UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2023/030
Judgment No.: UNDT/2024/059
Date: 12 September 2024
Original: English

Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

SOUM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Christopher Bollen

Counsel for Respondent:
Elizabeth Brown, UNHCR
Chenayi Mutuma, UNHCR

Introduction

1. The Applicant, a Senior Data Management Associate, Evaluation Service, with the Office of the United Nations High Commissioner for Refugees ("UNHCR"), contests the decision not to initiate a full fact-finding investigation into her allegations of harassment, discrimination, islamophobia, and racism against her First Reporting Officer ("FRO").

2. For the reasons below, the Tribunal decides to reject the application.

Relevant facts and procedural background

3. On 15 August 2022, the Applicant lodged a complaint against her FRO for different instances of harassment, discrimination, islamophobia, and racism.

4. On 20 October 2022, the Inspector General's Office ("IGO"), UNHCR, decided not to initiate an investigation into the Applicant's allegations (the "contested decision").

5. On 18 December 2022, the Applicant requested management evaluation of the contested decision, which was upheld by the Deputy High Commissioner in a decision dated 5 March 2023.

6. On 4 June 2023, the Applicant filed an application against the contested decision.

7. By Order No. 65 (GVA/2023) of 28 June 2023, the Tribunal suspended the proceedings pending the conclusion of settlement discussions following a parties' joint motion request.

8. On 10 August 2023, 31 October 2023, and 30 November 2023, the parties filed new joint motions for suspension of the proceedings, pursuant to art. 10.1 of the Tribunal's Statute, which were respectively granted by Orders No. 97 (GVA/2023), 144 (GVA/2023), and 165 (GVA/2023).

9. On 16 January 2024, the Respondent filed his reply.

10. On 26 March 2024, the Applicant filed her rejoinder.

11. By Order No. 58 (GVA/2024) of 24 May 2024, the Tribunal instructed the parties to file their respective closing submission, which they did on 7 June 2024.

Consideration

Preliminary issue: motion on anonymity

12. As a preliminary matter, the Respondent filed a motion with his closing submission stating, *inter alia*, the following:

> The present matter states the names of several staff members not party to the present matter and if the name of the Applicant and her supervisor are included in the judgment and other publications, these members of the relevant work unit could be easily identified, if they are not anonymised.

13. The Respondent further adds that the United Nations Appeals Tribunal ("Appeals Tribunal", or "UNAT") has acknowledged that there are calls for privacy of individuals and parties to be protected in judgments (see, e.g., *AAE* 2023-UNAT-1332).

14. Accordingly, the Respondent requests the Tribunal "to redact and/or otherwise anonymise all identifying particulars of the parties and relevant unit".

15. Art. 11.6 of the Tribunal's Statute states that "[t]he judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal".

16. It is well-settled case law that "the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality" (see *Buff* 2016-UNAT-639, para. 21).

17. The Tribunal also recalls that in its resolutions 76/242 and 77/260, adopted on 24 December 2021 and 30 December 2022 respectively, the General Assembly reaffirmed the principle of transparency to ensure a strong culture of accountability throughout the Secretariat.

18. It follows that the internal justice system is governed by the principles of transparency and accountability. A deviation from these principles by means of anonymization requires that a party meets a high threshold for such a request to be granted.

19. In the present case, it is for the Applicant to decide whether she requires the anonymization of her name in her own case, not the Respondent. However, not only has she not done so, but the Tribunal does not see any exceptional circumstance surrounding this case that would warrant said anonymization, much less one that would prompt it to make the decision in the Applicant's place.

20. With respect to the anonymization of witnesses and other staff members, it is already a well-established practice of the Dispute Tribunal to protect the privacy and identity of witnesses and others in its judgments. In this context, the Tribunal confirms that, except for the Applicant's name, all parties mentioned herein will not be named.

21. It follows that the Tribunal is not satisfied that the Respondent's interest of anonymity overrides the need for transparency and accountability in this case. The Respondent's motion is, therefore, rejected insofar as to the anonymization of the Applicant.

Whether the application is receivable

22. The Respondent asserts that the application is not receivable because the Applicant is challenging the management evaluation decision, which is not a reviewable administrative decision under the jurisdiction of the Dispute Tribunal.

23. The Applicant submits that the contested decision to close her case without a full investigation into her complaint affected her right as a staff member and that, following the communication of the management evaluation outcome, her timely application is receivable.

24. While it is true that this Tribunal cannot exert judicial review over the outcome of a request for management evaluation, it is well-settled law that it has "the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review", and "may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed" (see *Fasanella* 2017-UNAT-765, para. 20; *Cardwell* 2018-UNAT-876, para. 23).

25. It is also well-established jurisprudence that an administrative decision is "a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order" (see, *e.g.*, *Parayil* UNDT/2017/055, para. 26).

26. In the instant case, it is fairly obvious that the Applicant is challenging the decision not to initiate an investigation into her complaint of potential prohibited conduct, and not the outcome of the management evaluation.

27. The decision in question brought the Applicant's complaint of potential prohibited conduct to a closure and, as such, produced direct legal consequences on her rights and terms of employment. The Applicant is, therefore, entitled to challenge such decision under art. 2.1(a) of the Dispute Tribunal's Statute.

28. Accordingly, the Tribunal finds that the application is receivable.

Scope and standard of judicial review

29. Art. 2.1(a) of the Tribunal's Statute confers jurisdiction on the Tribunal to examine the lawfulness of administrative decisions. The administrative decision presently under scrutiny is that of IGO to not initiate an investigation into the

Applicant's complaint of prohibited conduct under UNHCR/AI/2019/15, an "Administrative Instruction on Conducting Investigations".

30. In his communication of the decision to the Applicant, the Head of Investigation Service, IGO, UNCHR, conveyed the following to her:

> I have carefully assessed your full complaint implicating [your supervisor], and considered whether the alleged facts, if established, could amount to misconduct (para. 47 b Administrative Instruction on Conducting Investigations in UNHCR, UNHCR/AI/2019/15, hereinafter AI on Investigations). I have reached the conclusion that—although there appears to be workplace conflict and challenges within [your service]—the evidence assessed demonstrates that they do not qualify as discrimination or harassment, and do not rise to the level of staff misconduct. As such, the matter does not fall within the mandate of the IGO (para. 47 a of the AI on Investigations) and I have therefore decided not to initiate an investigation in line with para. 48 b of the AI on Investigations.

31. The provisions from UNHCR/AI/2019/15 referred to above read as follows:

> 47. The preliminary assessment should consider the following factors:
>
> a. Whether the matter falls within the mandate of the IGO;
>
> b. Whether the alleged acts or omissions, if established, could amount to misconduct;
>
> ...
>
> 48. Upon conclusion of the preliminary assessment, the Head of the Investigation Service shall decide to either:
>
> a. Initiate an investigation of all or part of the matters reported; or
>
> b. Not initiate an investigation and provide the reason thereof. The reason shall be explained in the assessment. In specific cases, the Head of the Investigation Service may inform DHR or other relevant organizational unit where the facts indicating that misconduct may have been committed are already established without requiring investigation.

32. In determining the lawfulness of an administration decision concerning the investigation of a complaint, the Tribunal may "enter into an examination of the propriety of the procedural steps that preceded and informed the decision eventually made, inasmuch as they may have impacted the final outcome" (see *Kostomarova* UNDT/2016/009, para. 44). In this connection, the Tribunal recalls that sec. 5.20 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) provides as follows:

> Where an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to chapter XI of the Staff Rules.

33. Accordingly, in assessing the legality of the decision not to initiate an investigation into the Applicant's complaint, "the Tribunal must examine whether the Administration breached its obligations pertaining to the review of the complaint and the investigation process that ensued, as set out primarily in ST/SGB/2008/5" (see *Duparc et al.* UNDT/2021/077, para. 34; *Belkhabbaz* UNDT/2018/016/Corr.1, para. 82).

34. Before commencing this exercise, however, the Tribunal must recall that, in cases of harassment and abuse of authority, it is not vested with the authority to conduct a fresh investigation into the initial complaint (see *Messinger* 2011-UNAT-123, para. 27). As for any discretionary decision of the Organization, it is not the Tribunal's role to substitute its own decision for that of the Administration (see *Sanwidi* 2010-UNAT-084, para. 40). The Appeals Tribunal also held in *Sanwidi*:

> 42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. 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. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

35. The Tribunal may "consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse" (see *Sanwidi*, para. 40). If the Administration acts irrationally or unreasonably in reaching its decision, the Tribunal is obliged to strike it down (see *Belkhabbaz* 2018-UNAT-873, para. 80). "When it does that, it does not illegitimately substitute its decision for the decision of the Administration; it merely pronounces on the rationality of the contested decision" (see *Belkhabbaz*, para. 80).

36. As per art. 47 of UNHCR/AI/2019/15, IGO has an obligation to consider whether the matters the Applicant complained of fall within its mandate. As provided by UNAT, "the Administration has a degree of discretion as to how to conduct a review and assessment of a complaint and may decide whether to undertake an investigation regarding all or some of the allegations" (see *Oummih* 2015-UNAT-518/Corr.1, para. 31).

37. The Tribunal also recalls that "the complainant has the burden of alleging the whole set of factual circumstances that may reasonably lead to the conclusion that prohibited conduct has been committed. It is essentially on this basis that the responsible official will decide whether there are sufficient grounds to warrant a formal fact-finding investigation" (see *Parayil*, para. 48).

38. In light of the foregoing, and having reviewed the parties' submissions and the evidence on record, the Tribunal defines the issues to be examined in the present case as follows:

a. Whether the preliminary assessment was conducted properly;

b. Whether the Administration committed any errors in making the contested decision;

c. Whether the Organization breached its duty of care towards the Applicant; and

d. Whether the Applicant is entitled to any remedies.

Whether the preliminary assessment was properly conducted

39. The Applicant filed a complaint of potential prohibited conduct against her FRO alleging, *inter alia*, having been subjected to:

a. Harassment by preferential treatment of others and unfair work distribution;

b. Harassment and retaliation through performance evaluation and contractual issues; and

c. Discrimination based on nationality, race, and religion.

40. In determining whether the Administration committed any errors in making the contested decision on the alleged misconduct, the Tribunal wishes to point out that while the parties may interpret differently in their submissions some alleged incidents, it will frame their examination by reference to UNHCR/HCP/2014/4 ("Policy on Discrimination, Harassment, Sexual Harassment, and Abuse of Authority").

41. As for the harassment allegations, the Tribunal recalls that sec. 5.2 of UNHCR/HCP/2014/4 defines harassment as:

> any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle or cause personal humiliation or embarrassment to another; or that cause an intimidating, hostile or offensive work environment. While typically involving a pattern of behavior, it can take the form of a single incident. Harassment may be unintentional and may occur both at the workplace and outside working hours. Disagreement on work performance or on other work-related issues is normally not considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

42. Thus, the key consideration in ascertaining if a given set of facts constitute harassment remains whether those facts amount to an "improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation", and whether it tends to "annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment" (see *Osman* UNDT/2012/057, para. 44).

43. The Tribunal will proceed to consider each of the Applicant's principal arguments in turn.

Harassment by preferential treatment of others and unfair work distribution

44. With respect to the alleged harassment and racism in task distribution and preferential treatment of others, the Applicant alleges, *inter alia*, the following:

a. Performing "lower jobs": the Applicant's FRO favoured the more junior (G-5 level) Caucasian colleague of the unit at the expense of the Applicant (G-7 level) and another senior colleague (G-6 level), who are both women of colour, through an arbitrary distribution of tasks that did not respect their respective job description;

b. Physical presence in the office during Covid: the Applicant had been asked to return to the office full time "to cover for all those who [were] telecommuting";

c. Denial of teleworking requests: the Applicant's FRO denied her requests to work from home in circumstances where her FRO occasionally worked from home herself;

d. Recording of *ad hoc* teleworking arrangements: the Applicant was "the only one required to record her teleworking";

e. Reporting of excessive expenditure: the Applicant was reprimanded for raising her concerns through a whistle-blowing report regarding an unreasonable use of the Organization's resources for a staff retreat in Interlaken in 2021; and

f. Failure to approve leave: the Applicant requested to be separated from her FRO, which was only approved after an intervention from HR.

45. IGO considered all of the above allegations and concluded that the matter of task distribution fell outside the scope of sec. 5.2 of UNHCR/HCP/2014/4, which normally excludes disagreements on work performance or other work-related issues from the definition of harassment.

46. While the Tribunal notices that the use of the word "normally" in sec. 5.2 of UNHCR/HCP/2014/4 indicates that disagreements on performance and other work-related issues may in some cases amount to harassment (see *Osman*, para. 44), the evidence on record demonstrates otherwise.

47. A complete reading of the emails the Applicant provided did not disclose any preferential assignment of tasks. IGO did not find evidence that the Applicant's FRO promoted a "white woman" at the expense of the Applicant, nor that the allegations pertaining to office absences had any foundation. Neither did the Tribunal.

48. With respect to teleworking, IGO further noted that contemporaneous emails showed that the Applicant was not the only one asked to work from the office, and that her allegation that her FRO was not recording her own teleworking properly was not only not a misconduct but also an unsupported allegation.

49. IGO thus concluded that the evidence the Applicant provided for its review and preliminary assessment did not demonstrate any instance of harassment or discrimination, but instead merely showcased the Applicant's own disagreements over the distribution of tasks within the unit, and work-related grievances with her FRO.

50. As stated above, the Tribunal is not mandated to conduct a fresh investigation in the matter, nor to draw its own conclusions of the evidence. Instead, it is tasked with identifying whether the preliminary assessment was conducted properly based on the evidence and information available to the investigators.

51. On review of the evidence on record, the Tribunal agrees that the evidence the Applicant provided does not support her allegations with respect to task distribution. Furthermore, it agrees that most of the allegations, even if proven, would still fall within the scope of performance management.

52. The Applicant's allegation that the decision of her FRO to promote her "white colleague" was racially motivated is speculative at best. There is no evidence on record to support such conclusion, and thus the Tribunal does not see any error in the decision of IGO not to initiate an investigation into the matter.

53. A plain reading of the email exchanges on record with respect to the alleged "lower jobs" shows that the emails did not provide any details as to what the Applicant considers to be lower level or purely administrative work. They also did not disclose any preferential assignment of tasks based on skin tone.

54. As to the allegations concerning physical presence in the office during COVID, denial of teleworking requests and recording of *ad hoc* teleworking arrangements, the Tribunal finds that telecommuting and office presence were decided on a rotational basis and no evidence provided by the Applicant substantiates her claims that these decisions were of a retaliatory nature.

55. The Applicant's allegation in her application that the failure of her FRO to approve her leave and sick leave requests after filing her complaint against her FRO was neither part of her 15 August 2022 complaint nor a subject of an administrative decision, and thus is not receivable and falls outside the current judicial review.

56. As such, it finds no legal or significant factual basis to overturn the decision of IGO concerning its conclusion that the Applicant's allegations fell outside its mandate and did not warrant a full investigation.

Harassment and retaliation through performance evaluation and contractual issues

57. The Applicant alleges that, at the backdrop of her whistleblowing and activism against racism in the Organization, her FRO abused her power and used the performance appraisal exercise to create a toxic work environment by:

a. Including unwarranted negative comments and characterizing the Applicant as someone "confrontational" in her performance evaluation;

b. Shortening the Applicant's 2022 performance review period from twelve to nine months after she filed a complaint against her FRO. Only with the Ombudsman's intervention did her FRO eventually use the correct evaluation period; and

c. Without any valid reason, granting to the Applicant a reduced contract renewal when she should have been offered a three-year appointment.

58. The Applicant also claims that, in March 2022, she exchanged emails with a UNHCR Representative of a Member State about a condescending email of the latter who complained about a petition denouncing discrimination in the conflict in Ukraine. Said Representative complained about it to the Applicant's FRO, who, in turn, used this event to later justify negative comments in the Applicant's 2021 performance evaluation.

59. The Tribunal notes that IGO considered the Applicant's allegations and concluded that, based on the nature of the allegations and the evidence provided, the ongoing disagreements over the performance evaluation fell under the context of performance management and not misconduct. Furthermore, the investigators highlighted that the final assessment for the two previous performance evaluations of the Applicant did not contain any hidden sanction therein. Thus, her allegation that said documents were used for harassment was unsupported by the evidence.

60. With respect to the contractual issue, the IGO noted that, contrary to the Applicant's assertion, the chain of emails that she provided for the period between 21 October 2020 and 9 November 2020 did not indicate that the decision of the FRO over the Applicant's contract renewal length had been made "to show power". IGO further noted that its mandate does not extend to issues related to contract renewals.

61. Upon review of the parties' submissions, the Tribunal notes that the allegedly negative comments, if any, on the Applicant's performance evaluation were eventually excluded from her record. It also notes that the Applicant did not provide any evidence suggesting that the matter has not been handled nor that it was motivated by retaliation, ill will or bias.

62. The Tribunal sees no evidence of ill intent that would warrant an investigation into the matter, especially since the allegedly offensive comments were removed during the finalisation of the relevant performance evaluations. More importantly, matters relating to performance evaluations ought to be addressed through the relevant rebuttal processes, which, in this case, did not happen.

63. Thus, insofar as it relates to the 2020, 2021 and 2022 performance evaluations, the Applicant's grievances were indeed outside the scope of the mandate of IGO.

64. In the same vein, IGO concluded that the Applicant did not substantiate her claim of harassment in relation to her racism activism in the Organization, and neither that her FRO had been critical of her anti-racism work. Thus, the Tribunal does not consider unreasonable that the IGO decided not to pursue the matter.

65. With respect to the Applicant's contract, the Tribunal notes that, as per staff rule 4.13(c), a fixed-term appointment does not carry any expectation, legal or otherwise, of renewal or conversion, irrespective of the length of service. Unless the Applicant can clearly demonstrate that she was expressly promised and had a legitimate expectation to a three-year renewal, which she did not do, the Tribunal does not see any lawful reason to support her complaint of wrongdoing. More importantly, even if she had such legitimate expectation, the Tribunal agrees with

IGO that any alleged broken promise in this respect would not amount to misconduct warranting a harassment investigation against the Applicant's FRO.

Discrimination based on nationality, race, and religion

66. Turning to this allegation, the Tribunal notes that sec. 5.1 of UNHCR/HCP/2014/4 reads as follows:

> Discrimination is any unfair treatment or arbitrary distinction based on a person's race, sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language, or social origin. Discrimination may be an isolated event affecting one person or a group of persons similarly situated, or may manifest itself through harassment or abuse of authority.

67. Sec. 5.4 of UNHCR/HCP/2014/4 provides that:

> Abuse of Authority is any improper use of a position of influence, power or authority by an individual against another person. This is particularly serious when an individual misuses his/her influence, power or authority to negatively influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. It can include a one-off incident or a series of incidents. Abuse of authority may also include conduct that creates a hostile or offensive work environment, which includes - but is not limited to - the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

68. The Tribunal recalls that "discrimination involves more than a difference of treatment. It must be established that this difference was made on a prohibited ground" (see *Parayil*, para.56).

69. The Applicant claims that her FRO abused her authority through degrading and discriminatory communication with the UNHCR Representative of the Applicant's home country, from where she was going to be teleworking for a period in 2022.

70. The respective email, dated 4 August 2022, shows the FRO telling the aforementioned Representative, *inter alia*, the following:

> I have been remiss in writing to you to extend my thanks for your agreeing to host [the Applicant] in your office. … Recognizing this special courtesy, I would like to stress that the ES staff member will be otherwise fully autonomous, requiring no other support from your office. As for any UNHCR staff member, [she] will conduct herself professionally during her stay […], recognize the specific political pressure under which UNHCR works, and avoid any activities that could have implications or otherwise be seen as reflecting on UNHCR and/or the Representation.

71. The Applicant considered that the email in question discriminated against her by alluding to a lack of professionalism, integrity and the presence of a conflict of interest because of her nationality.

72. A plain reading of the email makes it clear to the Tribunal that the FRO politely expressed gratitude to the Representative for accommodating the Applicant onsite and stated what is normally expected from a staff member in terms of conduct.

73. The Tribunal finds that the email does not allude to any lack of professionalism, integrity and/or the presence of a conflict of interest because of the Applicant's nationality, as she claims. Equally, the email also does not infer any form of abuse of authority.

Islamophobia and racism

74. In his respect, the Applicant's complaint includes two incidents:

a. The Applicant's FRO allegedly showed islamophobia and racism towards a third party and a colleague (i.e., Ms. AA); and

b. The Applicant allegedly witnessed a conversation between two Caucasian colleagues, the FRO and Ms. BB, during which they named an Indian origin lady "the small woman" while she was not present. Whereas Ms. BB accepted the inappropriateness of their conduct, the FRO did not. Instead, she used this incident 18 months later in the Applicant's performance evaluation to accuse her of having a "confrontational approach".

75. In response, the Respondent submits that when IGO contacted Ms. AA to seek her input, she unambiguously stated that the matter had been resolved and that she did not wish to make a formal complaint about it. Thus, a formal investigation was not warranted under the circumstances.

76. Due to the fact that the Applicant provided no evidence to suggest that "the small woman" comment was motivated by race, nor did the nature of the comment lend itself to such a suggestion, IGO did not err in concluding that a reference to a colleague's height was insufficient indicia of misconduct to warrant a full investigation.

77. As for the Applicant's allegations that her FRO and Ms. BB made inappropriate comments to a colleague, the Tribunal recalls that the Applicant was not a witness in the alleged incident.

78. Accordingly, the Tribunal finds that the decision of IGO not to pursue an investigation was also reasonable.

Alleged overall effect of the events and the intent behind them

79. The Applicant asserts that, by dismissing her complaint as a series of work-related disagreements, the Administration failed to account for the overall effect of the different events she raised and wrongly reviewed each instance in isolation. It further failed to recognize an accumulation of incorrect behaviour that led to a toxic work environment and denied ill intent behind the conduct of her FRO, whereas intent is not a condition of harassment (see *Belkhabbaz* 2018-UNAT-873, para. 76). By acting in this way, the Administration overstepped its discretionary power and misapplied the definition of harassment as per its own policies.

80. The Tribunal recalls that "[i]t is possible that the cumulative effect of a series of actions may reveal a pattern of harassment, whereas each action, taken alone, may appear as perfectly lawful and harmless" (see *Osman*, para. 54).

81. However, in the present case, even considering together and in context the entire set of events the Applicant reported, no meaningful indicia of harassment can be found. Some of the actions of her FRO, such as the negative comments in the Applicant's performance evaluation, which were later removed, were not favourable to the Applicant. Yet, they cannot be regarded as arbitrary or unreasonable. Others, like the email of her FRO to the Representative in Eritrea, on the contrary, showed a true intention to facilitate the Applicant's accommodation in another office. As such, the denounced behaviours do not point to any kind of prohibited conduct under UNHCR/HCP/2014/4.

82. The Applicant correctly observes that intent is not a condition of harassment. This is consistent with the wording of sec. 5.2 of UNHCR/HCP/2014/4 that "[h]arassment may be unintentional and may occur both at the workplace and outside working hours". The Applicant noted that the Respondent, in his reply, stated that there was "no evidence that [the] response [of the Applicant's FRO] to the Applicant was motivated by discrimination". She therefore claimed that IGO incorrectly considered intent in its examination of her complaint deeming it necessary that the Applicant prove motive. The Tribunal is not persuaded by this argument. The statement alone does not prove that IGO considered intent a condition of harassment in its examination of the Applicant's complaint.

83. Accordingly, the Tribunal finds that IGO properly conducted its preliminary assessment of the Applicant's complaint. The Tribunal sees no discernible error in the decision not to open a formal fact-finding investigation into the Applicant's complaint.

Whether the Administration committed any errors in making the contested decision

84. The Applicant submits that IGO had a duty to open an investigation, thoroughly investigate her allegations, and interview potential witnesses who would be able to provide more context. She also contends that IGO erred in applying the standard of evidence for an initial assessment, and that it was not up to the Applicant to provide evidence of the facts she raised in her complaint. She argues that it was up to IGO to conduct a full fact-finding investigation to clarify all the allegations,

and that the evidence she provided met the threshold of meaningful indicia of prohibited conduct warranting an investigation (see *Osman*, para. 23).

85. The Tribunal recalls that merely disagreeing with an evaluation method does not lead to conclude that it was unreasonable and unfair (see *Wang* 2014-UNAT-454, para. 42).

86. It is well-established jurisprudence that the instigation of disciplinary charges against a staff member is the privilege of the Organization, and it is not legally possible to compel the Administration to take disciplinary action (see *Abboud* 2010-UNAT-100, para. 34; *Benfield Laporte* 2015-UNAT-505, para. 37; *Oummih*, para. 31). Hence, decisions to investigate or not to investigate allegations of misconduct and to interview how many witnesses and whom, are matters that are within the margin of discretion of the Organization.

87. The evidence on record shows that, in compliance with the provisions of UNHCR/AI/2019/15, IGO timely undertook a preliminary assessment of the complaint. It reviewed emails and other documents that the Applicant submitted; it also interviewed the Applicant and contacted the staff member that the Applicant identified in her allegation of islamophobia. Said staff member informed IGO that the matter had already been resolved informally and that she did not wish to pursue a formal complaint. The reasoning of IGO for deciding not to initiate a full and formal investigation concerning each allegation is fully documented in detail in its closure report.

88. The Tribunal finds that in undertaking the preliminary assessment, IGO duly reviewed the evidence and did not err in concluding that the complaint lacked sufficient evidence and meaningful indicia of misconduct.

89. The Tribunal, whose role is limited to control the legality of the contested decision rather than to conduct a fresh investigation into the initial complaint, finds that the conclusion reached is reasonable and supported by the record.

Whether the Organization breached its duty of care towards the Applicant

90. The Applicant claims in her application that the Organization breached its duty of care by failing to protect her from continuous bullying and retaliation. She argues that a toxic work environment had a significant impact on her health and career. The UNHCR Medical Section failed to approve her sick leave request. She thus requests compensation for moral damages.

91. The Respondent points out that IGO informed the Applicant about not initiating an investigation and explained to the Applicant that "although there appear[ed] to be workplace conflict and challenges within [her service]—the evidence assessed demonstrate[d] that [these did] not qualify as discrimination or harassment, and [did] not rise to the level of staff misconduct". IGO promptly referred the matter of the Applicant's work environment to the Ombudsman/Mediator. Subsequently, the Division of Human Resources ("DHR"), UNHCR, took steps to support the Applicant in applying to suitable positions at the Ombudsman's recommendation.

92. Duty of care is an implicit obligation crystallized in the legal framework of the Organization. Staff regulation 1.2(c) shines light on the matter as follows:

> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority, the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

93. In *Cahn* 2023-UNAT-1329, para. 38, the Appeals Tribunal stated that:

> the Administration of the Organization has a duty of care to ensure a harmonious work environment and protect staff members from harm by way of, *inter alia*, taking appropriate preventive and remedial measures in each specific case. This duty is an inherent part of the employment relationship and a fundamental condition of service and must be fulfilled by the Administration with due diligence and without delay.

94. In the case at hand, the Tribunal notes that with the support of DHR, the Applicant was admitted as a member of the Emergency Response Team, which made her eligible for relevant job openings as they arose. Moreover, when the Applicant was selected for her current temporary assignment away from her service, DHR facilitated this by providing funding for her assignment.

95. The Applicant's other allegations in these proceedings were not part of her complaint of prohibited conduct to IGO and, consequently, do not form part of the contested decision under judicial review. Similarly, these allegations were not subject of a management evaluation exercise. Thus, the Tribunal deems them not receivable and will not make any determination in their respect. This includes the Applicant's complaints that UNHCR Medical Section refused to approve her certified sick leave, the denial of annual leave after her complaint to IGO, and the advertisement of her position on 21 February 2023.

96. Furthermore, the Applicant did not file a complaint with the Ethics Office to protect her from the allegedly retaliatory actions of her FRO, which is the appropriate office to deal with claims of retaliation. Therefore, the allegations in this respect equally fall outside the scope of this judicial review.

97. Therefore, the Tribunal is satisfied that the Organization took appropriate steps to support the Applicant's request to be removed from a work environment she found disagreeable, and does not find any duty of care violations. It follows that the Applicant's claims in this regard must also fail.

Whether the Applicant is entitled to any remedies

98. In her application, the Applicant seeks the rescission of the contested decision, nine days of paid leave, the amount of CHF2,000 for compensation of moral damages and the reimbursement of her legal costs up to a maximum amount of CHF5,000.

99. The Tribunal having upheld the contested decision, all requested remedies are consequently rejected.

Conclusion

100. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)
Judge Sun Xiangzhuang
Dated this 12th day of September 2024

Entered in the Register on this 12th day of September 2024
(Signed)
René M. Vargas M., Registrar, Geneva