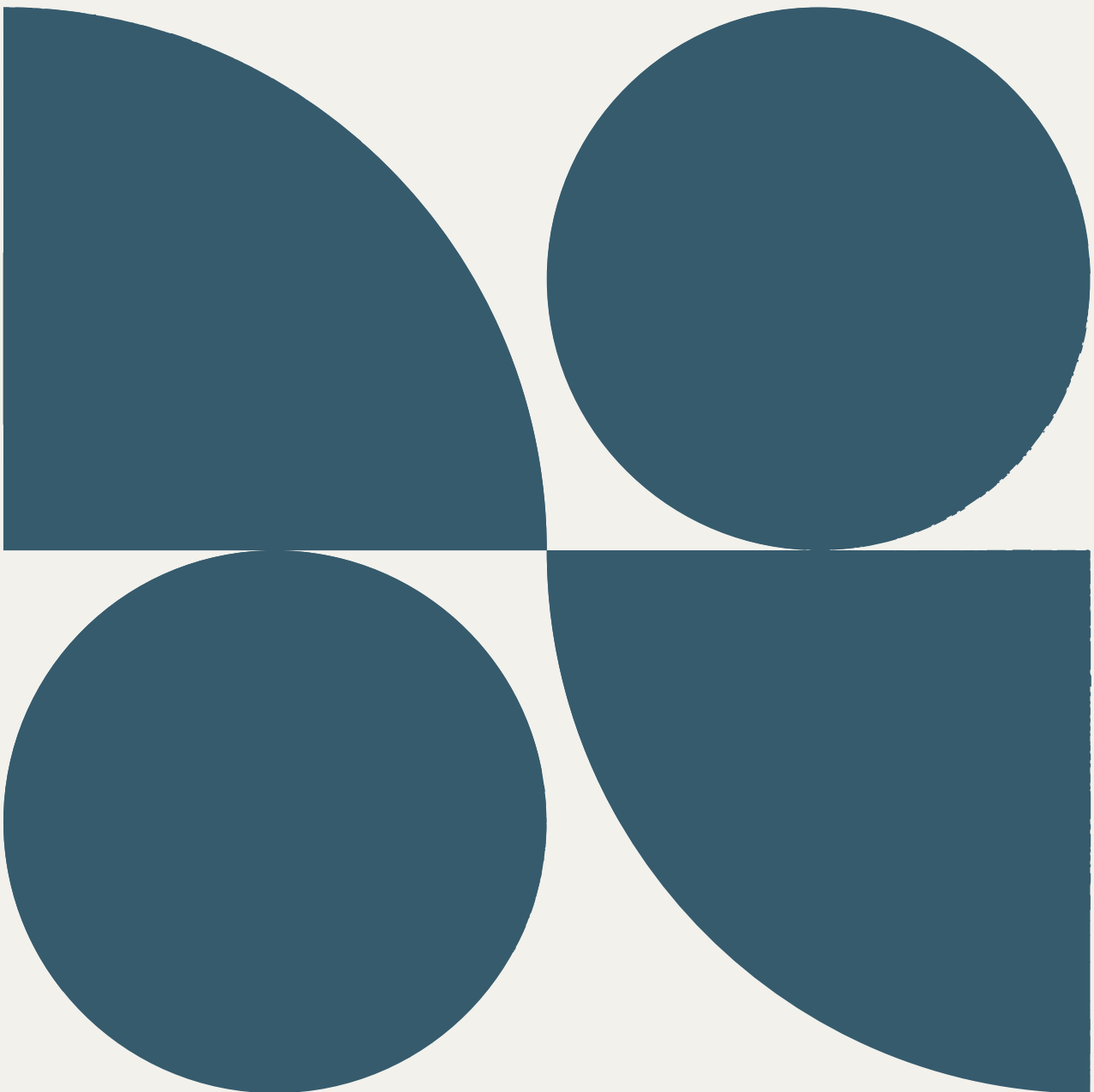


Modulaw Magazine



Introduction

Throughout 2023, we have been asked to provide training or legal updates to staff associations and management in international organisations on the issues that we litigate the most and the trends that we observe, both in jurisprudence and organisational culture.

This magazine replaces our monthly mailing updates with a compilation of longer articles that we have prepared for the benefit of our network. We hope this is a useful resource for all readers, in all of their roles.

This publication would not have been possible without the contribution of our consultant, Lucija Baumann.

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The Duties and Obligations of Staff Representatives

As a quasi-union function, staff representatives of international organisations (**IOs**) across the globe take on a vital role in protecting and promoting the rights, welfare, and well-being of staff as a whole. This role is taken on by staff members on top of their day to day jobs and performed under challenging and demanding circumstances – often with little to no benefit for the individuals themselves.

Staff representatives work to negotiate and advocate for fair employment conditions, benefits, and career development opportunities for the staff. They also provide support and assistance to staff members in matters related to their employment, including grievances, disputes, and disciplinary actions.

They play a crucial role in representing the staff's concerns and interests in discussions and negotiations with the management of their respective organisations and engage in dialogue and consultation with the management on various policy matters affecting staff.

Given that staff representatives are often the first point of contact for staff when they are encountering a difficult situation, we are frequently asked to deliver training on how they can maximise their impact and the crucial elements of their role. This article provides a brief overview of the key duties and obligations that come with the responsibility of being a staff representative.

Our top tips on being a staff representative

Always act with **integrity** and in the **best interest of staff**.

- ! Remain available for **dialogue** with staff and consultants.
- ! Act with **objectivity and impartiality** and avoid any actual or perceived conflicts of interest. Report any conflicts without delay.
- ! **Show empathy** to staff who might be negatively and emotionally affected by their situation.
- ! Unless otherwise stated, all information received by staff or consultants must be treated as **confidential** – a breach of confidentiality could itself amount to misconduct.
- ! Don't promise what you can't deliver.

The role itself

Staff representatives have a primary duty to be informed about their role, including the limits on their function. In principle, their role is to enhance the welfare of all staff, regardless of their contractual status. They should aim to be available and approachable by all staff. This includes responsibility such as:

- Facilitating **communication** between staff and management, ensuring that the concerns, grievances, and suggestions of staff are effectively conveyed to the appropriate authorities.
- **Representing** staff interests in meetings, negotiations, and discussions with management, advocating for fair treatment, improved working conditions, and the protection of staff rights.
- Engaging in **consultations** with staff to gather feedback, opinions and suggestions on various matters related to their work environment, policies, and procedures.
- Assisting in **resolving conflicts and disputes** between staff members and management, thereby promoting a harmonious and productive work environment.
- Participating in **policy-making processes and decision-making** forums, ensuring that staff perspectives and interests are taken into account.
- Providing **guidance, support, and training** to staff members on their rights, responsibilities and available resources within the organization.

Conflicts of interests

Importantly, staff representatives must avoid situations which give rise to a **conflict of interest**, meaning that they cannot act in a matter that would call their objectivity into question. This is an individual duty which is non-delegable. The purpose of this policy is to establish a standard of conduct to ensure that staff representatives act in the best interest of the staff they represent without putting their own individual duties to the IO in question. This could arise in the following situations:

- Where a representative is asked to assist an individual in a dispute involving or implicating the representative's direct supervisor;
- Where a representative is asked to assist in a case involving or implicating an associated person such as a close friend, family member, partner, spouse, etc.;

- Where a representative is using their position to advocate for approval of a specific outcome from which they stand to realize a direct personal, financial or professional benefit.

It is important to note that each situation has to be assessed on its own facts. However, once established, a staff representative who has become aware of an actual, potential or perceived conflict of interest must **immediately inform** the Staff Council Chair and Vice Chair.

Usually, the disclosure of a conflict of interest will mean that the staff representative must recuse themselves from any matters where they have an interest, affiliation or other factor that may create an actual, potential or perceived conflict of interest.

Confidentiality

Staff Representatives are subject to a strict **obligation of confidentiality** for matters and information brought to them by staff. This means that all information provided to a Staff representative by a member of the staff or a consultant shall be treated as confidential unless the person giving the information provides **written authorization** to treat it as non-confidential.

In particular, staff representatives should refrain from discussing or referencing confidential information and confidential information should be treated within the explicit boundaries of the mandate given to them by the staff member or consultant.

Staff representatives have to exercise their own discretion to determine what is confidential and to whom they can disclose the information. As a general rule, it is always better to assume that information received is confidential and to treat it as such.

What is Workplace Harassment?

Harassment at work refers to any unwelcome behavior, actions, or comments that create a hostile or intimidating environment for an individual. It can take various forms, such as verbal, physical, or psychological abuse, discrimination, bullying, or sexual harassment. Harassment can have serious negative effects on the victim's well-being, job performance, and overall work environment.

Despite the increased attention dedicated to the topic, workplace harassment is still a prevalent issue in the United Nations (**UN**) and other international organisations. While efforts have been made to raise awareness and implement policies to prevent harassment, it continues to occur in various forms. [Studies and surveys](#) have consistently shown that a significant number of employees have experienced some form of harassment during their careers.

Importantly, staff are often not provided with sufficient guidance to distinguish harassment from other employment issues, and we have seen an increasing overlap between harassment and performance appraisals. This article provides an overview of the key differences between harassment and other performance-related disputes and the importance of distinguishing between the two when seeking redress.

What constitutes workplace harassment?

The UN harassment policy is defined in the UN Secretary-General's Bulletin on [Addressing discrimination, harassment, including sexual harassment, and abuse of authority](#) (ST/SGB/2019/8), which defines harassment as:

- unwanted verbal, non-verbal, or physical behaviour based on a person's sex, gender, race, ethnicity, nationality, religion, disability, sexual orientation, or any other protected characteristic;
- actions or comments that create a hostile or intimidating environment, interfere with a person's work or education, or negatively affect their dignity and well-being;
- including such things as offensive jokes, slurs, insults, threats, unwanted advances, stalking, or any other behavior that violates a person's rights and dignity.

The bulletin uses neutral terminology and recognises a range of consequences from a single act of misconduct. It also specifically applies to “non-staff personnel” (e.g. consultants), meaning that a broader range of staff members can have access to the

UN's mechanisms for reporting harassment and being involved in any potential disciplinary proceedings.

Harassment or poor performance?

Performance appraisals consist of an objective and subjective component – the objective part is whether the person under review has achieved key performance indicators or objectives, and the subjective part is how they got there, the reviews they have received from other colleagues and whether their performance as a whole is positive or not. There appears to be an increasing trend in cases where individuals allege that:

- they are suffering from workplace harassment, which has led to a negative performance appraisal; OR
- they receive a negative performance appraisal which continues an ongoing pattern of workplace.

While the two scenarios are clearly intertwined, it is important to highlight that a harassment complaint and any grievance arising from a performance appraisal are two distinct processes with different avenues for redress.

So how do you distinguish the two? It is often a fine line and will depend on the facts of each case. For example, absenteeism, the assignment of tasks, reference checks, decisions on promotions or competitive selections and the application of progressive discipline, up to and including termination, constitute the legitimate exercise of management's authority and will normally **not** constitute harassment.

Similarly, staff should be aware that work-related stress in itself does not constitute harassment, but the accumulation of stress factors may increase the risk of harassment. Difficult conditions of employment, professional constraints, and organisational changes affecting an individual's roles and responsibilities will normally **not** be classified as harassment.

Instead, the factors to look out for in determining whether incidents or patterns of conduct could amount to harassment include:

- the context in which the incident(s) took place and whether there are other factors contributing to the situation (stress levels, workload, professional constraints, etc.);
- whether the behaviour was unwanted and objectively offensive to a protected characteristic in the definition;

- if it was a one-off incident or a series of incidents;
- is the incident related to a person's work performance or their individual characteristics;
- whether someone is being singled out and treated differently to their colleagues;
- the power dynamic in terms of seniority and reporting lines;
- the impact of the alleged behaviour on the individual, both in terms of their professional development or progression in the organisation and their well-being;
- whether there has been any attempt to clarify and/or stop the unwanted behaviour, including through informal resolution.

Reporting harassment

The distinction between harassment and other work-related issues is essential as the reporting and investigation process set out in the UN Bulletin is only available for matters which fall within the definition of harassment.

A staff member who considers that they are being subject to harassment may, on a voluntary basis, attempt to address a situation in an informal manner by having a discussion with more senior staff, through HR or with the assistance of the Ombudsman. An Ombudsman or mediator in particular could include one-on-one conflict coaching to give voice to concerns effectively, shuttle diplomacy to communicate with others through an intermediary without having to be in the same physical space, and facilitated discussions.

Under the UN Bulletin, if the attempt to resolve the matter informally is not successful, the staff member may issue a formal report either to the responsible official or to the Office of Internal Oversight Services (**OIOS**). The report can be made anonymously and is not subject to time limits. However, the anonymity of reports of possible prohibited conduct and the passage of time may render the initiation or completion of an investigation or disciplinary process more difficult.

If OIOS considers there is a *prima facie* case of harassment, it will conduct a confidential fact-finding exercise and all staff members have an ongoing duty to cooperate fully with investigations. During the investigation and any disciplinary process that may follow, the complainant may request interim measures such as a change of reporting lines or a change of team/group until these processes are completed.

The complainant has a right to be regularly updated by OIOS on the progress of its investigation. OIOS will prepare a final, confidential report on whether it considers the

allegations have been substantiated, and this will then be referred back to the UN agency for potential disciplinary action. The complainant is not a party to any disciplinary proceedings, which means they will only be informed of a final outcome.

Dealing with performance-related disputes

Performance-related disputes are administrative and therefore subject to the usual grievance procedures at an organisation. Certain organisations also have specific rebuttal processes for performance appraisals that must be followed prior to lodging a request for review, or as the first step in the appeal process.

Broadly speaking, initiating informal resolution should always be the first step. The staff member can request a discussion with management together with HR or the Ombudsman to try and resolve the matter. They can also engage with their Staff Council to seek advice and/or assistance with such a discussion.

For unsatisfactory performance reviews, the staff member should first approach management and voice his/her concerns on the feedback provided and if this does not lead to a satisfactory outcome, approach HR with the issue. At UN agencies, there is a rebuttal process set out in Section 15 of the Secretariat's [Administrative Instruction – Performance Management and Development System](#) (ST/AI/2021/4). This provides that ratings that have not been rebutted are final and not subject to appeal, whereas administrative decisions stemming from final performance appraisals (for example, refusing a promotion or increase in grade) are subject to appeal.

As the recourse for each of these scenarios varies significantly, staff should be regularly updated on policies and reporting mechanisms so that they can improve self-awareness, distinguish different types of behaviours and access the appropriate internal justice system.

Reporting Sexual Harassment

This article was prepared for FICSA and published in the Legal Tip of the Month, 9 August 2023

Harassment of any type is antithetical to the principles of the United Nations (**UN**), and sexual harassment in particular undermines its credibility and degrades its staff. Five years after the UN Secretary General established the Chief Executives Board for the Coordination Task Force on Addressing Sexual Harassment (**Task Force**), addressing and effectively investigating sexual misconduct within the UN system remains a persistent challenge.

The Task Force is now in its third phase and has launched a number of initiatives which promote a more victim centred approach in addressing sexual harassment. This article provides an overview of the progress made in the last five years by the UN and the Task Force. It also assesses potential areas where further work is necessary to make reporting for victims more transparent and enhance coordination between different UN agencies.

What is the UN definition of sexual harassment?

As set out in the UN Secretary-General's Bulletin on Addressing discrimination, harassment, including sexual harassment, and abuse of authority (ST/SGB/2019/8), the key features of sexual harassment are:

- unwelcome conduct of a sexual nature that takes place in the workplace or in connection with work;
- it can occur as a pattern of conduct or be a single incident;
- the conduct may be of a verbal, nonverbal or physical nature, including written and electronic communications; and
- it may occur between persons of the same or different genders and individuals of any gender can be either the targets or the perpetrators.

How do you lodge a complaint?

There is a comprehensive reporting system for sexual harassment in the UN. Reports can be made through various channels, including designated focal points within each UN entity, specialised units such as the Conduct and Discipline Teams, or through the UN's confidential helpline. This reporting system aims to provide a safe and supportive environment for victims to seek justice and hold perpetrators accountable. Reports may be submitted anonymously, information provided will be treated confidentially and will only be disclosed to those who have a legitimate need to know.

Generally, each UN agency will have its own reporting mechanism which can be found on the entity-specific Intranet. If there is uncertainty as to which entity the alleged perpetrator belongs to, staff can report incidents through the [UN Office of Internal Oversight Services \(OIOS\)](#) which offers a confidential helpline called [Speak Up](#). The 24-hour resource offers UN personnel the opportunity to speak confidentially with impartial and trained individuals, who can provide information on protection, support and reporting mechanisms.

Once a report has been made, the investigation team will start by making a *prima facie* assessment of the allegations to establish whether an investigation is warranted. If it is, the team will initiate the fact-finding process based on the agency's investigation manual. All staff members are required to cooperate fully with investigations. Based on the evidence gathered during the investigation, the team will put together a confidential report which should include their findings and whether they consider the allegations have been substantiated. The report might also include recommendations for potential disciplinary action.

The ClearCheck Screening Database

In order to increase transparency and prevent perpetrators from switching to a different UN agency after being found guilty of committing sexual misconduct, the UN developed the screening tool, [ClearCheck](#). ClearCheck is a highly secure and confidential centralised database. It permits UN agencies to share information on UN personnel against whom allegations related to sexual harassment have been established as well as those who were the subject of a pending investigation and/or disciplinary process and resigned before the investigation was completed. Importantly, the platform records individuals who had any type of contractual relationship with the UN whether on a long- or short-term contractual basis with the aim to prevent re-employing them within the UN system.

Launch of the UN Knowledge Hub on Addressing Sexual Harassment

Most recently, the Task Force launched a new [UN System-wide Knowledge Hub on Addressing Sexual Harassment](#). The Knowledge Hub serves as repository of resources from across the UN system on addressing sexual harassment and currently has 34 participating entities. It is intended to help enhance coordination between UN agencies and facilitate easier access to key documents for internal and external audiences, and is available to all UN personnel, Member States and civil society. The Hub offers a complete list of resources which includes the [UN Code of Conduct to prevent sexual harassment](#), the [UN Manual on Investigation of Sexual Harassment Complaints](#) as well as [resources](#) available to individuals affected by sexual harassment.

More work remains to be done

While efforts continue to be made by the UN, the investigation of sexual harassment incidents remains a challenge for the organisation and there is a need for substantial reforms to ensure a safer and more inclusive working environment for all staff members. Some of the key areas for improvement include:

- **Lack of accountability:** Holding perpetrators accountable for their actions remains too often wishful thinking for victims. They are still faced with instances where individuals accused of sexual harassment face minimal consequences, are transferred to other UN missions without proper investigation or disciplinary action, or resign before investigations conclude so that their cases are closed.
- **Inadequate reporting mechanisms:** While a lot of effort has been made to improve the UN's reporting mechanisms for sexual harassment, they still follow complex and bureaucratic processes. The average time for an incident to be investigated is 12 months from reporting. This leaves victims in a limbo for a significant time and often forcing them to face the perpetrator on a daily basis.
- **Slow response and lack of transparency:** The investigation process has been criticised for its slow response in addressing sexual harassment allegations. Delays in investigations and lack of transparency in sharing information about the progress of cases have raised concerns about the UN's commitment to addressing the issue.
- **Power imbalances and culture of impunity:** The hierarchical structure of the UN coupled with power imbalances has been identified as a contributing factor to the prevalence of sexual harassment. It is essential that managers and executives do not foster a culture of impunity where individuals in positions of power are protected and shielded from accountability.
- **Insufficient prevention and awareness programs:** There is a need for comprehensive and mandatory training programs for all staff members, including senior officials, to raise awareness about sexual harassment, its impact, and the importance of reporting incidents.
- **Lack of diversity and gender parity:** Lack of gender parity and diversity further contributes to an environment where sexual harassment is more likely to occur. Therefore, increasing the representation of women in leadership positions and decision-making roles is crucial to addressing the issue effectively.

It is important to acknowledge the improvements made by the UN and to recognise that investigating sexual harassment within the UN is highly complex due to its size, global reach and its limited resources. The introduction of a dedicated hotline for reporting

sexual harassment, the creation of special units to deal with such complaints as well as the introduction of more checks and balances in the hiring process of UN personnel are all welcome steps in the right direction. However, concerns remain about the lack of transparency and accountability in addressing sexual harassment cases as well as a lack of consistency in the conduct of investigation across UN entities.

Importantly, UN staff should be regularly updated on policies and reporting mechanisms and encouraged to report serious conduct without fear of retaliation. Modulaw stands ready to support staff if they require assistance with filing complaints or during investigation and disciplinary processes.

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