



Judgment No. 2023-UNAT-1329



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9. On 4 April 2019, Mr. Cahn's FRO filed a complaint against Mr. Cahn under Secretary-General's Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

10. On 9 April 2019, the Chief, Programme Support and Management Services

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mission to the ROE to assist all staff members and assess the situation. In addition, OHCHR took specific, precautionary measures to accommodate Mr. Cahn's stated concerns, including removing him from the RR's direct oversight, providing him with a new portfolio and arranging his transfer to a new duty station, while keeping in mind the particular needs of his family. Discussions of these matters included consultation with Mr. Cahn on his new terms of reference, arrangements for him to work remotely from outside the duty station for the first six months of his new assignment, and arrangements to accommodate his request to "pause" his sick leave so that he could go on a previously scheduled home leave. The UNDT reduced all of these actions to a bare finding that "OHCHR discussed with [Mr. Cahn] and implemented different arrangements to accommodate him in connection with actions that he had requested the Organization to take". Yet, in reaching its conclusion that OHCHR failed to take any action, the UNDT failed to consider even its own abridged factual finding. The UNDT's failure to consider OHCHR's actions to assist and support Mr. Cahn constitutes an error of fact, resulting in a manifestly unreasonable judgment and award of compensation.

19. The Secretary-General further argues that the UNDT erred in fact, resulting in a manifestly unreasonable judgment, in finding that Mr. Cahn had been subjected to a "toxic" and "degrading" work environment. The UNDT ignored the panel's findings and substituted its own determinations of fact, essentially accepting as true Mr. Cahn's claims that the RR's actions caused a "toxic" work environment and that "degrading" conditions of work violated Mr. Cahn's rights and dignity. Yet these findings contradict the UNDT's acceptance of the panel's findings, and OHCHR's decisions based thereon, as lawful and reasonable. It is clear from the panel's findings that contrary to that which Mr. Cahn had complained, none of the behaviour or actions of the RR had caused a "toxic" or "degrading" work environment. The panel indicated that, at most, some of the messages sent by the RR might have been considered "unpleasant". There was thus no need to take special measures to protect Mr. Cahn, beyond the measures that were taken by OHCHR.

20. The Secretary-General avers that to the extent that there was a deterioration of the working relationship, specifically between Mr. Cahn and the RR, the panel's findings, found lawful by the UNDT, show that—if anything—Mr. Cahn bore responsibility. This is because the investigation report of the complaint made by the RR against Mr. Cahn resulted in the panel finding four instances where Mr. Cahn may have engaged in prohibited conduct against the RR. The High Commissioner agreed with these findings and considered that Mr. Cahn, by his actions, "may have contributed to an intimidating, offensive and hostile work environment" and referred the

investigation report on Mr. Cahn's conduct to the Assistant Secretary-General/Office of Human Resources (OHR) for possible disciplinary action. OHR shared this assessment, informing OHCHR on 16 April 2020 that "[o]n the basis of the evidence on record, [it] consider[ed] that the [relevant] conduct appears to be substantiated and indicates possible inappropriate/unsatisfactory conduct by [Mr. Cahn]] that could be addressed by OHCHR through administrative and/or managerial action". Instead of taking account of the panel's findings regarding Mr. Cahn's possible prohibited conduct towards the RR, the UNDT found

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the foregoing reasons, the UNDT's finding that the Administration owed Mr. Cahn a duty of care to ensure a harmonious work environment and protect him from work-related harm was based on a correct reading of the applicable legal framework and the facts of the underlying matter, was not manifestly unreasonable and should thus not be overturned.

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Administration does not have an interest and a duty of care towards keeping a good work environment. Thus, in the instant matter, the UNDT was correct to consider “the working conditions in an objective way, irrespectively of the responsibility in causing them (which cannot be put on [Mr. Cahn] only but is the consequence of multiple factors as the investigators stressed)”. Accordingly, it is the harm, not the cause that is compensable. The panel found that there were multiple causes, the RR principally among them, and as the supervisor she bore a preeminent duty to maintain the highest standard of conduct. Further, Mr. Cahn sounded the alarm as early as the beginning of January 2019. Had the Administration responded immediately, much of the harm suffered could have been averted. The negligent delay compounded the disharmony and directly contributed to further deterioration within the ROE, the breakdown suffered by Mr. Cahn

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2.2 The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed.

...

3.1 All staff members have the obligation to ensure that they do not engage in or condone behaviour which would constitute prohibited conduct with respect to their peers, supervisors, supervisees and other persons performing duties for the United Nations.

3.2 Managers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct. They must act as role models by upholding the highest standards of conduct. Managers and supervisors have the obligation to ensure that complaints of prohibited conduct are promptly addressed in a fair and impartial manner. Failure on the part of managers and supervisors to fulfil their obligations under the present bulletin may be considered a breach of duty, which, if established, shall be reflected in their annual performance appraisal, and they will be subject to administrative or disciplinary action, as appropriate.

3.3 Heads of department/office are responsible for the implementation of the present bulletin in their respective departments/offices and for holding all managers and other supervisory staff accountable for compliance with the terms of the present bulletin.

4.1 Prevention of prohibited conduct is an essential component of the action to be taken by the Organization. In the discharge of its duty to take all appropriate measures towards ensuring a harmonious work environment and to protect its staff from any form of prohibited conduct, the following preventive measures will be used.

4.2 The Organization shall conduct regular and mandatory awareness programmes for all Secretariat staff to raise awareness (e)3. pre

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5.3 Managers and supervisors have the duty to take prompt and concrete action in response to reports and allegations of prohibited conduct. Failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings.

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5.6 Aggrieved individuals may ask for assistance from a third party in seeking informal resolution. Depending on the situation and on their level of comfort with one official rather than another, they may seek the assistance of any of the following:

- (a) The Ombudsman or a member of the Ombudsman's Office;
- (b) The Staff Counsellor at the duty station;
- (c) A human resources officer at the duty station;
- (d) A member of the conduct and discipline team in a peacekeeping mission or at Headquarters;
- (e) A member of the executive committee of the staff representative body at the duty station;
- (f) A staff representative of the department or office concerned;
- (g) The Office of the Special Adviser on Gender Issues and Advancement of Women;
- (h) The Focal Point for Women in the Secretariat or the focal point for women in the department or office concerned;
- (i) A member of the Panel of Counsel or the Office of Staff Legal Assistance;
- (j) A supervisor, including the first or second supervisor.

In all cases, the Medical Service may be consulted for advice. Aggrieved individuals may also consult an outside adviser, such as an occupational psychologist or stress counsellor, at their own expense.

5.7 The official from whom assistance has been requested may, with the consent of the

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45. The UNDT based its final conclusion on the following considerations and findings.

46. In the beginning, the UNDT opined that there exists a duty of care of the Organization vis-à-vis its staff members, which is crystallized in an implicit and explicit way in the obligations the Organization has towards its staff that are contained in both hard and soft law instruments, Policies, Regulations and Rules, Administrative Instructions and other internal acts of the Organization, and whose standard is determined by requirements of reasonableness and it varies depending on the circumstances of the case.¹⁶

47. Next, the UNDT found that the duty of care includes, inter alia, the obligation of the

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54. The same harsh and discomfoting working conditions as well as their impact on Mr. Cahn’s health are vividly illustrated in the affidavits of a Human Rights Officer, Council Treaty Mechanism, OHCHR (Geneva), who was also a member of the OHCHR Staff Committee, and a former Deputy, REO, which the UNDT correctly found as particularly meaningful and alarming.

55. The first witness stated that:

Since January 2019, several staff members of the Regional Office of Brussell^{27.2} (f)-0.6 (B)3.4 (ru)

- Being subjected to micro-aggressions; ex. being reminded in front of other staff of duties such [a]s servicing coffee,
- Experiencing symptoms of anxiety when called to talk with the manager,
- Working without enthusiasm or motivation,
- Having received threats that they would be formally accused of prohibited behaviour,
- Fear of retaliation for having reported misconduct,
- Receiving harsh emails during weekends,
- Being accused for misusing private social media;
- Experiencing having no longer any trust in their relation with the manager,
- Anxiety in having to cope with stressful situations on a continuing basis,
- Feel demoted because of having stopped working on substantive issues[.]
- Anxiety in going to work on a daily basis,
- Poor quality of sleeping hours, flashbacks of stressful situations,
- Over smoking or drinking to cope with stress,
- Long periods of sick leave due to depression, burn-out and emotional breakdown,
- Felt compelled to consider start looking for other job opportunities in order to avoid continuing working in an unhealthy environment,
- Feeling that management was not responding p (m)3.5nding p ai4e

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59. While it is true that the Administration responded with some kind of protection, by engaging in discussions with Mr. Cahn on a possible transfer to OHCHR headquarters in Geneva, this only happened in May and June 2019, namely after five whole months had elapsed between Mr. Cahn's request and the Administration's response. (See, e.g., *UNAT v. Mr. Cahn*, 2019-UNAT-1329 (2019), available at <https://www.unat.org/en/cases/2019-UNAT-1329>.)

62. Hence, we find no reasons to differ from the conclusions reached by the UNDT. The Dispute Tribunal has broad discretion under Article 18(1) of its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence. The findings of fact made by the UNDT can only be disturbed under Article 2(1)(e) of the Appeals Tribunal Statute when there is an error of fact resulting in a manifestly unreasonable decision, which is not the case here. This Tribunal is mindful that the Judge hearing th

conditions at the specific place (ROE) and time as well as in its holding that the Administration had failed to act with due diligence and without delay in taking the appropriate protective measures, like the ones finally adopted but long after the damage had been done to Mr. Cahn.

65. Further, and more relevantly, the UNDT Judge was correct in determining these working conditions at the ROE in an objective way, irrespective of the responsibility in causing them and in finding that, if anything, the contribution to the disharmonious work environment of the ROE was not Mr. Cahn's alone but it was a result of multiple causes, which had led to these threatening and harmful working conditions and established the duty of the Organization to preemptively protect Mr. Cahn's welfare. Hence, the Secretary-General to no avail asserts that: i) it was Mr. Cahn who "bore responsibility" and "may have engaged in prohibited conduct against the [FRO] RR"; ii) "The High Commissioner for Human Rights agreed with these findings and considered that [s(6)](1)(b) (LJ01 T)SGE02 T)B.9 220.258)T(dT(1)2 0102 (");6

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6. Under Article 2(1)(a) of the UNDT Statute,

[t]he Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual (...) against the Secretary-General (...) [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms ‘contract’ and ‘terms of appointment’ include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

7. According to Article 10(5) of the UNDT Statute,

[a]s part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years’ net base salary of the applicant. The

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Can the award of compensation be based on Article 10(5)(b) of the UNDT Statute?

17. While the Secretary-General is legally bound to award compensation for service-incurred harm only under Appendix D, the situation for the Tribunals is different. The General Assembly established the UNDT and UNAT Statutes which in their respective Articles 10(5)(b) and 9T49 13.0TD. (e) (e)-3.1 (I.6 ()-2.4 (-)-0.6 (a)73.2 (s)1x)1 (e)-p.1 (r)8.89 (e)-3.2 (s)11.1 3

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