

ORGANISATION
FOR ECONOMIC
CO-OPERATION
AND DEVELOPMENT



ORGANISATION DE
COOPÉRATION ET
DE DÉVELOPPEMENT
ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 26 April 2022

JUDGEMENT IN CASE No. 100

AA

v.

Secretary-General

JUDGMENT IN CASE No. 100 OF THE ADMINISTRATIVE TRIBUNAL

Hearing on 6 April 2022
In Château de la Muette,
2 rue André-Pascal à Paris

The Administrative Tribunal consisted of :

Mrs. Louise OTIS, Chair

Mr. Pierre-François RACINE

And Mr. Chris DE COOKER

with Mr. Nicolas FERRE and Mr. David DRYSDALE providing Registry services.

The Tribunal heard

Mr. Matthieu RAGOT and Mrs. Rafaela CHOIRY, counsels of the Applicant;

Mrs. Diana BENOIT, Head of General Legal Affairs Division and Mr. Auguste NGANGA-MALONGA, Senior Legal Advisor of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General;

Mr. Jeremy MADDISON, President of the Staff Association.

Mr BB and Ms AA

I. INTRODUCTION

1. In her application for annulment and compensation lodged with the Registry on 30 April 2021, the applicant, Ms. AA (hereinafter “Ms. AA”), challenges the Secretary-General’s decision of 29 January 2021 to follow the opinion of the Joint Advisory Board (hereinafter “JAB”), rejecting the applicant’s prior request of 17 January 2020 confirming the challenged decision dated 24 October 2019 concerning the claims of sexual harassment, abuse of power and inappropriate managerial behaviour brought against her former line manager, Mr. BB, who has since left the Organisation.
2. She asks the Tribunal to annul the Decision dated 29 January 2021 and to set aside the Investigation Report (hereinafter “Report”). The applicant also asks to be awarded compensation of 150 000 € for moral and material damages as well as a compensation of 5 000 € for the lack of diligence in the handling of the formal complaint, in conducting the investigation and in the handling of the request for referral to the JAB and 8 500 € in legal costs.
3. The Secretary-General (hereinafter “The Organisation”) submitted his comments in response on 5 July 2021.
4. Ms. AA submitted a reply on 5 October 2021.
5. An application for an extension of the time limit for the Organisation to present its comments in rejoinder was made on 9 November 2021. This application was granted by the Chair of the Tribunal, who extended the time limit to 3 December 2021.
6. The Staff Association submitted a statement of intervention on 20 September 2021.
7. As per Article 5 b) of the Resolution of the Council on the Statute and operation of the Administrative Tribunal,¹ the Chair of the Tribunal authorised the production

¹ Annex III, Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation, March 2020.

of Mr. BB's written statement and gave the applicant permission to present a testimony or written report in reply to that of Mr. BB.

8. Mr. BB submitted a written statement on 1 November 2021.
9. Ms. AA submitted a response to Mr. BB's written statement on 1 December 2021.
10. The Organisation submitted its comments in rejoinder on 3 December 2021.
11. All the documents cited and produced by the applicant (annexes) bear the reference letter **R**, whereas those cited and produced in defence by the Organisation bear the reference letter **O**.
12. The application hearing was held on 6 April 2022. Counsels for Ms. AA, the Organisation and the Staff Association were heard.
13. The Tribunal heard Ms. IB, former Deputy Head of HRM, Mr. BB and Ms. AA.

II. FACTUAL BACKGROUND

14. Ms. AA, a former official of the Organisation which she left on the 17 July 2020 on the expiry of her fixed-term appointment, requests that the decision dated 29 January 2021 of the Secretary-General, which endorses the opinion of the Joint Advisory Board (JAB) rejecting her complaint of sexual harassment, abuse of power and inappropriate managerial behaviour be annulled, and that compensation be awarded for the prejudice she incurred.
15. Ms. AA was a temporary staff member of EXD/HRM/CSG under two consecutive contracts from 25 January 2017 until 17 July 2017 before being appointed as a grade B3 staff in the same service from 18 July 2017 until 12 November 2018.
16. On 13 November 2018 she was transferred to the TMA service under the authority of a new line manager, Mr. BB.
17. Only a few weeks after starting her new appointment, Ms. AA explains noticing a shift in Mr. BB's behaviour towards her which she describes as inappropriate and amounting to sexual harassment.

18. In particular, Ms. AA submitted as evidence several emails and Skype for Business instant messages whose existence and content are not contested in support of her claim of sexual harassment, in addition to verbal comments.
- a. In an email dated 22 January 2019, Mr. BB refers to an actress as a “gorgeous woman”;
 - b. In a Skype for Business instant message dated 23 January 2019, Mr. BB referred to the applicant’s appearance using the following terms: “Snowing lots here... Ground looks like you”;
 - c. In a Skype for Business instant message dated 4 February 2019, referring again to her appearance, Ms. BB writes: “... it should be included in your annual objective [] wear something very bright”;
 - d. In an email dated 14 February 2019, after the applicant informed Mr. BB that she would be on sick leave, Mr. BB answered: “I will be waiting, hopefully from the office...”;
 - e. In a Skype for Business instant messages of Sunday 24 February 2019 and sent around 10.25 pm, Mr. BB wrote to Ms. AA, after noticing that she was online, that she “should have just opened a bottle of wine” and referred to her as a “popular girl”, adding: “Don’t be too popular”;
 - f. In a Skype for Business instant message dated 25 February 2019, while talking about bottles of wine that Mr. BB had asked the applicant to bring back from Hungary, Mr. BB described one of the bottles as being “sexier” than the other one and added that it is a “pity that i can’t share with you but they are very good wines”. After the applicant replied “ok – let me know if they are good and next time I’ll invest”, Mr. BB answered: “ah yes, you can share it with me”. On the same day, Mr. BB invited her for lunch or dinner: “let me take you out to lunch or dinner before you go to Japan”. Still on 25 February 2019, while discussing reimbursement of Ms. AA for the difference in price for the bottles of wine, Mr. BB wrote: “dont be silly. no changes [...]

just buy me a drink one day”. After Ms. AA mentioned that she cannot drink, Mr. BB wrote: “child”;

- g. In a Skype for Business instant message dated 26 February 2019, while discussing taking Ms. AA for lunch, Mr. BB referred to drinking alcohol: “like I like wines but you don’t so...”;
- h. In a Skype for Business instant message dated 4 March 2019, Mr. BB, while discussing the fact that Ms. AA is not her assistant, wrote: “as an assistant, i tend to agree your value is different”;
- i. In a Skype for Business instant message dated 6 March 2019, Mr. BB wrote to Ms. AA: “and please don’t be bossy with me. i’m very sensitive” in the context of Ms. AA’s 2018 performance evaluation;
- j. In a Skype for Business instant message dated 11 March 2019, Mr. BB wrote, in the context of a discussion about OECD outreach events in Asia and Hungary, “you work, i smile [...] smile is important part of work”. On the same day, in the context of a discussion about pictures to be used in a presentation, the following discussion took place:

Mr. BB: “so we can use your pics for Prezi as well?”

Ms. AA: “my pix? = Audrey’s pix”

Mr. BB: “I mean pictures you are in it”

Ms. AA: “sadly I went to direct them but a girl had to leave so they asked me to keep gender balance”

Mr. BB: “don’t be modest, some looks good [] some looks grumpy but think we can use it effectively”

Ms. AA: “I’ll use ones without me in them”

Mr. BB: “nope”

Ms. AA: “otherwise it’s weird”

Mr. BB: “i should decide”

Ms. AA: “!”

Mr. BB: “it’s my show.....”

Ms. AA: “alright”

Mr. BB: “i need favourite pix in my slide or get very nervous”

- k. In a Skype for Business instant message dated 11 March 2019, Mr. BB wrote: “if i move to vienna, i might offer you a job then” and after Ms. AA explained that a University was moving to Vienna, Mr. BB wrote: “just like

us then”. On the same day, Mr. BB referred to himself as: “being a big boss and all” and invited Ms. AA to go hiking: “we should go to hiking”.

19. In early March, the TMA Advisor, Mr. NS, became aware of the unfolding situation and Ms. AA had also spoken to her TMA colleague, Ms. GMS, about her interactions with Mr. BB. In addition, Ms. AA had an informal meeting with a HRM junior advisor, Ms. NT, on 14 March 2019. During that meeting, Ms. AA provided information to Ms. NT about the exchanges that had taken place between herself and Mr. BB and expressed her concerns and the unease caused by Mr. BB’s behaviour towards her.
20. Despite information about the ongoing exchanges between Ms. AA and Mr. BB being shared with individuals, no actions were taken by HRM. Instead, Ms. NT, who had a close relationship with Mr. BB, reported the content of the discussion that she had with Ms. AA the same day, on 14 March 2019, to Mr. BB which marked the beginning of a sudden change in Mr. BB’s behaviour. Mr. BB’s change of behaviour led to the isolation of Ms. AA in the workplace as well as her removal from work projects and general exclusion from important professional duties and opportunities.
21. Ms. AA went on annual leave from 18 March 2019 until 31 March 2019.
22. The HRM Management Review Group conducted a “People Review” on 7 and 11 March 2019 during which a one-year extension of the applicant’s contract was discussed as well as an incident involving her with respect to a breach of confidentiality by the latter in the context of a recruitment process.
23. Ms. AA met with a legal advisor of the Staff Association on 3 April 2019 to discuss the aforementioned events which was followed, on 5 April 2019, by a meeting with the Deputy Head of HRM. The confidentiality incident was addressed during this meeting, in addition to her intention to bring a complaint against Mr. BB.
24. Series of exchanges and meetings took place between 8 April 2019 and 23 April 2019 involving the Head and Deputy Head of HRM and, respectively, Ms. AA

and Mr. BB leading to a warning letter being delivered to Mr. BB by the Executive Director on 23 April 2019.

25. On 24 April 2019, Ms. AA filed a formal complaint in which she reported sexual harassment, abuse of power and inappropriate managerial conduct against her by her line manager, Mr. BB.
26. Ms. AA was placed on sick leave from 24 April 2019 until 3 May 2019.
27. On 7 May 2019 the Deputy Head of HRM informed Ms. AA of the opening of a formal investigation which was conducted until October 2019. The opening of the investigation was further confirmed by the Executive Director in an email dated 6 June 2019.
28. On 9 May 2019, Ms. AA was informed of the renewal of her fixed term appointment from 18 July 2019 until 17 July 2020, which she accepted.
29. She was placed on sick leave between July and September 2019.
30. Upon receipt of the Investigation Report on 27 September 2019, the Executive Director shared the Memorandum disclosing the conclusions of the investigation with Ms. AA on 24 October 2019 and a redacted version of the Report was delivered to her on 31 October 2019.
31. Ms. AA transferred to the EXD/DKI service as of 14 November 2019.
32. On 17 January 2020, Ms. AA submitted a request for referral to the JAB requesting that the Report of 24 October 2019 be declared illegal and/or inequitable as well as compensation for the moral and financial prejudice suffered. In the request for referral as well as in two subsequent emails to the acting Head of HRM dated 4 February 2020 and 14 February 2020, she requested that an unredacted copy of the Report be provided.
33. The unredacted Report was provided to Ms. AA on 19 February 2020. On the same day, the Chair of the JAB established the deadline for Ms. AA to produce her legal brief to the 1st of March 2020. This deadline was later postponed to the 2nd of March 2020.

34. The JAB issued its Opinion (hereinafter “Opinion”) on 15 of December 2020 (and provided it to the Organisation on 7 January 2021), rejecting Ms. AA’s claim.
35. The JAB’s Opinion was subsequently upheld by the Secretary-General in his Decision of 29 January 2021.
36. The Secretary-General’s Decision of 29 January 2021 was communicated to Ms. AA by email on 2 February 2021.

III. THE CONTESTED INVESTIGATOR’S REPORT, JAB OPINION AND SECRETARY-GENERAL’S DECISION

A. The Investigator’s Report

37. Following the opening of a formal investigation, an investigation was conducted until October 2019 by the Investigator.
38. The investigation involved three interviews of Ms. AA and three interviews of Mr. BB as well as the interview of eleven witnesses selected among lists of individuals proposed by Ms. AA and Mr. BB.
39. The Investigator submitted her Investigation Report to HRM on 27 September 2019 .The Fact-Finding Investigation Report concludes that:

7.1. As a manager and Head of Division, it would be Mr. [BB]’s responsibility to ensure that there is no room for misinterpretation about the nature of the working relationship with his team members. Based on the findings of this investigation, it is the opinion of this investigator that the content of some of his communications with Ms. [AA], a junior official in his team, leave room for misinterpretation and were inappropriate. The findings also show that Mr. [BB]’s communication style is such that on occasion he makes statements that have the potential of being perceived as offensive or hurtful, and that he made a few such statements towards Ms. [AA]. Consistent with paragraph 32 of the Code of Conduct, Mr. [BB] should have been more aware that statements or actions that he might not have intended to be taken by Ms. [AA] negatively or offensively might nevertheless have been taken that way.

7.2. Mr. [BB]’s reaction in cancelling the scheduled lunch with Ms. [AA] without explaining his reasons for doing so, his limited communication with her upon her return from annual leave at the beginning of April 2019, and his decision to take another colleague on a mission to Korea when Ms. [AA]

had been expecting to go without having discussing it with her was a reaction to his belief that Ms. [AA] was accusing him of sexual misconduct. His actions in this regard were nonetheless ill-judged because they contributed to creating an insecure work environment for Ms. [AA]. The change in Mr. [BB] behaviour towards Ms. [AA] was, however, not the only contributing factor to Ms. [AA]'s sense of job insecurity. Prior to learning of Ms. [AA]'s concerns with Mr. [BB]'s behaviour, HR Management informed her that a concern had been raised with respect to her actions on a matter that had occurred before she transferred to TMA. Ms. [AA] believed that the timing of this matter was connected to her raising concerns about Mr. [BB]'s behaviour towards her. The findings show otherwise. Ms. [AA] nonetheless believed she would not be adequately protected by HR Management and that her contract would not be extend. She filed a formal complaint in part understanding that it would help to secure an extension to her contract.

7.3. Ms. [AA]'s allegations that Mr. [BB] had sexually harassed and abused his authority over her are not, in the opinion of this investigator, established by the evidence. In particular, viewed in context, Mr. [BB]'s written communications do not show that he was attempting to elicit sexual favours as a condition of employment, nor do his actions show that he had attempted to negatively influence Ms. [AA]'s career. The evidence shows that he had been supportive of the extension of her contract, and that the actions which Ms. [AA] perceived as “punishment” towards her for not acquiescing to him were a reaction to him having learnt that he was being accused of sexual misconduct. Additionally, the testimonies of witnesses do not support Ms. [AA]'s assertion that Mr. [BB] has a “pattern of harassment” as she alleged in the course of this investigation. [Emphasis added].

B. The JAB Opinion

40. The JAB, established under Staff Regulation 22 is composed of seven (7) members in accordance with Staff Instruction 122/1: a Chairman chosen by the Secretary-General from a list of six (6) persons proposed by the Staff Association, three (3) officials appointed by the Secretary-General and three (3) officials designated by the Staff Association.

41. Ms. AA's submitted a request for referral to the JAB on 17 January 2020 requesting that the Report of 24 October 2019 be declared illegal and/or inequitable as well as compensation for the moral and financial prejudice suffered.

42. In her legal brief, Ms. AA argued that the Investigator had made a manifest error of appreciation in fact and law and that she had been treated unfairly.
43. Mr. BB produced his legal brief on 2 April 2020 and an oral hearing was held on 25 September 2020 before the JAB, after Ms. AA left the Organisation on 17 July 2020 when her contract ended. Mr. BB, the Deputy Head of HRM and Ms. NT were heard as witnesses during the oral hearing.
44. The JAB met on 25 September 2020 and 12 October 2020 and issued its Opinion on 15 December 2020 (and provided it to the Organisation on 7 January 2021), rejecting Ms. AA's claim. Section III of the JAB's Opinion provides:

Section III: On law and equity

A – On law

20. The Joint Advisory Board unanimously considered that the Organisation acted adequately when HRM was formally made aware of the allegations, that the Organisation was right to trigger an investigation and to follow the conclusions, and therefore that the decision of the Secretary-General to reject Ms. [AA]'s request was not contestable from a legal perspective.

B – On equity

21. The Board considered that sexual harassment and abuse of power were not constituted based on the evidence provided. It recognized that Mr. [BB]'s behaviour was inappropriate and that the measures taken by the Organisation towards the manager were appropriate and proportionate.

22. While it did not find inequity towards the claimant in the present case, the Board felt however that processes to deal with complaints of similar nature in the Human Resource Management Service should be improved, and such complaints be taken seriously and rigorously. In such processes, appearances of what is done count as much as what is done, and the processes could be clearer, and adapted. The JAB felt that strong recommendations were in order.

C - Conclusions.

1 – Following its meetings held on 25 September 2020 and 12 October 2020, the Joint Advisory Board unanimously rejected the claim.

2 – More generally, the Secretary-General should take all means necessary to ensure that the Organisation's Human Resource Management Service be sufficiently equipped to deal with cases that occur within its own staff in order to guarantee an efficient and effective complaints mechanism. More especially, the Secretary-General should make it an urgent priority to adopt concrete steps to ensure impartiality, to establish independent handling of

claims within HRM, to make ethics training mandatory for HRM staff to know how to deal with all internal division harassment claims, and lastly to ensure that all OECD Staff can trust and respect HRM to be ethical and impartial when handling all sensitive claims. Consulting with the Staff Association to coordinate on how best to achieve this important goal could be an adequate step. [Emphasis added].

C. The Secretary-General's Decision

45. Following receipt of the JAB's advisory opinion on 7 January 2021, the Secretary-General issued his Decision on 29 January 2021, upholding the findings of the JAB.

46. The Secretary-General's Decision of 29 January 2021, which was communicated to Ms. AA by email on 2 February 2021, provides, *inter alia*, that:

The JAB's unanimous opinion found no basis in law or equity to grant your requested relief. I have decided to follow this opinion and your claim is therefore denied. The JAB's additional recommendations of a general nature will be communicated to the Staff Association, as provided in Staff Instruction 122/1.10.

47. It is this Decision of 29 January 2021 that is challenged before this Tribunal by Ms. AA.

IV. THE PARTIES' ARGUMENTS

48. Ms. AA argues (1) that the investigation was not carried out in accordance with the applicable rules and principles; (2) that the Investigator's Report contains manifest errors and that contrary to the Report's conclusion, she was subject to sexual harassment and harassment more generally by Mr. BB; (3) that she endured retaliation and institutional harassment and (4) that the Organisation acted in breach of its duty of care.

49. Ms. AA first explains that the investigation was not carried out in accordance with the applicable rules and principles, and that the Investigator lacked independence. In this regard, Ms. AA observes that the Investigator was in a

conflict of interest because the latter, who has been appointed numerous times by the OECD to carry out investigations into allegations of harassment, is being selected by HRM and is asked to investigate a staff member of HRM while maintaining close ties with the Head and Deputy Head of HRM. In addition to the importance of ensuring that the Investigator is independent, Ms. AA highlights the importance of the perception of independence.

50. Ms. AA further explains that the Investigator displayed bias in the conduct of the investigation and breached her rights by demonstrating hostility towards her and refusing to interview all the witnesses which she suggested, such as the OECD Doctor, without justification. The Investigator further failed to investigate all of Ms. AA's allegations and did not provide her with the written account of the witnesses' interviews. The Investigator also heavily relied on the interviews of Ms. NT despite the latter being an unreliable witness because of her close relationship with Mr. BB and endorsed inaccurate allegations and unwarranted assumptions.
51. Regarding the argument that the Investigator's Report contains manifest errors, Ms. AA explains that in concluding to the absence of harassment and sexual harassment, the Investigator committed errors in the appreciation of facts by overlooking the volume and frequency of Mr. BB's messages as well as their timing and content.
52. Ms. AA further explains that she was subject to retaliation and institutional harassment after she started to express her concerns about Mr. BB's behaviour towards her. In particular, Ms. AA explains that Mr. BB stopped communicating with her and that she was removed from work-related projects. Furthermore, retaliation and institutional harassment took the form of a frivolous and vague allegation of a breach of confidentiality.
53. Finally, Ms. AA argues that the Organisation acted in breach of its duty of care and failed to ensure a safe and adequate environment by attempting to dissuade her from filing a formal complaint of sexual harassment against Mr. BB and by not being diligent in the handling of the investigation. Ms. AA also observes that the Organisation failed to protect her as a victim of sexual harassment which led

her to being stigmatised by her HRM colleagues. Finally, Ms. AA explains that her dignity was undermined and disrespected by the Organisation because of the facts that she never received an apology from HRM, that the Executive Director suggested that the situation was equally difficult for her and Mr. BB, and because of the JAB's erroneous statement according to which she had a "friendly relationship" with Mr. BB.

54. The Secretary-General starts by refuting Ms. AA's argument according to which the Investigator lacked independence. In this regard, the Secretary-General explains that investigators are selected using a roster system which helps ensuring that the investigators are professionals whose credentials have been vetted by the Organisation. In addition, the Secretary-General observes that no rules prohibit the use of the same investigator over time for more than one investigation.
55. The Secretary-General similarly refutes Ms. AA's arguments with respect to the Investigator's bias by emphasising, *inter alia*, that the Investigator interviewed eight of the eleven individuals proposed by Ms. AA as witnesses and six of the individuals proposed by Mr. BB. The witnesses that were not interviewed were further considered for their relevance in the investigation and a justifiable reason was provided by the Investigator with respect to the witnesses that were not interviewed, such as Dr. B. The Secretary-General adds that the inadvertent omission of the interview summary of one of Mr. BB's witnesses from the Investigation Report cannot amount to a breach of Ms. AA's right to be heard in the light of the fact that it was summarised in the main part of the Report, in addition to being subsequently provided to Ms. AA.
56. Regarding Ms. AA's claim of manifest errors in the Report and erroneous conclusion with respect to the absence of sexual harassment, the Secretary-General observes that whereas the Investigator, and subsequently the Executive Director, concluded that certain actions of Mr. BB constituted a form of misconduct pursuant to the relevant rules, the higher standard of proof to establish harassment, including sexual harassment, was not met in the case at hand. In particular, the Secretary-General highlights that much of the

documentary evidence put forward by Ms. AA consists of screenshots of Skype for Business instant messages, which is an informal way of communication, and which, while containing some inappropriate messages for a line manager, are not sexual in nature, hostile, intimidating or evidence of an offensive work environment. The same is true with respect to the off-site lunch invitation.

57. With respect to Ms. AA's allegations of retaliation against her for raising her claim, the Secretary-General explains that Mr. BB's change in behaviour after learning of her concerns about him were taken into account by the Investigator in concluding to Mr. BB's inappropriate managerial conduct and that the latter should have explained to Ms. AA the reason for his behaviour. However, this change in comportment cannot be qualified as retaliatory. Similarly, the removal of Ms. AA from some work projects is explained by their cyclical nature does not amount to retaliation. Regarding the Deputy Head of HRM's allegations of breach of confidentiality during the meeting of 5 April 2019, they were neither vague nor frivolous and, in any case, when such allegations were raised, the Deputy Head of HRM had not yet been made aware of Ms. AA's intention to raise a complaint about Mr. BB's behaviour. Similarly, such instances cannot, as alleged by Ms. AA, be characterized as retaliatory actions.
58. Finally, the Secretary-General refutes Ms. AA's argument according to which the Organisation acted in breach of its duty of care. The Secretary-General explains that the Deputy Head of HRM did not attempt to dissuade her from raising a complaint and explains that the Organisation acted promptly, reasonably and respectfully throughout the process.
59. In light of the above, the Organisation requests the Tribunal to uphold the Secretary-General's Decision of 29 January 2021 and to deny Ms. AA's requests for relief in their entirety.

V. THE TRIBUNAL'S ANALYSIS

A. Receivability

60. The application was submitted in accordance with Annex III of the Staff Regulations and in particular within the time limits, i.e. within three months of the notification of the Decision dated 29 January 2021 upholding the JAB's Opinion.

61. Consequently, the application is receivable, and the Tribunal will examine the merits of the dispute.

B. Applicable law

62. Annex XX (PREVENTING AND DEALING WITH HARASSMENT AT THE OECD POLICY AND GUIDELINES) to the Organisation's Staff Regulations provides (relevant excerpts):

1. All OECD staff members have the right to be treated with dignity and respect and to work in an environment which fosters professional respect and courtesy. Harassment of any kind at work, or in connection with work performed on behalf of the Organisation, will not be tolerated and may give rise to disciplinary action.

2. All staff, regardless of their grade and contract status, share the responsibility for preventing harassment and maintaining a harmonious working environment. This implies that, in accordance with the standards of conduct expected in the relevant provisions of the Organisation's staff rules, they shall treat each other with respect and due regard for individual dignity so as to ensure that the workplace is free of intimidation, hostility or offensive behaviour and, in particular, of any form of harassment. In an international environment like the OECD we must all be aware of the fact that our own cultural norms and values may not be shared by colleagues and be sensitive to misunderstandings or differences of opinion based on those differences of culture. But these differences cannot be used as an excuse for harassing behaviour.

3. Managers at all levels have a key role and bear special responsibility for preventing the occurrence of any form of harassment. They should foster a positive working environment and, in their leadership, display a willingness and ability to deal effectively with harassment when it does occur, in particular by being responsive to and supportive of any staff member who complains about such conduct. They must set a good personal example and ensure that the Organisation's policy and guidelines on harassment are communicated to and understood by all their staff, and that they are applied in the workplace.

4. Any retaliation or threat of retaliation against individuals making formal or informal complaints of harassment, or participating in the investigation of such complaints (for example, as witnesses), will be considered a violation of acceptable standards of conduct and will result in disciplinary action. At the same time, any accusation or complaint shown to be made in bad faith will also be considered a violation of acceptable standards of conduct and will be treated in the same manner.

5. This policy will regularly be reviewed in order to ensure its effectiveness.

Personal harassment

6. *Personal harassment is any repeated behaviour or pattern of behaviour that is reasonably regarded as aimed at creating a hostile work environment. It may be perpetrated by an individual or by a group. It includes behaviour which, in violation of the right to dignity at work, demeans, belittles or causes humiliation or embarrassment to an individual, or unfairly compromises the individual's career prospects.*

While an isolated incident of such behaviour may infringe the right to dignity at work, personal harassment takes the form of an accumulation of incidents, even when each incident, taken in isolation and out of context, could be seen as trivial.

7. *Even though there may be "grey" situations, personal harassment should be distinguished from other types of behaviour that may be detrimental to another individual's working conditions, but that are manifestly unintentional, or are attributable solely to poor management skills. For example, the behaviour of a manager or colleagues who fail to keep staff informed of important business developments as a result of poor organisation would not, prima facie, be considered personal harassment. On the other hand, the behaviour of a manager or colleagues who sabotage an individual employee's work by deliberately withholding information that is required to fulfil a task, and who do so repeatedly, would, prima facie, present the characteristics of personal harassment.*

Sexual harassment

8. *Sexual harassment is any sexual advance, request for sexual favour, or other type of conduct of a sexual nature, whether verbal, physical or otherwise, which is offensive and unwelcome, which interferes with work, is made a condition of employment or advancement, in other ways adversely influences, or tries to influence, the career of the person subjected to it, or which creates an intimidating, hostile or offensive environment.*

Harassment and abuse of power

9. *When harassment is engaged in by an official or group who is in a position to influence the career or employment conditions of the victim (including through recruitment, assignment, contract renewal, performance evaluation or promotion), it constitutes an abuse of a position of power which in itself will be regarded as serious misconduct.*

[...]

Investigation

16. The Head of Human Resource Management will examine the information that is submitted and if appropriate will initiate an investigation under the conditions set out in the Decision of the Secretary-General concerning the investigation procedure within the Organisation (Annex XXV to the Staff Regulations applicable to officials of the Organisation).

17. In the light of this information and, if applicable, of the conclusions of the investigation, the Head of Human Resource Management will take appropriate measures, ranging from closing the case with no further action to initiating disciplinary measures, as provided for in Regulation 21 of the Staff Regulations and the Instructions relating thereto.

C. The Merits

a. The Investigator's independence

63. Before going any further, this Tribunal deems it necessary to determine whether the Investigator demonstrated a lack of independence and bias in the conduct of her investigation, as alleged by the applicant.

64. In this regard, in the light of the facts of the case and the arguments of the parties, the Tribunal finds no indication that the Investigator lacked independence or demonstrated bias while conducting her investigation which led to her Report of September 2019.

65. The fact that a roster system is used when having recourse to investigators, which can entail several appointments of a same investigator, does not in itself demonstrate a lack of independence nor bias.

66. Instead, bias or lack of independence must be analysed in the light of the conduct of the investigation and of the Investigator's Report. In this regard, the Tribunal finds no evidence of bias or lack of independence on the part of the Investigator who has, in the Tribunal's view, undertaken a thorough and rigorous investigation.

67. The Tribunal wishes to highlight in this regard that although the Investigator did not interview all the witnesses proposed by both Ms. AA and Mr. BB, the Investigator nevertheless conducted eleven such interviews with witnesses selected on the basis of their relevance. In selecting eight of the witnesses

proposed by Ms. AA and six of the witnesses proposed by Mr. BB, there is no doubt for this Tribunal that the Investigator conducted interviews with diligence. This is further demonstrated by the content of the interviews annexed to the Investigator's Report. This Tribunal wishes to note, in addition, that two of the witnesses proposed by Ms. AA and chosen by the Investigator were no longer working for the Organisation at the time of the interviews thus ensuring that at least two of the witnesses could express themselves without any sort of pressure or fear of retaliation.

68. The Tribunal also finds that Ms. AA's right to be heard was respected by giving her the opportunity to express her views during three interviews with the Investigator and that the initial omission (which was subsequently remedied) of Ms. GA's interview summary from the Report's annexes, despite being summarized in the Report itself, cannot amount to a violation of Ms. AA's right to be heard.

69. Finally, the Tribunal also wishes to note that it was legitimate for the Investigator to raise the question of the breach of confidentiality and job security of Ms. AA in light of the latter's own interview annexed to the Report (Ms. AA's interviews of 5 and 23 July 2019, p. 2).

b. The Organisation's breach of its duty of care

70. The Tribunal finds that the complaint was addressed in a timely manner given the facts that: the Investigator's Report was issued approximately five months after the initial complaint, the JAB's Opinion was issued approximately eleven months after the matter was referred to it and the Secretary-General's Decision upholding the JAB's Opinion was issued approximately one month later. In the Tribunal's opinion, this timeline does not amount to a breach of the duty of care and lack of diligence on the part of the Organisation, especially in the light of the difficult circumstances and delays caused by the COVID-19 pandemic.

c. The Investigator's qualification of the facts and the issue of retaliation

71. Both the Investigator and the JAB concluded that the behaviour of Mr. BB which is at the centre of this dispute does not amount to harassment or sexual harassment.
72. To reach this conclusion the Investigator conducted a thorough investigation which led her to dismiss the complaint of formal sexual harassment. However, the investigator blamed Mr. BB for inappropriate management.
73. The JAB – whose Chair was selected from a list of persons proposed by the Staff Association and whose three members were designated by the Staff Association – unanimously endorsed the conclusion of the Investigator regarding sexual harassment. Furthermore, the JAB reached the same conclusion on the inappropriate behavior of Mr. BB.
74. The Tribunal takes note of these conclusions but nevertheless wishes to make some observations with respect to the Investigator's qualification of the allegations at the core of Ms. AA's complaint. The Tribunal considers that the Investigator should have concluded that Ms. BB's behaviour towards Ms. AA were more than merely "inappropriate". The Tribunal considers that his behavior was highly unprofessional and constituted misconduct as well as misuse and abuse of authority.
75. In reaching this conclusion, this Tribunal wishes to highlight several facts.
76. First, the Tribunal finds it striking that Mr. BB's messages which have led Ms. AA to file her complaint have started very soon after Ms. AA started working under his supervision. In particular, Mr. BB started sending such messages in January 2019, whereas Ms. AA started working under his supervision in November 2018. Arguably, the assessment of the facts might have been different had it been demonstrated that Ms. AA and Mr. BB had been working together for an extended period of time and had developed a friendship explaining the tone of the messages sent by Mr. BB. Such is certainly not the case in the instant dispute.
77. Instead, what is clear with respect to Ms. AA and Mr. BB's relationship is its power dynamic, with Ms. AA being a 28-year-old (at the time of the facts) junior professional under the direct hierarchical authority of Mr. BB, a senior official of

the Organisation. This Tribunal finds it relevant, in this regard, to quote the Administrative Tribunal of the International Labour Organization (ILOAT)'s judgment No. 2642, according to which “‘flirtatious’ remarks made in the workplace by a male supervisor to female staff inevitably diminish their professional standing” [para. 25].

78. Second, this Tribunal observes that Mr. BB’s messages addressing other than work-related topics are not limited to isolated instances. Instead, on a span of approximately three months, the evidence submitted to this Tribunal demonstrates a certain pattern through the frequency with which such messages were sent to Ms. AA.

79. It is partly on that basis and as a consequence of the cumulative effect of the many messages sent by Mr. BB to Ms. AA that the Tribunal is of the view that Mr. BB’s behaviour cannot be merely qualified as “inappropriate”.

80. The Tribunal notes with respect to the frequency of Mr. BB’s messages at issue in the instant case that it is not convinced by the latter’s explanation according to which “[h]e had been following Ms. [AA]’s [...] leak of confidential information, and because he was assessing her for other tasks [...]” [Investigation Report, para. 4.2.1.]. The Tribunal fails, indeed, to understand how the messages at issue in this case are even remotely connected to the aim of monitoring or evaluating Ms. AA’s work.

81. Third, this Tribunal is troubled by the clear behavioural pattern of Mr. BB in the workplace. Indeed, although most of the witnesses interviewed in the context of the investigation note that they did not think that Mr. BB’s comments were meant in an offensive way, it is also repeatedly mentioned in the witnesses’ statements that Mr. BB’s behaviour could be problematic for others. Even though none of the witnesses who were interviewed described Mr. BB’s behaviour as particularly problematic for them, this Tribunal nevertheless finds some of the witnesses’ accounts very troublesome, including references to comments made by Mr. BB about the way people dress, their identities and personalities, as well as comments about other colleagues’ performance [Investigation Report, paras. 5.16–5.22]. In the Tribunal’s view, the fact that such comments may not be hurtful

to some does not make them acceptable for those for whom they do hurt. Instead, they confirm a behavioural pattern that cannot be tolerated in a professional environment.

82. Fourth, the Tribunal notes that, as observed by the JAB [JAB Opinion, para. 17]:

coaching had been offered to Mr. [BB], that new lines of hierarchical management had been decided so that Ms. AA would not be under his direct supervision, and more generally that junior staff were not to travel with him in the future.

In addition, the Tribunal finds it useful to recall that the Investigator concluded that some of Mr. BB's communications with Ms. AA "leave room for misinterpretation and were inappropriate" [Investigation Report, para. 7.1].

83. In light of the above, this Tribunal finds particularity troublesome the fact that Mr. BB persists to "deny completely Ms. [AA]'s allegations of sexual and personal harassment, retaliation, abuse of power, inappropriate behaviour and derogatory remarks on my part" [Written Statement by Mr. BB of 1 November 2021, para. 1 (emphasis added)]. Such a lack of recognition of any wrongdoing on his part despite the Investigator's Report – which was endorsed by the JAB and ultimately by the Secretary-General – concluding that Mr. BB did in fact act inappropriately towards Ms. AA is disturbing.

84. It also raises concerns in terms of the way in which serious cases such as this one are dealt with by the Organisation that, as it itself recognises, "embraces the principles behind this [...] both globally and close to home" [Response of the Secretary-General of 5 July 2021, para. 27]. It is noteworthy in this regard that the Organisation has never sent a formal letter of apology for the inappropriate behavior of Mr. BB towards Ms. AA.

85. Fifth, and in addition to the harmful impacts on Ms. AA's health explained in Dr. B's written statement, this Tribunal finds that the filing of her complaint against Mr. BB had negative implications on Ms. AA's professional opportunities.

86. In this regard, the Tribunal is cognisant of the importance for young professionals to be given the opportunity to work on a wide array of projects and of the benefits of acquiring diverse work experiences. Furthermore, this Tribunal finds it useful to observe that in reaching this conclusion, it rules out other possible reasons for

excluding Ms. AA from work projects and opportunities, such as the confidentiality incident. Indeed, being aware of the confidentiality incident involving Ms. AA since January 2019 [Interview of Mr. BB of 20 June 2019, Summary of Discussion, Annex to the Investigation Report, p. 3] did not stop Mr. BB from dangling a job opportunity in Vienna in front of Ms. AA on 11 March 2019, something which in itself is highly inappropriate. Instead, Mr. BB's change of behaviour leading to the isolation of Ms. AA in the workplace and exclusion from important professional opportunities can be traced back to mid-March 2019, after Ms. NT informed Mr. BB of the content of her discussion of 14 March 2019 with Ms. AA.

87. Finally, the Tribunal wishes to emphasise the importance of ensuring a better and more efficient way in which cases of misconduct are addressed. This imperative was raised by the JAB [JAB Opinion, paragraph 2 of the Opinion's conclusions] as well as by the Staff Association in its written statement submitted in the context of this dispute. Although the revamping of Annex XX on Preventing and dealing with Harassment of the OECD Staff Regulations must be welcomed, the Tribunal is of the opinion that in the specific dispute before it, a more stringent approach should have been adopted towards Mr. BB concerning his behaviour and that the Organisation should have ensured that Ms. AA would not have suffered from unwarranted repercussions for filing a formal complaint against Mr. BB in terms of professional opportunities.

88. For all these reasons, the Tribunal concludes that the behaviour of Mr. BB was not merely inappropriate but highly unprofessional and constituted misconduct as well as misuse and abuse of authority² which does not have its place – and cannot be tolerated – in an International Organization and certainly not within a Human Resources Management group.

89. In the light of these circumstances, in this Tribunal's view, Ms. AA is entitled to damages as a result of the highly inappropriate behaviour of her Line Manager.

² The ILOAT defined misuse of authority in its judgement no. 1129 as instances "where an administration acts for reasons that are extraneous to the organisation's best interests and seeks some objective other than those which the authority vested in it is intended to serve." (paragraph 8).

As explained in the ILOAT's judgment No. 4034, damages may be warranted where no conclusion of harassment can be made but that a "patently unacceptable situation" is created in the workplace (para. 18. See also para. 20). Such a situation has arisen in the instant case, which led to Ms. AA suffering from considerable stress and anxiety as a result of Mr. BB's behaviour towards her, as confirmed by Dr. B's assessment.

90. Furthermore, as explained in more details above, it is clear that as a result from Mr. BB's behaviour and Ms. AA's ensuing complaint in this regard, a tensed and unwelcoming professional environment was created in the workplace which was materialised through a reduction of work and career opportunities within the parameters of her ongoing mandate with the Organisation. Such limitations that were imposed on Ms. AA caused her a prejudice which must also, in the Tribunal's view, give rise to compensation.

91. Finally, the Tribunal deplores the decision of the Organisation not to issue a formal letter of apology to Ms. AA for the abuse of authority she was the victim of.

92. Considering the moral prejudice suffered by Ms. AA and the fact that, in the Tribunal's view, work-related opportunities within the Organisation were reduced for Mr. AA following the filing – and as a consequence – of her complaint, Ms. AA is entitled to general reparation for the damage and moral prejudice that she suffered by the award of the sum of EUR 50 000.

93. Finally, the Tribunal grants Ms. AA the sum of EUR 8 500 for reimbursement of her legal costs.

VI. DECISION

94. For these reasons, the Tribunal:

1) Annul the Decision dated 29 January 2019 of the Secretary-General of the Organisation insofar as it rejected the request of compensation for the moral and material damages;

2) Rules that the Organisation shall pay Ms. AA in reparation of damages and moral prejudice the total sum of EUR 50 000;

- 3) Rules that the Organisation shall pay Ms. AA the sum of EUR 8 500 in reimbursement of her legal costs;
- 4) Rules that the Organisation shall reimburse Ms. AA the travel and subsistence expenses that she incurred to attend the hearing;
- 5) Rejects the remainder of Ms. AA's request.