B.

v.

WHO

138th Session **Judgment No. 4858**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. B. against the World Health Organization (WHO) on 13 July 2021, WHO's reply of 25 October 2021, the complainant's rejoinder of 17 February 2022, WHO's surrejoinder of 9 June 2022, the complainant's additional submissions of 11 September 2023 and WHO's final comments of 24 November 2023;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering the decision of the President of the Tribunal to disallow the complainant's request for postponement of the adjudication of the case;

Considering that the facts of the case may be summed up as follows:

The complainant contests the decision to summarily dismiss her for serious misconduct.

The complainant is a former staff member of UNAIDS – a joint and co-sponsored United Nations (UN) programme on HIV/AIDS administered by WHO. She joined UNAIDS in December 2009. On 1 February 2013, she was assigned to the P-4 position of Technical Adviser and was reassigned on 1 June 2015 to another programme under the direct supervision of Mr S. In February 2016, UNAIDS

received anonymous allegations of misconduct against Mr S. In these allegations, the whistleblower indicated that evidence of misconduct could be found in Mr S.'s emails. In April 2016, the complainant was informed of her temporary reassignment to another unit taking into consideration that she and her first-level supervisor, Mr S., had acknowledged being in a personal relationship.

UNAIDS requested the Senior Ethics Officer to undertake a preliminary assessment of the allegations of misconduct. The preliminary assessment examined Mr S.'s emails covering the period 24 August 2015 to 24 February 2016. The complainant's name appeared in relation to an allegation of sexual exploitation and sexual abuse, and an allegation of misuse of funds raised against Mr S. In March 2016, Mr S. was formally notified of the allegations. Further anonymous communications were received by UNAIDS in March and April 2016 on these allegations.

On 7 November 2016, the complainant wrote to the UNAIDS Executive Director alleging sexual harassment against a Deputy Executive Director for facts that had occurred in May 2015. The Executive Director replied that, although her email was sent outside the time limit to file a formal complaint, the matter was referred to WHO's Office of Internal Oversight Services (WHO/IOS) for investigation. A formal investigation was launched in December 2016 with an initial report submitted in September 2017 and an addendum issued a year later, in December 2017, following the receipt of additional information. WHO/IOS recommended closing the case as it found the allegations to be unsubstantiated. The matter was re-opened in April 2018 pursuant to the disclosure of additional allegations against the alleged sexual harasser.

In the meantime, as from April 2017, the complainant was absent most of the time either on sick leave, special leave, maternity leave or annual leave, and was promoted to grade P-5, effective 1 September 2017.

On 11 July 2018, WHO/IOS informed UNAIDS that it was appropriate to suspend again the investigation into the allegations of misconduct made against Mr S. and the complainant in light of the re-opening of the investigation into the allegations of sexual harassment.

However, WHO/IOS stressed that, during its preliminary review of the allegations of misconduct, it found evidence that Mr S. and the complainant may have engaged in fraudulent practices, misuse of travel funds and Information Technology (IT) resources, and in unprofessional conduct.

On 15 April 2019, UNAIDS informed all staff about facts which, as reported in the "notification to staff", had been subject to media attention in an article about UNAIDS. In particular, it indicated that, in early 2016, an allegation of misconduct had been made against a staff member and that, after a preliminary review, the matter had been referred for further investigation. However, in late 2016, WHO/IOS suspended the investigation to safeguard the integrity of a potentially related sexual harassment case. The investigation into the misconduct case resumed in January 2018 before being suspended a second time after the sexual harassment case, which was initially closed as unsubstantiated, was re-opened in April 2018. That case was being investigated by the United Nations Office of Internal Oversight Services (UN/OIOS) and the investigation into the misconduct case would resume as soon as appropriate. The UNAIDS Executive Director had recused himself.

In mid-2019, the investigation of the misconduct case was referred to an external investigation company to review the evidence, conduct interviews and conclude the investigation in the form of a report. On 19 September 2019, the external investigator informed the complainant that she was the subject of an investigation and invited her to an interview stressing that she had a duty to cooperate with investigation activities, and that the investigation was about "allegations, not proven facts". Despite having been asked several times by the external investigator and by UNAIDS, she did not participate in the interview.

The external investigation company issued its investigation report on 22 November 2019 recalling that anonymous allegations of misconduct were made, in February 2016, against Mr S. Following a preliminary assessment conducted by the UNAIDS Senior Ethics Officer and the UNAIDS Senior Legal Adviser, two other staff members, including the complainant, were identified as subjects of the investigation. The

external investigation company collected and reviewed documentation received from WHO/IOS, UNAIDS and conducted some interviews. It found evidence of irregularities regarding the complainant's absences, her duty travels and travel requests, as well as inappropriate use of UNAIDS IT resources as she routinely used her email address to exchange messages with sexual language, and explicit content. There was also proof that she had misused UNAIDS corporate funds to her personal advantage and that she had an intimate relationship with Mr S., her first-level supervisor, without disclosing it to the Organization for the proper measures to be taken.

On 2 December 2019, UNAIDS informed the complainant that it had received the external investigation company's report, according to which the allegations made regarding unauthorized absences, travel irregularities, non-disclosure of a personal relationship, unprofessional conduct, misuse of UNAIDS funds and resources were substantiated. Consequently, she was charged with failing to observe the standards of conduct for staff members, but also with failing to comply with her duty to participate in investigation activities as she had refused to take part in the interview organised by the external investigator. As a result, she could be subject to disciplinary action including dismissal and summary dismissal. But, before deciding whether she had committed misconduct or not, she was invited to provide her written comments, within eight days, on the allegations contained in the investigation report and addressed in the letter of charges.

The complainant's legal representative replied on 10 December 2019 that she categorically denied the charges. The alleged misconduct was purported to have occurred more than three years prior and the complainant had not been formally advised of the existence of the charges raised against her, until receiving the letter of charges, which created serious doubt regarding their veracity. The legal representative contended that the complainant was a victim of retaliation for having filed an internal complaint of sexual harassment. The legal representative asked for additional time for the complainant to provide her comments stressing she was ill. That request was denied.

By letter dated 11 December 2019, the complainant was informed that she had been placed on administrative leave without pay as of 9 October 2019.

On 12 December 2019, the complainant wrote an email to the Executive Director denying all the charges raised against her, alleging that she was being constructively dismissed. On the following day, 13 December 2019, she was notified of the Executive Director's decision to summarily dismiss her for serious misconduct, and of the possibility to lodge an appeal against that decision with the WHO Global Board of Appeal (GBA). The complainant did so on 13 April 2020.

In its recommendations of 18 January 2021, the GBA found that the investigation into the allegations of misconduct and the disciplinary process complied with the applicable rules. The complainant's right to due process was respected, noting, in particular, that she was given the opportunity to provide countervailing evidence during the investigation process and to respond to the charges before UNAIDS made its decision. The GBA found no evidence that the investigation or the disciplinary process was procedurally or substantively flawed. It was satisfied that the decision to summarily dismiss her rested on evidence supporting a finding of guilt beyond reasonable doubt, and found no error of fact or law in the findings of misconduct, neither did it find evidence of bias, prejudice or retaliation against her. Lastly, it considered that the disciplinary measure of summary dismissal was proportionate.

On 20 January 2021, the UNAIDS Executive Director endorsed the GBA's recommendations. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision with all legal consequences flowing therefrom, and to order her reinstatement in a P-5 post at UNAIDS with full retroactive effect.

She seeks an award of moral damages for the psychological injury caused by the investigation conducted against her and by the other irregular actions taken by UNAIDS towards her, together with exemplary damages. She also claims costs in relation to the filing of her complaint, and internal appeal, as well as interest on all amounts

awarded to her, at the rate of 5 per cent per annum from 13 December 2019 through the date all such amounts are paid in full. Lastly, she claims such other relief that the Tribunal deems necessary, just and fair.

WHO asks the Tribunal to dismiss the complaint as devoid of merit. It stresses that reinstatement is inadvisable as her actions have irreparably undermined the trust.

CONSIDERATIONS

1. The complainant impugns the UNAIDS Executive Director's 20 January 2021 decision, which, endorsing the 18 January 2021 Global Board of Appeal (GBA) recommendations, rejected her internal appeal and upheld the Executive Director's 13 December 2019 decision to summarily dismiss her for serious misconduct, based on nine numbered counts plus an unnumbered one.

2. This is the complainant's first complaint before the Tribunal. In her rejoinder, the complainant requests joinder of the present complaint with her second one. In her second, third, and fourth complaints, she requests their joinder with the present complaint. Although the four complaints concern facts and decisions which, in the complainant's view, are interconnected, the legal issues raised are partially discrete and the impugned decisions concern different subject matter. Accordingly, the present complaint will not be joined with the other three.

3. The complainant applies for oral proceedings, however, she does not list witnesses in her complaint. In her rejoinder, she requests that the Tribunal interview as witnesses: Ms Ca., Ms Cr., Ms Ho., Mr Le., Mr Lo., Mr Si., Mr Sw. and Mr W. In essence, she is requesting that the Tribunal replace the investigators and the GBA in their role as fact-finders in order to assess:

(i) whether her summary dismissal was the result of a pattern of retaliation,

(ii) who was responsible for leaking the news of the investigation to the press, and

(iii) whether she was incapacitated to participate in the investigation due to her medical condition.

Given its vagueness and width, this request should be rejected. The complainant, in the course of the disciplinary proceedings or, at the latest, in the course of the internal appeal, could have requested the interview of the witnesses, whom she now lists before the Tribunal, but she did not. Thus, the fact that those persons were not interviewed in the course of the disciplinary proceedings and in the course of the internal appeal, or were not interviewed on the facts now listed by the complainant, does not establish a legal flaw in the process (see Judgments 4764, consideration 7, and 4227, consideration 12). The Tribunal's case law clearly states that the primary triers of the facts are the internal investigation and the internal appeal bodies (see Judgment 4171, consideration 5). Thus, the Tribunal's role in reviewing disciplinary or harassment decisions does not require, indeed contemplate, further evidence to be furnished in the proceedings before the Tribunal. The touchstone for error in this regard concerns the evaluation of the evidence by the relevant decision-maker, namely the evidence before him or her (see Judgment 4764, consideration 13). Apart from the impermissible request that the Tribunal interview witnesses, the Tribunal considers that the parties have presented ample written submissions and documents to enable it to reach an informed and just decision on the case. The request for oral proceedings is, therefore, rejected.

4. The complainant advances ten pleas (which she names "grounds" or "arguments") under the following headings. "Ground 3" contains fourteen subheadings listed from (i) to (xiv).

(1) The commencement of a preliminary assessment into allegations implicating the complainant violated the principle of due process and the Organization's own rules and procedures.

(2) The delay in commencing the investigation into the complainant was excessive and unreasonable.

(3) The investigation conducted by the external investigation company and relied on in the impugned decision was procedurally and substantively flawed. This plea contains fourteen subheadings, as follows:

(i) UNAIDS applied improper pressure and exerted undue influence over the external investigators, which prejudiced the investigation;

(ii) the lack of operational independence of the external investigators meant that the investigation was fatally tainted by a conflict of interest;

(iii) the investigators commenced the investigation without notifying the complainant;

(iv) the complainant was denied her right to know the identity of her accuser;

(v) the external investigation company failed to gather, accept, and consider all relevant evidence;

(vi) failure to disclose all relevant documents and evidence;

(vii) facts and submissions were ignored or not properly considered;

(viii) the investigators went beyond the scope of their mandate as fact-finders;

(ix) the Administration breached its duty of confidentiality towards the complainant by leaking details about the investigation to members of the Programme Coordination Board (PCB) and the press;

(x) the complainant's good name was compromised;

(xi) the complainant was denied the presumption of innocence and benefit of the doubt;

(xii) the Organization breached the complainant's right against self-incrimination;

(xiii) the Administration has failed to meet its burden of proving each allegation beyond reasonable doubt; and

(xiv) the investigation report and the impugned decision constitute retaliation.

(4) The Executive Director erred in finding that the complainant engaged in fraudulent practices and misuse of UNAIDS funds in collusion with her direct supervisor.

(5) The Executive Director erred in finding that there were irregularities in the complainant's duty travels, recorded absences or travel requests and collusion in the related travels of the complainant's supervisor.

(6) The Executive Director erred in finding that the complainant failed to disclose a personal relationship and that the complainant's private interests conflicted with UNAIDS interests.

(7) The Executive Director erred in finding that the complainant had unauthorized absences for the purposes of private encounters while on duty for UNAIDS and during working hours.

(8) The Executive Director erred in finding that the complainant had sexual relations on UNAIDS' office premises and while on official missions.

(9) The Executive Director erred in finding that the complainant routinely used UNAIDS Information Technology (IT) resources inappropriately and that the use of UNAIDS IT resources conflicted with the interests of UNAIDS and the WHO Acceptable Use policy.

(10) The Executive Director has failed to properly consider mitigating factors and the principle of proportionality.

Since the complainant's "arguments" and "grounds" are repetitive and overlapping, the Tribunal will examine them in the following considerations, regrouped in a logical order. Additionally, in her rejoinder and in her further written submissions, the complainant advances further arguments related to the pleas contained in her complaint. The Tribunal will address them together with the pleas to which they are related.

The complainant also requests the disclosure of a number of documents. This request will be addressed by the Tribunal in consideration 5 below.

5. The complainant requests that the Tribunal order the Organization to disclose a significant number of documents, which she lists as follows:

(i) all communications and records of meetings between UNAIDS Administration and the external investigators and between WHO's Office of Internal Oversight Services (WHO/IOS) and the external investigators, including a copy of the mandate agreement between the external investigation company and UNAIDS;

(ii) all communications between IOS and UNAIDS and the external investigation company and IOS and UNAIDS as they relate to the complainant;

(iii) UNAIDS audit reports for 2018 and 2019;

(iv) the complainant's "[Human Resources (HR)] file" or relevant extracts thereof;

(v) the IOS preliminary report of July 2018;

(vi) all communications between the Director of Human Resources Management (HRM) and the Executive Director mentioning or having a bearing on the complainant and/or investigations into allegations against her from 1 January 2016 to the present day;

(vii) a complete list of all absences of the complainant, all her travel authorizations and travel claims, as well as all her cleared and uploaded trip reports, in the UNAIDS [electronic] system, from 2014 to 2018 inclusive;

(viii) copies of all her "UNAIDS Outlook files" which were presumably reviewed by the external investigators; and

(ix) the complainant's personal belongings and files in her office.

In her rejoinder, the complainant further requests the disclosure of:

(x) the investigation report on her sexual harassment complaint;

(xi) the defamatory anonymous letter and "transcripts from this person or the report from the fact-finding mission, [and] the testimony of this person";

(xii) "any 'precise and clear information', including any email exchanges between IOS and UNAIDS HR that can establish the chronology of events from the receipt of the defamatory anonymous letter, action taken to establish the sender, and their motivations which might exclude that it was malicious reporting";

(xiii) in her rejoinder, the complainant contends that she requested access to her office email account in order to provide the Tribunal with email exchanges and photos, but to no avail; such request for access is reiterated before the Tribunal;

(xiv) in her rejoinder, she also reiterates the request for disclosure, already submitted in her complaint, and listed above under (ii), and she insists that, up to the date of the filing of her rejoinder, the Organization "has withheld several of her personal belongings and files for no good reason, denying her access to items of potential importance to her appeal".

The Vice-President of the Tribunal, by delegation of the President, has already ordered the Organization to disclose the documents listed above under (iv), (vii), and the "defamatory anonymous letter" listed above under (xi).

As far as it concerns the complainant's personal belongings (see above under (ix)), the Vice-President held that there seemed to be no dispute that the complainant was entitled to pick them up from the UNAIDS premises, and the parties were invited to arrange for that as soon as possible.

The Vice-President did not allow all other requests for disclosure, leaving them to the Tribunal's assessment.

The Tribunal notes that, in the meantime, the complainant has been provided with a redacted copy of the investigation report on her harassment complaint (issued on 14 December 2020), listed above under (x). Indeed, in her fourth complaint, she challenges the decision adopted on her harassment complaint and contends, inter alia, that she

should have been provided with an unredacted copy of such report. The Tribunal considers that, without prejudice to the outcome of her fourth complaint, for the purposes of the present complaint there is no need to provide the complainant with an unredacted copy of the investigation report concerning her harassment complaint. Thus, the request for its disclosure is rejected.

As to the complainant's request to be provided with the "IOS preliminary report of July 2018" listed above under (v), the Tribunal notes that the submissions of both parties make reference to the 11 July 2018 Memorandum sent by the Director of WHO/IOS to UNAIDS. The Memorandum is appended by the complainant to her complaint; it states that, as the IOS "preliminary review" had identified indications of potential serious misconduct perpetrated, among others, by the complainant, IOS found it appropriate at that stage to refer the "preliminary findings" to UNAIDS management, for determination of the best course of action. The Memorandum also contains a list of the preliminary findings. It does not list annexes. The Memorandum refers to the IOS "preliminary review", not to the IOS "preliminary report". Thus, apparently, the "preliminary review" is not a "report", but the IOS activities conducted to date. Considering that the 11 July 2018 Memorandum contains no annexes, there is no evidence of the existence of an IOS "preliminary report" issued in July 2018, other than the 11 July 2018 Memorandum. Even the GBA, in its recommendations, seems to consider that the 11 July 2018 Memorandum is the "report". In any event, there is no evidence that such a "preliminary report" – even if it existed – was dispatched by IOS to UNAIDS and by UNAIDS to the external investigation company. The fact that the "estimated budget for the project 11" (that is to say the investigation into the complainant's misconduct) attached to the contract between WHO/UNAIDS and the external investigation company signed on 21 August 2019 mentions "the complete IOS preliminary report produced in July 2018" is not conclusive. This expression lacks precision (there is no complete date) and was made only for the purpose of the provisional cost estimation, but does not prove that this report was other than the 11 July 2018 IOS Memorandum. Neither the external investigation report, nor the disciplinary decision, nor the impugned

decision rely upon an "IOS preliminary report of July 2018" other than the 11 July 2018 IOS Memorandum. Even the complainant, whilst insisting that the external investigation company conducted a "desk review" of the preliminary report of July 2018 admits that this "report" was not referred to as one of the background documents provided to the external investigator. In the Tribunal's view, there is persuasive evidence that no "IOS July preliminary report" was sent from WHO/IOS to UNAIDS, and in any event, from UNAIDS to the external investigation company. Since the external investigation did not rely on this preliminary report, it is immaterial to the case. Therefore, the request for its disclosure is rejected.

The complainant's request to be provided with "transcripts from this person [the author of the anonymous letter of 22 February 2016] or the report from the fact-finding mission, [and] the testimony of this person", listed above under (xi), is manifestly unsubstantiated, because to date the author of the email is still anonymous, of which circumstance the complainant is aware. Since the requested document is not proven to exist, the request for its disclosure is rejected.

As to the requested access to her personal belongings and files (listed above under (ix) and under (xiv)), allegedly unduly denied by the Organization up to the date of the filing of her rejoinder, the complainant contends that they are "items of potential importance to her appeal". The Tribunal notes that this assertion is too vague to be taken into account. She should know and explain to the Tribunal why her personal belongings and files are material to this case. Alleged "potential importance" is not enough. In any case, the Organization, in its surrejoinder, has noted that access to personal belongings and files was granted on 9 May 2022. Thus, this request is rejected, and it is, in any event, moot.

All other requests for disclosure, concerning the documents listed above under (i), (ii), (iii), (vi), (viii), (xii), (xiii), and (xiv) are formulated in too general and vague terms, and refer to documents which are not relied upon by the impugned decision or by the disciplinary decision. These requests amount to an impermissible fishing expedition and are, thus, rejected.

6. At the outset, the Tribunal considers that all the complainant's accounts and arguments concerning private disputes between Mr S. and his estranged spouse Ms Ce. and between the complainant and Ms Ce. are immaterial to the case and will not be addressed. They are outside the scope of the disciplinary proceedings and of the impugned decision. Those private matters are not concerned with the non-observance of the complainant's terms of appointment, and, pursuant to paragraph 5 of Article II of the Tribunal's Statute, they are not within the competence of the Tribunal (see Judgment 4603, consideration 7).

7. In her first plea, the complainant contends that the commencement of a preliminary assessment into allegations implicating her violated the principle of due process and the Organization's own rules and procedures. Her arguments may be summed up as follows.

– The GBA wrongly concluded that the Organization had followed the WHO Whistleblowing and Protection Against Retaliation Policy and Procedures ("the Whistleblowing Policy and Procedures") correctly. Pursuant to this policy, anonymous allegations are discouraged. Mr Lo. (the Deputy Executive Director, Programme Branch (DXD/PRG)) convened a meeting of senior managers who decided that the Senior Ethics Officer would undertake a preliminary assessment of the anonymous allegations. This approach violated the policy, which requires the manager who has received the allegations to seek advice from the Ethics Officer or report the matter to WHO/IOS.
– The preliminary investigation was conducted in breach of the policy, as senior managers usurped the role of the independent investigative body established for such a purpose, namely IOS.
– The actions of Mr Lo. after having received the anonymous allegations were malicious and biased against her and Mr S. They were taken in retaliation for her having filed a sexual harassment complaint against Mr Lo.
– Hence, the decision to initiate a preliminary investigation was tainted by an error of law.

This plea is unfounded.

The Whistleblowing Policy and Procedures in force at the material time, relevantly read:

> "22. Anonymous reports of wrongdoing are accepted either verbally through the external hotline managed by CRE [the Office of Compliance, Risk Management and Ethics] or in writing through email. The whistleblower is provided with a reference number with which they can identify themselves for future reference in their interaction with CRE.
>
> 23. Preliminary reviews and/or investigations can only be undertaken under anonymity if independent data can corroborate the information provided. It is therefore particularly important for anonymous reports of suspected wrongdoing to provide substantiated supportive evidence that allows confirmation of the background.
>
> [...]
>
> 36. In all cases, supervisors or managers who receive a report of suspected wrongdoing must act to address it fully and promptly and either seek the guidance of CRE for ethics advice or other specialized relevant mechanisms [...], or report to IOS as applicable."

Contrary to the complainant's contention, the anonymous report of wrongdoing received by UNAIDS Management on 22 February 2016 could be accepted and could prompt the investigation, as it was sufficiently precise and indicated where the supporting evidence could be found, namely in Mr S.'s emails. It fell within the discretionary power of the Organization to consider the anonymous letter sufficiently substantiated to justify a preliminary investigation. This was done in compliance with paragraphs 22 and 23 of the Whistleblowing Policy and Procedures. Moreover, pursuant to paragraph 36 of the Whistleblowing Policy and Procedures, Management was allowed to seek ethics advice from CRE. The evidence in the file shows that a number of UNAIDS senior staff members attended the meeting held on 22 February 2016. During the meeting, it was agreed that the Organization was obliged to assess whether a formal investigation would be warranted. As a consequence, it was agreed "that the Senior Ethics Officer would undertake a preliminary assessment of the allegations by reviewing the last six months of [Mr S.'s] emails, as well as his financial dealings with [an external Agency]". In any event, in its preliminary review, WHO/IOS found evidence that Mr S. may have engaged in fraudulent

practices, unprofessional conduct, and misused UNAIDS IT resources, travel funds and other funds. Thus, the Tribunal is satisfied that IOS did its own preliminary assessment.

As to the allegation that the initiative of Mr Lo. was retaliatory, it is useful to recall the definition of retaliation contained in the Whistleblowing Policy and Procedures:

> "12. Retaliation is defined as a direct or indirect adverse administrative decision and/or action that is threatened, recommended or taken against an individual who has:
>
> - reported suspected wrongdoing that implies a significant risk to WHO; or
> - cooperated with a duly authorized audit or an investigation of a report of wrongdoing.
>
> 13. Retaliation thus involves three sequential elements:
>
> - a report of a suspected wrongdoing that implies a significant risk to WHO, i.e. is harmful to its interests, reputation, operations or governance;
> - a direct or indirect adverse action threatened, recommended or taken following the report of such suspected wrongdoing; and
> - a causal relationship between the report of suspected wrongdoing and the adverse action or threat thereof."

By definition, retaliation is an adverse action threatened, recommended or taken following a report of a whistleblower.

In light of such a definition, it cannot be concluded that at the relevant time, February 2016, the conduct of Mr Lo. was retaliatory against the complainant. Her formal complaint of harassment against Mr Lo. was lodged almost eight months later, in November 2016. There is no evidence in the file of informal complaints of harassment lodged by the complainant prior to the formal one. She has provided the Tribunal with an email sent to her on 2 July 2015 by a representative of the Swedish Government, which refers to a previous conversation with the complainant. It cannot be inferred from its content that the subject matter of the conversation was the alleged sexual assault of May 2015. In any event, the conversation with a Swedish Government representative is not an informal complaint of harassment. The two emails sent by the complainant, respectively on 9 April 2016 to the Ombudsman and on

27 April 2016 to the Director, IT, even if they were to be construed as informal grievances, do not mention Mr Lo., and, in any event, they were sent after the commencement of the preliminary investigation into Mr S., which prompted, later, the investigation into the complainant. In her complaint, the complainant recalls that "[o]n 14 April 2016, at the request of the Swedish [Minister of Foreign Affairs], the [c]omplainant disclosed the details of the assault to UNAIDS Chief of Staff, [Mr M.]". However, there is no documentary evidence in the file of this meeting. In any event, this episode happened after the anonymous emails of 22 February 2016, and 7 and 13 April 2016, and her reassignment to a different position. As a result, there is no persuasive evidence that Mr Lo. was aware, in February 2016, that the complainant had submitted informal complaints of harassment against him. Most relevantly, the 22 February 2016 anonymous email did not mention the complainant, but only Mr S. Thus, it can be inferred, in all the circumstances of this case, that Mr Lo., when he received the anonymous email and took action, was not in a position to foresee that the subsequent investigation would have involved the complainant. Nor is there evidence that Mr Lo. was biased against Mr S., as, again, in February 2016 Mr Lo. could not foresee that, eight months later, Mr S. would be a witness against him in the harassment complaint lodged by the complainant. In addition, the preliminary assessment of the anonymous communication was immediately referred to the Senior Ethics Officer, and there is no evidence that Mr Lo. influenced the steps taken by the Senior Ethics Officer and subsequently, by the IOS.

The complainant relies on paragraph 19 of the Whistleblowing Policy and Procedures and contends that retaliation must be presumed. This contention is misconceived. Pursuant to paragraph 19:

> "Retaliation will be found to have happened unless the administration can demonstrate by clear and convincing evidence that the act which is suspected to be retaliatory would have occurred even if the whistleblower had not reported a suspicion of wrongdoing. [...]"

The presumption that retaliation is found to have happened presupposes that the retaliatory conduct follows a report of wrongdoing. In the present case, the alleged retaliatory conduct preceded the report of wrongdoing, thus, having no evidence of a causal link between the

harassment complaint and the disciplinary action, retaliation cannot be presumed. The Tribunal has excluded the retaliatory nature of disciplinary proceedings which were initiated some months before an initiative of the subject of the disciplinary proceedings (see Judgment 4364, consideration 3).

8. In her second plea, the complainant alleges that the delay in commencing the investigation into her alleged misconduct was unreasonable and unjustified. Her arguments may be summed up as follows.

– The investigation was suspended twice, allegedly due to the investigation into her own complaint of sexual harassment. Almost four years elapsed between the receipt of the anonymous allegations and the completion of the investigation. This delay also put in question the veracity of the testimonies and the accuracy of the fact-finding.
– This "irregular" start to the investigation demonstrates a "patent lack of good will" and the delay must be seen as part of the pattern of retaliation against her for having complained formally and informally of sexual harassment.
– This unreasonable delay exacerbated her psychological injury and she was not compensated for it.
– Details of the allegations of misconduct were leaked internally and to the international press during the time lapse between the initial preliminary investigation and the external investigation, which caused irreparable damage to her health, reputation, dignity, and professional standing.
– The Organization did not grant her certified sick leave in the months that preceded her dismissal and put her retroactively on administrative leave.

This plea is unfounded.

The complainant errs in maintaining that the disciplinary proceedings lasted from February 2016 to December 2019, as the investigation began with the referral of the matter to the external investigation

company in August 2019. Before this date, the process had not progressed past the stage of preliminary review. However, even if the entire period from February 2016 to December 2019 were to be taken into account, this time span was not unreasonable, having regard to the circumstances of the case. The two suspensions of the proceedings were made in the interest of the complainant and not to her detriment, as they were aimed at giving priority to the investigation into the complainant's complaint of harassment, and at protecting the alleged victim of harassment from charges of misconduct. The two suspensions were consistent with the practice of WHO/IOS to give priority to the review of allegations of sexual harassment received in relation to individuals who are under investigation for misconduct. The first suspension decision was instrumental to the first investigation into the complainant's formal complaint of sexual harassment, whilst the second suspension decision, issued by the Director of IOS on 11 July 2018, was instrumental to the re-opened investigation into her sexual harassment complaint. The delay in the proceedings, having an objective and verifiable justification, does not amount to bias and retaliation. The complainant's doubts about the veracity of testimonies and the accuracy of the fact-finding due to the length of the proceedings are mere and unsubstantiated suppositions. As the delay was justified and reasonable, she was not entitled to compensation for it, and thus, the contention that she was not compensated is unfounded.

As to the injury allegedly suffered from the leak of the news of the investigation, there is no persuasive evidence that the Organization was responsible for leaking details of the investigation either internally or to the press.

As to the complainant's arguments related to the denial of certified sick leave and to her placement on administrative leave, they are the subject matter of her second complaint, dismissed by the Tribunal in Judgment 4863 delivered in public on the same day as the present judgment. The conduct of the Organization in this respect did not amount to retaliation.

9. In her pleas 3(i), 3(ii) and 3(v), which are interconnected and overlapping, and will therefore be examined together, the complainant contends that the investigation conducted by the external investigation company was procedurally and substantively flawed, that the external investigators lacked operational independence, and that the external investigation company failed to properly gather evidence.

Her arguments may be summed up as follows.

– The complainant was not informed of the choice to resort to an external investigator and could not object to this decision.

– The decision to hire the external investigation company appears to have been taken not on the basis of an assessment of suitability but, instead, on the basis of an ongoing commercial relationship. Since the hiring of the external investigation company was based on previous investigation services provided by the company, this relationship opened the possibility of collusion between the Organization and the external investigation company, who had an interest in conducting an investigation in line with their client's perceived or actual goals. There was no competitive bidding for the contract of 89,000 Swiss francs agreed between UNAIDS and the external investigation company to conduct the investigation. The bidding process was waived by Ms Ca., DXD/MER, for reasons of urgency.

– The external investigation company was required to expedite its investigation to meet UNAIDS' demands, and this entailed the production of a report over a very short space of time.

– Paragraph 4 of the WHO/IOS document "investigation process" states that the Director-General "has granted IOS functional independence and accordingly, IOS formulates its investigative programme, the way it conducts that programme, and the contents of its reports". In the present case, the self-recusal by IOS meant that the investigative programme was set and defined directly by the Organization and not dictated by the operational framework of IOS. This operational independence therefore collapsed.

- The adjudication report further reveals that UNAIDS had other opportunities to directly influence the proceedings and the outcome of the investigation. The Director of IOS and the Executive Director ad interim met with the external investigation company's personnel who would lead and organize the investigation. In their meeting with the external investigation company, WHO/IOS personnel provided the investigators with information and details about the case; this meeting breached paragraph 16 of the Whistleblowing Policy and Procedures, which requires that "[a]ll internal communications regarding reports of suspicions of wrongdoing must be in writing". Moreover, the self-recusal by WHO/IOS was inconsistent with the participation of IOS representatives in the meeting with the external investigation company.
- The external investigation was agreed to be a mere "desk review" of IOS' "preliminary report of July 2018" and to hear one or two specific witnesses. IOS' "preliminary report" was not made available to the complainant and was not referred to in the background documents provided to the external investigation company.
- The methodology followed by the external investigation company demonstrated that the scope of the investigation was limited to the evidence already collected by UNAIDS, and UNAIDS provided the external investigation company with a limited number of pieces of evidence, namely with a sample of the emails extracted from Mr S.'s mailbox. Moreover, some of the witnesses were close friends of the then Executive Director, whilst other staff were not interviewed. Thus, the investigators failed to collect and consider exculpatory evidence, in violation of the Tribunal's case law (see Judgment 4011, consideration 12).
- The fact that the exact terms of reference (TOR) and other supporting documents were kept in the Deputy Executive Director, Management and Governance (DXD/MER) Office also evidences collusion between the Organization and the external investigators, with the former controlling the process and outcome.

– The DXD/MER, Ms Ca., played a role in the contract with the external investigation company, concerning the budget, and the custody of the terms of reference, whilst she had a conflict of interest, as, in the complainant's view, she was responsible for leaking the news of the investigation.
– This collusion between UNAIDS and the external investigation company had the effect of placing the needs of the Organization above the interests of justice and the complainant's rights.
– The report of the Independent Expert Panel (IEP) on prevention and response to harassment published on 7 December 2018 drew severe conclusions regarding the fundamental conflict of interest with respect to investigations at UNAIDS.

In order to substantiate these allegations, the complainant relies, inter alia, on the adjudication report, the contract between UNAIDS and the external investigation company signed on 21 August 2019, and the 7 December 2018 report of the IEP.

These pleas are unfounded.

Similar arguments raised in her internal appeal were rejected by the GBA. It considered that the appointment of the external investigation company was lawful and justified, falling within the scope of the Organization's authority to hire an external investigator. The GBA found no evidence to suggest that the external investigation company had been improperly instructed or unduly influenced by UNAIDS, that its investigators lacked the requisite objectivity, or that its independence had been compromised in any way. The Tribunal is satisfied that the GBA's findings were reasonable and correct. Firstly, the Tribunal notes that the Organization was not bound to inform the complainant that it had resorted to contracting external investigators.

The complainant bears the burden of proving the alleged collusion between UNAIDS and the external investigation company and she has not established the existence of such a collusion to the requisite standard. The complainant's allegation that Ms Ca. had a conflict of interest is mere speculation, as there is no evidence that Ms Ca. was responsible for leaking the news of the investigation. The complainant's

reliance on the adjudication report is misplaced, as collusion, undue influence and lack of independence cannot be inferred from its content. Moreover, the complainant excerpts single words or parts from this report, which, instead, must be read in its entirety. The adjudication report offers a clear and convincing account of the reasons why an external investigator was hired (in order to ensure a speedy and independent investigation after the self-recusal by IOS) and of the objective criteria which led to the selection of the external investigation company. The Tribunal's case law accommodates for the referral of investigations to external investigators in such cases (see Judgment 4014, considerations 4 and 6). The briefing which took place between the WHO/IOS representatives and the external investigators is not inconsistent with the self-recusal by IOS, because self-recusal implied that IOS could not investigate further, but did not prevent it from handing over all the relevant information and documentation to the new investigator. Such a briefing does not, by itself, amount to undue interference, nor is it proven that there was undue interference during the meeting. This meeting did not breach the rule that any communication regarding wrongdoing should be in writing, because this rule refers to the relevant steps of the proceedings, whereas the handover from WHO/IOS to the external investigation company does not constitute a formal step. There is no evidence that the estimated budget for the investigation reflected an intention to reduce the investigation to a mere "desk review". The external investigation company received a full mandate to "analyze" the existing review and its supporting documentation in order to identify witnesses who could provide additional information, and to provide its own report in each of the cases it had been asked to examine. The external investigation company was not impeded by the budgetary document from gleaning further documentation or from interviewing all the individuals it would identify as witnesses. The methodology described and followed by the external investigation company does not evidence an improper limitation of the scope of the investigation. On the contrary, it shows that the external investigation company was entitled to independently identify and interview witnesses. It can be read in the investigation report, section 4.1, that the investigators focused on:

> "• Reconciling and comparing the received exhibits as electronic documents to UNAIDS/WHO related policies and guidelines;
>
> • Interviewing witnesses identified by [the external investigation company], based on the provided documentation, in order to obtain additional information and clarifications regarding travels within UNAIDS, primacy of decisions, travel ceilings, working atmosphere, working relationships and protection against retaliation;
>
> • Analyzing the findings and determining for each allegation whether or not the allegation is substantiated."

The evidence in the file shows that, contrary to the complainant's assumption, the investigators interviewed more than two witnesses. In this respect, the Tribunal notes that the complainant, in order to substantiate her argument that the external investigation company's mandate was to review the evidence and hear only "one or two witnesses", relies on the contract between WHO/UNAIDS and the external investigation company agreed upon and signed on 21 August 2019. Appended to this contract there is a table entitled "Estimated budget for the project 11", which lists the hourly rate in Swiss Francs for the investigators' activities, expressed in different amounts in consideration of the different level of the investigators (455 Swiss francs for a director, 400 Swiss francs for a senior manager, 225 Swiss francs for a senior consultant). This table mentions, inter alia, the activity consisting in "identify, based on the analysis, 1 or 2 witnesses to be interviewed" and estimates that for this activity a time span of four hours of a senior consultant is needed. In the Tribunal's view, this is only an estimation of the time and cost needed for the hearing of one or two witnesses, but it does not imply that the external investigation company's mandate was limited to hearing only one or two witnesses. It is also noteworthy that in the table in question the total estimated budget was indicated from 43,000 to 46,000 Swiss francs, whilst in the end the cost of the external investigation almost doubled, which proves that the provisional budget cannot be identified with the mandate assigned to the external investigation company.

It falls within the discretionary power of an organization to select the period under investigation. Thus, since, in the present case, the preliminary review – already conducted by WHO/IOS before the

investigation was referred to the external investigation company – had focused the investigation for a limited period of time, and it was already comprehensive of a selection of relevant evidence, it was open to UNAIDS to request the external investigation company that the external investigation include only the selected period. It fell under UNAIDS's capacity and responsibility to assess whether the evidence, as reviewed or gathered anew by the investigators, supported a conclusion of misconduct beyond reasonable doubt, with regard to the facts that occurred during the limited period of time under investigation. The complainant was invited to participate in the investigation and to provide counter-evidence, but she did not avail herself of this opportunity. Thus, she cannot now criticise the process on the basis that some staff, whom she never suggested be interviewed, were not interviewed. It was open to the investigators to identify the persons to be interviewed as witnesses and the complainant never took the opportunity to list further witnesses. The complainant's reliance on Judgment 4011, consideration 12, in order to allege a failure to collect and consider exculpatory evidence, is misplaced. The case considered by Judgment 4011 was different, as the Tribunal criticized the lack of a proper record of the evidence, not the failure of the investigator to look for exculpatory evidence. The allegation that the witnesses were biased against the complainant or had a conflict of interest is merely speculative, as it is not based on evidence. The fact that the investigation was deemed by the Organization to be urgent and that the investigators carried out their mandate expeditiously, does not imply, in the absence of corroborated evidence, that the investigation was perfunctory or otherwise flawed. As to the complainant's argument that she was not provided with the "IOS preliminary report of July 2018" and that this report was not referred to in the background documents provided to the external investigation company, suffice it to recall the Tribunal's reasoning contained in consideration 5 above. It must be reiterated that there is no persuasive evidence of the existence of an "IOS preliminary report of July 2018" other than the "11 July 2018 IOS memorandum".

The Tribunal is satisfied that, as the Organization submits, the conditions of storage for the terms of reference and supporting documents (in the office of the UNAIDS Executive Director ad interim)

were designed to protect the confidentiality of the documentation in view of the sensitivity of the matter.

The complainant's reliance on the content of the 7 December 2018 report of the IEP is misplaced, as this report:

(i) concerns harassment proceedings and not disciplinary proceedings, such as those at stake in the present case; and

(ii) contains general recommendations, but makes no specific reference to the merits of any particular complaint. In any case, the referral of the complainant's case to an external investigator was consistent with the general recommendations included in the report of the IEP to ensure independent investigations.

10. In her pleas 3(iii) and 3(iv), which are interconnected and will be examined together, the complainant contends that the investigators commenced the investigation without notifying her, and that she was denied her right to know the identity of her accuser. Her arguments may be summed up as follows.

– She was not the subject of the investigation initiated in 2016, which means that much of the IOS investigation in terms of evidence gathering was conducted prior to the external investigation and without her knowledge.

– This lack of timely notification amounts to retaliation and constitutes a breach of due process, as she was told about the allegations made against her only after enquiries had already started and preliminary conclusions were reached.

– The lack of timely notification of the investigation also had as a consequence that she did not have the opportunity to seek legal advice prior to the commencement of the investigation or even in its early stages, and this amounts to a further breach of due process.

– She reiterates that Mr Lo. initiated the investigation for a retaliatory purpose rather than opening an investigation concerning the author of the anonymous defamatory emails of February, March and April 2016. The Organization was under a duty to

establish the identity of the anonymous accuser, by means of an IOS investigation if necessary.

– She alleges a breach of due process also on the ground that she was on "service-incurred sick leave" when the investigation took place and when she was invited for an interview.

These pleas are unfounded.

There are neither internal rules nor principles of case law requiring that the subject of an investigation be informed at the stage of the preliminary review. According to the Tribunal's precedents, there is no obligation to inform a staff member that an investigation into certain allegations will be undertaken (see Judgments 4106, consideration 9, and 2605, consideration 11). Although it is preferable to notify the persons concerned that they are to be the subject of an investigation, except where this would be liable to compromise the outcome of the investigation, such notification is not a requisite element of due process (see Judgment 3295, under 8). Moreover, in the present case, the first preliminary review was prompted by an anonymous email, which made no reference to the complainant. Later, the preliminary review was suspended twice in order not to jeopardize the pending investigation into the complainant's sexual harassment complaint. Therefore, the Tribunal is satisfied that the complainant was notified of the investigation against her in due time, on 19 September 2019, and in a timely manner, considering that the investigation was referred to the external investigation company in August 2019. The allegation that, due to the delay in the investigation, she did not have the opportunity to seek legal advice prior to the commencement of the investigation or even in its early stages is unfounded. On the one hand, as she was not entitled to be informed of the investigation at the stage of the preliminary review, her contention that she was deprived of the opportunity to seek legal advice at this early stage does not establish a legal flaw or a breach of the due process principle. On the other hand, the Organization did not deny her the opportunity to avail herself of a legal counsel, as proven by the fact that her legal counsel wrote on several occasions to the Organization, on her behalf, after she was notified, in 2019, of the investigation.

The Tribunal has already considered that the preliminary review was lawfully initiated on the basis of an anonymous email. The issue of whether the emails of February, March, and April 2016 were defamatory in nature, and whether the Organization failed to properly investigate in order to identify the anonymous whistleblower(s), are outside the scope of the present complaint. Since, as already said, the investigation into misconduct was lawfully prompted on the basis of the first anonymous communication, the complainant had no right to know the identity of the whistleblower(s). Nor was the Organization bound, by any rules, to identify the anonymous whistleblower(s) prior to the commencement of the preliminary review and the investigation. Moreover, in the present case, after receiving the anonymous emails, the Organization gathered evidence which is mainly documentary and, to a small extent, based on witness statements. The complainant was provided with all the evidence upon which the disciplinary decision relied. The knowledge of the identity of the authors of the emails would have no bearing on the outcome of this case, irrespective of its possible relevance to other purposes pursued by the complainant, and which are, in any event, outside the scope of the present complaint.

The allegation regarding retaliation perpetrated by Mr Lo. at the stage of the preliminary review has already been addressed and rejected by the Tribunal, in consideration 7 above.

The alleged breach of due process on the ground that the complainant was on "service-incurred sick leave" when the investigation took place and when she was invited for an interview, is unsubstantiated. The Tribunal notes that no service-incurred illness had been acknowledged by the Organization and no certified sick leave had been granted at the relevant time. The question of her leave status at the material time is the subject matter of the complainant's second complaint, which has been dismissed by the Tribunal in Judgment 4863 delivered in public on the same day as the present judgment. It is useful to reiterate that the Staff Physician (WHO Staff Health and Wellbeing Services) assessed the complainant's pathology, as declared in the medical certificates signed by her physician, and concluded that her medical condition did not prevent her from participating in the

disciplinary proceedings. This conclusion does not show legal flaws. Indeed, it fell within the competence of the Staff Physician to assess the reliability of the medical certificates provided by the complainant, thus there was no need to seek a third expert opinion or to arrange an independent medical examination. The complainant's reliance on Judgment 4232, consideration 5, is misplaced. She quotes an excerpt from Judgment 4232, taken out of context, that reads: "the findings of an official's doctor may be disputed by the employer organisation, but where the medical certificate is sufficiently precise as to the existence and nature of the illness and the link with the official's employment, the organisation may not reject it without carrying out its own medical examination". In the case decided by Judgment 4232, the Organization had refused to take into consideration the medical certificate provided by the complainant, without carrying out a medical examination. The Tribunal thus stated that the Organization might not reject the medical certificate provided by the complainant, "without carrying out its own medical examination". However, it did not establish that a third independent medical examination was required, or that the "medical examination" to be carried out by the Organization required that the staff member concerned be examined in person. In the present case, the Organization rejected the complainant's medical certificates after having carried out its own medical examination of the documents, thus the principle of the above-quoted case law was complied with. In conclusion, there is no evidence that the complainant was incapacitated and that the right of due process was infringed in this respect.

11. In her plea 3(vi), the complainant contends that the investigator failed to disclose all relevant documents and evidence. Her arguments may be summed up as follows.

– As she was not notified at an early stage of the investigation into allegations against her, she did not have access to the evidence, nor the opportunity to properly test it and question witnesses at that stage.
– She might have otherwise contested the investigation before it was undertaken by the external investigation company.

– Once the external investigation was completed, she was presented with the report but she was given only eight days to comment on it while she was on sick leave.
– The failure to give her time to respond once she had recovered also breached the adversarial principle.

This plea is unfounded.

Suffice it to recall what the Tribunal said in consideration 10 above. She was informed in due time of the investigation, in September 2019, and she refused to participate. According to the GBA's findings on her internal appeal, not substantially disputed by the complainant, she was invited by the investigators, by email of 19 September 2019, to participate in an interview. She never replied. The GBA goes on to state:

> "Between 20 September 2019 and 1 October 2019, in an attempt to contact her, [the external investigation company] sent 7 further emails, telephoned the [complainant] 16 times and left 6 voice messages for the [complainant]. By email dated 27 September 2019, the Director/HRM, referring to several attempts by [the external investigation company] to contact the [complainant] in the context of the investigation and reminding her of the obligation to cooperate with investigations, requested her urgent reply to [the external investigation company] [...]
>
> By email dated 6 November 2019 to the [complainant], the Director/HRM reiterated the [complainant]'s duty to cooperate with [the external investigation company] and requested her to contact [the external investigation company] before 8 November 2019 as a last chance since '[her] current absence from work is not covered under sick leave', and '[t]here is no valid reason for [her] to refuse to participate in the investigation.' Failing to attend the interview, the investigation would follow its course."

She was not incapacitated, as it was not proven that her illness impeded her from being interviewed, as said in consideration 10 above. Once she received the charges letter and the investigation report, she was provided eight days to comment, a time limit granted in strict compliance with Staff Rule 1130, which read as follows:

> "A disciplinary measure listed in Staff Rule 1110.1 may be imposed only after the staff member has been notified of the charges made against him and has been given an opportunity to reply to those charges. The notification and the reply shall be in writing, and the staff member shall be given eight calendar days from receipt of the notification within which to submit his reply. This period may be shortened if the urgency of the situation requires it."

Not only was the eight-day time limit consistent with the Staff Rules, it was also, in the circumstances of the case, consistent with due process and the adversarial principle, given the established unwavering refusal of the complainant to participate in the process of investigating her conduct.

12. In her plea 3(vii), the complainant contends that facts and submissions were ignored or not properly considered. She seems to refer her allegations to the investigation process. Her allegations may be summed up as follows.

– She insists that she was not granted adequate time for her submissions or to provide evidence.
– She reiterates that the proceedings advanced while she was on sick leave.
– She adds that her medical documentation should have been assessed by an independent expert after the WHO Director of WHO Staff Health and Wellbeing Services, had determined that she was capable of attending interviews.

This plea is unfounded.

Her allegation that her account of "[f]acts and submissions were ignored or not properly considered" is misleading, as she did not participate either in the investigation or in the disciplinary proceedings and never submitted her account of the facts and evidence, thus, there was nothing to consider or to ignore. The allegations that she was not granted adequate time considering her illness and that her medical documentation should have been assessed by an independent expert have already been addressed and rejected by the Tribunal in considerations 10 and 11 above.

13. In her plea 3(viii), the complainant contends that the investigators went beyond the scope of their mandate as fact-finders. Her allegations may be summed up as follows.

– Reaching conclusions on misconduct is beyond the mandate of the investigators. The WHO Investigation Process document provides that investigations conducted by IOS are administrative fact-finding exercises. It is for the executive head to make the charges of misconduct.
– The external investigation company concluded that she engaged in the alleged misconduct by stating for instance that it found "substantiated evidence of misconduct".

This plea is unfounded.

The investigators did not overstep their role as fact-finders. An analysis of the external investigation company investigation report shows that the investigators described the "alleged misconduct", and for each allegation reported the evidence and the findings. Their conclusions were limited to whether they found "substantiated evidence" of the allegations. They did not assess that the "alleged misconduct" actually amounted to misconduct, nor did they propose any specific sanction. Thus, they did not draw the conclusion that misconduct was proven beyond reasonable doubt. The mere use of the word "misconduct" in the external investigation company's report does not indicate a lack of neutrality by the investigators, as they refer to "alleged misconduct" not to "assessed" or "proven" misconduct. In the 22 November 2019 letter addressed by the external investigation company to UNAIDS and enclosing the investigation report, it is clearly stated that "[...] it is UNAIDS['s] responsibility to determine how and to what extent to act on the findings and recommendations included in our report". The evaluation of the existence of misconduct, of the level of its gravity, and of the sanction to be applied, was left to the Organization.

14. In her pleas 3(ix) and 3(x), which are interconnected and overlapping, and, thus, will be examined together, the complainant contends that by leaking details about the investigation to members of the PCB and to the press, the Organization breached its duty of confidentiality towards her. As a result, her good name was compromised. Her arguments may be summed up as follows.

– Paragraphs 19 and 20 of the Investigation Process document were infringed, since leaking her name to the press clearly shows that the investigation was not conducted in a manner designed to preserve her good name.
– Ms Ca., in her capacity as Deputy Executive Director, distributed the 11 July 2018 IOS Memorandum to the PCB, and this memorandum was leaked to the former spouse of Mr S.
– The complainant assumes that a press release had been prepared and sent to the press on 13 December 2019, and that a UNAIDS spokesperson made a clear statement about the situation.
– This leak was a further element of the harassment and retaliation campaign against her.

These pleas are unsubstantiated.

The Tribunal notes that the failure to respect confidentiality, even if it were proven, does not amount to a conclusive flaw in the proceedings which would justify the setting aside of the disciplinary decision. The breach of confidentiality, if proven, might only arguably entitle the complainant to moral damages. The plea will be addressed to this limited extent. However, it must be rejected, as there is no evidence that the Organization was responsible for leaking details about the investigation, internally or to the press. The evidence in the file shows that on 5 April 2016 an anonymous whistleblower revealed, by an email addressed to a significant number of staff members, that the complainant was being investigated for misconduct. On 7 April 2016, the UNAIDS Senior Legal Adviser wrote to the recipients of the anonymous email, stating that the Organization was investigating its source and had requested that the sender cease any further action of this nature. A further anonymous message was sent on 13 April 2016, and the Senior Legal Adviser took action and informed the complainant. It can be inferred from these communications that, whilst the Organization took immediate and proper action to stop the leak, the news of allegations of misconduct against the complainant had already been spreading throughout the Organization since 5 April 2016. Thus, it would have been impossible for the Organization, at that stage, to prevent internal or external leaks. In turn, the 15 April 2019 communication to staff, was

made after, and not before, a press article, which had been published prior to the 15 April 2019 communication. The complainant's contention that Ms Ca., in her capacity as Deputy Executive Director, distributed the 11 July 2018 IOS Memorandum to the PCB, and that this memorandum was leaked by a staff member to the former spouse of Mr S., is purely speculative. Additionally, there is no evidence in the file of the allegation that the Organization had prepared a press release for the issuance of the disciplinary decision. The complainant also grounds her allegation on a press article apparently published on 17 December 2019, but there is no evidence that it was the Organization that leaked the news to the press. The 17 December 2019 article reports that the UNAIDS spokeswoman Ms K. in an email that did not identify the complainant by name, told the press "that two staff members were dismissed from UNAIDS after an independent investigation concluded beyond reasonable doubt that they had misused UNAIDS corporate funds and resources and had engaged in other misconduct, including sexual misconduct". However, there is no evidence in the file that a UNAIDS spokesperson actually sent an email with this content to the press. The complainant provides the Tribunal with a further document, containing the news of her dismissal, however there is no date or author identified in the document, much less evidence that UNAIDS was responsible for leaking the news contained therein.

In conclusion, there is neither evidence that UNAIDS failed to follow the proper procedures to ensure the confidentiality of the investigation nor of how the rumours were started, thus, no legal consequences arise (see Judgment 3236, consideration 14). Since there is no persuasive evidence that the Organization was responsible for the unauthorized disclosure of information, the leak cannot be considered as part of a pattern of retaliation, and the complainant is not entitled to moral damages for breach of confidentiality.

15. In her pleas 3(xi) and 3(xiii), the complainant contends that she was denied the presumption of innocence and the benefit of the doubt and that the Organization has failed to meet its burden of proving each allegation beyond reasonable doubt. She alleges that the external investigation report contained conclusory statements to the effect that

her alleged behaviour amounted to misconduct. Such statements went beyond the fact-finding remit and constituted premature, inappropriate, and unlawful opinions, which tainted the report on which the Executive Director relied with bias and prejudice. Such conclusions were to be left to the Executive Director. She was presented with a *fait accompli* and was required to prove her innocence. The contention concerning the breach of the role of the investigators as fact-finders has already been addressed and rejected by the Tribunal in consideration 13 above. The contention that the Organization failed to meet its burden of proof for each allegation beyond reasonable doubt will be addressed by the Tribunal together with the complainant's pleas concerning the specific counts contained in the disciplinary decision.

16. In her plea 3(xii), the complainant contends that the Organization breached her right against self-incrimination, whilst in her plea 3(xiv) she contends that the investigation report and the impugned decision constitute retaliation. The Tribunal will examine these two pleas after consideration of her pleas from 4 to 9, and before consideration of her tenth plea.

17. Before addressing the complainant's pleas from 4 to 9, which allege substantive flaws in the disciplinary charges, it is appropriate to recall the Tribunal's well-settled case law on disciplinary decisions. A staff member accused of wrongdoing is presumed to be innocent and is to be given the benefit of the doubt (see, for example, Judgments 4491, consideration 19, and 2913, consideration 9). The burden of proof of allegations of misconduct falls on the organization and misconduct must be proven beyond reasonable doubt (see, for example, Judgment 4364, consideration 10). In reviewing a decision to sanction a staff member for misconduct, the Tribunal will not ordinarily engage in the determination of whether the burden of proof has been met but rather will assess whether a finding of guilt beyond reasonable doubt could properly have been made by the primary trier of fact (see, for example, Judgments 4491, consideration 19, 4461, consideration 5, and 4362, considerations 7 to 10). In cases of charges of misconduct based on allegations of fraud resulting in dismissal, in order to determine whether

a finding of guilt beyond reasonable doubt could have been made, the Tribunal has adopted the approach that it "will not require absolute proof, which is almost impossible to provide on such a matter [involving allegations of fraud or similar conduct]. It will dismiss the complaint if there is a set of precise and concurring presumptions of the complainant's guilt" (see Judgments 3964, consideration 10, 3757, consideration 6, and 3297, consideration 8). Disciplinary decisions fall within the discretionary authority of an international organization, and are subject to limited review. The Tribunal must determine whether or not a discretionary decision was taken with authority, was in regular form, whether the correct procedure was followed and, as regards its legality under the organization's own rules, whether the organization's decision was based on an error of law or fact, or whether essential facts had not been taken into consideration, or again, whether conclusions which are clearly false had been drawn from the documents in the dossier, or finally, whether there was a misuse of authority. Additionally, the Tribunal shall not interfere with the findings of an investigative body in disciplinary proceedings unless there was a manifest error (see Judgment 4579, consideration 4, and the case law quoted therein). It is not the Tribunal's role to reweigh the evidence collected by an investigative body, the members of which, having directly met and heard the persons concerned or implicated, were able immediately to assess the reliability of their testimony. For that reason, reserve must be exercised before calling into question the findings of such a body and reviewing its assessment of the evidence (see Judgments 4764, consideration 7, and 4237, consideration 12).

18. In her fourth plea, the complainant challenges counts 1 and 9 contained in the disciplinary decision.

Counts 1 and 9 read as follows:

"1) You engaged in fraudulent practices and misuse of UNAIDS funds in collusion with your direct supervisor, Dr [S.];

[...]

9) You misused UNAIDS corporate funds for your and Dr [S.]'s personal advantage: in particular, you requested and obtained, with the intent to misuse UNAIDS corporate funds, a modified invoice from the Geneva

> [S.] Hotel; you colluded with your supervisor, Dr [S.], to request and obtain said modified invoice. Furthermore, you involved the team assistant Ms [N.], in the request to obtain a modified invoice; and you did not report any wrongdoing. In doing so you did not respect UNAIDS values and ethical concepts, and you misappropriated and misused UNAIDS corporate funds."

The complainant's arguments concerning the charge of fraud in connection with the modification of the invoice issued by the S. Hotel, may be summed up as follows.

– Neither the external investigation company nor the Executive Director demonstrated that she had intentionally sought to obtain financial advantage, or altered a document or account, therefore her conduct did not amount to fraud as defined in the Fraud Prevention Policy.

– Her team contracted with the S. Hotel for two back-to-back meetings in the spring of 2015, whilst she was in charge of the substantive aspects of the event (not the logistics) and "so perhaps for this reason her name appeared on the invoice".

– The initial referral, in the invoice, to the "side-meeting" room as "accommodation-package" did not reflect the actual use of the room as a meeting room.

– The investigators should have interviewed Ms R. or Ms Co., who negotiated with the S. Hotel for the arrangement of the meetings.

This plea is unfounded.

The WHO Fraud Prevention Policy and Fraud Awareness Guidelines effective April 2005 (Fraud Prevention Policy), in the relevant part, read as follows:

> "17. Fraud involves deliberate and deceptive acts with the intention of obtaining an unauthorized benefit, such as money, property or services, by deception or other unethical means. Fraudulent and other irregular acts included under this policy may involve, but are not limited to any of the following:
>
> a) embezzlement, misappropriation or other financial irregularities
>
> b) forgery or alteration of any document or account (cheques, bank draft, payment instructions, time sheets, contractor agreements, purchase orders, electronic files) or any other financial document [...]"

The complainant was charged with fraud on the account that, by visiting the S. Hotel in Geneva and meeting the catering and conference manager, the complainant and Mr S. obtained, at their request, a modified invoice with the intent to misuse UNAIDS corporate funds. The investigators found that the S. Hotel had issued three invoices, dated 19 October, 3 December and 11 December 2015, for the same event. As can be read in the 23 January 2016 Memorandum addressed from the Chief, Office of Special Initiatives (OSI) to the Director of Planning, Finance and Accountability Department, the first invoice issued by the hotel in late October was incorrect, as "there were errors in the invoice (unspecified budget lines and incorrect amounts) not in agreement with the contract and the financial reporting of UNAIDS". At this point, the S. Hotel issued the second invoice, which specified the single items in order to justify the total amount, mentioning, inter alia, an "accommodation-package" for Mr S. on 16 and 17 March 2015 and an "accommodation-package" for the complainant, on 18 and 19 March 2015. Upon request by the complainant, Mr S., accompanied by the complainant, directly intervened with the S. Hotel, which then issued the third invoice, where the item "accommodation-package" had been replaced by the item "meeting facilities", and the names of Mr S. and of the complainant had been deleted. Evidence that Mr S., accompanied by the complainant, contacted the hotel and spoke in person with its staff, is found:

– in an email sent by the complainant to Mr S. on 11 December 2015, that is the same day when the modified invoice was issued; and
– in an email sent by the S. Hotel staff to Mr S. and copied to the complainant, containing the revised invoice as an attachment.

Later, the invoice dated 11 December 2015 was uploaded to the UNAIDS system and paid by the Organization on 23 February 2016.

The evidence in the file (namely, email exchanges in September and December 2015, between the complainant, Mr S. and another staff member, Ms N., and between the S. Hotel and Mr S.; and the witness statements of Ms N. and of Ms Hi. before the investigators) shows that the Organization intended to charge the "accommodation-packages" to the complainant and Mr S., and not to pay for them. According to the

Organization, the complainant and Mr S. were not entitled to stay in the hotel at the Organization's expense, as the March 2015 meetings took place in Geneva, which was their duty station at the time. The complainant and Mr S., when they became aware that they might be requested to personally cover the hotel expenses for their accommodation, contacted the hotel and obtained a modified invoice. The team assistant, Ms N., when interviewed by the investigators, confirmed that she was aware that the conduct related to the S. Hotel's modified invoice amounted to improper behaviour, but she never reported it for fear of retaliation from Mr S. Also a further witness confirmed that this behaviour amounted to misconduct and reported being harassed by Mr S. The complainant's contention that she was in charge of the substantive aspects of the event (not the logistics), and "so perhaps for this reason her name appeared on the invoice" does not explain why her name (and the name of Mr S.) were not mentioned in the first invoice. If she had not stayed at the hotel, there would be no plausible reason for her name to have been known by the hotel and indicated in the second invoice as the beneficiary of the "accommodation-package". It must be recalled that the second invoice, containing the name of the complainant, was issued by the hotel at the request of UNAIDS, as the first invoice did not comply with the agreement between the hotel and UNAIDS and a more precise invoice was required.

Thus, the evidence supports the Organization's conclusion that the complainant and Mr S. took accommodation at the S. Hotel when the global consultations took place, and subsequently sought to conceal this in order to avoid covering their costs personally. This amounted to fraud within the meaning of the WHO Fraud Prevention Policy, pursuant to its paragraph 17 quoted above. Indeed, the complainant's conduct amounted to a deliberate and deceptive act with the intention of obtaining an unauthorized benefit. For the purposes of paragraph 17, fraudulent acts are not limited to those expressly listed therein, and, in any case, the act of the complainant amounted to a financial irregularity. The contention that the invoice was an act of the S. Hotel is disingenuous, as the S. Hotel acted at the request of the complainant and of Mr S. The alternative recollection of the facts submitted by the complainant is not convincing. Indeed, if the negotiation with the hotel

had been conducted by other staff (namely Ms R. or Ms Co.), and the room had been used as a meeting room, the hotel would not have known the names of the complainant and of Mr S. and would not have put the "accommodation-package" in their names in the second invoice. As to the complainant's contention that the investigators should have interviewed Ms R. and/or Ms Co., the Tribunal reiterates (see considerations 3 and 9 above) that the complainant should have brought this circumstance to the attention of the investigators during the disciplinary proceedings. In addition, the investigation report indicates that a team assistant was interviewed and recounted that there was no contract for the arrangement of the March meetings at the S. Hotel. Thus, the contention that two staff members should have been interviewed is untenable, and the request that they be interviewed by the Tribunal, is an impermissible expansion of the legitimate scope of the Tribunal's role.

19. In her fifth plea, the complainant challenges counts 3 and 8 contained in the disciplinary decision.

Counts 3 and 8 read as follows:

> "3) There were irregularities related to your duty travels, recorded absences and travel requests: specifically, you travelled without authorization including while on sick leave; you did not record annual leave for periods travelling without approved travel authorization; you colluded with your supervisor to arrange irregular travels; and you did not report wrongdoing;
>
> [...]
>
> 8) Your behaviour did not comply with UNAIDS rules and procedures, as well as expected professional behaviour;
>
> [...]"

Her arguments may be summed up as follows.

– The investigators did not rely on the UNAIDS Travel Policy in force at the relevant time.

– The irregularities did not result from her intent to defraud UNAIDS, they were rather "administrative discrepancies" not uncommon in a fast-moving and demanding workplace such as UNAIDS. "Discrepancies of this nature must be regarded as a regrettable by-product of an overloaded work schedule."

– The data from which the investigators drew their final conclusions was incomplete, partial and biased. Had the external investigation company been given access to the UNAIDS electronic system, they would have gained full access to all the complainant's travel documentation and leave records. Such access to the data would have allowed them to examine the travel requests, travel claims, trip reports, and tickets related to the travels of the complainant.
– The complainant relies on the wording "irregularities" used by the investigators, to infer that her travels were not found to be inappropriate and did not cause a financial loss to the Organization, as she travelled at her own expense and whilst being on annual leave.
– The charge that the complainant engaged in misconduct with regard to duty travels constitutes a mistaken conclusion drawn from the facts.

This plea is unfounded.

The investigators' finding of travel irregularities focuses on three specific episodes and rests on the following conclusions:

– a trip to Johannesburg, South Africa, in November 2015, for which no leave was registered in the complainant's absence dashboard and for which she had no travel clearance;
– a trip to Dakar, Senegal, in November 2015, for which the complainant did not raise a travel request and for which her request for insurance purposes only was untimely submitted; no absences were recorded in her absence dashboard; despite not having been authorized to travel, she nevertheless officially represented the Organization;
– a trip to Harare, Zimbabwe, in November and December 2015 for which the complainant's travel request was not withdrawn after the then DXD/PRG's disapproval. The complainant travelled to Harare even though her supervisor did not clear the trip (even though the trip was paid for by an external organization) and her trip was recorded as duty travel even in the absence of such approval. The complainant did not request annual leave for the

period of her trip to Harare, and this means that her absence was unauthorized for the time in question.

The findings related to these episodes take into account the UNAIDS Travel Policy and rest on significant documentary evidence. There is no evidence in the file of the complainant's assumption that the investigators did not rely on the Travel Policy in the version in force at the material time. In any case, the complainant has not demonstrated to the Tribunal's satisfaction that the investigators relied on Travel Policy rules not in force at the relevant time.

The Tribunal is satisfied that the Organization correctly viewed the episodes above not as mere discrepancies, but as violations of the duties of the complainant in light of the Travel Policy. The Tribunal notes that not only are the staff expected to know the Travel Policy, they are also expressly requested to comply with it and they are directly responsible for such compliance (see paragraph 20 of UNAIDS Travel Policy: "Staff members traveling [...] are responsible for adherence to the travel policy"). Thus, any attempt, on the part of the complainant, to downgrade her non-compliance to mere irregularities, or to consider other staff responsible for the irregularities, is untenable. Even if the complainant did not charge the cost of her unauthorised trips to the Organization, this does not imply that she did not damage the Organization, considering that:

– pursuant to the Travel Policy, paragraph 3, "[d]uty travel may also include travel at the invitation of outside institutions or other parties for a specific purpose or activity related to the work of [the] organization, the cost of which may be borne in full or partly by the inviting party". Thus, also for trips not paid by UNAIDS, a travel request must be prepared and cleared, where, as happened at least on one occasion in the present case, the traveller is representing UNAIDS (see paragraph 21 of the Policy: "A Travel Request (TR) must be prepared, cleared and approved in ERP for any duty travel undertaken for the UNAIDS Secretariat, or when the traveller is representing UNAIDS even if the travel is not paid for by the UNAIDS Secretariat");

– on these occasions, she was not on annual leave, thus she perceived her salary whilst being on unauthorized absence.

Moreover, the evidence in the file (namely the emails exchanged between the complainant, Mr S. and other staff) shows that:

– the complainant was well aware of the Travel Policy and of possible objections to her travels based on the travel ceiling;
– she made arrangements to circumvent the Policy in order to travel to the same destinations as Mr S. for the same events; and
– thus, she bypassed proper oversight and procedures.

The complainant's allegation that the investigators reviewed a limited number of travel and leave documentation and that they should have been given access to the UNAIDS electronic system in order to gain full access to all the complainant's travel documentation and leave records, is vague. The documents reviewed substantiated the alleged violations and there was no need to investigate further. The complainant does not explain how full access to her travel documentation and leave records might disprove the charge against her. In conclusion, the disciplinary decision and the impugned decision, with respect to the charge of travel irregularities, did not overlook essential facts nor draw mistaken conclusions from the facts.

20. In her sixth plea, the complainant challenges count 4 contained in the disciplinary decision.

Count 4 reads as follows:

> "You were involved in an intimate personal relationship with your direct line supervisor, Dr [S.] but did not disclose this personal relationship. As a consequence of this personal relationship, your private interests conflicted with UNAIDS interests [...]"

She asserts that according to the WHO Code of Ethics and Professional Conduct, consensual intimate relationships between colleagues are acceptable. She informed her colleagues and the "administration" of the relationship, and, as a result, she was transferred to another unit. She insists that it cannot be denied that she duly and promptly informed the Organization. She adds that since the

Organization had already adopted the decision to transfer her to another unit, the Organization was not allowed to sanction her again, more than three years later, for the same fact, and this amounts to a breach of the double jeopardy rule.

This plea is unfounded.

Pursuant to paragraph 36 of the WHO's Ethical principles and conduct of staff (reiterated with more precision in the UNAIDS Secretariat Ethics Guide, paragraph 3.5.1.1):

> "**Personal relationships in the workplace**
>
> Consensual intimate relationships between colleagues should not interfere with work [...] In cases where there is a hierarchical or supervisory relationship, the colleagues have an obligation to bring the relationship to the attention of their respective supervisors or Director [Human Resources Department (HRD)] or [Director of Administration and Finance] in order to decide for example whether one of the persons should be reassigned to a different work unit."

This provision sets forth, in cases of intimate relationships between staff in a supervisory relationship, as in the present case, an obligation to bring the intimate relationship to the attention of the officer in charge of taking the proper decision on the matter. The duty of the staff to avoid a conflict of interest and to act in compliance with the interests of the Organization entails that such obligation must be discharged with the utmost promptness, with no delay.

The chronology of the events is entirely at odds with the complainant's account of the facts.

Mr S. was her direct supervisor from 17 November 2014 to 12 April 2016. Most relevantly, on 1 June 2015, the complainant was temporarily reassigned, at her request, to the P-4 position of Technical Adviser, OSI, Programme Branch, in UNAIDS Headquarters in Geneva for an initial six-month period, which was subsequently extended. She was supervised, even in this new position, by Mr S. in his capacity as Chief, Global Outreach and Special Initiatives. The evidence in the file reveals that her intimate relationship with Mr S. dates back at least to May 2015. Thus, she should have informed the Organization of her intimate relationship at least as of June 2015, when she took a new

position under Mr S.'s supervision. She did not do so until at least February 2016. The evidence in the file shows that the news of the intimate relationship between the complainant and Mr S. spread throughout the Organization after the reception of the anonymous emails of February and April 2016, and that, soon after, the complainant was temporarily reassigned to a new post, under a different supervisor, as from 13 April 2016. The complainant insists that her reassignment took place after she had informed the Organization of her intimate relationship. The Organization objects, in its reply, that it was never formally informed by the complainant. However, there is at least a clue that, at some point, she did inform the Organization. Indeed, the 13 April 2016 reassignment decision says: "[t]aking into consideration the information provided both by you and your first level supervisor concerning your personal relationship and the relevant provisions [...]". In any event, the fact that she informed the Organization in 2016 is immaterial to the outcome of the case. At most, it would have been belated information, which, in any case, infringed her duty to promptly inform the Organization. For the period that elapsed from the beginning of the intimate relationship to its communication, the lack of proper information put the complainant in a position of conflict of interest with the Organization. The complainant adds that there was clear evidence that the relationship had been brought to the attention of both the complainant's colleagues and the Organization, as can be inferred from the investigation report, reading as follows: "As per information gathered during the witnesses' interviews, the personal relationship of Mr. [S.] and Ms. B was known by UNAIDS and its top management, even if they were working in the same unit in direct line supervision. One witness is said to have been indirectly informed by Mr. [S.] that Ms. B was his girlfriend." This part of the investigation report does not prove that the relationship had been promptly communicated by the complainant, but, at most, that it was known *de facto*. In the Tribunal's view, it is immaterial that the intimate relationship between the complainant and Mr S. was an open secret. That knowledge by hearsay was not tantamount to formal acknowledgment and would not have absolved the complainant of her duty to formally and promptly inform the officer in charge of taking the appropriate measures.

As to the alleged infringement of the double jeopardy rule, the Tribunal recalls that according to its precedents, the double jeopardy rule precludes only the imposition of further disciplinary sanctions for acts which have already attracted a disciplinary sanction, but does not prevent both disciplinary and non-disciplinary consequences from attaching to the same acts. That rule does not therefore prevent the organization concerned from taking measures of various kinds, each corresponding to its interests in a particular area, in response to the same act or conduct by an official (see Judgments 4400, consideration 28, 3725, consideration 9, 3184, consideration 7, and 3126, consideration 17). In brief, the double jeopardy rule prevents a person being tried and sanctioned twice for the same charge based on the same act. In the present case, the complainant has not been issued with two sanctions for the same act, as the measure to transfer her to another unit was not a sanction for the failure to disclose her intimate relationship. She has been sanctioned only once, thus there was no infringement of the double jeopardy rule. Additionally, the fact that the Organization transferred her to another unit as of April 2016, does not imply an intent, on the part of the Organization, to abandon the pursuit of the disciplinary action.

21. In her seventh plea, the complainant challenges count 5 contained in the disciplinary decision.

Count 5 reads as follows:

> "You had unauthorized absences on at least one occasion for the purpose of private encounters with Dr [S.], while on duty for UNAIDS and during working hours [...]"

Her arguments may be summed up as follows.

– Whilst the investigation report said that there was substantiated evidence showing that the complainant did not properly record nor officially request leave for two trips, based on this statement the Organization drew the wrong conclusion that the unauthorized absences were for the purpose of private encounters.
– There is no evidence that when she travelled to Paris, France, and London, United Kingdom, or when she stayed, in January 2016, at the I. Hotel in Geneva, her absence was unauthorized.

– The responsibility for the correct record of her absences was that of the competent manager, not hers.
– Even the investigation report suggests that the finding of unauthorized absences was not supported by sufficient evidence.

This plea is unfounded.

The investigation report found evidence of unauthorized absences with reference to the following trips:

– Johannesburg in November 2015;
– Dakar in November 2015;
– Harare in November and December 2015;
– Paris from 30 September to 2 October 2015.
– London from 12 to 13 October 2015.

In addition, they found evidence of unauthorized absence for one day in January 2016.

The unauthorized absences during the trips to Johannesburg, Dakar and Harare, together with travel irregularities concerning these three trips, are the subject matter of count 3, which the complainant challenges in her fifth plea (addressed by the Tribunal in consideration 19 above).

In count 5, challenged in the complainant's seventh plea, the complainant is charged only with unauthorized absences, and not with travel irregularities. The charge is of unauthorized absences for private purposes "on at least one occasion". Therefore, for the lawfulness of this charge, it is sufficient that unauthorized absence is proven at least for one out of the three episodes related to this charge. In any event, the investigators actually found evidence with regard to her trips to Paris and London, and, in addition, with regard to her stay at the I. Hotel in Geneva on 5 January 2016.

Contrary to the complainant's contention, the investigation report did find substantiated evidence of these unauthorized absences, and did not deem that further investigation into the complainant's leave record was needed in order to demonstrate that the absences were unauthorized. The external investigation company found that the complainant did not record official travel or annual leave in her absence dashboard or in her

travel statistics for the trip to Paris. The external investigation company added that the complainant travelled to London while she was on certified sick leave. It must be recalled that pursuant to Staff Rule 740.5:

> "A staff member on sick leave may not leave the duty station without prior approval of the Staff Physician or a physician designated by the Staff Physician."

Furthermore, regarding travel during sick leave, paragraph 140 of section III.6.9 of the WHO e-Manual specifies that:

> "In accordance with Staff Rule 740.5 a staff member on approved certified sick leave may not leave the duty station or the place where the sickness has been certified without prior approval from the Director [WHO Staff Health and Wellbeing Services] SHW/RSP. [...]"

Thus, it was open to the Organization to assess that the complainant, being on certified sick leave, was not authorized to travel abroad, and the complainant has not provided the Tribunal with convincing evidence that she had been. With regard to her absence on 5 January 2016, the investigators concluded: "While reviewing Ms. B's absence dashboard for Monday 4 and Tuesday 5 January 2016, no absences are registered on these specific dates. We would suggest analysing her professional agenda on this specific date to obtain additional information and conclude on the purpose of the absence." Thus, further information would be needed only to assess the purpose of her absence, not that no absences had been duly recorded.

In addition, the external investigation company found substantiated evidence of unauthorized and unrecorded absence for personal encounters of the complainant with her first level supervisor, Mr S. Indeed, there is consistent evidence in the file that the purpose of the unauthorized absence was private encounters with Mr S., who was on duty travel in Paris and London during the same days, and who was in the I. Hotel in Geneva on 5 January 2016 (according to official and private documents regarding Mr S.'s trips and emails exchanged between the complainant and Mr S.).

22. In her eighth plea, the complainant challenges count 6 contained in the disciplinary decision.

Count 6 reads as follows:

> "You had sexual relations with Dr [S.] on UNAIDS office premises as well as while on official missions [...]"

In her view, there is no proof, let alone proof beyond reasonable doubt. The investigation report relies on emails exchanged between the complainant and Mr S., and this calls into question the reliability and admissibility of the entire investigation process. She reiterates the argument, already addressed and rejected by the Tribunal, that the external investigation company has not exercised its independence by rejecting unreliable evidence such as these emails.

This plea is unfounded.

The Tribunal has already stated that the selection of a number of emails out of the over 21,000 emails initially gleaned by the Organization is acceptable and lawful. There is no need to dwell at length on the content of the email exchanges referred to in the investigation report, and provided to the Tribunal in attachment to the parties' written submissions. The emails unequivocally reveal sexual intercourse of the concerned staff whilst on duty. As to the reference made by the complainant to the reliability and admissibility of the entire investigation process, insofar as it is based on private email exchanges, this issue will be addressed by the Tribunal in consideration 23 below.

23. In her ninth plea, the complainant challenges counts 2, 7 and 8, contained in the disciplinary decision.

Counts 2, 7 and 8 read as follows:

> "2) You engaged in unprofessional conduct and misuse of UNAIDS IT resources and, in doing so, exposed UNAIDS to reputational risk;
>
> [...]
>
> 7) You routinely used UNAIDS IT resources inappropriately, by using your UNAIDS email address to exchange messages with explicit sexual language and content, sometimes profanity, nudity, including photographs, and reference to casual sex while on duty for UNAIDS: as a consequence, your personal use of UNAIDS IT resources conflicted with the interests of UNAIDS and WHO's policy on the Acceptable Use of Information Systems;

8) Your behaviour did not comply with UNAIDS rules and procedures, as well as expected professional behaviour;

[...]"

The complainant raises two issues, the breach of confidentiality and that there was no improper use of UNAIDS resources.

The first issue, concerning the breach of confidentiality, is twofold.

Firstly, she contends that the anonymous emails regarding her are apparently based on an illicit intrusion in her private communications, which was never investigated.

Secondly, she submits that any improper emails attributed to her were retrieved from the UNAIDS IT server by violating the confidentiality of her private communications. She notes that:

– no appropriate technical safeguards were adopted in order to protect the confidentiality of her private messages;
– she was not consulted before her emails were accessed; and
– the Organization has provided no assurances that only prescribed and authorised individuals had access to her emails and were bound by explicit rules of confidentiality.

This plea is unfounded.

The alleged breach of confidentiality, which prompted the anonymous emails, is outside the scope of the present complaint. It is not the role of the Tribunal to assess how the anonymous whistleblower(s) gleaned information about the private life of the complainant and whether this was done by illicitly accessing the complainant's private communications.

With regard to the second aspect of the alleged breach of confidentiality, the Tribunal is satisfied that, in light of the applicable rules, there was no breach of confidentiality in the retrieval of the emails. As to the confidentiality policy of emails sent through the UNAIDS accounts, it is useful to recall that section XIV.1.2 of the WHO e-Manual, under the heading "E-mail Usage Policy" relevantly read as follows:

> "70 The Organization reserves the right to review, intercept, access, and disclose E-mails sent or received through the WHO E-mail systems. Any specific rules or related procedures in this regard may be listed in the operational guidelines referred to in section XIV.1.4 paragraph 240, as applicable to WHO headquarters or the relevant regional office.
>
> [...]
>
> Confidentiality and privacy
>
> [...]
>
> 260 All WHO electronic messages, including the contents of all files stored on WHO systems, are the property of WHO. WHO reserves the right to access all such information. Any specific regulations or related procedures may be listed in the operational guidelines applicable to the relevant WHO office."

There is no evidence in the file of the existence of specific regulations or related procedures listed in operational guidelines (referred to in section XIV.1.2, paragraph 260, and in section XIV.1.4, paragraph 240), and the complainant's submissions do not rely on specific rules in this respect. Based on the rules above, the Organization had the right to access the emails sent or received by the complainant and by Mr S. through the WHO/UNAIDS email system. There was no specific process to be followed or authorization to be sought, which are, instead, required only in the different case of WHO's access to the information and communication systems (ICS) used by staff (ICS is defined in section XIV.1.1, paragraph 70, as "all computing networks, telephony equipment, computers, applications, storage devices, printers and software owned, licensed or leased by or on loan to WHO"), as per paragraphs 230, 300 and 310 of section XIV.1.1. Thus, prior information or consent of the complainant was not required. In any event, the Organization retrieved the complainant's emails by accessing the email account of Mr S., and not the complainant's.

In light of the above rules, the duty to respect the confidentiality of the staff emails did not prevent the Organization from accessing the staff emails when requested in connection with an investigation into inappropriate conduct by a staff member. The Tribunal agrees, in principle, that, in retrieving staff emails for investigation purposes, the Organization had to safeguard the confidentiality of the emails (see Judgments 2741, consideration 3, and 2183, consideration 19).

However, in the present case, there is no evidence that confidentiality was infringed. It can be read in the preliminary assessment of the allegations against Mr S.:

> "On 24th February 2016, the Senior Ethics Officer wrote to Director IT requesting the last 6 months of [Mr S.'s] email, including those in his inbox, send mail, spam, bin and any other directories, as well as mails that may have been permanently deleted within the period. Director IT, instructed the Systems Administrator, [...] to provide the data to the Senior Ethics Officer under strict confidentiality. A little over twenty-one thousand (21,034) emails covering the period 24th August 2015 to 24th February 2016 (4:15pm) were provided."

Thus, the emails were retrieved in full compliance with the duty to safeguard confidentiality. In addition, there is no evidence that the emails were used for purposes other than the investigation. The Tribunal further notes that the authenticity of the emails, as to their authors and to their content, is undisputed.

24. With regard to the second issue raised in the complainant's ninth plea, concerning the misuse of UNAIDS resources, she contends that:

– private use of the office email account is allowed, within certain limits, which she did not overstep;
– there is neither proof that her intimate communications affected her work performance nor that they were made "routinely", considering the limited number of private emails against the over 21,000 emails retrieved;
– the WHO Policy on the Acceptable Use of Information and Communication Systems is intended to limit private communications towards external addressees. In her case, the emails were exchanged with another staff member, thus the exchange could not endanger the resources of the Organization; and
– the WHO Policy requires that private emails do not endanger the reputation of the Organization only with regard to mails sent to external addressees; as a result, correspondence that is not directed externally is not subject to such a requirement. Considering the private nature of the communications exchanged between two

persons, they could not damage the reputation of UNAIDS. Private communications should be treated with due respect for the privacy of those engaged therein and "not subject to additional and arbitrary ethical standards".

This plea is unfounded.

As to the "tolerated" personal use of the office email account, it is useful to recall that, pursuant to paragraph 108 of the WHO Code of Ethics and Professional Conduct concerning the use of official time and office technology:

> "WHO staff members are responsible for ensuring that the resources of WHO, including computers, telephone equipment and vehicles, are used for official business. Professional conduct requires that staff members devote their time during working hours to the official activities of WHO. It requires that any personal use of office equipment, in particular internet, e-mail and telephone, be kept to a minimum and not conflict with the interests of WHO. Moreover, any such use must not disrupt the work of colleagues, or over-burden the electronic network."

These rules reiterate those enshrined in the 2015 UNAIDS Secretariat Ethics Guide (paragraph 3.3.) and in the WHO e-Manual, sections XIV.1.1 and XIV.1.2, respectively, under the heading "Acceptable Use of Information and Communication Systems Policy", paragraphs 90 and 100, and the heading "E-mail Usage Policy", paragraphs 140 and 160.

More specifically, pursuant to paragraphs 140 and 160 of section XIV.1.2, concerning the "E-mail Usage Policy":

> "140 Occasional personal use of E-mail for private purposes is tolerated if this use does not negatively affect the user's work performance and the content does not conflict with the interests of the Organization or WHO's Policy on Acceptable Use of Information Systems (see section XIV.1.1).
>
> [...]
>
> 160 To conserve shared resources, personal use of E-mail and storage space, to the extent to which it is permitted, must be kept to a minimum."

In turn, section XIV.1.1 on acceptable use of information systems, referred to by paragraph 140 of section XIV.1.2, in the relevant part read as follows:

> "90 Occasional personal use of WHO information and communication systems for private purposes is permitted if this use does not negatively affect the work performance of the user and does not conflict with the interests of the Organization.
>
> 100 Any use for private purposes during work hours should be kept to a minimum, and must not cause any disruption to the work of the individual, or of WHO."

In light of the above rules, the personal use of email has an additional requirement in respect to the requirements of "Acceptable Use of Information and Communication Systems Policy".

The requirements in common are the following five:

(i) the personal use must in any case be occasional;

(ii) it must not affect the work performance of the user;

(iii) it must not conflict with the interests of the Organization;

(iv) it must be kept to a minimum during working hours; and

(v) it must not cause any disruption to the work of individuals or of WHO.

The further requirement for the email use is that "[t]o conserve shared resources, personal use of E-mail and storage space, to the extent to which it is permitted, must be kept to a minimum". This further requirement is confirmed by paragraph 108 of the WHO Code of Ethics and Professional Conduct concerning the use of official time and office technology, where it read: "[...] any personal use of office equipment, in particular [...] e-mail [...], be kept to a minimum and not conflict with the interests of WHO. Moreover, any such use must not disrupt the work of colleagues, or over-burden the electronic network."

The requirement that the personal use of email "be kept to a minimum" is additional and independent of the other requirements. As a result, it must be complied with regardless of whether the use of the office email account is made during or outside working hours and of whether it affects the user's work performance.

The complainant contends that her use of UNAIDS resources was not "routine" and that often the emails were sent outside working hours, thus, the use of the office email account did not affect her work performance.

In light of the rules above, the number of personal emails retrieved must be assessed by itself, irrespective of the number of the personal emails against the total number of the emails, and irrespective that a number of personal emails had been sent and received outside working hours. Since the evidence in the file shows that the number of personal emails is significant, there is no reviewable error in the Organization's finding that the personal use did not comply with section XIV.1.2 of WHO e-Manual on the "E-mail Usage Policy". Moreover, for the purposes of the "E-mail Usage Policy", a personal use is also the sending of emails to a fellow staff member, for private reasons. The finding that the emails exchanged between the complainant and her supervisor, including the photos attached therein, had "explicit sexual language and content", leaves no doubt on the private use of the office email account. Thus, notwithstanding the email exchanges happened between colleagues and not towards external addressees, there was an issue of personal use of UNAIDS IT resources and of personal use of working hours.

As to the impact of the personal use of the office email account on the complainant's work performance, the Tribunal has already noted that the personal use of an office email account must be kept to a minimum, irrespective of its impact on the work performance. In any event, the negative impact on her work performance was not specifically charged by the Organization to the complainant. In addition, the complainant's contention that her personal use of her office email account did not affect her work performance is not proven. She has provided the Tribunal with her performance appraisal report (PAR) for the period 1 April 2016 to 31 March 2017, but this period was not under investigation, and, as a result, this PAR is immaterial. As to her work performance during the period under investigation (six months prior to 24 February 2016), she has not provided the Tribunal with her PAR for this period. In any event, in that period she was involved in an intimate relationship with her direct supervisor Mr S.

Thus, any PAR signed by Mr S. would be affected by a self-evident conflict of interest and could not be considered reliable.

The complainant's personal emails in the file demonstrate, to the Tribunal's satisfaction, that she sent a significant number of messages and attachments with intimate content by using her office email account. Thus, it was open to the Organization to deem that the use of the UNAIDS IT resources was not kept to a minimum nor occasional, but was routine, and that, accordingly, it conflicted with the interests of the Organization.

The complainant further contends that the email exchanges did not endanger the reputation of the Organization and that her private communications with a fellow staff member pertained to her private life, and, as such, they could not be "subject to additional and arbitrary ethical standards".

This plea is misconceived. The disciplinary decision does not state that the intimate/sexual content of the email exchanges exposed the Organization to reputational risk. The Tribunal notes that in count 7 there is no reference to the reputation of the Organization, nor censorship or judgmental comments based on ethics concerning the complainant's private life. As a result, the Tribunal does not accept the contention that her private life was subject to "additional and arbitrary ethical standards". The only ethical standard applied by the Organization was the one concerning the private use of UNAIDS IT resources and working hours. The reference to the intimate content of the emails must be interpreted, in the context of count 7, as made in order to demonstrate the personal use of the office email account. To such an extent, a concise description of the content of the private communications was needed. Nonetheless, contrary to the complainant's contention, the Organization did not affirm that the intimate/sexual content of the communications exposed the Organization to reputational risk, but only that the reiterated personal use of the office email account was a misuse of the UNAIDS IT resources.

Reference to the Organization's reputation is made twice in the context of the 13 December 2019 decision, namely:

– count 2 reads: "You engaged in unprofessional conduct and misuse of UNAIDS IT resources and, in doing so, exposed UNAIDS to reputational risk";
– after the description of the nine counts, the decision reads: "These actions resulted in financial loss and reputational damage to the UNAIDS Secretariat".

Thus, the reputational risk and damage refer to the "unprofessional conduct", which is not mentioned in count 7, and to the misuse of UNAIDS IT resources, which is the only issue mentioned in count 7. Reputational risk and damage are not grounded upon the intimate content of the communications. In light of the foregoing, the Tribunal notes that there was no undue interference with the complainant's private life.

25. In her plea 3(xii), the complainant challenges the charge of refusal to cooperate with the investigation and contends that the Organization breached her right against self-incrimination. She submits that the internal rules the charge relies upon, and which set forth the duty to cooperate with an investigation, do not comply with the "general principle of law against self-incrimination" stated in the United Nations Appeals Tribunal (UNAdT) Judgment 1246. In her view, it was an affront to ask her to participate in a process moving contrary to her interests, particularly given the retaliatory nature of the disciplinary action and considering that the Organization had failed to inform her of the commencement of that process, leaked the allegations against her to the PCB and to the press, and failed to provide her with the precise allegations.

This plea is unfounded.

From the wording of the 2 December 2019 letter of charges and of the 13 December 2019 disciplinary decision, it can be inferred that the complainant was charged with the violation of the duty to cooperate with the investigation, in addition to being charged with nine further counts specified in the disciplinary decision. This charge reads as follows:

> "[...] in breach of Staff Regulation 1.10 you failed to comply with your duty to participate in investigation activities, including participation in an interview; that you failed to comply with WHO's Fraud Prevention Policy (paragraph 25); and IOS - The Investigation Process (paragraph 23)."

The Tribunal accepts that the charge in question was consistent with the internal rules. Pursuant to paragraph 25 of the WHO Fraud Prevention Policy, in case of investigations into reported fraud:

> "Staff members have the duty to cooperate with any investigation and assist investigators. [...]"

This is reiterated in paragraph 10 of the WHO/IOS investigation process, reading: "10. The WHO Fraud Prevention Policy (Fraud Prevention Policy) makes it clear that staff are obligated to cooperate with IOS investigators and must respond fully to requests for information from those authorized to conduct investigations".

In turn, paragraphs 23 and 24 of the WHO/IOS investigation process, in the relevant part, add that:

> "23. [...] If a staff member refuses to cooperate, he or she will be told of the obligation to cooperate and supply documents, records or information. [...]
>
> 24. If it becomes apparent that there are inconsistencies between evidence gathered by IOS and the explanations of the subject of an investigation, the subject may be questioned further. During any such interviews, the subject will normally be told of the inconsistencies that arose as a result of the prior interview and will be given a reasonable opportunity to comment and present any further evidence."

The words "any investigation", encapsulated in paragraph 25 of the WHO Fraud Prevention Policy, imply that staff members have a duty to cooperate not only in fraud investigations into other staff members, but also in fraud investigations concerning themselves.

The complainant relies on the "general principle of law against self-incrimination", allegedly stated in UNAdT Judgment 1246, in order to draw the conclusion that the above-quoted internal rules are unlawful because they are inconsistent with such a general principle.

The Tribunal does not accept this argument.

At the outset, it is recalled that this Tribunal is not bound by the case law of other international or regional courts (see Judgments 4363, consideration 12, 4167, consideration 7, and 3138, consideration 7), nonetheless it can take such case law into account as persuasive precedents.

However, the complainant's reliance on UNAdT Judgment 1246 is misplaced. The complainant excerpts a single sentence affirming that "[...] the Tribunal finds that there is a general principle of law according to which, in modern times, it is simply intolerable for a person to be asked to collaborate in procedures which are moving contrary to his interests, *sine processu*". It is manifest from the reading of the entire Judgment, that, contrary to the complainant's contention, UNAdT Judgment 1246 did not hold that the general principle against self-incrimination is infringed by staff rules, which affirm a duty of the staff subject to investigation to cooperate in the investigation. That case was different from the present, as it concerned a staff member who was requested to collaborate in an informal procedure against his interests, without due process. He was offered a separation package before he was notified of the investigation and of the charges against him. In the present case, the complainant was requested to cooperate in disciplinary proceedings carried out in compliance with the due process principle. Thus, in the case ruled by UNAdT Judgment 1246 cooperation was requested in "procedures [...] *sine processu [without a process, that is to say without the safeguards of a formal procedure]*", whereas in the present case cooperation was requested *"in processu"*, that is to say in the disciplinary proceedings governed by rules embodying due process.

Irrespective of the misplaced reliance on UNAdT Judgment 1246, the issues raised by the complainant are:

(i) whether a general principle affirming an absolute and unlimited right of accused persons to remain silent and not to incriminate themselves does exist;

(ii) whether such a general principle does apply in disciplinary proceedings; and

(iii) whether such a general principle was infringed by the staff rules which oblige the subject of an investigation to cooperate in the investigation and by the disciplinary decision which charged the complainant for failure to comply with such obligation.

The Tribunal considers that any right against self-incrimination was, in any event, not infringed in the present case, even if it were to be accepted that this right – which mainly concerns criminal proceedings – is applicable also in administrative proceedings. The persons subject to investigation have a duty to cooperate with the investigation, and may be sanctioned if they fail to do so. Nonetheless, the duty to cooperate does not impede the exercise of the right to silence, if there be one, of the persons concerned, insofar as their answers might lead to charges against them. The above-quoted UNAIDS rules encompass the duty to participate generally in interviews, to provide documents, to list persons who might be interviewed as witnesses, and, at least, the duty not to obstruct the expeditious carrying out of the investigation. Inviting the complainant to an interview did not necessarily imply an obligation to answer questions, which might incriminate her. The file contains persuasive evidence that the complainant infringed her duty to cooperate, by refusing to be interviewed and by attempting to obstruct the conclusion of the proceedings. Namely:

– she never replied to the external investigator's invitation, sent to her by an email of 19 September 2019, to participate in an interview;
– she did not reply to seven further emails, 16 phone calls and six voice messages sent to her by the external investigation company between 20 September and 1 October 2019 (as reported by the GBA);
– she declined a further invitation from the Director, HRM, received on 27 September 2019, alleging, by a 30 September 2019 communication sent by her counsel, that she was not in a position to submit to any interview, until she received formal notification and terms of reference of investigation from UNAIDS;

– her counsel replied to a further invitation from the Director of HRM, received on 6 November 2019, that the complainant would not participate in an interview unless she was provided with "the names of her accusers" and "with all evidence UNAIDS has which gave rise to the investigation of which she is the target"; and
– by email dated 13 November 2019, HRM reiterated the complainant's obligation to cooperate, noting that she was not on certified sick leave.

In conclusion, it was open to the Organization to sanction the complainant for her failure to cooperate with the investigators.

26. In her plea 3(xiv) and in her further submissions, the complainant reiterates some arguments already advanced in other pleas, concerning the alleged retaliatory conduct of Mr Lo. and further elements of retaliation, which, in her view, can be inferred from the allegedly unreasonable length of the disciplinary proceedings and from the leak of the investigation to the press. In the present plea, she contends that both the disciplinary proceedings and the impugned decision were retaliatory and adds other elements of the alleged pattern of retaliation. She refers to her promotion to the P-5 grade, which in her view was an attempt to "buy [her] off", and to the conduct of Ms Ca. In her further submissions to the Tribunal, she alleges that she was the victim of a conspiracy, and draws the Tribunal's attention to some civil and criminal proceedings pending before French and Swiss Courts. She further relies on what appears to be text messages by phone or by mail (annex R31 to her rejoinder).

These pleas are devoid of merit.

The Tribunal's firm case law holds that the party asserting abuse of authority, bias and improper motive must prove it (see, for example, Judgments 4524, consideration 15, 4467, consideration 17, 4146, consideration 10, 3939, consideration 10, 2264, consideration 7(a), and 2163, consideration 11). Mere suspicion and unsupported allegations are clearly not enough, the less so where the actions of the organization, which are alleged to have been tainted by personal prejudice, are shown

to have a verifiable objective justification (see Judgment 4688, consideration 10).

The same principle regarding the burden of proof is applicable to retaliation: it is incumbent on the complainant to establish that the actions or conduct complained of were retaliatory (see Judgment 4363, consideration 12).

It is true that, in the present case, paragraph 19 of the WHO Whistleblowing Policy and Procedures read as follows:

> "Retaliation will be found to have happened unless the administration can demonstrate by clear and convincing evidence that the act which is suspected to be retaliatory would have occurred even if the whistleblower had not reported a suspicion of wrongdoing."

The Tribunal deems that in the present case retaliation is not proven, even applying the standard of proof enshrined in the above-cited paragraph 19. As to the commencement of the investigation in 2016, the Tribunal has already noted (in consideration 7 above) that it cannot be considered retaliatory, because it preceded the complainant's harassment complaint. As to the further steps of the disciplinary proceedings, which took place after the lodging of the sexual harassment complaint, on one hand, they were the prosecution of an action taken before the lodging of the sexual harassment complaint. On the other hand, the disciplinary process had an objective justification and, thus, the Tribunal is satisfied that it "would have occurred even if the whistleblower had not reported a suspicion of wrongdoing", in compliance with the standard required in paragraph 19 quoted above. There is clear and persuasive evidence that the disciplinary proceedings would have occurred even if the complainant had not reported a suspicion of wrongdoing. The allegation that the timing of the investigation suggests that Ms Ca. (DXD/MER) used the process of investigation in an effort to "distract" from her own alleged misconduct, using the investigation process to avoid scrutiny into her own leak and dissemination of confidential documentation, is mere speculation. So is the allegation regarding the complainant's promotion to the P-5 grade, dated 3 October 2017, and with effect as from 1 September 2017. Indeed, retaliation implies an action detrimental to the staff member

concerned, whilst a promotion is not detrimental by definition. Nor has she demonstrated her contention that she was "offered" the promotion "to silence" her, and "in exchange for dropping her complaint", as the evidence in the file shows that she expressly requested to be promoted, by an email sent to Mr Si. on 12 April 2017. The content of this mail relevantly shows that she had already requested to be granted a P-5 position on further occasions prior to this email. Thus, the promotion, effective 1 September 2017, does not seem to be "offered", but rather granted on her request. Furthermore, there is no evidence that she withdrew her harassment report in connection with her promotion. The IOS report was issued on 27 September 2017 and found the complainant's allegation of harassment to be unsubstantiated, nonetheless suggesting some recommendations to be addressed both to Mr Lo. and to the complainant. The complainant commented on the 27 September 2017 report, contesting it, by means of communications sent on 30 September, 3 November, 14 November and 7 December 2017. Thus, there is no corroborating evidence of the alleged attempt of the Organization to offer her a promotion as an "exchange" for her to drop the sexual harassment complaint. As to the text messages appended to her rejoinder, which date back to 2018, the authenticity of their source and of their authors is not proven. Moreover, they appear to be an informal exchange of opinions regarding the situation at UNAIDS after the leak to the press of the news of the investigation into misconduct. These messages do not amount to an element of retaliation in reaction to the fact that in early 2018 "the complainant went public with her allegations against [Mr Lo.], appearing on [an international television] program". As to the attitude of Mr Si., allegedly emerging from a press article, the Tribunal notes that the press article states that it reproduces parts of an internal speech held by Mr Si. to staff, which was leaked outside the Organization. In the absence of the complete text of this speech, the authenticity of the sentences attributed to Mr Si., or, at least, the meaning and the relevance of some statements, read out of context, are disputable, as well as the relevance of the press article to the case. Thus, these press publications do not demonstrate a biased attitude of Mr Si. towards the complainant. Moreover, Mr Si. had no role in the disciplinary decision, which was taken by the new

Management of UNAIDS after Mr Si. had left the Organization. As to further allegations of conspiracy, there is no evidence that the former and the current UNAIDS Management conspired against her, nor that Ms Ce. and Mr Le. took part into this conspiracy and influenced the author of the disciplinary decision or of the impugned decision. The alleged conspiracy is mere speculation and conjecture. The chronology of the events disproves the complainant's recollection of the facts. Indeed, the decisions under review were taken several months after the departure of the former management members. The former DXD/PRG, Mr Lo., retired in April 2018, and the former Executive Director, Mr Si., resigned on 9 May 2019. The ad interim Executive Director was Ms Ca. from May to October 2019, who also held the position of DXD/MER as from February 2018, whilst the new Executive Director, Ms By., was elected on 14 August 2019 for a mandate starting from November 2019. There is no evidence in the file that the former managers influenced the new Executive Head or played any role in the disciplinary outcome. Nor is there evidence that the complainant's role as a whistleblower and her harassment complaint prompted the disciplinary investigation against her, considering that the Organization firstly received an anonymous communication regarding Mr S.'s activities in February 2016, that is to say, almost eight months before she lodged her formal harassment complaint, in November 2016. Moreover, the investigation into the complainant's misconduct was suspended twice, in 2016 and 2018, in order to safeguard the integrity of the investigation into her harassment complaint. Therefore, the investigation into her misconduct, which initiated well before the harassment proceedings, and was suspended twice in consideration of the pending of the latter, cannot be considered a reprisal, which, by definition, is an illegal action taken in reaction to a preceding action, and not in prevention. The available extract from the Multilateral Organisation Performance Assessment Network report for 2021-2022 regarding the UNAIDS Secretariat concerns the period 2021-2022, thus it is immaterial to the complainant's allegations of sexual assault and sexual harassment, which concern episodes allegedly dating back to 2011-2015. As already said in consideration 6 above, all arguments and documents concerning private disputes between the complainant and

Ms Ce., or between Mr S. and Ms Ce., are outside the scope of the present complaint. Moreover, there is no evidence, even in the documentation appended to the complainant's further submissions regarding such private disputes, of the alleged role that, in the complainant's view, Ms Ce. and Mr Le. played in the complainant's summary dismissal. Namely, the Tribunal notes the following.

– The 16 August 2022 decision of the Court of Justice of Geneva, Criminal Chamber, states that further investigation is feasible into the anonymous email of September 2021, in order to identify its author, whilst it does not order further investigation into the anonymous communications of 2016. It cannot be inferred from this decision that the author(s) of the anonymous emails were Ms Ce. and/or Mr Le., nor that WHO UNAIDS failed to properly ascertain who the author of the anonymous emails was. What is clear from this decision, is that any investigation into the identity of the anonymous whistleblower of the 2016 communications is definitively precluded. Moreover, the anonymous email of 2021 is immaterial to the present case, which concerns facts that occurred well before 2021.

– The 6 December 2022 submissions of Ms Ce. to a French Court, concerning a marital dispute, are immaterial. The fact that Ms Ce. was appointed by WHO after the complainant's dismissal and that she was promoted in 2022, does not prove conspiracy. The fact that in her submissions to a French Court Ms Ce. was imprecise about the outcome of the complainant's complaint against her dismissal is immaterial to this case.

– The 23 December 2022 letter, addressed by the Public Prosecutor of the Swiss Canton of Vaud to the Public Prosecutor of the Swiss Canton of Geneva, invites the latter to take up an investigation into Mr Le., regarding the leak of an internal document of WHO UNAIDS. It does not prove that Mr Le. was guilty of this leak, which is still under investigation; thus, it cannot be inferred from this letter the evidence that Mr Le. acted to the detriment of the complainant.

– The 2 May 2023 decision of the Public Prosecutor of Geneva, is an *"ordonnance de non-entrée en matière"* and, thus, by definition does not address the merits of the relevant case. Therefore, it does not assess that Mr Le. was found guilty of criminal offences. Again, it cannot be inferred from this decision the evidence that Mr Le. acted to the detriment of the complainant.
– The 12 May 2023 *"mandat d'actes d'enquête"* addressed by the Public Prosecutor of Geneva to UNAIDS, is a request that Ms Ce.'s immunity from jurisdiction be lifted. To date, it only demonstrates that Ms Ce. is under criminal investigation, not that she was found guilty of criminal offences. Therefore, it cannot be inferred from this request the evidence that Ms Ce. acted to the detriment of the complainant.

27. After consideration of the complainant's pleas from 4 to 9 and of her pleas 3(xii) and 3(xiv), the Tribunal finds that it was open to the Organization to be satisfied, having regard to the evidence before it and the findings of the investigators, that the complainant's serious misconduct was proven to the requisite standard, that is beyond reasonable doubt. Thus, her contention that she was not granted the presumption of innocence and that the charges were not proven beyond reasonable doubt (pleas 3(xi) and 3(xiii)), is rejected.

28. The complainant's tenth plea is concerned with the proportionality of the sanction. She contends that several clearly mitigating factors were not taken into account, namely:

(i) the absence of any corrupt motive;
(ii) the fact that UNAIDS has suffered no financial damage;
(iii) the length of her service with the Organization;
(iv) her recognised professional abilities and previous good record;
(v) the fact that the investigation appears to have originated out of the malicious and irregular motives of Mr Lo. who eventually sexually assaulted her; and
(vi) the pattern of the institutional harassment she has endured over a number of years.

This plea is unfounded.

The Tribunal's well-settled case law has it that the choice of the appropriate disciplinary measure falls within the discretion of an organization, provided that the discretion be exercised in observance of the rule of law, particularly the principle of proportionality (see Judgments 4660, consideration 16, 4504, consideration 11, 4247, consideration 7, 3640, consideration 29, and 1984, consideration 7). In reviewing the proportionality of a sanction, the Tribunal cannot substitute its evaluation for that of the disciplinary authority, and it limits itself to assessing whether the decision falls within the range of acceptability (see Judgment 4504, consideration 11).

In the present case, pursuant to Staff Rule 1075.2:

> "A staff member may be summarily dismissed for serious misconduct, if the seriousness of the misconduct warrants it, subject to the notification of charges and reply procedure required by Staff Rule 1130. Such staff member shall not be entitled to notice of termination, indemnity, repatriation grant or end-of service grant."

Since, as assessed by the Tribunal above, the Organization lawfully considered that the complainant's behaviour amounted to serious misconduct, which is the gravest violation of staff duties, it was open to the Organization to choose the most severe sanction. It was justified, in the view of the Organization, on the grounds of the repeated nature of the complainant's actions, her seniority, and her level of responsibility.

There was no disregard of mitigating factors of the kind alleged by the complainant. Bribery is not the only ground for summary dismissal, thus the absence of any corrupt motive does not imply, by itself, that she could not be summarily dismissed. The contention that there was no financial loss for the Organization is disproven by the evidence in the file, as already noted by the Tribunal (see considerations 18 and 24 above). The complainant's lengthy service with UNAIDS and her recognised professional abilities and previous good record are not, by themselves, mitigating factors (see Judgment 3083, consideration 20), even though in some cases they can be (see Judgment 4457, consideration 20). Although the 31 August 2021 decision taken on her harassment complaint found, to a certain extent, that Mr Lo. had an

improper behaviour, this does not imply that the disciplinary action was retaliatory and, thus, Mr Lo.'s conduct cannot serve as a mitigating factor. In the file there is neither persuasive evidence of the alleged "institutional harassment she has endured over a number of years", nor evidence of an administrative decision taken on this issue, other than the 31 August 2021 decision. This latter was taken on her sexual harassment complaint, and drew conclusions regarding sexual harassment but did not mention institutional harassment. Without prejudice for the outcome of the complainant's fourth complaint concerning the harassment allegedly suffered by her, outside the scope of the present complaint, her summary dismissal was justified by objective reasons and it is not proven that it was retaliatory in nature or inserted in a pattern of harassment. The evaluation of any extenuating factors fell within the discretion of the Organization, and the exercise of such discretion, in the present case, was not affected by errors of fact or law, or by disregard of essential facts. The Tribunal is satisfied that it was open to the Organization to issue the complainant with the most severe sanction based on the repeated nature of her actions, her seniority and her level of responsibility.

29. In light of the foregoing, as all the complainant's pleas have been considered either unfounded or immaterial or outside the scope of the present complaint, all her claims are rejected and her complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 29 April 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER