appreciate the note, and asked [The Applicant] not to send any such note again.

c. The panel found that in September 2006, after [person 4, name redacted] joined the section, [the Applicant] called [person 4] twice on her private cell phone - the first time, to ask her how her weekend was; and the second time, to ask for her private address, reportedly to update the system. The panel further found that these calls, sometimes anonymous, continued until October 2006, and that they made [person 4] nervous. When [person 4] confronted [the Applicant] about the calls, [the Applicant] admitted that [he] had made them because [he] wanted to find out if the "signals [person 4] was sending [the Applicant] were real." [Person 4] denied that she had shown any interest in [the Applicant] and reported the matter to the Chief of the Interpretation Section.

d. In addition, the panel found that on 28 September 2006, when [person 4] was leaving the United Nations premises, she realized that [the Applicant] were [sic] behind her. [The Applicant] asked if [he] couldn 2

> unwelcome and unwarranted. Each complainant indicated that she had never given him any indication to the contrary. These seemingly innocent experiences, along with an apparent resistance and/or simple non-comprehension by [the Applicant] that the complainants were each individually not interested, perpetuated an unprofessional atmosphere in the workplace."

10. The Applicant was informed that, on the basis of the investigation report and the supporting documentation, he was being charged with sexual harassment which, if established, would constitute a violation of the Secretary-General's policy on harassment promulgated by ST/SGB/2008/5 (Prohibition of discrimination and harassment including sexual harassment and abuse of authority). He was also informed that, if established, his behaviour would constitute a violation of former.6(establ9f(establ9

13. Whereas para. 36 of the investigation report states that:

> [The investigation panel] *has reviewed the evidence and verified the facts of this alleged sexual harassment*. While [the Applicant] never physically touched the complainants, *the Panel finds that [the Applicant's] unusual and repeated patterns of behavior amount to highly inappropriate and unprofessional activity that is unsuitable in the workplace*. [Emphasis added]

14. The subsequent recommendation made by the investigation panel is

19. According to email dated 25 February 2009 from Ms. Phippard to

> (b) a written censure, to be placed on [the Applicant's] Official Status file;
>
> (c) attendance at counseling with, the Staff Counselor's Office in respect of the alleged conduct;
>
> (d) reassignment to the Publishing Section, Department for General Assembly and Conference Management ["DGACM"], commencing upon [the Applicant's] return to work in the first week of May, 2009.

22. Whilst these negotiations were taking place, consideration was being given to offering eligible staff members conversion to permanent appointments. These discussions led to the issuance of ST/SGB/2009/10, the contents of which ought reasonably to have been in the minds of OHRM when it offered the Applicant the opportunity of a waiver of his right to go to the JDC.

23. The procedure for consideration for permanent appointment in this case began

grounds for OHRM not to recommend his conversion". The email ended by asking all recipients to contact ALU/OHRM if they wished to discuss the matter. There is no evidence that OHRM subsequently considered or investigated the matter of the Applicant's disciplinary sanction any further. They did not contact ALU/OHRM for any further guidance.

25. On 26 June 2010, OHRM sent the recommendation not to convert the Applicant's appointment to permanent status to the Chairperson of the Central Review Board ("CRB"). It is instructive that the referral is in the following terms (emphasis added):

> … Attached is a recommendation for the conversion of the contractual status of [the Applicant] to permanent.
>
> … Taking into account the provisions of staff rule 13:4 and section 2 of ST/SGB/2009/10, Section D of the Human Resources Services [sic] has decided not to recommend [the Applicant] for permanent appointment in the interest of the Organization.
>
> … This decision is made on the basis of the gravity of [the Applicant's] receipt and agreement to be demoted for *sexual harassment* after his waiver of the JDC in April 2009 …
>
> … Kindly note that [DGACM] informed us (OHRM) that they were unable to make an informed decision to offer [the Applicant] a permanent appointment based on the seriousness of his ALU case.
>
> … In accordance with section 3.4 of ST/SGB/2009/10, we would appreciate if you could review and confirm that [the Applicant] has not fully met the criteria set out in section 2 of ST/SGB/2009/10.

26. It should be noted that the CRB was informed that the lack of a positive recommendation was "on the basis of the gravity of the Applicant's receipt and agreement to be demoted for sexual harassment." In the circumstances, the CRB concurred with the recommendation not to offer permanent appointment to the Applicant.

27. By letter dated 21 January 2011, the ASG/OHRM notified the Applicant that his fixed-term appointment would not be converted to a permanent appointment. The reason given in the 21 January 2011 letter was incorrect in that it stated that the non-conversion was based upon unsatisfactory performance. This error was subsequently corrected by letter dated 26 January 2011 in which the ASG/OHRM made it clear that the decision taken was in "the interests of the Organization" and was "based on the fact that [the Applicant's] records showed that a disciplinary/administrative measure had been taken against [him]". The Tribunal accepts that no adverse inference is to be drawn from this administrative error.

28. The Applicant requested a management evaluation of the administrative decision not to grant him a permanent appointment on 17 January 2011 and received a response on 24 March 2011.

29. At a case management discussion ("CMD") on 8 November 2012, the Tribunal discussed with the parties the issues in the case as well as its future conduct. The Applicant was present and was clearly distressed. The Tribunal noted that there was no evidence of any repetition of the conduct in question and it seemed clear that the advice and counseling, which the Applicant received, had its desired effect. The Applicant had very good e-PAS reports and was well regarded by his supervisors and colleagues with whom he now worked. In all the circumstances, the Tribunal considered it appropriate to explore an alternative resolution of the dispute. By Order No. 226 (NY/2012) dated 9 November 2012, the parties were encouraged to consider the option of a referral to the mediation services of the Ombudsman. In the event, the parties, having considered the matter, opted for a judicial determination on the documents.

Applicant's submissions

30. The Applicant's contentions may be summarized as follows:

35. Section 2 of ST/SGB/2009/10 provides as follows regarding the eligibility of staff members for permanent appointment:

> … a permanent appointment may be granted, taking into account all the interests of the Organization, to eligible staff members who, by

b. Whether, during the discussions/negotiations leading up to the Applicant consenting to the disciplinary measures in contention, the Administration breached its duty to fully and properly inform him about his options as well as the consequences of his acceptance of these measures?

c. If it is established that OHRM breached the Applicant's rights during the process leading up to the agreed disciplinary measures, was there a breach of the Applicant's rights to a fair and unbiased consideration in that these disciplinary measures were used as a basis for determining whether the Applicant was suitable for a permanent appointment?

*Did OHRM mischaracterise the Applicant's offence as "*sexual *harassment"?*

41. Former staff rule 101.2(d) specifically provides that different forms of harassment may occur in the workplace. It is noted from the difference in the definitions of "sexual harassment" and "harassment" in ST/SGB/2008/5 that these cover two distinctively separate behaviours albeit both being unacceptable. "Sexual harassment" is explicitly defined in sec. 1.3 of the Bulletin in terms of the sexual content or nature of the relevant behaviours. However, sec. 1.2 defines "harassment" in terms akin to the actual conduct of the Applicant as found by the investigation panel at para. 36 of its report (as quoted in para. 13) as well as in other places (see quotations in paras. 5, 6, 7 and 14 above). It is also instructive that, in para. 36, the investigative panel did not refer to the Applicant's conduct as sexual harassment, but merely that this was "alleged".

42. Furthermore, none of the behaviours that the Applicant engaged in, as set out by OHRM in its letter dated 19 May 2008 (see para. 9 above), was in any manner portrayed as being of a sexual nature within the meaning of "sexual harassment" pursuant to sec. 1.3 of ST/SGB/2008/5. Instead, a fair reading of the investigation panel's findings, as described by OHRM, suggests that the Applicant's actions were

somewhat misguided romantic advances, which were, however, highly inappropriate and unprofessional and would appear to fit the description of "harassment" at the lower end of the range of seriousness under sec. 1.2 of ST/SGB/2008/5.

43. The World Bank Administrative Tribunal in *Applicant v. International Bank for Reconstruction and Development* Decision No. 366 found that "annoying and inappropriate ways" of a male staff member towards his female colleagues, including unrequested massages, an offer to read a staff member's palm, invitations to get together after work or to go to the Applicant's apartment for dinner, did not constitute sexual harassment.

44. Similarly, the Tribunal finds that inappropriate and unprofessional activity is not equivalent to sexual harassment notwithstanding the fact that such conduct has no place in the interactions between staff members and is deserving of an appropriate sanction. The Tribunal further finds that OHRM conflated the disciplinary charge against the Applicant with the actual findings of the investigation panel.

45. The mischaracterisation of the Applicant's behaviour as "sexual harassment" rather than "harassment", repeated at para. 28 of the Respondent's reply, has also resulted in a failure to properly give effect to "the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered", para. 9 (see para. 38 above), which provide that the weight to be given to the measures imposed "will depend on when the conduct at issue occurred and its gravity". An examination of the documentary evidence reveals that various individuals involved in the decision-making process failed to notice the significant distinction between findings of "sexual harassment" and "harassment" because of the preconceived mind-set that they were dealing with a staff member, who had the disciplinary measure of "sexual harassment" recorded in his files.

46. It would appear that although there was no bad faith on the part of the OHRM officials concerned, they were less than meticulous in their examination of

the investigation panel's findings. They thereby failed to note the differences between the charges and the actual findings, and then failed to apply properly the definitions in secs. 1.2 and 1.3 of the Bulletin to those findings. They also failed to follow their "the Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered".

47. Accordingly, the Tribunal finds that OHRM, as a matter of fact, misinterpreted the investigation report and mischaracterised the Applicant's offence as "*sexual* harassment" rather than "harassment", if at all, at the lower end of the range of seriousness.

During the negotiations leading up to the agreed disciplinary measures, did the Administration fully and properly observe the Applicant's rights to due process by informing him about his options as well as the consequences of his accepting the proposed disciplinary measures?

48. Pursuant to the implied requirement of good faith and fair dealing between parties to an agreement, it is reasonable to expect that the Administration, when negotiating an agreement on a disciplinary measure pursuant to former staff rule 110.4(b), had a duty to inform the staff member about any foreseeable consequence of that agreement, including, in particular, any possible adverse consequences.

49. As indicated in paras. 16-20 above, during the negotiations leading to the agreed disciplinary measurements, neither the Applicant nor his then legal adviser were informed that the agreed sanction would affect in any way the Applicant's suitability for advancement within the Organization on the grounds that the recording of such disciplinary measures would be regarded by the Administration as the Applicant not having met the high st

the agreement in the belief that, having accepted the sanctions, a veil would be drawn over the unfortunate episodes. It should also be noted that, during the course of the exchange of correspondence with the Applicant's then legal counsel, the email from ALU/OHRM dated the 25 February 2009, by which the Applicant's counter proposal was rejected, stated that "the recent practice … has been to separate staff members who engage in such conduct from service", but that a lesser sanction was proposed "in recognition of certain mitigating factors in his case, including his prior record of service" without any further specification.

50. At this crucial moment during the negotiations, the message that is clearly being given to the Applicant is that if he did not reconsider his position on the proposed penalty, there was a real possibility that an investigation by the JDC would more likely than not result in a recommendation that he be separated from service. This conclusion may legitimately be drawn from the reference to "the recent practice" of the Secretary-General to separate staff members who "engage in such conduct". The inducement of a lesser sanction in the proposed agreement is noted.

51. It is important for the credibility of ST/SGB/2008/5 that penalties imposed should not be disproportionate, or seen by staff members as being disproportionate, to the offence. Whilst there was a risk inherent in going before the JDC, the Tribunal is aware of cases arguably similar to that of the Applicant's, which were determined around the same time as his and where a staff member, who had been found to have committed sexual harassment, was not recommended to be separated from service, as otherwise suggested by ALU/OHRM. For instance, in para. 52 of ST/IC/2019/30 (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2008 to 30 June 2009), the Under-Secretary-General for Management describes a situation where a staff member sexually harassed six staff members, but only received the disciplinary sanction of written censure after the advice of a JDC, a sanction even much less severe than that ALU/OHRM actually proposed to the Applicant. In another example mentioned in ST/IC/2019/30, at

para. 48, a staff member, who had sexually harassed three new sta

the Appeal's Tribunal in *Doleh* 2010-UNAT-025 and *Charles* 2012-UNAT-233). However, the Tribunal may consider whether the Administration undertook a proper review of the case before it, including whether it was decided on the basis of well-documented facts and not erroneous, inconsistent or fallacious grounds such as incorrect legal findings and inducement (*Bertucci* 2011-UNAT-121, as well as *Masri* 2010-UNAT-098).

56. The Tribunal finds that OHRM were in error in recommending to the CRB that the Applicant should not to be granted a permanent appointment because of his "receipt and *agreement* to be demoted for

a. Based on the investigation report and ST/SGB/2008/5, OHRM mischaracterised the Applicant's offence as "sexual harassment" rather than "harassment" at the lower end of the range of seriousness. By doing so, OHRM also failed to follow its own procedures at para. 9 of the "The Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered" in that they failed to give appropriate weight to the nature of the Applicant's offence as well as its timing and gravity.

b. There was a breach of the Applicant's rights to due process and the duty of good faith and fair dealing in that the Applicant was induced into entering into an agreement to accept certain disciplinary measures without being properly informed of the possible or probable effect of voluntarily accepting the disciplinary measures on his prospects of obtaining a permanent appointment;

c. In preparing the recommendations to the CRB, OHRM should have undertaken a proper examination of the underlying facts, which would have led it to realise its previous mistakes, as set out in (a) and (b) above. By failing to do so OHRM breached the Applicant's right to have a fair and proper assessment of his eligibility and suitability to have his contractual status being converted to a permanent appointment.

Non-pecuniary damages

59. It was clear to the Tribunal, at the CMD on 8 November 2012, that the Applicant was, and still is, distressed by the decision, and the reasons for denying him a permanent appointment. The Tribunal does not consider it necessary in this case to convene a separate hearing to determine the degree to which the Applicant was distressed so as to quantify the award for non-pecuniary damages.

b. Any consequential loss in salary or other benefits, if any, are to be made good by the Administration;

c. The Respondent is to pay to the Applicant the sum of USD10,000 in non-pecuniary damages for the distress suffered.

63. Under art. 10.5 of the Statute of the Dispute Tribunal, the total sum of compensation as detailed above in para. 62(b) and (c) is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(*Signed*)

Judge Goolam Meeran

Dated this 28th day February 2013

Entered in the Register on this 28th day February 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York