from 22 until 27 July 2019, whereas on 26 June 2019 he had in fact planned to be absent in that period; and/or (ii) submitting false information to the Organization on 20 July 2019 that he had a family emergency that required him to take family emergency leave from 22 until 27 July 2019 whereas in fact he spent those days of the leave on holiday.<sup>3</sup>

6. During the period under review, V01 served with the United Nations Volunteer in UNMISS, as the Human Immunodeficiency Virus ("HIV") Training Officer and Counsellor in the HIV Unit.<sup>4</sup>

### **Submissions**

#### *The Applicant's submissions on sexually exploiting V01*

7. The Applicant maintains that the Respondent has not established with clear and convincing evidence that V01 was vulnerable, or that she was taken advantage of. On the contrary, there is ample evidence to demonstrate that she was not only a willing participant but also actively pursued the relationship even after the Applicant indicated his reservations about continuing it. The Respondent has constructed an entirely false narrative to arrive at this conclusion, by relying almost entirely on misstatements of the Applicant's interviews. The Respondent repeatedly confuses the Applicant's

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<sup>3</sup> Reply, annex 4, para. 2.

<sup>4</sup> Hearing of 28 July 2022, V01's testimony.

comments on the earlier part of their relationship with the later, more volatile episodes caused by V01, which were brought not by his continuation of the relationship but by his efforts to end it.

8. The Applicant further argues that the Respondent has not proved that V01 was dependent on alcohol and drugs and in what way she was vulnerable or that the Applicant's efforts to end the relationship in a supportive and non-confrontational way exacerbated her psychological problems. There is an admission that there is no record of drug or alcohol abuse or any medical condition of impairment.<sup>5</sup>

*Applicant's submissions on the issue of family emergency leave*

9. The Applicant asserts that the Administration cites no rule or instruction that he violated in using Family Emergency Leave. There is no prohibition against using other types of leave in connection with annual or rest and recuperation ("R&R") leave as long as the proper procedures are followed to secure approval. He maintains that the Office of Internal Oversight Services ("OIOS") confirmed that Family Emergency Leave is not subject to supervisor pre-approval. The Applicant addressed a request to UNMISS Human Resources on 20 July 2019 for the additional days, which was approved. The supervisor also gave his approval. The sole procedural error was that he did not immediately enter the approval in Umoja, which was caused by technical difficulties in accessing Umoja. In any case, he rectified the records when he became aware that his request had not been recorded in Umoja.

10. The Applicant indicates that he used the additional days to be with his son and to reassure his wife of his commitment to his family after V01 had been threatening and harassing them.

*The Respondent's submissions on the issue of sexual exploitation*

11. The Respondent submits that the facts are sufficiently established by the Applicant's own statements and admissions in his two interviews by OIOS, and the

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<sup>5</sup> Application, para. 30.

video and audio recordings he made, part covertly, of his disturbing interactions and sexual intercourse with V01.

12. The Applicant's attempt at retractions and denials is not credible and fails. In particular, the Applicant denies that "[he] *was aware from March she had an alcohol and drugs problem*" and that "[he] *wanted to end the relationship in March due to her drug and alcohol problem*."<sup>6</sup> These assertions contradict his own coherent, detailed, and consistent statements and admissions in his OIOS interviews. In his secret recording of 27 June 2019, the night before he had sex with V01, he asked her whether she had taken any pills, she confirmed: "I took something. This is the only way I can talk to you".<sup>7</sup> The Respondent maintains that this should have given the Applicant pause, so that he refrains from having any further sexual activity with V01. However, the Applicant continued to have sex with her.

13. Regarding the Applicant's argument that V01 never claimed that he took advantage of her or that she was vulnerable, the Respondent maintains that this assertion is erroneous. V01 clearly felt sexually taken advantage of by the Applicant; she alleged that he raped her. In addition, the Applicant's assertion conflicts with the established facts which are based on his own statements and admissions and the recordings, which confirm that V01 was vulnerable due to her substance abuse during the period of early March until end of June 2019, while the Applicant continued enjoying sexual activities with her, even following the multiple serious incidents with V01 in those months that gave the Applicant pause about ending this problematic relationship.

*Respondent's submissions on the issue of Family Emergency Leave*

14. According to the Respondent, since the Applicant does not dispute the material facts, they are sufficiently established. Nowhere does the Applicant assert that on 20 July 2019, when he requested Family Emergency Leave, there was a family emergency, i.e., an unexpected family situation that happened suddenly and required immediate

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<sup>6</sup> Reply, para. 30, citing application, para. 27.

<sup>7</sup> Reply, para. 31.

action so that the Applicant was unable to attend his work. The contested decision was based on the fact that there was no family emergency on 20 July 2019 which justified the Applicant's claim for Family Emergency Leave from 22 to 27 July 2019. The Applicant clearly states that he "used the additional days to be with his son and to reassure his wife of his commitment to his family". The Respondent stresses that the Applicant had been home since 3 July 2019.

15. The Respondent emphasizes that the context of the case merely confirms that there was no such emergency. The Applicant had a premeditated plan to claim Family Emergency Leave from 22 to 27 July 2019. Available evidence is that on 26 June 2019 the Applicant planned to be absent from the mission in the period for which he claimed Family Emergency Leave, since he purchased an Ethiopian Airlines ticket with a scheduled return flight on 29 July 2019. Second, he knew on 26 June 2019 that he had insufficient normal leave (*i.e.*, annual leave and R&R leave) to cover the period from 22 to 27 July 2019 of his planned absence.

*Standard of review and burden and standard of proof*

16. The United Nations Appeals Tribunal's ("UNAT") jurisprudence establishes the following principles; when judging the validity of the Secretary-General's exercise of discretion in administrative matters, the United Nations Dispute Tribunal ("UNDT") determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered and also examine whether the decision is absurd or perverse.<sup>8</sup>

17. It is not the role of the UNDT to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General". In this regard, "the Tribunal is not conducting a "merit-based review, but a judicial review" explaining

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<sup>8</sup> *Sanwidi* 2010-UNAT-084; *Santos* 2014-UNAT-415, para. 30.

that a “judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision”.<sup>9</sup>

18. The role of the Tribunal is “to ascertain whether the facts on which the sanction is based have been established, whether the Applicant’s due process rights were respected during the investigation and the disciplinary process, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence”.<sup>10</sup>

19. The Administration bears the burden of establishing that the misconduct has occurred.<sup>11</sup> The misconduct must be established by clear and convincing evidence which has been interpreted to mean that the truth of the facts asserted is highly probable.<sup>12</sup>

20. Counsel for the Applicant argues that it is improper to apply the policy relating to sexual exploitation to this case, since the mischief which staff rule 1.2(e) was aimed to address is “the reputational harm to the Organization caused by its staff members engaging in exploitative conduct in disadvantaged communities subject to the protective mandate of the Organization.”<sup>13</sup>

21. Staff rule 1.2(e) provides that:

**Sexual exploitation and abuse is prohibited** (emphasis added). ... The exchange of money, employment, goods or services for sex, including sexual favors or other forms of humiliating, degrading or exploitative behavior, is prohibited. United Nations staff members are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse.

22. The general terms in which staff rule 1.2(e) is crafted do not suggest that its application is restricted in the manner suggested by Counsel.<sup>14</sup> The comment that the

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<sup>9</sup> *Sanwidi*, *op. cit.*, para. 42.

<sup>10</sup> *Mahdi* 2010-UNAT-018, para. 27; *Haniya* 2010-UNAT-024, para. 31; *Sanwidi* 2010-UNAT-084, para. 43; *Masri* 2010-UNAT-098, para. 30; *Portillo Moya* 2015-UNAT-523, paras. 17, 19-21; *Ibrahim* 2017-UNAT-776, para. 48; see also *Mbaigolmem* 2018-UNAT-890, paras. 15, 16.

<sup>11</sup> *Diabagate* 2014-UNAT-403.

<sup>12</sup> *Molari* 2011-UNAT-164; *Appellant* 2013-UNAT-302.

<sup>13</sup> *Gisage* 2019-UNAT-973 at para. 37; *Applicant* UNDT/2019/187 at para. 78 cited in *Lucchini* UNDT/2020/090 at paras. 27 and 29.

<sup>14</sup> Applicant’s Counsel seeks to rely on *Applicant* UNDT/2019/187, para. 78.

Tribunal “*considers {staff rule 1.2(e)} applicable to sexual relations exploiting systemic inequality, such as between peacekeepers and local population, and particularly where transactional exchange is involved*” cannot be the basis for exclusion of intra-staff sexual exploitation from the rule’s application. The Tribunal did not make a positive finding that the rule was **only** applicable to non-staff/United Nations staff sexual exploitation complaints. *Lucchini*<sup>15</sup> did not even turn on the fact that the exploitative conduct was between United Nations staff members, but rather on a finding that the facts on which the sanction was based were not established.

23. The facts and jurisprudence cited above require that the following issues be determined:

- a. Whether the established facts and evidence support a finding that V01 is vulnerable;
- b. Whether the Applicant was aware of her vulnerability; and
- c. Whether the Applicant sexually exploited her vulnerability.

*Whether the established facts and evidence support a finding that V01 is vulnerable*

24. The Respondent seeks to rely on evidence that during the material period, V01 was in a state of depression and anxiety partly due to an alcohol and drugs problem. It is in evidence that she had Xanax pills at her home in early March, and that one time “she was like a zombie, like a dead walking”, due to alcohol and drug abuse. Her alcohol problem was the reason the Applicant wanted to end their relationship in March 2019.<sup>16</sup>

25. In May 2019 when she was on sick leave, she sent the Applicant several documents from psychologists/psychiatrists in Bosnia, which indicated that she had

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<sup>15</sup> *Lucchini* UNDT/2020/090.

<sup>16</sup>Hearing of 27 July 2022, Applicant’s testimony at 1:16:55.250-690; 1:17:50.430-570; 1:18:37.220-390; 1:18:52.180-610 and at 1:19:14.650 - 1:19:23.40.



had psychological issues for a year, which had worsened during the prior months of their relationship.<sup>17</sup>

26. In the email of 9 May 2019<sup>18</sup>, she wrote to the Applicant stating that “*or u report me first for being on antidepressants and relaxants and it will be fun*”, and included pictures of the blisters, prescriptions for Eglonyl and Accentra, and her doctor’s examinations.<sup>19</sup>

27. At the beginning of June 2019, the Applicant wanted to end their relationship again, because V01 had “*the habit of drinking alcohol and taking pills and even self-medicating with drugs for schizophrenia*”. In the subsequent days, he told her that she “cannot take pills with alcohol because this is a nuclear bomb.” By mid-June 2019, V01 was already a different person. She informed him that her psychological issues had worsened during the period of their relationship.<sup>20</sup>

28. Since the decision maker based his decision on the fact that V01 was labouring under depression and anxiety and effects of drugs such as Eglonyl and Xanax, the Tribunal would not be overstepping its judicial review boundaries (in a bid to provide context to the case) in providing research-based clarification about the nature of those conditions and effects of those drugs to a human body.

### Depression

29. Individuals who are diagnosed with depression as a psychiatric disorder manifest severe low mood which tends to persist. In women, depression tends to manifest as sadness, worthlessness and guilt. Some of the symptoms of Major Depressive Disorder (the most commonly diagnosed form of depression) include feelings of worthlessness, recurrent thoughts of death and suicidal ideation, and

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<sup>17</sup> Investigations report, Applicant’s interview held on 24 September 2019, OIOS Doc. No. 148, lines 501-511.

<sup>18</sup> Reply, annex 4, p. 40.

<sup>19</sup> Hearing of 27 July 2022, Applicant’s testimony at 1:22:58.760 --> 1:22:59.390; 1:25:0.240 --> 1:25:0.990.

<sup>20</sup> Ibid, Applicant’s testimony at 1:26:19.310 --> 1:26:28.100; 1:27:36.80 --> 1:27:51.590; 1:28:38.610 --> 1:28:43.830 and at 1:25:22.640 --> 1:25:28.160.

cognitive difficulties such as diminished ability to think, concentrate and take decisions.<sup>21</sup>

### Anxiety

30. The symptoms of anxiety include nervousness, irritability, lack of concentration and sleeping problems.<sup>22</sup>

### Side effects of antidepressants and relaxants.

31. Some of the side effects for antidepressants and drugs for anxiety include dizziness, drowsiness or fatigue, feeling agitated or restless, headaches, sleep problems, confusion and loss of memory or concentration.<sup>23</sup>

32. Some of the antidepressants which V01 was taking include Eglonyl and Xanax.

### Eglonyl

33. Eglonyl capsule contains sulpiride as an active ingredient and is used to treat depression, loss of balance, mental disorder, etc. Its side effects include increased or decreased sex drive, lack of energy, feeling confused, over excitement and aggression.<sup>24</sup>

### Xanax

34. Its side effects include weak or shallow breathing, seizures, hallucinations, risk taking behavior, increased energy, decreased need for sleep, racing thoughts, being agitated or talkative, drowsiness or dizziness.<sup>25</sup>

### The definition of “vulnerable”.

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<sup>21</sup> <https://adaa.org/understanding-anxiety/depression>.

<sup>22</sup> <https://adaa.org/understanding-anxiety/depression>.

<sup>23</sup> <https://www.medicnewstoday.com/articles>.

<sup>24</sup> <https://pillintrip.com/medicine/eglonyl>

<sup>25</sup> <https://www.drugs.com>.

35. According to the Oxford English Dictionary, the adjective “vulnerable” refers to being “exposed to the possibility of being attacked or harmed, either physically or emotionally”. When used to describe a person, it refers to “a person in need of special care, support, or protection because of age, disability, or risk of abuse or neglect”.

*Whether V01 was vulnerable*

36. The Applicant testified about V01’s self-destructive behavior.<sup>26</sup> She also exhibited unreasonable behavior such as when she poured beer on the Applicant, cut his shirt, and cried at a social gathering.<sup>27</sup> At one time she was visibly drowsy, looking “like a zombie and a walking dead.”<sup>28</sup> As we now know, these are some of the side effects of depression/anxiety and of the anti-depressants V01 was taking.<sup>29</sup>

37. The assertion that V01 was not vulnerable since she was able to execute her official roles at all material times seems to be based on a misconception of vulnerability as a condition. The fact that V01 could perform her official roles, rather than being taken as a sign of strength, must be taken to have been **in spite of** her vulnerability (which has been established). Vulnerable has nothing to do with the nature of one’s work or professional knowledge.

38. The argument that V01 did not feel vulnerable and exploited and that had she felt so, given her professional medical knowledge, she would not have actively sought after the Applicant ignores the fact that she was labouring under a compromised sense of judgment. The proposition that her violent behavior was a function of her unreasonable jealousy, and that the Applicant perceived her as an intelligent person with a sense of humor, sociable, communicative and elegant ignores the above facts as well.

39. It is moreover not true that V01 did not feel vulnerable and exploited. In her evidence she stated that she reported the Applicant for psychological, physical and

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<sup>26</sup> Hearing of 27 July 2022, Applicant’s testimony at 2:8:59.280 --> 2:9:10.670.

<sup>27</sup> *Ibid*, Applicant’s testimony at 1:14:23.70 --> 1:14:23.330.

<sup>28</sup> *Ibid*, Applicant’s testimony at 1:18:11.650 --> 1:18:11.920.

<sup>29</sup> <https://www.drugs.com>.

sexual violence.<sup>30</sup> She again stated that “he was sneaking back into my life. But his manipulation.”<sup>31</sup> “... he used to bring drinks all the time in my house and my fridge was full of drinks and I don't drink beer. I don't drink whiskey And I don't drink so much red wine, but that's what he would be usually drinking. And his, you know, was just making me to drink. And we were just sitting. And he was just using the situation and even watching me taking these indications”.<sup>32</sup> These statements suggest that V01 viewed herself as vulnerable and exploited by the Applicant.

40. The behavior exhibited by V01 supports the conclusion as the Tribunal does, 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 a vulnerable person.

*Whether the Applicant was aware of V01's vulnerability*

41. The assertion that the Applicant was aware of V01's vulnerability is premised on evidence that he was aware that;

- a. she had alcohol and drug problems.<sup>33</sup> In the email of the 9 May 2019,<sup>34</sup> she wrote that “or u report me first for being on antidepressants and relaxants and it will be fun”, and included pictures of the blisters, prescriptions for Eglonyl and Accentra, and her doctor's examinations.<sup>35</sup>
- b. she had psychological/psychiatric problems<sup>36</sup> in May 2019 when she was on sick leave, she sent the Applicant several documents from psychologists/psychiatrists in Bosnia, which indicated that she had had

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<sup>30</sup> Hearing of 28 July 2022, (V01's testimony at 0:8:44.370 --> 0:8:50.240,

<sup>31</sup> Ibid, at 0:18:13.380 --> 0:18:24.410.

<sup>32</sup> Ibid, at 0:23:6.400 --> 0:23:21.870 and 0:23:6.400 --> 0:23:21.870.

<sup>33</sup> Hearing of 27 July 2022, Applicant's testimony at 1:18:52.180 --> 1:18:55.610 and at 1:19:14.650 --> 1:19:23.40; 1:22:2.570 --> 1:22:8.770 and at 1:22:34.840 --> 1:22:55.950.

<sup>34</sup> Reply, annex 4, p. 40.

<sup>35</sup> Hearing of 27 July 2022, Applicant's testimony at 1:22:58.760 --> 1:22:59.390; 1:25:0.240 --> 1:25:0.990.

<sup>36</sup> Ibid, Applicant's testimony at 1:22:2.570 --> 1:22:8.770 and at 1:22:34.840 --> 1:22:55.950.

psychological issues for a year, which had worsened during the prior months of their relationship.<sup>37</sup>

- c. she exhibited violent and destructive conduct towards herself and towards the Applicant.<sup>38</sup>
- d. at one time she was visibly drowsy or sleepy.<sup>39</sup>

42. Counsel for the Applicant argues that evidence which is based on the applicant's investigation interview amounts to misstatements of his interviews arising out of confusion of his comments on the earlier part of their relationship with the later more volatile episodes.

43. This submission is without merit. The Applicant's testimony before the Tribunal reaffirms the contents of his interview statement in material particulars.<sup>40</sup> He for example re-affirmed that he became aware of V01's drug problem in early March 2019.<sup>41</sup> He reaffirmed that when she joined him for lunch at one time, he observed that she was "like a zombie" and "like a dead walking",<sup>42</sup> and that he made the connection with drugs since he could not smell alcohol on her breath.<sup>43</sup> He maintained his evidence that he had wanted to end his relationship with her in March 2019<sup>44</sup> due to her alcohol problem. He further reaffirmed the evidence that he saw medical documents indicating that V01 had psychological/psychiatric problems<sup>45</sup> and that at one time he observed that she looked like a zombie and a sleeping dead.<sup>46</sup>

44. While it is true that in some instances his testimony slightly differed with what he had stated in his subject interview, (he for example testified that when he said that

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<sup>37</sup> Investigation report, Applicant's interview held on 24 September 2019, OIOS Doc. No. 148, lines 501-511.

<sup>38</sup> *Ibid.*, Applicant's testimony at 2:8:9.790 --> 2:8:18.580.

<sup>39</sup> *Ibid.*, Applicant's testimony at 0:32:38.700 --> 0:32:40.490 and at 1:18:37.220 --> 1:18:39.390.

<sup>40</sup> *Ibid.*, at 1:13:19.500 --> 1:13:19.910.

<sup>41</sup> *Ibid.*, at 1:14:33.460 --> 1:14:33.980; 1:18:37.220 --> 1:18:39.390 and 1:19:14.650 --> 1:19:23.40.

<sup>42</sup> *Ibid.*, lines 376-396.

<sup>43</sup> *Ibid.*, lines 392-399.

<sup>44</sup> *Ibid.*, lines 400-402.

<sup>45</sup> Hearing of 27 July 2022, Applicant's testimony between 1:22:2.570 → 1:22:8.770 and 1:23:22.760 -> 1:23:28.320.

<sup>46</sup> *Ibid.*, at 1:18:11.650 --> 1:18:11.920.

had seen V01 drowsy and observed that she looked like a zombie and like a walking dead, he had merely suspected so), to a large extent the differences were in the form of shedding light on what he meant when he made some statements. The Tribunal however considers that the Applicant's explanations during his subject interview, having been spontaneous, is more plausible than the explanations he offered at a hearing at which he had an impending judgment in mind. The original version of the Applicant's evidence is, therefore, preferred.

45. Based on the Applicant's own testimony, the Tribunal finds that he was aware that V01 had alcohol and drug problems, and that she had psychological/psychiatric problems. He was aware that she exhibited violent and destructive conduct towards herself and towards the Applicant, and that one time she was visibly drowsy or sleepy.

*The Applicant's awareness of V01's vulnerability*

46. The Applicant maintains that he had no expertise which could have enabled him to determine that V01 was vulnerable. The Tribunal, however, considers that the ability to determine that another person is vulnerable does not require any expertise or specialty. When the Applicant wanted to end the relationship in March 2019 due to V01's alcohol problem for example,<sup>47</sup> he had no expertise based on which he determined that she had an alcohol problem. He made the determination as the stable individual and professional who hardly drinks as he claims to be, who saw her drink to levels which he gauged to have been dangerous.

47. It is in evidence that at the beginning of June 2019, he again wanted to end the relationship because V01 had "the habit of drinking alcohol and taking pills and self-medicating with drugs for schizophrenia". In the subsequent days, he told her that she "cannot take pills with alcohol because this is a nuclear bomb." It is his evidence that

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<sup>47</sup> *Ibid.*, at 1:16:55.250 ---1:16:55.690; 1:17:50.430 --- 1:17:52.570; 1:18:37.220 --- 1:18:39.390; 1:18:52.180 --- 1:18:55.610 and at 1:19:14.650 --- 1:19:23.40.

by mid-June 2019, V01 was already a different person,<sup>48</sup> and that she informed him that her psychological issues had worsened during the period of their relationship.<sup>49</sup>

48. The above evidence suggests that he was aware that she had lost control over her life and required protection, support, and advice (which he indeed offered). He was therefore aware that she was vulnerable.

*Whether the Applicant sexually exploited V01's vulnerability*

49. In terms of staff rule 1.2(e) and section 1 of ST/SGB/2003/13 it must be shown by clear and convincing evidence that the applicant misconducted himself in one of the following five ways: (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.

50. The allegation is that the applicant abused a position of vulnerability for sexual purposes. He maintains that the sexual relationship was consensual, and that V01 actively pursued it to the extent that on occasions when he tried to disengage, she threatened to file complaints against him. She indeed filed complaints only to withdraw them once he had sex with her. V01, however, maintains that their relationship was consensual only in the beginning but that the Applicant was later manipulative of her.

51. The Tribunal considered the evidence that the Applicant was sober at all material times (as was confirmed when he was tested for alcohol by security). He indeed testified that he is a stable individual and professional who hardly drinks. V01 on the other hand was laboring under the influence of a combination of alcohol, drugs, depression and anxiety, and the side effects of all that. Clearly, there was a power imbalance between them.

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<sup>48</sup> *Ibid.*, at 1:28:35.630 --- 1:28:39.70.

<sup>49</sup> *Ibid.*, at 1:26:19.310 --- 1:26:28.100; 1:27:36.80 --- 1:27:51.590; 1:28:38.610 --- 1:28:43.830 and at 1:25:22.640 ---1:25:28.160.

52. As has been indicated in paragraph 29 above, one of the side effects V01 was labouring under was that her decision-making ability had been compromised. This negates any suggestion that the sexual relationship between V01 and the Applicant was consensual.

53. The Applicant does not deny that he had sexual intimacy with V01 on several occasions including on 1 January 2019 and on 12 June 2019 when she asked him to sleep with her at her place because she was afraid following some security incidents at the mission.<sup>50</sup> On 22 June 2019, he went to pick V01 from her house to go to a party and found her in bed.<sup>51</sup> He stated that it was clear to him that she had consumed alcohol as he could smell it, and he saw the bottle, and that he was sure that she had taken drugs at the same time. He described V01 as having been dizzy.<sup>52</sup>

54. He left her at home and went alone to the party but later picked her and took her to the party, where she consumed more alcohol. Later that night and in the early morning of 23 June 2019, there was an incident at his house. The Applicant was sober the whole time as was confirmed when he was tested for alcohol by security. According to him, and as he stated to OIOS, during that incident V01 was under the effect of a combination of alcohol and drugs. In the evening of 23 June 2019, he went to her house and saw her drinking vodka and he told her that she drinks too much.<sup>53</sup>

55. On 24 June 2019, there was another incident with V01 at his house, when she entered his veranda and damaged his bike and poured water around. On 27 June 2019, V01 went to the Applicant's house at 11.00 p.m. and spent the night there. He made a covert recording of their conversation that night. He asked her whether she had taken any pills and she replied that she had taken pills because this was the only way she could talk to him. During the night from 27 until 28 June 2019, V01 got into bed with him and on the morning of 28 June 2019, he had sexual intercourse with her despite

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<sup>50</sup> *Ibid.*, at 1:27:5.840 --> 1:27:20.250.

<sup>51</sup> *Ibid.*, at 1:30:42.630 --> 1:30:46.90.

<sup>52</sup> *Ibid.*, at 1:30:58.120 --> 1:31:10.260; 1:31:22.290 --> 1:31:28.820; 1:32:53.620 --> 1:32:55.140.

<sup>53</sup> *Ibid.*, at 1:33:27.0 --> 1:33:27.430; 1:33:52.240 --> 1:34:0.210; 1:34:24.70 --> 1:34:24.660; 1:34:28.790 --> 1:34:29.410; 1:34:49.300 --> 1:34:51.210; 1:35:24.300 --> 1:35:24.760; 1:36:8.940 --> 1:36:13.290 and 1:36:28.760 --> 1:36:31.100.



her having told him that she had taken pills. He made covert audio recordings of the intercourse.<sup>54</sup>

56. On 29 June 2019, the Applicant spent the night with V01 at her house. The next morning, 30 June 2019 she performed oral sex on him.<sup>55</sup>

57. Based on the finding that the Applicant was aware of V01's vulnerability, the evidence that he continued to have sexual intercourse with her even at times when she had just taken alcohol and drugs supports a finding that he sexually exploited V01's vulnerability. The Tribunal finds that the facts on which the sanction was based have been established.

***Misrepresenting for purposes of obtaining Family Emergency Leave.***

*Whether the facts on which the sanction is based have been established.*

58. It was alleged that the Applicant engaged in a misrepresentation to the Organization and a misappropriation of assets from the Organization regarding family emergency leave from 22 until 27 July 2019.

59. He is said to have submitted false information to the Organization on 20 July 2019, that he had a family emergency that required him to take family emergency leave from 22 until 27 July 2019, whereas on 26 June 2019 he had in fact planned to be absent during that period, and he in fact spent those days of the leave on holiday.

60. The Applicant does not contest the evidence that the air ticket he purchased on the 26 June 2019 had a return date of 29 July 2019. His explanation that he bought the ticket for 29 July but that at the same time he considered that he could sort out the family matter earlier and return to the mission on 22 July 2019 which did not

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<sup>54</sup> *Ibid.*, at 1:36:41.580 --> 1:36:51.130; 1:36:57.800 --> 1:37:0.890; 1:37:10.560 --> 1:37:11.70; 1:37:31.110 --> 1:37:33.280; 1:37:42.740 --> 1:37:43.390; 1:38:44.340 --> 1:38:46.430; 1:38:45.710 --> 1:38:51.800; 1:38:53.710 --> 1:38:54.140; 1:39:9.270 --> 1:39:9.900; 1:39:19.260 --> 1:39:21.270; 1:39:57.670 --> 1:39:58.470 and 1:40:47.640 --> 1:41:3.370.

<sup>55</sup> *Ibid.*, at 1:41:19.480 --> 1:41:20.450; 1:41:33.810 --> 1:41:34.450.

materialise, is rejected as lacking in credibility. The fact that he purchased an air ticket with a return date of 29 July 2019, can only mean that he pre-planned to be away from the mission from 3 to 29 July 2019. That he spent the five days on holiday<sup>56</sup> galvanises the position that he had no emergency (an unexpected family situation that suddenly happened and required immediate action so that the Applicant was unable to attend his work) which necessitated the taking of the family leave.<sup>57</sup>

61. The Applicant denies the assertion that he failed to record this leave in Umoja, despite being instructed to do so, and that he recorded it retroactively on 25 October 2019.<sup>58</sup> He explained that he in fact recorded the leave but due to the technical difficulties he encountered in accessing Umoja and getting information, there were errors. He however, rectified the records when he became aware that his request had not been recorded.

62. While the Respondent bears the burden to prove that the facts which formed the basis for the decision are established, the evidential burden to prove matters such as that the Applicant encountered problems recording his leave in Umoja lies with him. He should for example have produced screenshots of the error messages from the system. That he did not do so supports the decision of rejecting his explanation as lacking in credibility.

63. Since the Applicant booked an air ticket on 26 June 2019 with a return date of 29 July 2019, meaning that he pre-planned his absence for the five days as the Tribunal found, and since the Applicant admits that he spent the five days on holiday,<sup>59</sup> before he came back on the 29 July 2019, the Tribunal agrees with the Respondent that he had no emergency when he sought for the family emergency leave.

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<sup>56</sup> Reply, annex 3, A/2, Doc. 57 (email from V01 allegation of possible sick leave fraud).

<sup>57</sup> *Ibid.*, Doc. 227, (electronic ticket Mr. Stefan (26 June 2019)).

<sup>58</sup> *Ibid.*, Doc. 240, (email from Mr. Stefan re notification of Emergency Leave (14 July 2020)); Doc. 235, (email from UNMISS Human Resources, Mr. Stefan leave dates (14 July 2020)); Doc. 240, (email from Mr. Stefan re notification of Emergency Leave (14 July 2020)); Doc. 235, (email from UNMISS Human Resources, Mr. Stefan leave dates (14 July 2020)).

<sup>59</sup> Reply, annex 5.

64. The Tribunal finds that the facts that the Applicant engaged in a misrepresentation to the Organization and a misappropriation of assets from the Organization regarding family emergency leave, submitted false information to the Organization that he had a family emergency that required him to take family emergency leave, have been established with clear and convincing evidence.

**Whether the established facts qualify as misconduct**

*The sexual exploitation of V01*

65. The Applicant does not challenge the characterization of his conduct as a violation of staff regulation 1.2(f) as stated in the contested decision. His behavior was unbecoming of an international civil servant and amounts to serious misconduct. He in addition violated staff rule 1.2(e) and sections 1, 3.2 and 3.3 of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse) and/or staff regulation 1.2(f), as well as staff regulations 1.2(b) and 1.2(q).

*Misrepresentation to the Organization and a misappropriation of the Organization's assets regarding family emergency leave.*

66. Staff rule 6.2(c) provides that “a staff member may take uncertified sick leave for up to seven working days in an annual cycle [...] when incapacitated for the performance of his or her duties by illness or injury. Part or all of this entitlement may be used to attend to family-related emergencies.”

67. The Applicant asserts that no violated rule was cited by the Respondent.

68. Staff regulation 1.2(b) provides that staff members “shall uphold the highest standards of efficiency, competence and integrity”, while 1.2(q) provides that staff members “shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets”. Since the Applicant was irregularly paid for the days he did not work on account of his misrepresentations, he misappropriated the funds of the Organization, thereby violating the above cited rules.

69. In view of the established facts, in particular the fact that the misconduct was pre-meditated as early as 26 June 2019 when the Applicant booked his trip, it is also apparent that his misrepresentation and misappropriation was wilful, or at least reckless or grossly negligent, in the sense of staff rule 10.1(b), which justified requiring him to reimburse the loss the Organization suffered due to his actions, as mandated by the contested decision.

*Whether there were any due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.*

70. The Applicant does not dispute the fact that his procedural fairness rights were respected. In accordance with staff rule 10.3(a) he was informed of the charges against him, he was afforded the right to be heard, and the right to mount a formal defence.

71. The Tribunal finds that there were no due process violations in the investigation and the disciplinary process leading up to the disciplinary sanction against the Applicant.

**Whether the sanction is proportionate to the offence.**

72. Judicial review of discretionary conduct also entails the penalties imposed. In *Samandarov* 2018-UNAT 859 (citing *Sanwidi* 2010-UNAT-084) the Appeals Tribunal held that,

the proportionality principle limits discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability.

73. In *Haidar*,<sup>60</sup> the Tribunal reiterated that,

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<sup>60</sup> *Haidar* 2021-UNAT-1076.

the requirement of proportionality asks whether termination is the appropriate and necessary sanction for the proven misconduct or whether some other alternative sanction will be more suitable in the circumstance. It must be kept in mind that termination is the ultimate sanction and should not be imposed automatically.

74. The Applicant did not provide reasons for his claim that the disciplinary measures were not proportionate. He merely asserts that the charges against him “have arisen from demonstrably false and retaliatory accusations,” which relates to the facts of the case rather than on the proportionality of the sanction.

75. Considering the gravity and nature of the misconduct, compounded by the fact that the disciplinary measure in this case is in line with the zero-tolerance policy to sexual exploitation, there is no doubt that the sanction of separation from service was proportionate to the offence.

## **JUDGMENT**

76. The application is dismissed for lack of merit.

*(Signed)*

Judge Margaret Tibulya

Dated this 20<sup>th</sup> day of September 2022

Entered in the Register on this 20<sup>th</sup> day of September 2022

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi