

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 (no. 146) with the Tribunal. He contests the 22 May 2023 decision to separate him from service with compensation *in lieu* of notice, and with half

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

f. A first interview with the Applicant as the investigation subject was conducted remotely via 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

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

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

- 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-118:

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,

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.

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.

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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.

