



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1329

**Claude Cahn
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Sabine Knierim Judge Martha Halfeld
Case No.:	2022-1681
Date of Decision:	24 March 2023
Date of Publication:	20 April 2023
Registrar:	Juliet Johnson

Counsel for Mr. Cahn: Jason Biafore, OSLA

Counsel for Secretary-General: Rupa Mitra

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The Secretary-General of the United Nations has appealed before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) against Judgment No. UNDT/2022/008 by which the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) partially granted an application filed by Mr. Cahn, a staff member of the United Nations High Commissioner for Human Rights (UNHCHR), awarding him compensation for non-pecuniary damages.

2. For the reasons set out below, we dismiss the appeal by majority, Judge Knierim dissenting.

Facts and Procedure

3. Mr. Cahn is a Human Rights Officer (P-4) who has been serving with the Office of the United Nations High Commissioner for Human Rights (OHCHR) since April 2009.

4. In May 2017, Mr. Cahn's First Reporting Officer (FRO) took up her function as Regional Representative, Regional Office for Europe (RR and ROE, respectively) based in Brussels.

5. Mr. Cahn joined the ROE, OHCHR, in August 2017.

6. On 5 February 2019, Mr. Cahn addressed to OHCHR Senior Management a memorandum alleging *inter alia* harassment and abuse of authority by his FRO (the RR), which in his view was demonstrated by different actions of his FRO that he described in said memorandum. In this memorandum, Mr. Cahn also raised attention to the impact on his health of his FRO's actions.

7. Due to ongoing conflicts within the ROE, OHCHR undertook a Human Resources mission on 14 February 2019 "to identify issues and provide possible avenues to resolve various concerns of the [ROE] staff".

8. On 2 April 2019, coming out of a work meeting, Mr. Cahn had a complete collapse both physically and mentally. Thereafter, Mr. Cahn was continuously on medically certified sick leave from 24 April 2019 to 4 September 2019.

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 (PSMS), OHCHR, appointed a fact-finding panel (panel) to investigate Mr. Cahn's allegations in the above-mentioned memorandum. It was later agreed by all concerned that the same fact-finding panel would also investigate the 4 April 2019 complaint of Mr. Cahn's FRO against Mr. Cahn. Between May and June 2019, OHCHR discussed with Mr. Cahn and implemented different arrangements to accommodate him in connection with actions that he had requested the Organization to take.

11. On 31 July 2019, the panel issued its report on Mr. Cahn's complaint. By letter dated 9 October 2019, e-mailed to Mr. Cahn on 17 October 2019, the then UNHCHR *inter alia* communicated to Mr. Cahn her conclusion that, upon review of the investigation report, the facts as established did not amount to evidence of possible harassment or abuse of authority on the part of his FRO against him and her decision not to initiate disciplinary proceedings against his FRO.

12. By letter dated 4 November 2019, Mr. Cahn requested the UNHCHR to provide him with a copy of the report(s) of the panel into matters at the ROE. By letter dated 22 November 2019, the Chief ad interim, PSMS, OHCHR, provided Mr. Cahn with a detailed summary of the investigation report.

13. On 14 December 2019, Mr. Cahn requested management evaluation of several decisions, including the three decisions he subsequently challenged before the UNDT, namely to close his 5 February 2019 complaint against his FRO and not to refer her conduct to the Assistant Secretary-General for Human Resources; not to pay him compensation for moral harm resulting from harassment and abuse of authority by his FRO as well as from the Organization's lack of protective measures; and not to take disciplinary or other appropriate action against his FRO, in accordance with ST/SGB/2008/5, for making malicious allegations against him through a complaint filed on 4 April 2019.

14. By letter dated 7 February 2020, e-mailed to Mr. Cahn on 10 February 2020, the Under-Secretary-General for Management Strategy, Policy and Compliance responded to Mr. Cahn's request for management evaluation, *inter alia* upholding the contested decision related to his complaint against his FRO.

15. On 23 April 2020, Mr. Cahn filed an application contesting the above three decisions.

16. On 31 January 2022, the UNDT issued Judgment No. UNDT/2022/008. The UNDT dismissed Mr. Cahn's claim that OHCHR should have taken disciplinary action against the RR following the investigation of his complaint against her. The UNDT held that OHCHR had properly handled Mr. Cahn's complaint against the RR, and that "the case record fully support[ed] the reasonableness of the decision not to initiate disciplinary proceedings against"¹ the RR. The UNDT separately found that OHCHR had an independent, so-called duty of care that required it to take "immediate protective action" upon receiving Mr. Cahn's complaint, that OHCHR took no action to protect him and that it had therefore violated this alleged duty.² The UNDT found that OHCHR had infringed this so-called duty of care toward Mr. Cahn from February 2019 through August 2019, because Mr. Cahn had returned to work from sick leave in September 2019. On this basis, the UNDT awarded Mr. Cahn seven months' net base salary for harm suffered from "OHCHR's failure to timely protect him from a toxic work environment".³

17. On 1 April 2022, the Secretary-General appealed the UNDT Judgment to the Appeals Tribunal. Mr. Cahn filed an answer on 3 June 2022.

Submissions

The Secretary-General's Appeal

18. The Secretary-General submits that the UNDT erred in fact, resulting in a manifestly unreasonable judgment, in finding that OHCHR did not exercise due care concerning Mr. Cahn under the relevant legal framework. OHCHR promptly took a series of actions to address the work environment at the ROE in Brussels alleged by Mr. Cahn. Just nine days after the submission of Mr. Cahn's complaint, the Chief, Human Resources Management Service undertook a special

¹ Impugned Judgment, para. 35.

² *Ibid.*, para. 90.

³ *Ibid.*, para. 103.

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 that the RR's complaint against Mr. Cahn could be regarded as a sign of "managerial weakness" in handling the conflict with Mr. Cahn, a finding that is manifestly misplaced in light of the panel's report. The UNDT further misconstrued the factual scenario, finding that the RR's complaint increased the harm caused to Mr. Cahn, the very person responsible for engaging in behaviour that the panel, and the High Commissioner, considered could constitute prohibited conduct against the RR. The UNDT's findings in this regard are manifestly unreasonable.

21. The Secretary-General alleges that the UNDT further erred in law in finding that, despite the measures that OHCHR took to accommodate Mr. Cahn, and the panel's finding of no misconduct by the RR, OHCHR had nevertheless breached its "so-called" duty of care. The UNDT found that all of OHCHR's actions, including in removing Mr. Cahn from the RR's supervision and working with him on a new assignment to a different duty station, were insufficient in this regard and indeed the UNDT wholly discounted them. The UNDT cited a number of cases and sources in support of its finding, none of which support the UNDT's conclusions. In addition, the UNDT failed to cite any legal support for its finding that OHCHR breached a "so-called" duty of care, absent any finding of misconduct by the RR, and indeed with lawful investigative findings that, instead, Mr. Cahn bore responsibility in the breakdown of communication with the RR.

22. The Secretary-General contends that the UNDT's characterization of OHCHR's "so-called" duty of care was not based on any source of law and was unreasonably broad. The UNDT's citation of a preliminary Report from the High-Level Committee on Management (HLCM) Working Group on "Reconciling Duty of Care for UN personnel while operating in high risk environments" was not applicable to the present case since the HLCM's Report does not constitute part of the legal framework of the United Nations and it addresses United Nations personnel working in "high-risk environments". Finally, the HLCM has stopped using the "ill-advised" term "duty of care" in its further studies and reports on the matter. The UNDT next referred to Appendix D to the Staff Rules, which also did not apply. Although Mr. Cahn could have attempted to bring a claim

under Appendix D, he did not do so, and, if anything, the UNDT's award of compensation to Mr. Cahn amounts to a circumvention of the requirements of Appendix D. To the extent that the UNDT cited provisions from ST/SGB/2008/5, none of them provide legal support for the UNDT's finding that OHCHR breached any duty owed to Mr. Cahn. The panel did not find that Mr. Cahn was ever exposed to any form of prohibited conduct, and, in any event, OHCHR did take appropriate precautionary measures to address his stated concerns. His complaint was timely acted upon and his concerns about the RR were addressed with concrete measures. The fact-finding investigation was initiated in April 2019, and discussions took place the next month regarding the change of supervisor and duty station. There was no finding of any lack of cooperation with the fact-finding investigation or retaliation as a result of his complaint or its investigation.

23. The UNDT also cited a variety of cases in support of its findings, none of which support the UNDT's interpretation of the legal scope of the duty that may have been owed to Mr. Cahn or its factual application. In sharp contrast to the present proceedings, these cases largely dealt with situations in which prohibited conduct was found, and/or where there was no administrative action to address clearly established, service-incurred harm caused to the complainant. The UNDT's reliance on the UNAT jurisprudence in *Cohen*⁴ is similarly misplaced as the facts in *Cohen* were entirely different from those of the present case. For all of the foregoing reasons, the UNDT's finding that OHCHR had breached a duty towards Mr. Cahn is unsupported in law, and the UNAT should overturn that finding.

24. Turning to the issue of compensation, the Secretary-General contends that the UNDT erred on a question of law and fact in finding that Mr. Cahn should be compensated by an award of one month of net base salary "for each month of infringement of the duty of care by OHCHR, that is the period running from OHCHR's inertia until [Mr. Cahn's] return to work, namely from February to August 2019 (seven months)". The UNDT erred in awarding Mr. Cahn compensation and failed to note that Mr. Cahn had suffered no financial harm, as he was on sick leave during much of the period. Sick leave entitlements are provided to staff to protect their health, and they were properly used in this situation; there is no ground to use the fact that Mr. Cahn was on sick leave to grant him additional compensation. The UNDT thus erred in awarding damages to Mr. Cahn, and UNAT should reverse the award.

⁴ *Cohen v. Registrar of the International Court of Justice*, Judgment No. 2017-UNAT-716.

25. The Secretary-General requests that the UNAT vacate the Judgment, except for paragraphs 30-49 (dismissing Mr. Cahn's other claims), and to dismiss Mr. Cahn's application in its entirety.

Mr. Cahn's Answer

26. Mr. Cahn argues that the UNDT correctly concluded that the Administration breached its duty of care to ensure a harmonious work environment and to protect Mr. Cahn from harm. Staff Regulation 1.2(c), various sections of ST/SGB/2008/5 as well as the jurisprudence establish that the Administration has a duty of care to ensure a harmonious work environment and protect its staff members from harm by way of, *inter alia*, taking appropriate preventative and remedial measures against foreseeable risks, including those associated with threat of physical harm or working in high-risk duty stations, as is evidenced by the administrative issuances, policies, and jurisprudence addressing the issue at the heart of this matter, i.e., the duty to ensure a harmonious work environment. The UNDT correctly and reasonably asserted that Staff Regulation 1.2(c) enshrines an obligation of duty of care incumbent on the United Nations vis-à-vis its staff members. Contrary to the Secretary-General's contention, there is no limitation of its application only to high-risk duty stations. There is also no limitation of its application to ensuring physical safety and security. Further, ST/SGB/2008/5, applicable at the time, recognizes the existence of a duty of care owed by the Administration to its staff members to protect them from a disharmonious work environment and sets out the requirements for managing this duty, as well as a specific duty of care for supervisors and managers towards their supervisees.

27. Mr. Cahn submits that the UNAT jurisprudence has also recognized a duty of care owed by the Organization to its staff and further established that monetary compensation for moral damages is appropriate where a breach of said duty is found. Additionally, UNAT has acknowledged that a duty of care exists towards all staff, not only those serving in hardship locations or high-risk environments. In spite of a well-established body of law, in his appeal, the Secretary-General "dismissively and callously" refers repeatedly to the Organization's duty of care towards Mr. Cahn as "so-called", "ill-advised", and even based on Mr. Cahn's "extreme characterization" of the events. By its own admission and purported actions, the Secretary-General demonstrated that he owed a duty of care to Mr. Cahn since otherwise no action would have been taken to protect him. The jurisprudence is replete with examples where staff are admonished for failing to live up to the highest standards expected of international civil servants. Yet, the Secretary-General appears to argue that the Organization should be excused from having the same high expectations imposed on itself, insofar as its work relations with staff members go. For all of

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.

28. Mr. Cahn further argues that the Administration breached its duty of care to ensure a harmonious work environment. As set out clearly in *ST/SGB/2008/5*, and contrary to what the Secretary-General argues, the Organization's duty is not merely to protect staff members from prohibited conduct in the form of harassment, discrimination or abuse of authority misconduct as found to have occurred following a duly constituted investigation. Rather, it requires a broad duty on the Organization to ensure a harmonious work environment, and a specific duty on supervisors to maintain the highest standards of conduct in ensuring the workplace is free from intimidation, hostility and offence. If the Organization had sought to strictly limit the application of its duty of care only to protecting against prohibited conduct, it would have so legislated this intent in the applicable administrative issuance, which it did not. Further, if only a finding of prohibited conduct would trigger the Organization's duty of care, in the event of conduct reasonably considered intimidating, hostile or offensive, though not strictly prohibited, the Organization would be excused from any negligence or duty to care for its staff members, even where such conduct resulted in harm. It is not reasonable to accept that this was the Organization's intent when it expressly enshrined a requirement to ensure a harmonious work environment and a specific duty on supervisors. In addition, if indeed UNAT were to accept the Secretary-General's apparent contention that protection measures should be only available where an investigation has already established prohibited conduct, the right to protection or injunctive relief would in effect be eviscerated: by their very definition, preventative and interim measures impose a duty on the Organization that necessarily takes effect before any finding of prohibited conduct can be made.

29. In the instant case, the Administration's failure to timely implement preventive or interim measures and expeditiously undertake an investigation into Mr. Cahn's reports, compounded the harm he suffered and further supports the reasonableness of the UNDT's ruling that the duty of care owed to him was breached. Apart from the panel's finding in the instant case that the RR did not engage in prohibited conduct, it nonetheless found that there was sufficient evidence of a disharmonious work environment, attributable to a number of individuals, including the RR. As the ROE supervisor, the RR bore a specific duty to act as a role model, maintain the highest standards of conduct and ensure the workplace was free from intimidation, hostility and offence.

On the underlying record, she failed in this obligation and breached her duty of care to Mr. Cahn and his fellow colleagues. By this measure, and as a result of the RR's "cold", "harsh" and "authoritative" conduct, she bore primary responsibility for creating a work environment that was anything but harmonious, and as such, the UNDT's ruling that the Administration breached its duty of care toward the Respondent was not manifestly unreasonable.

30. Mr. Cahn notes that none of the specific examples of the RR's conduct in the underlying record, giving rise to the "cold", "harsh", "authoritative" and disharmonious work environment pertain directly to Mr. Cahn. Rather, these are credible and verifiable accounts of his immediate ROE colleagues as well as OHCHR's Senior Management, presented to and accepted by the panel as illustrative of the RR's disharmonious conduct. As far as Mr. Cahn himself is concerned, the accounts of his negative experiences are well documented in the underlying record and formed the manifestly reasonable basis for the UNDT's conclusion that he suffered work-related harm as a result of the Administration's failure and breach of its duty of care to ensure a harmonious work environment, free from intimidation, hostility and offence. The RR created a disharmonious work environment in breach of her specific duty of care to Mr. Cahn and his colleagues. Finally, the Secretary-General's contention that the UNDT erred in finding that the Administration did not take any action to address Mr. Cahn's complaint seeks to conflate the UNDT's rulings and fails to acknowledge that the UNDT rested its decision on the Administration's failure to take protective or immediate action upon learning of the disharmonious working environment at the ROE following Mr. Cahn's alarming complaints. The UNDT acknowledged that measures were implemented, but only long after the damage had been done to Mr. Cahn, ultimately leading to the breakdown he suffered several weeks earlier in April 2019. By this point, the Administration was simply much too late.

31. Mr. Cahn avers that the UNDT correctly concluded that Mr. Cahn should be awarded moral damages as compensation for the Administration's breach of its duty of care. Contrary to the Secretary-General's assertion that Mr. Cahn's appropriate remedy was to pursue a claim for service-incurred injury or illness under Appendix D of the Staff Rules, under UNAT jurisprudence a claim of gross negligence or breach of duty of care against the Administration is a separate action which cannot be included in a claim under Appendix D. Mr. Cahn's claims were thus procedurally correct. In addition, the UNAT has ruled that the applicable legal framework prioritizes redress of the harm done to the staff member rather than fixing the cause of such harm. The consequence takes precedence over the cause of the harm. This does not mean, however, that the

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 and his disablement for work for several months. As in *Cohen*, Mr. Cahn’s similar loss of amenities of life and disablement from work for a period of several months during 2019 and his medical evidence has not been meaningfully contested and thus supports an award of moral damages.

32. Mr. Cahn submits that nearly four months passed before the Administration even commenced its investigation in response to Mr. Cahn’s initial complaints, starting in January 2019. By the time the investigation was commenced, on 9 April 2019, the Respondent had already suffered a complete breakdown as a result of the disharmonious and harmful working conditions he had been exposed to in the pre-investigation period. Thereafter, it took the Administration an additional four months for the panel to complete its review of the Respondent’s complaints. In light of the UNAT’s prior rulings on the issue of awarding compensation for undue delay in responding to staff member complaints, and in view of the actual harm suffered by Mr. Cahn, verified by uncontested certified medical evidence, the UNDT’s compensation award of moral damages for a period of seven months was not manifestly unreasonable, and should thus remain undisturbed. The harm suffered by Mr. Cahn, as a direct result of the disharmonious, intimidating, hostile and offensive work environment, and the Administration’s negligence, should be fully compensated and thus it is not manifestly unreasonable to award compensation for the entire period that the impact of the harm suffered remained unabated, and while Mr. Cahn continued to experience disablement from work.

33. In light of the foregoing, Mr. Cahn requests that the UNAT dismiss the Secretary-General’s appeal in its entirety.

Considerations

34. The issue before the Appeals Tribunal is whether the UNDT erred on a question of law or fact, resulting in a manifestly unreasonable decision, when it found that the Organization had breached its duty of care towards Mr. Cahn and awarded him compensation for non-pecuniary damages for that cause.

Applicable legal framework

35. There is a commitment that all international organizations must have “zero tolerance” for harassment in the workplace and will not tolerate conduct that can be construed as harassment, sexual harassment or abuse of authority. This is especially true for the United Nations, as such behaviour or conduct is contrary to the spirit of the United Nations Charter, its Staff Regulations and Rules and to the Standards of Conduct for the International Civil Service. The “zero tolerance” policy is aimed at providing a safe environment for all United Nations employees,⁵ free from discrimination on any grounds and from harassment at work, including sexual harassment.

36. As a general rule, this policy aims to tackle the issue of harassment in the workplace mainly by means of two methods. The first and more immediate one has the corrective purpose of addressing any possible inappropriate behaviour and applying the necessary measures according to the situation. The second and broader one has the preventative aim of promoting a positive work environment and preventing inappropriate behaviour in the workplace.⁶

37. Concerning the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, ST/SGB/2008/5 provides in relevant parts as follows:⁷

Section 2

General principles

2.1 In accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, and the core values set out in staff regulation 1.2 (a) and staff rules 101.2 (d), 201.2 (d) and 301.3 (d), every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse. Consequently, any form of discrimination, harassment, including sexual harassment, and abuse of authority is prohibited.

⁵ *Sergio Baltazar Arvizú Trevino v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1231, para. 39.

⁶ *Kenneth Conteh v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1171, para. 41.

⁷ Internal footnote omitted.

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.

...

Section 3

Duties of staff members and specific duties of managers, supervisors and heads of department/office/mission

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.

Section 4 Preventive measures

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 of the Organization's zero tolerance of prohibited conduct, to provide guidance on the relevant policy and procedures and to foster the creation of a harmonious working environment, free from intimidation, hostility, offence and any form of discrimination or retaliation. In particular, all staff members shall be required to complete the mandatory online training programme on prevention of harassment, sexual harassment and abuse of authority in the workplace, promulgated under ST/SGB/2005/20. The successful completion of this programme shall be reflected in staff members' performance appraisal.

...

Section 5 Corrective measures

...

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.

...

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 aggrieved individual, meet informally with the alleged offender to apprise him or her of the situation and discuss the manner in which it might be resolved to the satisfaction of all concerned.

...

5.9 Regardless of the outcome, the officials listed in section 5.6 above shall provide continuing support to the aggrieved party at every stage of the process, in consultation with the appropriate officials, taking into account the positive or negative consequences of the proposed course of action. If the temporary assignment of the aggrieved party or the alleged offender to another position is proposed, this may not take place without the consent of the individual concerned.

38. It is well-settled in the Appeals Tribunal's jurisprudence that, under the above provisions, 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.⁸ This duty is an inherent part of the employment relationship and a fundamental condition of service⁹ and must be fulfilled by the Administration with due diligence and without delay.¹⁰

39. We have gone through the record of the present case, examined the grounds of appeal, the Respondent's answer, and hold that the UNDT did not commit an error of law or fact or exceed its jurisdiction.

40. Notably the UNDT, after having reviewed the lawfulness of the administrative decisions challenged before it by Mr. Cahn, i.e.: a) to close his 5 February 2019 complaint against his FRO pursuant to ST/SGB/2008/5 and not to refer her conduct to the Assistant Secretary-General for Human Resources; and b) not to take any or other appropriate action against his FRO, in accordance with Section 5.19 of ST/SGB/2008/5, for making malicious allegations against him through a complaint filed on 4 April 2019, reached the conclusion in the Judgment under appeal that these decisions were lawful and reasonable. Though these administrative decisions do not form part of the instant dispute before us on appeal, nevertheless, the factual elements that surrounded them and constituted the basis of the UNDT's relevant findings and determinations on them are pertinent also to the adjudication of the present subject matter.

⁸ *Melanne Civic v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1069, para. 73; *Delaunay v. Registrar of the International Court of Justice*, Judgment No. 2019-UNAT-939, para. 59; *Cohen, op. cit.*, para. 38; see also, *Cheikh Thiare v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1167, para. 42; *Haq and Kane v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-922, para. 31.

⁹ *Comp. Haq and Kane, op. cit.*, para. 31.

¹⁰ *Comp. Cheikh Thiare, op. cit.*, para. 42.

41. In particular, the UNDT, after “[h]aving examined the evidence on file, particularly the panel’s investigation report and its annexes”, was satisfied that “OHCHR properly handled [Mr. Cahn’s] complaint against his FRO [RR], and that the case record fully supports the reasonableness of the decision not to initiate disciplinary proceedings against said FRO”.¹¹

42. The UNDT also found that the panel had “diligently” investigated all of Mr. Cahn’s allegations “through all relevant and available means” and that:¹²

messages sent to [Mr. Cahn] could reasonably be considered unpleasant but not threatening; that the actions taken by [Mr. Cahn’s] FRO were not “punitive” or a result of “sabotage” or “work denigration” but the result of an evaluation by a supervisor; that the removal of portfolio(s) was a simple result of the exercise of managerial powers and of the Applicant’s FRO vision as Regional Representative; that the Applicant’s performance evaluation was conducted in accordance with the applicable Rules and Policies and therefore could not be interpreted in this instance as “Harassment” or “Abuse of Authority” (and that it showed a mere disagreement on work performance and not a prohibited conduct)[.] The panel concluded that none of the behaviours, actions, interactions or decisions made by the Applicant’s FRO constituted “Harassment” or “Bullying” as he alleged or a breach of ST/SGB/2008/5 or the OHCHR’s “Dignity@Work” policy”.

43. The UNDT moreover determined that Mr. Cahn had never provided any evidence of bias towards him or had substantiated his accusation of gender discrimination,¹³ and that his due process rights had been respected throughout the investigation.¹⁴ The UNDT also rejected Mr. Cahn’s claim that his FRO’s complaint against him was malicious and that there should have been disciplinary proceedings against the FRO.¹⁵

44. Nonetheless, in terms of the issue of Mr. Cahn’s request for compensation due to OHCHR’s alleged failure to exercise its duty of care towards him, -which is the principal matter before us on appeal-, the UNDT eventually held that the Organization was liable to damages and awarded Mr. Cahn compensation in an amount equivalent to seven months of net base salary for harm suffered.

¹¹ Impugned Judgment, para. 35.

¹² *Ibid.*, paras. 37-38.

¹³ *Ibid.*, para. 41.

¹⁴ *Ibid.*, para. 39.

¹⁵ *Ibid.*, paras. 48-49.

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 Organization to ensure a positive and harmonious working environment free of intimidation, hostility or offence and any form of harassment, and provide preventive and interim measures, as well as effective remedies, to protect its staff members from the negative effects of the working environment.¹⁷

48. In this context, the UNDT held that the obligation of the Organization as an employer to prevent any damage to the health of the staff member “stands also when alleged harassment remains undemonstrated, because the duty of care involves also the alleged victim of harassment (whatever will be the result of the harassment investigation)”. Per its reasoning, “the subjective perception of being harassed—when sustained by an objective situation of crisis or conflict in the workplace and producing a certain negative impact on the health conditions of the staff member—may already be relevant in causing moral damage”, and “[t]his liability by the Organization is general and objective and encounters a limitation only in the behaviour of the affected staff member as sole cause of the situation”.¹⁸

49. In this line of reasoning, the UNDT thoroughly considered the factual matrix that was before it, including the panel’s investigation report, a statement by Mr. Cahn’s psychiatrist and affidavits from a Human Rights Officer, Council Treaty Mechanism, OHCHR (Geneva), who was also a member of the OHCHR Staff Committee, as well as from a former Deputy, ROE, who testified about the general working conditions at the ROE, which the UNDT assessed as particularly meaningful and alarming.

¹⁶ *Ibid.*, paras. 56-57.

¹⁷ *Ibid.*, paras. 51-74.

¹⁸ *Ibid.*, paras. 99-100.

50. Upon considering the evidenced working conditions “in an objective way, irrespectively of the responsibility in causing them”,¹⁹ the UNDT determined that Mr. Cahn had suffered harm to his health due to the Organization’s failure to fulfill its duty of care towards him, namely to timely protect Mr. Cahn for many months despite having been asked to intervene and having been aware of the serious impact of the working environment, –characterized as toxic by the UNDT-, on his health.

51. Indeed, it is common cause that Mr. Cahn had sought, from early January 2019, the assistance of OHCHR Senior Management and in particular of his Second Reporting Officer (SRO), with a view to seek intervention or mediation that might stop the negative treatment he felt he received. He also submitted, on 5 February 2019, a complaint of harassment and abuse of authority by his FRO to OHCHR Senior Management in which Mr. Cahn raised attention to the impact that his FRO’s actions had on his physical and mental health.

52. The available record clearly indicates further that, following Mr. Cahn’s complaint to OHCHR, his working conditions continued to deteriorate to the extent that on 2 April 2019, coming out of a work meeting, Mr. Cahn had a complete collapse both physically and mentally as a result of the cumulative effect of his worsening work conditions. According to Mr. Cahn, the specific trigger for this breakdown was a visit by his SRO, who was also the official responsible for supervision of the ROE. Mr. Cahn recalled that “[his SRO and FRO] conducted a staff meeting as if absolutely nothing was amiss, notwithstanding the fact that virtually all of the staff of the office had complained to management about the conduct of the head of office”²⁰. As a result, Mr. Cahn suffered a breakdown during the meeting and subsequently collapsed into uncontrollable crying. Thereafter, he was continuously on medically certified sick leave from 24 April 2019 to 4 September 2019.

53. It is also a matter of the record that there has been a disharmonious work environment attributable to a number of individuals, including Mr. Cahn’s FRO. As it was ascertained by the investigative panel and descriptively indicated in its investigation report on 31 July 2019 (paragraph 132.6), the atmosphere in the ROE since the appointment of Mr. Cahn’s FRO (the RR) in May 2017 and the subsequent deterioration of the working environment at the ROE was the result of a combination of factors, with responsibility falling on a number of individuals,

¹⁹ *Ibid.*, para. 76.

²⁰ *Ibid.*, para. 79.

situations and sequences of events. Specific examples of said disharmonious work environment are identified in the same investigation report. Indicatively:

- The tone of some of the RR's e-mails was not appreciated and considered offensive by ROE staff (para. 124);
- Communication between the RR and other ROE staff deteriorated significantly from December 2018 onward (para. 124);
- The HQ/CRPD team was "shocked" at RR's cancellation of Mr. Cahn's mission (para. 97);
- The RR did not act in the best interest of parties when not engaging them in bilateral discussion on certain matters (para. 103);
- The RR conducted the ePAS outside the usual manner and this was "not ideal" (para. 109);
- Staff were genuinely afraid of the RR's abrasive and negative feedback and refrained from full participation in office activities for fear of retaliation (para. 122);
- Staff complained of insulting and negatively-toned e-mails that were demoralizing and uncomfortable, to the point that interactions with the RR were described by staff as humiliating (para. 122);
- All colleagues felt there were issues with the RR's communication (para. 122);
- Staff felt uncomfortable witnessing colleagues being reprimanded in an unacceptable manner and felt on edge (para. 122);
- Staff reported the RR's e-mail communications as cold and hostile, with others reporting her communications as authoritarian and belittling and retaliatory for one staff member upon returning from maternity leave (para. 122);
- Staff reported the RR as being very strict (para. 122);
- The HR Chief who conducted the surprise mission to the ROE in February 2019 similarly reported that there was a strong communication problem and major trust issues (para. 125); and
- Senior Management also expressed concerns, noting that they had heard reports of the RR making staff cry, questioning her management style, noting that she exhibited some flaws, pursues actions that are not the best course, that her communication and feedback was not professional, her style and approach was an issue, among various other similar concerns (para. 128).

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 Brussels approached OHCHR Staff Committee. They reported several incidents occurred in the Regional Office related to harassment, abuse of authority and poor working environment leading to deteriorating mental health situations. Based on the Staff Committee's mandate and on other UN policy documents, and particularly the [Secretary-General's Bulletin on Prohibition of Discrimination, Harassment and Abuse of Authority and the Secretary-General's UN-wide Mental Health and Well-being strategy for 2018-2023, the Staff Committee followed up on the above-mentioned allegations, which were brought to the attention of OHCHR Human Resources and OHCHR Management. The incidents reported by staff members in the Regional Office included:

- Stress and uncertainty about their portfolios as a result of: significant number of matters under their responsibility drastically reduced; decisions to cut down portfolios done without any involvement or prior discussion with the staff concerned, decisions presented to staff members as final and staff being summarily informed that grounds for the decision were changes introduced to the Annual Work Plan for the office,
- Not being acknowledged for their work-related accomplishments, no recognition of their work,
- Anxiety after having been informed that their work performance was considered poor and being requested to consider leaving the organization or requested to find new jobs,
- Fear of their contracts not being renewed,
- Fear of being considered or labelled as challenging the views of the manager if they express their views in a team meeting or in front of other colleagues,
- Fear of receiving emails with harsh messages, after having received email content belittling them or treating them poorly,
- Working in isolation,
- Fear to communicate with other colleagues,
- Fear to gather in groups during lunchtime or after working hours, as these gatherings were considered as occasions for undermining the regional office's management,

- 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 properly to their allegations and requests,
- Feeling their allegations were not taken seriously,
- Feeling they were blamed for the unhealthy working environment in the Regional Office,
- Feeling caught in surprise for changes or attempts to introduce changes of their First [R]eporting Officers without being properly consulted,
- Feeling uncomfortable and embarrassed in front of outsiders inquiring about changes in the Office's priorities and changes in portfolios,
- Being under regular surveillance by their medical practitioners, burnout counsellors, or psychologists,
- Having been advised by their medical practitioners or psychologist to try to do whatever was possible to leave the unhealthy working environment,
- Experiencing anxiety in their interaction with family members,
- Experiencing living in a toxic working environment, not in line with standards in force in the United Nations.

56. Per the second witness' affidavit:

I am ... a direct witness to his having collapsed in tears, his whole body shaking, immediately after [the 2 April 2019] meeting, before going on sick-leave, from which he did not return before September 2019. It is my view that this is the direct result of his having been left under an abusive supervisor for months, despite his efforts to raise his situation with colleagues outside Brussels, in the hope that the treatment he was suffering would be addressed. When I recollect those times, I count myself lucky that I myself was not reduced to a similar state. In short, I have witnessed, during the period in question, the gradual degradation of a valued colleague because of bullying.

57. In this respect, of notable probative value is also the statement by Mr. Cahn's psychiatrist that:

[Mr. Cahn] is a 51-year-old man, consulting for first time on 12/07/2019, due to a mixed anxiety-depressive disorder caused by toxic work environment.

As a reminder, he has been working at the United Nations, for many years. He is married and father of two children.

Since January 2019, he has begun to feel a form of insidious and repeated harassment and bullying by his unit manager. ... [S]everal colleagues in his unit were experiencing the same process at this period.

Under these stress conditions, he started to feel oppressed, anxious and with sleep disturbances.

Also, and given the persistence of the deleterious atmosphere at work he reports very precisely that some months later, in April 2019, coming out of a work meeting, he had a complete collapse both physically and mentally.

He described also how this professional issue had major negative impact in his family.

In a first time, he consulted [a] general practitioner, and [a coach] for psychosocial support. [The former] requested a psychiatric consultation.

58. In light of the totality of the evidence on record, the Appeals Tribunal is satisfied that the Administration had been made aware of the disharmonious working conditions within the ROE and put on notice about the possible harmful impact on Mr. Cahn's health before the formal complaint was investigated and reported on 31 July 2019, and therefore could have acted pre-emptively to protect Mr. Cahn in accordance with the applicable legal framework in a timely manner. Nonetheless, the actions taken by the Administration to address this situation were reactive, delayed and eventually much too late in this instance to prevent the harm experienced by Mr. Cahn, as he correctly asserts.

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 seeking assistance and said discussions to accommodate him. Specifically, on 31 May 2019, while on long-term sick leave, the Administration contacted Mr. Cahn to offer him the possibility to change supervisor, conditional upon moving to a new duty station. Further, proposed revised terms of reference were presented to him on 7 June 2019. Thereafter, Mr. Cahn was removed from his FRO's supervision and was assigned a new portfolio and was fully consulted on the process and the terms of reference for the new position. Additionally, arrangements were made so that Mr. Cahn could telecommute outside of his duty station for six months and be authorized to travel while on sick leave.

60. However, all the while, Mr. Cahn had suffered until these measures were implemented and while he was still under the undisputedly harmful working conditions, as described above. Actually, as already noted, it was only at the beginning of May 2019, following Mr. Cahn's episode of nervous breakdown and four months after his complaint, that the Administration discovered the issue and later started to address it by taking these measures to protect Mr. Cahn. By failing to take such action earlier to address the worsening and disharmonious work environment at ROE and thus exposing Mr. Cahn to harmful working conditions for a considerable amount of time, the Administration failed in its duty of care vis-à-vis Mr. Cahn and compensation shall be awarded to alleviate the harm suffered, provided that the criteria set in law are met and the harm is supported by evidence, issues which are determined below.²¹

61. In conclusion, the Appeals Tribunal agrees with and affirms the UNDT's findings and conclusions. The UNDT conducted a thorough judicial review of the contested administrative decision, i.e., the Administration's decision not to pay Mr. Cahn compensation for moral harm resulting, *inter alia*, from the Administration's failure to take such measures.²² The Appeals Tribunal is satisfied with the detailed analysis of the whole evidence as undertaken by the Dispute Tribunal and agrees with its well-reasoned conclusions about the Organization's failure to fulfill its duty of care towards Mr. Cahn, namely to promptly take protective action upon having been made aware of the disharmonious working environment.

²¹ Article 10(5)(b) of the UNDT Statute. Article 9(1)(b) of the Appeals Tribunal Statute.

²² *Comp. Cohen, op. cit.*, para. 37.

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 the case has an appreciation of all the issues for determination and the evidence before it.²³ We are satisfied that the UNDT's conclusions are consistent with the evidence and that there was no error of law or procedure, excess of jurisdiction or failure to exercise jurisdiction such as to vitiate the UNDT's Judgment pursuant to Article 2(1)(a) to (d) of our Statute. The Secretary-General has not put forward any persuasive grounds to warrant interference by this Tribunal.

63. Therefore, we reject the Secretary-General's assertions to the contrary as being without merit. Notably, there is no merit in the Secretary-General's claim that the UNDT erred on a question of fact, resulting in a manifestly unreasonable judgment, in finding that the Administration did not exercise due care concerning Mr. Cahn under the relevant legal framework and that the latter had been subjected to a "toxic" and "degrading" work environment. As the Secretary-General argues, this is so because, first, the Administration took a number of specific, concrete actions appropriate to address Mr. Cahn's concerns about his work environment and, second, Mr. Cahn's SRO's behaviour had not been found abusive by the investigative panel and the UNDT, which in this way contradicted itself.

64. As alluded above, the panel found that the cumulative negative effect of more than one cause, including the behaviour of a number of individuals, situations and sequences of events, had ultimately led to a disharmonious working environment at the ROE. These stifling and harmful working conditions are also corroborated by the rest of the evidence on file. Arguably, in the circumstances of the instant case, which depict a picture of anything but a harmonious working environment at ROE, there existed a duty of care on the part of the Organization towards Mr. Cahn to timely implement preventive or interim measures and expeditiously undertake an investigation into his complaint and thus prevent any possible harm to his health, irrespective of whether the actions of his FRO rose, legally strictly speaking, to the level of prohibited conduct. In this respect, the UNDT was correct in its approach to assess the working

²³ *Kacan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-582, para. 25; *Staedtler v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-546, para. 35, citing *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123.

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 [Mr. Cahn], by his actions, 'may have contributed to an intimidating, offensive and hostile work environment' and referred the [i]nvestigation [r]eport on [Mr. Cahn's] conduct to the Assistant Secretary-General/OHR for possible disciplinary action"; and iii) The "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 following 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'". These assertions do not assist him.

66. Be that as it may, on 14 April 2022, Mr. Cahn ultimately received the final decision memorandum from the Deputy High Commissioner regarding the outcome of the complaint filed by his FRO against him. The finding confirmed that Mr. Cahn had not engaged in prohibited conduct warranting imposition of a disciplinary sanction, and it was determined that his conduct would instead result in managerial action in the form of an advisory communication and a requirement to undertake training on how to improve his communications skills.

67. Given that the above referenced 14 April 2022 memorandum is evidence which had previously not been available to, or known by, the parties, nor could it have been presented to the UNDT in the underlying record, there is merit in Mr. Cahn's submission that this additional documentary evidence be received by this Tribunal insofar as the Secretary-General makes factual assertions in its submission that are contrary to its contents. There exist exceptional

circumstances, as contemplated in Article 2(5) of the UNAT Statute and Article 10(1) of our Rules allowing for it be part of the record before the Appeals Tribunal.

68. Finally, because of the way in which this appeal is dealt with by us and our holding that the cited provisions of ST/SGB/2008/5 provide legal support for the UNDT's finding that the Administration breached its duty of care owed to Mr. Cahn in the specific case, i.e., to ensure a harmonious work environment and protect him from work-related harm, which forms an inherent part of his employment status in this regard, it is not necessary to address the grounds of appeal advanced by the Secretary-General that the UNDT erred in law by: a) making a reference to the Preliminary Report from the HLCM Working Group on "Reconciling Duty of Care for UN personnel while operating in high risk environments" (CEB/2016/HLCM/11 dated 15 March 2016), because it was not applicable to the present case; b) making a reference to Appendix D to the Staff Rules, which was not applicable to Mr. Cahn's claims for many reasons; and c) finding an Administration's duty of care vis-à-vis its employees which was unreasonably broad and sweeping, such as it would be virtually impossible to meet. They are not decisive for the outcome of the present case as an appeal is not against the reasoning of the lower tribunal; it is against the order. This is so irrespective of the correctness of the UNDT's finding that there exists, in general, an employer's duty to protect the health, safety and welfare of their employees and other people who might be affected by their business and that the employer must do whatever is reasonably practicable to achieve this by "making sure that workers and others are protected from anything that may cause harm, effectively controlling any risks to injury or health that could arise in the workplace".²⁴

Moral damages (non-pecuniary damages)

69. Turning to the issue of non-pecuniary damages, we recall our jurisprudence that "an entitlement to moral damages may arise where there is evidence produced to the Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee, which can be directly linked, or reasonably attributed, to a breach of his or her substantive or procedural rights and where the Tribunal is satisfied that the stress, harm or anxiety is such as to merit a compensatory award".²⁵

²⁴ Impugned Judgment, para. 53.

²⁵ *Mohammad Yahya Al Othman v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2022-UNAT-1196, para. 117; *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36.

70. Moreover, this Tribunal has consistently held that “compensation must be set by the UNDT following a principled approach and on a case-by-case basis” and that the Appeals Tribunal will not interfere lightly as “[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case”.²⁶

71. In the case before us, the UNDT followed this approach. It found there was harm directly caused by the Administration’s (OHCHR) failure to take protective action at an early stage, despite having been asked to intervene many months before and having been aware of the serious impact of the “toxic” working environment on Mr. Cahn’s health. The evidence on file supports this finding. Further, the UNDT Judge exercised his remedial discretion in awarding compensation for non-pecuniary damages (moral damages) equivalent to seven months of net base salary for the harm suffered. In this context, we hold that the UNDT did not commit any error of law or fact in its award and assessment of the compensation for this specific reason. The Secretary-General has not demonstrated any error of law or manifestly unreasonable factual findings on the part of the UNDT. In such circumstances, the Appeals Tribunal gives deference to the UNDT in the exercise of its discretion and will not lightly disturb the quantum of damages.

72. In the premises, the appeal must be dismissed.

²⁶ *Mohammad Yahya Al Othman op. cit.*, para. 114, citing *Ho v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-791, para. 31; *Mihai v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-724, para. 15; *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-691, para. 28.

Judgment

73. The appeal is dismissed by majority, Judge Knierim dissenting, and Judgment No. UNDT/2022/008 is hereby upheld.

Judge Knierim appends a dissenting opinion.

Original and Authoritative Version: English

Decision dated this 24th day of March 2023 in New York, United States.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Halfeld

Judgment published and entered into the Register on this 20th day of April 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar

Judge Knierim's Dissenting Opinion

1. I am respectfully dissenting from the Majority Judgment. In my view, the UNDT erred in law and exceeded its jurisdiction in awarding Mr. Cahn compensation for the harm he suffered. Therefore, I would grant the Secretary-General's appeal and dismiss Mr. Cahn's application in its entirety.
2. Before the UNDT, Mr. Cahn challenged the following decisions:
 - a) To close his 5 February 2019 complaint against his FRO pursuant to ST/SGB/2008/5 and not to refer her conduct to the ASG/HR;
 - b) Not to pay him compensation for moral harm resulting from harassment and abuse of authority as well as from the Secretary-General's lack of protective measures; and
 - c) Not to take disciplinary or other appropriate action against his FRO.
3. By Judgment No. UNDT/2022/008 issued on 31 January 2022, the UNDT partially granted the application and ordered the Secretary-General to pay Mr. Cahn compensation in the amount of seven months' net base salary for the "period running from OHCHR's inertia until [Mr. Cahn's] return to work, namely from February to August 2019".¹ The UNDT held that Mr. Cahn suffered harm because the Secretary-General violated his duty of care. The UNDT elaborated that "[d]uty of care would have required OHCHR to take immediate protective action after having received [Mr. Cahn's] alarming complaint. Instead, OHCHR Senior Management took no action to protect [Mr. Cahn] from a toxic working environment."² In all other aspects, Mr. Cahn's application was dismissed. The UNDT held that the decision not to initiate disciplinary proceedings against Mr. Cahn's FRO was reasonable and lawful.
4. Only the Secretary-General but not Mr. Cahn appealed the Judgment.
5. I do not see any legal basis to award Mr. Cahn compensation for harm.

¹ Impugned Judgment, para. 103.

² *Ibid.*, para. 90.

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 Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

8. Consequently, an award of compensation can either be ordered by the UNDT as specific performance under Article 10(5)(a) of the UNDT Statute (because a claim for compensation follows directly from the staff member's terms of appointment or contract of employment including all pertinent Staff Regulations and Rules and relevant administrative issuances in force at the time of alleged non-compliance) or be based on Article 10(5)(b) of the UNDT Statute.

9. In the present case, the UNDT does not explain whether the award of compensation was ordered under Article 10(5)(a) or (b) of the UNDT Statute. The requirements of these provisions were not reviewed.

10. For the following reasons, I find it is not possible to base Mr. Cahn's claim for compensation on either of these provisions.

Can the award of compensation be ordered as specific performance under Article 10(5)(a) of the UNDT Statute because a claim for compensation follows from Mr. Cahn's terms of appointment including all pertinent Staff Regulations and Rules and all relevant administrative issuances?

11. It is possible for staff members to file a direct claim for compensation against the Secretary-General under Appendix D of the Staff Rules. If a staff member suffers death, injury or illness attributable to the performance of official duties on behalf of the United Nations, he or she can be entitled to such compensation. Appendix D establishes strict time limits to file such claims and a procedure which has to be followed (e.g. involvement of the Medical Services Division and the Advisory Board on Compensation Claims).

12. Mr. Cahn, although alleging that he suffered a physical and mental breakdown coming out of a work meeting on 2 April 2019, never filed a claim for compensation under Appendix D.

13. Article 1.2 of Appendix D points out that “[c]ompensation or other forms of recourse provided under the present rules constitute the sole remedy for service-incurred death, injury or illness” and that “[t]he United Nations will not accept, consider or provide compensation or benefits for service-incurred death, injury or illness except under the present rules”.

14. In accordance with this provision, ST/SGB/2008/5 does not mention or contain any entitlement for compensation in case staff members suffer harassment, abuse of authority and/or discrimination.

15. There is no legal or administrative provision which would allow or oblige the Secretary-General to award compensation for harm which a staff member suffered because the Administration violated its duty of care. When the Secretary-General receives a claim for compensation for service-incurred harm, he is legally obliged to reject it unless it is based on Appendix D. Consequently, the UNDT may not order the Secretary-General to pay compensation as specific performance due to an alleged violation of the duty of care.

16. Therefore, the UNDT's award of compensation cannot be based on Article 10(5)(a) of the UNDT Statute.

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 9(1)(b) expressly authorize the Tribunals to order compensation for harm caused by an unlawful administrative decision. This includes compensation for damage resulting from service-related injuries or illnesses.

18. However, an award of compensation under Article 10(5)(b) of the UNDT Statute (and Article 9(1)(b) of the UNAT Statute) requires that the harm suffered by a staff member was caused by an administrative decision which the staff member had challenged before and which was found unlawful by the UNDT. There must be a direct causal link between the unlawful administrative decision and the harm suffered by the staff member.

19. These conditions are not met in the present case.

20. Mr. Cahn, before the UNDT, challenged the Secretary-General's decision to close his 5 February 2019 complaint and not to take disciplinary or other action against his FRO for harassment and abuse of authority. This administrative decision was found reasonable and lawful by the UNDT. As Mr. Cahn did not appeal the first instance Judgment, this finding by the UNDT stands. The Appeals Tribunal has consistently held that absent an unlawful administrative decision, there can be no award of compensation under Article 10(5)(b) of the UNDT Statute. Further, the administrative decision challenged by Mr. Cahn was issued on 9 October 2019; on 14 December 2019, he requested management evaluation. However, the harm suffered by Mr. Cahn occurred already between February and August 2019 (this is the time period for which the UNDT ordered compensation for harm), particularly on 2 April 2019 when he had a physical and mental breakdown coming out of a work meeting. Consequently, the harm suffered by Mr. Cahn cannot have been caused by the 9 October 2019 administrative decision.

21. I cannot detect any other administrative decision which was challenged by Mr. Cahn and which could serve as a basis for an award of compensation under Article 10(5)(b) of the UNDT Statute.

22. Insofar as the UNDT elaborates that OHCHR should have taken protective measures sooner, there is no evidence on record that Mr. Cahn requested any administrative decision to protect him (e.g., a transfer), that such a request was (implicitly) denied, that Mr. Cahn subsequently filed a request for management evaluation and then brought the matter before the UNDT. As stated above, the first administrative decision apparently was issued on 9 October 2019 and cannot have caused the harm which occurred between February and August 2019. Mr. Cahn did not challenge, and the UNDT did not review, the lawfulness of any other administrative decision.

23. Subject to the following requirements, an administrative decision to reject a claim for compensation can also be a basis to award compensation under Article 10(5)(b) of the UNDT Statute: the staff member brought a claim for compensation before the Secretary-General, the claim was rejected by the Secretary-General, the staff member requested management evaluation of this decision (if required), the staff member brought the matter before the UNDT, claiming and showing that he or she suffered harm by the denial to award compensation, and the UNDT found i) the denial of compensation was unlawful, and ii) this unlawful decision had caused (additional) harm to the staff member.

24. In the present case, it is evident that these conditions are not met. In his 5 February 2019 memorandum, Mr. Cahn does not address the matter of compensation. In his 14 December 2019 request for management evaluation, he alleges that he lodged a claim for compensation in his 27 June 2019 submissions to the fact-finding panel. Assuming, like Mr. Cahn, that this request was implicitly denied by the 9 October 2019 decision, the denial of compensation cannot have caused Mr. Cahn's harm which had already occurred between February and August 2019. Also, Mr. Cahn never stated before the UNDT that his harm occurred because the Secretary-General rejected his claim for compensation. Finally, as Mr. Cahn did not file a claim under Appendix D, any decision of the Secretary-General not to award compensation would have been lawful and cannot be a basis for an award of compensation.

Conclusion

25. In not strictly applying and reviewing the prerequisites of Article 10(5)(a) and (b) of the UNDT Statute including the required causal link between an unlawful administrative decision and the harm for which the staff member claims compensation, as the Tribunals do in all other

cases, the UNDT committed an error of law. At the same time, it exceeded its competence because it established a whole new regime of compensation (for breach of duty of care) alongside Appendix D which the Tribunals have no authority to do and which is expressly forbidden under Article 1.2 of Appendix D.

26. The Majority, while mentioning Article 10(5)(b) of the UNDT Statute and Article 9(1)(b) of the UNAT Statute in a footnote,³ does not undertake a proper review either. At paragraph 61, my colleagues hold that “[t]he UNDT conducted a thorough judicial review of the contested administrative decision, i.e., the Administration’s decision not to pay Mr. Cahn compensation for moral harm resulting, *inter alia*, from the Administration’s failure to take such measures”. At paragraph 71, they state that the UNDT (correctly) “found there was harm directly caused by the Administration’s (OHCHR) failure to take protective action at an early stage, despite having been asked to intervene many months before and having been aware of the serious impact of the ‘toxic’ working environment on Mr. Cahn’s health”. It is not clear what the (unlawful) administrative decision is which allegedly caused Mr. Cahn’s harm. As explained above, the “failure to take protective measures” could only be regarded as an administrative decision, if Mr. Cahn had requested such protective measures, the Secretary-General had denied them, Mr. Cahn had filed a timely request for management evaluation, had brought the matter before the UNDT, and the UNDT had found the denial unlawful and also that Mr. Cahn’s harm was directly caused by the unlawful denial.

27. The Majority should have said in which aspect any administrative decision challenged by Mr. Cahn before the UNDT was unlawful and how it could have caused his harm which had already occurred between February and August 2019.

28. As to the alleged violation of duty of care, I find the Majority Judgment inconsistent. After citing ST/SGB/2008/5, my colleagues refer to the well-settled jurisprudence of the Appeals Tribunal “that, under the above provisions, 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”.⁴ It is common cause that ST/SGB/2008/5 has the goal to protect staff members against harassment, abuse of authority, and discrimination. However, as already mentioned above, even in a case of such harassment, abuse of authority or discrimination,

³ Majority Judgment, para. 60.

⁴ *Ibid.*, para. 38.

ST/SGB/2008/5 does not provide for compensation as a “remedial measure”. In the present case, the Administration decided to close Mr. Cahn’s complaint because it had not been established that his FRO had committed harassment, abuse of authority or discrimination, and the UNDT found this decision reasonable and lawful. The Majority does not explain how a duty of care can derive from ST/SGB/2008/5 in cases where there is neither harassment nor abuse of authority or discrimination of the staff member but only his or her “subjective perception of being harassed”.⁵

Dated this 24th day of March 2023 in New York, United States.

(Signed)

Judge Knierim

Entered into the Register on this 20th day of April 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar

⁵ *Ibid.*, para. 99.