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## Tips and Information Newsletter for International Civil Servants

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### The standard of proof required for termination

#### In Brief

In *Stefan v Secretary-General of the United Nations*, [2023-UNAT-1375](#), the UN Appeals Tribunal (UNAT) considered the standard of proof in misconduct cases where the likely sanction to be imposed is termination.

#### Facts and Decision

Mr. Stefan served as a Close Protection Officer to the Special Representative of the Secretary-General at the United Nations Mission in the Republic of South Sudan (UNMISS).

Mr Stefan engaged in a volatile and unhealthy relationship with a former colleague at UNMISS. The former colleague lodged two complaints, resulting in two investigations into Mr Stefan's conduct.

The first investigation concerned allegations of assault, sexual abuse, racism, and threats by Mr. Stefan that he would kill the complainant. The investigation findings were that:

- the multiple allegations made against Mr Stefan were not always specific and could not be corroborated by evidence;
- the complainant lacked credibility and displayed strong motivation to cause professional and personal harm to Mr Stefan;
- Mr Stefan was aware of the colleague's mental and emotional trauma and her use of medication, but continued to engage in sexual relations with her anyway;
- Mr Stefan had applied for 5 days' emergency leave for personal family matters and was instead found to have been on holiday without his family, which was a misrepresentation and misappropriation of the UN's assets; and
- accordingly, there were reasonable grounds to conclude that the applicant failed to observe the standard of conduct expected by a UN staff member.

The second investigation concerned an allegation of rape. In the context of the relationship between Mr Stefan and the complainant, the investigation again

found there were reasonable grounds to conclude that the applicant failed to observe the standard of conduct expected by a UN staff member.

Following the disciplinary process, the disciplinary measures imposed upon Mr Stefan were separation from service with compensation instead of notice, no termination indemnity, a fine of one month's salary, and entry of his name into the ClearCheck database.<sup>1</sup>

Mr Stefan appealed this decision to the UN Dispute Tribunal (UNDT), which found that the established facts constituted serious misconduct, Mr. Stefan's due process rights had been respected, and that the disciplinary measures imposed were proportionate. The UNDT dismissed the application. Mr Stefan appealed to the UNAT.

### **Reasons for decision**

In disciplinary cases, the Tribunal must establish:

- whether the facts on which the sanction is based have been established;
- whether the established facts qualify as misconduct;
- whether the sanction is appropriate to the offense; and
- whether the staff member's due process rights were observed in the disciplinary process.

Where termination is a possible outcome, misconduct must be established by clear and convincing evidence, which means that the truth of the facts asserted is highly probable. The administration bears the *onus* (= *the burden*) of proving its case to a clear and convincing standard of evidence.

The UNAT considered that the UNDT did not consider whether the organization had proven the facts to this standard and had committed the following errors:

- There was no analysis of how the administration had met the standard of proof;
- there was no independent or medical evidence in support of the finding that the complainant was a vulnerable person at risk of abuse – the UNDT relied solely on the complainant's testimony;
- the UNDT relied on internet-based research on depression, anxiety, and the effects of the complainant's medication, which meant that it had obtained its own evidence with no notice to the parties and no opportunity for them to respond to it – this was a violation of procedural fairness;
- the UNDT did not properly assess the credibility and reliability of either the complainant's or Mr Stefan's testimonies, including inconsistencies between the testimony and other evidence;
- the UNDT made findings with no evidentiary support and failed to properly assess the evidence, such that the facts of sexual exploitation were not established to the standard of clear and convincing evidence.

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<sup>1</sup> A UN-wide centralised database that permits sharing of information on personnel against whom allegations related to sexual harassment have been established or are pending investigation.

However, the UNAT agreed that the allegations concerning Mr Stefan’s misrepresentation of a family emergency had been established and that this was misconduct.

The UNAT reversed the UNDT’s judgment and rescinded both counts of misconduct, noting that the Administration was free to take another administrative decision on the family emergency count. Mr Stefan’s name was deleted from the ClearCheck database and he was awarded compensation of one year’s salary, but his claims for compensation for harm to this career and professional reputation were dismissed.

**Key takeaways**

In line with the UN’s legal framework, Tribunal case law has developed strict parameters when assessing misconduct of a sexual nature. For ST/SGB/2003/13, there are five possible ways to commit misconduct:

- Abuse of a position of vulnerability for sexual purposes
- Abuse of a position of differential power for sexual purposes
- Abuse of trust for sexual purposes
- Exchange of money, employment, goods, or services for sex
- Engage in some form of humiliating, degrading, or exploitative sexual behaviour

However, in order to promote the consistency of legal principles and certainty in their application, equal and due consideration must be given to the presumption of innocence and whether the evidentiary standards have been met, especially where termination is a possible outcome for the subject of the complaint.

This means that organizations and Tribunals have a heavy responsibility in cases of serious (sexual) misconduct. Organizations must investigate exculpatory evidence in accordance with the presumption of innocence and strengthen any inculpatory findings that they are inclined to make. Tribunals must properly assess evidence and whether it is to a clear and convincing standard, and must refrain from making factual findings without corroborating evidence. Stricter evidence standards will lead to more accurate findings and reduce the likelihood of errors of judgment.

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