UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2023/066
Judgment No.: UNDT/2025/053
Date: 11 August 2025
Original: English

Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: Liliana López Bello

MELBIKSIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Marietta Hristovski, UNHCR
Jan Schrankel, UNHCR

Introduction

1. The Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), contests the decision of the Inspector General's Office ("the IGO") to decline to open investigations into three different and separate misconduct reports filed by him.

2. In response, the Respondent contends that the application is not receivable and, in any event, without merit.

3. For the reasons set out below, the application is rejected.

Facts

4. In March 2016, the Applicant started working with UNHCR on a temporary appointment. In February 2017, he received a fixed-term appointment and, in January 2020, he went on Special Leave Without Pay ("SLWOP"). On 22 June 2020, he resigned.

5. On 26 June 2020, the Applicant and UNHCR entered into a settlement agreement regarding two management evaluation requests, which the Applicant had filed on 11 March 2020 and 4 June 2020 ("MER1" and "MER2", respectively) concerning two non-selection decisions, a decision not to extend his SLWOP, and a decision to separate him from service ("the settlement agreement").

6. In 2023, the Applicant filed three misconduct reports to the IGO (on 15 March 2023, 31 May 2023, and 2 June 2023, respectively) concerning (a) the UNHCR Regional Representative at the duty station where he had worked, (b) DB (name redacted for privacy reasons), also a UNHCR staff member who, according to the Applicant, had rejected a request that he had filed to extend his SLWOP, and (c) ZS (name redacted for privacy reasons) who was his former UNHCR supervisor.

7. On 28 June 2023, the IGO refused to investigate the Applicant's 2 June 2023 misconduct report concerning DB, and on 6 July 2023, the IGO also refused to investigate his 31 May 2023 misconduct report regarding ZS. The IGO never

responded to the Applicant's 15 March 2023 misconduct report about the UNHCR Regional Representative.

Consideration

Receivability

The Respondent's claims concerning non-receivability

8. The Respondent submits that the application is not receivable as the Applicant's three misconduct reports: (a) were covered by the settlement agreement, including its no-sue clause, (b) did not have a sufficient nexus to his former employment with UNHCR, and (c) were filed out of time. In response, the Applicant contends that his appeal against the IGO's refusal to investigate any of these three misconduct reports is indeed receivable.

Were any or all of the misconduct reports covered by the settlement agreement, including its no-sue clause?

9. The Respondent contends that the Applicant is "contesting matters which have been previously resolved through mediation". According to art. 8.2 of the Dispute Tribunal's Statute, "[a]n application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation". In response, the Applicant, in essence, submits that the settlement agreement covered none of his three misconduct complaints.

10. By the settlement agreement the parties agreed to "resolve and fully and finally settle any and all past, present and future claims in respect of, arising from, connected with, or in any way relating to, MER1 and MER2 and causes of action and possible claims which [the Applicant] may have or have had against UNHCR arising out of any and all facts and matters referred to, or described in, MER1 and MER2". The Applicant further agreed "not to take any other action or bring proceedings before [the Dispute Tribunal] or the … Appeals Tribunal or any other court in any jurisdiction with respect to any and all matters arising out of or related to the facts and/or matters referred to or described in MER1 and MER2, including his separation from UNHCR".

11. In the settlement agreement, "MER1" referred to the Applicant's 11 March 2020 request for management evaluation contesting "the decision not to select him against job opening 18380 P-2 Associate Communications Officer Stockholm Sweden, the decision not to extend his [SLWOP] and the decision to separate him from UNHCR", whereas "MER2" referred to the Applicant's 4 June 2020 request for management evaluation contesting the "decision not to recruit him to a position as P-2 Associate Social Media Officer in Bangkok". The Tribunal notes that these definitions properly reflect and correspond to the Applicant's actual requests for management evaluation.

12. The Tribunal also notes that even if certain facts and/or matters referred to or described in MER1 and MER2 may also have been relevant to, at least, some parts of the Applicant's three misconduct reports, the legal issues at stake are entirely different. While the present case concerns the lawfulness of the IGO's rejection of these three misconduct reports, the settlement agreement relates to certain administrative decisions regarding non-selection, SLWOP, and separation from service. The underlying legal frameworks and decision-makers are therefore separate and distinctive.

13. Accordingly, the Tribunal finds that the Applicant's three misconduct reports are not covered by the settlement agreement, including its no-sue clause. The Tribunal further notes that if a no-sue clause of a settlement agreement was to be extended to cover all future misconduct reports of a releasor (in the present case, the Applicant) concerning a releasee (UNHCR), the risk would be that any rejection of a misconduct report regarding, even very serious, disciplinary offences could subsequently be shielded entirely from judicial review. Creating such a culture of impunity defies the fundamental principle of access to justice and would not be in the best interest of the Organization. In any event, the Tribunal notes that, at minimum, the 15 March 2023 misconduct report also concerned facts and circumstances other than those encompassed by the settlement agreement.

Did any of the three misconduct reports lack a nexus to the Applicant's former employment with UNHCR?

14. The Respondent's submissions may be summarized as follows:

a. Article 3.1 of the Statute of the Dispute Tribunal "extends jurisdiction *ratione personae* to former staff members", but "there must be a sufficient nexus between the former employment and the contested decision", referring to the Appeals Tribunal's judgments in *Khan* 2017-UNAT-727*,* para. 29 and *Hassan* 2022-UNAT-1287*,* paras. 40-41. "A sufficient nexus exists when the challenged decision has bearing on an applicant's former status as a staff member, specifically when it affects his or her prior contractual rights"; and

b. At the time of the misconduct reports, the Applicant "was not a staff member as he had resigned from UNHCR almost three years earlier", and "[a]ny sufficient nexus which may exist, is at most inextricably linked to the Applicant's separation, and therefore covered by the mediation agreement signed by the Applicant on 26 June 2020". The "decisions by the IGO to not open investigations into the allegations do not affect the Applicant's prior contractual rights and thus had no bearing on his former status as a staff member". "As such, the matter is not receivable *ratione personae*".

15. The Applicant, basically, contends that there was indeed a nexus between all three misconduct reports and his former employment with UNHCR.

16. Article 3.1(b) of the Statute of the Dispute Tribunal provides that an application to the Dispute Tribunal "may be filed by … [a]ny former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes". A precondition is, however, that "there must be a sufficient nexus between the former employment and the contested decision" (see *Arango* 2021-UNAT-1120, para. 28).

17. For the Tribunal to determine if such nexus existed, it therefore needs to review the content of each of the three misconduct reports to assess whether they were sufficiently connected to the Applicant's former employment with UNHCR:

a. In the 15 March 2023 misconduct report concerning the UNHCR Regional Representative, the Applicant requested an investigation into the following matters:

i. A "letter of intent" from the UNHCR Regional Representative concerning a reclassification of the Applicant's former position with UNHCR; the UNHCR Regional Representative's subsequent decision to reclassify the position; and the failure to hold the UNHCR Regional Representative responsible for the alleged error in doing so and his possible aversion against the Applicant;

ii. The UNHCR Regional Representative's decision to appoint CB (name redacted for privacy reasons) to serve as a "P4 [R]egional [O]fficer" and as the Applicant's "supervisor"; and

iii. The UNHCR Regional Representative's (i) decision on "selectable holidays" without consulting with the staff, (ii) demanding "extensive written reports", (iii) maintaining "key position vacant for prolonged period, including P4 comms officer", (iv) possible breach of "branding rules" on business cards, (v) moving the office to a location "without functioning telephones and internet" and a "proper security check", (vi) "elusive" answers to the Applicant's request for "possibilities to get another position in the office in 2020 as [his] contract was expiring and position was cut by the end of 2019 … although [his] P2 [communications] colleague moved to Geneva [headquarters] in November 2019", (vii) rejection of the Applicant's candidacy for this colleague's former position based on his gender and then leaving the post vacant, (viii) emails of January 2020 in which he wrote the Applicant "in an aggressive tone that [he had] to set an autoreply to [his] email stating that [he did] not work at the office anymore".

b. In the 31 May 2023 misconduct report regarding DB, the Applicant complained about this UNHCR staff member's rejection of his request to

have his SLWOP extended in 2020 when the Applicant was still working in UNHCR; and

c. In the 2 June 2023 misconduct report, the Applicant took issue with ZS, who was his former supervisor at UNHCR, and how this person had handled (i) the possible non-extension of the Applicant's appointment on 30 January 2018 due to the reallocation of resources to other offices in the region, and (ii) his placement on an alleged flawed performance improvement plan.

18. Accordingly, since all three misconduct reports directly concerned his former employment with UNHCR, the Respondent's non-receivability claims in this respect are rejected.

Were any or all of the Applicant's three misconduct reports time-barred?

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

a. "[T]o the extent the Applicant's complaints on 15 March 2023, 31 May 2023, and 2 June 2023 relate to purported decisions that may not be fully covered by the settlement agreement and that the Applicant alleges were taken for improper motives", then "these complaints essentially amount to a formal contest of these decisions three to five years after they were actually taken, and that any such contest in the disguise of a complaint of misconduct is time-barred";

b. Pursuant to art. 8.1(c) of its Statute, "the Tribunal has jurisdiction to consider applications only against an administrative decision for which an applicant has (timely) requested management evaluation, and … according to Staff Rule 11.2 (c) a 'request for management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested'";

c. Under "the jurisprudence of the Appeals Tribunal, statutory time limits must be strictly enforced, and pursuant to art. 8.3 of the Dispute Tribunals'

Statute and the established jurisprudence of the Appeals Tribunal, the Dispute Tribunal has no discretion to waive the deadline for management evaluation"; and

d. The Applicant's "complaints to the IGO did not reset the time limit for a request for management evaluation to reconsider decisions for which he did not previously file timely management evaluation requests". "As such, he cannot now seek to contest decisions originally taken three to five years ago by his complaints to the IGO, and subsequent management evaluation against the IGO's decisions not to investigate them". Accordingly, "as the Applicant did not challenge the purported decisions within the statutory 60 calendar day-deadline, his request for management evaluation, and consequently this [a]pplication, are therefore also not receivable *ratione temporis*".

20. The Applicant, essentially, contends that all three misconduct reports were filed in a timely manner.

21. The Tribunal notes that the Respondent's theory has no foundation in law. By challenging the IGO's rejections of his three misconduct reports, the Applicant also did not "formally" contest any other decisions under art. 2.1(a) of the Tribunal's Statute to which he referred in these misconduct reports. Rather, the other decisions may, as relevant, form part of the factual background of the contested rejections. Still, under its Statute, the Tribunal has no authority to rescind or grant any other remedy related to any of these other decisions.

22. Consequently, this non-receivability claim is also rejected.

Did the Applicant request management evaluation of the IGO's rejection of his 15 March 2023 misconduct report?

23. It is trite law that the Tribunal must examine its own jurisdiction (see, for instance, *O'Neill* 2011-UNAT-182 and *Briel* 2024-UNAT-1480). Requesting management evaluation of a contested decision, such as the IGO's rejection of the Applicant's 15 March 2023 misconduct report, is a mandatory preliminary step before filing an application with the Dispute Tribunal under staff rule 11.2. In this regard, the "purpose of management evaluation is to afford the Administration the

opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary" (see *Applicant* 2013-UNAT-381, para. 37).

24. In the present case, the Applicant makes no direct reference to the IGO's rejection of his 15 March 2023 misconduct report in his request for management evaluation of 24 August 2023, wherein he only referred explicitly to his 31 May and 2 June 2023 misconduct reports. This may be explained by the fact that the IGO never responded to the 15 March 2023 misconduct report and therefore did not notify him of any decision. The absence of a response may, however, be construed as an implied decision (see, for instance, *Birya* 2015-UNAT-562, para. 47), and in UNHCR's management evaluation of 27 October 2023, reference was also made to the Applicant's misconduct report concerning the "former Representative", which indeed is the 15 March 2023 misconduct report. Similarly, in the reply, the Respondent also referred to the Applicant's 15 March 2023 misconduct report as being under appeal, and he made no claim regarding non-receivability for failure to request management evaluation. Further, in the Applicant's response to Order No. 073 (GVA/2025) dated 27 June 2025, he confirmed that in his application, he also intended to appeal against the IGO's rejection of his 15 March 2025 misconduct report.

25. Accordingly, the Tribunal finds that the Applicant's request for management evaluation of the IGO's rejection of his 15 March 2023 misconduct report is subsumed in the Applicant's 24 August 2023 management evaluation request.

The lawfulness of the contested decisions

The parties' submission

26. The Applicant submits that his three misconduct reports to the IGO "allege serious misconduct". He argues that even if the "IGO possesses discretion regarding when and whether to initiate investigation, this discretion must be exercised reasonably and in accordance with the law. Such discretion, "is not a blank check; it is the responsibility that must be discharged in good faith and with proper consideration of relevant factors". When the "IGO refuses to investigate

documented rule violations—not mere disagreement or subjective grievances, but concrete breaches of established procedures—this is not an exercise of discretion but an abdication of responsibility". He further questions UNHCR's authority to represent the IGO as "an independent investigative body".

27. Nowhere in the Applicant's submissions to the Tribunal does he more concretely specify why any of the IGO's rejection of any of his three misconduct reports were unlawful. Instead, the Tribunal will refer to his management evaluation request dated 24 August 2023, in which he contended that:

a. "[T]he facts that he reported describe clear breaches of relevant rules". In "one case the management tried to refuse extending [his fixed-term appointment FTA] with only 15 days notice" and "[i]n the other case the responsible officer tried to refuse an extension of SLWOP";

b. In "both cases the actions of UNHCR staff not only [were] a clear abuse of power, but were also harmful for the reputation of UNHCR". He "cannot see how 'the evolving practice in addressing grievances in UNHCR' to which IGO refers to in their e-mail is applicable to his report", and "[a]lleged misconduct … still needs to be investigated by [the] IGO";

c. The "IGO also attempted to argue that the events the report refers to date back to 2018 and therefore 'would not be so easy to substantiate with evidence'". The Applicant "disagrees, as [the] IGO had an investigation on him which was finalized in 2022 and was about events in 2018". The "evidence can be easily collected in this case as all the decisions have been well-documented", and "[j]ustice demands that investigation is conducted no matter how long back in time the events took place"; and

d. The "IGO also chose to not open an investigation in one of the reported cases with the argument that the person [he] referred to no longer works for UNHCR". The IGO's "investigation on himself … was conducted and finalized although he was no longer working for UNHCR". Accordingly, "the fact that a person is no longer working for UNHCR cannot by itself be used as grounds to not open an investigation".

28. The Respondent, in essence, submits that the IGO acted within its scope of discretion when rejecting the Applicant's three misconduct reports.

The Tribunal's limited judicial review

29. As also recognised by the Applicant, the Tribunal's judicial review is limited. In its seminal judgment in *Sanwidi* 2010-UNAT-084, the Appeals Tribunal explained that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General" (see para. 40). In this regard, the Appeals Tribunal noted that "the Dispute Tribunal is not conducting a 'merit-based review, but a judicial review'" explaining that a "[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see para. 42). Moreover, as the Appeals Tribunal has stated regarding the circumstances to consider when assessing the Administration's exercise of its discretion, "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see para. 38).

Did IGO act within its scope of discretion when rejecting the Applicant's three misconduct reports?

30. The Tribunal notes that, according to the reply, the contested decisions were taken pursuant to para. 47 of UNHCR's Administrative Instruction on Conducting Investigations (UNHCR/AI/2019/15), although the Tribunal also notes that in UNHCR's management evaluation of 27 October 2023, reference was instead made to UNHCR's Policy on Discrimination, Harassment, Sexual Harassment and Abuse of Authority (UNHCR/HCP/2014/4). The Applicant has not contested either of the legal references.

31. From the Administrative Instruction on Conducting Investigations in UNHCR, it follows that after receiving a report on possible misconduct, the IGO shall "conduct a preliminary assessment to determine whether an investigation is

warranted", which, *inter alia*, is to include an assessment concerning "[w]hether the alleged acts or omissions, if established, could amount to misconduct" (see paras. 46 and 47(b)). If "[u]pon conclusion of the preliminary assessment", the IGO then decides to "[n]ot initiate an investigation", it is to "provide the reason thereof" (see para. 48). Although it is not stipulated in the Administrative Instruction to whom this reason is to be provided, it must be assumed from the context that the reason is to be provided to the person who reported the possible misconduct.

32. Further, to be lawful, a reason must be "adequate and coherent" to ensure "intelligibility (enabling both implementation and acceptance), accountability, and reviewability" and provide proper access to justice (see *Ozturk* 2024-UNAT-1451/Corr.1, paras. 27 and 28).

33. In the present case, the Applicant must therefore be provided with an explanation to why his different misconduct report was rejected by the IGO:

a. The 15 March 2023 misconduct report—the Respondent admits that the Applicant never received a response from the IGO;

b. The 2 June 2023 misconduct report—the IGO indicated in its 28 June 2023 response that "the facts date back to 2018 and [it] would not be so easy to substantiate with evidence", and that "[a]ll things considered … our assessment has concluded that we would not be in a position to open an investigation into the allegations that [he] reported" without further stating what these "things" were; and

c. The 31 May 2023 misconduct report—in its 6 July 2023 response, the IGO referred the Applicant to its 28 June 2023 response and added that "the person [he was] referring to no longer works for UNHCR".

34. Based thereon, concerning the 15 March 2023 misconduct report, the Tribunal finds that not even responding to the Applicant amounts to a direct breach of the IGO's obligation to provide a reason under para. 48 of the Administrative Instruction on Conducting Investigations in UNHCR. Regarding the IGO's common responses to the 31 May 2023 and 2 June 2023 misconduct reports, the

Tribunal finds that the IGO provided no meaningful feedback whatsoever on the substance of the reports and the refusal even to try to obtain any evidence was unconvincing. Further, as for the 31 May 2023 misconduct report, the sole fact that DB no longer worked for UNHCR was not a reason to reject the report without any further explanation. Both rejections, therefore, also breached para. 48.

35. At the same time, the Appeals Tribunal has, on several occasions, pronounced the so-called "no difference" principle whereby a procedural error that made no substantive difference in a specific situation does not invalidate a related administrative decision. For instance, in *Wan* 2024-UNAT-1436, it held that (see para. 40, references to footnotes omitted):

> … Where an irregularity or error in proceedings is identified, its nature and impact must be weighed in context, with it carefully considered whether a different outcome would have resulted had the irregularity not occurred. This requires that it be found to a high standard, variously been described as an "overwhelmingly clear" or "irrefutable" standard, that the outcome would have been inevitable even if the Administration had acted in a lawful manner. If this is so, the fact of the irregularity will not avail to the benefit of the staff member. Commonly referred to as the "no difference principle", such an approach may be applied where, despite the irregularity which has arisen, the ultimate outcome is an irrefutable foregone conclusion.

36. In the present case, the Tribunal finds that, in and of themselves, the underlying decisions referred to in the Applicant's 15 March 2023, 31 May 2023 and 2 June 2023 misconduct reports (see summary above), were nothing but ordinary administrative matters undertaken in the regular course of business of UNHCR. For any of them to constitute "acts or omissions" that, if established, "could amount to misconduct" in accordance with para. 47(b) of the Administrative Instruction on Conducting Investigations in UNHCR, the UNHCR Regional Representative, DB and/or ZS must therefore have undertaken them with a malicious intent or for some other ulterior motive.

37. When alleging ill-motivation, it is the consistent jurisprudence of the Appeals Tribunal that the onus of proof is on the person making the allegation (see, for instance, *Chawla* 2024-UNAT-1423, para. 64, and *Ross* 2019-UNAT-944,

para. 25). In this regard, in *Sobier* 2022-UNAT-1208, the Appeals Tribunal defined the notions of bias and ill-motivation, also holding that they could include certain objective elements in addition to the decision-maker's subjective mindset (see paras. 29 and 30):

> … Bias is an element of natural justice which examines not only the mind of the decision-maker subjectively but also examines the manifestation of the process of decision-making objectively. Put another way, a decision is not only biased if made by a decision-maker deliberately intending to favour or disadvantage the subject of it for improper reasons. Bias can also occur unintentionally on the part of the decision-maker if, considered objectively, a neutral, reasonable and informed bystander would conclude that it is likely to have been made to favour or disadvantage improperly the person affected by the decision. This is sometimes called "a reasonable apprehension of bias". Its ascertainment is an objective exercise, and it arises and is entirely dependent on the circumstances of the case.
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> … Unconscious bias or unconscious prejudice, sometimes based on inaccurate stereotyping of persons or classes of people, is a now well-recognised phenomenon in many legal systems. Its application may, if detected objectively, cause a decision to have been made improperly and so be unsupportable. However difficult in practice it may be to make an accurate assessment of the subjective mind of the decision-maker to determine whether a decision was infected by bias, an objective consideration of all other relevant factors may nevertheless bring the tribunal to the decision that bias was established.
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> … An ill-motivated decision includes not only one in which the decision-maker is deliberately motivated to maliciously deprive the staff member of what would otherwise have been the staff member's entitlement: an ill-motivated decision can also include one where the decision-maker's reasons are simply wrong in law, for example by taking into account irrelevant, or failing to take into account relevant, considerations. While the word "ill" in the phrase "ill-motivated" can include moral wrongfulness, it can also include what might be called innocent or mistaken or negligent wrongfulness. The important element is wrongfulness, not the subjective attribution to the decision-maker's motive for its occurrence.

38. In the present case, the Applicant alleges that the decisions to which he refers in the 15 March 2023, 31 May 2023 and 2 June 2023 misconduct reports were indeed ill-motivated but has not provided any evidence, or even explanations, why this should be so. Also, the Applicant has not demonstrated how any of these

decisions were "simply wrong in law" in accordance with *Sobier*. The Tribunal has therefore no basis for making such finding(s) and must therefore reject the Applicant's claim as concerns ill-motivation.

39. Accordingly, even though the IGO provided no proper reasons for rejecting the Applicant's 15 March 2023, 31 May 2023 and 2 June 2023 misconduct reports, they were all "irrefutable foregone conclusion[s]" as per *Wan*. The Tribunal therefore finds that the IGO acted within its scope of discretion when taking the contested decisions.

Conclusion

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

(Signed)
Judge Sun Xiangzhuang
Dated this 11th day of August 2025

Entered in the Register on this 11th day of August 2025
(Signed)
Liliana López Bello, Registrar, Geneva