



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

MAPURANGA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Sétondji Roland Adjovi

Counsel for Respondent:

Miryoung An, ALS/OHRM, UN Secretariat

Matthias Schuster, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 19 April 2018, the Applicant, a Senior Trade Promotion Officer at the International Trade Centre (“ITC”), challenges the disciplinary sanction of separation from service with compensation in lieu of notice and without termination indemnity.

Facts

2. The Applicant joined the ITC on 1 December 2002. From 2005, he worked at the Office for Africa (“OA”), Division of Country Programmes, as a Senior Trade Promotion Officer (P-4).

3. The Complainant joined ITC as a consultant in May 2014 working for the Office for Asia and Pacific until 14 August 2014. On 15 August 2014, she started working as a consultant for the OA until 31 December 2014. She then obtained a three-month temporary appointment as an Associate Programme Adviser (P-1) starting on 2 February 2015, which was extended for another three months on 2 May 2015. From that time, the Applicant was the Complainant’s first reporting officer. The Complainant was separated on 1 August 2015.

4. By letter dated 13 August 2015 to the Executive Director, ITC, the Complainant filed a formal complaint of discrimination, sexual and workplace harassment and abuse of authority against the Applicant and the Chief, OA, pursuant to ITC/EDB/2015/7 (Prohibition of discrimination, harassment, including sexual harassment and abuse of authority). She alleged, *inter alia*, that the Applicant:

- a. Verbally abused her;
- b. Made inappropriate comments on her appearance such as “why did you come dressed like this?” when she was wearing a skirt;
- c. Touched her hand while he was alone with her in his office;

- d. In March 2015, gave her a card with a hand-written message reading: “Our love is an electric blanket and you control the switch”;
 - e. Called her nicknames such as “hamster”, “gypsy” and “daft”;
 - f. Excluded her from office meetings and told her loudly to go away after she rejected his “sexual advances”; and
 - g. Asked her to work with him for free as well as with the Chief, OA, and another colleague, saying that “it was important to make them happy and [her] future [with the OA] depends on this”.
5. On 28 October 2015, the Director, Division of Programme Support (“DPS”), appointed a fact-finding panel to investigate the complaint.
 6. On 17 September 2015, the Complainant addressed another letter to the Executive Director, ITC, providing complementary information on her complaint. She, *inter alia*, reiterated her claim of being excluded from the OA team and described the impact that the alleged prohibited conduct had on her health and family life.
 7. On 30 November 2015, the panel issued its first report, in which it found that the complaint “was, to a very large extent, justified due to several instances of discrimination, harassment, sexual harassment and abuse of authority suffered by [the Complainant]”.
 8. After reviewing the report, on 31 March 2016, the Director, DPS, requested the panel to provide clarifications and additional information.
 9. When the investigation resumed in May 2016, the Complainant was asked to clarify an incident where the Applicant allegedly tried to kiss her at his apartment. She told the panel that she had provided all the necessary evidence and documentation and that she was not in a position to be confronted with the issue again. The panel contacted the Complainant’s psychiatrist who wrote in a certificate of 6 June 2016 that her mental health was such that she could not continue to cooperate with the investigation or answer phone calls or e-mails about it. By email

of 8 June 2016, the Complainant informed the panel that she could not “continue as [she] was also a victim of rape” for which the Applicant was responsible.

10. By letter of 14 June 2016 to the Executive Director, ITC, the panel indicated that in view of the possible tampering with evidence and the new allegation of rape, it was of the opinion that the latest developments “necessitate an expertise that is beyond [their] own” and suggested that “the case be taken over by [the Office of Internal Oversight (“OIOS”)] or that the Panel should be strengthened through the deployment of OIOS technical staff”.

11. On 15 June 2016, the Executive Director, ITC, requested OIOS to investigate the Complainant’s allegation of rape pursuant to ITC/EDB/2012/06 (Special measures for protection from sexual exploitation and sexual abuse). The Executive Director also asked OIOS to “review the final report compiled by the fact-finding panel and provide an opinion regarding the sufficiency of the Summary of Findings. Specifically, the review had to focus on the finding of Harassment (ref “d”, p. 20); Sexual harassment (ref “e”, p. 21) and Abuse of authority (ref “f”, p. 22) with reference to ITC Executive Bulletin ITC/EDB/2015/07”.

12. On 24 June 2016, the fact-finding panel issued its second report. It concluded that the complaint was “to a very large extent, justified due to several instances of discrimination, harassment, sexual harassment and abuse of authority”. On the allegations of sexual harassment, the panel more specifically concluded that it was possible that the Complainant and the Applicant entered into an “ambiguous relationship” soon before the Applicant joined the OA, a situation that, as per the panel, the Complainant accepted to consolidate her career. The panel also noted that when the Complainant decided to put an end to this relationship, she was met with retaliation from the Applicant, who isolated her.

13. Following a formal request for assistance made by ITC to OIOS on 20 July 2016, which specified the terms of reference for an investigation, OIOS undertook an investigation that essentially consisted in reviewing the fact-finding panel’s report and its attached material, interviewing witnesses (including the Applicant and the Complainant), reviewing the Applicant’s official e-mail account, and conducting a forensic analysis of the hard disk drives of the Applicant’s and

Complainant's computers, the Applicant's official mobile phone and photographs of the Applicant standing by the Lake Geneva provided by the Complainant.

14. On 28 February 2017, OIOS completed its investigation report where it found that:

- a. There was insufficient evidence to support the allegations of rape;
- b. There was sufficient evidence to conclude that the Applicant sexually harassed the Complainant and abused his authority;
- c. In particular, OIOS found on the allegations of sexual harassment and abuse of authority that the Applicant:
 - i. addressed private text messages to the Complainant using an inappropriate tone for a professional work environment;
 - ii. was unable to provide any explanation as to how three photographs of him by the lake came into the possession of the Complainant and these photographs were very likely taken by the camera of the Complainant's cell phone;
 - iii. wrote a greeting card saying "Our love is an electrical blanket and you control the switch"; and
 - iv. abused his authority as the Complainant was in a vulnerable situation.
- d. However, OIOS found that there was no evidence to support the Complainant's claim that the Applicant attempted to kiss her in his office or of self-touching.
- e. Contrary to the panel's finding, OIOS found that there was insufficient evidence to support the Complainant's allegations of discrimination and workplace harassment.

15. By memorandum of 1 May 2017 from the Director, DPS, the Applicant was notified of the allegations against him as follows, which were considered to constitute sexual harassment and abuse of authority:

In its report, OIOS made the following assessment of the allegations of sexual harassment and abuse of authority against you:

On at least two occasions, you addressed private text messages to [the Complainant] using an inappropriate tone for a professional work environment.

Your explanation for the use of the word “hamster” when addressing [the Complainant], a female subordinate, was inadequate.

You were unable to provide any explanation as to how the three photographs of you allegedly taken by [the Complainant] at your meeting in Evian (which you had allegedly initiated telling [the Complainant] this was an “office retreat”) came to be in her possession.

Forensic analysis by OIOS of the three photographs found that these were very likely taken by the camera of [the Complainant]’s cell phone.

Your explanation regarding the greeting card (that you allegedly gave to [the Complainant]) with the words “Our love is an electric blanket and you control the switch”, which you claim to have written to your daughter, was not credible.

You were unable to provide an explanation as to how both the greeting card and the scarf (that you allegedly gave to [the Complainant]), which you claimed were missing from your office, came to be in [the Complainant]’s possession.

[The complainant] was in a vulnerable professional situation as she was in an insecure contractual arrangement, which she could reasonably perceive to have depended on you and your position or authority. This was a clear situation of a power imbalance with an elevated risk of a quid pro quo scenario.

16. On 6 July 2017, the Applicant submitted, through his previous Counsel, his comments on the allegations of misconduct.

17. Following a review of the dossier, on 6 December 2017, the Executive Director, ITC, submitted the matter to the Under-Secretary-General for Management, through the Assistant-Secretary-General for Human Resources Management (“ASG, OHRM”), for consideration. Between 28 December 2017 and 9 February 2018, ITC provided relevant documents to OHRM for review.

18. By letter of 6 April 2018, the ASG, OHRM, informed the Applicant of her conclusion that the following facts had been established:

The evidence establishes that you engaged in inappropriate conduct towards [the Complainant] by sending her text messages calling her a “BB” and a “hamster” and giving her a gift of scarf together with a love message. Your conduct may be viewed as one of a sexual nature because the content of your messages to her, i.e., “BB” may be read to mean “baby” and the love message in the card is sexually suggestive. Such conduct may have reasonably been perceived as humiliating and offensive and [the Complainant] stated that she was intimidated by your conduct.

With respect to the three photographs of you on a jetty, the forensic analysis indicated that it is most likely that the photographs were taken by the camera of [the Complainant]’s mobile phone. As such, [the Complainant]’s account that while she was a consultant, in October 2014, you sought to meet her outside office, and lured her to the meetings under the disguise of “office retreats” is credible. This provides a context to your subsequent conduct, for instance, sending her text messages and giving her a card with a love message.

Your comment that the card with a love message was meant for your daughter and was stolen from your office is not satisfactory. There is no evidence supporting your contention that you had placed the scarf and/or card in your office, or that you reported those items as being stolen from your office. Contrary to your claim that the Administration shifted the burden of proof by requesting you to prove your innocence, giving you an opportunity to justify the evidence produced during the investigation does not shift the burden of proof.

You were [the Complainant]’s hiring manager and her first reporting officer. Additionally, the record indicates that [the Complainant] was under a precarious contractual condition as her temporary appointment had no guarantee of renewal, and that she was under the impression that you were in a position to renew her appointment. Given this imbalance in power between you and [the Complainant], the substance of your text messages and the love message in a card exceeds the level of appropriate interactions, and may be reasonably

perceived as humiliating and offensive. You knew or at least should have known that your conduct may be perceived as inappropriate and humiliating. Further, your conduct towards [the Complainant] exhibited your improper use of a position of influence, power or authority against her.

19. The ASG, OHRM, concluded that it had been established by clear and convincing evidence that the Applicant had engaged in misconduct by sexually harassing the Complainant and abusing his authority towards her, in violation of staff regulation 1.2(a), staff rule 1.2(e) and ITC/EDB/2015/7.

Procedure before the Tribunal

20. The application was filed on 19 April 2018 and, on 30 April 2018, the Respondent produced the investigation file maintained by OIOS, in compliance with Order No. 82 (GVA/2018) of 20 April 2018. The file was disclosed on an under seal basis to the Applicant. On 18 May 2018, the Respondent filed his reply.

21. The Tribunal held a case management discussion on 6 June 2018, whereby it discussed the scope of review, ordered the production of documents and prepared for a hearing on the merits, as detailed in Order No. 103 (GVA/2018) of 11 June 2018.

22. On 14 June 2018, the Respondent submitted additional documents in compliance with Order No. 103 (GVA/2018).

23. On 20 June 2018, the Applicant submitted a rejoinder to the Respondent's reply, as authorised by Order No. 103 (GVA/2018).

24. On 5 July 2018, the Tribunal held a second case management discussion to discuss the modalities for the appearance of the Complainant, who had raised concerns in respect of testifying in the presence of the Applicant. By Order No. 120 (GVA/2018) of 10 July 2018, the Tribunal ordered that the Complainant be heard *in camera* via a video link to be provided in a room outside the courtroom, that she be questioned by the Applicant's Counsel, that the Applicant not be visible to her and that she be addressed/referred to as "Complainant".

25. On 11 July 2018, the Respondent responded to the Applicant's rejoinder, as authorised by Order No. 110 (GVA/2018) of 27 June 2018 and Order No. 114 (GVA/2018) of 2 July 2018. He also submitted a note to the file prepared by OIOS on 5 July 2018 and an additional forensic analysis report prepared by OIOS and dated 9 July 2018.

26. The Tribunal held a hearing on the merits from 22 to 24 October 2018; it heard testimonies from:

- a. The Complainant;
- b. The two OIOS investigators who conducted the investigation;
- c. The OIOS forensic analyst;
- d. The Executive Director, ITC; and
- e. The Director, DPS, ITC.

27. A number of additional documents were produced by the Applicant during the hearing and, at his request, the Respondent produced additional documents on 15 November 2018, in compliance with Order No. 185 (GVA/2018) of 2 November 2018. The Applicant made additional submissions in relation to the documents on 23 November 2018 and the Respondent responded to these on 30 November 2018, in compliance with Order No. 185 (GVA/2018).

Parties' submissions

28. The Applicant's main contentions are:

- a. The Complainant was ill-motivated in filing her complaint, as her temporary appointment was not renewed and she was under the impression that the Applicant was responsible for the non-renewal. She also sought to obtain financial compensation out of her complaint;

- b. The investigation was vitiated by several procedural irregularities, namely:
- i. The fact-finding panel did not have authority to assess the Applicant's credibility, it was biased against the Applicant and it did not question the Complainant's credibility;
 - ii. The investigation was compromised and no assessment has been done in this respect;
 - iii. The fact-finding panel did not complete its investigation before OIOS was brought in to assess its work;
 - iv. OIOS did not have authority to assess the work carried out by the fact-finding panel;
 - v. OIOS relied upon the report of the fact-finding panel to establish misconduct, whilst at the same time criticizing it for its lack of coherence and clarity;
- c. The investigation was flawed in several respects, namely:
- i. The burden of proof was reversed;
 - ii. The Applicant was deprived of his right to legal assistance during the investigation;
 - iii. The investigators failed to gather certain pieces of evidence from the Applicant, including the blanket that he intended to give to his daughter, and did not take on his offer to provide a DNA sample under a legally controlled environment nor his request to visit his apartment;
- d. The facts have not been established through clear and convincing evidence:
- i. There is no evidence that the scarf and the handwritten card were given or addressed to the Complainant. They were intended to the Applicant's daughter and could have been picked up in his office by the Complainant;

- ii. As to the photos on the jetty regarding the alleged retreat, the Applicant was only shown one of them, which he had on his smartphone and on his computer. He took it on a trip with his family, as shown by a similar photo where he was with his grandson. A forensic analysis required that the Complainant give access to her mobile phone, which she refused to do, rendering the analysis inconclusive; the Complainant provided no evidence of an invitation to the alleged retreat;
 - iii. The text messages must be put in their context and were merely a joke, based on the fact that the Complainant happily shared the story of her husband calling her “hamster” because of her using a treadmill to exercise and the Applicant stopped using this nickname when the Complainant asked him to do so; the Complainant did not produce her own responses nor did she gave access to her mobile phone;
 - iv. Relevant evidence was not considered, notably the statement of Mr. T., who stated that the Complainant was “seductive” to him;
- e. The Executive Director, ITC, lied under oath during her testimony in stating that the Applicant’s former position had not been filled yet;
- f. The Applicant requests the Tribunal to:
- i. Rescind the disciplinary sanction;
 - ii. Order the Respondent to reinstate him in his position or to provide him appropriate compensation;
 - iii. Award him compensation for his loss of salary from April 2018 until judgment, plus 12 months; and
 - iv. Award him compensation in the equivalent of 24-month salary for moral damages.

29. The Respondent's main contentions are:
- a. The facts are established by clear and convincing evidence. In particular:
 - i. The Applicant lured the Complainant to meetings in Evian and Montreux, as evidenced by a picture of him from the Complainant's phone;
 - ii. The Applicant addressed the Complainant by inappropriate names and nicknames in two text messages;
 - iii. The Applicant gave the Complainant a card with a suggestive message: "Our love is an electric blanket and you control the switch";
 - iv. The Applicant gave the Complainant a gift of a scarf with a wild animal pattern;
 - b. The Applicant's explanations are not credible and the fact that the fact-finding panel and the Executive Director, ITC, did not believe him is not evidence of bias;
 - c. There were no procedural irregularities:
 - i. The fact-finding panel acted within its mandate in assessing the facts, including the Applicant's credibility, and the assessment was ultimately made by the Executive Director, ITC;
 - ii. The fact-finding panel's second report was provided to OIOS;
 - iii. The task given to OIOS fell within its mandate;
 - iv. OIOS did not simply rely upon the conclusions of the fact-finding panel but conducted its own forensic analysis on the hard drives of the Applicant and the Complainant and on the Applicant's professional mobile phone;

- v. The Applicant's right to legal assistance arose during the disciplinary proceedings and was fully respected;
 - vi. The panel did not refuse to gather relevant evidence proposed by the Applicant;
 - vii. The allegations of interference by one of the subjects of the investigation were not sufficiently substantiated by the panel and did not affect the validity of its investigation, nor of the subsequent OIOS investigation;
- d. The Executive Director, ITC, did not lie during her testimony as the Applicant's post has only been temporarily filled and is still under recruitment;
- e. The application should thus be dismissed; and
- f. Furthermore, the Applicant has produced no evidence of harm for the requested compensation and his claim exceeds the normal limit of compensation for harm.

Consideration

Standard and scope of judicial review

30. Pursuant to a well-settled jurisprudence (*Haniya* 2010-UNAT-024, *Wishah* 2015-UNAT-537, *Portillo Moya* 2015-UNAT-423, *Applicant* 2013-UNAT-302, *Kamara* 2014-UNAT-398, *Walden* 2014-UNAT-436, *Koutang* 2013-UNAT-374, *Nasrallah* 2013-UNAT-310, *Mahdi* 2010-UNAT-018, *Abu Hamda* 2010-UNAT-022, *Aqel* 2010-UNAT-040, *Maslamani* 2010-UNAT-028), in cases concerning the imposition of a disciplinary measure, the Tribunal must verify if a three-fold test is met, to wit, whether:

- a. The facts on which the disciplinary sanction was based have been established;
- b. The established facts qualify as misconduct; and

c. The sanction is proportionate to the offence.

31. It is also incumbent on the Tribunal to determine if any substantive or procedural irregularity occurred (*Maslamani* 2010-UNAT-028, *Hallal* 2012-UNAT-207), either during the conduct of the investigation or in the subsequent procedure.

32. As the Appeals Tribunal held in *Mizyed* 2015-UNAT-550, para. 18:

And, of course, “the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred”. “[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is highly probable”.

33. As to the role of the Dispute Tribunal in examining whether the facts had been established, the Appeals Tribunal recently held in *Mbaigolmem* 2018-UNAT-819 that:

27. The right of a staff member to “appeal” an administrative decision imposing a disciplinary measure, in terms of Article 2(1)(b) of the UNDT Statute, is not restricted to a review of the investigative process. On the contrary, it almost always will require an appeal *de novo*, comprising a complete re-hearing and redetermination of the merits of a case, with or without additional evidence or information, especially where there are disputes of fact and where the investigative body *a quo* had neither the institutional means or expertise to conduct a full and fair trial of the issues.

28. However, that said, there will be cases where the record before the UNDT arising from the investigation may be sufficient for it to render a decision without the need for a hearing. Much will depend on the circumstances of the case, the nature of the issues and the evidence at hand. Should the evidence be insufficient in certain respects, it will be incumbent on the UNDT to direct the process to ensure that the missing evidence is adduced before it.

29. Thus, while there may be occasions where a review of an internal investigation may suffice, it often will be safer for the UNDT to determine the facts fully itself, which may require supplementing the undisputed facts and the resolution of contested facts and issues arising from the investigation. The UNDT ordinarily should hear the evidence of the complainant and the other material witnesses, assess the credibility and reliability of the testimony under oath before it, determine the probable facts and then render a

decision as to whether the onus to establish the misconduct by clear and convincing evidence has been discharged on the evidence adduced.

34. It follows that when the facts are contested in a disciplinary case and the dispute cannot be resolved through an examination of the investigation file, the Tribunal shall hear the evidence *de novo* and re-determine the merits of the case. This was the case here, so the Tribunal proceeded to hear the Complainant and the Applicant, amongst others, and reviewed all the material collected by the fact-finding panel and the OIOS investigators to determine whether the facts upon which the contested decision is based were established through clear and convincing evidence.

Was the investigation vitiated by procedural flaws?

35. The Applicant argues that the investigation was vitiated by several procedural flaws regarding, firstly, the intervention of OIOS in the investigation and, secondly, the way the evidence was collected by the fact-finding panel and OIOS. These grievances will be addressed in turn.

Intervention of OIOS

36. At the outset, the Tribunal notes that the procedure to investigate this case was unusual and departed from the one formally envisaged in ITC/EDB/2015/07 in that the investigation into the complaint was first conducted by a fact-finding panel and it was then reviewed and completed by OIOS.

37. Pursuant to ITC/EDB/2015/07, when a fact-finding panel is appointed, it shall investigate the complaint and “prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence” (sec. 5.18). The report shall be submitted to the Director, DSP, who will review it together with the related documentation and make a recommendation on the appropriate course of action to the Executive Director, ITC (see secs. 5.15, 5.18, 5.19 and 5.20).

38. The intervention of OIOS in this matter resulted from a request for assistance formulated by the members of the fact-finding panel in a letter of 14 June 2016 to

the Executive Director, ITC, as the panel members felt that the developments upon resumption of their work in May 2016 required an expertise beyond their own.

39. Firstly, the panel members indicated that they thought that the investigation “had been compromised” as they had indications that the first investigation report had been leaked to one of the two alleged offenders, who may have had unauthorised access to the hard disc of the Complainant’s former computer, that a number of witnesses interviewed may have shared information with those to be interviewed, and “there are strong indications of possible tampering and fabrication of documentary/electronic evidence”.

40. Secondly, they indicated that the recent allegation of rape made by the Complainant fell beyond the scope of their mandate under ITC/EDB/2015/07 and required a different procedure. Some of these concerns were reiterated in more detail in the fact-finding panel report dated 24 June 2016, which more specifically alludes to the Applicant being the one to whom the first draft investigation report would have been leaked. The panel also referred to witnesses being “uncooperative”, either in their attempt to help the Applicant and the Chief, OA, or out of fear of reprisals.

41. There can be no doubt that the members of the fact-finding panel, who are not professional investigators, were overwhelmed by the complexity of this investigation. They faced various challenges, including a lack of cooperation from the witnesses, possible tampering of evidence, a wide scope of very serious allegations, contradictory accounts of events and the difficulty to seize material evidence and to have it analysed by forensic experts in the context of their mandate under ITC/EDB/2015/07. Their report also shows some difficulties to fully capture the procedure applicable to the conduct and report on such investigation. The panel notably gave pseudonyms to the parties involved and to all witnesses, to preserve the confidentiality of the involved individuals. A report of such nature is confidential and it is essential for those involved in the review of the case to know who the parties involved and the witnesses are. Further, the report concludes that the Applicant sexually harassed the Complainant but it is not clear on which factual basis the panel reached this conclusion. In any event, the report of the fact-finding

panel did not serve as the basis for the contested decision so it is not necessary to examine it in any further detail.

42. In response to the panel's request for assistance, the Executive Director, ITC, assigned the investigation into the allegations of rape to OIOS on the basis of Executive Director's Bulletin ITC/EDB/2012/06 (Special measures for protection from sexual exploitation and sexual abuse). The Executive Director, ITC, also asked OIOS to "review the final report compiled by the fact-finding panel and provide an opinion regarding the sufficiency of the summary findings".

43. The appointment of OIOS to investigate the allegations of rape *per se* is not at issue in the present proceedings since these allegations have been dismissed. It is however a relevant consideration when examining the legality of the referral of the sexual harassment allegations since the two matters are connected to some extent. The nature of the relationship between the Applicant and the Complainant and the allegations of sexual harassment could provide a context useful to assess the allegations of rape, especially to determine the element of consent. The request from the Executive Director, ITC, to OIOS to review the investigation into the allegations of sexual harassment was thus a useful complement to the mandate to investigate the allegations of rape and, vice-versa, the investigation into the allegations of rape could possibly supplement or inform that on the allegations of sexual harassment.

44. More importantly, the difficulties expressed by the fact-finding panel to complete its mandate to investigate, *inter alia*, the allegations of sexual harassment called for action to be taken to ensure that the complaint was fully and fairly investigated. ITC/EDB/2015/07 does not provide for any specific avenue to address this situation and different possibilities could be envisaged. Seeking assistance from OIOS was a reasonable solution in the framework of ITC/EDB/2015/07. This administrative issuance specifically grants authority to OIOS to investigate complaints when the report is made directly to it (see sec. 5.12). The Director, DPS, when selecting a fact-finding panel, may also elect to appoint investigative officials from OIOS or designated by it (see sec. 5.15 of ITC/EDB/2015/07). Investigations into possible violations of administrative issuances such as ITC/EDB/2015/07 and misconduct fall squarely within the mandate and expertise of OIOS, as defined in

secs. 16 and 18 of ST/SGB/273 (Establishment of the Office of Internal Oversight Services). Thus, requesting assistance from OIOS to establish the facts related to the complaint under ITC/EDB/2015/07 does not constitute a procedural flaw.

45. The Tribunal agrees however with the Applicant's argument that OIOS did not have authority to assess the work of the fact-finding panel and to provide an opinion on its factual findings. Pursuant to ITC/EDB/2015/07, it was incumbent upon the panel to ascertain the facts and then upon the Executive Director, ITC, to make a decision on the course of action to be taken, based on the recommendation of the Director, DPS. Under ITC/EDB/2015/07, the facts shall be established by those who have investigated them, such that they could, *inter alia*, assess the credibility of witnesses. Those who heard the witnesses are the best placed to assess their credibility. The opinion of OIOS on facts investigated by the fact-finding panel had no probative value. The mandate would thus have been more appropriately defined as one to review the investigation of the fact-finding panel and to complete it as necessary to ascertain the facts alleged in the complaint.

46. That being said, the situation is particular in the present case due to the dual mandate given to OIOS. In investigating the allegations of rape, OIOS collected additional evidence that was relevant to the allegations of sexual harassment and abuse of authority, including additional testimonies by the Applicant and the Complainant and pictures from the Applicant's and the Complainant's computers, and it conducted a forensic analysis of the three pictures of the Applicant standing on a jetty by the Lake Geneva submitted by the Complainant to the fact-finding panel. This material could validly be used to ascertain the facts underlying the complaint for sexual harassment and abuse of authority and thus to supplement or review the factual findings reached by the panel on these allegations.

47. The investigation conducted by OIOS did not violate the Applicant's rights or due process requirements. The Applicant was allowed to challenge the evidence collected by OIOS in the same way as that collected by the fact-finding panel.

48. Irrespective of the foregoing, the Tribunal finds that the OIOS report, akin to the report of the fact-finding panel, does not contain sufficiently clear findings of fact on the allegations made by the Complainant to meet the requirements of sec.

5.18 of ITC/EDB/2015/07 and to support the contested decision, which essentially relied upon these findings. The OIOS report, similar to the fact-finding report, concludes that the Complainant was subjected to sexual harassment and abuse of authority by the Applicant but the underlying facts remain unclear. The OIOS report merely refers to the Applicant having addressed private text messages to the Complainant using “an inappropriate tone for a professional environment”, without specifying what these exchanges were and referring to the evidence supporting this conclusion.

49. Even more worrying, the OIOS investigators stated that the Applicant did not provide any plausible explanation for the three photographs presented by the Complainant, the love card and the scarf, but they did not reach any conclusion about the actual acts that the Applicant would have committed. Another area of serious concern is the absence of an assessment of the Complainant’s credibility, notably in light of the dismissal of most of her allegations. Despite the fact that this case contains contradictory evidence on most of the issues at stake, no balancing exercise was done to carefully review the evidence and assess it. Vague conclusions are reached without any proper reference to the underlying evidence or any explanation as to why one testimony was preferred to another. There is no consideration of the unwelcome character of the acts allegedly committed by the Applicant. In this connection, OIOS rejected the conclusions reached by the fact-finding panel about the nature of the relationship between the Applicant and the Complainant and the circumstances in which she obtained her employment as a staff member on the basis that it was not supported by any evidence, but it did not reach its own conclusions.

50. In view of the foregoing, the Tribunal finds that the intervention of OIOS to assist in the investigation into the complaint was not unlawful and the evidence it collected in the course of its investigation into the allegations of rape could be used to inform the factual findings on the allegations of sexual harassment and abuse of authority. However, both the fact-finding panel and OIOS reached a conclusion that the Applicant sexually harassed the Complainant and abused his authority without ascertaining the facts as required by sec. 5.18 of ITC/EDB/2015/07. Furthermore, any opinion expressed by OIOS on the evidence collected by the fact-finding panel,

which is not based on an assessment of additional evidence it itself collected, fell beyond the scope of its authority under ITC/EDB/2015/07 and had no legal value.

51. Therefore, the Tribunal deemed it necessary to re-hear the witnesses and review all the evidence collected by the fact-finding panel and OIOS to ascertain the facts. As such, any procedural flaw related to the expression of an opinion by OIOS on the findings of the fact-finding panel is cured by the Tribunal's review.

Other alleged procedural flaws

52. The Applicant takes issue with the fact-finding panel's suspicions that the investigation had been compromised and that OIOS failed to address this issue.

53. The Tribunal notes that, indeed, OIOS was not mandated to investigate the alleged interference with the investigation. However, it appears from the report of the fact-finding panel that it would have been the Applicant himself who would have received a copy of the first report of the fact-finding panel and then sought to adapt his testimony accordingly. It is also mentioned that the Applicant would have had access to the Complainant's computer and that he would have deleted pictures from his own computer a few days before it was seized by OIOS for investigation. It is thus unclear what prejudice the Applicant suffered from the absence of an investigation into these matters. Rather to the contrary, neither the OIOS report nor the contested decision contain any conclusion on possible interference with the investigation by the Applicant, which would not only strongly affect his credibility in respect of the allegations of sexual harassment and abuse of authority but may also constitute separate serious offenses for which he could be held accountable.

54. As to the allegations of bias by the fact-finding panel, the Applicant has adduced no evidence that would support them, as required by the jurisprudence of the Appeals Tribunal (*Staedtler* 2015-UNAT-577). The fact that the fact-finding panel did not believe his explanations on a number of points is not evidence of bias. Further, the assessment of the Applicant's credibility fell squarely within the role of the panel, contrary to the Applicant's arguments. Those who conduct the interviews are best placed to assess the credibility of witnesses as they can assess

their demeanour. It is indeed part of their role to test the credibility of witnesses by asking clarifications and exposing contradictions when necessary.

55. As to the alleged violation of the Applicant's right to be represented by Counsel during the investigation, the Tribunal recalls that ITC/EDB/2015/07 does not provide for such a right. The right to legal representation only arises during the disciplinary proceedings, in accordance with sec. 25(b) of ITC/IC/2012/22 (Detailed disciplinary measures and procedures), which are initiated after the fact-finding investigation (see sec. 5.20(c) of ITC/EDB/2015/07). Given the very limited rights afforded to the subject of investigations, the Tribunal notes that it is of crucial importance for the fact-finding panel or OIOS to investigate exculpatory evidence and, consequently, to follow any lead that may tend to exonerate the alleged offender or to affect the credibility of inculpatory evidence.

56. In this connection, the Applicant takes issue with the fact that OIOS did not take on his offers to provide the electric blanket that he had in his office, to provide a DNA sample under a certain legal framework or to visit his apartment. The Tribunal notes that since the allegations of rape have been dismissed and that none of the underlying facts for the finding of sexual harassment in the contested decision are based upon any of the allegations made by the Complainant that the Applicant had lured her into his apartment, these evidentiary elements are not material to the contested decision. Any failure to collect them would thus not constitute a procedural flaw that could vitiate it. As to the electric blanket, the Tribunal will examine this matter in the next section, when looking more closely into the facts related to the card and the scarf that the Applicant allegedly gave to the Complainant (see para. 73 and seq. below).

Have the facts that form the basis of the disciplinary sanction been established?

57. The Tribunal notes that the contested decision is not entirely clear as to the factual matrix that actually forms the basis of the finding of misconduct. The Tribunal is of the view that only the first and last paragraphs of the factual conclusions in the contested decision (see para. 18 above) can be considered as such. The reference to the alleged "office retreats" in para. 2 of the factual findings

is said to provide a “context” for the sending of the text messages and the love card and is thus not seen as constituting reprehensible conduct in and of itself.

58. When questioned about the factual ground for the contested decision during her testimony, the Executive Director, ITC, confirmed that the finding of misconduct was based on the facts that the Applicant called the Complainant “hamster” and “BB”, referring to “baby”, and that he gave her a love card. However, she also later referred to the photographs of the Applicant by the Lake Geneva on the Complainant’s phone at a meeting “that was not a real retreat”. It remained unclear what conclusion exactly the Executive Director, ITC, drew from this.

59. The Tribunal also notes that the Respondent’s reply refers to a series of additional facts, namely the Complainant’s allegations that the Applicant attempted to hold her hand and to kiss her in his apartment and that he touched his intimate parts looking at her, touched her hand and waist and tried to kiss her eight times in the office (see paras. 14, 15 and 18.a. of the reply). These facts are not part of the contested decision and thus cannot be considered.

60. The Tribunal will now turn to examine the evidence in respect of each of the facts that form the basis of the contested decision, namely the Applicant calling the Complainant nicknames and giving her a love card with a scarf. The Tribunal will also examine the Complainant’s allegations that the Applicant lured her into two “office retreats” as part of the overall context of their relationship.

Nicknames

61. It is common ground, and the documentary evidence indeed shows, that the Applicant wrote to the Complainant on 30 December 2014 in a text message sent to her personal mobile phone via Viber:

Good da BB or more Hamster. Do you know why Ramin is call me 2 times now. Am on holiday so what’s so urgent? Do you know?

62. The Applicant later wrote in another text message on 1 January 2015:

Happy New Year my Hamster. You’re the best there is and the best there shall be. Take care and remains for me to wish you a wonderful time with mum.

63. The Applicant and the Complainant, however, presented different interpretations of these messages.

64. The Applicant claims that his exchanges with the Complainant were simply cordial and jovial, as he likes to maintain good relationships with his colleagues. As to the use of the word “hamster”, the Applicant claims that it had no sexual or romantic connotation but rather referred to the Applicant working very hard. The Applicant stated that once, the Complainant came to his office while he was on the phone trying to cancel his gym membership. The Complainant allegedly said that she herself uses a treadmill, which prompted her husband to call her “hamster”. They both laughed and the Applicant used this nickname once or twice, in a jovial and friendly way. He added during his testimony at the hearing that he used the expression “my hamster” as the Complainant told him he was the only one who knew that her husband was calling her that way. The Applicant also told the investigators about the 1 January 2015 message that he wanted to support the Complainant morally, as she was afraid that her appointment may not be renewed. He did not see anything bad in the words he used.

65. The Complainant testified that the Applicant’s version was not plausible as she said that her husband does not call her “hamster” and that she never said so to the Applicant. She testified that she did not appreciate being called by reference to the name of an animal that she felt “uncomfortable” and that this was “confusing” and “embarrassing”.

66. As to the use of the abbreviation “BB”, the Applicant claimed that he made a typo when writing the message, as he meant to write “Good day B”, B being the first letter of the Complainant’s last name. The Complainant, in turn, said that she took it as “baby”, which she interpreted in a romantic sense.

67. The Tribunal is concerned that only a small excerpt of the exchanges between the Applicant and the Complainant was provided. The Complainant refused to hand over her mobile phone, claiming that it is her personal property. She also said that she only kept a small part of the exchanges, deleted her Viber account and, thus, could no longer retrieve the whole series of exchanges. The Applicant did not

provide the exchanges either. The exact context and tone of the exchanges thus remains unclear.

68. However, the documentary evidence does provide one text message sent by the Complainant to the Applicant via Viber on 1 January 2015, in response to the Applicant's message of the same day (see para. 62 above), which reads as follows:

Little Keys Open Big Locks!
Simple Words Reflect Great Thoughts.
Smile Can Cure Blocks. So Keep On Smiling. It Rocks!
Wish you a Happy New 2015!
[Complainant's first name]

69. Although this text message was also part of the investigation file, the Complainant was not questioned about it, nor was it referred to in the investigation report or the contested decision. When asked about it at the hearing, the Complainant said that this was a quotation that she took from the internet and sent to a group of people at New Year.

70. There is no evidence that the Complainant at any point asked the Applicant to stop having this type of exchanges with her. It is noted, however, that in his testimony to the investigators, the Applicant said that after the email where he referred to the Applicant as "hamster", two or three days later, the Complainant came to him and said "you know Silencer if people hear you are calling me hamster, they will laugh at me" and then he stopped.

71. The Tribunal finds that the text messages sent by the Applicant on 30 December 2014 and 1 January 2015 are inappropriate and have a sexual connotation. The Applicant's explanations for a typo in the use of the abbreviation "BB" are not credible, especially in the context of the whole message, which also uses the expression "my hamster". The Complainant reasonably interpreted the abbreviation as "baby", which is commonly understood as a term of endearment and has a romantic connotation. Likewise, the Tribunal finds that the use of the word "hamster" and then "my hamster", especially in the context of the message of 1 January 2015 where the Applicant tells the Complainant that she is "the best there

is and the best there shall be” displays a level of intimacy that is not appropriate between a supervisor and his supervisee and, again, may reasonably be interpreted as having a sexual connotation.

72. The Tribunal notes that the Complainant’s own email of 1 January 2015 may suggest that she was not offended by the messages sent by the Applicant and that she was also willing to participate in an exchange of messages of an intimate nature, although her own message had no sexual connotation. However, both the Applicant and the Complainant have consistently denied to have had an intimate relationship or exchanges that would go beyond the nature of a purely professional relationship. Neither of them produced the full content of the exchanges, and the Applicant even denied having used the word “baby”. In these circumstances, the Tribunal cannot speculate about the circumstances in which these exchanges occurred and shall assess the text messages as they are.

Card and scarf

73. The Complainant claims that the Applicant gave her a gift card with a picture of three roses and a handwritten note saying: “Our love is an electric blanket and you control the switch”. She also claims that the Applicant gave her a scarf. She produced both evidentiary elements to the fact-finding panel.

74. According to the Complainant’s testimony at the hearing, the Applicant called her to his office in March 2015, just after she had been appointed as a staff member, and while they were sitting at his table, he pushed the card in her direction, saying that she should be very grateful to him as it is because of him that she was appointed as a staff member. She said that she was shocked and left, taking the card with her. On the same day, she found a colour paper bag with a scarf with African motives on her desk. She said the card was ripped from the bag containing the scarf. She said she was “almost positive it was the same day”. Still according to the Complainant, the Applicant then asked the next day if she liked what he had left for her, implicitly confirming that he was the one who had given her the scarf. She testified that she felt sexually harassed, embarrassed and frustrated. She further said that she is married and not interested in the Applicant. She allegedly kept the card in her wallet and took the scarf with her at home.

75. The Applicant denied in his testimony having given the card or the scarf to the Complainant. The Applicant said that the card was for his daughter and meant to be given with a blanket that he brought her when he was on mission. The words in the card referred to the blanket. He said during his testimony at the hearing that the card was attached with a small cord to the blanket when he bought it and that he kept both together in a cupboard in his office. He said that when he was interviewed, he still had the blanket in his office and he showed it to the investigators. It is unclear, though, if he referred to OIOS investigators or the fact-finding panel. He testified that the message conveys an expression of love to his daughter, with whom “he jokes all the time”. He further stated that the scarf was also in his cabinet, together with other gifts that he had bought during his missions. The Applicant could not explain how the card and the scarf got in the Complainant’s possession but said that his office is always unlocked and easily accessible.

76. The Applicant’s testimony about the blanket that would allegedly have been in his office during the investigation is not fully consistent with his previous declaration to the fact-finding panel of 3 and 5 November 2015. When asked by the fact-finding panel whether he noticed that the card was missing when he gave the blanket to his daughter, the Applicant answered: “Not at all. I do not pay attention to this kind of details”. The Applicant did not allude to the fact that he had not given the blanket to his daughter such that it would still be in his office. He simply added a handwritten note to the interview record that the blanket was in his office. Only the report of the Applicant’s second interview by the fact-finding panel, dated 30 May 2016, referred to the blanket being still in his office. There is no record of any discussion about the card or the blanket in the interview conducted by OIOS.

77. The Applicant takes issue with the fact that the investigators did not take on his offer to produce the electric blanket that he had in his office as exculpatory evidence. The Tribunal finds that the fact that the Applicant may have had an electric blanket in his office after he was interviewed about this issue by the fact-finding panel would have very little probative value since it would be very easy for him to make this self-serving evidence available. The fact that the Applicant could present an electric blanket after his interview would not change the factual conclusion below about the credibility of the Applicant’s explanations on the card

(see paras. 81-82 below). It is further noted that there is no record of any formal offer by the Applicant to produce the said blanket during the fact-finding investigation. Thus the failure to collect the blanket cannot be seen as a procedural flaw.

78. The Applicant's testimony in respect of the scarf also appears to be in contradiction with his previous statement to the fact-finding panel on 3 and 5 November 2015. The written record of the interview reads:

Q46: What about the scarf?

A46: It is not me who offered it. It was a single present I gave her as I do with other colleagues when I return from mission. She also gave me a present: a pen but I had to tell her that I can't accept it and it is still on my desk and have never used it. I have an email where I told her that I cannot accept gifts.

79. However, the Applicant crossed out part of the reported statement before signing it as the written record of interview. Particularly, he crossed out the second sentence that states that he would have given the scarf to the Complainant when returning from mission. The panel indicated in its report dated 24 June 2016 that it did not take into account the corrections made by the Applicant to the record as "both members of the Panel are sure to have reproduced the correct wording of [the Applicant]".

80. During his interview with the fact-finding panel, the Applicant insisted that it was the Complainant who gave him gifts, but he told her that he could not accept them. He mentioned that she gave him a pen for his birthday and then a gift card for a massage at Globus. The Complainant denied having given any gift to the Applicant and she said that it is the Applicant who asked her to buy him a pen, as he liked the one she had. The Applicant was meant to reimburse her but he did not as he found that the pen was too expensive.

81. The Tribunal finds that there is clear and convincing evidence that the Applicant gave the Complainant the card in March 2015 and the scarf, although it is not entirely clear that the scarf was given on the same day as the card. The Complainant had the card and the scarf in her possession and she consistently

testified that the Applicant gave them to her. The words on the card are also consistent with the nature of the exchange that the Applicant had with the Complainant on 1 January 2015, conveying an intimate relationship.

82. In turn, the Applicant's explanations are not credible. The words used on the card are much more consistent with a romantic affair than a father-daughter relationship. Furthermore, whilst the Applicant's explanation that the card and the scarf could have been stolen from his office is not impossible, there is no evidence to corroborate that this actually happened and thus to cast doubts on the Complainant's testimony on that point. The Applicant did not report anything stolen. Rather, the explanations he provided appear to be an attempt to conceal the truth. His various declarations in respect of the card and the scarf are marked by contradictions.

83. As to the timing for giving the scarf, the Tribunal finds that the Complainant's statements leave doubts about whether it was actually left on her desk on the same day she was given the card. During her interview of 30 October 2015 with the fact-finding panel, the Complainant said that the Applicant gave her the card in his office in March when he came back from mission. She also said that he gave her a scarf, but it was unclear from her testimony whether this was at the same time. During her second interview with the fact-finding panel on 30 May 2016, the Complainant said that the Applicant gave her a card in the morning in his office and that she found a scarf on her desk in the afternoon. When asked if they were both given on the same day or in different occasions she said "I don't know. I don't remember, now". At the hearing, the Complainant said she was "almost positive" it was on the same day. In addition, the Complainant mentioned the card in her initial complaint but made no reference to the scarf.

84. The inconsistencies in the timing for the giving of the scarf are not such as to cast reasonable doubts on the Complainant's testimony and material evidence to the effect that the Applicant gave her a scarf at some point after he had given her the card. Whether the two were connected, or not, is not determinative of the matter at stake. The fact that the Applicant claimed that the Complainant had given him two gifts supports the view that the two were exchanging gifts and, thus, the

Complainant's version of events on that point. In any event, the crucial point in this matter is the card.

85. The Tribunal finds that the words used on the card, together with the three roses, are sexually suggestive.

Alleged office retreats

86. As mentioned above, the contested decision refers to the Complainant's allegations that the Applicant lured her twice to disguised office retreats as "a context to [the Applicant's] subsequent conduct".

87. The Complainant testified at the hearing that the Applicant invited her to an alleged office retreat in Montreux in September 2014, when she was a consultant for the OA. She said that it was common at ITC to hold informal office retreats where four or five colleagues would meet. She allegedly went and nobody else was there. The Complainant said that "nothing happened", they discussed about "normal things" and had a coffee. She said that once again in October 2014, the Applicant invited her to another office retreat in Evian where she again turned out to be alone. The Applicant allegedly asked her to take pictures of him in Evian with her phone and his own. She said that she found it "odd at the beginning" but the Applicant insisted that she took multiple pictures. She said she found it "bizarre" and it made her feel "uncomfortable". She produced three pictures of the Applicant standing on a jetty by the Lake Geneva. The Complainant did not remember how exactly she was invited to these alleged retreats. She stated that she went the second time without asking any questions.

88. The Applicant denied having been with the Complainant to Montreux or Evian and claimed that he never invited her to any office retreat or event where they would be alone. At the hearing, the Applicant did not testify about the pictures. However, in his previous interviews with the fact-finding panel and the OIOS investigators, he provided different explanations about these pictures.

89. In particular, the Applicant stated in his second interview with the fact-finding panel of 30 May 2016 that there were no office retreats during that time and that he did not convoke the Complainant to any such event. He showed one of the three

pictures on his phone and said he had them (presumably referring to the three pictures) on his computer drive. He could not explain how the Complainant had this picture as he said that he never sent it to her. The Applicant later provided another picture portraying him with the same clothes, in company of his grandson, which he claimed was taken on the same day.

90. In his interview with OIOS on 13 October 2016, the Applicant stated that the picture on the jetty was taken by his family. He said he was with four adults he was taking around the lake. He did not refer to his grandson being also present. He claimed that the picture was sent to him and that he also had it on his camera.

91. According to a forensic analysis report prepared by OIOS and dated 25 October 2016, the three pictures of the Applicant on the jetty were taken from a Samsung Galaxy 3 mobile phone and “matched the smartphone camera of a photograph which was found on the computer used by [the Complainant] and were most likely taken from the same device.” The picture that the Applicant had does not contain any metadata which, the report says, “is common when the image has been downloaded from an online site or social media portal, as well as when an application shares the image.” The forensic analyst, OIOS, further testified at the hearing that this picture thus appears to be copy of one of the three pictures produced by the Complainant.

92. The Respondent produced an additional note for the file prepared by the forensic analyst, OIOS, dated 5 July 2018, together with additional pictures found on the Applicant’s and Complainant’s computers. Given that this evidence was produced by OIOS after the contested decision and thus did not form part of the factual matrix upon which the decision was based, the Tribunal will not take it into account. The Tribunal does not exclude the possibility that such *ex post facto* evidence may be admitted under exceptional circumstances where, for instance, it is vital to the disposal of the case and due process rights can be protected or it would contribute to exonerate the staff member. But this is not the situation here.

93. The Applicant alluded to the possibility that the Complainant manipulated the pictures, including their metadata, and that she may have obtained the picture from his own files. There is no evidence to support these allegations and the metadata of the various pictures is consistent.

94. The Tribunal finds that the evidence is sufficiently clear and convincing to conclude that the Applicant and the Complainant found themselves together at least once by the Lake Geneva, in Montreux and/or Evian, and that the Complainant took pictures of the Applicant with her mobile phone. Not only the Complainant consistently testified as such but the forensic analysis concluded that the pictures were taken from a Samsung Galaxy 3 mobile phone, which corresponds to another picture taken from the same model of phone found on the Complainant's computer and which contains similar metadata. A formal confirmation that the pictures were taken from the Complainant's phone would have required that she surrenders it, which she refused to do. This does not mean, however, that the evidence is not sufficient to reach a conclusion. In turn, there is no evidence supporting the Applicant's assertion that the picture that he had on his computer may have been taken from his mobile phone or camera. The picture on the Applicant's computer contains no metadata, which suggests that it was a copy taken from a picture sent by email or downloaded from a social media site. The Applicant's explanations about the source of the picture on his computer are self-contradictory, as he said that the picture was sent to him by his family but that at the same time he had it on his camera.

95. However, the Tribunal finds that the evidence is insufficient to reach any conclusion as to how the Applicant and the Complainant ended up by the Lake Geneva together. The Complainant could not provide any details as to how the Applicant would have invited her to any of the two alleged office retreats. Furthermore, the fact that the Complainant claimed that she went a second time to an alleged office retreat, without making any verification about the real nature of the invitation, which she could have easily done if it was meant to be an office retreat, casts serious doubts on her credibility. Finally, it also appears that at the time, the Complainant was not working under the Applicant's direct supervision, such that it would appear unlikely that she would be invited to an office retreat by

him. Although the evidence is not entirely clear as to the exact reporting lines of the Complainant in September and October 2014, it appears that she was working as a consultant with the OA. The Complainant may have done some work with the Applicant, as she claims, but she was not under his direct supervision.

96. Equally, the Tribunal finds that the Applicant was not forthcoming in consistently denying his presence with the Complainant by the Lake Geneva and the fact that she took pictures of him. It appears that the Applicant and the Complainant met outside work and that neither is prepared to fully explain the context.

97. In this connection, the Tribunal notes that in addition to the meeting(s) in Evian and/or Montreux, both the Applicant and the Complainant referred during their testimony before the Tribunal to a meeting at Lake Geneva Hotel in Versoix, where they both live. Again, they had different explanations as to this meeting outside work. The Applicant said that the Complainant invited him there so that he could meet her husband, but the Complainant showed up alone so he decided to leave. However, in a previous interview with OIOS, the Applicant did not mention this encounter and rather stated: “[T]he Complainant lives barely hundred and twelve meters from my apartment. She knows where I live. She shops in the same shop. We have never met either socially or otherwise”. The Complainant, in turn, testified that the Applicant invited her at the Lake Geneva Hotel on a Saturday for a coffee, before she started to work with him, and the Applicant asked her for tips about Switzerland and to bring books.

98. The Tribunal concurs with the contested decision that the presence of the Applicant together with the Complainant by the Lake Geneva, as established by the pictures provided by the Complainant, provides a context to her allegations. However, the Tribunal, in light of its analysis of the evidence above, interprets this context differently from the Executive Director, ITC. The presence of the Applicant and Complainant by the Lake Geneva, without any evidence that the Applicant lured the Complainant there under the false pretext of an office retreat, together with another meeting at the Lake Geneva Hotel, cast doubts about the nature of the relationship between the two. However, since neither of the two seem prepared to

fully disclose it, the Tribunal cannot infer any connection between their presence by the Lake and the later exchanges of text messages and love card thereafter.

Reporting lines

99. The evidence shows that the Complainant was and remained in a precarious employment situation from the commencement of her consultancy at the ITC in May 2014 until her separation from service on 1 August 2015. She even had a period in January 2015 when she had no contract. When she joined the OA in August 2014, she was not under the direct supervision of the Applicant but she worked with him, amongst other people. According to the Complainant's testimony, the Applicant told her when they met at the Lake Geneva Hotel in August 2014 that he could help her secure a position within the OA commensurate with her educational background as a doctor. The Applicant denies having made such statement. The Complainant also repeatedly claimed in her complaint and during her interviews with the fact-finding panel and the OIOS investigators that the Applicant made her believe that he could influence her employment at ITC, either by getting her an appointment as a staff member or to have her appointment renewed. She further testified at the hearing that when the Applicant gave her the love card, he said that she should be thankful to him as he was instrumental in getting her an appointment as a staff member (see para. 74 above).

100. The Tribunal finds that there is clear and convincing evidence that the Complainant was under the impression that the Applicant could help her secure her employment at the ITC, which he actually did in February 2015 when she started working for him as a staff member at the P-1 level on a three-month appointment. The Complainant's appointment was only renewed once, again for a three-month period. The Applicant denies having been in a position to secure the renewal of the Complainant's appointment which, he claims, was due to a lack of funding. Whilst the reasons for the non-renewal of the Complainant's appointment go beyond the scope of this matter, there is clear and convincing evidence that the Complainant believed that the Applicant, as her supervisor, may have an influential role in the renewal of her contract. This belief was not unreasonable in the circumstances. Whereas the Applicant could not ensure the renewal of the Complainant's

appointment if there was a lack of funding, an unfavourable recommendation from his part would most certainly have a detrimental effect on the possibility of the Complainant to have her contract renewed absent any budget consideration. In that sense, the Complainant was to some extent dependent upon the Applicant for the renewal of her appointment, which placed her in a vulnerable situation.

Credibility of the Complainant and the Applicant

101. The Tribunal notes that neither the contested decision nor the OIOS report discuss the credibility of the Complainant, an issue that is of significant import to the present case given that there were no other witnesses than the Applicant and the Complainant during the events under review and they present diametrically divergent accounts. This case largely rests upon the credibility of the Complainant and the Applicant.

102. The Tribunal finds that a number of elements in this case cast serious doubts as to the credibility of the Complainant and her motivation for filing a complaint.

103. Firstly, the complaint was submitted to the Executive Director, ITC, 13 days after the Complainant was separated from ITC. In her complaint, she raised a number of grievances concerning the way her non-renewal was processed thus suggesting that her complaint against the Applicant is not foreign to the non-renewal of her appointment. She further asked for compensation for her loss of revenue, indicating that she sought to obtain a financial advantage out of her complaint. She wrote in this respect:

Given my current situation and knowing that the period necessary for psychotherapy now places me in a difficult financial situation as well as I am not able to immediately integrate another workplace, I hereby kindly request ITC and senior management to seek a solution for my current loss of revenue and during the recovery period.

104. Secondly, the Complainant also consistently claimed that the Applicant was responsible for the extension (or not) of her appointment, and she said in her complaint that the Applicant created expectations in July that her appointment would be extended. This may be indicative of a motive to seek revenge against the Applicant for the non-renewal of her appointment.

105. Thirdly, as her complaint was being investigated, the Complainant had several exchanges with the Director, DPS, where she repeatedly asked to be reinstated or to receive compensation for the alleged harassment of which she was victim. For example, in an email of 30 March 2016 to the Complainant, the Director, DPS, refers to emails from the Complainant dated 12 February and 29 March 2016 where she requested to be “kept under contract at ITC” in her quality as “whistle blower”. In an email of 14 May 2018 to the Director, DPS, the Complainant asked “why there [was] no comment regarding [her] file submitted for personnel compensation at UNOG after [she had] submitted the formal complaint and while [she] was undergoing medical treatment as per documentation submitted during the investigations”. In another email to the Director, DPS, the Complainant asked for a copy of the investigation report into her complaint, which she claimed was “necessary as to enable [her] human right to legally pursue compensation for [her] very bad experience as former staff member at ITC and medically attested trauma.” She added that “[t]his is independent of [their] internal decisions at ITC or any of [their] resolution strategies and will be addressed to the Swiss local authorities.” She made similar allusions to her claim for compensation in emails dated 30 November 2016 and 11 January 2017.

106. Fifthly, a large number of allegations made by the Complainant were not found in the fact-finding panel reports, the OIOS report and/or the contested decision, including that the Applicant invited her for dinner, that he attempted to hold her and kiss her when she brought work documents to his apartment at his request, that on many occasions the Applicant touched his intimate parts looking at her when he was alone with her in his office, that he touched her hand and waist in his office and that he tried to kiss her neck when they stayed late in the office on approximately eight to ten occasions. The Complainant also made an allegation that the Applicant raped her twice when the investigation into her complaint by the fact-finding panel resumed in May 2016, which is almost a year after she had filed her initial complaint. Some of these allegations are referred to in the contested decision or the reply, but were not the subject of any finding in the contested decision, indicating that they were not found to be factually proven. Others, including the allegation of rape, were expressly found not to be established.

107. The Tribunal notes that only those allegations made by the Complainant where she had some corroborative evidence were considered in the contested decision. This strongly suggests that OIOS and the decision-maker did not find the Complainant sufficiently credible to rely exclusively on her testimony to reach a conclusion on the allegations she made, although no express finding was made in respect of the Complainant's credibility.

108. The Tribunal did not reassess the several allegations made by the Complainant, which were not retained in the contested decision since these did not form the basis of the disciplinary sanction imposed on the Applicant. However, the fact that the Complainant made a number of allegations which were not established, that she filed her complaint only after she separated from service under the assumption that the Applicant was responsible for the non-renewal of her appointment and that she repeatedly claimed compensation for her treatment by ITC, cast serious doubts as to her credibility. The Complainant also refused to hand over her phone and produced only excerpts of text messages exchanged with the Applicant, which may tend to suggest an intent not to reveal the full picture of her relationship with the Applicant.

109. The Applicant, in turn, provided implausible explanations in respect of a number of issues, including the gift card, the picture and the text message he wrote to the Complainant. He did not seek to adduce evidence of the totality of the text messages he had with the Complainant. He claimed himself that the Complainant gave him gifts, including a certificate for a massage. His behaviour is also indicative of an attempt to conceal his relationship with the Complainant, the nature of which remains unclear.

110. The Tribunal recalls that it is not for the Applicant to disprove the facts alleged against him. As recalled by the Appeals Tribunal, he is presumed innocent (*Bagot* 2017-UNAT-718). However, the Applicant's providing implausible explanations in respect of the allegations made by the Complainant necessarily affects his credibility and this is an element to take into account when considering whether the facts have been established through clear and convincing evidence.

Similar to the credibility of the Complainant, the credibility of the Applicant is material to the determination of the case.

111. In this connection, the Tribunal finds that the Applicant's argument that the Executive Director, ITC, reversed the burden of proof is without merit. The contested decision is based on the evidence provided by the Complainant, which the Executive Director, ITC, found was sufficient to establish the facts, albeit erroneously. The Applicant's explanations were considered and the decision-maker found that they were not plausible and, as such, did not rebut the evidence adduced by the Complainant.

112. To conclude, the Tribunal has serious doubts about the credibility of both the Complainant and the Applicant, such that little weight can be given to their testimonies unless corroborated by additional evidence. The various allegations made by one another suggest the existence of a relationship that may have gone beyond a purely professional one, including various encounters outside the workplace. A number of factual elements remain unexplained, such as the fact that the Applicant and the Complainant found themselves together by the Lake Geneva at least once and the Complainant took pictures of the Applicant with her private mobile phone; their meeting at the Lake Geneva Hotel in Versoix; the context of the text messages and the import of the Complainant's own message of 1 January 2015; the alleged exchange of gifts between the two which they reported in a contradictory manner and the Complainant's apparent motivation to secure her employment at ITC and to ensure her career development. The Tribunal is also concerned by the Complainant's motivation for filing the complaint, to which she kept adding additional grievances throughout time, including an allegation that the Applicant raped her twice almost a year after she filed her initial complaint.

113. The fact-finding panel indeed referred to "a possibly ambiguous relationship" and to the fact that the Complainant possibly accepted it, in its report of 24 June 2016. The panel also found that "[i]t is possible that during the last quarter of 2014 the foundations of [the Complainant's] recruitment as a professional staff member might have been laid down with an unspoken caveat".

Conclusion

114. In view of the foregoing, the Tribunal finds that there is clear and convincing evidence to establish the following facts retained in the contested decision, which are supported by material evidence:

- a. The Applicant sent two text messages to the Complainant, on 31 December 2014 and 1 January 2015, where he called her “hamster”, “my hamster” and “BB”, which in the context can reasonably be read as “baby”, together with a message saying “you are the best there is and there shall be”. In the context, these may reasonably be perceived and have been perceived by the Complainant as terms of endearment and to have a sexual connotation;
- b. The Applicant gave a card with a picture of three roses to the Complainant in March 2015 with a handwritten note saying “Our love is like an electric blanket and you control the switch.” The words on the love card are sexually suggestive. On the same day or thereafter, the Applicant also left a scarf on the Complainant’s desk as a present;
- c. The Applicant was in a position of authority towards the Complainant from at least February 2015, when he recruited her as a staff member and became her direct supervisor. Beforehand, the Complainant was working with the Applicant as a consultant in the OA. The Complainant was under the impression that in both situations, the Applicant could help her secure her employment at the ITC. Her perception was not unreasonable in the circumstances.

115. However, there is no clear and convincing evidence that the Applicant “lured [the Complainant] to the meetings under the disguise ’office retreats’” and no inference can be drawn from their presence by the Lake Geneva in September and/or October 2014.

116. As to the conclusion in the contested decision that the Applicant's words in the text messages and the love card "may have reasonably been perceived as humiliating and offensive and [the Complainant] stated that she was intimidated by [the Applicant's conduct]", the Tribunal will address it in the next section, which examines in more details the legal requirements for sexual harassment. However, the Tribunal reaches in this respect the following additional factual findings.

117. The Tribunal finds that the context in which the exchanges between the Applicant and the Complainant occurred could not be ascertained. However, the Complainant stated that she was intimidated by the Applicant's conduct and no contrary evidence was adduced by the Applicant or otherwise. Her testimony on that point should thus prevail. Although there are a number of indications that the Complainant voluntarily met with the Applicant outside the office, there is no evidence to conclude that she was involved in an intimate relationship with the Applicant or otherwise contributed to romantic exchanges with him.

Do the facts amount to misconduct?

118. The Tribunal must now examine whether the facts listed in para. 114 above constitute sexual harassment and/or abuse of authority, in violation of staff regulation 1.2(a), staff rule 1.2(e), and ITC/EDB/2015/07.

119. Sexual harassment is defined as follows in sec. 1.3 of ITC/EDB/2015/07:

Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.

120. This definition contains three material elements: firstly, there must be a conduct of a sexual nature; secondly, the conduct must be expected or be perceived to cause offence or humiliation and thus be unwelcome; and thirdly, it must have an effect on the working environment.

121. The definition does not require that the alleged offender subjectively knew that his or her conduct is inappropriate or offensive. Sec. 1.3 of ITC/EDB/2015/07 very clearly sets out an objective test for establishing sexual harassment in stating that “the conduct *might reasonably be expected or be perceived* to cause offence or humiliation” (emphasis added). The test focusses on the conduct itself and requires an examination of whether it would be expected or be perceived to cause offence or humiliation to a reasonable person, taking into account the overall circumstances in which the conduct occurred.

122. Further, the reference to “unwelcome” conduct does not require that the alleged offender be put on notice that his or her conduct is unwelcome. Sec. 5.5 of ITC/EDB/2015/07 specifically provides in this respect that:

Aggrieved individuals are encouraged to notify the offender of their complaint or grievance and ask him or her to stop as, in some instances, the alleged offender may not be aware that his or her behaviour is offensive. However, disparity in power or status or other considerations may make direct confrontation difficult, and aggrieved individuals are not required to confront the offender.

123. However, if staff members engage in an ambiguous relationship or in consensual exchanges of a sexual nature and, at some point, one of them no longer consents to being part of such exchanges, it may be required that the other staff member be put on notice of the change in the dynamics of the relationship (see, e.g., *Oummih* UNDT/2018/016). The objective assessment of the unwelcome nature of the conduct depends largely on the circumstances of the case.

124. As to abuse of authority, it is defined in sec. 1.4 of the same bulletin as follows:

Abuse of authority is the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or employment conditions of another, including, but not limited to, appointment, assignment, contract renewal, performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

125. In the instant case, the Tribunal finds that the two text messages and the love card sent by the Applicant to the Complainant, which contain terms of endearment and convey messages of sexual or at least romantic connotation, amount to a behaviour of a sexual nature within the definition of sec. 1.3 of ITC/EDB/2015/07. The first element for sexual harassment is thus met.

126. The Tribunal concurs with the conclusion of the Executive Director, ITC, that the Applicant's conduct may reasonably be perceived to cause offense or humiliation to the Complainant, such that this conduct was unwelcome. Absent any information as to the context in which this conduct occurred, and without any submission or admission by the Applicant—and/or the Complainant—that they had engaged in an ambiguous relationship, the Tribunal must examine the situation in light of the standards that apply to a normal professional relationship between a supervisor and his supervisee. There is no doubt that a reasonable person would feel intimidated or offended by the above referenced messages from the Applicant and, indeed, the Complainant claimed that she was. In turn, there is not enough evidence of a situation of *quid pro quo* that would have required the Complainant to put the Applicant on notice that his conduct was unwelcome. The second requirement for sexual harassment is thus met.

127. The Applicant's conduct occurred in the work place in the context of a superior-subordinate relationship. There can be no doubt that it interfered with work under the terms of sec. 1.3 of ITC/EDB/2015/07 and, thus, the third element for sexual harassment is met.

128. Therefore, the Tribunal finds that the Applicant's conduct amounts to sexual harassment under sec. 1.3 of ITC/EDB/2015/07.

129. This conduct also amounts to abuse of authority under sec. 1.4 of ITC/EDB/2015/07, as it occurred in a context where the Complainant was in a vulnerable situation of employment and was under a reasonable impression that the Applicant could secure her employment. The Applicant indeed recruited her as a staff member shortly after he sent her the text messages at the end of 2014 and he gave her the love card and the scarf about a month after the Complainant had

become his supervisee. The Applicant used his position of power to sexually harass the Complainant.

Was the sanction proportionate?

130. The ASG, OHRM, imposed the disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity, in accordance with staff rule 10.2(a)(viii). This is the second most severe sanction. In deciding on the sanction, the ASG, OHRM, considered that cases of sexual harassment normally attract sanctions at the stricter end of the spectrum, that there were no mitigating factors and that the repeated conduct of the Applicant's behaviour towards the Complainant and his lack of remorse constituted aggravating factors.

131. The Tribunal recalls that the Secretary-General has a broad discretion in the establishment of disciplinary sanctions and the Tribunal would intervene only if its exercise was manifestly abusive. The Tribunal sees no compelling reasons to intervene here in the exercise of discretion.

132. Firstly, the Tribunal concurs with the decision-maker as to the factual matrix upon which the contested decision is based, apart from the reference to the office retreats. This difference is not significant enough to warrant reconsideration of the sanction since this factual element was referred to as a context and did not form part of the reprehensible conduct for which the sanction was imposed.

133. Secondly, the Applicant did not challenge the proportionality of the sentence nor did he put forward any mitigating factor.

134. Thirdly, the Tribunal concurs with the ASG, OHRM, that sexual harassment is a very serious conduct that generally attracts severe sanctions, including separation from service. In this connection, the Appeals Tribunal recently held in *Mbaigolmem* 2018-UNAT-819 that:

Sexual harassment is a scourge in the workplace which undermines the morale and well-being of staff members subjected to it. As such, it impacts negatively upon the efficiency of the Organization and impedes its capacity to ensure a safe, healthy and productive work environment. The Organization is entitled and obliged to pursue a severe approach to sexual harassment. The message therefore needs to be sent out clearly that staff members who sexually harass their colleagues should expect to lose their employment.

135. Furthermore, the Tribunal concurs with the ASG, OHRM, that the continuing denial of the Applicant, his implausible explanations and the lack of remorse are aggravating factors. The Tribunal also considers that the element of abuse of authority constitutes an aggravating factor, as provided in sec. 1.4 of ITC/EDB/2015/07.

136. The Applicant sought to establish that he was treated unequally with respect to other staff members, alluding to another instance of sexual harassment that would have occurred at a Christmas party in ITC and where the alleged offender was allegedly not disciplined.

137. The Tribunal recalls that it is not seized of this other matter of alleged sexual harassment committed by another staff member for which the facts have not been established. There is thus insufficient evidence to conclude that the Applicant received an unequal treatment. As recalled above, the practice in the Organization is not to tolerate sexual harassment. The fact that this practice may not have been followed in another case would not exonerate the Applicant.

138. The Applicant also argued that his separation from service was motivated by a hidden agenda pursued by the Executive Director, ITC, to achieve gender parity by getting rid of a male staff member at the P-4 level. There is no evidence to substantiate this allegation. Rather, the Executive Director, ITC, made it clear in her testimony that she would not tolerate sexual harassment and this is why she recommended the imposition of a severe sanction. In any event, the decision was ultimately made by the ASG, OHRM, who deemed the sanction appropriate in the circumstances.

139. In view of the foregoing, the Tribunal finds that the decision to impose a disciplinary measure of separation from service with compensation in lieu of notice and without termination indemnity was lawful.

Allegations of contempt of court

140. The Applicant alleged in his written submissions of 23 November 2018 that the Executive Director, ITC, lied under oath when she said that the Applicant's position had not been filled yet. The Tribunal finds that the evidence is not sufficiently clear to support the Applicant's assertion. The Executive Director, ITC, stated in her testimony that to her knowledge the Applicant's position was still open and under recruitment. The documentary evidence produced in this connection shows that the Applicant's position was moved from the OA to the Office of Asia and the Pacific in August 2018. An internal female candidate was temporarily assigned to the position, from 1 September to 31 December 2018. It is thus possible that a regular recruitment for the Applicant's position is underway.

Conclusion

141. In view of the foregoing, the Tribunal DECIDES that the application is rejected in its entirety.

(Signed)

Judge Rowan Downing

Dated this 14th day of December 2018

Entered in the Register on this 14th day of December 2018

(Signed)

René M. Vargas M., Registrar, Geneva