

Judgment No. 2023-UNAT-1375



Counsel for Appellant: George G. Irving





13. In April 2019, Mr. Stefan was on leave, as was V01 who returned to UNMISS on 21 May 2019 after a period of annual leave and sick leave.

14. In the UNDT hearing, V01 testified that she received medical treatment in March or April 2019 and was prescribed two prescription medications for anxiety and depressive disorder from her psychiatrist back home.<sup>8</sup> She had previously received treatment for anxiety, depressive disorder for PTSD a “long time ago”, but was not on medication until April 2019.<sup>9</sup>

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

16. V01 also testified that from January to August 2019, she continued to perform her functions and was never unable to perform her professional functions.<sup>11</sup> She also testified that she would not have been able to perform her functions if she had not been taking the medications.<sup>12</sup>

20. With respect to this same incident, V01 testified before the UNDT that on the night of 22 June 2019, she had mixed pills with alcohol.<sup>13</sup> Mr. Stefan confirmed in his testimony that he smelled alcohol on her and that she told him that she had taken pills.<sup>14</sup> They eventually went to a party where V01 consumed alcohol but he was sober as confirmed later that evening when he was tested for alcohol by security.<sup>15</sup> While driving home, there was an argument resulting in V01 exiting the vehicle and Mr. Stefan driving to his home. In the early morning of 23 June 2019, V01 arrived at Mr. Stefan's accommodation where there was a violent argument. Mr. Stefan videotaped this argument. The investigation found V01 "appeared to be the aggressor" and the video evidence showed V01 "lunge aggressively at Mr. Stefan while he was standing on the stairs of his accommodation, apparently causing a fall".<sup>16</sup>

21. V01 attended the medical clinic or UN Medical Services that night. The Clinic Visit

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

41. Mr. Stefan was informed *inter alia* that, if established, his conduct would constitute a violation of n722.2 (a)6.4 (r)-7.13 (io)-3.7 (n)u-7.(.)]TJ 0 Tc 0 Tw 848 Td [(th)7.1 (ap)-5.3 4f asTJ 0 Tc 0 Tw 12 .650

Submissions

Mr. Stefan's Appeal

46. Mr. Stefan claims that the Dispute Tribunal erred in law and in fact when it concluded that the Administration had established that he had sexually exploited V01. He says this resulted in an unjust outcome and an expansion of the Organization's SEA policy to private consensual conduct between staff members, where one later makes a claim of vulnerability. In support thereof, Mr. Stefan advances various arguments.

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

48. Mr. Stefan claims that the Dispute Tribunal erred in failing to take into consideration relevant evidence and in introducing extraneous considerations with no convincing evidence that he had sexually abused V01's vulnerability. Specifically, the Dispute Tribunal erred when (i) finding that V01 was vulnerable, in the absence of medical reports and by conducting its own medical analysis; (ii) citing "incorrect" facts when finding that he was aware of V01's vulnerability; (iii) relying on his initial statements to OIOS, contending they "are not determinative for various reasons";

emergency leave, by submitting false information that he had a family emergency. Mr. Stefan claims that his use of family emergency leave from 22 to 27 July 2019 did not breach any rule. The Dispute Tribunal's conclusion, he submits, is erroneous for several reasons, in particular, because the Dispute Tribunal ignored his reasons for needing to extend his leave; there is no definition or restriction on what "family emergency" entails; and the charge against him regarding his use of family emergency leave was "one of [V01's] unfounded allegations".

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

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

The Secretary-General's Answer

53. The Secretary-General submits that the Dispute Tribunal did not err in law in its application of Staff Regulations and Rules, in particular, Rule 111A(1) and (2), which provide that a staff member who is absent from duty for a period exceeding 30 days without having provided a valid reason for the absence shall be considered to have resigned from the United Nations. The Secretary-General also submits that the Dispute Tribunal's finding that Mr. Stefan's absence from duty was due to a family emergency was not supported by the evidence. The Secretary-General also submits that the Dispute Tribunal's finding that Mr. Stefan's absence from duty was due to a family emergency was not supported by the evidence. The Secretary-General also submits that the Dispute Tribunal's finding that Mr. Stefan's absence from duty was due to a family emergency was not supported by the evidence.



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

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

61. The Secretary-General contends that Mr. Stefan has failed to establish that the Dispute Tribunal committed any reversible error when it found that separation from service was proportionate to Mr. Stefan’s serious misconduct of sexually exploiting V01’s vulnerability and of engaging in a misrepresentation regarding emergency family leave and a misappropriation of the Organization’s assets.

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

#### Considerations

63. In disciplinary cases, the Dispute Tribunal must establish: “ i) whether the facts on which the sanction is based have been established, ii) whether the established facts qualify as misconduct under the Staff Regulations and Rules, iii) whether the sanction is proportionate



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

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

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

70. The issue in the case is whether there is clear and convincing evidence that Mr. Stefan’s conduct fell within one of the five categories of sexual exploitation. In the impugned Judgment, the Dispute Tribunal seems to have focused its determinations on whether V01 was a vulnerable

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

73. Second, the Dispute Tribunal erred in its factual findings that led to a manifestly unreasonable decision when it found V01 was a vulnerable person, that Mr. Stefan was aware that she was vulnerable, and that he sexually exploited V01's vulnerability.

74. In the impugned Judgment, the Dispute Tribunal held that V01 was vulnerable and that "s



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

- a) a developmental, physical, medical, or psychological condition,
- b) an unequal relationship with c7 3.3 (7D [(d)1 (o)r-1.8 (bn.3 (his).8 4.3)-8.7t)o-7.9 (fy)55.3 (d)1 (o)hc wvdu133 (

V01 testified that, from January to August 2019, she continued to perform her functions and was never unable to perform her professional functions due to any kind of substance abuse. She also testified that she would not describe herself as an alcoholic, has never been treated for alcoholism, and did not consider herself as having a drinking problem.<sup>34</sup> However, the Dispute Tribunal held that there was evidence that “she had alcohol and drug problems”.<sup>35</sup> Although there is evidence that V01 drank alcohol and took prescription medication (at times together), the evidence does not clearly and convincingly support a finding that her alcohol and medication use constituted a chronic or consistent impairment of judgment such that she was vulnerable

82. The Dispute Tribunal made findings with no evidentiary s.467 -1.717 Td [(and)-6.3 (e)-5.3/.317.6 1e( tr 0

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

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

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

87. On 20 July 2019, Mr. Stefan requested leave for a family emergency until 27 July 2019 due to “personal family matters”

a demotion with deferment, deferment or written censure was no longer appropriate (although

Judgment

95. Mr. Stefan's appeal is granted in part, and Judgment No. UNDT/2022/083 is hereby modified. The contested decision is rescinded. We set in lieu compensation of one