

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2024-

7. In March 2021, Mr. Makeen engaged in sexual relations with V01, resulting in her pregnancy. After becoming pregnant, V01 had to either marry Mr. Makeen or be taken to her paternal village, where she would have lived in even greater poverty⁵

8. On 26 April 2021, V01's uncle filed a formal complaint against Mr. Makeen with the local police for the rape of a minor, as V01 believed she was approximately 17 years old at the time of the events⁶ Mr. Makeen was arrested by the local police on the same date⁷

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 V01, 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 V01 and Mr. Makeen, respectively on 6 May and 2 June 2021⁹

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

12. On 25 June 2021, a on 1.315 09.8 (564) 6910-160 11290 T20187439849(0)T400376(5)8.5 (J)B

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 (d) 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 whi

THE UNITED NATIONS APPEALS TRIBUNAL

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. Male acR8.7 (ro)-1.5 (m)3.6 (iJ)]T25 (m)3.815 Td [t3.Td [(Mr)w 0 -1.72

THE UNITED NATIONS APPEALS T

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

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 SecretaryGeneral'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, V01, allegedly a minor. He impregnated her and she gave birth to a son. After being arrested twice on charges of raping V01 and released on bail, Mr. Makeen married V01 in a marriage agreement that entailed the

payment of 31 cows and 5 bulls to V01'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 agree with the UNDT's conclusion that they

was vulnerable and less powerful than [Mr. Makeen] and that [his] actions regarding [V01] 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 V01 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, consen

52.

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" in article 10.3n (sj-382 63Tc -0 66Tc 0.i855 0 T

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

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 V01.

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

i33tgd (.6 (1 (r)-7.4 (-)-16.8 Td ()17 Tc -0.0n33)0.8 (t)7 (p)-9.3 (l)4)-12.3 (p).8 (M)-1 b910.5 (re)-re5.8 (c)-5 (a4.8

72. Furthermore, in the course of the disciplinary proceedings, the

THE UNITED NATIONS APPEALS T