UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2023/028
Judgment No.: UNDT/2024/078
Date: 10 October 2024
Original: English

Before: Judge Margaret Tibulya

Registry: New York

Registrar: Isaac Endeley

AMMAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Ron Mponda

Counsel for Respondent:
Elizabeth Brown, UNHCR
Louis Lapicerella, UNHCR

Introduction

1. The Applicant is a former staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR") based in Tripoli, Libya. On 21 August 2023, he filed an application in which he contests the 22 May 2023 decision to separate him from service with compensation *in lieu* of notice, and with half termination indemnity, pursuant to staff rule 10.2(a)(vii).

2. The disciplinary sanction of separation from service was based on a finding that it had been established by clear and convincing evidence that the Applicant had "made a public comment in support of an honour killing" on the Facebook page of a news media entity in which his personal Facebook profile specifically mentioned his employment with UNHCR.

3. On 13 September 2023, the Respondent filed his reply stating that the application is without merit.

4. On 1 April 2024, the case was assigned to the undersigned Judge.

5. On 17 July 2024, a hearing was held via MS Teams, where the following witnesses gave testimony (all names redacted for privacy reasons): the Applicant, CK (the Applicant's expert witness), and SY (the Respondent's expert witness).

6. For the reasons set out below, the application succeeds.

Facts

7. According to the Appeals Tribunal, once the parties agree on certain facts the Tribunal must accept them as settled. There would therefore be no need to further review such facts (see *Ogorodnikov* 2015-UNAT-549, para. 28). In the present case, in response to the Tribunal's Order No. 129 (NY/2023) dated 11 November 2023, the parties submitted a consolidated list of agreed facts in which they presented the following chronology (emphasis in original but footnotes references omitted):

On 1 January 2020, the Applicant joined UNHCR on a temporary appointment as Human Resources Associate (G-6 Level) in Tripoli, Libya. On 1 July 2021, he was granted a Fixed-Term appointment to this position and a Fixed-Term contract until 30 June 2022. On 1 July 2022, the Applicant was granted a Fixed-Term contract expiring on 30 June 2024.

On 3 September 2022, a Facebook page called ["news media entity" – name redacted] posted a video of a man who killed his ex-wife in an "*honor killing*" (hereinafter "*the Video*").

According to the investigators, this post depicted a crime that was committed in February 2018.

On 3 September 2022, a Facebook comment supportive of the killer's actions was made (hereinafter "*the Comment*") on the said [news media entity's] Facebook page. It is this comment that is the subject of this case.

On 3 September 2022, the Applicant left Tripoli for Tunis on mission.

On 27 October 2022, the Applicant was interviewed as the investigation subject. He was given an opportunity to respond to the allegations and to provide any documentation and names of witnesses in support of his version of the events. The Applicant proposed the name of his supervisor, ["AA" (name redacted for privacy reasons)] who he wanted to attest as to his character and personality. The [Inspector General's Office—"IGO"] did not interview [AA].

The Applicant also informed the investigators that he could not immediately think of the identity of anyone who might have harboured ill motives against him on account of his role as a human resources person, and possibly hacked his [Facebook] account to make the revulsive Comment.

On 31 October 2022, the Applicant sent the IGO five documents.

On 14 November 2022, the IGO conducted a second subject interview.

On 21 November 2022, the investigative findings were shared with the Applicant, he responded on 23 November 2022, and the [Investigation Report—"IR"] was finalized.

On 16 January 2023, formal allegations (dated 13 January 2023) of misconduct were issued against the Applicant, and he was informed that it had been decided to institute disciplinary proceedings against him.

On 2 February 2023, the Applicant responded to the charges; he denied having made the Comment.

On 22 May 2023, the Applicant was notified of the High Commissioner's decision to separate him from service with compensation in lieu of notice and with half termination indemnity pursuant to Staff Rule 10.2 (a) (viii).

The parties' submissions

8. The Applicant's principal contentions may be summarized as follows:

a. The disciplinary charge levelled by UNHCR was based on an anonymous complaint (or complaints) reporting a comment purportedly written by the Applicant supporting the content of a video posted on the public Facebook page of a news media entity. The video depicted a man confessing to having conducted an "honour killing" of his ex-wife.

b. The video depicted a crime that was committed in February 2018. The video post on the news media entity's Facebook page and the comment attributed to the Applicant were reportedly made on 3 September 2022.

c. The Applicant denies having made the "revulsive comment" supporting the crime. The Applicant suspects that either his mobile phone or his personal computer might have been "hacked" and that "the hacker made the malicious comment to harm [his] career".

d. He "had no idea" as to who might have hacked his Facebook account but thought "a possible motive for the malicious post might be [linked to] his role as a Human Resources officer" since his work sometimes placed him in conflict with disgruntled colleagues and unsuccessful job applicants.

e. "The apparent and surprising spontaneity of the lodging of the complaint(s)", barely two hours after the comment in question was made, suggests that "the complaint was premeditated and lodged by someone familiar with, or coached on the [United Nations] Rules".

f. The Respondent's investigators used the "cursor method" to link the "revulsive post" to the Applicant's Facebook account despite the Applicant's "vehement denials" as well as his defence that his devices "which were not properly secured might have been hacked". The Applicant

also made a "specific suggestion" to the Respondent "to make pertinent enquiries with Facebook as to the Internet Protocol (IP) Address from which the revulsive comment and post might have been made".

g. In denying authorship of the "revulsive comment" on Facebook, the Applicant drew the investigators' attention to the fact that he was "friends" with both his mother and sister on the Facebook platform and that, for that reason, "he could not possibly have made the comment which is steeped in sexism when there was the real possibility that his mother and sister would have seen the comment".

h. The Applicant's plea with the investigators to interview his supervisor and others who could testify to his character, personality and disposition was ignored as irrelevant. Nonetheless, the Applicant "fully and unreservedly cooperated with the investigators", contrary to what was stated in the sanction letter.

i. The contested decision is "palpably unlawful, improper and unjust" because it relied only on the "cursor" digital forensic method of identifying the author of the comment, which method is "not conclusive" and "not fool-proof" as it "does not rule out hacking, phishing or astroturfing". Secondly, identifying a Facebook account is in itself "equally not sufficient" as the Internet Protocol Address of the owner of the device or the account "could have been stolen". Thirdly, "[e]xcessive and unjustifiable weight" was given to the fact that the Applicant's Facebook account showed that he worked for UNHCR, "thereby clouding other relevant considerations such as the possibility of hacking".

j. "The Respondent erred at law in shifting the burden wholly onto the Applicant" by asking him to "produce copies of other posts" he may have made on Facebook and then "dismissing these as being unrelated to the issue of 'honour' killings". In so doing, "the Respondent failed to discharge its burden of showing that the Applicant was the putative author" of the offensive comment.

k. The Respondent also "failed to appraise the relevance of the four-year period that had elapsed since the 'honour' killing", which presumably occurred in 2018, "and the actual date when it was conceivably re-posted and accompanied by the revulsive comment" which the Applicant "vehemently continues to deny" authoring.

l. "The Respondent incurred an error, in breach of its duty of care to the Applicant as its employee, when it centrally assumed bad faith on the part of the Applicant without for a moment giving him the benefit of the doubt particularly given the real possibility of hacking, phishing, astroturfing and the possibility that his Internet Protocol Address (IP) might have been stolen".

m. Failure to protect one's devices does not constitute misconduct under the Staff Regulations and Rules, "and it is common knowledge that people suffer lapses in securing their internet devices". The argument that because the Applicant failed to secure his devices, he is responsible for the content that appeared under his Facebook account is "erroneous, overly simplistic and fictitious". Relying on the "soft law" of the UNHCR Guidelines on the personal use of social media (2018) to ascribe fault to the Applicant is equally an error of law.

n. The Respondent further erred at law by withholding the identity or identities of the complainant or complainants "on the nefarious ground of 'confidentiality'".

o. Finally, the Respondent "erred in ruling out hacking given that it is common knowledge that even sophisticated multi-layered [information technology] systems such as those regulating air traffic, water systems, sensitive defence installations have succumbed to hacking in the real world". The reasoning behind the contested decision reveals "serious flaws in understanding of information technology and is based on equally flawed legal reasoning and deduction".

9. The Respondent's main contentions may be summarized as follows:

a. On 3 September 2022, the popular Facebook page of a news media entity— which had more than one million followers at the time—posted a video of a man who murdered his ex-wife in an honour killing. On the same day, a Facebook comment was made from the Applicant's Facebook account on the video, publicly expressing support for the honour killing.

b. The IGO conducted "open-source research" regarding the video and the associated crime, and found that:

> This video, published by [a news media entity's] Facebook Page on 3 September 2022, portrayed a Libyan man confessing to murdering his ex-wife. The man stated that he enticed his ex-wife into going back with him to his house where he killed her. He also said that while she was in the toilet, he strangled her, and then slaughtered her. He added that he then cut off her head, arms and legs and put her body in a bag which he later threw in some dumpster in one of the neighbourhoods in Tripoli, Libya. He further stated that his ex-wife gave him trouble, complained against him, and cheated on him when they were still married.

c. The following comment, which was clearly supportive of the murderer's actions, was made from the Applicant's Facebook account: "Since the issue involves cheating, let him slaughter so that they could be taught. He should be acquitted since it is about his honour" (translated from the original Arabic).

d. The IGO noted that "when hovering the computer mouse over the name" of the author of the comment, it revealed the Applicant's name and indicated that he worked for UNHCR.

e. On the same day, 3 September 2022, the comment was reported to the IGO. On 6 October 2022, the Office of Internal Oversight Services ("OIOS") referred to the IGO an anonymous complaint on the same matter that had been received by the United Nations Office on Drugs and Crime ("UNODC"). On 12 October 2022, the IGO opened an investigation.

f. A first interview with the Applicant as the investigation subject was conducted remotely view Microsoft Teams on 27 October 2022 and a second interview was conducted on 14 November 2022. The investigation findings were shared with the Applicant on 21 November 2022 and his response was received on 23 November 2022. The response "was taken into account in the finalization of the investigation report", which was issued on 28 November 2022.

g. "It is actually undisputed" that the comment was made using the Applicant's Facebook account. This in itself "very strongly suggests" that the Applicant made the comment himself. The possibility that he did not make the comment "was nevertheless carefully considered during the investigation and the disciplinary process", but "the various explanations raised by the Applicant were untenable and unconvincing".

h. In his first subject interview, on 27 October 2022, the Applicant "denied having shared his Facebook username or password with anyone", stated that he was sometimes careless with his mobile phone, and that no one had ever used his Facebook account to post views or comments. The Applicant also said he recalled the story discussed in the video, "but did not recall having commented on it". When the comment in question was shown to him, "he indicated that he did not remember it, and denied having made" it. He stated: "the comment is quite weird to me, to be honest".

i. The Applicant offered to review his past alerts and notifications from Facebook to see if someone else had made the comment. He then "suggested that he could have been the target of hacking due to his role as [a Human Resources] practitioner" and noted that the comment would have been out of character for him as the facilitator in Code of Conduct trainings. The Applicant confirmed to the IGO investigators that he normally accessed Facebook through his mobile phone and "reiterated that he was negligent in securing and handling it".

j. On 31 October 2022, the Applicant sent the IGO four screenshots of social media posts and comments where he had expressed humanitarian

values, including a post concerning "a very similar crime". He also informed the IGO that he "only had access to his Facebook notifications from the preceding week" and that his siblings sometimes used his mobile phone to play games.

k. On 2 November 2022, the IGO sent the Applicant a record of the first subject interview for his review and observed that he had proceeded to delete the comment under examination "before retrieving necessary information". The IGO also requested him to "provide elements that could help prove" that he was not the author of the Facebook post. The Applicant responded on the same day, stating that he could not confirm the exact date when the comment was made, but that it was made seven weeks before the date when he took the screenshot of it.

l. In the second subject interview, on 14 November 2022, the Applicant denied that he had deleted the comment to hide the exact date and time when it had been posted.

m. On 3 September 2022, the Applicant had departed at 12:30 p.m. on official mission from Tripoli, Libya to Tunis, Tunisia. The video was posted on Facebook at 6:51 p.m. and the first complaint was received at 10:33 p.m. on the same day (Libya time). The complaint included a screenshot showing that both the video and the comment had been made "2h" (two hours) before the screenshot was taken.

n. The Applicant gave "inconsistent and unreliable testimony in the course of the investigation". For instance, he said his Facebook activities consisted mainly of browsing and not commenting, yet he received a "top fan badge" from the news media entity's Facebook page for being one of its most engaged followers. He also said on the day of the comments, he had received an alert from Facebook regarding a login attempt into his account from a device that was not his, but that he had ignored it because he thought no action was needed from his side. Further, the Applicant pointed to the possibility that his siblings, who lived with him and often used his mobile

phone, could have made the comment, but it turned out that he had travelled alone on mission on that day.

o. The Administration did not unduly shift the burden to the Applicant to demonstrate that he had not posted the comment. "From a practical perspective, the Applicant's Facebook account is personal and private and the IGO cannot make requests to Facebook". Accordingly, it was incumbent on the Applicant "to request the information necessary to proceed with an in-depth analysis of his private Facebook account and private device". "Legally, the Administration's burden to exculpate the Applicant is not unlimited".

p. The Applicant's expert criticized the "cursor method" used by the IGO but "failed to identify the difference between Facebook comments and posts" and arrived at a conclusion that was "based on a false premise". The IGO "considered the possibility that the Applicant's Facebook account had been hacked, but did not find it credible". The IGO also discounted other theories such as "astroturfing", "author attribution profiling" and "unauthorized access" proposed by the Applicant's expert. The expert's report "has been widely discredited and has no probative value".

q. The complaints were sent "anonymously" and as such, "the Respondent is not 'withholding' the identity of the complainant or complainants". The complaints were "self-standing in that they simply directed the IGO to a public Comment on Facebook; no further information or context was required". The news media entity's Facebook page where the comment was posted "currently has more than 1,500,000 followers" and the Applicant presented himself on Facebook as a UNHCR staff member. "Given the shocking content" of the comment and the "clear clash" with United Nations values that it represented, many individuals with knowledge of the Organization's values would notice the comment and feel compelled to complain. As such, the speedy reporting of the comment cannot be deemed to be indicative of the involvement of a malevolent actor.

r. The facts are established to the required standard of proof; they constitute misconduct; the disciplinary measure is proportionate to the gravity of the Applicant's misconduct; and the Applicant's due process rights were respected.

Considerations

The sanction letter dated 22 May 2023

10. According to the sanction letter dated 22 May 2023 (emphasis in original):

> On 3 September 2022, [the Applicant] made a public comment in support of an honour killing on the ["news media entity's"] Facebook page; [the Applicant's] Facebook profile specifically mentioned [his] employment with UNHCR. This comment was made in response to a video discussing the honor killing, and was supportive of the murderer's actions: *"Since the issue involves cheating, let him slaughter so that they could be taught. He should be acquitted since it is about his honour"* (translated from Arabic).

Disclosure of the complainant's identity

11. The Applicant filed a motion for disclosure of the complainant's identity (or the complainants' identities). The Respondent opposed the motion on the basis that the complaints were filed with an expectation of confidentiality. The Tribunal ordered the Respondent to file the first and second complaints on an *ex-parte* basis. After carefully examining the information contained in both complaints, the Tribunal declined to grant the Applicant's motion and promised to provide the reasons for its decision in due course.

12. There are two reasons for the Tribunal's decision not to disclose the details to the Applicant, the first being that since the complaints were sent anonymously as is supported by evidence on record, the suggestion that the complainant is (or that the complainants are) known to the Respondent is mere speculation. The Applicant has not presented any evidence to support this assertion. Under the circumstances, any order for disclosure may be in futility.

13. Secondly, the Tribunal will not casually issue orders that breach confidentiality imperatives. In this case, there is no indication that disclosure of the

complainant's (or the complainants') identity would serve any useful purpose in terms of assisting the Tribunal in resolving the key issue, which is whether it has been established by clear and convincing evidence that the Applicant was the author of the comment at issue. There is therefore no need for disclosure of the complainant's (or the complainants') identity.

14. The Tribunal notes that the first complaint was received by the IGO at 10:33 p.m. on 3 September 2022, approximately two hours after the comment was made on Facebook. As for the second complaint, it was also initially sent to the United Nations Office for Drugs and Crime ("UNODC") on 3 September 2022 before being referred to the Office of Internal Oversight Services ("OIOS") and subsequently forwarded to the IGO on 6 October 2022. The contents of both complaints are identical and the (non-UNHCR) email addresses of the complainants are almost the same except for one letter that is different in each case (an "o" in the first complaint and an "i" in the second complaint).

15. The Tribunal further notes that in both cases, the complainant appears to have a lot of personal information about the Applicant. For instance, while the Applicant's Facebook profile reveals only his first name and middle name, the complaints include his first, middle and last name. The complainant also appears to be aware of other details regarding the Applicant that are not apparent just from viewing his Facebook profile, such as the fact that he is "[a Human Resources] officer with high grade" and that he serves as "a guardian for code of conduct". These observations raise important questions about the motivations of the complainant or the complainants.

Standard of judicial review in disciplinary cases

16. Pursuant to art. 9.4 of the Statute of the Dispute Tribunal, and in keeping with established jurisprudence (see, for instance, *AAC* 2023-UNAT-1370, para. 38; *Nyawa* 2020-UNAT-1024, para. 48; *Mizyed* 2015-UNAT-550, para. 18; *Maslamani* 2010-UNAT-028, para. 20), the Tribunal's role in reviewing disciplinary cases is to determine:

a. Whether the facts on which the disciplinary measure was based have been established;

b. Whether the established facts legally amount to misconduct under the applicable Regulations and Rules;

c. Whether the disciplinary measure applied is proportionate to the offence; and

d. Whether the staff member's due process rights were respected during the investigation and disciplinary process.

Whether the facts on which the disciplinary measure was based have been established

17. The Administration bears the burden of establishing that the misconduct occurred. The Appeals Tribunal has stated that in a disciplinary proceeding, "when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of evidence but less than proof beyond reasonable doubt—it means the truth of the facts asserted is highly probable" (*Abdrabou* 2024-UNAT-1460, para. 54. See also *Stefan* 2023-UNAT-1375, para. 63; *Bamba* 2022-UNAT-1259, para. 37; and many other judgments).

18. In *Soobrayan* 2024-UNAT-1469, para. 66, the Appeals Tribunal, citing *Kennedy* 2021-UNAT-1184, defined "clear and convincing evidence" as follows:

> Clear and convincing evidence of misconduct, including serious misconduct, imports two high evidential standards: clear requires that the evidence of misconduct must be unequivocal and manifest and convincing requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence.

19. The impugned decision is premised on a determination that there was clear and convincing evidence that on 3 September 2022, the Applicant made a public

comment on the Facebook page of a news media entity and that the said comment was in support of an "honour killing" of a woman by her ex-husband. The Applicant's Facebook profile specifically mentioned his employment with UNHCR.

20. The video posted on the news media entity's Facebook page on 3 September 2022 depicted a crime that is known to have been committed in February 2018. Within three hours of the video being posted, the Applicant is alleged to have made a comment that was supportive of the murderer's actions.

21. In his second subject interview and at the oral hearing, the Applicant acknowledged that the comment was posted from his Facebook account. He does not therefore dispute that fact, but denies that he wrote the comment.

22. He takes no issue over the position that if it is proved that he wrote the comment, then misconduct will have been proved against him. He does not take issue over the proportionality of the sanction to the offence, and over his due process rights during the investigative and disciplinary processes. Based on the case record, no such questions arise.

Whether the Applicant wrote the comments in issue

23. As already noted, the Applicant denies that he wrote the comment and advances various possibilities regarding the identity of the writer. These include that his siblings could have written the comments or that it could have been the act of a hacker. The Tribunal will assess the various possibilities advanced by the Applicant with a view to determining their credibility.

The possibility that the Applicant's siblings wrote the comment

24. The video was posted on the news media entity's Facebook page at 6:51 p.m. on 3 September 2022 and the IGO received the first complaint at 10:33 p.m. (Libya time) on the same day. The logical inference to be drawn from these facts is that the comment in question was made between those times.

25. It is common knowledge that the Applicant had travelled to Tunis during the material time. His air ticket, which was allowed in evidence, indicates that he travelled on official mission from Tripoli, Libya to Tunis, Tunisia on 3 September 2022, departing at 12:30 p.m. and returning on 10 September 2022. The Applicant admitted during the second subject interview that he was away from his family during this period and that his siblings did not travel with him. There is also no indication that he left his mobile phone behind in Tripoli so that his siblings might have accessed it. This effectively rules out the possibility that the Applicant's siblings wrote the comment.

The possibility that someone else wrote the comment

26. The Applicant maintains that the investigators failed to check and verify the Internet Protocol ("IP") address from where the comment came and failed to rule out the possibility that someone else could have stolen and remotely used the Applicant's Facebook account without his authorization or knowledge. He submits that the Administration denied him the benefit of the doubt particularly given the real possibility of practices such as "hacking", "phishing" and "astroturfing", and the possibility that his IP address might have been stolen.

27. The Tribunal notes that whereas the Applicant resides in Tripoli, the IGO investigators conducted both subject interviews remotely via Microsoft Teams from their location in Nairobi, Kenya. Therefore, the investigators were not able to physically inspect the Applicant's mobile phone or to conduct a forensic examination of the information technology ("IT") aspects of the case. At the oral hearing, the Applicant admitted that during the first subject interview the investigators made it clear to him that his cooperation would be required to show that he did not make the comment. He stated that he "explored everything but [he] [could not] find anything … to support the investigators".

28. While it is true that the Applicant's mobile phone and his Facebook account are his private property (arguments on which the Respondent heavily relies to explain the failure to examine those resources), there is no indication that the IGO investigators specifically requested the Applicant to allow them access to his IT resources to aid the investigation, or that he refused to cooperate. Save for evidence

that the Applicant was informed that the Respondent had a forensics expert in Amman, Jordan, the record bears no evidence that the investigators offered him any direct forensic assistance to help him obtain exculpatory evidence. They did not offer to put him directly in contact with any United Nations forensics expert in Libya or the surrounding region who could have assisted him in his search for exculpatory evidence. The Applicant being a Human Resources practitioner and not an IT specialist could not reasonably be expected to master all the methods of extracting forensic evidence from his mobile device.

29. The Tribunal notes that CK (the Applicant's forensic expert) did not also physically examine the Applicant's mobile phone before preparing and submitting his expert report. The Tribunal does not, however, attach much weight to that omission given that the expert was in a different country from that in which the Applicant was, and considering that the burden of proving the allegations by clear and convincing evidence lay with the Respondent and not the Applicant.

30. Based on the foregoing, the assertion that there was a real possibility of hacking, phishing and astroturfing, and the likelihood that the Applicant's IP address might have been stolen, which were given prominence by his expert witness (CK), cannot be said to have been ruled out. In his report, CK opined that the "cursor method" (which was used by the IGO investigators to attribute authorship of the comment to the Applicant) is not conclusive of the actual identity of the author of a post on social media because of the possibility of hacking, phishing or astroturfing. Further, he stated that a "more definitive attribution of authorship is more credible when the cursor method … is used jointly with the principles of author attribution and the possibility of hacking, phishing or astroturfing are conclusively ruled out".

31. At the oral hearing, CK testified that hacking, which he defined as the unauthorized and illicit access to, or the manipulation of, someone else's Facebook account on the Facebook platform itself was a possibility.

32. It must be emphasised that the Respondent bears the burden of establishing that the misconduct occurred. This, considered against the backdrop of the undisputed fact that the Applicant's IT resources were not forensically examined,

leaves the possibility that someone with malicious intent could have gained unauthorized access to the Applicant's account standing. This must be resolved in the Applicant's favour.

33. The Applicant confirmed that he normally used his mobile phone to access Facebook, and that he travelled with it to Tunis on 3 September 2022. He also confirmed that he was the only one with access to his mobile phone at the material time. He further stated that at around the time of the comment, he received a Facebook alert pointing to the possibility of unauthorized access but that he did not pay any attention to it because he did not think any action was required from him.

34. The Applicant's failure to produce that alert when the IGO investigators requested for it several weeks later does not prove that he did not receive it. The Tribunal accepts the Applicant's unchallenged explanation that his efforts to retrieve the alert were unsuccessful because he could only view alerts that were sent up to one week earlier, and that alerts older than one week were no longer available to him.

35. Based on the foregoing, the Tribunal finds that the IGO inappropriately discounted the possibility of unauthorized and illicit access to the Applicant's Facebook account.

<u>The possibility of manipulation of the Applicant's Facebook account on the Facebook platform itself</u>

36. The Applicant concedes that the comment was posted from his Facebook account, and that he subsequently deleted it following the first subject interview with the IGO investigators. He admits that his ability to delete the comment proves that it was made using his Facebook account. He, however, does not agree that since he owned the Facebook account and was able to delete the comment, his Facebook account could not have been manipulated.

37. Both forensic experts, for the Applicant (CK) and for the Respondent (SY), also agree that the Applicant's ability to delete the comment proves that he owned this Facebook account. SY was clear that only a Facebook account owner can delete a comment made from that account. CK, however, added that the ability to delete

the comment does not mean the Applicant was in control of that account at the time when the comment was made.

38. Considering the finding above, that the possibility of unauthorized and illicit access to the Applicant's Facebook account cannot be discounted, the Tribunal cannot rule out the possibility that the comment was the work of a hacker.

The possibility of astroturfing

39. CK defined astroturfing as the creation of a fake social media account to achieve a malicious objective. He, however, confirmed that the comment under examination was not posted from a fake account, and that he did not suggest that the Applicant was a victim of astroturfing. He further testified that if the comment was posted from the Applicant's account and he managed to delete it, then it could not have been from a fake account. He admitted that astroturfing is irrelevant to the present case.

The possibility that the Applicant's IP address might have been stolen

40. The Applicant maintains that the IGO investigators failed to check and verify the IP address from where the comment came.

41. That the Applicant's Facebook account and mobile phone are personal and private is common knowledge. It is not disputed that, without the Applicant's consent and collaboration, the investigators could not request the Facebook corporation for information which was necessary to proceed with an in-depth analysis of his private Facebook account and private device to support the claim that he had not made the comment.

42. However, the investigators, who are the experts in these matters, did not ask the Applicant if he might be willing to grant them access to his account or his mobile phone, nor did they refer him to a United Nations forensics expert in Libya or the surrounding region who might have assisted him. They only informed him that they have a forensics expert in Amman, Jordan but did not offer to put him in contact with that expert.

43. The assertion that the Applicant was specifically requested not to delete the comment before gathering the necessary evidence which could corroborate his version of events also needs to be clarified. The record of the first subject interview does not contain any such injunction. However, during the second subject interview, it was explained that after the first interview had concluded (and presumably the recording device had been turned off), the Applicant asked if he could delete the comment. His understanding of the investigators' response was that he could delete it after obtaining relevant information from it. The Applicant obtained what information he could from the comment and then proceeded to delete it.

44. Besides, considering the allegation that the comment was causing reputational damage to the Organization, it is not clear what benefit could have been derived from retaining the comment on Facebook for more viewers to see.

45. The Tribunal notes that the Applicant's own expert, CK, did not conduct an IP investigation or a forensic examination of the Applicant's personal mobile phone or Facebook account. He did not investigate the possibility that the Applicant's IP address might have been stolen and did not even discuss IP addresses in his expert opinion. He stated that it would have been possible for him to analyze the Applicant's devices but that in relation to the Facebook account, he would have had to seek information from Facebook as a corporation, which is a difficult task.

46. CK further stated that it is possible for the owner of a personal Facebook account to access the private data related to the account, explaining that a user can, for example, establish the exact time when a post or comment was made and the device which was used to make a post or comment. He explained that there is a request channel through which any user may request for all this information and access it. This evidence is consonant with the expert's evidence that the IP address related to one's Facebook activity can only be accessed via the Facebook user activity log, to which only the Facebook account owner has access.

47. Based on the above evidence, the Applicant's assertion that the IGO investigators failed in their duty to check and verify the IP address and instead shifted the burden to him to provide the information is not unreasonable.

Throughout the investigation process, the Applicant was not assisted by counsel, and he was repeatedly warned by the investigators that he must not discuss the details with anyone. Not being an IT specialist, he could not have known how to go about obtaining forensic evidence on his own but at the same time, he was prohibited from contacting any possible experts.

48. The Respondent's explanation that there was need to protect the Applicant's privacy, which required that he took the lead role in ensuring that the required information was accessed, appears contradictory. Since the investigators did not specifically request the Applicant to grant them access to his device or his Facebook account, and since they prohibited him from discussing the investigation details with anyone or from seeking anyone's assistance, it seems unreasonable to have expected him at the same time to have obtained the assistance of an independent forensics expert.

49. As stated in the final investigation report, the Applicant "was cooperative throughout the investigation and was prompt in his responses". The Tribunal finds no reason to believe that the Applicant would not have cooperated with the investigators if they had requested access to his mobile phone or his Facebook account.

50. Drawing on the above, the Tribunal finds that the evidence supports the Applicant's claim that the Respondent shifted of the burden of proof to him by requiring him to provide exculpatory information.

The cursor method

51. The cursor method of attributing authorship involves hovering the computer mouse over a person's Facebook "handle" or name to reveal their full identity. The Applicant argues that the investigators' use of the "cursor" method to link the comment to his Facebook account despite his vehement denials was flawed. In view of his defence that his devices were not properly secured and could have been hacked, and his specific suggestion to the Respondent to make pertinent enquiries with Facebook as to the IP address from which the comment might have been made, this method cannot be relied upon as it leads to inconclusive results.

52. The Applicant further argues that while the cursor method can be useful, on its own, it is not fool-proof and it does not rule out hacking, phishing or astroturfing. It only identifies the account from which a post was made. Identifying an account in itself is equally not sufficient as the IP address of the owner of the device or account could have been stolen.

53. The Applicant was supported by his expert's opinion suggesting that, "There is no widely known or recognized 'cursor method' specifically for linking posts to Facebook accounts. In order to achieve this, one would have to be a very highly skilled programmer. Posts, however, can easily be linked via manual sharing, tagging, or mentions. The information provided for the purpose of this opinion suggests that the employer did not use these links".

54. The Respondent's expert, however, disagrees with the above position. According to him, the cursor method is a robust digital investigation approach. It had to be used in this case to establish the facts given that the input provided by the Applicant in the course of the investigation was insufficient to allow for the analysis of his Facebook data or personal device, as well as the need to respect his privacy. Had it been possible, a digital forensic examination of the Applicant's Facebook account activity log, and/or his device would have been conducted.

55. At the hearing, the Applicant's expert, CK, reneged on his opinion on this point, agreeing that in the above opinion, he referred to a post that can be linked to via sharing, tagging or mention, and that he is aware that this matter relates to a Facebook comment made on a specific post and a news media entity's Facebook page. CK admitted that a Facebook comment has a general timestamp, expressly identifies who has made the comment, and cannot be linked via sharing, tagging or mention.

56. He further admitted that by looking at a Facebook comment, an observer can see which person or account made the comment and when the comment was made. He agreed that since the Applicant admitted that the comment was made from his Facebook account and he was able to delete it, there is no need for a sophisticated method to identify the account from which the comment was made.

57. Crucially, CK admitted that the portion of his expert report about the cursor method is not particularly relevant to this case. He also admitted that the Applicant had been correctly identified as the owner of the Facebook account from which the comment was made.

Evidence of character

58. The Applicant testified that the comment was out of character, but the investigators failed to interview his supervisor, AA, who would have given them an insight into his attitude, mindset and thoughts about such crimes. Further, he stated that since he is Facebook "friends" with his mother, sister and fiancée, he could not write such a comment since they would see it and he would have a lot to lose. He also had female co-workers with whom he shared an office, and they could have testified about his character had they been interviewed. Moreover, as the Code of Conduct facilitator, he was aware of UNHCR values and could not possibly make such comments.

59. He reminded the Tribunal that in a Muslim country like Libya, honour crimes are a very sensitive and taboo subject. It is very unlikely that such topics would be discussed in public.

60. In the Tribunal's view, establishing whether the Applicant wrote the comment in issue is more a function of forensic evidence than of his character. It is undisputed that the comment was made from the Applicant's personal Facebook account. What is not clear is whether the Applicant himself is the one who made the comment. The Applicant has maintained that he did not write the comment, and the Respondent has not clearly shown that he did. In this day and age when hacking and other social engineering methods are commonplace, absent conclusive forensic evidence, the Tribunal cannot easily discount the possibility that the comment was made by someone with malicious intent who gained unauthorized access to the Applicant's Facebook account.

61. The Applicant cooperated fully with the IGO investigators, as shown in the final investigation report. Perhaps because of the physical distance between him in Tripoli and the investigators in Nairobi, it was not possible for them to conduct a

forensic examination of his mobile phone. However, the United Nations is global Organization with representatives in all parts of the world. It would surely have been possible for the investigators to refer the Applicant to a United Nations-affiliated forensics expert in Libya or in a nearby country to examine his mobile phone to determine whether the comment was made from it.

62. The Tribunal notes that throughout the investigative process and in these proceedings, the Applicant has consistently and vehemently denied having made the comment. He has also expressed shock and horror at the suggestion that he was the author of the comment. In his defence, he has pointed to multiple instances where his comments on Facebook were fully in line with UNHCR's values and principles and where he showed pride in his work with the Organization.

63. Based on available evidence, the Tribunal finds that the Applicant has successfully rebutted the Respondent's presumptions and raised a lot of doubts regarding the conclusions of the investigation and the sufficiency of the evidence presented.

64. In conclusion, the Tribunal finds that the Respondent has not been able to demonstrate that the facts on which the disciplinary measure was based were established by clear and convincing evidence, as otherwise required by the Appeals Tribunal in its above cited jurisprudence.

Whether the established facts amount to misconduct under the Regulations and Rules

65. Having found that the facts on which the disciplinary measure was based have not been established by clear and convincing evidence, the Tribunal must also find that there was no established misconduct by the Applicant.

Whether the sanction is proportionate to the offence

66. Given the finding of absence of misconduct by the Applicant, the Tribunal must also rescind the sanction imposed on him.

Whether the staff member's due process rights were respected

67. The Applicant takes no issue with the fact that his due process rights were respected throughout the investigation and disciplinary processes. It is on record that he was provided with the Allegations Memorandum and all the supporting documentation. He was informed of his right to seek the assistance of counsel and availed the opportunity to comment on the allegations. He was given an opportunity to submit his comments, and his comments were considered when determining the outcome of the matter. There was therefore no substantive or procedural irregularity during the investigative and disciplinary processes.

Conclusion

68. The Tribunal therefore allows the application and rescinds the contested decision.

Remedies

69. The Applicant seeks an order of rescission of the decision to separate him from service, and in the alternative, orders for:

a. Two years' net base salary as compensation.

b. Payment of full indemnities under the Staff Regulations and Rules.

c. Reimbursement of the amount of USD500 (five hundred US dollars) he incurred in obtaining the IT expert's opinion.

d. An Order that the disciplinary records be expunged from his Personnel File.

70. Since the decision to separate the Applicant from service was not based on clear and convincing evidence, the Tribunal hereby grants his request for an order of rescission, and orders that the Applicant be reinstated in service.

71. In the event that the Applicant cannot be reinstated in service, in keeping with the law and the practice of the Tribunal, it is ordered that he be paid two years' net base salary with full indemnity *in lieu* thereof.

72. The Applicant seeks reimbursement of the amount of USD500 (five hundred US dollars) which he claims he incurred in obtaining the IT expert's services. While the Applicant did not provide any evidence to support this claim, the fact that forensic expert evidence was adduced sufficiently proves that he spent money in that regard. The Tribunal therefore allows this claim and awards USD500 as a reasonable expense incurred by the Applicant in that regard.

73. The Applicant prays that the disciplinary records regarding the present matter be expunged from his Personnel File. In light of the finding that the facts on which the disciplinary measure was based have not been established by clear and convincing evidence, this is a logical outcome of the process. Accordingly, the Tribunal grants this request for specific performance and instructs the Respondent to take the necessary measures in that regard.

(Signed)

Judge Margaret Tibulya
Dated this 10th day of October 2024

Entered in the Register on this 10th day of October 2024

(Signed)

Isaac Endeley, Registrar, New York