

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;

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

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: l Td ()Tjritt.82500076 0 -075.86eti43 ()Tj -307.5

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 3our[the

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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;

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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 0062T017(3)T596459718 0 Td (piecon)0 Td56

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

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

- 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.

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. ~~the~~ ^{they} ~~in~~ ~~the~~ ~~fact~~ ~~that~~ ~~it~~ ~~was~~ ~~not~~ ~~clear~~ ~~that~~ ~~the~~ ~~panel~~ ~~was~~ ~~not~~ ~~in~~ ~~the~~ ~~best~~ ~~position~~ ~~to~~ ~~deal~~ ~~with~~ ~~the~~ ~~issues~~ ~~raised~~ ~~in~~ ~~the~~ ~~complaint.~~ (in)Tj ()Tjj 40.23

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”.

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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

panel did not serve as the basis for the contested decision so it is not necessary to examine it 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 constitute a procedural flaw.

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.

63. The Applicant and the Complainant, however,

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:

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.

(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

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 ~~platel~~

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

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

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 Exeeview

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.

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

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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.

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 ~~86j1h382n0~~ 86j1h382n0 ered

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 ITC

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