G.

v.

PAHO

134th Session **Judgment No. 4540**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs A. D. C. G. against the Pan American Health Organization (PAHO) (World Health Organization) on 17 September 2020, PAHO's reply of 7 December, corrected on 14 December 2020, the complainant's rejoinder of 9 February 2021 and PAHO's surrejoinder of 9 April 2021;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges her dismissal as a result of disciplinary proceedings.

The complainant joined PAHO in April 2011 as an administrative assistant in the Assistant Director's Office. On 8 April 2015, the complainant's co-worker, Mrs T., filed a complaint of harassment against her. On 20 May 2015, the complainant was informed of the decision to reassign her to a post in the Department of Financial Resources Management (FRM) due to her "inability to maintain a respectful relationship with [Mrs T.] and her inability to resolve differences with her coworker in a courteous and discreet manner". The complainant's reassignment took effect on 26 May 2015.

As of 14 December 2017 the Ethics Office received several complaints regarding the complainant's workplace conduct from her colleagues in FRM, including the Director of FRM. As a result, the Ethics Office decided to launch a formal investigation into the complainant's conduct. On 28 February 2018 the complainant was interviewed by the investigator and, on that occasion, she in turn formulated allegations of harassment against four of her colleagues in FRM.

On 26 April 2018 it was determined that the allegations raised by Mrs T., who had since left the Organization, did not rise to the level of harassment.

On 6 September 2018 a letter of charges was issued to the complainant on the basis of the investigation report dated 6 July 2018. The charges included: creating a hostile work environment, personal harassment and bullying and violating time and attendance rules and policy. It was also added that the Organization believed the evidence in the record was sufficient to establish that the complainant was unsuitable for international service.

On 9 October 2018 the complainant transmitted her reply challenging the charges against her.

By letter of 15 November 2018 from the Director of Human Resources Management (HRM), the complainant was informed of the decision to dismiss her for misconduct with immediate effect. It was indicated to her that she would receive payment of one month's salary in lieu of notice.

On 14 January 2019 the complainant filed a Notice of Intent to Appeal. Her appeal was filed on 1 April 2019, after multiple extensions of the time limit.

In its report of 22 April 2020, the Board of Appeal found that the complainant had violated PAHO's Harassment Policy and the rules governing time and attendance which constituted misconduct and deserved a significant penalty. However, it concluded that the record did not support a termination of employment since PAHO was "obligated under its own rules to first impose a lesser punishment and/or issue an explicit performance evaluation that would have put [the complainant]

on notice of the need to correct her behavior". The Board recommended to rescind the dismissal decision and to impose a suspension without pay as a disciplinary penalty, followed by reassignment.

By letter of 22 June 2020 the Director of PAHO indicated that he did not agree with the Board's findings that the disciplinary measure was disproportionate but nevertheless decided that it would be an equally appropriate measure to dismiss the complainant for unsuitability for international service rather than for misconduct. The Director further indicated that the complainant's unsuitability for service was the conclusion reached by the Organization based on the three charges set out in the 15 November 2018 decision. That is the impugned decision.

By letter of 25 June 2020 the complainant was advised that the Organization's record had been revised to reflect the changes on the motive for separation, and that she would be entitled to receive three months' notice instead of one.

The complainant asks the Tribunal to reverse the impugned decision, to reinstate her immediately and to reassign her in accordance with the recommendations of the Board of Appeal in order to prevent her from "further exposure to a toxic work environment". She seeks material damages in the amount of 20,000 United States dollars for procedural errors. She further seeks material damages for the loss of salary from the initial decision taken on 15 November 2018 until the date of the Tribunal's final decision. This amount should be calculated on the basis of a monthly salary of 5,173.20 United States dollars and should include such deduction as the Tribunal deems appropriate with regard to the duration of the complainant's suspension without pay. The complainant requests the award of 50,000 United States dollars for moral damages, or such other amount the Tribunal considers appropriate. She also seeks the reimbursement of 5,297.80 United States dollars for medical expenses incurred as a result of the injury caused by these proceedings as well as reimbursement of her legal fees in an amount to be quantified at the conclusion of the proceedings, but not exceeding 5,000 United States dollars. The complainant asks for any other orders the Tribunal considers appropriate.

PAHO asks the Tribunal to deny the remedies sought by the complainant and dismiss the complaint.

CONSIDERATIONS

1. The complainant was a member of staff of PAHO, having commenced employment with the Organisation in April 2011. In September 2018, she was charged with misconduct. Her employment was terminated for proven misconduct by letter dated 15 November 2018. Staff Rule 1110 governed the imposition of disciplinary measures for misconduct. Her internal appeal against that decision did not result in it being set aside notwithstanding a recommendation of the PAHO Board of Appeal (BOA) in its report of 22 April 2020 that the proven misconduct did not warrant the disciplinary measure of dismissal. In the impugned decision of the Director of 22 June 2020 addressing the recommendations of the BOA as part of the process of finalising the appeal, the Director decided the complainant should be dismissed because of her unsuitability for international service under Staff Rule 1070 and not under Staff Rule 1110 for misconduct.

2. In the brief, the complainant, who is legally represented, raises only two arguments, each of which is narrowly focused. The first is that the decision to dismiss was a disproportionate response having regard to the complainant's conduct. The second is that the impugned decision of the Director was tainted by illegality. The foundation of a substantial part of the second argument is that the Director, in determining the appeal, was reviewing her own decision thus violating the principle of *nemo judex in causa sua* (no one can be the judge of their own cause). Also, so it is contended, "the Director exercised her discretion improperly in disregarding the BOA Report recommendations".

3. It is convenient to deal with the second argument first. Under Staff Rule 1230.1 a staff member can, subject to one presently irrelevant qualification, "appeal against any administrative action or decision affecting his or her appointment status". The appeal is considered by the BOA which is obliged by Rule 1230.7.1 to submit its findings and

recommendations to the Director within a specified time. Staff Rule 1230.7.2 then provides, consequentially, "[t]he final decision in appeal matters heard by the Board of Appeal rests with the Director". The Rules provide expressly that the final decision is made by the Director.

4. The Tribunal derives its jurisdiction from its Statute. In an early case it was described as "a [c]ourt of limited jurisdiction [...] bound to apply the mandatory provisions governing its competence" (see Judgment 67, consideration 3). One of the Tribunal's central roles, founded on Article II of the Statute, is to enforce compliance with staff regulations where they have not been observed. The touchstone of its jurisdiction is, in this respect, lawfully adopted staff regulations or rules of international organisations. The provisions in the staff regulations and rules are the starting point in the exercise of jurisdiction. Accordingly, Staff Rule 1230.7.2 which provides that the final decision in an appeal is made by the Director, must be respected and given full effect. The Director was authorised to make the decision in the appeal in the present case and her decision was not tainted by illegality as alleged by the complainant.

5. Cases do arise in the Tribunal where the decision appealed against and the decision in the appeal are made by the same person, but the latter decision involves a rejection of recommendations of the appeal body. The discussion in the preceding consideration is not intended to suggest that in such cases there is no real scrutiny by the Tribunal of that latter decision and the reasons given. To the contrary, there is. The Tribunal's case law is replete with examples where the motivation for the rejection has been found to be inadequate and the decision in the appeal has been set aside (see, for example, Judgments 4427, consideration 10, 4259, considerations 11 and 12, and 4062, consideration 4). This approach has the effect of respecting rules conferring, ordinarily, on the executive head of an organisation the power to make the final decision in an appeal even if an appeal from a decision of that person, while recognising the vitally important role appeal bodies play and the need to give considerable weight to findings and recommendations they make.

6. In any event, the initial decision of 15 November 2018 to terminate was made by the HRM Director and the ultimate and impugned decision in the appeal was made by the chief executive officer of PAHO, the Director, a different person. The suggestion that "the Director exercised her discretion improperly in disregarding the BOA Report recommendations" is a point without substance. The Board's recommendations were not disregarded even if not accepted and followed.

7. The Tribunal now turns to consider the complainant's first argument about proportionality. As noted in consideration 1 above, the Director, as part of the process of finalising the appeal, decided the complainant should be dismissed because of her unsuitability for international service under Staff Rule 1070 and not under Staff Rule 1110 for misconduct. However, the complainant's pleas proceed on the basis that the dismissal was a disciplinary measure and reference is made to Tribunal's case law concerning proportionality in the context of the imposition of a such measure. PAHO does not challenge the proposition that proportionality had legal relevance in this case to the decision to dismiss even if the termination was based on the complainant's unsuitability for international service. Indeed, PAHO argues in its reply that "[...] in order to gauge whether the decision to separate [c]omplainant from the Organization due to unsuitability for international service was proportionate to the degree of her misconduct, a review of the facts in this case is necessary". In any event, had PAHO challenged the proposition that proportionality was relevant, almost certainly the actual decision based on unsuitability for international service, in proceedings where the entire decision-making process preceding the impugned decision including the appeal was focused on misconduct, could have been characterised by the Tribunal as a disguised disciplinary measure (see Judgment 3848, considerations 6 to 8).

8. Having regard to its report as a whole, the BOA's recommendation that the complainant's dismissal be rescinded (but that the complainant be suspended without pay and reassigned) was materially underpinned, in part, by a conclusion that while the

complainant's conduct on 12 December 2017 constituted harassment, events on other days were not shown to be harassment. The BOA observed that the incident on that day had been "proved by evidence with a significant level of specificity" but that events on other days had not been. In her impugned decision, the Director recounted in nine dot points "numerous specific examples of inappropriate behaviour" demonstrated by the record of the case. In her brief, the approach of the complainant is to note the "obvious inconsistency between the BOA's findings and the [i]mpugned [d]ecision reversing or ignoring those findings" but then to say "[h]owever the [c]omplainant is not asking the Tribunal to reconsider these issues". Ultimately the scope of the factual foundation of the Director's decision to dismiss the complainant notwithstanding the BOA's recommendation to the contrary need not be further addressed because one point raised by the complainant is decisive.

9. Another conclusion of the BOA materially underpinning, in part, its recommendation that the complainant's dismissal be rescinded was a failure of PAHO to put the complainant on notice that her conduct might lead to her dismissal. In the final section of its report under the heading "RECOMMENDATION", the BOA identified the need for there to have been an explicit performance evaluation. In its pleas, PAHO seeks to demonstrate that this was not possible having regard to failures of the complainant to follow procedural steps which would have led to a performance evaluation. But this really misses the more important point. Earlier in the report, in the context of expressing doubt about the extent of the complainant's misconduct, the BOA observed that if the complainant "had truly made work untenable over the course of two years, one would have expected action to have been taken long before her termination. Yet [the complainant's] supervisors did nothing to stop [the complainant's] conduct. There was no warning, counselling or lesser discipline that would have put the [complainant] on notice that her conduct, if unchanged, could lead to termination". Also, as the BOA later observed "the due process requirement of fair warning is applicable to both charges of misconduct and unsatisfactory performance. [The complainant] was entitled to warning that having an angry face or speaking angrily in a loud voice was a potential ground for dismissal."

10. In PAHO's pleas, it recounts a number of instances where discussions occurred between the complainant and more senior officials about her conduct over a number of years. There is also one instance referred to involving a letter of 24 April 2018 from the Director HRM to the complainant. These are also referred to in the impugned decision. But in the Staff Rule governing, amongst other things, termination for unsuitability for international service (Rule 1070 being the rule actually relied on by the Director in her impugned decision for the termination) there is a requirement that prior to termination action the staff member must be given "a written warning and a reasonable time to improve". The rule is couched in terms of a "warning". Quite clearly this is intended to be something more than a discussion about the undesirability or inappropriateness of a staff member's conduct or even an admonition for that conduct. The notion of warning in this context involves a clear and unambiguous statement that if the conduct complained of continues, a consequence could well be termination. Moreover, the gravity of the warning is reinforced by the need for it to be in writing. The findings of the BOA referred to at the conclusion of the preceding consideration are, on the material before the Tribunal, correct. The written notice relied on by PAHO, namely the letter of 24 April 2018, in which the Director HRM accepted that the complainant had not engaged in harassment (as had been alleged by a colleague Mrs T.) but noted that she and Mrs T. had engaged in tit-for-tat negative behaviour, concluded with the sentence: "I bring these issues to your attention with the hope that you can learn from this experience and apply that knowledge in your current and future assignments". Neither that statement nor the letter as a whole even remotely constitutes a written warning of the type comprehended by the Rule.

11. The complainant relies on the failure to give a warning as a mitigating factor which should have been, but was not, taken into account when assessing what was the appropriate measure, to use the language of the dismissal letter of 22 June 2020, culminating in the decision to dismiss under Staff Rule 1070. It is not simply identified by the complainant as a procedural breach of the Rule, albeit a significant one. The complainant's pleas are in this respect, correct. That is to say,

the failure to give the complainant a written warning and a reasonable time to improve was an important factor to be considered in determining what was an appropriate measure having regard to her conduct, even as determined by the Director in the impugned decision. Indeed, having regard to the terms of Staff Rule 1070.2, no decision to dismiss should have been made in the absence of a warning and providing a reasonable time to improve. The measure of dismissal under Staff Rule 1070 was unlawful. Accordingly, the impugned decision should be set aside.

12. It is now necessary to consider what is the appropriate remedy in addition to setting aside the impugned decision. Three further conclusions of the BOA are relevant. While these matters are not admitted by the complainant in her pleas, she has expressly elected to conduct the case on the basis that they are not challenged. The first is that the BOA found that the complainant had showed a persistent pattern over a long time of violating PAHO's flexitime policies and that the violations of the time in attendance rules were, in turn, grounds for a charge of misconduct. The second contains two elements. The first is that the BOA rejected the complainant's contention that she had been the subject of harassment and, in substance, rejected the suggestion that those who had complained about her conduct had acted in bad faith. The second element is that the BOA accepted the investigation of the complainant's conduct which led to her termination was not an act of retaliation. The third conclusion, when the BOA was considering whether PAHO had proved that the complainant was unsuitable for international service, was that "[t]he Board also recognizes that the [complainant's] conduct on other occasions [other than of 12 December 2017] was confrontational, rude and disagreeable with both supervisors and other staff members".

13. The complainant seeks reinstatement. In all the circumstances and particularly having regard to the three matters referred to in the preceding consideration and notably the third, it is more likely than not that the complainant will not establish a satisfactory working relationship with her colleagues and supervisors in PAHO (see Judgment 4310, consideration 13), if reinstated. Nonetheless, the complainant has lost a valuable opportunity to continue in employment

with PAHO and it cannot be assumed there is no prospect at all, of her entirely abandoning her confrontational, rude and disagreeable behaviour. She is entitled to material damages for this loss which the Tribunal assesses in the sum of 45,000 United States dollars.

14. The complainant also seeks 50,000 United States dollars moral damages for "the mental and emotional stress of the proceedings and the irreparable damage to the [her] reputation". There is no evidence of this last-mentioned matter. At least in the ordinary course, moral damages flow from the moral injury caused by the unlawful conduct of the organisation. They are not intended to compensate for the emotional effect of litigation, which in any event is unproved in this case.

The complainant also seeks reimbursement of medical expenses (in the sum of 5,297.80 United States dollars) incurred for the injury "caused by these proceedings". As with moral injury just discussed, any injury requiring medical treatment not flowing from the acts of the organisation is, ordinarily, not compensable and, in any event, is unproved in this case.

15. The complainant is entitled to legal costs. She seeks reimbursement of the actual amount up to a maximum of 5,000 United States dollars. As ordinarily happens, the Tribunal will award a global amount which, in this case, is assessed in the sum of 5,000 United States dollars.

DECISION

For the above reasons,

1. The impugned decision of 22 June 2020 is set aside, as is the decision of 15 November 2018.
2. PAHO shall pay the complainant 45,000 United States dollars in material damages.
3. PAHO shall pay the complainant 5,000 United States dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 16 May 2022, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ