UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

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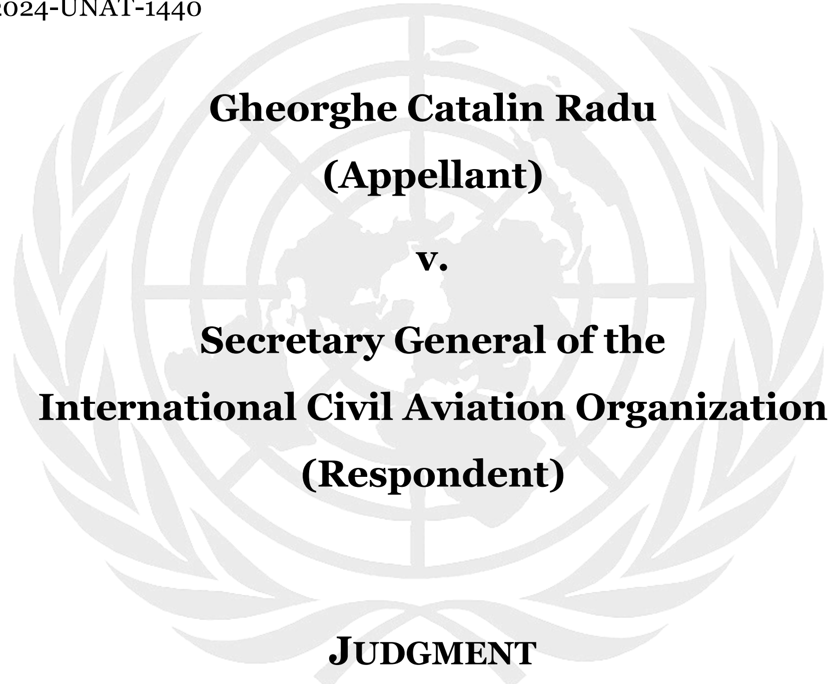
Judgment No. 2024-UNAT-1440



Gheorghe Catalin Radu

(Appellant)

v.

Secretary General of the

International Civil Aviation Organization

(Respondent)

JUDGMENT

Before:	Judge Gao Xiaoli, Presiding Judge Katharine Mary Savage Judge Graeme Colgan
Case No.:	2023-1804
Date of Decision:	22 March 2024
Date of Publication:	24 May 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Christopher M. Petras

JUDGE GAO XIAOLI, PRESIDING.

1. Mr. Gheorghe Catalin Radu, a former D-1 staff member with the International Civil Aviation Organization (ICAO), contested before the ICAO Appeals Board (Appeals Board) via two separate applications the administrative decision to separate him from service with immediate effect for misconduct (contested decision). The first application challenged the decision on purely procedural grounds, arguing that he should not have been separated while on certified sick leave; and the second application contested the merits of the decision, i.e. the actual disciplinary measure of discharge from his employment with ICAO on the ground of misconduct. By Decision No. ICAO/2022/006 dated 20 September 2022 (Appeals BoardDecision No. 1) and Decision No. ICAO/2023/001 dated 21 February 2023 (Appeals Board Decision No. 2), the Appeals Board dismissed Mr. Radu's applications.

2. Mr. Radu appealed both Decisions to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).

3. For the reasons that follow, we dismiss the appeal in relation to Appeals Board Decision No. 1. We grant, by Majority (Judges Savage and Colgan), Judge Gao dissenting, the appeal against Appeals Board Decision No. 2, reverse the Appeals Board Decision No. 2 and remit the matter to the Appeals Board, differently constituted, for a new hearing.

Facts and Procedure

4. At the time of the events relevant to this appeal, Mr. Radu was a Deputy Director (D-1), Aviation Safety, Air Navigation Bureau with ICAO in Montreal, Canada.[1]

5. On 10 April 2019, the Ethics Officer (EO) submitted her preliminary assessment report (the preliminary assessment report) recommending investigation of several complaints against Mr. Radu.

6. On 16 April 2019, the ICAO Investigations Intake Committee (Committee) met to consider allegations against Mr. Radu of six instances of sexual harassment in breach of the ICAO

[1] Appeals Board Decision No. 2, para. 1.

Service Code. The Committee concluded that there was *prima facie* evidence of sexual harassment and referred the matter for investigation.[2]

7. On 18 April 2019, the Secretary General requested the Office of Internal Oversight Services (OIOS) to investigate the sexual harassment allegations against Mr. Radu.[3]

8. On 25 April 2019, the EO notified Mr. Radu of the Committee's determination and the referral of the complaints for formal investigation. Mr. Radu was also advised of the procedures to be followed.[4]

9. On 31 December 2019, OIOS issued its investigation report (the investigation report), which made detailed findings in respect of the allegations against Mr. Radu.[5]

10. On 6 February 2020, a copy of the investigation report and the supporting evidence were provided to Mr. Radu. He was invited to provide a written response and produce any countervailing evidence within 30 calendar days.[6]

11. On 4 March 2020, Mr. Radu requested an extension of time to submit his response, "if possible until the end of March". The Secretary General approved a 17-calendar day extension until 23 March 2020. On 23 March 2020, Mr. Radu requested a further extension of the time limit, and the Secretary General granted an additional extension until the 26 March 2020 within which period Mr. Radu submitted his response and countervailing evidence.[7]

12. On 27 April 2020, Mr. Radu wrote to the Acting EO, asking for an additional four to five weeks to review his submission with his legal counsel and to be given the opportunity to revisit areas he had overlooked and to provide additional evidence and clarification. The Acting EO advised Mr. Radu that same day of the Secretary General's decision not to grant any further extension.[8]

[2] *Ibid.*, para. 4.
[3] *Ibid.*, para. 5.
[4] *Ibid.*, para. 5.
[5] OIOS Investigation Report on Sexual Harassment by a Staff Member at the International Civil Aviation Organization, Investigation Division Case No. 0400/19, Report No. 220/19, Annex 3 to Mr. Radu's Appeal.
[6] Appeals Board Decision No. 1, para. 80.
[7] *Ibid.*
[8] Appeals Board Decision No. 2, para. 12.

13. On 28 April 2020, Mr. Radu wrote again to the Acting EO clarifying that the purpose of his correspondence of the previous day was to request that the EO 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".[9]

14. On 30 April 2020, the Acting EO replied to Mr. Radu, advising that once the staff member's response had been submitted or the response deadline had expired, the EO had no discretion to grant the staff member additional time. He also advised Mr. Radu that the EO had no power to independently dismiss the case.[10]

15. On 29 June 2020, the Secretary General requested Mr. Radu's consent to provide the investigation report and supporting evidence, Mr. Radu's comments in response, and his claims of procedural irregularities, to a third party not involved in the investigation for review for advice regarding the alleged irregularities. On 9 July 2020, Mr. Radu consented to the release of any information necessary to undertake a full and fair inquiry of the issues.[11]

16. On 9 September 2021, after having previously requested and received advice from the lawyers in the United Nations Office for Human Resources, Administrative Law Division (ALD/OHR), the Secretary General received comments back from OIOS with respect to the factual and procedural irregularities that had been alleged by Mr. Radu.[12]

17. On 16 September 2021, the Secretary General wrote to the President of the ICAO Council (President) pursuant to Staff Regulation 9.9, to request approval to terminate Mr. Radu's appointment.[13]

18. On 17 September 2021, Mr. Radu, who had previously submitted a medical certificate for the period of 13 to 17 September 2021, which was subsequently certified by the ICAO medical consultants, requested further sick leave for the period of 20 to 22 September 2021.[14]

[9] *Ibid.*, para. 13.
[10] *Ibid.*, para. 14.
[11] *Ibid.*, paras. 15 and 16.
[12] *Ibid.*, para. 19.
[13] Appeals Board Decision No. 1, para. 80.
[14] *Ibid.*, para. 81.

19. On 21 September 2021, the President approved the termination of Mr. Radu's appointment, whereupon the Secretary General, in turn, that same day, notified Mr. Radu of his provisional decision to impose the disciplinary measure of discharge against him for misconduct. Pursuant to Staff Rule 110.1(15), Mr. Radu was given an opportunity to submit, within 14 calendar days from the date of receipt of the Secretary General's provisional decision, a statement in writing on the action proposed to be taken.[15]

20. On 22 September 2021, Mr. Radu sent an e-mail to the Secretary General requesting information following his receipt of the 21 September 2021 e-mail. He also asked advice about his right to appeal.[16]

21. From 29 September to 8 October 2021, Mr. Radu was on certified sick leave based on a 1 October 2021 medical certificate.[17]

22. On 4 October 2021, being within the time allowed, Mr. Radu submitted his reply to the Secretary General's provisional decision, wherein he requested the case against him be dismissed or, alternatively, subjected to review.[18]

23. From 12 to 22 October 2021, Mr. Radu returned to work serving in his official capacity as Secretary to the Safety Stream of the High-Level Conference on COVID-19 (HLCC 2021).[19]

24. On 22 October 2021, Mr. Radu submitted a medical certificate from his treating physician in support of a request for sick leave to cover the period of 8 October to 8 November 2021.[20]

25. On 26 October 2021, Mr. Radu submitted a medical certificate from his treating physician in support of a revised request for sick leave for the period of 22 October to 8 November 2021, to take into account his participation in the HLCC 2021.[21]

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[15] Letter from ICAO Secetary General to Mr. Radu, Annex 5 to Mr. Radu's Appeal.
[16] Appeals Board Decision No. 1, para. 80.
[17] *Ibid.*, para. 81.
[18] Letter from Mr. Radu toICAO Secretary General, Annex 6 to Mr. Radu's Appeal.
[19] Appeals Board Decision No. 1, para. 80.
[20] *Ibid.*, para. 81.
[21] *Ibid.*

26. On 8 November 2021, the Secretary General advised Mr. Radu that he had decided to maintain the decision to impose the disciplinary measure of discharge against Mr. Radu with immediate effect.[22]

27. On 10 November 2021, Mr. Radu requested that the Secretary General suspend the application of the discharge pending a hearing on the matter by the Appeals Board. On 12 November 2021, the Secretary General notified Mr. Radu that his request for suspension of the discharge decision was denied.[23]

28. On 12 November 2021, Mr. Radu submitted a request for administrative review by the Secretary General, alleging that the Secretary General's denial to suspend the disciplinary proceedings against him while on sick leave was in violation of Staff Rule 110.1(11).[24]

29. On 23 November 2021, Mr. Radu submitted a second request for administrative review, challenging the regularity and merits of the decision to discharge him from the service of the Organization for misconduct.[25]

30. On 26 December 2021, the Secretary General advised Mr. Radu that Staff Rule 110.1(11) did not mandate the suspension of disciplinary proceedings against a staff member on sick leave, and that the facts demonstrated that his medical condition had not affected his participation in the disciplinary process, and thus his 12 November 2021 request for review was denied. The Secretary General further advised him that his 23 November 2021 request for review related to the merits of the 8 November 2021 decision to discharge him for misconduct was also denied, so that decision too would stand.[26]

31. On 28 December 2021, Mr. Radu submitted an application to the Appeals Board contesting his "[s]eparation from service during certified sick leave" (which decision was notified to him on 8 November 2021), claiming that Staff Rule 110.1(11) provides for consultation with the Medical Clinic as a mandatory step to be taken by the Secretary General before undertaking

[22] Letter from ICAO Secretary General to Mr. Radu dated 8 November 2021, Annex 7 to the Appeal.
[23] Appeals Board Decision No. 1, para. 80.
[24] Letter from ICAO Secretary General to Mr. Radu dated 26 December 2021, Annex 9 to Mr. Radu's Appeal.
[25] *Ibid.*
[26] *Ibid.*

the disciplinary process when a staff member is on sick leave and that as this mandatory step was not taken, the decision to discharge Mr. Radu was void *ab initio*.[27]

32. On 7 February 2022, Mr. Radu submitted another application to the Appeals Board, this time contesting the merits of the Secretary General's decision to discharge him for misconduct.

33. Following a Case Management Discussion on 20 June 2022, the Appeals Board, with the agreement of the parties, issued Order No. 2 (2022), dated 21 June 2022, whereby it ordered that Mr. Radu's 28 December 2021 application contesting his separation from service during certified sick leave would proceed on the papers.[28]

34. On 22 June 2022, the Appeals Board issued Order No. 1 (2022), whereby it ordered the Secretary General to produce a copy of all documents relating to the misconduct investigation within 21 days.[29]

35. On 1 August 2022, the Secretary General requested an Appeals Board ruling on the basis of Rule 6 of the ICAO Appeals Board Rules of Procedure (Appeals Board Rules), as to whether communications between the Secretary General and ALD/OHR exchanged on 17 July 2020 and 28 September 2021, which had been furnished to the Appeals Board for review *in camera*, were exempted from disclosure to Mr. Radu by Staff Rule 111.1(17).

36. On 10 August 2022, the Appeals Board issued its ruling with respect to Mr. Radu's right of access to the advice that the Secretary General received from ALD/OHR and held that the documents were confidential within the contemplation of Staff Rule 111.1(17) and thus immune from production to Mr. Radu.[30]

37. On 18 August 2022, further to Mr. Radu's request for an adjournment, the hearing of his 7 February 2022 application contesting the merits of the decision to discharge him was rescheduled for 12 October 2022, upon which day the hearing was held. Neither party advised of witnesses to be called, however, according to the Appeals Board, Mr. Radu gave sworn

[27] Appeals Board Decision No. 1, para. 80.
[28] *Catalin Gheorghe Radu v. Secretary General of the International Civil Aviation Organization*, Order No. 2 following Case Management Order (ICAO Appeal No. 2021-004), Annex 11 to the Appeal.
[29] *Catalin Gheorghe Radu v. Secretary General of the International Civil Aviation Organization*, Order No. 1 (ICAO Appeal Nos. 2021-001 and 2021-003), Annex 3 to the Answer.
[30] Appeals Board Decision No. 2, para. 30.

evidence, effectively confirming on oath or affirmation the facts set forth in his application and submissions.[31]

38. On 20 September 2022, the Appeals Board issued Appeals Board Decision No. 1 on Mr. Radu's first application. The Appeals Board reached the following conclusions:[32]

> ... The Staff Rule applies only to give a staff member subject to the disciplinary process a right to exercise due process rights, that is to respond and to produce countervailing evidence. The Staff Rule does not provide for additional purposes as asserted by the Applicant.
>
> ... That the Staff Rule provided no obligation on the Respondent to consult with the Medical Clinic on 8 November 2021, as the disciplinary process had entered a phase that did not call for the participation of the Applicant, giving no rights to respond and to produce countervailing evidence.
>
> ... That there was no requirement for the Respondent to take the medical condition of the Applicant into account when making or communicating the decision to discharge the Applicant from his employment with ICAO.
>
> .... That the rights of the Applicant to have applied for a disability pension or other like matters were not considerations valid to the decision to discharge the Applicant from employment following a finding of misconduct.

39. On 22 December 2022, Mr. Radu filed an appeal to the UNAT of Appeals Board Decision No. 1, and on 31 January 2023, the Secretary General filed his answer (UNAT Case No. 2022-1768).

40. On 21 February 2023, the Appeals Board issued Appeals Board Decision No. 2 dismissing Mr. Radu's second application. The Appeals Board found that the facts in respect of Mr. Radu's sexual harassment of two individuals, V01 and V04, had been proven by clear and convincing evidence and amounted to misconduct.

41. With respect to V01, the Appeals Board found that 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. Moreover, sometime in September 2017, Mr. Radu called V01 into his office, closed his office door and proposed having drinks together again,

[31] *Ibid.*, para. 31.
[32] Appeals Board Decision No. 1, paras. 117 to 120.

thus again leaving V01 feeling uncomfortable. Finally, it was established, as Mr. Radu himself admitted, that he used to hug her, kiss her cheeks and may have addressed her as "hello beautiful".[33]

42. Turning to V04, the Appeals Board established that V04 and Mr. Radu had 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 she rejected verabally. 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 he approached and tried to grab her upper arms, which she rebuffed.[34]

43. The Appeals Board found that the proven instances of sexual harassment, taken on their own or together, were sufficiently serious for the sanction of dismissal to have been applied; and that Mr. Radu had been accorded due process not only during the investigation into his case, but in respect of all legal requirements which led to the final decision being made.[35]

44. On 22 May 2023, Mr. Radu filed an appeal to the UNAT challenging Appeals Board Decision No. 2 (UNAT Case No. 2023-1804), and the Secretary General filed his answer on 31 July 2023.[36]

45. On 27 October 2023, the Appeals Tribunal pronounced the outcome of UNAT Case No. 2022-1768 stating that the appeal was dismissed without prejudice. That same day, the Appeals Tribunal issued Order No. 538 (2023), by which it ordered that Mr. Radu may amend his appeal brief in UNAT Case No. 2023-1804, scheduled for consideration at the UNAT's 2024 Spring Session, to incorporate the grounds of his appeal in UNAT Case No. 2022-1768; and that Mr. Radu was given 30 days to file an amended appeal from the issuance of the written Judgment, with the Secretary General having a period of 30 days from receipt of the amended appeal thereafter to file any amended answer.

[33] Appeals Board Decision No. 2, paras. 5, 117 and 200.
[34] *Ibid.*, paras. 5, 187 and 200.
[35] Ibid., paras. 204 and 220.
[36] *Radu v Secretary General of the International Civil Aviation Organization*, Judgment No. 2023-UNAT-1385, para. 29.

46. On 21 November 2023, the UNAT issued the written Judgment, Judgment No. 2023-UNAT-1385, in which it dismissed Mr. Radu's appeal of the Appeals Board Decision on grounds that Appeals Board Decision No. 1 was not a final judgment, in that it merely addressed one element of Mr. Radu's allegedly unlawful dismissal for misconduct, which was the dismissal of Mr. Radu for misconduct while on certified sick leave, and without prejudice on the basis that in accordance with Order No. 538 (2023) dated 27 November 2023, both parties would have the opportunity to amend their respective briefs in UNAT Case No. 2023-1804, to include the grounds of appeal raised in this matter, within the time limits set out in said Order. The Appeals Tribunal found that it was not in the interest of justice for the Appeals Tribunal to issue separate judgments on different claims of error with respect to the same administrative decision. Such an approach would encourage a multiplicity of appeals on different aspects of one decision. Rather than address Mr. Radu's claims concerning the contested decision in a piecemeal fashion, the Appeals Tribunal would consider all of his claims in the same Judgment at the Appeals Tribunal's Spring Session in 2024.

47. Mr. Radu filed his amended appeal on 26 November 2023, and the Secretary General filed his amended answer on 21 December 2023.

Submissions

Mr. Radu's Appeal

48. Mr. Radu asserts that the Appeals Board erred in its consideration that the ICAO Personnel Instructions 1.3 (PI/1.3) and Personnel Instructions 1.6 (PI/1.6) do not provide for the right to informal resolution. He contends that the complaints against him could have been resolved through informal resolution, and that by not doing so his due process rights were violated. If Mr. Radu had been given a fair opportunity to be made aware of the issues raised at the time of the complaint, to explain his behaviour, mediate and apologize, V01 may have felt sufficiently comfortable and satisfied. Instead, he was not given a meaningful opportunity to respond in a timely manner.

49. Mr. Radu submits that the procedure implemented by the Ethics Office fell far short of its obligations. Mr. Radu raised issues of irregularities several times. The interim EO recommended that the entire process be referred to an external expert to look into the procedural irregularities, however, he still expressed his opinion that Mr. Radu had committed misconduct

as by that time, unfortunately, significant damage had already been done to Mr. Radu's reputation by the former EO that impeded the entire process.

50. Mr. Radu contends that according to PI/1.6, the EO was required to complete an assessment within 30 days. However, in Mr. Radu's case, it took over a year from the date he was notified of the allegations to the date he was informed that the complaint was sent for formal investigation to OIOS. OIOS also noted in its investigation report the abnormal length of time of the initial assessment that amounted to an in-depth investigation although it should not have been so. As also denounced by OIOS, the Staff Rules and the Ethics Framework do not provide for the EO to investigate matters on her own initiative as it is a prerogative of OIOS.

51. Mr. Radu submits that the Appeals Board erred by failing to consider his allegations of bias and malfeasance by the EO. The EO abused her authority when she sent her preliminary assessment report (the preliminary assessment report) to a Committee which did not exist at the time the complaint was made and established as a feature of the new Ethics Framework. The Appeals Board refused to take into account the complaints against the former EO and her preliminary assessment report, despite the fact that the investigation report and subsequently, the Secretary General's justification of dismissal was heavily based on the preliminary assessment report. Moreover, the EO failed to protect the investigation files under her purview and respect the confidentiality that any case should be treated with. Elements of the investigation were sent "anonymously" to the workplace of Mr. Radu's spouse and there were six cases of leaks and threats against Mr. Radu and his family, which the Appeals Board all disregarded. The OIOS interview process also revealed that there were issues with the EO, as stated by the Director of the Air Navigation Bureau in his interview as well as by other witnesses.

52. Mr. Radu submits that the whole process was delayed by the extensive in-house preliminary assessment conducted by the former EO. By the time the preliminary assessment was completed and the preliminary assessment report provided to the internal body and then to OIOS, almost two years had elapsed which made it difficult for Mr. Radu to gather reliable testimony from witnesses as to whether those incidents occurred and how third parties may have perceived them. From a procedural point of view, Mr. Radu should have been given copies or at least provided with the contents of the complaints. Neither the EO or OIOS provided Mr. Radu with any complaints or witnesses' statements except at a later stage for V02, together with the investigation report. As a result, Mr. Radu was never given the chance to question and cross-examine the complainants.

53. Mr. Radu asserts that although there was no formal complaint from V01, V03, V04, V05 and V06, their names were included in the preliminary assessment report misguiding the content of his case. The Director, OIOS stated in the context of evaluating the possibility to have OIOS investigate the matter, that he was "uncomfortable with its size and scope as it looks as if an almost full investigation has already been done and that he would categorize this as an investigation and not mere fact finding". This, Mr. Radu contends, highlights once again the unprofessional approach used by the EO in dealing with such files. The Director, OIOS also wrote to ICAO that "there was a corporate failure to address and prevent the conduct".

54. Mr. Radu submits that the Appeals Board further erred by failing to consider his allegations of conflict of interest on the part of OIOS. The Appeals Board stated that OIOS did not have a conflict of interest. However, OIOS, the author of the investigation report, was asked by ICAO to comment on the irregularities found in its own report. ICAO requested clarifications from OIOS on 23 August 2021, as a result of the inconsistencies and irregularities found by ALS/OHR in the OIOS report. The request for clarification was carried out by OIOS who replied on 9 September 2021, meaning by the same entity who made the report.

55. Mr. Radu contends that the Appeals Board only retained two cases (V01 and V04) out of six which demonstrates that the EO's fact-finding was neither fair nor objective. Additionally, neither was OIOS as it used it as basis for its own report. OIOS should have considered the former EO's preliminary assessment and report irregular, due to the process used and the undue delay that violated the requirement of an expedient findings of facts. The fact that the Appeals Board still retained the two cases, without any clear or convincing evidence, still shows that the Appeals Board is not fully independent and that the strong affiliation with ICAO (with the judges being selected and paid by ICAO with the rest of the Appeals Board being ICAO employees) produce bias and has a strong influence on the final outcome.

56. Mr. Radu claims that considering V04, the Appeals Board erred in its efforts to maintain the V04 case despite the fact that V04 herself did not consider Mr. Radu's comments as sexual harassment. The Appeals Board indeed recognized that V04 stated that she "did not feel harassed or victimized". Also, she never submitted a complaint. Mr. Radu submits that he might have lacked courtesy and displayed bad judgment, but he did not commit sexual harassment. Further, OIOS did a forensic analysis of his phone that did not reveal any messages or information suggesting any impropriety. Thus, the clear and convincing standards for sexual

harassment on which the disciplinary measure was based have not been established regarding V04.

57. Turning to V01, Mr. Radu recalls that when, in March 2020, he finally received the investigation report, he requested the examination by an external expert of the investigation report by OIOS and the preliminary assessment report by the EO, which was supported and agreed to by the interim EO. The matter was therefore referred to the UNOHR, who confirmed multiple irregularities and more importantly inconsistencies pointed out in the countervailing evidence submitted by V01. Mr. Radu contends that he had never been informed about any discussion of V01 with the EO and he only discovered this three years later upon receipt of the investigation report. The EO deliberately chose to hold onto the first notification from V01 for more than six months before any action was taken.

58. Regarding the alleged incident of December 2016, Mr. Radu states that there was no evidence to support the allegations, no direct witnesses to corroborate the date or event, nor any witnesses who ever saw him in the presence of V01, even though V01 stated in her account of the event that the door was open. On the contrary, multiple witnesses and V01 herself contradicted the statements made by OIOS in its finding on this issue.

59. Turning to the alleged events in September 2017, based on the evidence, the events did not take place. There were no direct witnesses to corroborate the event or any direct witnesses to confirm that the alleged September meeting took place. The last time Mr. Radu had any interaction with V01 was in August 2017 which prompted him to report her behaviour to the EO. V01 made up the alleged September 2017 events in retaliation for his report.

60. Mr. Radu asserts that there was not one incident where he was made aware of the unwanted aspect of his alleged behavior. The ICAO Personnel Instructions (PI/1.3 and PI/1.6) specifically state that in sexual harassment cases, the staff member should have informed the alleged offender immediately. In addition, no formal complaints of sexual harassment have ever been made against him using the reporting procedure in force. In fact, by complaining directly to the EO over one year and half later demonstrated that his behavior was not such an imminent threat, nor that he maintained such behavior after the investigation(s) when he was finally made aware.

61. Mr. Radu emphasizes that V01 and V04 did not file a formal complaint of sexual harassment against him using the reporting procedure in force. The fact-finding investigation was unilaterally decided by the EO without any formal complaint by either V01 or V04. The fact that the EO sent Mr. Radu only V02's complaint shows that, in fact, she was the only one who filed a formal complaint, and her case was dismissed by the Appeals Board.

62. Mr. Radu seems to contend that the sanction was not proportionate to the alleged misconduct. The Secretary General made his decision to summarily dismiss Mr. Radu four years after the facts and despite his years of satisfactory services, based on the investigation report containing five cases that should not have been mentioned as they did not meet the threshold of the required standards for sexual harassment.

63. OIOS and subsequently the Appeals Board failed to demonstrate to the required standard of clear and convincing evidence that any of Mr. Radu's alleged behavior constitutes sexual harassment, since none of the events recounted after the fact included clear indications that his behavior was unwelcome, unreciprocated, or imposed as per the ICAO definition. The case that was constructed by the EO to fit a predetermined conclusion was accepted as clear and convincing evidence. Mr. Radu was effectively precluded from defending himself. Since the Appeals Board did not hear any witnesses, Mr. Radu was not given the opportunity to cross-examine them. Moreover, throughout the proceedings, Mr. Radu was self-represented as ICAO does not allow counsel of choice.

64. Finally, Mr. Radu submits that under Staff Rule 110.1(11), if a staff member is on certified sick leave, the disciplinary process shall normally proceed, subject to consultation with the Medical Clinic. There was however no evidence of any consultation with the ICAO Medical Clinic prior to proceeding with the disciplinary process. The consultation process is an important element of due process to ensure that any staff member is physically and mentally capable of understanding his rights and responding accordingly. Obtaining a "medical" opinion is therefore a pre-condition to make a decision as a medical condition cannot and should not be assessed by the Organization other than by the certification of its medical authority.

65. Mr. Radu requests the rescission of the contested decision, an award of compensation in the amount of three years' net base pay for harm to reputation and career, the grant of anonymity in the publication of the Judgment in light of the sensitive nature of the issues involved, and the reimbursement of costs.

The Secretary General's Answer

66. The Secretary General submits that there is no merit to Mr. Radu's complaint that the Appeals Board did not hear from witnesses and that he did not have a chance to cross-examine the complainants. Staff Rule 111.1(17) and Rule 36 of the Appeals Board Rules unambiguously afforded Mr. Radu the right to call any witness he desired, and the record of the case shows he had repeated opportunities to do so. However, unlike the case in *Appellant*, where the accused staff member made a detailed submission to the UNDT requesting five witnesses he wished to call, which the Dispute Tribunal refused, Mr. Radu here never made a request for witnesses and the trial record reflects that he did not object to the absence of witnesses at any point during the Appeals Board proceedings. Any assertion of error by Mr. Radu on the grounds that he was denied the opportunity to present witnesses or cross-examine his accusers is thus disingenuous and without merit.

67. The Secretary General contends that Mr. Radu's assertions with regard to the Appeals Board's application of Staff Rule 111.1(15) are misplaced. Though ICAO staff members may freely engage legal counsel of their choice at their own expense with respect to their cases, under Staff Rule 111.1(15) outside counsel may not appear before the Appeals Board. At the same time, hearings before the Appeals Board are conducted using an inquisitorial approach, whereby the Appeals Board takes an active role in the proceedings by defining the issues, gathering evidence and, if necessary, calling and questioning witnesses. In this way, the part that legal representation plays in the Appeals Board proceedings is diminished, thereby furthering the overriding organizational objective of ensuring the parties are on equal footing. Furthermore, like all ICAO Regulations and Rules, Staff Rule 111.1(15) is part of Mr. Radu's contract of employment and neither the Appeals Board nor the Appeals Tribunal has the authority to amend any regulation or rule of the Organization.

68. The Secretary General further contends that Mr. Radu's claims that the Appeals Board erred in its application of PI/1.3 (Policy statement on the prevention of sexual harassment) and PI/1.6 (Procedures in relation to harassment, including sexual harassment) have no merit. The Appeals Board correctly noted that 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 and that this is not a "compulsory process". The Appeals Board therefore correctly concluded that the Personnel Instructions did not provide for the resolution suggested by Mr. Radu to be a right and dismissed his claim in this regard.

69. Furthermore, Mr. Radu's claim that his lack of access to confidential correspondence between the Secretary General and ALD/OHR "denied [him] the opportunity to present a complete defense" is equally without merit. ICAO Staff Rule 111.1(17) generally shields confidential attorney-client communications bearing upon the decision under appeal from disclosure to the staff member. Under Rule 6 of the Appeals Board Rules, the Appeals Board may direct the party invoking confidentiality to produce the document for *ex parte* /*in camera* review and a determination by the Appeals Board as to whether its relevance overrides its confidentiality. The Appeals Board examined the correspondence and determined that its "sole purpose" was "[the] requesting and the giving of legal advice" and that it "is thus subject to an immunity from production as provided for in Staff Rule 111.1(17)". Thus, its probative value (if any) did not outweigh the Secretary General's interest in the confidentiality of communications with legal counsel, and it was therefore exempt from disclosure under Staff Rule 111.1(17). Finally, the statements and opinions of counsel are not evidence, and Mr. Radu does not offer any credible explanation as to what specific exculpatory evidence, documents, or related facts he would have submitted that would have affected the outcome of the case if he otherwise had access to the correspondence at issue.

70. Next, the Secretary General submits that Mr. Radu's assertion that the Appeals Board erred by failing to consider his allegations of bias and malfeasance by the EO is without merit. The record plainly shows that the Appeals Board properly and thoroughly exercised its discretion to assess the evidence before it and to determine both its admissibility and its weight, and provided its reasons for doing so, and Mr. Radu has not demonstrated any error by the Appeals Board with respect to the admission of his submission of these allegations or in deciding upon the weight to be given to them. As Mr. Radu has failed to meet his burden to demonstrate an error of fact or law relative to the Appeals Board's decision warranting a reversal in this case, his appeal must be denied.

71. The Secretary General contends that Mr. Radu's contention that the Appeals Board erred by failing to consider his allegations of conflict of interest on the part of OIOS is equally without merit. Before the Appeals Board, the Secretary General offered evidence to demonstrate that Mr. Radu's due process rights were respected, including an e-mail exchange between the Secretary General and OIOS, whereby the Secretary General asked for OIOS to address alleged inconsistencies in the statements of two of the complainants that Mr. Radu had raised in the countervailing evidence he submitted, in order to assist the Secretary General in making a

decision on the case. Mr. Radu's assertion that this exchange put OIOS in the position of being "prosecutor and judge at the same time" distorts the role of OIOS in the investigative process. The Appeals Board duly considered the claim of a conflict of interest on the part of OIOS but concluded "[t]here [was] no evidence to support such an assertion". Mr. Radu has not demonstrated any error by the Appeals Board in this regard.

72. The Secretary General next asserts that Mr. Radu has the burden of establishing that the decision of the Appeals Board is defective, and he must therefore identify the alleged defects and state the grounds relied upon in asserting that the decision is erroneous; he, however, simply rehashes the same arguments he unsuccessfully made to the Appeals Board. In this case, the Appeals Board conducted a detailed analysis of its scope of review, the nature of the evidence before it, and the applicable burden of proof, while also taking into account Mr. Radu's analysis of the evidence in respect of each witness and the errors he alleged with respect to the consideration of the evidence and the conclusions reached, and considered these matters in respect of the allegations of each of the five victims.

73. As to V01, the Appeals Board considered the entire "matrix of evidence," including, at every stage, the exculpatory evidence presented by Mr. Radu, and found, *inter alia*, that the evidence given by V01 "was detailed and precise and largely corroborated" by the evidence of other witnesses, whereas the evidence of Mr. Radu was "contradictory, uncertain as to numerous matters, and not consistent". The Appeals Board further analyzed the evidence and found that there was "clear and convincing evidence that this situation had a negative impact on V01 and that the approaches were clearly unwelcome[,]" and ultimately concluded that the facts alleged as to V01 were "established according to the 'standard of proof' of clear and convincing evidence".

74. The Appeals Board applied the same approach to V04—thoroughly examining the totality of the evidence, including the evidence of Mr. Radu. The Appeals Board, *inter alia*, noted that V04 impressively "recalled events in significant detail … [which] were confirmed by the text exchanges[,]" and that "[w]hen asked to expand on her evidence by the investigators, she was consistent and again detailed[,]" whereas the Appellant's explanations "lack[ed] veracity", were "most unlikely", and "do not explain [his] conduct." The Appeals Board thus again found that "the facts as stated in the evidence of V04 were proven at the standard of clear and convincing."

75. As to the Appeals Board's finding that the established facts amounted to misconduct, Mr. Radu merely repeats the arguments the Appeals Board rejected and fails to demonstrate how the Appeals Board erred in a manner that invalidates its judgment.

76. Mr. Radu's challenge to the proportionality of the sanction imposed is without merit. The Appeals Board applied the correct legal standards in considering the proportionality of the imposed disciplinary sanction striking the right balance between the lawful exercise of the Secretary-General's discretion to select an adequate and proper sanction and Mr. Radu's right to judicial protection. The Appeals Board thus determined that the disciplinary sanction of separation from service was proportionate to Mr. Radu's misconduct. While the Appeals Board acknowledged that this disciplinary sanction was one of the most severe that could be imposed, the Appeals Board found that the sanction of dismissal was proportionate for each of the proven instances of sexual harassment, on their own, or taken together, due to the serious nature of Mr. Radu's actions, his "good record of service at ICAO" notwithstanding.

77. Finally, Mr. Radu's claims of error with regard to the Appeals Board's conclusions as to the purpose/function of Staff Rule 110.1(11) are misplaced. ICAO Staff Rule 110.1 addresses "Disciplinary measures and process" and paragraphs 7 through 11 of Staff Rule 110.1 address "Staff member's right to respond and to produce countervailing evidence". The Appeals Board concluded that Staff Rule 110.1(11) "is clearly directed to the exercise of due process rights by a person [who is] the subject of the disciplinary proceedings," and that it "applies only to give a staff member subject to the disciplinary process a right to exercise due process rights, that is to respond and to produce countervailing evidence[,] … [and] does not provide for additional purposes as asserted by the Appellant."

78. The Secretary General submits that Mr. Radu merely disagrees with the Appeals Board and repeats the same arguments he unsuccessfully made to the Appeals Board without demonstrating any error in law in the Appeals Board's decision. In addition, in support of his claims, Mr. Radu fails to offer any credible explanation as to why he submitted a timely ten-page reply to the Secretary General's 21 September 2021 provisional decision to discharge him, without having made a request for a stay of proceedings or for additional time. Nor does he address his subsequent failure to exercise his right under Staff Rule 111.1 to request that the Appeals Board waive the time limit for him to request administrative review of the Secretary General's 8 November 2021 discharge decision and/or the time limit for him to submit an appeal following his receipt of the Secretary General's 26 December 2021 response. The Secretary

General seems to suggest that Mr. Radu's "alleged physical and mental incapacity" was not severe enough to affect his ability to participate in the proceedings.

79. The Secretary General requests that the Appeals Tribunal enter a final judgment dismissing Mr. Radu's appeal.

Considerations

Whether anonymity should be granted to Mr. Radu

80. On appeal, Mr. Radu seeks the relief of granting anonymity in the publication of this Judgment in light of the sensitive nature of the issues involved.

81. The application for anonymity or confidentiality is treated as a preliminary matter in our jurisprudence. The relevant regulatory framework concerning anonymity includes Article 10(9) of the Appeals Tribunal Statute, which provides that "[t]he judgements of the Appeals Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal".

82. Article 20(2) of the UNAT Rules of Procedure provides that the "published judgements will normally include the names of the parties".

83. Section II.C "Anonymity" of UNAT Practice Direction No. 1 stipulates:

> A person who has been granted anonymity by the UNDT or the neutral first instance process of an entity accepting UNAT's jurisdiction need not request it at UNAT as such order will remain in effect, unless there is a challenge to such anonymity on appeal and UNAT has given its judgment on the issue. A person who wishes anonymity before UNAT for the first time may file a motion to request anonymity in exceptional circumstances and for good cause.

84. For the purpose of transparency and accountability, the judgments of this Tribunal are published on its website with the parties' names routinely included. The UNAT may justifiably redact the names, identities and other personal information of the victims and witnesses of misconduct to protect their privacy while publishing the judgments. However, whether the redaction could naturally extend to the staff member who had committed, or is alleged to have committed, misconduct is not clearly defined under Article 10(9) of the UNAT Statute. As an instrument to implement the Statute, our Rules of Procedure requires that the names of the

parties should "normally" be included in the published judgments. To further guide the parties, Practice Direction No. 1 details the steps an applicant should take to request anonymity under different conditions.

85. It is worth paying attention to the last part of the above-mentioned provision of Practice Direction No. 1, where the request of anonymity is raised for the first time before the UNAT, just like the present case. We note that Mr. Radu did not ask for anonymity during the first instance, and Appeals Board Decisions No. 1 and No. 2 only granted anonymity to the witnesses. So, when Mr. Radu decided to apply for anonymity on appeal, the requirement of "exceptional circumstances and for good cause" should be met. In other words, the presumption of publication of parties' names in the UNAT judgments can only be reversed in exceptional (abnormal) circumstances with sufficient grounds to warrant the departure from this general principle.

86. Our jurisprudence has consistently held that the names of litigants are routinely included in judgments of the internal justice system of the United Nations, and personal embarrassment and discomfort are alone not sufficient grounds to grant confidentiality.[37] Names should be redacted "in only the most sensitive of cases".[38] That being said, the matter of anonymity is never an easy question to decide. Judges need to strike a delicate balance between competing interests, protecting personal privacy on the one hand, and deterring potential perpetrators and maintaining the transparent operation of the Tribunals on the other hand.

87. One of the most influential cases in this respect is the UNAT's full bench Judgment in *AAE*, in which anonymity was a core issue in dispute and the full bench was closely divided on this matter. The Majority enumerated the circumstances warranting departure from the general and established principle that parties' names should be included in the judgments.[39]

88. We do not find these exceptional circumstances exist in the present case. Mr. Radu merely requests anonymity based on "the sensitive nature of the issues involved" without elaborating on other considerations that could support his request. In our view, anonymity cannot be automatically granted only because a case involves sexual harassment. In similar

[37] *Buff v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-639, para. 21.
[38] *Mobanga v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-741, para. 22.
[39] *AAE v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1332, para. 156.

cases, the alleged perpetrators' (staff members') names have been published despite the sensitive nature of the misconduct.

89. In conclusion, Mr. Radu has failed to demonstrate any substantive reason to justify anonymity. There are no exceptional circumstances and good cause that persuade us to depart from the general principles and our well-established jurisprudence. The anonymity request is therefore denied.

Mr. Radu's Appeal against Appeals Board Decision No. 1

90. On 28 December 2021, Mr. Radu submitted an appeal to the Appeals Board contesting his separation from service during certified sick leave, primarily on the ground that Staff Rule 110.1(11) provides for consultation with the Medical Clinic as a mandatory step to be taken by the Secretary General before undertaking the disciplinary process when a staff member is on sick leave and that as this mandatory step was not taken, the decision to discharge Mr. Radu was void *ab initio*.

91. The Appeals Board dismissed the application on grounds that Staff Rule 110.1(11) applied only to give a staff member subject to the disciplinary process a right to exercise due process rights, i.e. to respond and to produce countervailing evidence; that the Staff Rule did not provide for additional purposes as asserted by Mr. Radu; that the Staff Rule provided no obligation on the Secretary General to consult with the Medical Clinic on 8 November 2021, as the disciplinary process had entered a phase that did not call for Mr. Radu's participation; that there was no requirement for the Secretary General to take Mr. Radu's medical condition into account when making or communicating the dismissal decision; and that Mr. Radu's rights to have applied for a disability pension or other like matters were not considerations valid to the decision to dismiss Mr. Radu following a finding of misconduct.

92. In our view, if the consultation with the Organization's Medical Clinic is a mandatory precondition to terminate the employment relationship between the two parties based on the Staff Rule in issue, then the failure to do so would be a violation of Mr. Radu's due process rights. So, we would consider this matter as one aspect of the alleged due process rights violation.

93. It seems to us that both parties agree that the nub of the contentious issue is the application and interpretation of Staff Rule 110.1(11) (amended on 23 December 2020, hereinafter referred as the Staff Rule), which stipulates that "[i]f a staff member is on certified

sick leave, the disciplinary process shall normally proceed as envisaged in the present Rule, subject to consultation with the Medical Clinic. If the staff member is on any other leave, including maternity or paternity leave, the disciplinary process should normally proceed as envisaged in the present Rule."

94. The Appeals Board concluded that the Staff Rule "applies only to give a staff member subject to the disciplinary process a right to exercise due process rights, that is to respond and to produce countervailing evidence. The Staff Rule does not provide for additional purposes as asserted by the Applicant."[40] Mr. Radu does not accept this interpretation. On appeal, he argues that the consultation process cannot be subject to subjective interpretation. Words must be construed objectively in their plain context. In addition, a clause in a document should be interpreted in favor of the party who did not draft the clause. In other words, the interpretation of the Staff Rule favoring a broader application for the benefit of staff member should be adopted. To conclude, obtaining a "medical" opinion is therefore a precondition to taking a decision as a medical condition cannot and should not be assessed by the Organization other than by the certification of its medical authority.

95. The key words of the disputed provision are"subject to". How should we understand its meaning in this context? Does it place an obligation on the Organization to consult with the Medical Clinic before taking every step in the disciplinary process, as Mr. Radu claimed? Or does it place a mandatory conditionality on the continuation of the disciplinary process only in terms of the exercise of due process rights by the staff member at critical stages and points, as the Appeals Board held?

96. To start with, it is useful to review our jurisprudence on the principles of interpretation. As set out in the case of *Scott*, it provides in relevant part the following:[41]

> The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would be the author.

[40] Appeals Board Decision No. 1, para. 117.
[41] *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225, para. 28.

97. The interpretation of a staff rule begins with the literal reading of the rule, but it also should be done in the context and structure where the rule is placed. Our case law established that the interpretation of a rule is made within the context of the hierarchy in which the rule appears.[42] This was the approach taken by the Appeals Board in interpreting the Staff Rule. In this connection, the contested provision is part of Staff Rule 110.1 which regulates "*Disciplinary measures and process*" and is under the subtitle "*Staff member's right to respond and to produce countervailing evidence*". The provisions preceding this rule lay down detailed procedures for both the Organization and the staff member to abide by, so that the staff member has sufficient and proper opportunity to respond and produce countervailing evidence at the critical stages of the disciplinary process. That would include, for example, after receiving the allegations of misconduct, the investigation report and the provisional decision. The Staff Rule is a natural continuation along this line except that it concerns the staff member who is on certified sick leave.

98. We agree that a rule must generally be interpreted by reference to its context and purpose. However, we agree with Mr Radu that a plain literal reading makes it clear that the Organization is in general under the obligation to consult with the Medical Clinic in order to proceed with the disciplinary process if the staff member is on certified sick leave. "[S]hall normally proceed" means that there is a presumption of proceeding according to the procedures envisaged in the previous clauses. However, what constitutes the exception to this general obligation and thus could reverse the presumption is not prescribed. In particular there is no express qualification to the rule that might allow for the interpretation accepted by the Appeals Board, that is that it applies only to such stages of the disciplinary process as need the staff member's participation. A rule should be clear on its face to a staff member without legal training or expertise. On its face, the words of the Staff Rule do not appear to convey the meaning given to it by the Appeals Board. We conclude that the Appeals Board wrongly interpreted and applied the Staff Rule in this case. However, it is another question altogether as to what effect this might have on Mr. Radu's due process rights and thereby the validity of the Organization's decision to separate Mr. Radu from his employment with it.

99. While we conclude that Mr. Radu's due process rights were affected adversely by the Organization's failure to follow its rules as we have interpreted and applied Staff Rule 110, we

[42] *Timothy v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-847, para. 54.

conclude that this breach alone was not such as to vitiate the decision taken in relation to his continued employment with ICAO.

Mr. Radu's appeal of Appeals Board Decision No. 2

100. In its decision on 21 February 2023, the Appeals Board found that the facts in respect of Mr. Radu's sexual harassment of two individuals, V01 and V04, had been proven by clear and convincing evidence and amounted to misconduct justifying summary dismissal.

101. In relation to V01, the Appeals Board found established that Mr. Radu invited V01, a General Service staff member 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. Moreover, 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. Finally, it was established, as Mr. Radu himself admitted, that he used to hug her, kiss her cheeks and may have addressed her by saying "hello beautiful".[43]

102. Turning to V04, the Appeals Board found it to have been established that 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 she alleged that he approached and tried to grab her upper arms, which she rebuffed.[44]

103. The Appeals Board found that the remainder of the instances of sexual harassment, detailed by V02, V03 and V05, which had been contained in the investigation report and which had formed, together with the complaints of V01 and V04, the basis for the decision taken by ICAO

[43] Appeals Board Decision No. 2, paras. 5, 117 and 200.
[44] *Ibid.*, paras. 5, 187 and 200.

to dismiss Mr. Radu, had not been proven. The sexual harassment of V01 and V04, taken on their own or together, were found to have been proved and were sufficiently serious for the sanction of dismissal to have been applied.

104. Having considered the record before the Appeals Board, our jurisprudence, and the parties' submissions, we find, by Majority, Judge Gao dissenting, that the appeal must succeed, with the decision of the Appeals Board reversed and the matter remanded for re-hearing by the Appeals Board before a differently constituted panel. We find this for the following reasons.

105. Article XI of the ICAO Service Code was amended in October 2020 to establish an Appeals Board, chaired by an independent person with legal and judicial expertise who is not a staff member. This followed the decisions of this Tribunal in matters such as *Spinardi*[45] and *Fogarty*,[46] in which it was found that for the UNAT to conduct its function as an appellate tribunal, impugned decisions must emanate from a neutral first instance process.

106. It is well-settled in the Appeals Tribunal jurisprudence that in disciplinary cases, the Tribunals will examine the following: (a) whether the facts on which the disciplinary measure is based have been established by clear and convincing evidence when termination is a possible outcome; (b) whether the established facts qualify as misconduct under the Staff Regulations and Rules; (c) whether the sanction is proportionate to the offence; and (d) whether the staff member's due process rights were observed in the investigation and disciplinary process.[47] The last consideration has been dealt with above.

107. Clear and convincing proof 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.

108. In undertaking its task, the Appeals Board Rules have been established to enable it

> to deal with cases fairly, justly and independently of the Administration. The overriding objectives of these rules include:
>
> (a) ensuring that the parties are on an equal footing;

[45] *Spinardi v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-957, para. 26.
[46] *Margaret Mary Fogarty, Robert Sheffer, Monia Spinardi, Astrid Dispert & Minglee Hoe v.Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1148, paras. 7 and 10
[47] See *Josef Reiterer v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1341, para. 52.

(b) dealing with cases in ways that are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far is compatible with proper consideration of issues; and

(e) promoting and, where appropriate, facilitating amicable resolution of disputes.

109. In terms of Rule 24 of the Appeals Board Rules, the hearing of appeals:

> shall be conducted by the Board on an inquisitorial basis, whereby the Board may assist the parties as necessary by clarifying the issues and contention and by adopting an inquisitorial approach to elucidating such evidence as relevant and necessary to determine the facts in issue, to include calling and examining witnesses as requested by either of the parties or such other witnesses as it determines will assist the Board.

110. Rule 36 of the Appeals Board Rules provides that "[t]he parties have the right to give evidence as witnesses and may request that other witnesses or experts be called to testify before the Board and the Board may grant such a request if, in the opinion of the President, such evidence is or may be relevant to an issue to be decided in the case".

111. Rule 40 of the Appeals Board Rules requires that "[t]he Board shall decide whether the personal appearance of a witness or expert is required at oral proceedings and determine the appropriate means for satisfying the requirement for personal appearance".

112. Rule 42 of the Appeals Board Rules states in relevant part that "[t]he Board shall first examine the witnesses and will provide the parties with a reasonable opportunity to cross-examine them as deemed necessary."

113. Under "Sequence of proceedings", Rule 50(d) of the Appeals Board Rules provides:

> Witnesses and experts are called by the Board and are examined by the President and, if appropriate and necessary, by each of the staff members of the Board. The parties may then be permitted to clarify aspects of the witnesses' testimony and/or to cross-examine the witness for such time as the President considers appropriate to just handling of the proceedings.

114. In its decision, the Appeals Board recorded that: "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."[48]

115. While the decision of the Appeals Board expressly states that Mr. Radu gave sworn evidence before the Appeals Board, from the record of proceedings it is apparent that this was not so. Although the Appeals Board invited Mr. Radu on several occasions to be sworn in as a witness and to give evidence, he expressed his wish to rely on his extensive written submissions previously filed. The Appeals Board explained to him the differences between submissions made, and evidence given by a litigant in person, and intimated on several occasions that it would prefer Mr. Radu to be sworn in as a witness. This did not occur. Instead, Mr. Radu made oral submissions to the Appeals Board, some of which included material that was evidential in nature and extended beyond simply a submission.

116. We accept that the Appeals Board afforded Mr. Radu the opportunity to call witnesses, including himself, at the hearing before it, but that Mr Radu declined that opportunity. The Appeals Board complied with its procedural rules in this regard. We do not criticise the Appeals Board for not compelling Mr. Radu to give evidence, although if it apprehended from its pre-reading of the extensive file, as it said it had, a need or the desirability for him to do so, it could have itself called Mr. Radu and examined him. Indeed, the transcript of the hearing makes it clear that this is what the Appeals Board expected to do but, inexplicably, did not do.

117. Since Mr. Radu did not give evidence, he was not cross-examined. No witness testified for ICAO and instead counsel for the Secretary General urged the Appeals Board to listen to the recording of the complainants' testimonies.

118. Assuming erroneously that Mr. Radu had given evidence before it, the Appeals Board concluded therefrom that it disbelieved him and found the evidence of the complainants V01 and v04 credible. However, it is unclear how it did so given the manner in which it considered and evaluated the evidence, particularly the conflicting versions of events before it.

119. The Appeals Board recorded that the evidence that was referred to by Mr. Radu as hearsay "has been ignored" since "it is no more than contextual". However, somewhat inexplicably the Appeals Board found in contrast, without hearing the evidence of the complainants, that the demeanour of complainants was "acceptable evidence to take into account. It is direct evidence

[48] Appeals Board Decision No. 2, para. 31.

of such."[49] This was so in spite of the Appeals Board finding that the investigation report was "basically hearsay in nature, as it is a record or summary of the evidence which has been obtained."[50]

120. The Appeals Board then stated that it had "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." Further, it is stated that "[t]he 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."[51]

121. The Appeals Board recorded that in relation to cases of sexual 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."[52]

122. The difficulty with the approach taken by the Appeals Board to the evidence in the matter is that while it is recognized that it served as a neutral first instance process, the Appeals Board failed to ensure that, in adopting an inquisitorial approach to proceedings, it approached and evaluated the evidence in a balanced and fair manner in accordance both with its Rules and accepted legal norms. Had it done so this would have ensured that it was placed in a position to assess the credibility, reliability and the probabilities of disputed versions in order to make important factual findings on the merits. The Appeals Board's task was not simply to review the investigation report and the evidence obtained by the investigators. It was required as a neutral first instance body to determine whether clear and convincing evidence existed which supported the findings of misconduct made. To do this required a consideration and assessment of the totality of the evidence before it, including any further evidence the parties sought to rely on. It could not be found that clear and convincing evidence existed, if factual disputes were simply overlooked or left unresolved and when no careful assessment of the evidence is apparent from the decision.

[49] *Ibid.*, para. 93.
[50] *Ibid.*, para. 95.
[51] *Ibid.*, para. 95.
[52] *Ibid.*, para. 97.

123. Although the Appeals Board stated that Mr. Radu had given sworn evidence before it, that was not the case. It is therefore unclear from the Appeals Board's decision what approach the Appeals Board adopted to the assessment and evaluation of the different versions of the parties or why it elected not to call any witnesses to testify. Without any explanation regarding such approach and the reasons for it, it is difficult to understand how the Appeals Board considered itself to have been placed in a position which enabled it to make findings regarding the demeanour and credibility of witnesses who had not testified before it, and to make adverse and similarly-based findings against Mr. Radu.

124. In addition, the Appeals Board failed to undertake a careful analysis of the documentary evidence before it in reaching the findings that it did. It found, for example, that the electronic messages between V04 and Mr. Radu supported the evidence of V04, without a careful and detailed analysis of the content of such messages, including, for example, what V04 intended when she wrote to Mr. Radu on 7 December 2017 "next time just seize the moment. Hello and hug!". This was in response to an electronic message from Mr. Radu to her saying: "…You've disappeared No hug, nothing". In failing to analyze this evidence carefully, the Appeals Board omitted to determine material issues of direct relevance, including the nature of the relationship between the V04 and Mr. Radu and what it was that V04 had intended by stating that Mr. Radu should "seize the moment".

125. A serious allegation raised against Mr. Radu was that he had assaulted V04 in an elevator. We find in relation to this incident that there are various shortcomings in the evidence before it, shortcomings which were not resolved by the Appeals Board in arriving at its decision. These include that there was no evidence placed before the Appeals Board or considered by it which showed whether the lift doors were open or closed at the time of the incident, whether the lift was between floors in a building or whether there were other people in the lift at the same time. Further, and concerningly, there is a suggestion that there may have been an independent witness to this event but that there was no investigation of that person's account of the incident, which could have assisted the Appeals Board to resolve the conflict between the accounts of V04 and Mr. Radu.

126. As stated above, where a dismissal decision has been taken by ICAO, as an independent neutral body of first instance the Appeals Board is required to consider the evidence adduced and to determine whether the facts on which the sanction is based have been established on clear and convincing evidence. It must undertake this task fairly, justly and independently, while

ensuring that in doing so the parties are placed on an equal footing. Rule 24 of the Appeals Board Rules requires the Appeals Board to conduct the hearing of appeals on an inquisitorial basis, assisting the parties as is necessary, in order to determine the facts in issue. The Appeals Board may not, in the performance of its task, dispense with important legal rules relating to the evaluation of witnesses and evidence, which safeguard the parties and ensure that decisions taken are not arbitrary or unjust.

127. Rule 36 of the Appeals Board Rules expressly provides that parties have the right to give evidence as witnesses, to call other witnesses and that the Appeals Board may call for witnesses to be called to testify and examined. The Appeals Board is permitted by Rule 40 to determine whether the personal appearance of a witness is required at oral proceedings and determine appropriate means to ensure such appearance. Where a witness is called, under Rule 42 and reiterated in Rule 50(d), the Appeals Board is to first examine that witness and then provide the parties with a reasonable opportunity to cross-examine such witness. Given these Rules, where the Appeals Board decides not to call for evidence, it is incumbent on it to explain why this is so. Without a careful analysis of considerations relevant to a determination of the credibility of the distinct versions before it and the reliability of such versions, it is difficult to understand on what basis a finding could be justified such that it was "impressed with the evidence of V04", but not with that of Mr. Radu.

128. We find that there was not clear and convincing evidence of misconduct on the part of Mr. Radu in relation to V04. In light of the factual disputes which exist, in undertaking the task of a neutral first instance review body, the Appeals Board was required to evaluate the evidence in a manner which allowed it to determine issues of credibility, the reliability of the different versions of Mr. Radu and V04 and to assess the probabilities. We are of the view that in relation to V04, the Appeals Board failed to assess the relevant evidence in the manner required of it. The finding that there existed clear and convincing evidence of misconduct in this regard does fall not within the bounds of reasonableness required and therefore cannot stand.

129. Similar considerations apply in relation to the evidence of V01, which lead us to the same conclusion. Given these defects, we are satisfied that the Appeals Board erred in reaching the decision that it did, being a decision that a reasonable decision-maker on the material before it could not have reached. Despite the extended period which has elapsed between the date on which the allegations of misconduct were investigated and this decision, justice demands that the appeal

must succeed, with Appeals Board Decision No. 2 set aside, with the matter remanded to the Appeals Board for a re-hearing, without delay, before a differently constituted panel.

Judgment

130. Mr. Radu's Appeal against Appeal Board's Decision No. 1 is dismissed.

131. Mr. Radu's appeal against Appeals Board's Decision No. 2 is granted, by Majority (Judges Savage and Colgan), Judge Gao dissenting, with the allegations in respect of complainants V01 and V04 being remanded to a differently-constituted ICAO Appeals Board for re-hearing.

Judge Gao appends a partially dissenting opinion.

Original and Authoritative Version: English

Decision dated this 22nd day of March 2024 in New York, United States.

(Signed)	*(Signed)*
Judge Savage	Judge Colgan

Judgment published and entered into the Register on this 24th day of May 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar

JUDGE GAO XIAOLI 'S PARTIALLY DISSENTING OPINION.

1. In this Judgment, the Appeals Tribunal granted the appeal with respect to Appeals Board Decision No. 2. I however respectfully disagree with the reasoning and outcome with respect to Appeals Board Decision No. 2.

2. The Majority's decision regarding Appeals Board Decision No. 2 is based on the following main grounds: i) the Appeals Board erroneously assumed that Mr. Radu had given evidence; ii) the Appeals Board made a positive credibility assessment of V01 and V04 without hearing them in person, while at the same time making a negative credibility assessment of Mr. Radu who was presenting his case before the Appeals Board, who had not been sworn in as a witness and did not give evidence and was not cross-examined; iii) the Appeals Board failed to properly assess the documentary evidence before it; and iv) the Appeals Board failed to consider that there may have been an independent witness, but that there was no investigation of that person's account of the incident, which could have assisted the Appeals Board to resolve the conflict between the accounts of V04 and Mr. Radu.

3. I do not agree with the Majority's decision that the Appeals Board failed to assess the evidence in a fair and balanced manner.

4. First, the Appeals Board did not err in its decision not to call any witnesses to testify. Rule 36 of the Appeals Board Rules grants the parties the right to request that witnesses or experts be called to testify before the Appeals Board. If a party wishes to do so, Rule 38 continues to specify that the party shall provide the Appeals Board with the names of the witnesses they request be called during the hearing together with the information on the location, contact details of the witnesses, and the relevance to the issues to be decided. Rule 40 provides that the Appeals Board retains discretion to refuse or require the presence of a particular witness, for the purpose of the proper conduct of a hearing. In the present case, the fact that no witnesses were called to testify and the fact that Mr. Radu was not cross-examined was of Mr. Radu's own making. He was fully informed of his right to call witnesses,[53] but he chose not to do so.

5. Second, I do not find any error in the Appeals Board's consideration and assessment of hearsay evidence. The Appeals Board made a thorough analysis of hearsay evidence relying

[53] *Catalin Gheorghe Radu v. Secretary General of the International Civil Aviation Organization,* Order No. 1 (ICAO Appeal Nos. 2021-001 and 2021-003), Annex 3 to the Answer.

predominantly on the case of *Applicant*.[54] Mindful of its nature and limitations, the Appeals Board carefully examined the relevant hearsay evidence in this case in making its assessment of each of the complainants, including V01. The Appeals Board listened to the lengthy audio recordings of the witness interviews, compared the written statements of each witness with the audio recordings, examined the investigation report and reached its own conclusion that the investigation report, although largely hearsay in nature, reflects a proper recording of the actual evidence provided to the investigators.

6. As we have stated in many sexual harassment cases, this type of misconduct typically occurs in private, often with little or no direct, independent evidence.[55] Therefore, the first report in the immediate aftermath of the event is of considerable evidentiary weight. As such, albeit being hearsay in nature, these witness statements should be acceptable. Hearsay evidence has its intrinsic limitations and drawbacks, it nevertheless is admissible in exceptional circumstances as long as it is taken with caution and corroborated fully, which the Appeals Board did in this case.

7. Third, the Appeals Board did not err in its assessment of V01's and Mr. Radu's credibility, I note that the Appeals Board reached its conclusions about their credibility based on its detailed, thorough, and proper examination of the evidence on record. It found that the evidence given by V01 was detailed and precise, largely corroborated and her statements were clear and congruent. V01 provided details about her interaction with Mr. Radu that rendered her testimony even more credible. On the contrary, the evidence produced by Mr. Radu was contradictory, uncertain as to numerous matters, and not consistent. The Appeals Board gave examples to support its conclusion.

8. Any inconsistencies or contradictory statements by V01 as alleged by Mr. Radu are either insufficient, unsubstantial or irrelevant. It is normal that there might be some minor inconsistencies in one's recount of an event. Demanding every detail to be strictly consistent is putting an unreasonable burden on the victim. This is especially true for those witnesses who the victims confided in what had happened to them and whose accounts may be slightly different as to the same event due to their differing memories and reactions to the event. But as long as their testimonies corroborate certain portions of V01's account, taken cumulatively, I am satisfied that

[54] *Applicant v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1187.
[55] *Al Hussein Haidar v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1076, para. 43.

the clear and convincing evidence standard has been met which established that the alleged misconduct in fact occurred.

Whether the established facts amount to misconduct

9. Having concluded that the facts have been established, it is necessary to consider the next prong of the test, i.e. whether the established facts concerning V01 and V04 qualify as misconduct under the Staff Regulations and Rules.

10. Paragraph 3 of ICAO Personnel Instruction PI/1.3 provides that "[s]exual 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." Paragraph 7 of PI/1.3 reads: "Sexual harassment is distinguished from other forms of mutual contact by its unwelcome, unreciprocated and imposed nature. Mutually acceptable behaviour is not sexual harassment regardless of the employment relationship." Paragraphs 3.3 and 3.5 of PI/1.6.5 provide for almost verbatim the same definition of sexual harassment.

11. It is irrelevant that, as Mr. Radu contends, V01 and V04 did not file formal complaints of sexual harassment against him. The failure by a victim to report offensive or humiliating behaviour does not render the conduct acceptable.[56] There are some sexual harassment cases that are initiated by the complaints of victims, others by witnesses, and also others where the Organization spotted clues and decided to take action to commence an investigation. Whether a victim comes forth on their own or whether the harassment is discovered during an investigation otherwise makes no difference as to the fact that sexual harassment occurred. In the present case, contrary to Mr. Radu's claim, V01 did file a complaint against him, only that her reporting e-mail to the former EO, in the eyes of Mr. Radu, did not represent a "formal" complaint. I agree with the Appeals Board that it is not mandatory as to the manner a complaint was made.[57] Mr. Radu's behaviour was clearly unwelcome as demonstrated by V01's statements, and her reaction and demeanor after the events. The Appeals Board made no error in concluding that Mr. Radu's conduct towards V01 constituted sexual harassment based on the established facts.

[56] *Andry Adriantseheno v. Secretary-General of the United Nations,* Judgment 2021-UNAT-1146/Corr.1, para. 50.
[57] Appeals Board Decision No. 2, para. 41.

12. The situation with respect to V04 is different. Mr. Radu did not contest the facts and V04 stated that she "did not feel harassed or victimized" and she had "successfully fended off" Mr. Radu.[58] The Appeals Board found it evident that Mr. Radu had engaged in conduct amounting to sexual harassment, inferring from her statement that she did not welcome his behaviour. It further held that some words or expressions indicating intimacy or having sexual connotations used by Mr. Radu towards V04 were forced familiarity on V04. I find the Appeals Board's inference unpersuasive.

13. According to PI/1.3 and PI/1.6, the core element of the definition of sexual harassment is its unwelcome, unreciprocated and imposed nature. It refers to conduct that is unwanted by the recipient. Mutually acceptable behaviour is not sexual harassment regardless of the employment relationship. The victim's perception of the incident is thus vital when evaluating whether the contested conduct constitutes sexual harassment. If the concerned party did not deem she was harassed or victimized by the other party, it indicates that the conduct in question was acceptable to her. As such, the conduct is "mutually acceptable behaviour" instead of sexual harassment. In *Appellant*, one of the victims, AA, originally expressed her concern over the appellant's demeanour, but she never considered the incident as sexual harassment and accepted an apology and considered the matter closed. The UNAT found that "[w]hile the conduct may have been unwelcome, AA did not consider it sexual in nature or offensive. An unwelcome kiss, without sexual motivation, and which causes no offence, is not sexual harassment."[59]

14. The evidence on record shows that the exchanges between Mr. Radu and V04 were mutually accepted from the very beginning, not one-way or forced on V04. V04 either responded actively to Mr. Radu or at least did not oppose or reject him in those exchanges. They continued with a cordial relationship in Montreal after their encounter in Nigeria. Even when she stated that she had to physically fend off Mr. Radu in the elevator incident, she still clearly expressed that she "did not feel harassed or victimized". In light of the above, the Appeals Board erred in law in deciding that Mr. Radu's conduct concerning V04 constituted sexual harassment.

[58] *Ibid.*, para. 172.
[59] *Appellant v. Secretary-General of the United Nations,* Judgment No. 2022-UNAT-1210, para. 47.

Whether the sanction is proportionate to the offence and the circumstances

15. I also find no merit in Mr. Radu's contention that the disciplinary measure of discharge against him with immediate effect lacked proportionality. Sexual harassment is categorially prohibited and constitutes serious misconduct under the relevant regulatory framework.[60]

16. Of the five cases, the Appeals Board confirmed the two cases of V01 and V04 to be justified on a legal basis to amount to misconduct. Even so, the Appeals Board still determined that the ultimate sanction of dismissal was proportionate in the circumstances, because "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."[61]

17. I find no error in the Appeals Board's holding. It is reasonable to expect that Mr. Radu, as a senior supervisor at the D-1 level, should have the knowledge of the standards of conduct regarding sexual harassment, should have been aware that his words or actions towards female colleagues might be deemed as inappropriate in the workplace and have negative impacts on them. Though he claimed repeatedly that he was innocent of the situation, it could not serve as an excuse to behave the way he did and fail to meet the standards of conduct of the Organization.

18. Sexual harassment is serious misconduct that warrants the harshest disciplinary measures. Consequently, I find that the Appeals Board did not err in considering that the sanction of dismissal was proportionate. Mr. Radu's years of service should not be considered as mitigating circumstances.

Whether Mr. Radu's due process rights were observed

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[60] Article I of the ICAO Service Code/Staff Regulations provides: "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, nondiscrimination, gender equality, accountability and respect for human rights." ICAO Service Code Annex 1 ("Framework on Ethics") provides: "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." PI/1.3.2 states in relevant part that: "Conduct which is determined to constitute sexual harassment will be subject to appropriate administrative or disciplinary action."
[61] Appeals Board Decision No. 2, para. 220.

19. Mr. Radu submits that the Organization breached his due process rights at several junctures during the investigation, the disciplinary process and the hearing before the Appeals Board. He challenges most of the Appeals Board findings in this regard. I find no merit in any of these allegations. I will only address the issues where Mr. Radu made proper submissions before us, and will not further address issues where Mr. Radu merely repeats his submissions before the Appeals Board.[62]

20. First, Mr. Radu claims that the complaints against him could have been resolved through informal methods, and by not giving him the opportunity to do so, his due process rights were violated. However, a review of the ICAO Personnel Instructions reveals an alleged offender does not have a right to an informal approach. The informal approach is directed at the victim, not the alleged offender.

21. PI/1.3/10 sets an obligation on the staff member to immediately inform the alleged harasser of the unwelcome nature of his behavior and express their expectation that it will cease. After taking this action, if the offensive behaviour does not cease, informal and formal means of resolving the problem are available. The exception to the inform obligation is where it is too difficult for the staff member to approach the alleged harasser directly.[63]

22. Further, PI/1.6/3.7 states that an aggrieved staff member has the option to choose from two mechanisms to address cases of alleged harassment - an informal approach and a formal approach.[64] The option of choosing from two available mechanisms has been given to the

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[62] Mr. Radu's challenge of the non-disclosure of communications between the ICAO Secretary General and ALD/OHR; and his challenge regarding legal counsel.

[63] 10. Staff members who believe they are being sexually harassed should immediately inform the alleged harasser of the unwelcome nature of his or her behaviour and express their expectation that it will cease. If the offensive behaviour does not cease, or where it is too difficult for the staff member to approach the alleged harasser directly, the following informal and formal means of resolving the problem are available. When staff members so request, every effort should be made to enable them to express their complaint in any of the ICAO languages.

...

13. Where informal resolution is not appropriate or has been unsuccessful, the aggrieved staff member may request that the issue in question be reviewed following the current disciplinary procedures....

[64] 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. ...

aggrieved staff member from the outset, without requiring them to inform the harasser first. If the staff member chooses the informal approach, PI/1.6/3.8 requires the aggrieved staff member to attempt to resolve the case directly with the accused, which is the "initial step" of the informal way. Then if the direct negotiation fails, he or she could resort to other informal avenues like the Ombudsman or opt for the formal approach directly. Therefore, Mr. Radu's reliance on PI/1.6/3.8 as the basis for his claim that the informal approach is an initial step before the formal approach may be taken is misplaced.

23. Second, Mr. Radu's assertion that he was never given the chance to question his complainants during the investigation is equally meritless. An investigation is not a hearing. It is a process initiated and carried out by the investigative body under its mandate given by the Organization. The investigative body takes the leading role and controls the proceedings while abiding by the applicable legal framework. There is no obligation on the investigative body to hold a judicial nature hearing where the accusers and the accused could be examined and cross-examined. The general practice for the investigation of misconduct is to first interview the complainants, witnesses and the accused staff member separately. The alleged perpetrator has the opportunity to respond to the charges and testimonies at a later stage. Therefore, Mr. Radu's understanding of the role of the investigation is equally misplaced.

24. Third, Mr. Radu alleges that the former EO committed several procedural irregularities during the process of dealing with his case. Based on the alleged bias and malfeasance of the former EO, which he submits inevitably tainted the preliminary assessment report, Mr. Radu also refused to accept the investigation report and the Secretary General's dismissal decision, which, as he claimed, were heavily based on the preliminary assessment report. This issue is beyond the scope of the judicial review of this Tribunal and as such, I would dismiss this ground on this basis alone.

25. In any event, the Appeals Board carefully considered each and every point raised by Mr. Radu against the former EO and I find no error in this regard.

26. There are possibly some procedural irregularities as the Appeals Board correctly pointed out, such as the long time spent on the preliminary assessment and the actual investigation, but

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B. Formal approach

> 3.9 The aggrieved staff member may report confidentially, in writing, to the Ethics Officer, using one of the means of communications indicated in paragraph 1.7 above….

they cannot vitiate the whole disciplinary process and its result. Disciplinary cases are not criminal in nature and the standards for due process rights are thus different. Furthermore, our prior jurisprudence has held that only "inordinate delays" in process or "substantial procedural irregularities" will render delays to be fatal and the resulting separation unlawful.[65] What constitutes "inordinate delays" or "substantial procedural irregularities" "will depend on the circumstances, including any practical challenges encountered in the investigation, the nature and gravity of the allegations, the complexity of the issues and evidence in the investigation, and the need to observe due process".[66] Considering the volume of evidence and the scale of the incidents subject to investigation, the various challenges raised by Mr. Radu at almost every stage of the process, the delay in the investigation cannot be deemed as "inordinate".

27. Mr. Radu's contention that the investigation report and the final administrative decision were largely based on the preliminary assessment report is also groundless. He misconstrues the various stages of the disciplinary process and the role each stage plays. The Appeals Board did not err in concluding that the preliminary assessment report had no bearing upon the investigation report or the findings.

The Appeals Board failed to consider conflict of interest on the part of OIOS

28. Finally, Mr. Radu challenges the conclusion of the Appeals Board that there was no evidence to support his assertion of a conflict of interest by OIOS. He claims that ICAO sought clarification from OIOS regarding the inconsistencies and irregularities found by ALD/OHR in the investigation report. Since OIOS was the author of the report, he submits, OIOS could not be "prosecutor and judge at the same time" and this was a clear conflict of interest that the Appeals Board refused to consider.

29. Evidence on record shows that after receiving Mr. Radu's response to the investigation report, the Secretary General took Mr. Radu's submission seriously, especially in relation to the possible procedural irregularities alleged. To fairly and properly evaluate the merits of the case and make a fully-informed decision, the Secretary General sought legal advice from ALD/OHR. After receiving their assessment, the Secretary General further sought the clarification from OIOS on the issues pointed out by ALD/OHR. OIOS is the author of the investigation report,

[65] *AAE v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1332, para. 79, citing *Sall v. Secretary-General of the United Nations,*Judgment No. 2018-UNAT-889, para. 34.
[66] *Ibid.,* para. 80.

which put it in a suitable position to explain to the Secretary General any questions that may arise. In deciding the weight to attach to the investigation report and making the final decision regarding the alleged misconduct, the Secretary General is the judge instead of OIOS. Mr. Radu's assertion of conflict of interest on the part of OIOS is therefore also misplaced.

Original and Authoritative Version: English

Dated this 22nd day of March 2024 in New York, United States.

(Signed)

Judge Gao, Presiding

Entered into the Register on this 24th day of May 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar