



**International Civil Aviation Organization**

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**APPEALS BOARD**

Case No.: ICAO Appeal No.  
2022-001  
Decision No: ICAO/2023/001  
Date: 21 February 2023  
Original: English

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**Before:** Judge Rowan Downing KC, President  
Ms. Alessandra Andrade, Member  
Mr. Ciaran Carolan, Member

**Registrar:** Mr. Arie Jakob

CATALIN GHEORGHE RADU

v.

SECRETARY-GENERAL  
OF THE INTERNATIONAL CIVIL  
AVIATION ORGANIZATION

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**DECISION**

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**Counsel for Applicant:** Self-represented

**Counsel for Respondent:** Christopher Petras

Case No. 2021-003 and Case No. 2022-001 were scheduled and heard together by the Appeals Board. Separate decisions are published.

## Introduction

1. The Applicant, formerly Deputy Director (D-1), Aviation Safety, Air Navigation Bureau (ANB) (hereinafter “the Applicant”) has brought an application appealing the decision of the Respondent of 8 November 2021 to impose the disciplinary measure of discharge from his employment with ICAO with immediate effect on the ground of misconduct.

2. The Respondent contests the application.

## Receivability

3. There are no issues concerning the receivability of the Application by the Appeals Board.

## Facts & Procedure

4. On 16 April 2019, the ICAO Investigations Intake Committee met to consider allegations of six instances of sexual harassment in breach of the ICAO Service Code. The Committee decided that there was *prima facie* evidence of sexual harassment and referred the matter for investigation.

5. On 18 April 2019, the Secretary General requested assistance from the Investigations Division of the United Nations Office of Internal Oversight Services Investigations (OIOS) to investigate the allegations against the Applicant.

6. On 25 April 2019, the Ethics Officer notified the Applicant of the Committee’s determination and the referral of the complaints for formal investigation. The Applicant was also advised of the procedures to be followed.

7. Following the completion of the investigation OIOS transmitted its Investigations Report 0400/19 under cover of a memorandum dated 31 December 2019. The findings of OIOS are at paragraph 159 of the Investigation Report in the form below. These are considered below in respect of each of the six matters considered (redacted to remove the names of witnesses):

- i. Mr. Radu invited V01, a General Service staff in his chain of command, into his office on 14 December 2016, during which time he looked her up and down, cupped her shoulders, made an unwelcome comment and proposed having drinks together, all of which left V01 feeling uncomfortable as she perceived that Mr. Radu had something sexual in mind. V01 disclosed the matter to Mr. [C], Ms. [MG] and W01, all three of whom provided evidence that corroborated certain portions of V01’s account, which thus collectively supported her account;
- ii. Sometime in September 2017, Mr. Radu called V01 into his office, closed his office door and proposed having drinks together again, thus again leaving V01 feeling uncomfortable. V01 disclosed the matter contemporaneously to Ms. [B] and to Ms. [MG] a shortly thereafter, both of whom provided evidence that supported V01’s account of being called into Mr. Radu’s office and him shutting the door;
- iii. On 6 December 2017, while at the ANB Christmas party, Mr. Radu approached W01, indicated that he had heard that V01 had said that he had sexually harassed her and that she had a Quebecois mentality. Mr. Radu instructed W01 to pass the message on to V01 on his behalf. W01 corroborated V01’s account. V01 had also disclosed the matter to Ms. [MG], who was supportive of V01’s account;

- iv. On 8 January 2018, V01 sent an email to Ms. [K] in which she reported Mr. Radu's behaviour as sexual harassment and indicated that his conduct had made her feel dirty and violated;
- v. V01's account of her interactions with Mr. Radu is supported by electronic evidence, as well as the statements of five witnesses. This corroborative evidence, along with Mr. Radu's admission that he used to hug her, kiss her cheeks and may have addressed her as "hello beautiful", leads OIOS to find that V01's account is credible;
- vi. Mr. Radu denied having any sexual interest in or displaying any sexual interest towards V01, and he denied approaching anyone at a party and asking them to pass a message to V01 on his behalf. Mr. Radu's explanation that V01 was coached by persons wanting to harm him and was retaliating for his email to Ms. [K] is not convincing and remains uncorroborated. Thus, OIOS finds that Mr. Radu's account regarding V01 lacks credibility;
- vii. On 19 June 2018, Mr. Radu called V02, a General Service staff, into his office, closed the door and displayed behaviour with a sexual undertone, all of which left her feeling uncomfortable. V02 disclosed the matter contemporaneously to Mr. [R], Mr. [T], Ms. [G] and Mr. [G];
- viii. On 21 November 2018, W03, a General Service staff in Mr. Radu's chain of command who is his mistress, approached V02 to discuss V02's complaint against Mr. Radu. V02 disclosed the matter contemporaneously to Ms. [P], who then confronted W03 and also advised Mr. Radu of the incident;
- ix. V02's early disclosure to Mr. [R] is supported by way of electronic evidence, specifically emails exchanged on 19 and 20 June 2018. In total, eight witnesses provided evidence that corroborated certain portions of V02's account, which thus collectively supported her account and leads OIOS to find that V02's account is credible;
- x. Mr. Radu, while confirming the meeting with V02, denied all her adverse claims. He rejected having proposed a position to V02 in exchange for intimacy and only acknowledged that a handshake and possibly a shoulder touch when guiding her out of the office door. However, the evidence outlined above is not consistent with Mr. Radu's statement, including in light of Ms. [P]'s observations that she advised Mr. Radu about W03's behaviour and that she never spoke to Mr. Radu about anything that V02 had disclosed to her. Thus, OIOS finds that Mr. Radu's account regarding V02 lacks credibility;
- xi. Mr. Radu and his junior supervisee, V03, had professional meetings, and V03 stated that Mr. Radu once jokingly said to her that she should wear high heels at their next meeting, a comment she did not like. W02 then sent her a meeting request titled "Meeting with DD/SAF (HH)" in January 2017, on behalf of Mr. Radu, as demanded by him;
- xii. V03's account regarding the meeting request is supported by way of electronic evidence, specifically four Outlook meeting requests titled "Meeting with DD/SAF (HH)"; however, W02 could not recall this being associated to high heels. Even so, OIOS does not find V03's account to lack credibility, especially as V03 indicated that she did not feel victimized or sexually harassed by Mr. Radu but had perceived his conduct as a joke;
- xiii. Mr. Radu denied having told V03 to wear high heels or asking W02 to send a meeting request with high heels or "HH" for high heels in the subject line. Mr. Radu's explanation of "HH" referring to Mr. Henrik Hololei appears implausible and was also not corroborated by V03. Beside W02's lack of recollection on the event, OIOS could not locate any potential evidence to further support Mr. Radu's credibility in this regard. Mr. Radu further offered no explanation as to the reasons for V03's claims;
- xiv. V04 and Mr. Radu attended a conference in Nigeria in November 2017, during which time they socialized and sent text messages to each other, including a text message from Mr. Radu asking V04 to have drinks. V04 stated that Mr. Radu repeatedly engaged in unwanted touching, and she understood him to be interested in something sexual with her, which made her verbalize rejection. Once back in Montreal in December 2017, V04 and Mr. Radu continued to text message each other, during which time Mr. Radu complimented V04 on her appearance and indicated an interest in going for an end-of-the-year lunch. In early 2018, V04 and Mr. Radu had an interaction in an elevator during which, as V04 reported, he approached and tried to grab her upper arms, which she rebuffed;

- xv.V04's account in regard to November and December 2017 is supported by way of electronic evidence, specifically iMessages sent between V04 and Mr. Radu on 19 – 20 November 2017, 7-8 December 2017 and 18 December 2017; however, Mr. [J], the only identified witness to the elevator interaction, could not recall such situation. Even so, OIOS did not find V04 to be motivated by an agenda and her account seemed credible;
- xvi.Mr. Radu verified meeting V04 at an ICAO social event, socializing with her and sending her texts during a mission in Nigeria in November 2017, as well as sending her complimentary text messages in December 2017; however, he denied inviting her to his room in Nigeria for a sexual purpose or acting inappropriately towards her, including unwanted touching. Mr. Radu indicated that the text messages were not sexual but simply messages exchanged between good friends, which seemed plausible and reasonable given some of V04's responses to Mr. Radu. OIOS could not locate specific evidence undermining Mr. Radu's credibility in this regard. Mr. Radu also confirmed commenting to V04 that a Director was better than a Deputy Director while in an elevator; but he denied acting inappropriately towards her in the elevator. OIOS found Mr. Radu's explanation for V04's adverse claims, namely revenge for his joke, unconvincing;
- xvii.V05 and Mr. Radu first met at a conference in Nigeria in 2012, during which time V05 was a junior ICAO employee and Mr. Radu was not yet with the Organization but the President of ECAC. V05 claimed that Mr. Radu made flirtatious advances to her at this occasion, which she turned down. V05 and Mr. Radu later met on 3 September 2014 during a meeting at ICAO with V05's outgoing boss, as Mr. Radu was assuming his position. V05 was to report to Mr. Radu, but she opted to move sections as he made her uncomfortable including with a comment made on 3 September 2014;
- xviii. V05's account is supported by way of electronic evidence, specifically an Outlook meeting request requiring V05 to attend a 3 September 2014 "Meeting with Mr. Catalin". Mr. [R] also confirmed that V05 became quite emotional one day when discussing Mr. Radu; however, Mr. [R] could not discern why V05 was so distraught. Even so, OIOS does not find V05's account to lack credibility or be motivated by an agenda, especially as V05 indicated that she had not viewed her interactions with Mr. Radu as sexual harassment, but only "attempts"; and
- xix.Mr. Radu agreed that he met V05 in Nigeria, but he denied inviting V05 to his hotel room, contended that he had no sexual interest in V05, did not recall meeting her in September 2014 and claimed that he had not made any sexual advances or inappropriate comments towards her. Mr. Radu expressed concerns that the ICAO Audit Section, which Mr. [R], V02 and V05 were connected to, was building a negative narrative against him because he was critical of the work performed by the Audit Section. He also felt that Ms. [K] manufactured the complaint against him as she was motivated by her own career advancement, as well as by her friendship with V04's husband. OIOS could not locate any evidence which supported such and found in particular Mr. Radu's explanation of a story being "built" by the ICAO Audit Section unconvincing.

### **Procedural chronology**

8. On 6 February 2020, pursuant to paragraphs 1.16-1.18 of ICAO Personnel Instructions PI/1.6 [hereinafter PI] , a copy of the OIOS Investigation Report and the supporting evidence were provided to the Applicant, who was advised of his right to provide a written statement in response and to produce any countervailing evidence within 30 calendar days (or by 7 March 2020).
9. On 4 March 2020, the Applicant requested an extension of the statutory 30-calendar day period to submit his response "if possible until the end of March." An extension of 15 days was granted to 21 March 2020, which was extended to 23 March 2020, as 21 March 2020 was not a working day.
10. On 23 March 2020, a further extension was requested by the Applicant. The Respondent granted an extension to 26 March 2020.
11. This notwithstanding, the Applicant submitted his written response to the investigation report and countervailing evidence by email on 23 March 2020.

12. On 27 April 2020, the Applicant wrote to the Acting Ethics Officer, asking to be granted an additional four to five weeks to review his submission with his legal counsel and to be “given the opportunity to revisit” areas he overlooked and to provide additional evidence and clarification. The Acting Ethics Officer advised the Applicant that same day of the Secretary General’s decision not to grant the requested further extensions.
13. On 28 April 2020, the Applicant wrote again to the Acting Ethics Officer clarifying that the purpose of his correspondence the previous day was to request that he dismiss the case against him based on the Administration’s “failure to respect the established procedures” or, alternatively, grant him 190 days “to provide clarification and additional supporting evidence”. The Applicant asserted that that it was within the Ethics Officer’s authority to grant the request without the need for approval by the Secretary General.
14. On 30 April 2020, the Acting Ethics Officer replied to the Applicant, advising that once the staff member’s response has been submitted or the period for the response has expired the Ethics Officer had no discretion to grant the staff member additional time. He advised the Applicant that the Ethics Officer had no power to independently dismiss the case against him.
15. On 29 June 2020, pursuant to PI/1.6, paragraph 1.19, the Secretary General requested the Applicant’s consent to provide the OIOS Investigation Report and supporting evidence, the Applicant’s comments in response and his complaints alleging procedural irregularities, to a third party not involved in the investigation for review so that advice could be obtained in respect of the alleged irregularities.
16. On 9 July 2020, the Applicant gave his unconditional “consent to the release of any information necessary to undertake a full and fair inquiry of the issues.”
17. On 16 September 2021, the Secretary General wrote to the President of the ICAO Council pursuant to Staff Regulation 9.9, to request approval to terminate the Applicant’s appointment.
18. On 21 September 2021, the President approved the termination of the Applicant’s appointment. The Secretary General then notified the Applicant of his provisional decision to impose the disciplinary measure of discharge against the Applicant for misconduct as shown in the OIOS investigation report (0400/19) and the supporting evidence, pending consideration of the Applicant’s written response and countervailing evidence, pursuant to ICAO Staff Regulations 9.7 and 10.1, and PI/1.6. The Applicant was asked to provide any comments he wished make on the proposed action within 14 calendar days.
19. On 25 September 2020, the Secretary General received the advice from the lawyers in the UN Office for Human Resources (UNOHR), Administrative Law Division, as well as further correspondence to OIOS in relation to factual and procedural irregularities that had been alleged by the Applicant.
20. On 28 September 2021, the Applicant was informed that special measures for his access to the ICAO Headquarters building were put in place in accordance with Staff Regulations 10.1 and 10.2, Staff Rule 110.1, paragraph (f), and paragraph 53 of the ICAO Framework on Ethics. The Applicant that same day submitted a *Staff Member Request for Administrative Review by the Secretary General* (ICAO Form 177), contesting this decision. This matter proceeded to form the basis of Case No. 2021-003, which is considered in a separate judgment.
21. On 5 October 2021, the Applicant submitted his reply to the Secretary General’s provisional decision. He requested the case against him be dismissed or, alternatively, subjected to review.

22. On 8 November 2021, the Secretary General advised the Applicant that he had decided to confirm the decision to impose the disciplinary measure of discharge from his employment with ICAO with immediate effect.
23. On 10 November 2021, the Applicant requested that the Secretary General suspend application of the discharge pending a hearing of the matter by the Appeals Board.
24. On 12 November 2021, the Secretary General notified the Applicant that his request for suspension of implementation of the 8 November 2021 discharge decision was denied. The Appellant then submitted a *Staff Member Request for Administrative Review by the Secretary General* (ICAO Form 177), contesting the Secretary General's decision to impose the disciplinary measure of discharge against him while he was on sick leave, which matter has been separately considered by the Appeals Board in Decision No: ICAO/2022/006).
25. On 23 November 2021, the Applicant submitted yet another *Staff Member Request for Administrative Review by the Secretary General* (ICAO Form 177) challenging the regularity and merits of the decision to discharge him from the service of the Organization for misconduct.
26. On 26 December 2021, the Secretary General advised the Appellant that his requests for review of 12 and 23 November 2021 related to the 8 November 2021 decision to discharge him for misconduct pursuant to ICAO Staff Regulation 10.1 and ICAO Staff Rule 110.1(2) were denied.
27. On 7 February 2022, the Applicant submitted this Application.
28. By Order No. 1 of 14 June 2022, the parties in Cases 2021-003, 2021-004 and 2022-001 were called to a Case Management Discussion on 20 June 2022.
29. Following the Case Management Discussion, a Scheduling Order was issued on 22 June 2022, the relevant provisions of which are:
1. Case No. 2021-003 and Case No. 2022-001 shall be heard by the Appeals Board at the same time. The question as to whether the cases shall be joined for the purpose of any final decision, or otherwise, is reserved.
  2. ....
  3. Within 21 days of the date hereof, the Respondent shall produce to the Appeals Board a copy of all documents contained in any files, paper or electronic, in respect of the investigation of the Applicant, including documents provided to the Secretary General on or about 20 January 2020 from the United Nations Office of Internal Oversight Services in respect of OIOS Report no. 220/19. So as not to breach the confidentiality of witnesses and complainants, all names not already redacted and the subject of a code in the documents to be produced, shall be redacted with a code applied to such names. The code applied to each redacted name is to be noted and retained by the Respondent, to be made available if required. The contents of such files shall remain confidential as between the parties and be used only for the purposes of these Applications or subsequent actions. Save for the purpose of obtaining legal advice from a professionally qualified, admitted and practising lawyer, no details shall be released or otherwise provided to any person not being a party to this case without the leave of the Appeals Board having been first obtained. Such files shall become part of the evidence before the Appeals Board. The Respondent shall advise the Appeals Board of any files no longer in the possession of ICAO, or in existence, and why such are no longer in its possession or exist, and where such are to be found.
  4. ....
  5. No later than three business days before the hearing date both parties shall, in respect of each application, file and serve a set of documents, by way of an evidence book, which they will seek to prove and rely. Those documents submitted by the Applicant shall be marked numerically and those

submitted by the Respondent shall be marked alphabetically. At the hearing any documents which are not to be admitted into evidence by agreement shall be identified by the parties. Documents not so identified shall be assumed to be in evidence before the Appeals Board.

6. The parties shall attend a hearing on the merits of the applications to commence **at 9:30 am EST** on 17 August 2022, with an estimate of 5 days. Unless otherwise advised the hearing will be via video or other like link.

7.8, 9 .....

30. On 10 August 2022 the Appeals Board made a ruling in the following terms in respect of the right of access of the Applicant to the advice from UNOHR.

1. The Respondent, by an “Inter-Office Memorandum” to the Appeals Board dated 1 August 2022, requested that the Appeals Board rule upon whether communications between 17 July 2020 and 28 September 2021 passing between the Respondent and the office of the Administrative Law Division of the UN Office of Human Resources is to be produced to the Applicant. The communication was seeking, or providing, legal advice in respect of alleged irregularities asserted by the Applicant during the course of an investigation and other legal matters. The question is thus, is the communication immune for production under Staff Rule 111.1(17), and generally the subject of legal professional privilege? If it is, then it is not subject to production to the Applicant. The application for this ruling has not been provided to the Applicant, the matter being considered *ex parte* and *in camera*.

2. The matter is brought before the Appeals Board on the basis of the provisions of Rule 6 of the Rules of Procedure of the Appeals Board. This Rule provides:

Rule 6. A copy of each written submission and document furnished to the Board in connection with an appeal (or “the Application”) will be sent by the Board Secretary/Registrar, upon receipt, to the other party. If a party or witness refuses to produce a document on the grounds of confidentiality, the Board may direct its production for the limited purpose of determining whether its relevance overrides its confidentiality, without first transmitting a copy to the other party. Should it be so determined, a copy of such document, or only the relevant parts thereof, may be transmitted to the other party. The Board shall not take into account in its deliberations any document offered by a party that has not been disclosed to the other party.

3. Immunity is claimed by virtue of Staff Rule 111.1(17), which provides:

17. The staff member is entitled to give evidence personally and to request the production of documents, and shall have the right to call representatives of the Staff Association to present their views concerning the case under appeal. The staff member should have access to any confidential document related to, and which has a bearing upon, the decision under appeal, *other than confidential documents related to the staff member’s request for review of, or appeal against, the decisions, which were exchanged between legal and administrative units prior or subsequent to the request for review or appeal*. The staff member, the Representative of the Secretary General and, *proprio motu* (by its own authority), the Board shall be entitled to request the calling of witnesses. It shall be at the discretion of the Board to allow the request by the staff member or the Representative of the Secretary General for the calling of witnesses and/or the production of documents. The Board shall have the authority to request the appearance before the Board of a witness whose presence it deems necessary. Any witness may be questioned by the parties, as well as by the members of the Board. (emphasis added)

4. The documents produced to the Appeals Board have been considered. The Appeals Board is satisfied that the confidential documentation forms part of correspondence brought into existence for the sole purpose of requesting and the giving of legal advice and is thus subject to an immunity from production as provided for in Staff Rule 111.1(17). It is further noted that matters concerning the complaints of the Applicant in respect of alleged irregularities in the investigations, and the subject of some of the advice, are known to the Applicant.

Pursuant to Rule 6 of the Rules of Procedure

“...The Board shall not take into account in its deliberations any document offered by a party that has not been disclosed to the other party.”

#### Ruling

The documents passing between the Respondent and the office of the Administrative Law Division of the UN Office of Human Resources during the period of 17 July 2020 and 20 September 2021 seeking legal advice in respect of alleged irregularities asserted by the Applicant during the course of an investigation are confidential within the contemplation of Staff Rule 111.1(17) and thus immune from production to the Applicant.

31. On 18 August 2022, the Applicant having made an application for an adjournment, the hearing was rescheduled for 12 October 2022, upon which day the hearing was held. Neither party advised of witnesses to be called, however the Applicant gave sworn evidence, effectively swearing to the facts set forth in his Application and in his submission.

### **The regulatory provisions and relevant administrative issuances applicable to this matter**

32. International Civil Aviation Organization Service Code Staff Regulations

#### Article I

1.3 Staff members shall abide at all times during their service with the Organization by the principles and values of integrity, loyalty, independence, impartiality, tolerance and understanding, non-discrimination, gender equality, accountability and respect for human rights.

#### International Civil Aviation Organization Service Code Annex 1 Framework on Ethics

41 Unethical conduct is behaviour that is contrary to the core values and principles that are enshrined in this framework and includes discrimination; harassment, including sexual harassment; intimidation, retaliation and abuse of authority; staying in a conflict of interest situation; corruption; misuse of corporate information and breach of confidentiality; and nepotism, be it for personal benefit or for favours to others.

#### Appendix to Staff Rule 101.1

“**Standards of conduct**” listed several guiding principles and values that are enshrined in the United Nations organizations; they must also be those which guide international civil servants in all their actions: fundamental human rights, social justice, the dignity and worth of all people, and respect for the equal rights of men and women and of all nations. Regarding harassment, “an affront to human dignity”, the Standards of conduct referred to ICAO’s responsibilities in establishing the rules and provide guidance.

**The ICAO Personnel Instructions** provide elements of definition and process:

Extracts: PI/1.3/3 “*Sexual harassment is any unwelcome sexual advance, request for sexual favor, or other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment. In all cases it refers to conduct that is unwanted by the recipient...Sexual harassment is distinguished from other forms of mutual contact by its unwelcome, unreciprocated and imposed nature.*” PI/1.6/5/b) “*continued suggestions for social activity outside the workplace after it has been made clear that such suggestions are unwelcome.*”

(PI/1.6) Definition of sexual harassment

3.3 For the purpose of these procedures, sexual harassment is any unwelcome sexual advance, request for sexual favour, or other verbal or physical conduct of a sexual nature, when it interferes

with work, is made a condition of employment, or creates an intimidating, hostile or offensive environment. In all cases it refers to conduct that is unwanted by the recipient.

3.4 Three categories of conduct are generally considered to be covered by this definition:

a) Physical conduct of a sexual nature which is commonly regarded as meaning unwanted physical contact ranging from unnecessary touching, patting or pinching or brushing against another employee's body, to assault and coercing sexual intercourse.

b) Verbal conduct of a sexual nature which may include unwelcome sexual advances, propositions or pressure for sexual activity; continued suggestions for social activity outside the workplace after it has been made clear that such suggestions are unwelcome; offensive flirtations; suggestive remarks, innuendoes or lewd comments.

c) Non-verbal conduct of a sexual nature which refers to the display of pornographic or sexually suggestive pictures, objects or written materials; leering, whistling or making sexually suggestive gestures.

3.5 Sexual harassment is distinguished from other forms of mutual contact by its unwelcome, unreciprocated and imposed nature. Mutually accepted behaviour is not sexual harassment regardless of the employment relationship, but may in certain circumstances constitute misconduct.

#### Responsibilities

3.6 All staff members shall conduct themselves in a way which will ensure that the workplace is free of intimidation, hostility or offense and, in this context, of any form of harassment, including sexual harassment. Managers bear added responsibility in the process since they should make this clear:

a) by their example;

b) by clearly communicating, to all their staff, the policy outlined in the ICAO Framework on Ethics (Annex I to The ICAO Service Code);

c) by enhancing a positive working environment to prevent the occurrence of harassment in any form; d) by ensuring prompt attention to the adherence to the policy outlined in the ICAO Framework on Ethics.

#### Resolution of problem cases

3.7 An aggrieved staff member has the option to choose from two recourse mechanisms to address cases of alleged harassment — an informal approach and a formal approach.

##### A. Informal approach

3.8 As an initial step, the aggrieved staff member should attempt to resolve the case directly with the person who engaged in the alleged harassment. If this is unsuccessful, the staff member may either contact the Ombudsman or opt directly for the formal approach described in paragraph 3.9 below. According to Staff Rule 101.16, the mandate of Ombudsman places him in a position to achieve informal resolution to such cases.

##### B. Formal approach

3.9 The aggrieved staff member may report confidentially, in writing, to the Ethics Officer, using one of the means of communication indicated in paragraph 1.7 above, with as much detailed information as possible regarding the matter. All allegations of any form of harassment will be investigated by the Ethics Officer and dealt with in a confidential manner, in accordance with the procedures for cases of misconduct established in Section 1 above, as applicable. Any retaliation or threat of retaliation against individuals making complaints against harassment, or assisting in the investigation of such complaints, will be considered as a violation of standards of conduct and will be investigated and dealt with in accordance with the procedures in relation to the protection of staff against retaliation established in Section 2 above.

*Consideration of the Grounds of Appeal set out in the Case 2022-001 Form 178, Application, insofar as they relate to matters concerning procedures and errors of law*

33. While the role of the Appeals Board is well defined in respect of the Judicial Review of disciplinary matters, as is discussed further below, the Appeals Board notes that the Applicant has raised many preliminary grounds of appeal going to procedural and process issues in respect of the investigation

and the evidence. In order to do justice and to fully consider and address the matters raised by the Applicant the Appeals Board determined to address the specific issues raised. The Appeals Board notes that some of these grounds are argumentative of the conclusions reached and some relate to matters which are simply not relevant, as they are an attack upon the preliminary stages of the procedures leading up to the decision to refer the matter for investigation. These are discussed in respect of their place in the procedures, any bias and the impact, if any, on the conduct of the investigation of the alleged conduct of the former Ethics Officer when drawing and presenting her report to the Investigative Committee.

*The Secretary General failed to provide an explanation for his decision to summarily discharge the Applicant, relying only upon the OIOS report*

34. There is no requirement for the Secretary General to give a separate and detailed statement of reasons for adopting one sanction over any other. It is clear from the letter of 21 September 2021 to the Applicant advising him of the provisional decision, pursuant to Staff Regulation 9.7 and 10.1, that the reasons are expressed in respect for the finding of misconduct against the Applicant, which then led to a decision to summarily discharge him after the Applicant was given an opportunity to respond. It is recorded in the decision that there had been a thorough consideration of all findings and submissions and matters put by the Applicant prior to the Respondent making that final decision of 8 November 2021. Discharge from service is one of the sanctions available. No error is demonstrated in this ground.

*There were procedural “irregularities in the procedure led by the ICAO Ethics Officer (EO) who did not follow up on her mandate and impeded the entire process”*

35. The Applicant complains that the assessment of the credibility of the witnesses is usually tested within a criminal trial setting. He complains that he was entitled to be made aware of the unwanted behaviour and be given an “opportunity to respond, and to have my case fully and fairly considered through a process resembling what would be owed to me if the decision was being decided in a court of law”.

36. The procedures and the systems involved in disciplinary cases are well documented in the Staff Regulations and other administrative issuances and form part of the contract between a staff member and the Organization. See specifically Annex I ICAO Framework on Ethics, paragraphs 46 to 58. The system is one which is of general application throughout the United Nations and most of its agencies. It provides some checks and balances and an opportunity for participation at appropriate times by the staff member against whom allegations are made. Indeed PI/1.6, para 1.11 provides that the Ethics Officer “will conduct a preliminary review, which may include dialogue with the parties involved, including the alleged perpetrator, as appropriate and required”. This is a decision for the Ethics Officer to make and it does not form part of a reviewable decision before the Appeals Board. It is noted that in *Nyuyen-Kropp and Postica* 2015-UNAT-509 at paragraph 34 it was found:

Initiating an investigation is merely a step in the investigative process and is not an administrative decision which is subject to review.

37. In any event, no error is found in the manner in which this preliminary decision was made. Insofar as the Applicant asserts he had a right to be consulted at this preliminary stage, no such right is found to exist.

*Complaints could have been resolved*

38. The Applicant twice asserted that the complaints against him could have been resolved through informal resolution, and that by not doing so his due process rights were violated. It is noted that ICAO Personnel Instructions PI/1.3 and Personnel Instruction PI/1.6 do not provide for the resolution

suggested by the Applicant to be a right. These ICAO Personnel Instructions provide that an aggrieved staff member who believes that they have been a victim may seek to resolve a matter informally. It is not a compulsory process. Those impacted by such conduct can be in a position where they are exposed to retaliation and thus the procedures are permissive of victims taking action, only if they wish.

*Complaints not made properly*

39. The Applicant has also asserted that by failing to make reports in the manner provided in the administrative issuances, then the complaints are invalid.

PI/1.6, paragraph 1.7 provides:

1.7 One of the following means of communication *can* be used for reporting:

- a) email: by using the dedicated email account which will only be accessible to the Ethics Officer;
- b) facsimile: by using a dedicated fax line which will only be accessible to the Ethics Officer;
- c) mail: by sending the report to the Ethics Officer in an envelope, sealed and marked “Confidential, to be opened by the addressee only”. (emphasis added)

40. The use of the verb “can”, is permissive. What is provided is three methods of notification. They are not exhaustive. This is reinforced when one considers paragraph 3.9 of PI/1.6, which provides:

3.9 The aggrieved staff member *may* report confidentially, in writing, to the Ethics Officer, using one of the means of communication indicated in paragraph 1.7 above, with as much detailed information as possible regarding the matter. All allegations of any form of harassment will be investigated by the Ethics Officer and dealt with in a confidential manner, in accordance with the procedures for cases of misconduct established in Section 1 above, as applicable. Any retaliation or threat of retaliation against individuals making complaints against harassment, or assisting in the investigation of such complaints, will be considered as a violation of standards of conduct and will be investigated and dealt with in accordance with the procedures in relation to the protection of staff against retaliation established in Section 2 above. (emphasis added).

41. The word “may” in the first line of paragraph 3.9 above is an auxiliary verb which attracts to the manner in which a report may be made. It is not mandatory as to the manner. If it were intended to be mandatory, then the auxiliary verbs “shall” or “must” would appear. Thus, a report may be made to the Ethics Officer in any manner which provides the Ethics Officer with sufficient detail of what is alleged to have occurred so that it may be recorded and a decision then made as to what, if any, action is to be taken in respect of the matter.

42. To contrast the nature of the reporting, in section 2 of PI/1.6 dealing with retaliation, the nature of the mandatory reporting is such that “2.2. Any case of alleged retaliation *shall* be reported to the Ethics Officer using one of the means of communication indicated in paragraph 1.7 above.” (emphasis added).

43. No particular method of notification is provided for, and it can be, as asserted by the Respondent in answer to the Applicant, an oral notification. The Respondent has also correctly submitted that the ICAO Framework on Ethics requires “that the Ethics Officer receive and act on all allegations of misconduct, without regard to the method by which those allegations came to light.” The effect of this is also that the Ethics Officer is not reliant upon complaints coming directly from an alleged victim, others may report misconduct. This ground of review advanced by the Applicant fails to disclose a procedural error.

*There was a duty to inform the Applicant his conduct was unwanted.*

44. The Applicant asserts that the complainants had a duty or obligation to inform him that his conduct was unwanted and to thus effectively warn him. This matter has been expressly addressed by the UNAT in the decision in *Adriantseho* 2021-UNAT-1146/Corr. 1:

44. Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behavior of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another. While typically involving a pattern of behavior, it can take the form of a single incident. It does not require that the alleged harasser was aware of the offending character of his or her behavior and was put on notice, which would otherwise preclude a single incident from constituting sexual harassment.

And at para 50

In addition, there is no legal basis for suggesting that offensive or humiliating behavior ceases to be sexual harassment if the victim gives the perpetrator no warning or signal that the behavior is unwelcome and reports it to the appropriate authorities only when she feels safe to report it with the support of other victims. Thus, we cannot follow the UNDT's finding that, absent an explicit verbal protest and immediate reporting to authorities, the conduct cannot constitute sexual harassment.

45. It is thus clear that no requirement of notification existed. This ground cannot be upheld.

*Irregularities recognized by UNOHR and the failure to provide the Applicant with a copy of the advice given by UNOHR to the Respondent*

46. This issue was the subject of the following Ruling made by the Appeals Board on 10 August 2022 and is referred to above at paragraph 30.

*There was a failure to comply with the **definition of sexual harassment** in the ICAO Personnel Instructions.*

47. He has asserted that:

The only mandatory element of sexual harassment as defined by the ICAO Personnel Instructions is the **unwanted** character of the alleged behaviour.

48. This matter is addressed in the review of the findings upon which the decision under review is based.

*The Applicant asserts that the initial procedure launched by the Ethics Officer was biased and that the Investigating Committee should not have permitted her to take part in the process.*

49. No convincing evidence has been produced by the Applicant that discloses to the satisfaction of the Appeals Board that the Ethics Officer was biased. It appears that she may well have been overzealous in the manner in which she went into unnecessary detail in the initial preliminary investigation, but this does not disclose bias. The other complaints in respect of the initial investigation do not fall within the jurisdiction of the Appeals Board to consider in this appeal, as they were preliminary matters leading to the recommendation to commence an investigation and are this an initiating step. The Appeals Board refers to the case of *Nyuyen-Kropp and Postica* 2015-UNAT-509 at paragraph 34, cited above.

*The Applicant has further complained that delay related to dealing with the complaints was deliberate and appears to assert that this should also invalidate the whole of the investigation.*

Paragraph 1.11 of PI/1.6 at the time provided:

Upon receiving a report, in order to establish whether there are grounds to pursue the matter, the Ethics Officer will conduct a preliminary review, which may include dialogue with the parties involved, including the alleged perpetrator, as appropriate and required. The reporting person will be notified, normally within 30 calendar days from the receipt of the report, of the Ethics Officer's decision to pursue or close the matter.

50. This paragraph gives no rights whatsoever to the person in respect of whom a report has been made. The rights of the person making the report to receive advice is limited to a consideration of a normal reporting back within 30 days, but there is no direct requirement for this to occur. These assertions of a breach of procedures impacting upon the Applicant in this instance are without any foundation.

*The Applicant also complains about the time taken by to conduct the investigations and the process as a whole.*

51. The Applicant notes that the total time of the investigation was 570 days instead of a maximum time of 90 days, as he asserts is set out in PI/1.6. The Applicant complains that the whole process of the preliminary investigation and the actual investigation took 1166 days.

52. The precise reference to the time requirement is set out in PI/1.6, paragraph 1.15, which relevantly provides:

The investigator(s) shall make every effort to conclude the investigation and present a report thereon to the Ethics Officer within 60 calendar days of receipt of the terms of reference.

53. The OIOS noted in the Investigation Report, the abnormal length of time of the initial assessment that amounted to an in-depth investigation although it should not have been such.

54. The Appeals Board agrees with the Applicant, and the investigators, that the time taken for the investigations, both preliminary and actual, is entirely unsatisfactory and without adequate, or any, explanation. The issue is, however, what impact has this had upon the procedural and general rights of the Applicant and has he been disadvantaged in the defence and presentation of his case? The Applicant has made no significant allegations concerning the recall of the witnesses when giving their evidence to the investigators. The Applicant is correct in his assertion that a staff member has the right to expect that an investigation shall be undertaken expeditiously and those undertaking the investigation have a corresponding duty to so act. The issue is, has the Applicant been disadvantaged in such a manner by the delay as to outweigh the findings and efficacy of the investigation? The only disadvantage that the Applicant points to is the delay in having the decision made by the Respondent. This is not directly detrimental. The Appeals Board also notes that the many hours of recording of the interviews of the witnesses have been listened to and there was no mention of a lack of recollection of matters due to the time taken to finally investigate the matters formally, although V02 had some clear issues with recall, which are discussed below.

*There was an undue delay in bringing the complaints and they were examined by a committee not existent at the time when the alleged conduct complained of occurred.*

55. Please note that this is the understanding of the Appeals Board as to the ground asserted by the Applicant.

56. The Appeals Board notes the comments of the Applicant in this regard, but matters need to be considered under the legal regime applicable at the time of the complaint. To do otherwise when there is alleged conduct covering many years, would make it impossible to deal with complaints. In addition, the ICAO processes were strengthened to put in additional safeguards for the Applicant by the introduction of the Investigations Committee which was required to consider and determine, by majority vote, whether to refer a matter for investigation. This was to the benefit of the Applicant, as it provided an additional filter. It is generally appropriate when there is a change in a regulatory regime to the benefit of a staff member, it should, as a matter of fairness, be generally applied retrospectively.

57. Further, the Applicant has not, in any event, asserted how he has been disadvantaged as a consequence of the decision of the ICAO Council to introduce the Investigations Committee.

*Breach of confidentiality and inconsistencies in the Ethics Officer's report due to deficiencies in the Ethics Framework*

58. There is an assertion by the Applicant that the Ethics Officer breached confidentiality where she failed to protect the investigative files under her control. The Applicant then makes a number of unsubstantiated claims that there were six leaks of information. There appears to be an inference that they came from the Ethics Officer. The matter went no higher than an inference, as there was no attempt to substantiate the allegations at the hearing and there is no proven connection between the alleged leaks and the investigative procedures, the findings or the decision. In any event, if they occurred, they are not under review.

59. The conduct of the Ethics Officer, is not a matter in respect of which the Appeals Board has jurisdiction to review. The only involvement of the Ethics Officer was at a preliminary stage, before the actual investigation commenced. The Appeals Board will not further address the issues raised in this respect.

60. The Applicant has asserted that there were a number of due process violations which must form part of the review.

*Violation of due process*

61. By the time the Preliminary Assessment Report was terminated, and report provided to the internal body and then to OIOS, the time that had elapsed since the incidents in question (almost two years) made it difficult for the Applicant to gather reliable testimony from witnesses as to whether those incidents occurred and how third parties may have perceived them.

62. The Applicant provided no convincing evidence to support this assertion. As already noted, it may well be that the delay caused difficulties for the Applicant, but he must prove the assertion to this effect, which he has not done.

63. The Applicant asserts that he should have been provided with copies of the witness statements at an earlier stage than when he was provided with such. He does not provide any basis for this asserted right and the evidence is that the proper procedures provided for in respect of the provision of the Investigative Report and being advised of the charges against him were followed and that he was given a right to respond. He requested extensions of time, which were reasonably granted.

64. The applicant complains that he was not given the right to counsel of his choice. This was denied due to a lack of power of the Appeals Board to grant the request as a consequence of the operation of Staff Rule 111.1(15), which provides:

15. A staff member may present that staff member's appeal in person or may be assisted or arrange to have it presented on that staff member's behalf by any other active or retired staff member ("Counsel") serving or residing at the duty station where the hearing is conducted.

65. The Applicant has further provided as a ground for review the assertion that the former Ethics Officer went on a "Fishing expedition", attempting to convince staff to file complaints, rather than being merely witnesses. This again relates to a preliminary matter, it is not the subject of the decision under review. The state of mind and the actions of the Ethics Officer are not and cannot be the subject of review as they are not a "decision" within the jurisdiction for review by the Appeals Board.

66. The Applicant asserts that alleged errors and irregularities tainted the whole of the investigation and that there has been a lack of objectivity by the investigators. The Appeals Board is unable to agree with these assertions. The Appeals Board does not find the allegations in respect of the preliminary investigation are made out.

67. The Applicant has submitted as a further ground that "*The initial report by the Ethics Officer and transmission by the ICAO Investigations Committee impeded the entire investigation process*". The fact that the undertaking of the Preliminary Assessment Report may have been more detailed than was required and that this delayed the processes, does not invalidate the processes. It merely delayed them. The delay, while being unfortunate, does not vitiate the OIOS investigation and thus the findings made and the decision reached. It in no way leads the Appeals Board to the conclusion requested by the Applicant that there was a lack of objectivity by the investigators of OIOS, they being the investigators charged with the actual operative investigation in the matter which led to the Investigation Report, which was produced pursuant to paragraph 52 of the ICAO Framework on Ethics, being Annex I to the ICAO Staff Regulations. The Appeals Board has not found a lack of objectivity in the investigators which may have tainted the investigation. It is clear that the investigators have set out both inculpatory and exculpatory evidence in a fair and proper manner. The submissions of the Applicant are argumentative in respect of the findings reached and evidence accepted.

68. The Applicant has asserted that "*Evidence was biased from the start – no prima facie evidence provided*". The assertions by the Applicant are not well founded and appear to be based upon an error in the consideration of the role of the Investigation Committee. *Prima facie* evidence is evidence which merely on its face indicates that there may have been misconduct and that an investigation to ascertain the full facts should be undertaken to determine the truth of the facts and whether those facts amount to misconduct at the appropriate standard of proof, following which a decision may be taken as to whether any sanction should be applied for any misconduct thus proven. A determination by the Investigation Committee as to whether there is *prima facie* evidence is to ensure that there is an initial review of matters which touch upon the complaints or the conduct generally, to ensure that any investigation is not frivolous, but addresses a matter of serious concern. The evidence upon which a *prima facie* consideration may be based may include oral evidence of a hearsay nature which has been recorded by a reporting officer, in this case, the Ethics Officer. This evidence is no more than to assist in the formation of a view of whether there is a serious matter to be investigated, it does not relate to the final investigation and the findings made in respect of such after all matters have been taken into account. The Applicant appears to have merged the notion of the initial preliminary investigation to ascertain whether there is a serious matter to be considered, with the actual investigation by OIOS. They are separate forms of investigation, with the considerations of OIOS being at the much higher standard of proof and significantly more detailed. The considerations following the Investigation Report of OIOS is that of whether the facts found have been found at the evidentiary standard of proof of clear and convincing and whether such facts as found legally amount to misconduct.

69. The Applicant asserts that there is a “*Blatant contradiction between the Preliminary Assessment Report (PAR) and the OIOS finding*”.

70. This is not a concern of the Appeals Board, as the Preliminary Assessment Report is just that. It is preliminary. It is not the definitive report, or examination of the facts. The investigation report of OIOS is that which should properly record the matters investigated in order to be put before the decision maker so that he or she may examine it and the evidence appended to before a decision is made. This is undertaken pursuant to paragraph 57 of the ICAO Framework on Ethics, which provides:

*Action on investigation report*

57. On the basis of the investigation report and the supporting information, the Secretary General shall, subject to the observance of all relevant due process requirements:

- a) initiate a disciplinary process against the staff member concerned in accordance with the established rules and procedures; and
- b) if and when appropriate, take managerial actions and/or administrative measures.

71. The Preliminary Assessment Report has no bearing upon the OIOS report or findings. The further complaints made by the Applicant concerning the Preliminary Assessment Report are not further considered, as they are not relevant to the review undertaken by the Appeals Board.

72. The Applicant asserts that there has been “*Mishandling of the case and conflict of interest of OIOS*”. There is no evidence to support such an assertion.

73. The Applicant asserts that hearsay evidence has been used beyond that which is permissible. The Appeals Board has examined the evidence referred to in the Investigation Report. The issue of hearsay evidence is addressed in the detailed considerations of the evidence in respect of each of the five matters examined by the investigators.

74. “*OIOS used two investigators that appeared not to be mandated for this case.*” The Applicant requested the Appeals Board to receive the mandate of the investigators to check their [qualifications].

75. The Applicant produced no convincing evidence to support this assertion. Without such, the Appeals Board proceeded on the basis of a presumption of regularity in respect of the mandate of the investigators.

76. The Applicant asserted that “*The OIOS investigation was not conducted neutrally, without bias, and with a presumption of innocence as it should have. Nor was it an investigation established on facts.*”

77. This assertion is again argumentative of the findings made. A complete review of the Investigation Report fails to disclose bias, or that the matter has not been based upon a presumption of innocence. The processes undertaken disclose that there was a presumption of innocence, with the Applicant being able to answer the evidence produced which was inculpatory and to have suggested witnesses who would support his contentions interviewed by the investigators. The Appeals Board has noted that the investigators asked open, non-leading questions of witnesses, in a proper manner. They asked questions in such a manner as to ensure that the answers to questions were tested for consistency.

78. The Applicant has made specific assertions about the evidence and the findings made by the investigators. He commenced by discussing the judgment in *Aahooja* UNDT/2019/033, para 149, appearing to draw a parallel between the manner in which the investigators acted in that case and the manner

in which they acted in the investigation into the matters concerning his case. He referred to the following passage:

*“Much of what is contained in the investigation report is conjecture or hearsay assertion, which is unsupported by primary or corroborative evidence. For the consideration of the final disposition of a matter it is entirely insufficient for an investigator to provide a report substantially devoid of actual evidence and/or evidence that can be tested as part of the fair trial rights and procedural fairness rights of a party before the Tribunal. References to discussions and the citing of documents by an investigator does not prove the statement made or the contents of a document... Documentary evidence requires to be produced, not merely asserted to exist.”*

79. This passage must be viewed in light of paragraph 38 of the decision:

... The Tribunal found upon review and further inquiry on an appeal de novo, that many facts were missing, incorrectly recorded or illogically considered in the investigation report.

80. In *Aahooja* the situation was that the investigator asserted facts existed, but did not produce the evidence to support the asserted facts. The hearsay evidence was largely provided by the investigator as to what she had seen and in respect of the import of unrecorded conversations she had with people who should have made witness statements. This was no evidence at all. The conduct of the investigator in *Aahooja* was in no way repeated in the investigators in this case. The Investigation Report in this matter is very closely aligned with the evidence given by the witnesses. It is cross referenced to the interview in minute detail. While some matters of hearsay, coming from the witnesses, have been recorded in the Investigation Report, it does not mean that it was taken into account as such. The Appeals Board, as is referred to below, has been very careful in its review to discount hearsay in making its assessment of each of the complaints. In cases involving sexual harassment direct evidence of the happening of an event is often difficult to obtain from third parties to the alleged conduct. Thus, evidence of what a person may have said directly after the happening of an alleged event or observations of the conduct, demeanour or condition of a person after the happening of an event are important. They do not form hearsay, they form part of transactional evidence when viewed as a whole. Some evidence can be hearsay, but it may be relevant when viewed together with the transactional evidence, as the transactional evidence may provide the necessary corroboration to render the hearsay evidence relevant as part of the overall evidentiary considerations.

#### Scope of review by the Appeals Board

81. In the case of *Wan* Judgment ICAO/2022/007 the Appeals Board set out the scope of review in the following terms:

The administration bears the burden of establishing that the alleged misconduct for which the disciplinary measure has been taken against the staff member has actually occurred. See *Liyararachchiga* 2010-UNAT-087. The standard of proof required is that of clear and convincing evidence, which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt, it means that the truth of the facts asserted is highly probable. See *Molari* 2011-UNAT-164, para. 30. This jurisprudence reaffirmed in *Abu Ghali* 2013-UNAT-366, para. 33; *Nyambuza* 2013-UNAT-364, para. 31; *Diabagate* 2014-UNAT-403, para. 30; *Mobanga* 2017-UNAT-741, para. 24.

82. It has been further observed that “Clear and convincing evidence of misconduct [...] imports two high evidential standards. The first (‘clear’) is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard (‘convincing’) requires that this clear evidence must be persuasive to a high standard appropriate to the gravity of the allegation against the staff member and in

light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events, or may be of evidential inferences that can be properly drawn from other direct evidence.” See *Negussie* 2020-UNAT-1033, para. 45.

83. In other words, the evidence justifying the potential consequences (including up to the ultimate sanction of dismissal) must be both manifest as opposed to suppositional (‘clear’) and more than meets a balance of probabilities standard (‘convincing’). A sufficient doubt or doubts about the credibility of other evidence (including eyewitness evidence) can be a good indicator that this standard has not been met.

84. If a disciplinary measure of termination is based on several grounds, as in this case, including mitigating and aggravating factors, there must be clear and convincing evidence for all these facts or elements. See *Negussie* 2016-UNAT-700, paras. 23-25 and 28; *Negussie* 2020-UNAT-1033, paras. 11-12.

85. It is well established by the United Nations Appeals Tribunal (UNAT) that the nature of judicial review in disciplinary cases requires the Appeals Board to ascertain:

- (a) whether the facts on which the disciplinary measure was based have been established;
- (b) whether the established facts legally amount to misconduct;
- (c) whether the disciplinary measure applied was proportionate to the offence; and
- (d) whether due process was provided to the Applicant.

(See, for example, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Portillo Moya* 2015-UNAT-523, *Wishah* 2015-UNAT-537, *Turkey* 2019-UNAT-955, *Ladu* 2019-UNAT-956, *Negussie v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-700, para. 18, and *Nyawa* 2020-UNAT-1024 para. 39.)

86. In determining whether the facts upon which the disciplinary measures have been established, the Appeals Board may take into account matters which are asserted by the Applicant to have not been given the proper weight, were wrongly ignored or were irrelevant, yet taken into account. The facts established must be properly established according to law.

87. Further, when considering the decision it is noted that the decision maker has the discretion to impose the disciplinary measure that he/she considers adequate having regard to the nature of the misconduct, the objective of punishment and deterrence, and other relevant considerations. The decision-maker also has the discretion to weigh aggravating and mitigating circumstances. When reviewing proportionality, the test applied by the Tribunal is whether the measure is blatantly illegal, arbitrary or discriminatory or otherwise abusive or excessive.

88. The Appeals Board also notes the observations of UNAT in *Applicant* Judgment No. 2022-UNAT-1187. In that case, at paragraphs 62 and 70, it was held that the investigation by OIOS is to be considered as similar to a police inquiry in a criminal case and the investigative report is not a substitute for a judicial determination of whether misconduct has occurred.

89. Specifically, in the case of *Applicant* Judgment No. 2022-UNAT-1210 UNAT observed:

57. In determining the facts, the UNDT is required to keep the standard of proof uppermost in its mind. The Secretary-General bears the considerable onus to bring clear and convincing evidence before the UNDT proving that the misconduct was highly probable. There is no overall onus on the

staff member to prove his innocence. If the version of the accused staff member is reasonably possibly true there will be a reasonable doubt, and there must be compelling evidence that counters that doubt before a finding of highly probable wrongdoing is made. An OIOS investigation report, given its limited fact-finding methodology, usually will provide no more than reasonable grounds to conclude that misconduct occurred, amounting to proof that is appreciably less than clear and convincing. If it were accepted that an OIOS investigation report, based solely on a written record of interviews not observed or cross-examined by the Appellant, is adequate to determine whether sexual harassment occurred, then there would be little role for the UNDT.

90. In the case *Applicant* Judgment No. 2022-UNAT-1187 the Tribunal also held that it is insufficient for the Secretary General to defend a decision for misconduct on the basis of the investigative materials provided by the Office and that the Secretary-General must prove, with witness testimony before the Dispute Tribunal, the veracity of the Office's report and the other materials from the investigation and disciplinary process. UNAT went on to observe that it considered investigative reports by OIOS to be largely hearsay.

91. It is apparent from the judgment in *Applicant* Judgment No. 2022-UNAT-1187 that there were two irreconcilable versions of events without corroborating evidence and that the assessment of the credibility of witnesses was central to the task of the UNDT. This is a somewhat different case from that before the Appeals Board in this matter, where there appears to be certain disputed events, but there is evidence presented by emails and short message service (SMS) messages. It is an issue of whether the requisite standard of proof has been reached. It is to be noted that the parties were given the opportunity in the Scheduling Order of 22 June 2022 to advise the Appeals Board if they objected to any of the materials being produced as evidence and if so, to advise the Appeals Board of that fact. While it was clear that the Applicant questioned the evidence set out in the Investigation Report, no other advice was received from either of the parties, and the Appeals Board proceeds on that basis.

92. It is noted also that in *Applicant* Judgment No. 2022-UNAT-1187, UNAT also made the following observations concerning hearsay evidence:

72. While hearsay evidence is normally not admissible in jury trials, there can be no objection to its admissibility before the UNDT, provided it is in the interests of justice to admit it having regard to the nature of the evidence, the purpose for which it is tendered, its probative value, the reason for the evidence not being given by the person upon whose credibility the probative value of the evidence depends and any prejudice to the other party.

73. Nonetheless, it must be emphasized, hearsay evidence is intrinsically unreliable and of little weight, unless substantially corroborated, because its probative value depends largely on the credibility of a person (the complainants) other than the person giving such evidence (in this case the OIOS investigator, the interpreter and the person(s) responsible for the synopses – had they testified or verified the authenticity of the recordings and the accuracy of their translation). Hearsay must be received with caution as the maker of the statement (in this case those alleging sexual harassment) might have deliberately lied; been mistaken owing to the deficiencies of memory or observation in relation to the contested events; or may have narrated the facts to the investigator in a misleading fashion. The purpose of cross-examination is to expose these deficiencies, and if the maker of the statement is not before the UNDT, as in this case, this safeguard is lost.

93. The Appeals Board makes it clear that it agrees with this position, and it cannot do otherwise. Evidence which has been referred to by the Applicant in this matter as hearsay has been ignored as to considerations of it representing evidence of probative value, it is no more than contextual. Evidence of the demeanour of complainants or victims is, however, acceptable evidence to take into account. It is direct evidence of such.

94. It is further observed that the ICAO disciplinary procedures are not criminal in nature, they stem from the contract of staff members with ICAO. Issue of misconduct are serious, but they are not criminal in nature and the proceedings are civil in nature. See *Jahnsen Lecca* 2014-UNAT-408 para 24, *Molari* 2011-UNAT-164 para 30 and *Majut*-UNAT-862 para 74. The procedures followed in the making of the decision were those provided by the ICAO Framework on Ethics, paragraphs 52 to 57.

95. The Appeals Board also concurs with UNAT in respect of the Investigation Report being a document which is basically hearsay in its nature, as it is a record or summary of the evidence which has been obtained. In this decision, the Appeals Board has carefully considered and reviewed the evidence which has actually been provided in the witness statements and documents. It has found that the Investigation Report reflects a proper recording of the actual evidence provided to the investigators, who have been very detailed in their cross referencing of the Investigation Report to the evidence obtained from witnesses and the other evidence obtained from SMS and emails. The Appeals Board has approached its review on the basis of the material agreed to be before it and the submissions made by the parties. In doing so, it has reviewed the whole of the matters, reaching its own conclusions as to whether the conduct complained of is proven to the standard of clear and convincing and whether it amounts to misconduct as defined by the administrative issuances of the Organization.

96. The Applicant has provided a detailed analysis of the evidence in respect of each witness and the errors asserted to be made in the consideration of evidence and the conclusions reached. These are taken into account by the Appeals Board in its review.

97. The Appeals Board has considered the matters individually in respect of each of the victims V01 to V05. It is to be noted that in cases of sexual harassment and harassment it is rather common that direct evidence is not always available from third parties. Therefore, the Appeals Board's role is to evaluate the admissibility of the available evidence, its probative value and establish its relevance to the issues in dispute (*facta probanda*) and then to initially determine if the evidence is clear and convincing. The Appeals Board notes that from the recordings of the evidence of each witness that they made a declaration as to the truth of the evidence given.

98. **In respect of V01 the following findings were made by OIOS**, redacted to remove the names of witnesses.

- i. Mr. Radu invited V01, a General Service staff in his chain of command, into his office on 14 December 2016, during which time he looked her up and down, cupped her shoulders, made an unwelcome comment and proposed having drinks together, all of which left V01 feeling uncomfortable as she perceived that Mr. Radu had something sexual in mind. V01 disclosed the matter to [Mr. C.], [Ms. G], and W01, all three of whom provided evidence that corroborated certain portions of V01's account, which thus collectively supported her account;
- ii. Sometime in September 2017, Mr. Radu called V01 into his office, closed his office door and proposed having drinks together again, thus again leaving V01 feeling uncomfortable. V01 disclosed the matter contemporaneously to [Ms. B.] and to [Ms. G, HR Focal Point.] shortly thereafter, both of whom provided evidence that supported V01's account of being called into Mr. Radu's office and him shutting the door;
- iii. On 6 December 2017, while at the ANB Christmas party, Mr. Radu approached W01, indicated that he had heard that V01 had said that he had sexually harassed her and that she had a Quebecois mentality. Mr. Radu instructed W01 to pass the message on to V01 on his

behalf. W01 corroborated V01's account. V01 had also disclosed the matter to Ms. G, who was supportive of V01's account;

- iv. On 8 January 2018, V01 sent an email to [Ms. K, the ICAO Ethics Officer,] in which she reported Mr. Radu's behaviour as sexual harassment and indicated that his conduct had made her feel dirty and violated;
- v. V01's account of her interactions with Mr. Radu is supported by electronic evidence, as well as the statements of five witnesses. This corroborative evidence, along with Mr. Radu's admission that he used to hug her, kiss her cheeks and may have addressed her as "hello beautiful", leads OIOS to find that V01's account is credible;
- vi. Mr. Radu denied having any sexual interest in or displaying any sexual interest towards V01, and he denied approaching anyone at a party and asking them to pass a message to V01 on his behalf. Mr. Radu's explanation that V01 was coached by persons wanting to harm him and was retaliating for his [24 August 2017] email to Ms. K [about V01 asking *him* out for a drink] is not convincing and remains uncorroborated. Thus, OIOS finds that Mr. Radu's account regarding V01 lacks credibility;

99. The Applicant contests all the findings made in respect of V01.

100. The Appeals Board has reviewed in full the audio recording of the making of the statement by V01 and the witnesses and has found that the Investigation Report accurately records the relevant statements made at paragraphs 12 to 43. The Appeals Board thus refers to the Investigative Report, but in summary.

### **Statement of V01**

101. V01 recalled in her evidence that the Applicant addressed her "as hello beautiful". It was mentioned by V01 that the Applicant would kiss her three times on the cheeks. The investigators appear to place reliance upon this, but, as the Applicant asserts, this is most likely a cultural issue, a matter not considered by the investigators and not apparently put to V01.

102. The apparent favours offered or shown by the Applicant to V01 were inappropriate and may have formed part of a grooming process. V01 stated that she felt uncomfortable about such. V01 showed concern about the attitude of the Applicant attempting to get close to her.

103. V01 gave evidence that on 14 December 2016 the Applicant gestured her into his office. She stated that the Applicant looked at her with "elevator eyes", checking out her figure. The Applicant then cupped her shoulders and said "talking of cleavage"... "Mnn, what am I gonna do with you". This caused V01 to feel violated. The conclusion that he was acting in a manner with a sexual overtone is unavoidable. It is alleged that the Applicant then appeared to be promising V01 a job in respect of which at the time there was no job opening. He then invited V01 out for drinks. V01 described that she was both angry and sad. She did not want the attention and she reported having cried when she returned to her office.

104. In 2017, V01 recalled that she was addressed as "Hey sexy", which she found inappropriate. She was later asked out for a drink by the Applicant, which she also found inappropriate. In September 2017, V01 was again gestured into the office of the Applicant by him. He closed the door behind her. V01 was invited out by the Applicant. In response to a question from V01, the Applicant said he was not suggesting a team outing, but that they have a drink at V01's residence. Immediately after this event V01 shared the details of the interchange with two other ICAO staff members, while she was crying. She

sought guidance from another staff member in respect of the matter. A week later V01 sought out the ANB Human Resources focal point in respect of her encounters with the Applicant.

105. In December 2017 V01 was spoken to by a witness W01, telling her that the Applicant was saying that she was telling everyone that she was being sexually harassed by the him and that he had stated that such behaviour was a Quebecoise thing to do. As a result of this information, V01 then contacted the Ethics Officer, formulating a complaint.

### **Other evidence**

106. The evidence of V01 was corroborated through contemporaneous conversations and observations of five witnesses, C, M, R, G, and W01. One witness recommended by the Applicant in respect of this matter was interviewed, but stated that he did not know V01.

107. After a complaint had been made to the Ethics Office by V01, it is apparent that the Applicant attempted to denigrate V01. W01 recalled that the Applicant had said to her V01 had slept with the Chief of a new section she had applied to. This was confirmed in an email from W01 to V01. W01 also recounted that the Applicant had said that he thought that V01 was ugly and that her breasts were not as big as he had originally thought that they were.

### **Response by the Applicant**

108. The Applicant was interviewed on 11 October 2019 and provided further clarification by email on 5 and 6 November 2019. Paragraphs 128 to 137 of the Investigation Report fairly records the substance of the interview with the Applicant. The Applicant essentially denied the allegations made against him. The following assertions and denials are relevant to the allegations by V01 and the evidence given by the other witnesses:

- a. V01 did not report to him,
- b. V01's supervisor felt that V01 was not performing well and had an attitude and should not be extended. The Applicant told the supervisor that she needed to speak with V01 to address any issues of performance and the probationary period of V01 could be extended by 6 months.
- c. He thought he had been introduced to V01 by her supervisor after V01 joined ICAO, as they were both from Eastern Europe,
- d. His greeting of V01 with hugs and kisses was cultural, and that V01 actively engaged in and reciprocated the kissing every time they saw each other, including at an ICAO social event. -He described V01 as a "nice, beautiful lady" and indicated that he was unsure as to how he used to address her, but agreed that he could have greeted her as "hello beautiful", which was an expression he used often, along with "hello smartie" and "handsome guy".
- e. V01 asked the Applicant to go for coffee. He became worried about this, as he had heard that G staff sometimes targeted top management with ill intent so as to extract career-related favours later, as a result he sent an informal email to the Ethics Officer about the behaviour of V01, even though he did not believe he was being targeted by her.
- f. After sending the email to the Ethics Officer he ignored V01, trying not to interact with her.
- g. He did not recall meeting with V01 around Christmas 2016 though he stated it "might be".
- h. He doubted that he cupped V01's shoulders and talked to her cleavage, the Applicant stated "I doubt it", and then later said "I don't think so but I don't know".
- i. He did not recall touching V01
- j. He did not recall proposing drinks to V01. He said "I wouldn't say so, no, I don't think so".
- k. He may have suggested a group social drinks, which would have included V01
- l. He denied looking "people up and down", noting "when you see something nice...I usually, but..." not to ladies because he did not want to be misunderstood.

- m. He did not “know for sure” if he said anything or acted in such a way which would leave V01 with the impression that he had more than a professional interest in her, but it would not have been intentional. –
- n. He thought V01 was as a “nice, tall, very beautiful lady”,
- o. He denied having any sexual interest in V01, as he did not see relationships between workers as correct.
- p. He denied hovering around V01 at functions,
- q. He did not recall being present at an event where he introduced V01 to the Secretary General, although he agreed that, in general, he did introduce his people to the Secretary General or President when the chance availed itself.
- r. He did not recall saying to V01 as “hey sexy” during a phone call. He advised that he would not have said such to his staff.
- s. In September 2017; however, he did not remember whether he shut the door or was uncomfortably close to V01.
- t. He denied suggesting having drinks at V01’s house.
- u. He denied approaching anyone and voicing any concerns or anger about V01.
- v. He denied making any remarks about the behaviour of V01 relating to her being Quebecois
- w. He did not think he would have said V01 was stupid or slept with her new Chief. He stated that he was not inclined to say bad things about people, and he would never have said that a beautiful woman was ugly.
- x. He indicated that he had not even been aware that V01 had voiced any concerns about him until advised of such during the OIOS investigation.
- y. He was unsure as to whether V01 knew of his email to the Ethics Officer, but she would have certainly known he was ignoring her at the very least, V01 would certainly have felt that Mr. Radu was ignoring her.
- z. When the Applicant was asked if he thought V01 was lying? He responded that he was unsure sure “how she perceived this”.

109. The Appeals Board notes that when taking the interview of the Applicant into account, that he was unable to recall a number of matters, but he did not deny that they may have occurred. His reference to V01 as being a “nice, tall, very beautiful lady” and his later comment that he would have never said a beautiful lady was ugly, discloses that his approach to V01 was to objectify her. The “informal email” to the Ethics Office from the Applicant referred to above was dated 24 August 2017. It post-dated the alleged events of 14 December 2016 and predated the events of September 2017. The reference by the Applicant to the notification to the Ethics Officer of the behaviour of V01 has the indicia of action taken in anticipation of a need to defend a complaint. It was not formalised into a complaint against V01.

110. The Appeals Board finds that facts as asserted by V01 are proven as they are clear and convincing when the matrix of evidence is taken into account. The evidence of the Applicant is contradictory, uncertain as to numerous matters, and not consistent. The Appeals Board also takes note of the fact that the Applicant in giving evidence on 11 October 2019 in respect of the events involving V01, stated that he did not perceive relationships between workers as being correct, as set out at paragraph 132 of the Investigation Report. This is to be directly contrasted with his admission, as recorded at paragraph 140 of the Investigation Report during his interview in respect of the events involving V02, that he had been having a romantic relationship since early 2019, with W03, a staff member of ICAO, who he admitted was in his chain of supervision for a time. This was a matter admitted by W03, but only after she was reminded of her obligation to answer questions put to her. The Appeals Board finds that the statement made by the Applicant to the effect that he did not perceive relationships between workers was a self-serving statement and a false denial.

111. The evidence of V01 was detailed and precise and was largely corroborated by the demeanour evidence of the witnesses C, M, R, G, and W01. The evidence of W01 as to what she was told by the Applicant, although the Applicant has not recalled most of the remarks attributed to him, is of some significance, as W01 was independent in every respect from either the Applicant or V01.

112. The Tribunal finds V01's statements to be clear and congruent. She maintained the same narrative throughout the course of the investigation. The fact of her discussions with others to share her experience and to seek advice contemporaneous to the events is corroborated by a number of witnesses. V01 provided details about her interactions with the Applicant that render her testimony even more credible, for instance the fact that he has shared with her intimate details about his marriage and divorce and his former girlfriend. In addition, the chronology of events also renders her account reliable.

113. Further, the evidence of W01 clearly shows that after the events complained of, the Applicant had expressed views both derogatory and of a sexual nature of and concerning V01. Such comments are corroborative of the sexual harassment complained of and part of the overall transactional matrix.

114. There is also clear and convincing evidence that this situation had a negative impact on V01 and the approaches were clearly unwelcome. V01 cried during interviews when it was suggested that discussion could be had with the Applicant about concerns that she had and her demeanour was noted as changing when the name of the Applicant was mentioned. The Appeals Board found these testimonies credible not only because they were all consistent but also due to the fact that there is no evidence of bias or prejudice against the Applicant by those giving the evidence.

115. The Appeals Board emphasises that, in cases of sexual harassment, due regard should be given to the victims' account as they do not face these situations lightly. In fact, due to the sensitive nature of the matter at stake in most cases, it is extremely difficult for the victims to make a formal complaint and go through a formal procedure.

116. The Appeals Board notes that the Applicant has referred to a number of staff members whose desks were located close to his office, who have said that they did not recall certain events, including visits from V01 to the office of the Applicant. The fact that they may not recall seeing V01 in no way diminishes the evidence of V01. For the staff members who may sit near the office of the Applicant, they would have no reason to recall a specific event. For V01, she had reason to recall, and to recall in detail, events which were far from the usual. Thus, the evidence against the Applicant is not diminished by these assertions of the Applicant.

117. The Appeals Board finds that the facts alleged are established according to the applicable "standard of proof" of clear and convincing evidence.

b. Whether the established facts qualify as misconduct

118. This matter is discussed further below in this decision in respect of the findings overall by the Appeals Board.

119. **In respect of V02 the following findings were made by the OIOS** (redacted to remove the names of witnesses):

- vii. On 19 June 2018, Mr. Radu called V02, a General Service staff, into his office, closed the door and displayed behaviour with a sexual undertone, all of which left her feeling uncomfortable. V02 disclosed the matter contemporaneously to Mr. [R], Mr. T, Ms. [G], Mr. [G] and Mr. [C];
- viii. On 21 November 2018, W03, a General Service staff in Mr. Radu's chain of command who is his mistress, approached V02 to discuss V02's complaint against Mr. Radu. V02 disclosed the matter contemporaneously to [Ms.[P], (ANB/MO),] who then confronted W03 and also advised Mr. Radu of the incident;
- ix. V02's early disclosure to Mr. [R] is supported by way of electronic evidence, specifically emails exchanged on 19 and 20 June 2018. In total, eight witnesses provided evidence that corroborated certain portions of V02's account, which thus collectively supported her account and leads OIOS to find that V02's account is credible;
- x. Mr. Radu, while confirming the meeting with V02, denied all her adverse claims. He rejected having proposed a position to V02 in exchange for intimacy and only acknowledged that a handshake and possibly a shoulder touch when guiding her out of the office door. However, the evidence outlined above is not consistent with Mr. Radu's statement, including in light of Ms. P's observations that she advised Mr. Radu about W03's behaviour and that she never spoke to Mr. Radu about anything that V02 had disclosed to her. Thus, OIOS finds that Mr. Radu's account regarding V02 lacks credibility;

Are the facts are established in respect of the matters concerning V02 according to the applicable "standard of proof" of clear and convincing evidence?

120. The Investigative Report at paragraphs 44 to 91 set out the evidence obtained by the investigators, which are in broad terms set out below. These recounted facts fairly reflect a summary of the evidence contained in the records of interview.

121. V02 initially joined ICAO in early 2018 on a six-month contract.

122. On 19 June 2018, V02 was collecting letters from E and a person now identified as W02. As V02 was leaving an area near the office of the Applicant, whom she had not met before, when he called her by name and asked her into his office. It is asserted by V02 that the Applicant closed the door. There was then a discussion about the fact that she had applied for a position, V02 enquired if she had been recommended and why he knew her name, to which the Applicant said "No, I saw your picture". During this conversation V02 recalled that the Applicant was looking her up and down, licking his lips. V02 recalled that this made her uncomfortable, recalling that it made her feel like a "piece of meat". V02 was advised by the Applicant that the position for which she had applied was temporary, but that he could make it fixed term for her and it could be available from the next day. V02 recalled feeling that the situation was not good and that she was unsure of the purpose of the meeting.

123. The Applicant said to V02 that he would have to speak with Mr. R about his offer. The Applicant advised V02 that he did not like Mr. R. She then wondered if she was being manipulated in some manner so that the Applicant could get to Mr. R. She advised that she would have to consider the matter and would have to advise him. V02 recalled that as she left the Applicant put his left hand on her shoulder and then shook her hand. V02 reported feeling very uncomfortable about the meeting.

124. That night V02 was sufficiently concerned to send Mr. R, a senior supervisor, an email asking if they could meet the next day. At that meeting V02 discussed what had occurred with the Applicant and that she thought it was wrong and felt very uncomfortable about the meeting. Mr. R then arranged a meeting between the Ethics Officer and V02.

125. V02 received a phone call from Ms. G advising V02 she had had been successful in an ANB job application. V02 stated that she was then unsure whether to accept the offer, as she would have to move to the 7th floor, which was the floor on which the Applicant's office was located. V02 accepted the position on the understanding that she could continue to work from the 10th floor.

126. On 21 November 2018, a person now known as W03 came to V02's office. She was unknown to V02. W03 asked if V02 if she could buy her a coffee. When they later met in the cafeteria W03 stated to V02 "What you're doing right now, you're gonna destroy lives because he's gonna have to go". V02 advised that she would not withdraw her complaint against the Applicant. W03 then apologized for having approached V02. V02 was nervous about interacting with W03 after this encounter.

127. V02 recounted that while she was waiting for the annual ICAO Staff Association Assembly to commence, the Applicant took up a position standing close to her, which disturbed her. She said that at some point he sat in front of her and she could see the back of his head. He made eye contact with her, leaving her with the impression he was not happy with her. V02 moved seats so she was no longer in the Applicant's line of sight as she was experiencing palpitations, sweating, anxiety and difficulty breathing.

128. Quite properly, and consistent with their duty to search for exculpatory evidence the investigators showed V02 a video clip of the Assembly from 3 July 2019. She identified where she was sitting in the fourth row. The Applicant could be seen entering the hall and situating himself against the wall. V02 agreed the Applicant was not as close to her as she had recalled. The Applicant was then seen on the video moving to the back of the hall to socialize and then taking a seat at the back, from which he later stood up. The clip then ended.

129. It was also apparent from the evidence that V02 had incorrectly assumed that the Applicant was taking photographs of her, when a video clip of the occasion clearly showed he was holding up his phone and texting. V02 had clearly misinterpreted the actions of the Applicant.

130. As a consequence of the interaction with the Applicant, V02 reported that she started taking sleeping pills, she was unable to go on a date and she doubted herself and her clothing choices. V02 advised that she had anxiety well before her incident with the Applicant. V02 reported that after the incident she cried and had panic attacks and was scared that the incident might be used against her to jeopardize her career. V02 also stated that entering the building those first few weeks took all of her courage. For the first three weeks following her new position, she slept at her parents' house because she could not be alone and staying with her parents was the only way she could manage to report to work, given that her parents expected her to go to work. V02 further indicated that she was still scared because she was unsure of the long-term repercussions of her complaint. It was apparent that she believed that the incident caused issues with her performance at work. In a later interview on 31 July 2019, V02 described herself as being exhausted and perhaps unsure of how to interpret things anymore.

## Witnesses interviewed

131. Below is a summary of the record of the evidence recorded in the Investigation Report, which was found by the Appeals Board to fairly set out the statements made. Statements of opinion made by witnesses and set out in the Investigation Report have not been taken into account and are not summarised.

### Interview with Mr. R

132. Mr. R stated that sometime in the second quarter of 2018, V02 advised him that she had been requested to attend the office of the Applicant. V02 reported that the Applicant had been in close proximity to her and that he displayed inappropriate behaviour, including giving her looks and looking at certain body parts. V02 perceived “the aggression” to be of a “sexual nature”.

133. Mr. R perceived V02 was traumatized and “injured...mentally” as she was shaking, crying and seemed to be unsure of what to do. Mr. R reported that he checked on V02 routinely afterwards because he could see she was fearful and had lost some of her confidence, and because she had indicated that she was afraid to take the elevator for fear of running into the Applicant.

### Interviews with W02

134. W02 stated that, approximately one year ago, the Applicant asked W02 about V02 and her work style. W02 believed that she then called V02 for a meeting and, when V02 arrived, the Applicant greeted her and took her into a closed-door meeting in his office.

135. Ms. E. recalled that V02 had been speaking to her after an “admin lunch” in June 2018, at which point the Applicant asked to speak to V02 in his office. Ms. E did not believe V02 had met the Applicant before that point or that it was a scheduled meeting as V02 seemed surprised. Ms. E did not view it as an “unnatural” request because the Applicant spoke to many people, often had unscheduled meetings and he was a Deputy Director who V02 would be working with. Eventually, as someone else had a scheduled appointment with the Applicant and was waiting, Ms. E mentioned to W02 that perhaps they should knock on the Applicant’s closed door to advise him of his scheduled appointment.

136. Ms. E reported that she had daily contact with the Applicant, given where her work space was in relation to his, and she described him as a “gregarious personality” who was enthusiastic about his work. Ms. E further described the Applicant as “quite generous” and thoughtful in terms of how he treated his subordinates, which included recognizing his staff.

137. Ms. E indicated that she had heard the Applicant displaying “playfulness” but was alive to the fact that it could be construed as sexist, such as a comment the Applicant made to a staff member about her looking good wearing high heels, though Ms. E could not recall who the staff member was and whether the staff member viewed the comment as anything other than a compliment. Ms. E reported that the Applicant was also always jokingly swooning over one of her colleagues, saying that she was “really, really good-looking” and asking Ms. E to be introduced to her, but they were never introduced.

138. W02 stated that the Applicant would comment about other people when they were nicely dressed or he would acknowledge if someone was pretty; however, the comments would be directed at W02 and not the actual person.

### Interviews with Mr. T and Ms. G

139. In approximately June 2018, an extremely emotional and upset V02 disclosed to Mr. T, that while running on errand on the 7th floor, the Applicant had called her into his office, closed the door, stood close to her and made inappropriate comments about liking her, working together and how he could help her if she was nice to him. Mr. T recalled how V02 described that the Applicant looked at V02's body, including her legs, "measured her out" by looking her up and down, and, when V02 attempted to move away, the Applicant initially "didn't let her go", all of which left V02 feeling very uncomfortable and threatened. Ms. G also confirmed that V02 had disclosed some similar details to her.

140. Mr. T and Ms. G did not believe that V02 knew the Applicant and they could not discern what professional conversation the Applicant would have needed to have with V02.

141. After her incident with the Applicant, Mr. T noticed that V02 was sad and her performance suffered, as it took her longer to complete tasks and she asked more questions, which was contrary to what he had previously observed. Ms. G also felt that V02 was blocked because Ms. G had to repeat herself many times when conducting training with V02.

### Interview with W03

142. W03 indicated that she had become aware, possibly on 12 July 2019 via her co-worker, Ms. B, that V01 and V02 had made sexual harassment complaints against the Applicant.

143. W03 stated that she did not know V02 very well as they only met at social events; however, given V02's behaviour with men at various ICAO social functions, W03 perceived that V02 did not mind the attention. As a result of V02's conduct, W03 pro-actively approached V02 in the cafeteria around December 2018 and advised her not to drink so much or be so friendly with male colleagues at parties.

144. When asked if she had pro-actively sought out V02 in regard to her complaint against the Applicant, W03 denied such and indicated that she had not even been aware of V02's complaint until she was so advised by Ms. B. When asked if she had a romantic relationship with the Applicant W03 indicated that she did not want to answer the question but then, once reminded of her duty to cooperate, confirmed that she had been in a romantic relationship with the Applicant since February 2019; however, she repeated that her motivation in meeting with V02 was not related to the Applicant.

### Interview with Ms. B

145. W03 indicated that she had become aware, possibly on 12 July 2019 via her co-worker, Ms. B, that V01 and V02 had made sexual harassment complaints against the Applicant. Ms. B confirmed having mentioned to W03 that V02 had made sexual harassment complaints against the Applicant. She observed that given W03's reaction and body language, Ms. B understood that W03 already knew about the rumours.

146. Ms. B described the Applicant as a supportive, charming, well-mannered, professional gentleman who made nice comments about and showed appreciation for the work Ms. B did and who also complimented people's clothing. Ms. B had heard that the Applicant had three to four allegations of sexual harassment against him; however, she had never had issues with him nor observed or heard of him "harassing" or displaying disrespectful behaviour towards anyone.

Interview with Mr. G

147. In approximately July 2018, Mr. R advised Mr. G of a closed-door meeting between the Applicant and V02 in Applicant's office. V02 later recounted to Mr. G that the Applicant had run his tongue around his lips and displayed other physical signs which showed that he was attracted to her, complimented her on her face or physical attributes, badmouthed or demeaned Mr. R and had offered her a job. The Appeals Board notes the hearsay involved in this evidence.

148. V02 had after this approached Mr. G with other concerns about the Applicant, including the Applicant sitting in front of her at a staff event and looking at her with his phone while she was outside. Mr. G had a discussion with Mr. C suggesting a 10 metre no-approach area between V02 and the Applicant. Mr. G wondered whether V02 might be too sensitive, but he also appreciated that someone who had experienced something might have a difficult time when seeing the other person.

Interview with Mr. C

149. Mr. C stated that Mr. G told him that the Applicant had asked V02 into his office, closed the door and discussed the possibility of her becoming the Applicant's Assistant. Mr. C stated that he wondered though whether V02's perception of what happened with the Applicant was correct, given that when she first started her new position, she would sometimes say things which made him wonder whether the comments matched actual facts. Mr. C indicated that he also had a performance discussion with V02 in May or June 2019 and he may have praised her for doing a good job and overcoming her issues; however, V02 may have interpreted that to mean that Mr. C wanted her to put the issue behind her, which further exacerbated his concerns about her perception.

150. Mr. C declared that he had numerous conversations with the Applicant about "not being stupid about his behaviour" and keeping his door open, especially if he had women in his office.

151. The Appeals Board notes the hearsay elements of some of the evidence above recorded.

Interview with Ms. P

152. In late 2018, a stressed and nervous looking V02 approached Ms. P to indicate that she had a "serious" "incident" during a closed door meeting with the Applicant in which she felt intimidated. V02 said that "nothing happened", they were sitting on opposite sides of the table and the Applicant then stood up while V02 was still sitting, thus resulting in V02 having to look up at him, which was "intimidating". V02 then described the Applicant's actions as "sexual harassment". V02 also indicated that she had already spoken with Mr. R and he had encouraged her to speak to the Ethics Officer, thus leading Ms. P to believe that something bad had happened and that V02 must not be disclosing everything, as what V02 was narrating did not appear to be "sexual harassment" or serious enough to tell the Ethics Officer about. Ms. P also felt that the event was recent and had perhaps only happened up to two days beforehand. A few days later, Ms. P asked V02 how she was doing and she again asked what had happened. V02 stated "nothing happened" and that the Applicant had not touched her, which further contributed to Ms. P's confusion. Ms. P also reported that, as she began to hear gossip about the incident involving V02 and the Applicant and that V02 herself had disclosed the incident to other colleagues, Ms. P pro-actively approached V02 twice and encouraged her to keep matters confidential.

153. Approximately two to three months later, V02 advised Ms. P that W03, who V02 indicated she had never met before, had invited V02 to lunch or coffee that day and had asked V02 why she was carrying forward with this process as she was "destroying family". V02 was suspicious that the Applicant had sent W03. Ms. P chose to confront W03 that same day about approaching V02. W03 stated that she

had only spoken to V02 because V02 was not helping her case by being seen with other men, which Ms. P did not understand. When Ms. P asked W03 whether the Applicant knew that W03 had spoken to V02, W03 indicated that he did not. Ms. P then approached the Applicant the next day and advised him that W03 had approached V02, which the Applicant indicated that he had not known about.

154. In early 2019, V02 told Ms. P “I don’t know if I really did the right thing” and that Mr. R was the one who had really encouraged her to complaint to the Ethics Officer. When Ms. P asked if V02 would have made a complaint on her own, V02 indicated that she was not sure and she wondered if she had been influenced by Mr. R. Though V02 did not mention rescinding her complaint, Ms. P formed the impression that V02 might have been having second thoughts.

155. Ms. P described the Applicant as happy and friendly, and she indicated that he kissed her on her cheeks every time they saw each other. Additionally, Ms. P reported that the Applicant hugged her on special occasions, touched her on her shoulder occasionally and complimented her, all of which Ms. P found natural. Ms. P also heard the Applicant complimenting other female colleagues, and she observed him kissing people and touching or grabbing them on their arms and/or shoulders, but no one ever expressed any concerns to Ms. P about his conduct. On one occasion, when a “beautiful” “young” colleague of Ms. E was visiting her, the Applicant approached his front office staff, including Ms. P, to ask who the “beautiful” “girl” was and he indicated that if he “wasn’t married, oh my goodness”, which they all viewed as a joke and laughed about. On another occasion, when Ms. E was speaking to the Applicant about a hotel in reference to a mission, the Applicant stated that he wanted “full service” and when Ms. E and Ms. P asked him “what kind of full service”. The Applicant stated “well, if I can have a little fun”, which again prompted laughter. Ms. P presumed that “full service” meant “some fun at night” after work with women, but she also felt that he was joking because he said it openly in a very open area.

156. Ms. P, who was recommended as a witness by the Applicant indicated that she did not have any conversations with the Applicant in regard to V02 other than when she approached him about W03, and she never discussed with the Applicant what V02 had shared with her.

157. The Appeals Board notes the hearsay elements of some of this evidence, as well as noting the direct evidence of conversations had by Ms. P and the demeanour evidence.

### **Response of the Applicant**

158. When questioned by the investigators the Applicant made the following observations, as set out in paragraphs 138 to 142 of the Investigation Report, which observations fairly record the interview in respect of the matters.

- a. He had no relationship with V02 and she did not fall under his chain of command. He was aware that V02 had applied for many ICAO positions as her name kept showing up.
- b. He recalled that in approximately March or April 2018, when V02 was interacting with the front office ladies outside his office, he heard someone address V02 by her name.
- c. wanted to speak with her about her background to determine which position would best suit her.
- d. He was aware that V02 complained about him after that interaction, although he was not given the details of the complaint.
- e. He only had one interaction with V02.
- f. He was asked whether he had said or done anything which was not right, The Applicant stated that he had commented to V02 that it would be better for her to work with ICAO Safety and not her current boss, Mr. R.
- g. He indicated that he had nothing beyond a professional interest in V02, and he did not recall complimenting V02 or touching her beyond a handshake since it was his first time meeting her.
- h. He did not see any body language which displayed discomfort or unhappiness.

- i. V02 never came back to advise the Applicant that he had made her uncomfortable.
- j. He wondered how V02, who he described as a party girl, could be so sensitive, given her own behaviour.
- k. He advised that he had heard from Ms. P who used to work in the same section as V02, that V02 had said the incident “was nothing” and that she was thinking of withdrawing her complaint.
- l. He denied doing anything wrong during his interaction with V02. He did not think he said anything to V02 about seeing her picture.
- m. He denied looking her up and down and licking his lip, he indicated that he always played with his ring and he stated that it made no sense to him that he could turn a temporary position into a fixed term position.
- n. He also reported that he did not completely close his office door, though it was closed most of the way.
- o. He narrated that, during his conversation with V02, he had said that Mr. R did not like him, as opposed to saying that he did not like Mr. R.
- p. He denied displaying any sexual behaviours towards V02 and, though he did not remember touching V02 on her shoulder at the end of the meeting, he agreed that he would have shook her hand and maybe directed her out by putting his other hand on her right shoulder, which would not have had a sexual connotation.
- q. He stated that he did not propose any type of transaction such as a position for intimacy nor did he engage in “sexual harassment”, contrary to V02’s perception.
- r. He confirmed that he had been involved in a romantic relationship with W03 since early 2019, but he denied asking W03 to approach V02 to ask V02 to rescind her complaint against him. He stated that W03 was aware of V02’s complaint against him though, as W03 had mentioned it to him. The Applicant also clarified that he could not confirm that W03 had not approached V02, only that W03 had never mentioned it to him.
- s. He declared that he had never supervised W03 directly, though she had fallen under his chain of command at one point.
- t. He claimed that he did not sit in front of V02 deliberately and he did not recall seeing her there either at the Annual Meeting of the Staff Association.
- u. He claimed that V02 had previously been passing through the front office with no issues and even laughing about him; however, suddenly, after interviewing with OIOS, she had started circumventing him to the point that she tried to avoid line of sight of his office and she had even exited an elevator when he entered.
- v. The Applicant stated that V02 was suddenly acting as if she were afraid of him, and he wondered whether someone had instructed her to act like a real victim of sexual harassment.
- w. He also question whether Mr. R had motivated V02 to make her complaint as Mr. R did not like the Applicant.

### Issue of credibility of V02

159. It is evident that V02 gave evidence in respect of two matters occurring, which were later shown conclusively not to have occurred. The Appeals Board is left to contemplate whether this was as a result of stress or anxiety which made V02 recall matters incorrectly, in respect of the Staff Assembly, or make an assumption as to the actions of the Applicant in the use of his telephone to take photos of her near the rear door of the ICAO building. It may well be that anxiety, which the Applicant had suffered from before the alleged initial incident, caused V02 to have a perception of events in the Assembly hall and the rear door which were demonstrated and admitted to be incorrectly recalled. The issue for the Appeals Board is that it simply has no evidence before it upon which it can reach a conclusion about the basis of the incorrect recollection and incorrect assumptions made by V02. The Appeals Board has no doubt that V02 firmly believed that all of which she complained, had occurred. It is also noted that V02 was reported to have twice said that “nothing had happened”, when referring to the alleged sexual harassment. The Appeals Board makes no adverse remarks in respect of the evidence of V02, however, the impact of the incorrect recall of V02 has an effect upon whether the Appeals Board can reach a conclusion that the facts asserted can be found on the basis of standard of proof of clear and convincing. The evidence given appears to be

clear, but some of it is certainly not convincing in light of the doubts raised. The Appeals Board finds that it is more likely than not that the events occurred, but the demonstrated failure of proper recall, without any, or any explanation, makes it impossible to conclude that the facts are clearly and convincingly proven. This remains the finding, notwithstanding the conduct of W03, which is found by the Appeals Board to have occurred as alleged by V02. The Appeals Board has totally discounted the denials by W03 that she did not attempt to persuade V02 to withdraw her complaint, as it is apparent that she was having a relationship with the Applicant and she lacked any candour in her evidence in respect of this matter when asked by investigators.

**In respect of V03 the following findings were made by the OIOS:**

- xi. Mr. Radu and his junior supervisee, V03, had professional meetings, and V03 stated that Mr. Radu once jokingly said to her that she should wear high heels at their next meeting, a comment she did not like. W02 then sent her a meeting request titled “Meeting with DD/SAF (HH)” in January 2017, on behalf of Mr. Radu, as demanded by him;
- xii. V03’s account regarding the meeting request is supported by way of electronic evidence, specifically four Outlook meeting requests titled “Meeting with DD/SAF (HH)”; however, W02 could not recall this being associated to high heels. Even so, OIOS does not find V03’s account to lack credibility, especially as V03 indicated that she did not feel victimized or sexually harassed by Mr. Radu but had perceived his conduct as a joke;
- xiii. Mr. Radu denied having told V03 to wear high heels or asking W02 to send a meeting request with high heels or “HH” for high heels in the subject line. Mr. Radu’s explanation of “HH” referring to Mr. Henrik Hololei appears implausible and was also not corroborated by V03. Beside W02’s lack of recollection on the event, OIOS could not locate any potential evidence to further support Mr. Radu’s credibility in this regard. Mr. Radu further offered no explanation as to the reasons for V03’s claims;

160. The Investigation Report at paragraphs 92 to 103 set out the evidence obtained by the investigators, which are in broad terms set out below. These recounted facts fairly reflect a summary of the evidence contained in the records of interview.

Interview with V03

161. V03 joined ICAO as a P-2 in July 2015. In approximately 2017, due to restructuring, V03 reported to two chains of command, one of which included the Applicant. She never reported to him directly. V03 remembered that, at the end of a meeting with the Applicant, he advised her to wear high heels next time so V03 jokingly responded that she would, at which point W02 asked what she should put as the subject for the next meeting. The Applicant said “just put high heels” and W02 sent a meeting request with something associated to high heels, which surprised V03 because she expected W02 to have understood that the Applicant was joking. V03 stressed that she did not feel as if Applicant had been mandating her to wear high heels and that nothing about that interaction bothered her, though she clarified that she had not appreciated the Applicant making the high heel comment.

162. V03 indicated that the Applicant had praised and complimented her work performance, but she had never perceived any romantic or flirtatious interest from him. She also indicated that she had heard that the Applicant liked women, but she had never seen any behaviour from him, either towards herself or anyone else, which would cause her to take action.

163. Ultimately, reporting to two chains of commands and having two sets of meetings became professionally taxing so V03 asked that either the meetings cease or that she only report to one section. As a result, V03 was no longer assigned any new work under the Applicant.

164. V03 advised that the Ethics Officer asked to meet her and, during the meeting, the Ethics Officer indicated that she had heard that V03 may have been sexually harassed by the Applicant. V03 clarified that she had not been sexually harassed and that, though she had not liked the high heel comment, she had perceived it to be a joke. V03 left the meeting with the impression that the Ethics Officer was looking for one more formal complaint against the Applicant, for a total of three complaints, to proceed to the next step, but V03 clarified to the Ethics Officer that she was not “the third one”. As such, V03 was confused, as she did not feel victimized or sexually harassed by the Applicant.

165. The Appeals Board sees no need to proceed with the analysis of this matter. The events do not fall within the definition of sexual harassment. The comments made by the Applicant may have been sexist, but they were taken as a joke and were not seen as unwelcome, rather they perceived as a joke. The Appeals Board does not consider that on any view the conduct of the Applicant could be considered as evidencing sexual harassment or other misconduct on a clear and convincing standard of proof. The Appeals Board notes, however, that given the evidence of V03, the reference by the Applicant to a reference to “HH” in a meeting request was a reference to a “Mr. Henrik Hololei” is indeed far-fetched, given the accepted evidence of V03. This, however does not detract from the finding that the Respondent has failed to prove his case in respect of this complaint.

### **The findings in respect of V04 made by OIOS**

- xiv. V04 and Mr. Radu attended a conference in Nigeria in November 2017, during which time they socialized and sent text messages to each other, including a text message from Mr. Radu asking V04 to have drinks. V04 stated that Mr. Radu repeatedly engaged in unwanted touching, and she understood him to be interested in something sexual with her, which made her verbalize rejection. Once back in Montreal in December 2017, V04 and Mr. Radu continued to text message each other, during which time Mr. Radu complimented V04 on her appearance and indicated an interest in going for an end-of-the-year lunch. In early 2018, V04 and Mr. Radu had an interaction in an elevator during which, as V04 reported, he approached and tried to grab her upper arms, which she rebuffed;
- xv. V04’s account in regard to November and December 2017 is supported by way of electronic evidence, specifically Messages sent between V04 and Mr. Radu on 19 – 20 November 2017, 7-8 December 2017 and 18 December 2017; however, Mr. [J], the only identified witness to the elevator interaction, could not recall such situation. Even so, OIOS did not find V04 to be motivated by an agenda and her account seemed credible;
- xvi. Mr. Radu verified meeting V04 at an ICAO social event, socializing with her and sending her texts during a mission in Nigeria in November 2017, as well as sending her complimentary text messages in December 2017, however, he denied inviting her to his room in Nigeria for a sexual purpose or acting inappropriately towards her, including unwanted touching. Mr. Radu indicated that the text messages were not sexual but simply messages exchanged between good friends, which seemed plausible and reasonable given some of V04’s responses to Mr. Radu. OIOS could not locate specific evidence undermining Mr. Radu’s credibility in this regard. Mr. Radu also confirmed commenting to V04 that a Director was better than a Deputy Director while in an elevator; but he denied acting inappropriately towards her in the elevator. OIOS found Mr. Radu’s explanation for V04’s adverse claims, namely revenge for his joke, unconvincing;

166. The Investigation Report at paragraphs 104 to 115 set out the evidence obtained by the investigators, which are in broad terms set out below. The Appeals Board has added to the material provided by the investigators, as it found that some evidence provided by witnesses had not been included.

#### V04’s account

167. V04 stated she joined ICAO in 2006. She first met the Applicant during a staff party on 17 November 2017 and described being immediately struck by how the Applicant took her hand, enveloped

it between his two hands and kissed it. V04 reported being uncomfortable as the Applicant was “very handsy” throughout the party. She observed that the Applicant “kissed her hand in a very strange way”.

168. V04 stated that the following day, on the way to Abuja, she and the Applicant and one other person were in the Air France Lounge having a drink together, V04 said she had a particular liking of “scotch”. The Applicant became very friendly due to the alcohol. Once in Abuja, the Applicant asked for V04’s telephone number in front of another person, so she gave it because she did not want to embarrass him. Thereafter, the Applicant began persistently texting to ask if V04 wanted to have drinks and even offered to bring the drinks to her hotel room when she indicated she was working in her room. Some of the texts form part of the evidence. One evening, while they were socializing, the hotel bar closed, so the Applicant indicated that he had a bottle of Glenmorangie (whisky) in his room and he invited V04 up for drinks. V04 saw the Applicant as a “drinking buddy” and thus accepted the invitation to the room of the Applicant. V04 stated she accepted, making it clear that she was not interested in sex and that, if anything of that nature transpired, “it would be rape”. V04 stated that once in the room, the Applicant touched her hand and, given the way he was looking at her and not really engaging in conversation, she perceived that he was “horny”. He made a reference to the way of catching women. V04 said to the Applicant “Aren’t you married?” V04 stated that she advised the Applicant that they were in the #metoo era and that the way he touched people was going to land him in trouble. Even so, the Applicant still kept attempting to touch her. He said “Come on come on don’t take it this way”. When V04 said “No” to the Applicant, she said it appeared to incentivise him. When trying to leave the Applicant grabbed at V04 and tried to hug her. She observed “He knows how to block you're an exit using his body”. V04 thought that the Applicant would go out and now damage her reputation.

169. As the Applicant did not have any Glenmorangie, V04 indicated she was leaving; however, the Applicant stood in her way, grabbed her and tried to hold and hug her in a non-forceful way, which nonetheless left her feeling “trapped”. V04 said that she believed that the Applicant had lied to her about having Glenmorangie in his room because he hoped to get her to his room and have sex. V04 said that she regarded the Applicant “as another stupid man”.

170. V04 and the Applicant continued with a cordial relationship in Montreal, such as mingling at a retirement party in December 2017 where the Applicant commented on how good V04 looked and then texted her with similar comments.

171. V04 described how in early 2018, when she ran into Mr. Radu, he congratulated her on her new boyfriend, an ICAO Director, and indicated that a “D is better than a DD, meaning that a Director is better than a Deputy Director”. A few weeks later, V04 ran into the Applicant in the elevator. After the other colleagues, including Mr. J, departed the elevator, the Applicant approached V04 in an aggressive manner and attempted to grab her upper arms, thus making V04 feel “invaded”, “powerless”, “physically disarmed” and “violated”. The Applicant did not actually touch V04. He moved across the lift to be in the same corner of the lift as V04. V04 had to raise her hands and told him to “fuck off, really fuck off”. He was using both hands to try and grab her. V04 raised her hands to indicate “No”. The Applicant did not stop his approach. He said “Come on don’t be like that”. V04 had to physically fend off the Applicant. V04 formed an opinion that he was dangerous, given that he would not take “no” for an answer and would not move from where he was standing. V04 advised the Applicant that what he had said about a D versus a DD really offended her, but he “wouldn’t relent” and “kept approaching me and wanting to touch me”. As a result, V04 “flipped” her middle finger and kept it there until the Applicant left the elevator. V04 stated that she actually felt more unsafe in the elevator than she had in the Applicant hotel room, as she felt his desperation and hostility and because she perceived that he now had malicious intent.

172. V04 declared that she did not have any one-on-one interactions with Mr. Radu afterwards; however, she opted to share her experiences with the Ethics Officer via email. V04 stated that she “did not

feel harassed or victimized”. V04, in concluding, noted that she had “successfully fended off” the Applicant.

173. An interview with Mr. J disclosed that he had no recollection of any matters relevant.

174. OIOS reviewed email and iMessage communications submitted by V04.

175. An email from V04 to the Ethics Officer on 21 August 2018 mentions that V04 first met the Applicant on 17 November 2017 where she was struck by how touchy he was. Then, according to V04, while on mission in Abuja in November 2017, the Applicant kept inviting her for drinks and also invited her to his room.

176. The exchange of messages produced in evidence support the evidence of V04, showing that between 19 - 20 November 2017, the Applicant offered to send a drink to V04’s room, indicated that V04 was supposed to take care of him but he had not even seen her that day, and proposed having a drink together. The exchange continued into December 2017 with the Applicant complimenting V04’s glasses and expressing hope for an end-of-the-year lunch.

#### Evidence of the Applicant

177. The Applicant recalled that he was introduced to V04 during an ICAO event, at which point they had a nice chat and became friends. When asked how he would greet people he had just met, the Applicant indicated that he would shake hands and not exchange kisses, given that he did not know the other person. The Applicant also indicated that he generally shook hands using both his hands but he was not sure if that would qualify him as “handsy”.

178. The Applicant and V04 then saw each other on mission, in either 2016 or 2017, when they flew over together and socialized on the plane. While on mission, the Applicant claimed that he and V04 had drinks and interacted in general, including him going to her room or her coming to his room to smoke, as they were not allowed to smoke in the hotel lobby but could smoke in their rooms. The Applicant agreed that he texted V04 to ask if she wanted a drink sent to her room, as he wanted her to take some time to relax, but he contended that the repetitive text messages were a system glitch. He also used the term “hon” when texting her because he considered V04 a close friend and not because he had any sexual interest in her. The Applicant claimed that his text message about V04 taking care of him was in reference to an understanding that they would look out for each other as buddies while on mission and that the message had no sexual connotation. The Applicant did not remember anything about Glenmorangie in his room and V04 coming to his room for such, nor did he recall any conversations that he had with V04 while they were smoking together in their hotel room, including any conversations about #metoo. The Applicant also had no recollection of inviting V04 to his room and her saying something about rape. The Applicant said he was not “handsy” with V04 during the conference or while in the hotel room and he was not the kind of guy who prevented people from leaving. The Applicant did not recall trying to hug, kiss or touch V04, he did not try to grab her when she was trying to leave the room and he did not invite her to the room so they could engage in sex.

179. The Applicant re-iterated that he had no sexual interest in V04 and, though their discussions may have been sexually-oriented and he may have complimented or flirted with V04, all of these actions were within the boundaries of what their friendship allowed.

180. When asked about the December 2017 texts in which he complimented V04, the Applicant stated that he routinely complimented people who were good friends and could take a joke.

181. The Applicant indicated that he and V04 agreed to have lunch once they returned from mission, but it never happened because he made a “stupid joke” to her in the elevator. Specifically, when the Applicant found out that V04 was in a relationship with a Director, he jokingly stated that he now understood why she did not want to go for lunch with him, as it was better for her with a “D2 than a D1”. When V04 stated she was upset by the comment, the Applicant claimed he apologized and V04 accepted the apology. The Applicant stated that he acted professionally towards V04 while in the elevator, he did not try to appease her in any fashion other than apologizing, he did not believe that he attempted to physically grab V04 and he did not recall V04 telling him to fuck off.

*Have the facts been found at the appropriate level?*

182. The Appeals Board has considered the evidence provided by the Applicant, including the witness statements and the Investigative Report, as a summary of the record of evidence. The Appeals Board notes the learning from the UNDT which has held in *Hallal* UNDT/2011/046, at para. 55 (affirmed by the Appeals Tribunal in *Hallal* 2012-UNAT-207):

that, in sexual harassment cases, credible oral victim testimony alone may be fully sufficient to support a finding of serious misconduct, without further corroboration being required... [i]t is not always the situation in sexual harassment cases that corroboration exists in the form of notebook entries, email communications, or other similar documentary evidence, and the absence of such documents should not automatically render a complaining victim’s version as being weak or meaningless”. It was also held that “[a]s is always the case, any witness testimony should be evaluated to determine whether it is believable and should be credited as establishing the true facts in a case.

183. The Appeals Board has been provided with a table setting out a series of messages passing between the Applicant and V04. The Applicant provided the explanation for sending the messages, that V04 and he were good friends, or close friends. They met for the first time on 17 November 2017. The text exchange included the following:

19 November 2017

Applicant: Do you want me to send a drink to your room.

20 November 2017

Applicant: Morning Hon

Applicant: You were supposed to take care of me. I didn’t see you today. Then there were three “crying” emoji faces.

Let’s have a drink after if you’re ok.

V04: sure, where?

piano bar?

Applicant: Yeap Yeap. I can come to pick you up

V04: ...I’ll meet u there

7 December 2017

Applicant

Sleep on the plane

You’ve disappeared

No hug, nothing

V04: next time just seize the moment.

Hello and hug!

I come and go whenever I please or at least when I can :)

Applicant: You look nice

Very nice in fact

184. There were additional texts which were extremely repetitive. The explanation of the Applicant that there was a technical glitch lacks veracity and is most unlikely.

185. The Appeals Board is unable to comprehend the reference by the Applicant to a “hug”, the comment “you were supposed to take care of me” and referring to V04 as “hon” as being in any way related to V04 and the Applicant being “good friends”. The Applicant and V04 had only met socially on 17 November 2017. “Hon” is a term of endearment, short for “honey”. These references are explicable by reference to their sexual connotations and forced familiarity on the part of the Applicant towards V04. On 7 December 2017, the Applicant continued the inappropriate remarks, noting “You’ve disappeared. No Hug, nothing”. He further stated that V04 had looked “nice”. “Very nice in fact”.

186. The Appeals Board is impressed with the evidence of V04. She recalled events in significant detail and they were confirmed by the text exchanges. When asked to expand on her evidence by the investigators, she was consistent and again detailed. Her recall was excellent. The Appeals Board notes that the responses of the Applicant do not explain the conduct.

187. The Appeals Board finds that the facts as stated in the evidence of V04 are proven at the standard of clear and convincing.

188. The findings in respect of whether the facts found amount to misconduct are discussed further below.

#### V05 OIOS made the following findings in respect of V05

xvii V05 and Mr. Radu first met at a conference in Nigeria in 2012, during which time V05 was a junior ICAO employee and Mr. Radu was not yet with the Organization but the President of ECAC. V05 claimed that Mr. Radu made flirtatious advances to her at this occasion, which she turned down. V05 and Mr. Radu later met on 3 September 2014 during a meeting at ICAO with V05’s outgoing boss, as Mr. Radu was assuming his position. V05 was to report to Mr. Radu, but she opted to move sections as he made her uncomfortable including with a comment made on 3 September 2014;

xviii. V05’s account is supported by way of electronic evidence, specifically an Outlook meeting request requiring V05 to attend a 3 September 2014 “Meeting with Mr. Catalin”. Mr. [R] also confirmed that V05 became quite emotional one day when discussing Mr. Radu; however, Mr. [R] could not discern why V05 was so distraught. Even so, OIOS does not find V05’s account to lack credibility or be motivated by an agenda, especially as V05 indicated that she had not viewed her interactions with Mr. Radu as sexual harassment, but only “attempts”; and

xix. Mr. Radu agreed that he met V05 in Nigeria, but he denied inviting V05 to his hotel room, contended that he had no sexual interest in V05, did not recall meeting her in September 2014 and claimed that he had not made any sexual advances or inappropriate comments towards her.

xx. Mr. Radu expressed concerns that the ICAO Audit Section, which Mr. [R], V02 and V05 were connected to, was building a negative narrative against him because he was critical of the work performed by the Audit Section. He also felt that Ms. [K] manufactured the complaint against him as she was motivated by her own career advancement, as well as by her friendship with V04’s husband. OIOS could not locate any evidence which supported such and found in particular Mr. Radu’s explanation of a story being “built” by the ICAO Audit Section unconvincing.

189. The Investigative Report at paragraphs 116 to 127 set out the relevant evidence obtained by the investigators, which are in broad terms set out below. These recounted facts fairly reflect a summary of the evidence contained in the records of interview.

An interview was conducted of V05

190. V05 stated that she joined ICAO in 2012 as a P-2 and met the Applicant for the first time in 2012 during a mission to Abuja when Mr. Radu, who was then the president of the European Civil Aviation Conference (ECAC), pro-actively approached V05 and her colleague to introduce himself. Shortly after V05 returned to her hotel room that evening, the Applicant phoned and asked if she wanted to join him in his room for a drink. V05 declined because she viewed the invitation as more than just a friendly invite to drink, though the Applicant did not suggest anything further and did not insist when V05 declined. According to V05, the Applicant was flirtatious and charming during the conference, and he kept attempting to approach and engage in conversation with V05; V05 kept her distance as she did not view the approaches to be professionally motivated.

191. V05 explained that the Applicant was the successful candidate for the ICAO job held by V05's supervisor, Mr. E. When the Applicant visited ICAO to meet with Mr. E, V05 was also invited to the meeting. After the meeting, the Applicant and V05 walked out together and the Applicant stated, in a satisfied tone, that she "was finally going to be his", thus leaving V05 feeling very trapped. Hence, V05 decided she did not want to be supervised by him and instead opted for a transfer to the audit section V05 felt that the Applicant then engaged in "retaliation" against her by disallowing her to continue working on a project she had contributed to for seven years.

192. When asked if the Applicant had ever complimented her, V05 indicated that Mr. Radu once commented to her "I've never had a Latin" but V05 disregarded the comment. V05 stated that she attempted to avoid interacting with the Applicant afterwards; however, she viewed her incidences with Mr. Radu as "attempts" and not as sexual harassment because he had not promised anything or attempted to take advantage of his position.

193. V05 also reported that a distressed intern, V06, once came into V05's office and burst into tears. V06 disclosed to V05 that the Applicant had approached her on the street, had asked her to go to a hotel and had indicated that she could get a job if she did that.

194. Three witnesses were interviewed.

Mr. R

195. Mr. R talked of the reputation of the Applicant within ICAO. This was not directed to the events under consideration. The evidence was hearsay and is disregarded as being of no probative value.

196. Mr. R recalled an event with V05 in respect of her work and that she was abruptly advised she could no longer run a workshop. V05 broke down in tears, which Mr. R found uncommon in a woman of her competence. This evidence had no apparent disclosed link to the events under examination, although it appears as though it was proffered as having some link.

Mr. M

197. Mr. M gave evidence of V05 ceasing to work on a task force involving MH flight 17. He did not know why. He stated that V05 often expressed professional differences with the Applicant, but both V05 and the Applicant were professional in their disagreements.

Ms. P1

198. Ms. P1, a witness suggested by the Applicant, worked with V05 between December 2012 and May 2013. V05 then moved. She next had contact with V05 in 2016 and a file V05 was working on was transferred to Ms. P1, as directed by management. She presumed that this was at the direction of the Applicant and another manager involved, Mr. C.

199. The Appeals Board will not consider the brief submissions of the Applicant in respect of V05, as it considers that the evidence proffered by the Respondent in respect of allegations of sexual harassment of V05 by the Applicant are entirely insufficient for there to be a finding of the facts asserted on a clear and convincing basis. The evidentiary linkages are simply not present.

Conclusion

200. The Appeals Board has thus found that of the five matters considered by the investigators the facts have been proven on the basis of the standard of clear and convincing only in respect of the complaints concerning V01 and V04. The Appeals Board is thus left to initially consider if the established facts amount to misconduct?

201. In *Appellant v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1137, paras. 57-59. The Appeals Tribunal found:

“Sexual harassment can encompass numerous types of conduct, some overtly sexual in nature and others more subtle. There is a wide spectrum of conduct that can be defined as sexual harassment and its determination is entirely context specific. Whether a particular type of conduct constitutes sexual harassment will depend on a number of factors and the circumstances of each case. ... Importantly, a determination of whether a particular type of conduct is sexual in nature does not turn on the intentions of the perpetrator but on the circumstances surrounding the conduct, the type of conduct complained of, the relational dynamics between the complainant and the perpetrator, the institutional or workplace environment or culture that is generally accepted in the circumstances, and the complainant’s perception of the conduct. ... Harassment focuses on the conduct itself and requires an *objective examination* as to whether it could be expected or perceived to cause offence or humiliation to a reasonable person”

202. The Appeals Board finds that the established facts in respect of both V01 and V04 disclose conduct unwanted and unreciprocated by V01 amounting to sexual harassment as defined in the ICAO Personnel Instruction PI/1.3, paragraph 3, as set out in paragraph 32 above, as the facts amounted to unwelcome sexual advances and other conduct of a sexual nature which interfered with work and created an intimidating, hostile and offensive environment. The conduct of the Applicant also fell within proscribed conduct referred to in PI/1.6/5/b) “*continued suggestions for social activity outside the workplace after it has been made clear that such suggestions are unwelcome.*” The Appeals Board further finds, that it is clear the conduct was unwelcome in both instances.

203. The Appeals Board notes that V04 did state that she did not file a formal complaint, however it is evident that the Applicant engaged in conduct amounting to sexual harassment,

notwithstanding that V04 was of the view that she “was able to successfully fend off” the Applicant. One only fends off someone who is acting in a manner which is clearly unwelcome.

*Has there been compliance with due process?*

204. This relates not only to the conduct of the investigation, but in respect of all legal requirements which lead to the final decision being made. The Appeals Board finds that, due process has been accorded to the Applicant during the investigations into his case and during the period of the consideration of the final disposition of the matter.

205. The Applicant was provided with details of the allegations against him and the opportunity to suggest relevant witnesses to be interviewed, from whom evidence was taken.

206. Staff Regulation 9.9 applied to the Applicant in this matter, relevantly providing:

9.9 In cases of termination of appointment of staff at the D-1 and D-2 levels, the Secretary General shall seek the written approval of the President of the Council.

207. Such approval was sought by the Secretary General on 16 September 2021 and given by the President of the Council on 21 September 2021.

208. On 21 September 2021, the Secretary General wrote to the Applicant advising him of his provisional decision to impose the disciplinary measure of discharge from service giving the Applicant 14 days in which to provide a written statement on the proposed action in accordance with Staff Regulation 9.7.

209. Notwithstanding a request for an extension of time, the Applicant provided the statement on 5 October 2021.

210. On 8 November 2021, the Respondent notified the Applicant, that after having considered all matters put by the Applicant in his statement of 5 October 2021, he decided to maintain his decision and discharge the Applicant.

211. The Applicant filed a separate application asserting that the decision was void as he was on sick leave of receipt of the notice of his discharge. This application was dismissed in a separate decision.

*Proportionality of the disciplinary sanction*

212. In respect of the sanction applied, the UNAT has held “that the Administration has a broad discretion in disciplinary matters which will not be lightly interfered with on judicial review. This discretion is not unfettered and can be judicially reviewed to determine whether the exercise of the discretion is lawful, rational, procedurally correct and proportionate. This includes considering whether relevant matters have been ignored and irrelevant matters considered, whether the decision is absurd or perverse, or affected by bias... Assuming compliance with these legal standards, it is not the role of the Appeals Board to consider the correctness of the choice made by the Administration amongst the various courses of action lawfully open to it or to substitute its own decision for that of the Administration”. See *Sanwidi* 2010-UNAT-084, para. 40 and *AAD*. 2022-UNAT-1267/Corr 1 paras 38 to 40. Recently confirmed to apply in *Nadasan* 2019-UNAT-918.

213. It is clear that the Administration “has wide discretion in applying sanctions for misconduct but at all relevant times must adhere to the principle of proportionality”. See *Applicant* 2013-UNAT-280, para. 120. See also, *Abu Hamda* 2010-UNAT-022.

214. “[T]he principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result.” See *Sanwidi* 2010-UNAT-084, para. 39. This principle was also confirmed in *Applicant* 2013-UNAT-280. Once the facts and misconduct have been established, the appropriateness of the level of sanction can only be considered unlawful in case of “obvious absurdity or flagrant arbitrariness”. See *Aqel* 2010-UNAT-040, para. 35; *Konate* 2013-UNAT-334, para. 21; *Shahatit* 2012-UNAT-195, para. 25; *Portillo Moya* 2015-UNAT-523, para. 22. 927; *Rajan* 2017-UNAT-781, para. 48; *Negussie* 2016-UNAT-700, para. 28; *Ogorodnikov* 2015-UNAT-549, paras. 30-35.

215. In *Rajan* 2017-UNAT-781, para. 48, UNAT clearly stated “The most important factors to be taken into account in assessing the proportionality of a sanction include the seriousness of the offence, the length of service, the disciplinary record of the employee, the attitude of the employee, and his [or her] past conduct, the context of the violation and employer consistency.”

216. In *Appellant* 2022-UNAT-1216, UNAT made the following statements, which are binding upon the Appeals Board:

44. Staff Rule 10.3(b) provides, inter alia, that “[a]ny disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct”. In the present case, this means that the Dispute Tribunal as well as this Tribunal must determine whether the Secretary-General’s imposition of the ultimate sanction of dismissal from service meets the justice of the case, after due consideration is given to the entire circumstances of the case.

45. The matter of the degree of the sanction is usually reserved for the Administration, which has discretion to impose the measure that it considers adequate in the circumstances of the case and for the actions and conduct of the staff member involved. This appears as a natural consequence of the scope of administrative hierarchy and the power vested in the competent authority. It is the Administration that carries out the administrative activity and procedure and deals with the staff members. Therefore, the Administration is best suited to select an adequate sanction able to fulfil the general requirements of these kinds of measures; to wit: a sanction within the limits stated by the respective norms, which is sufficient to prevent repetitive wrongdoing, punish the wrongdoer, satisfy victims and restore the administrative balance. That is why the tribunals will only interfere and rescind or modify a sanction imposed by the Administration where the sanction imposed is blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity. This rationale is followed without any change in the jurisprudence of this Tribunal.<sup>23</sup> The Secretary-General also has the discretion to weigh aggravating and mitigating circumstances when deciding upon the appropriate sanction to impose.

46. Further, as we stated in *Samandarov*:

[D]ue deference [to the Administration’s discretion to select the adequate sanction] does not entail uncritical acquiescence. While the Dispute Tribunal must resist imposing its own preferences and should allow the Secretary-General a margin of appreciation, all administrative decisions are nonetheless required to be lawful, reasonable and procedurally fair. This obliges the UNDT to objectively assess the basis, purpose and effects of any relevant administrative decision. In the context of disciplinary measures, reasonableness is assured by a factual judicial assessment of the elements of proportionality. Hence, proportionality is a jural postulate or ordering principle requiring teleological application. ...The ultimate test, or essential enquiry, is whether the sanction is excessive in relation to the objective of staff discipline. As already intimated, an excessive sanction will be arbitrary and irrational, and thus disproportionate and illegal, if the sanction bears no rational connection or suitable relationship to the evidence of misconduct and the purpose of progressive or corrective discipline. The standard of deference preferred by the Secretary-General, were it acceded

to, risks inappropriately diminishing the standard of judicial supervision and devaluing the Dispute Tribunal as one lacking in effective remedial power.

47. When the sanction of termination is chosen by the Administration, it must be in line with the following principle, as stated in *Rajan*.

48. The requirement of proportionality asks whether termination is the appropriate and necessary sanction for the proven misconduct or whether some other alternative sanction will be more suitable in the circumstances. In this regard, it must be kept in mind that termination is the ultimate sanction and should not be imposed automatically. The question to be answered in the final analysis is whether the staff member's conduct has led to the employment relationship (based on mutual trust and confidence) being seriously damaged so as to render its continuation intolerable. In the case at bar, the Appellant was irrefutably found by clear and convincing evidence.

217. The Appeals Board also notes that UNAT stated in *In Mbaigolmem* 2018-UNAT-819 at paragraph 33:

Sexual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. As such, it impacts negatively upon the efficiency of the Organization and impedes its capacity to ensure a safe, healthy and productive work environment. The Organization is entitled and obliged to pursue a severe approach to sexual harassment. The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment.

218. The sanction of separation from service was set out in the letter of the Respondent to the Applicant of 21 September 2021 as a provisional decision, which was affirmed in the letter of the Respondent to the Applicant on 8 November 2021. It is apparent that this sanction was based upon findings of misconduct in respect of five matters, of these findings, only the first and the fourth have been found by the Appeals Board to be justified on a legal basis to amount to misconduct. Thus, the question is whether the sanction meted out is proportional when one finding alone is taken into account?

219. The Appeals Board has determined that the ultimate sanction of dismissal is proportionate in the circumstances. The Appeals Board has specifically considered that there are fewer findings based on clear and convincing evidence than those referred to be the Respondent when imposing the sanction of summary dismissal. It still remains the fact, as set out in the letter of 21 September 2021 from the Respondent to the Applicant that the two allegations found to be proven:

‘..... constitute sexual harassment under paragraphs 3-6 of PI/1.3... and therefore amount to misconduct under paragraphs 38 and 41 of *ICAO Framework on Ethics* ... They also amount to a violation of your obligations under paragraph 24 of the Standards of Conduct (Appendix to Staff Rule 101.1)’

220. The Appeals Board has determined that each of the proven instances of sexual harassment, on their own, or taken together, would have been sufficient in the context for the sanction of dismissal to have been applied. The conduct is of such a serious nature that it is considered appropriate, even though the Applicant had a good record of service with ICAO.

#### Anonymity

221. The Appeals Board, pursuant to Rule 59 of the Rules of Procedure determined that the names of the witnesses will be anonymised in this decision.

An observation

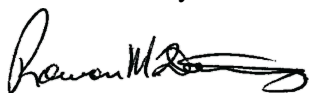
222. The Appeals Board observed that the manner in which the letter of the provisional decision of 21 September 2021 was written referred to the Organisation, when it should have referred to the Respondent in the person of the Secretary General. Whilst all parties understood what was intended, the decisions made are the personal decisions of the Secretary General of ICAO and not the Organisation. This matter should be avoided in the future, if such cases arise.

**Order**

The Appeals Board will not, in these circumstances interfere with the exercise of the discretion of the Respondent. The sanction is proportionate and affirmed.

The Application is dismissed.

Dated this 21st day of February 2023



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**Judge Rowan Downing KC**  
President

Entered in the Register on this 21st February 2023



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**Arie Jakob**  
Registrar