Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S. (No. 3)

v.

WHO

138th Session **Judgment No. 4859**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr B. S. against the World Health Organization (WHO) on 29 April 2021 and corrected on 13 July 2021, WHO's reply of 19 October 2021, the complainant's rejoinder of 12 February 2022 and WHO's surrejoinder of 2 June 2022;

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 him 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. He joined UNAIDS in July 2012.

On 22 February 2016, UNAIDS received anonymous allegations of financial and other misconduct against the complainant. A meeting took place on the same day among senior managers, who agreed that, in accordance with the applicable rules, the Administration had to

assess whether a formal investigation was warranted. The Senior Ethics Officer was asked to conduct the preliminary assessment of the allegations by reviewing the last six months of the complainant's emails (24 August 2015 to 24 February 2016) and his financial dealings in some specific areas. The complainant was orally informed on 23 February 2016 by the then Executive Director and by his direct supervisor, the Deputy Executive Director, Programme Branch.

By letter of 7 March 2016, UNAIDS Director of Human Resources Management (HRM) informed the complainant that UNAIDS had received, on 22 February 2016, anonymous allegations of misconduct against him regarding four issues: financial misconduct, sexual abuse, unauthorised absence, and improper language referred to external counterparts. The whistleblower further alleged that evidence could be found in the complainant's professional emails. The preliminary assessment showed that an investigation seemed justified on the allegations of financial misconduct and unauthorised absence. The Director of HRM asked the complainant to provide his written comments within eight calendar days. Following a review of his comments and the completion of the investigation, the Executive Director would decide whether the complainant's actions constituted misconduct and if any disciplinary action may be imposed. At that time, the complainant would have an opportunity to provide a reply in accordance with Staff Rule 1130.

The complainant denied the allegations on 15 March 2016. A further anonymous email was sent to UNAIDS on 18 March 2016 providing further information on the complainant's alleged misconduct and unauthorised absence, and the complainant was informed of this by UNAIDS Senior Legal Officer. That same month, the matter was referred to WHO's Office of Internal Oversight Services (WHO/IOS) for investigation.

On 3 November 2016, the complainant filed a harassment complaint against the Deputy Executive Director, Programme Branch. Later that month, the complainant was reassigned to the Office of the Executive Director under the latter's direct supervision.

On 7 November 2016, a staff member – the complainant's partner – filed a sexual harassment complaint against the Deputy Executive Director, Programme Branch. The matter was referred to WHO/IOS for investigation. That same month, WHO/IOS suspended the investigation into the complainant's alleged misconduct to safeguard the integrity of the potentially related sexual harassment case. WHO/IOS resumed the misconduct investigation in January 2018 after the investigation into the allegations of sexual harassment was closed. In July 2018, the Director of WHO/IOS informed UNAIDS that the misconduct investigation was suspended again because the sexual harassment case had been re-opened. He added that, in its preliminary review, WHO/IOS found evidence that the complainant may have engaged in fraudulent practices, unprofessional conduct, and misused UNAIDS Information Technology (IT) resources, travel funds and other funds.

On 9 August 2018, the Executive Director recused himself from all matters relating to the allegations concerning the complainant and delegated his authority to the ad interim Deputy Executive Director, Management and Governance.

Considering the significant lapse of time since the initiation of the preliminary review and the significant reputational, integrity and legal risks which might stem from a protracted delay to investigate, WHO/IOS found it appropriate to refer the preliminary findings to UNAIDS for determination of the best course of action, including the possible referral to an independent external investigative body for further investigation. In the summer of 2019, UNAIDS hired an external investigation company to continue the investigation. The external investigator and then the Administration contacted the complainant on several occasions for him to be interviewed in the context of the investigation, but the complainant refused.

The external investigation company issued its report on 22 November 2019. It found substantiated evidence of travel irregularities related to the complainant's duty travel, recorded absences and travel requests, and to his supervisee's travels as well as substantiated evidence of collusion with his supervisee to arrange irregular travels. It also found substantiated evidence that he was involved in an intimate personal

relationship with his supervisee, which he did not disclose as required by UNAIDS and WHO policies. It further found substantiated evidence that the complainant's private interests conflicted with UNAIDS' interests because of the aforementioned personal relationship. Indeed, the external investigation company found elements showing that the complainant had unauthorised absences on at least one occasion for the purpose of private encounters with his supervisee while on duty for UNAIDS and during working hours. It also found substantiated evidence that he routinely used UNAIDS IT resources inappropriately, by using his UNAIDS email address to exchange messages with sexual content and profanity. In addition, the investigator found substantiated evidence that UNAIDS corporate funds were misused for the personal advantage of the complainant and his supervisee.

By letter of 2 December 2019, UNAIDS Director of HRM notified the complainant of the charges of misconduct raised against him and enclosed the investigation report. The Director invited him to provide his comments within eight calendar days. The complainant's legal representative replied on 10 December 2019 that the complainant categorically denied the charges. He asked UNAIDS to prove the charges beyond a reasonable doubt, and to grant him additional time to reply because the complainant was undergoing medical treatment that impaired his capacity to concentrate.

On 13 December 2019, UNAIDS Director of HRM informed the complainant that, given the systematic and repeated nature of his misconduct, his seniority and level of responsibility, the Executive Director found that his actions constituted serious misconduct, which warranted the sanction of summary dismissal. He was required to fully compensate UNAIDS for the financial loss suffered as a result of his misconduct. The Director of HRM stated that if he wished to challenge that decision, he should submit an appeal directly before the Global Board of Appeal (GBA). The complainant did so in April 2020.

In its recommendations of 3 December 2020, the GBA concluded that the investigation and disciplinary process were conducted in line with the regulatory framework and the principle of due process. It found no errors of fact or law in the findings of misconduct and concluded

that the misconduct was "clearly established". In particular, the GBA was satisfied that the external investigator's findings rested on verifiable evidence leading to a finding of guilt beyond a reasonable doubt. The external investigator's analysis of evidence was detailed and showed no bias or prejudice against the complainant. The disciplinary measure of summary dismissal was proportionate. The GBA considered that the complainant's length of service and good work record could not constitute mitigating circumstances. It, however, concluded that the duration of the investigation was excessive and recommended awarding him 1,000 Swiss francs in compensation and 1,000 Swiss francs in legal fees.

On 29 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 award him material damages – including payment of all salary, benefits, step increases, pension contributions and any other emoluments or other entitlements which he would have received through his statutory date of retirement at age 65. He also claims moral damages for the psychological injury he suffered, and claims exemplary damages. He further asks to be reimbursed "all actual legal fees incurred in bringing this appeal" as well as interest on all amounts awarded to him, at the rate of 5 per cent per annum from 13 December 2019 through the date all amounts are paid in full, or any other relief granted is executed in full. Lastly, the complainant asks to be granted any such other relief that the Tribunal deems necessary, just and fair.

The Organization asks the Tribunal to reject the complaint as devoid of merit.

CONSIDERATIONS

1. The complainant impugns the UNAIDS Executive Director's 29 January 2021 decision, which, endorsing the Global Board of Appeal (GBA)'s 3 December 2020 recommendations, rejected his internal appeal and upheld the Executive Director's 13 December 2019 decision

to summarily dismiss him for serious misconduct, based on nine numbered counts plus an unnumbered one. The 29 January 2021 decision also awarded the complainant moral damages for the excessive duration of the misconduct investigation in the amount of 1,000 Swiss francs, plus 1,000 Swiss francs in legal fees.

2. This is the complainant's third complaint. He requests joinder of the present complaint with his second and fourth complaints. Although the three complaints concern facts and decisions which, in the complainant's view, are interconnected, the legal issues raised are partially discrete and the decisions impugned concern different subject matter. Accordingly, the present complaint will not be joined with the other two.

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

(i) whether his 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 he was incapacitated to participate in the investigation due to his 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 he now lists before the Tribunal, but he did not. Thus, the fact that those persons were not interviewed in the course of the disciplinary proceedings or 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 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). 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 eleven pleas (which he names "grounds" or "arguments"). Between "ground 1" and "ground 3" there is an "argument 2", and between "ground 3" and "ground 4" there is an extra "ground 2", which, for the sake of clarity, the Tribunal will renumber as "ground 3-bis". In turn, "ground 3" contains fourteen subheadings listed from (a) to (n), which, for the sake of clarity, the Tribunal will number from 3(i) to 3(xiv). The pleas may be summed up as follows.

(1) The immediate commencement by Mr Lo. of a preliminary assessment and then investigation into the complainant's actions violated the principle of due process and was motivated by bias and prejudice.

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

(3) The investigation carried out by an external investigation company was fatally tainted by conflicts of interest, breaches of due process, and procedural flaws. 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 his right to know the identity of his accuser;

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

(vi) the investigator failed 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 to the press;

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

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

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

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

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

(3-bis) The Executive Director erred in finding that the complainant engaged in fraudulent practices and misuse of UNAIDS funds in collusion with his direct supervisee ("ground 2" of the complaint).

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

(5) 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.

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

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

(8) The Executive Director erred in finding that the complainant routinely used UNAIDS Information Technology (IT) resources inappropriately and that the use of these resources conflicted with the interests of UNAIDS and the WHO Policy on the Acceptable Use of Information and Communication Systems.

(9) The Executive Director erred in finding that the complainant's behaviour did not comply with UNAIDS rules and procedures, as well as with expected professional behaviour.

(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 his rejoinder, the complainant advances further arguments related to the pleas contained in his 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 he lists as follows:

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

(ii) all documentation relating to the 22 February 2016 decision to immediately commence a preliminary assessment of the anonymous email and unsubstantiated allegations against the complainant;

(iii) all documentation related to the purported investigation against the complainant between 2016-2018 and any correspondence and/or minutes of meetings between UNAIDS, WHO and its Office of Internal Oversight Services (IOS) and all documentation (including but not limited to proof, interview transcripts, methodology etc.) related to the purported preliminary investigation carried out by the Administration in this period;

(iv) all documentation relating to the decision to commence an investigation into the complainant in 2019;

(v) all communications and records of meetings between UNAIDS' Administration and the external investigators, and between IOS and the external investigators, and UNAIDS and IOS dating back to 2016 onwards; and

(vi) the minutes of all PCB meetings for the years 2018 and 2019 as they relate to the complainant or to his supervisee, Ms B.

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

(vii) the investigation report on the sexual harassment complaint submitted by Ms B.

As to the request to access the investigation report on the harassment complaint submitted by Ms B., the Tribunal notes that the complainant was a witness in the harassment proceedings and, in this capacity, he is not entitled to access the investigation report. All other requests for disclosure, concerning the documents listed above from (i) to (vi) are

formulated in too general and vague terms, and refer to documents which are not relied upon by the disciplinary decision or by the impugned 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 him and his estranged spouse 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 his first plea, the complainant contends that the immediate commencement by Mr Lo., the Deputy Executive Director, Programme Branch, of a preliminary assessment and then investigation into the complainant violated the principle of due process and was motivated by bias and prejudice.

His 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 the Policy, anonymous allegations are discouraged. Mr Lo. 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 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 him and Ms B. They were taken in retaliation for Ms B. having filed a sexual harassment complaint against Mr Lo. and for the complainant being a witness in such harassment complaint.
– Hence, the decision to initiate a preliminary investigation was tainted by an error of law.

This plea is unfounded.

The WHO 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 the complainant'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, UNAIDS 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 [the complainant's] emails, as well as his financial dealings with [an external Agency]". In any event, in its preliminary review, WHO/IOS found evidence that the complainant 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 WHO Whistleblowing Policy and Procedures, in force at the material time:

> "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 or decision that is 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, in February 2016, the conduct of Mr Lo. was retaliatory against the complainant due to his role as witness in the harassment complaint filed by Ms B. Indeed, Ms B.'s 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 Ms B. prior to 22 February 2016. In Judgment 4858 concerning the summary dismissal of Ms B., delivered in public on the same day as the present judgment, the Tribunal held that the evidence provided by Ms B. (which partially differs from the evidence provided in the present complaint) does not support a conclusion that she had lodged an informal complaint of harassment prior to 22 February 2016. As a result, there is no persuasive evidence that Mr Lo. was aware, in February 2016, that Ms B. had submitted informal complaints of harassment against him. In addition, the 22 February 2016 anonymous email did not mention Ms B., but only the complainant. 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 Ms B. Most relevantly, there is no persuasive evidence that Mr Lo. was biased against the complainant, as Mr Lo. could not foresee that, eight months later, the complainant would be a witness against him in the harassment complaint lodged by Ms B. Nor is it material, to the purpose of ascertaining retaliation, that the complainant lodged a harassment complaint after the investigation into him was commenced. 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 IOS.

The Tribunal further notes that, pursuant to paragraph 19 of the Whistleblowing Policy and Procedures, "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. [...]" In light of this rule, 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 his second plea, the complainant contends that the delay in the investigation into his alleged misconduct was excessive and unreasonable. His arguments may be summed up as follows.

– The investigation was suspended twice, allegedly due to the investigation into the complaint of sexual harassment lodged by Ms B., considering that in this investigation the complainant was a witness. 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 him for his role as witness in Ms B.'s harassment complaint. The complainant was informed by his son of the irregular plan of UNAIDS to get rid of him and Ms B., and he brought this to the attention of IOS in July 2018 and asked IOS to investigate, but to no avail.
– This delay exacerbated his psychological injury.
– 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 his health, reputation, dignity, and professional standing.
– He was not adequately compensated for the delay, as the GBA recommended the award of moral damages for the excessive duration of the misconduct investigation in the amount of 1,000 Swiss francs, and 1,000 Swiss francs in legal fees.

This plea is unfounded.

The Tribunal notes that the complainant has already been awarded moral damages for the duration of the investigation, which the GBA deemed to be "excessive". Since the impugned decision has accepted that the length of the investigation was excessive, this question is no longer an issue under dispute. Thus, the Tribunal accepts that the duration was excessive, and its role is only to assess whether it is possible to draw the legal consequences alleged by the complainant from the excessive duration of the proceedings. The Tribunal notes that, although the proceedings were suspended twice, the two suspensions were made in the interest of the complainant and not to his detriment. They were aimed at giving priority to the investigation into Ms B.'s harassment complaint, and at protecting both the alleged victim of harassment and the complainant, in his capacity as a witness in that harassment complaint, from charges of misconduct. The 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 investigation into Ms B. and the one into the complainant were based on the same facts and were strictly interconnected, thus, the suspension of the investigation into the complainant was necessary in order to shield Ms B. The first suspension decision was instrumental to the first investigation into Ms B.'s formal complaint of sexual harassment, whilst the second suspension decision, issued by the Director of WHO/IOS on 11 July 2018, was instrumental to the re-opened investigation into Ms B.'s sexual harassment complaint. The delay in the proceedings, having an objective and verifiable justification, even admitting that it was excessive, does not amount to bias and retaliation. The complainant also relies on the information he received from his adult son. He has provided the Tribunal with an email received on 16 July 2018, informing him that his adult son had been told on 12 July 2018 by his stepmother (that is to say the complainant's estranged spouse), that Mr Si. had told his stepmother that the complainant had been the subject of an investigation by UNAIDS together with Ms B., and that both of them would be fired. This reliance is misplaced, as such information was no more than hearsay. As to the complainant's doubts about the veracity of testimonies and the accuracy of the fact-finding

due to the length of the proceedings, they are mere unsubstantiated suppositions.

As to the amount of the compensation for moral damages, the Tribunal recalls its case law stating that moral damages are awarded for moral injury and the complainant bears the burden of proving the injury and the causal link with the unlawful conduct of the defendant organization (see, for example, Judgments 4157, consideration 7, 4156, consideration 5, 3778, consideration 4, and 2471, consideration 5). Delay, by itself, does not entitle a complainant to moral damages (see, for example, Judgments 4487, consideration 14, 4396, consideration 12, 4231, consideration 15, and 4147, consideration 13). Without attempting to describe, exhaustively, what might constitute a moral injury, it includes emotional distress, anxiety, stress, anguish and hardship (see, for example, Judgments 4644, consideration 7, and 4519, consideration 14). In the present case, the complainant contends that the delay exacerbated his psychological injury. The Tribunal notes that it is not self-evident that the delay might have had this effect. The complainant bears the burden of proving moral injury and the causal relationship between that and the event complained of but has not done so in this case (see, for example, Judgments 4762, consideration 9, and 4644, consideration 7).

The complainant further contends that details of the allegations were leaked internally and to the international press in the time span between the initial preliminary investigation and the external investigation, and this caused irreparable damage to his health, reputation, dignity, and professional standing. These alleged damages appear to be the consequence of the leaks of the investigation, but the complainant has not established, to the Tribunal's satisfaction, a causal link between the delay in the proceedings and the leaking of the news. Thus, it cannot be assumed that the moral injury allegedly caused by the leak of the news is causally linked to the delay in the proceedings. Moreover, the complainant has not demonstrated to the Tribunal's satisfaction that the moral compensation he had already been awarded does not cover the entire moral injury allegedly suffered.

9. In his 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 they failed to properly gather evidence.

His 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., the Deputy Executive Director, Management and Governance (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 WHO/IOS and the UNAIDS 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 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 audit" of IOS' "preliminary report of July 2018" and to hear one or two specific witnesses.
– The methodology followed by the external investigation company demonstrated that the scope of the investigation was limited to the evidence already collected by UNAIDS. UNAIDS provided the external investigation company with a limited number of pieces of evidence, namely with a sample of the emails extracted from the complainant's mailbox. Additionally, 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 DXD/MER Office also evidences collusion between the Organization and the external investigators, with the former controlling the process and the 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 TOR, 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 the complainant's 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 he 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 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 WHO/IOS, because self-recusal implied that WHO/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 formal steps of the proceedings, whereas the handover from WHO/IOS to the external investigation company does not constitute a relevant formal step. There is no evidence that the estimated budget for the investigation reflected an intention to reduce the investigation to a mere "desk audit". 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 far more than two witnesses. In this respect, the Tribunal notes that the complainant, in order to substantiate his 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 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 the capacity and responsibility of UNAIDS 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 he did not avail himself of this opportunity. Thus, he cannot now criticise the process on the basis that some staff, whom he never suggested be interviewed, were not interviewed. It was open to the external 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.

The Tribunal is satisfied that, as the Organization submits, the conditions of storage for the TOR 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 his 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 him, and that he was denied his right to know the identity of his accuser. His arguments may be summed up as follows.

– In breach of due process, he was notified of the investigation only in 2019, whilst the previous notification of 7 March 2016 concerned only two allegations (financial misconduct and unauthorized leave), and he was not informed of the 11 July 2018 IOS Memorandum at the time it was issued.

– He was denied due process by not having the opportunity to seek legal advice prior to the commencement of the investigation or even in its early stages.

– He alleges a breach of due process also on the ground that he was on "service-incurred sick leave" when he was invited for an interview and he was requested to comment on the letter of charges.

– The Organization was under a duty to establish the identity of the anonymous accuser, by means of an IOS investigation if necessary.

– He reiterates that Mr Lo. initiated the investigation for retaliatory purposes rather than opening an investigation concerning the author of the anonymous defamatory emails of February, March and April 2016.

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, consideration 8). Moreover, in the present case, the complainant was notified on 7 March 2016 of the first preliminary review prompted by the anonymous email of 22 February 2016. Thus, he had the opportunity to comment at that time. Later, the preliminary review was suspended twice in order not to jeopardize the pending investigation on Ms B.'s sexual harassment complaint, in which he was a witness. Therefore, the Tribunal is satisfied that the complainant was notified of the investigation against him in due time, firstly on 7 March 2016 and secondly on 19 September 2019. Moreover, he was granted a sufficient period of time for his comments, given that the investigation was referred to the external investigation company in August 2019. It is immaterial that when he was notified in March 2016, the charges were less precise than those made in 2019, as the information he received in 2019 was sufficiently precise to allow him to defend himself.

The allegation that, due to the delay in the investigation, he 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, he had already been notified of the investigation at the earliest stage, in March 2016, thus he had, in fact, the opportunity to seek legal advice since then. On the other hand, the Organization did not deny him the opportunity to avail himself of a legal counsel, as proven by the fact that his legal counsel wrote on several occasions to the Organization on his behalf after he 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 author(s) 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 he was invited for an interview and when he was notified of the letter of charges, 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 Staff Physician (WHO Staff Health and Wellbeing Services) assessed the complainant's pathology, as declared in the medical certificate signed by the complainant's physician on 10 December 2019, and concluded that his medical condition did not prevent him from participating in the disciplinary proceedings. This conclusion does not evidence legal flaws. Indeed, it fell within the competence of the Staff Physician to assess the reliability of the medical certificate 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. He 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 certificate 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 his plea 3(vi), the complainant contends that the investigator failed to disclose all relevant documents and evidence. His arguments may be summed up as follows.

– As he was not notified at an early stage of the investigation into allegations against him, he did not have access to the evidence, nor the opportunity to properly test it and question witnesses at that stage.
– He might have otherwise contested the investigation before it was undertaken by the external investigation company.
– Once the external investigation was completed, he was presented with the report but he was given only eight days to comment on it while he was on sick leave.
– The failure to give him time to respond once he had recovered also breached the adversarial principle.

This plea is unfounded.

Suffice it to recall what the Tribunal said in consideration 10 above. Irrespective of the fact that he had already been notified of the preliminary investigation in March 2016, that is to say at its earliest stage, in any event he was informed in due time of the investigation, in September 2019, and he refused to participate. The evidence in the file shows that the complainant was invited by the investigators, by email of 19 September 2019, to participate in an interview to be held on 26 September 2019. He never replied. The investigators and the Director of HRM sent him further emails on 20, 23, 24, 25, 26 and 27 September 2019. He was sent two further emails by HRM on 6 and 13 November 2019. He was not incapacitated as it was not proven that his illness impeded him from being interviewed, as said in consideration 10 above. Once he received the charges letter and the investigation report, he 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 the principle of due process and the adversarial principle, given the established unwavering refusal of the complainant to participate in the process of investigating his conduct.

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

– He insists that he was not granted adequate time for his submissions or to provide evidence.
– He reiterates that the proceedings advanced while he was on sick leave.

– He adds that his medical documentation should have been assessed by an independent expert after the WHO Director Staff Health and Wellbeing Services had determined that he was capable of attending interviews.

This plea is unfounded.

His allegation that his account of "[f]acts and submissions were ignored or not properly considered" is misleading, as he did not participate either in the investigation or in the disciplinary proceedings and never submitted his account of the facts and evidence, thus, there was nothing to consider or to ignore. The allegations that he was not granted adequate time considering his illness and that his 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 his plea 3(viii), the complainant contends that the investigators went beyond the scope of their mandate as fact-finders. His 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 he 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 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 to UNAIDS by the external investigation company 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 his 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 him. As a result, his good name was compromised. His arguments may be summed up as follows.

– Paragraphs 19 and 20 of the Investigation Process document were infringed, since leaking his name to the press clearly shows that the investigation was not conducted in a manner designed to preserve his good name.
– Ms Ca., in her capacity as Deputy Executive Director, distributed the 11 July 2018 IOS Memorandum to the PCB; furthermore, this memorandum was also leaked to his former spouse.
– These leaks were a further element of the harassment and retaliation campaign against him.

These pleas are unsubstantiated.

The Tribunal notes that the failure to respect confidentiality, even if it were proven, is not a decisive 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 that very day. 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 complainant's former spouse, is purely speculative.

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 his pleas 3(xi) and 3(xiii), the complainant contends that he 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. He alleges that the external investigation report contained conclusory statements to the effect that his 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. He was presented with a *fait accompli* and was required to prove his 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 his plea 3(xii), the complainant contends that the Organization breached his right against self-incrimination, whilst in his plea 3(xiv) he contends that the investigation report and the impugned decision constitute retaliation. The Tribunal will examine these two pleas after consideration of his pleas from 3-bis to 9, and before consideration of the plea listed in the complaint as 10 (which is actually his eleventh plea).

17. Before addressing the complainant's pleas from 3-bis 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, and Judgment 4444, consideration 5). 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 his plea 3-bis ("ground 2" of the complaint), 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 supervisee, Ms [B.];
>
> [...]

> 9) You misused UNAIDS corporate funds for your and Ms [B.]'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. Furthermore, [...] you and Ms [B.] involved the team assistant, Ms [Na.], in misconduct by involving her in the request for a modified invoice; and you did not report any wrongdoing."

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 he had intentionally sought to obtain financial advantage, or altered a document or account, therefore his conduct did not amount to fraud as defined in the Fraud Prevention Policy.
– 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 adjudication report submitted by the complainant on 2 December 2015 specified that the S. Hotel was selected due to its facilities. Indeed, the hotel recognised this in its reference to "meeting facilities" in its invoice.
– Ms B.'s team contracted with the hotel for two back-to-back meetings in the spring of 2015, and Ms B.'s name was included in the invoice because she was in charge of the substantive aspects of the event (not the logistics); that is, she was the contact point for meetings and requests.
– The external investigation company failed to interview or seek to interview any individual directly involved in the establishment and execution of the contract with the S. Hotel.

The complainant advances some further arguments related to the invoice issued by a restaurant in Geneva ("the Restaurant") concerning a "working dinner" for 25 persons which took place in March 2015. He alleges that the dinner was authorized in the end and that there was no fraud.

This plea is in part immaterial and unfounded in the remainder.

The Tribunal notes that the investigation report addressed two episodes, in relation to "allegation 3" of "misuse of funds in collusion with others", one concerning the modified invoice of the S. Hotel, and one concerning the "working dinner" at the Restaurant. In relation to this dinner the investigators noted that its cost exceeded the amount allowed by the UNAIDS rules and that, although the dinner took place in March 2015, the complainant requested a retroactive clearance only in November 2015. The investigators also noted that the authorization was granted in the end, with a reminder that rules and procedures should be complied with in the future. However, in the conclusion concerning "allegation 3" there are no comments by the investigators on the "working dinner" in question. Thus, it was not considered as an element of fraud or misuse of funds. Count 9 refers only to the modified invoice of the S. Hotel and not to the invoice for the dinner. No other counts in the disciplinary decision mention this episode. Thus, it can be inferred that the complainant was not charged in this respect. As a result, any related argument raised by the complainant is irreceivable.

As to the modified invoice, it is useful to recall that 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 and meeting the catering and conference manager, the complainant and Ms B. 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 S. 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 the complainant on 16 and 17 March 2015 and an "accommodation-package" for Ms B., on 18 and 19 March 2015. Upon request by Ms B., the complainant, accompanied by Ms B., 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 the complainant and of Ms B. had been deleted. Evidence that the complainant, accompanied by Ms B., contacted the hotel and spoke in person with its staff, is found:

– in an email sent by Ms B. to the complainant 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 the complainant, copied to Ms B., 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, Ms B. and another staff member, Ms Na., and between the hotel and the complainant; 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 Ms B., and not to pay for them. According to the Organization, the complainant and Ms B. 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 Ms B., 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 Na., 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 the complainant. A further witness confirmed that this behaviour amounted to misconduct and reported being harassed by the complainant. The complainant's contention that Ms B. was in charge of the substantive aspects of the event (not the logistics), and this might explain why her name was included in the invoice does not clarify why his name and the name of Ms B. were not mentioned in the first invoice, and why his name was included in the second invoice. If he had not stayed at the hotel, there would be no plausible reason for his 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. The fact that the S. Hotel was chosen for its "facilities" does not explain why the second invoice made reference to an "accommodation-package" for the complainant.

19. Thus, the evidence supports the Organization's conclusion that the complainant and Ms B. 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's 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 Ms B. The alternative recollection of the facts submitted by the complainant is not convincing. Indeed, if the

negotiation with the S. Hotel had been conducted by other staff, and the room had been used as a meeting room, the hotel would not have known the names of the complainant and of Ms B. and would not have put the "accommodation-package" in their names in the second invoice. As to the complainant's contention that "[the external investigators] failed to interview or seek to interview any individual directly involved in the establishment and execution of the contract with [S.] Hotel", 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 further 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. In his fourth plea, the complainant challenges count 3, contained in the disciplinary decision. Count 3 reads as follows:

> "There were irregularities related to your duty travels, recorded absences and travel requests and related to the travels of your supervisee Ms [B.], while she was under your direct supervision; and you colluded with Ms [B.] to arrange irregular travels [...]"

His arguments may be summed up as follows.

– The GBA only referred to miscommunication and misinformation that was allegedly used to "bypass conditions attached to travel requirements". At the same time, the GBA recognised that there was "no institutional procedure that prevented the [complainant] from undertaking this travel" and recommended that UNAIDS "look into the approval system to ensure that such incidents do not repeat".
– The investigators did not rely on the UNAIDS Travel Policy in force at the relevant time. Moreover, they interviewed an administrative assistant rather than the individual in charge of travel procedures at UNAIDS, a member of the Finance Department.

Thus, they failed to identify the correct procedures and personnel before drawing conclusions.

– The investigation report repeatedly refers to a "travel ceiling issue" but at no point does it identify the ceiling amount or demonstrate why the cost of certain flights was unreasonable given the ceiling.
– The irregularities did not result from his intent to defraud UNAIDS, they were rather administrative discrepancies not uncommon in a fast-moving and demanding workplace such as UNAIDS. "[M]inor discrepancies of this nature must be regarded as a regrettable by-product of an overloaded work schedule, and nothing close to fraud or impropriety."
– 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 his travels were not found inappropriate.
– In order to demonstrate that he complied with the Travel Policy and the directives from his superiors, he recalls an email he sent to Ms B. in which he invited her not to breach the rules and not to travel in business class.
– The UNAIDS electronic system, which is used to register duty travel, is separate from the one where personal leave is entered. For duty travel to appear on the absence dashboard, a synchronisation between the modules (an automated process) is required, and thus not a manual action that could have been undertaken by the complainant. Staff members rely on the system being synchronised and have no control or responsibility for this.
– The accusation that the complainant had breached a rule by travelling with less than ten days' notice is misplaced. It is only a recommendation that trips should be planned well in advance, but

it was not always possible to comply with it and there was an institutionalised process that applied (travel exceptions) when it was not feasible to raise travel requests ten days ahead of trips.

– The trip to Abidjan, Côte d'Ivoire, was cancelled, as was often the case, and fraud was virtually impossible, because when a trip is cancelled tickets cannot be issued and no per diem (the daily subsistence allowance, "DSA") is paid. If the DSA has already been paid, it is recovered from the staff member's salary automatically.

– His duty travel to Addis Ababa, Ethiopia, from 28 January to 5 February 2016 as well as his duty travel to Dakar, Senegal, in November 2015 were duly cleared; there was no trip to Dakar from 4 to 7 October 2015, and, during those days, he was in Divonne-les-Bains, France. He provides the Tribunal with a photograph, indicating the place and the date as Divonne-les-Bains, on 4 October 2015 at 11:44 a.m.

– The fact that a travel authorization reflects dates other than those for the actual trip that occurred is "normal", as staff are sometimes required to raise a travel authorization with alternate days, but this is then corrected in the UNAIDS electronic system after the trip, through the travel claim process, which is carried out after the trip. In fact, most travel authorizations were raised with the planned dates, not the actual dates, which were subject to change in the UNAIDS electronic system after the travel occurred.

– The complainant cannot be held responsible for the private trips of his supervisee, Ms B., to Paris, France and London, United Kingdom, whilst the fact that she flew to Johannesburg, South Africa, in business class at her own expense does not amount to a breach of the travel rules.

– The investigators' statement that "Ms B.'s travels appeared to be kept secret within OSI" amounts to a failure to recognise that Ms B.'s travel was being deliberately blocked by Mr Lo. and that this severely hampered the work of OSI.

– The charge that the complainant engaged in misconduct with regard to duty travel constitutes a mistaken conclusion drawn from the facts.

Before addressing the numerous arguments advanced by the complainant, the Tribunal considers it appropriate to clarify the scope of its review of the impugned decision and of the disciplinary decision in relation to the issues raised by the complainant in the present plea.

The Tribunal notes that, on the one hand, some of the complainant's arguments address "elements" of the investigation report which are not included in the findings set out in section 5.1.1.5 of the investigation report in relation to the travels of the complainant and of his supervisee, and which, as a result, are not relied upon in the disciplinary decision. In this respect, the complainant's arguments are immaterial to the outcome of the case. On the other hand, the complainant does not challenge some of the findings set forth in section 5.1.1.5, which were relied upon in the disciplinary decision. More specifically, the Tribunal notes that section 5 of the investigation report sets forth the "findings" of the investigators. Section 5.1 deals with "Allegation 1 – Alleged travel irregularities related to travel requests and duty travels". It is structured in further sections as follows:

"5.1.1 Travel requests and duty travels

5.1.1.1 Findings and evidence

[...]

5.1.1.2 Mr [S.]'s approver role for the travels of his supervisee, Ms B.

[...]

5.1.1.3 Additional findings from the witnesses' interviews

[...]

5.1.1.4 Applicable policies

[...]

5.1.1.5 Summary of findings".

It is apparent from the content of sections from 5.1.1.1 to 5.1.1.4 that they only contain a description of the activities of the investigators, of the documents gathered and reviewed, of the interviews, and of the applicable rules, but no conclusions of misconduct are drawn in these

subparagraphs. Conclusions are, instead, drawn only in section 5.1.1.5 which reads as follows:

> "Based on the aforementioned elements described under sections 5.1.1.1.1, 5.1.1.2., 5.1.1.3 & 5.1.1.4 there is substantiated evidence that Mr [S.] committed irregularities regarding his own travels and colluded in requests for irregular travels of his supervisee, Ms B. Evidence shows that:
>
> [...]"

After this statement, section 5.1.1.5 goes on to set out the facts for which substantiated evidence was found.

Thus, only the facts described in section 5.1.1.5 have been considered by the investigators as supported by substantiated evidence, and not all the elements described in the preceding sections.

It is useful to quote in full the content of section 5.1.1.5 which is structured in fourteen bullet points; they are unnumbered in the investigation report, but they will be numbered by the Tribunal for the sake of clarity:

> "[...] Evidence shows that:
>
> [1] No travel request was submitted for the travel to Dakar from 4 to 7 October 2015, resulting in non-compliance with UNAIDS Travel Policy. Additionally, two days of duty travel were not recorded as such in Mr [S.]'s absence dashboard and left as blank;
>
> [2] Mr [S.]'s travels to London and Addis Ababa in October 2015 were not submitted 10 days before travel was to occur, in contradiction with UNAIDS Travel Policy;
>
> [3] One additional day was recorded as duty travel in Mr [S.]'s absence dashboard for travel to Dakar from 14 to 19 November 2015 whereas Mr [S.]'s statistics record of travel until 18 November 2015;
>
> [4] Mr [S.] recorded duty travel in his absence dashboard to Addis Ababa from 28 January to 5 February 2016 whereas the UNAIDS [electronic] system indicates that the travel request was cancelled;
>
> [5] Mr [S.] recorded duty travel on his absence dashboard from 14 to 17 February 2016 for travel to Abidjan while the UNAIDS [electronic] system shows that Mr [S.]'s trip to Abidjan was cancelled;
>
> [6] The OSI team assistant used an approved travel request uploaded in the UNAIDS [electronic] system for other travels as supporting evidence for travel by Mr [S.];

[7] In his role as supervisor, Mr [S.] was informed of travel irregularities committed by his supervisee Ms B.;

[8] Mr [S.] was informed that his supervisee Ms B. travelled on two occasions when no final clearance was provided (once for travel to Johannesburg and once for travel to Harare [Zimbabwe]);

[9] Mr [S.] was informed that Ms B. travelled business class for travel to Johannesburg;

[10] Mr [S.] did not cancel the issued travel requests for insurance purposes even though he stated that he would do so, for Ms B.'s travels to Johannesburg and Harare;

[11] Mr [S.] was aware that Ms B. was travelling to Paris, London and twice to Dakar;

[12] [the external investigators] did not review any evidence indicating that Mr [S.] disclosed Ms B.'s irregular travels to UNAIDS management;

[13] [the external investigators] reviewed substantiated evidence of a non-enabling working environment in the OSI team, described as a pressurized working environment, facing challenging working relationships and dynamics within the team;

[14] We found substantiated evidence that staff members with supervisory and/or managerial responsibilities did not act as role models nor did they set an appropriate 'Tone at the Top' or participate in open dialogue, as per evidence provided and interviews conducted."

Firstly, the Tribunal notes that count 3 contained in the disciplinary decision only charges the complainant with "[...] irregularities related to your duty travels, recorded absences and travel requests and related to the travels of your supervisee Ms [B.], while she was under your direct supervision; and you colluded with Ms [B.] to arrange irregular travels".

Neither count 3 nor the other counts of the disciplinary decision rely upon the findings listed in bullet points 13 and 14 of section 5.1.1.5 of the investigation report, which, in turn, make reference to a disagreeable working environment in the OSI team. There is no charge against the complainant in this respect.

Secondly, the Tribunal notes that none of the fourteen bullet points contained in section 5.1.1.5 of the investigation report make reference to the travel ceiling and to the secrecy maintained with regard to

Ms B.'s travels. Thus, the arguments raised by the complainant in this respect are immaterial, and will not be addressed by the Tribunal.

Thirdly, the Tribunal notes that the complainant does not advance specific arguments in relation to the findings contained in bullet points 6, 8 and 10 of section 5.1.1.5.

In light of the foregoing, the Tribunal will now address the complainant's arguments which contest the findings described in bullet points 1, 2, 3, 4, 5, 7, 9, 11 and 12 of section 5.1.1.5.

Firstly, the Tribunal notes that there is no evidence in the file of the complainant's assumption that the investigators did not rely on the UNAIDS 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.

It is useful to recall that the investigators reviewed, gathered and assessed the following evidence:

– documentary evidence, namely emails of the complainant and other staff of his team, the complainant's travel statistics, the complainant's absence dashboard records, information provided to the investigators by the Finance and Accountability Department; and
– interviews of the witnesses Ms Hi., Ms Me., Mr Ma., and Ms Na.

As to the trip to Dakar from 4 to 7 October 2015 (bullet point 1 above), for which the investigators found that no travel request was submitted and that two days of duty travel were not recorded as such in the complainant's absence dashboard and left as blank, the complainant objects that there was no trip to Dakar from 4 to 7 October 2015. He asserts that during those days he was in Divonne-les-Bains. He provides the Tribunal with a photograph apparently taken with a mobile phone, indicating the place and the date as Divonne-les-Bains on 4 October 2015 at 11:44 a.m. The Tribunal notes that it is not its role to assess fresh evidence, not previously examined by the investigators. Moreover, the complainant should have offered this evidence to the investigators. Since the investigators were never provided with this evidence, and,

thus, could never assess it, it cannot be established that there is a legal flaw in the investigation in this respect.

As to the finding indicated in bullet point 2 above, that the complainant's trips to London and Addis Ababa, in October 2015 were not submitted ten days before the trips were to occur, the complainant objects that it is only a recommendation that duty travels should be planned well in advance. He contends that authorizing a last-minute trip through the procedure of "travel exceptions" is allowed. The Tribunal notes that, whilst it is undisputable that last-minute trips may be cleared, nonetheless it should be demonstrated that submitting a travel request in advance was not feasible. In the present case, there is no evidence of plausible reasons, which impeded the complainant from seeking clearance ten days before the date of departure, in compliance with the Travel Policy.

As to the finding indicated in bullet point 3 above, concerning his trip to Dakar from 14 to 19 November 2015, the complainant objects that this trip was duly cleared, and provides the Tribunal with the boarding passes of the flights. More generally, he notes that the fact that a travel authorization reflects dates other than those of the actual travel that occurred, is "normal", as staff are sometimes required to raise a travel authorization with alternate days, but this is corrected in the UNAIDS electronic system after the trip, through the travel claim process. The Tribunal notes that the investigators do not contest that the trip to Dakar from 14 to 19 November 2015 took place and was cleared. The issue was that the complainant's travel statistics record a trip until 18 November 2015, whilst one additional day was recorded as duty travel in his absence dashboard for the trip to Dakar from 14 to 19 November 2015. This finding cannot be put in issue by the boarding passes provided by the complainant, as they are in the context of this case inadmissible fresh evidence never submitted to the investigators and to the GBA.

As to the finding indicated in bullet point 4 above, concerning his trip to Addis Ababa from 28 January to 5 February 2016, the complainant objects that this trip was cleared and actually took place, and he provides the Tribunal with tickets and boarding passes. This finding

cannot be put in issue by the tickets and boarding passes provided by the complainant, as they are in the context of this case inadmissible fresh evidence never submitted to the investigators and to the GBA. The Tribunal notes that the investigators did not dispute that this travel actually took place. They rather considered it a breach of the Travel Policy that the complainant's absence was recorded in the absence dashboard as duty travel from 28 January to 5 February 2016, but at the same time the UNAIDS electronic system indicates that the travel request was cancelled. In any event, even if this finding were wrong, a single mistake by the investigators would not affect the lawfulness of the charge of irregularities in duty travels, grounded on numerous additional elements.

As to the finding indicated in bullet point 5 above, concerning his trip to Abidjan from 14 to 17 February 2016, the complainant objects that the Abidjan trip was cancelled, as was often the case and fraud was virtually impossible, because when a trip is cancelled tickets cannot be issued and no DSA is paid. He adds that if a DSA has already been paid, it is deducted from the staff member's salary automatically. The complainant's comments are beside the point. The investigators did not dispute that the trip to Abidjan was cancelled, but that, nonetheless, in his absence dashboard the days from 14 to 17 February 2016 are recorded as duty travel. It is immaterial that fraud was impossible, because the complainant is not charged with fraud in this respect, but with travel irregularities. It remains unexplained why the complainant was absent from work for duty travel, considering that the travel was cancelled.

The findings indicated in bullet points 7, 9, 11 and 12, concern the travels of the complainant's supervisee. The complainant objects that he cannot be held responsible for the private trips of his supervisee, Ms B., to Paris and London, whilst the fact that she flew to Johannesburg in business class at her own expense does not amount to breach of the travel rules. He recalls that in an email he advised Ms B. not to travel in business class.

The Tribunal notes that the finding that Ms B.'s flight to Johannesburg in business class breached the Travel Policy might be incorrect, as it appears that this flight was not paid for by UNAIDS, although it is unclear who paid for it. This is, in any case, a minor flaw, which does not affect the outcome of the case, as all the other findings of irregularities concerning Ms B.'s travels are well founded. The complainant, in his capacity as Ms B.'s supervisor, was aware of the irregularities, and he did not prevent them, nor did he report them to UNAIDS.

The investigators' findings of travel irregularities concerning Ms B. focused on three specific episodes and rested on the following conclusions:

– a trip to Johannesburg in November 2015, for which no leave was registered in Ms B.'s absence dashboard and for which she had no travel clearance;

– a trip to Dakar in November 2015, for which Ms B. did not raise a travel request in November 2015, and for which her request for insurance purposes only was not timely submitted; no absences were recorded in her absence dashboard; and despite not having been authorized to travel, she nevertheless officially represented the Organization;

– a trip to Harare in November and December 2015 for which Ms B.'s travel request was not withdrawn after the disapproval of the then Deputy Executive Director, Programme Branch. Ms B. travelled to Harare and the complainant, in his capacity as Ms B.'s supervisor did not clear the trip (even though the trip was paid by an external organization). Ms B.'s trip was recorded as duty travel even in the absence of such approval. Ms B. 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.

As to Ms B.'s trips to Paris and London, the investigators found that, in one case, her absence was unauthorized and, in another case, she travelled abroad whilst she was on sick leave. Thus, the complainant cannot contend that he cannot be held responsible for the private trips of his supervisee, considering that they were together on both trips, and

that in his capacity as her supervisor, he should have known, impeded and reported Ms B.'s unauthorized absences and her travel during sick leave.

The Tribunal adds that Judgment 4858, delivered in public on the same day as the present judgment, concerning Ms B.'s summary dismissal, found that the travel irregularities Ms B. was charged with, relied on persuasive evidence. As a result, the complainant, as Ms B.'s supervisor at the material time, is also responsible for these irregularities.

The Tribunal is satisfied that the Organization correctly viewed the episodes above, concerning the complainant's duty travels and the travels of his supervisee, not as mere discrepancies, but as violations of his duties 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, 2015: "Staff members traveling [...] are responsible for adherence to the travel policy"). Thus, any attempt, on the part of the complainant, to downgrade his non-compliance to mere irregularities, or to consider other staff responsible for the irregularities, is untenable.

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 his travel documentation and leave records might disprove the charge against him. His alternative explanation concerning the operation of the UNAIDS electronic system used to register duty travel and of the system used to record personal leave, is unconvincing. The existence of two separate systems and the need to synchronize them might explain discrepancies at the stage of the planning or of the cancellation of a trip, but it cannot explain why discrepancies persist even a considerable time after a trip has been concluded or cancelled, as in the present case. Moreover, the evidence

in the file (namely the emails exchanged between the complainant, Ms B. and other staff) shows that:

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

As to the complainant's allegation that the investigators failed to interview the personnel in charge of travel procedures at the material time, the Tribunal notes that the investigators interviewed four people about the duty travel issues. Not only did they interview Ms Na., who at the material time was in the complainant's team and was in charge of the logistics of his duty travels, they also interviewed Mr Ma. (Director of the Office of the DXD), who, at the material time, had received from the former DXD delegated authority for clearing travels. Thus, the contention that Mr Ma. was not an expert or competent for travel procedures is a mere assumption. The investigators also interviewed the staff members Ms Hi. and Ms Me.

The argument related to the conclusion of the GBA is unfounded. The GBA correctly concluded that the complainant's conduct was aimed at circumventing the conditions attached to travel requirements. The GBA's further observation that at the material time there was "no institutional procedure that prevented the [complainant] from undertaking this travel" does not absolve him from the duty to comply with the Travel Policy, even if there were no preventive mechanisms, which might impede him from travelling in case of non-compliance with the said Policy. The GBA remarked on this weakness in the system in order to recommend that the Organization take action for the future to correct such weakness.

In conclusion, the disciplinary decision and the impugned decision, in relation to the charge of travel irregularities, irrespective of minor errors, did not overlook essential facts nor draw mistaken conclusions from the facts.

20. In his fifth 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 supervisee Ms [B.] but did not disclose this personal relationship. As a consequence of this personal relationship, your private interests conflicted with UNAIDS interests [...]"

He asserts that according to the WHO Code of Ethics and Professional Conduct, consensual intimate relationships between colleagues are acceptable. He informed his colleagues and the "administration" of the relationship, and, as a result, his supervisee Ms B. was transferred to another unit. He insists that it cannot be denied that he duly and promptly informed the Organization. He adds that since the Organization had already adopted the decision to transfer his supervisee, Ms B., to another unit, the Organization was not allowed to sanction him 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.

He was the direct supervisor of Ms B. from 17 November 2014 to 12 April 2016. Most relevantly, on 1 June 2015, Ms B. 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. Ms B., even in this new position, was supervised by the complainant, in his capacity as Chief, Global Outreach and Special Initiatives. The evidence in the file reveals that the intimate relationship between the complainant and Ms B. dates back at least to May 2015. Thus, the complainant should have informed the Organization of his intimate relationship at least as of June 2015, when he became the supervisor of Ms B. in relation to her new position. He 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 Ms B. spread throughout the Organization after the reception of the anonymous emails of February and April 2016, and that, soon after, Ms B. was temporarily reassigned to a new post, under a different supervisor, as from 13 April 2016. The complainant insists that the reassignment of Ms B. took place after he and Ms B. had informed the Organization of their 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, he did inform the Organization. Indeed, the 13 April 2016 reassignment decision, addressed to Ms B., 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 he 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 his 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 his 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 Ms B. was an open secret. That knowledge by hearsay was not tantamount to formal acknowledgment and would not have absolved the complainant of his 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 his supervisee Ms B. to another unit was not a sanction for the failure to disclose his intimate relationship. He has been sanctioned only once, thus there was no infringement of the double jeopardy rule. Additionally, the fact that the Organization transferred Ms B. 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 his sixth 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 Ms [B.], while on duty for UNAIDS and during working hours [...]"

He contends that the investigation report concluded that there was no substantiated evidence that the complainant took unauthorized absences with his direct line supervisee for the purpose of private encounters while being on UNAIDS official duty. Nonetheless, he was charged in this respect.

This plea is unfounded.

The evidence in the file (emails exchanged between the complainant and Ms B. and between the complainant and his staff; and the complainant's absence dashboard) shows that, on 5 January 2016, the complainant and Ms B. agreed to a private encounter at the I. Hotel in Geneva. Accordingly, the complainant informed his staff by a 5 January 2016 email that in the morning he had "offsite meetings". The investigators also found that no leave was registered in the complainant's absence dashboard. The investigators concluded that there was "suggested evidence", even though not "substantiated evidence" of unauthorized absence on 5 January 2016 for private purposes. In such circumstances, it was open to the Organization to assess that the evidence in the file substantiated the charge of unauthorized absence on one occasion. There are significant clues in this respect, and the complainant simply denies that the evidence is persuasive but does not provide the Tribunal with counterevidence that he was in the office on 5 January 2016 or that his absence was authorized, or at least justified.

22. In his seventh plea, the complainant challenges count 6 contained in the disciplinary decision. Count 6 reads as follows:

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

In his view, there is no proof, let alone proof beyond reasonable doubt. The investigation report relies on emails exchanged between the complainant and Ms B., and this calls into question the reliability and

admissibility of the entire investigation process. He reiterates the argument, already addressed and rejected by the Tribunal, that the external investigators have not exercised their 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, as based on private email exchanges, this issue will be addressed by the Tribunal in consideration 23 below.

23. In his eighth plea, the complainant challenges counts 2 and 7, contained in the disciplinary decision. Counts 2 and 7 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;
>
> [...]"

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

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

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

Secondly, he submits that any improper emails attributed to him were retrieved from the UNAIDS IT server by violating the confidentiality of his private communications. He notes that:

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

With regard to the second issue, concerning the misuse of UNAIDS resources, he contends that:

– private use of the office email account is allowed, within certain limits, which he did not overstep;
– there is neither proof that his intimate communications affected his 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 his 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 emails 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 standards".

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 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 used by staff (the information and

communication systems is defined in section XIV.1.1, paragraph 70, as including "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 light of the above rules, the duty to respect the confidentiality of 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 the complainant:

> "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.

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 communication systems, referred to in 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 "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". 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 his 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 his 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", as it "was not kept to a minimum". 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 his supervisee, 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 his work performance was not specifically charged by the Organization to the complainant. In addition, the complainant's contention that his personal use of his office email account did not affect his work performance has not been demonstrated by the complainant. The complainant's personal emails in the file demonstrate, to the Tribunal's satisfaction, that he sent a significant number of messages and attachments with intimate content by using his 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 was it 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 his private communications with a fellow staff member pertained to his private life, and, as such, they could not be "subject to additional and arbitrary 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 his private life was subject to an "additional arbitrary standard". The only ethical standard applied by the Organization was the one concerning the private use of UNAIDS resources and working hours. The reference to the intimate content of the email exchanges

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 resources.

Reference to the Organization's reputation was 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.

24. In his ninth plea, the complainant challenges count 8 contained in the disciplinary decision. Count 8 reads as follows:

> "Your behaviour did not comply with UNAIDS rules and procedures, as well as expected professional behaviour [...]"

The complainant refers to section 5.2.4 of the investigation report, where the external investigators stated that they asked two witnesses whether they suspected any misuse of UNAIDS assets by the complainant. These witnesses raised further allegations that pertained to periods outside the scope of the investigation. Three additional witnesses were also asked about these allegations but they had no idea or information about the matter. The external investigators concluded

that "because of lack of information [they] cannot establish the facts". Although having no information nor facts, the investigators still concluded that the complainant "did not comply with UNAIDS rules and procedures, as well as expected professional behaviour" (see section 5.2.5). Thus, the complainant submits arguments in order to disprove this allegation of further misconduct. With regard to the episode concerning British Columbia's contribution, which was reduced by approximately 20,000 Canadian dollars (CAD), the complainant objects that the deduction was not made for "his dinners and other private purposes" as the witness, Mr F., had initially said. It was made, as later Mr F. himself clarified, because the donor paid upfront for some of the activities and wanted these to be recognized as part of their contribution. With regard to the episode concerning a team retreat organized by the complainant in a hotel in Montreux, Switzerland, the complainant objects that the investigators acknowledged that they had no sufficient elements to establish the facts.

This plea is in part irreceivable and in part unfounded.

The Tribunal notes that the episode concerning the organization of a team retreat was not assessed by the investigators, and therefore was outside the scope of the letter of charges and of the disciplinary decision, which rely only on the facts of which the investigators found "substantiated evidence". Thus, in the absence of a charge of misconduct in this respect, the complainant's allegations are immaterial, and will not be addressed by the Tribunal.

As to the episode concerning the contribution of a donor, the Tribunal notes that, contrary to the complainant's allegation, the investigators found corroborated evidence of misconduct. They also suggested that the Organization enlarge the period under investigation, but the Organization chose not to, and finalized the disciplinary proceedings on the basis of the evidence in the file. The evidence in the file shows that:

– the memorandum of understanding (MoU) initially agreed between UNAIDS and the donor provided for a contribution of 270,000 CAD, to be paid in three parts;

– when requested to pay the third part of 90,000 CAD, the donor sent a cheque of 69,142.98 CAD rather than the expected 90,000 CAD; and
– it was necessary to sign an amendment to the initial MoU, in order to reduce the contribution from 270,000 CAD to 249,143 CAD. The total amount was reduced by 20,857 CAD.

The witness, Mr F., initially said that the amount of 20,857 CAD had been withheld by the donor in order to cover "dinners and other personal purposes" of the complainant. Later, he corrected this statement by saying and documenting that the donor decided to deduct that amount from the contribution "as they paid upfront for some of the [...] activities and wanted these to be recognized as part of their contribution [...] [the donor] responded that these actions were done based on the request of [the complainant]".

The Tribunal notes that, even if the fact that the deduction from the contribution was made to cover personal expenses of the complainant remained unproven, in any case the deduction was made to cover some activities, by request of the complainant, and without the Organization being informed in advance. There is no evidence that such a request from the complainant to the donor was authorized or, at least, known in advance by the Organization. Thus, the Tribunal is satisfied with the Organization's conclusion that this behaviour, even if it did not amount to misuse of funds, amounted to non-compliance with UNAIDS rules and procedures and to unprofessional conduct.

25. In his plea 3(xii), the complainant challenges the charge of refusal to cooperate with the investigation and contends that the Organization breached his right against self-incrimination. He 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 Administrative Tribunal (UNAdT) Judgment 1246. In his view, it was an affront to ask him to participate in a process moving contrary to his interests, particularly given the retaliatory nature of the disciplinary action and considering that the Organization had failed to inform him

of the commencement of that process, leaked the allegations against him to the PCB and to the press, and failed to provide him 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 him. The file contains persuasive evidence that the complainant infringed his duty to cooperate, by refusing to be interviewed and by attempting to obstruct the conclusion of the proceedings. Namely:

– he never replied to the external investigator's invitation, sent to him by an email of 19 September 2019, to participate in an interview;

– he did not reply to a number of further emails, sent to him by the external investigators between 19 and 26 September 2019;

– by a letter of 7 November 2019, he declined two further invitations from the Director of HRM sent on 27 September 2019 and on 6 November 2019, asserting that he could not agree to be interviewed "unless and until he ha[d] been provided with the names of his accusers, and also with all evidence UNAIDS ha[d] which gave rise to the investigation of which he [was] the target, in particular the actual complaint(s) against him as well as any evidence in UNAIDS"; and
– by email dated 13 November 2019, HRM reiterated the complainant's obligation to cooperate, noting that he was not on certified sick leave.

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

26. In his plea 3(xiv) and in his rejoinder, the complainant reiterates some arguments already advanced in other pleas, concerning the alleged retaliatory conduct of Mr Lo. and the leak of the investigation to the press as a further element of the retaliation against him. In the present plea, he contends that both the disciplinary proceedings and the impugned decision were retaliatory and adds other elements of the alleged pattern of retaliation. He recalls his complaint of harassment lodged on 3 November 2016 and adds that the retaliation included repeated and intentional efforts to restrict his work, abuse of power in preventing the complainant's team from performing effectively, reducing the number of staff available to the complainant with disregard for organisational commitments, rejection of resources, and deliberate attempts to defame the complainant and destroy his reputation. In his rejoinder, he reiterates that the manner in which the disciplinary proceedings were carried out demonstrates its retaliatory nature. In addition, he mentions, as a further element of the retaliation, the decision to withhold his salary for September and October 2019.

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 both the sexual harassment complaint lodged by Ms B. and the harassment complaint lodged by the complainant on 3 November 2016. As to the further steps of the disciplinary proceedings, which took place after the lodging of the two harassment complaints (by Ms B. and by the complainant), on one hand, they were the prosecution of an action taken before the lodging of the harassment complaints. 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.

In conclusion, since the complainant does not establish retaliation, his claim in that respect is rejected.

As to the alleged institutional harassment against the complainant, the Tribunal notes that no final decisions with regard to his harassment grievances have, to date, been impugned before the Tribunal. Without prejudice to any potential future complaints against such decisions, in respect to acts outside the scope of the present complaint, the Tribunal considers that the investigation into his alleged misconduct was initiated in February 2016, well before he lodged his harassment complaints, the first one on 3 November 2016 against Mr Lo., and the second one on 5 June 2018 against Mr Si.

The disciplinary action had an objective justification and neither the disciplinary proceedings nor its outcome can be considered retaliatory in nature. The chronology of the events confirms such a conclusion. Indeed, the decisions under review were taken several months after the departure of the former management members. The former Deputy Executive Director, Programme Branch, 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.

As to the text messages quoted in the complainant's 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.

The Tribunal has already stated that there is no evidence that the Organization can be held liable for leaking the news of the investigation and, thus, the leak cannot be construed as an act or an element of the alleged retaliation.

As to the decision to withhold the complainant's salary for September and October 2019, such decision is the subject matter of the complainant's fourth complaint. The latter was dismissed by Judgment 4864 delivered in public on the same day as the present judgment, which did not accept the contention that such decision was retaliatory.

27. After consideration of the complainant's pleas from 3-bis to 9, and of his 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 to say beyond reasonable doubt. Thus, his contention that he 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. He 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 his service with the Organization;

(iv) his 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. against him and Ms B.; and

(vi) the pattern of the institutional harassment he has endured after having participated in the harassment complaint lodged by Ms B. as a witness.

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, his seniority, and his 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 he 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 23 above). The complainant's lengthy service with UNAIDS and his 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 Ms B.'s harassment complaint found, to a certain extent, that Mr Lo. had an improper behaviour, this does not imply that the disciplinary action was retaliatory, for the reasons already stated, and, thus, Mr Lo.'s conduct cannot serve as a mitigating factor. Without prejudice to the outcome of any potential future complaints concerning the harassment allegedly suffered by the complainant, outside the scope of the present

complaint, his summary dismissal was justified by objective reasons and it is not proven that it was retaliatory in nature or that it formed part of 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 his actions, his seniority and his 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 his claims are rejected and his 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