Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

N. (No. 2)

v.

Energy Charter Conference

135th Session **Judgment No. 4613**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms M. N. against the Energy Charter Conference (ECC, hereinafter "the organisation") on 17 December 2019, the organisation's reply of 2 April 2020, the complainant's rejoinder of 30 June 2020 and the organisation's surrejoinder of 31 August 2020;

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 contests the decision to terminate her appointment.

The complainant joined the Energy Charter Secretariat, the secretariat of the organisation, in January 2017 under a three-year fixed-term appointment as Assistant Secretary-General. Owing to a tense working relationship with the Secretary-General, the complainant wrote to him mid-January 2019 stating that she would resign. Following a discussion with him, she decided to postpone her resignation until the end of her contract, that is to say December 2019.

On 1 June 2019 the complainant sent to a restricted number of persons, including delegates, a document entitled "Report on the Misfunctioning of the Energy Charter Secretariat" (hereinafter "the Report") that she

had written, stressing that it was confidential. Having been informed by a journalist, Mr S., that she had prepared that Report, the Secretary-General wrote a note to the complainant on 6 June 2019. He noted that the Report contained confidential and personal information and was intentionally malicious against himself and other colleagues at the Secretariat, and that she had probably provided it to "other external persons". Thus, he considered that her behaviour amounted to serious misconduct, incompatible in its nature with continuation of service, and suspended the complainant from duty with immediate effect. On the same day, the Secretary-General requested the advice of the Advisory Board concerning his intention to terminate the complainant's appointment for unsatisfactory service and repetitive serious failure to comply with her duties and obligations. He emphasised that, in April and May 2019, she had already been subjected to disciplinary measures for breaching impartiality, objectivity and discretion and had received a written warning and a written reprimand. The following day, the Report written by the complainant was published together with a news article on a public website.

On 10 June 2019 the complainant asked the Secretary-General to withdraw the suspension decision. He rejected her request two days later, indicating that her Report was not sent in compliance with applicable rules and was disseminated "to some delegations", which was another serious breach of applicable rules. He added that he was requesting the Advisory Board's opinion on his intention to terminate her appointment by 30 June 2019.

On 14 June 2019 the Chairman of the Advisory Board informed the complainant that he had received a request for advice from the Secretary-General on the termination of her appointment, and invited her for a hearing a few days later, which she did not attend explaining that she was on sick leave. In its 4 July report to the Secretary-General, the Advisory Board concluded that the complainant had failed to comply with the duties and obligations as set out in the Staff Regulations and Rules of the Staff Manual. It recommended that the complainant's appointment be terminated.

By a letter of 15 July 2019 the Secretary-General informed the complainant that he had decided, in line with Regulation 13a)i) and after consultation with the Advisory Board and "Senior Management", to terminate her appointment as of that date. His decision was based on her unsatisfactory service as well as her repetitive serious failure to comply with her duties and obligations, which he detailed in the letter. In particular, he stated that she had "prepared, signed and distributed" to certain members of the organisation a document which contained intentionally wrongful, misleading and false information. He added that she would be paid four months' emoluments in accordance with Rule 13.1(c) of the Staff Manual, and attached a copy of the Advisory Board's report of 4 July 2019.

On 25 July 2019 the complainant asked the Secretary-General to withdraw his decision, and to pay her damages and costs. The Secretary-General rejected these requests in early August and indicated that the complainant could consider that decision as final given that the Advisory Board had already provided its opinion on the matter. Accordingly, she could file an appeal directly to the Tribunal if she so wished. The complainant nevertheless submitted a request for advice to the Advisory Board on 22 August 2019, contesting the termination decision. She also expressed concern at the Board's independence and competence, asking that all its current members recuse themselves.

In its report of 21 September 2019, the Advisory Board did not recuse itself and noted that although the Secretary-General had waived the complainant's obligation to file an internal appeal, she had nevertheless decided to file one. It added that, in any event, the Board was bound to act with the maximum of dispatch consistent with a fair review of the issue before it, and that its members were independent and impartial. It found that the termination decision was taken in accordance with the Staff Manual and was within the Secretary-General's authority. It therefore advised the Secretary-General not to withdraw or modify his decision. It suggested dismissing all other claims for relief.

On 23 September 2019 the Secretary-General forwarded the Advisory Board's report to the complainant stating that he declined to modify his decision to terminate her appointment. That is the decision she impugns in the present complaint.

The complainant asks the Tribunal to set aside the impugned decision and to order her reinstatement. She seeks the payment of 563,175.37 euros in damages, which corresponds to the earnings she would have received had her appointment been extended for three years plus one and a half month's pay which, according to her, is still owed to her for 2019. In addition, she claims damages for "reputational harm", moral damages and costs.

The organisation asks the Tribunal to reject the complaint as unfounded. It states that the complainant has received the "end-of-service payments" she was entitled to.

CONSIDERATIONS

1. The complainant was a member of the staff of the Energy Charter Secretariat until her dismissal on 15 July 2019. She commenced employment with the Secretariat on 1 January 2017 as Assistant Secretary-General, which was a three-year fixed-term appointment. The complainant has filed three complaints with the Tribunal. The second, which this judgment addresses and was filed on 17 December 2019, concerns her dismissal.

2. It appears to be common ground that after the complainant's appointment to the position of Assistant Secretary-General, her working relationship with the Secretary-General became a tense one. So much so that in January 2019 the complainant informed him she would resign. After discussion, the complainant decided to postpone her resignation until the end of her contract, namely December 2019. On the material before the Tribunal, it appears that the working relationship was tense. In particular, the evidence reveals the complainant was repeatedly concerned about what she perceived to be the Secretary-General's aggressive behaviour towards her.

3. The event which heralded the complainant's dismissal was her creating before 1 June 2019 a document entitled "Report on the Misfunctioning of the Energy Charter Secretariat" (the Report) and disseminating the document though on the basis that it was confidential. The complainant was suspended on 6 June 2019. On that day the Secretary-General was contacted by phone by Mr S., a journalist from a European media, seeking comments on the Report. There had been prior email exchanges between them. This was how the Secretary-General came to know of the existence of the Report. Later that day the Secretary-General sent the complainant a note informing her of her suspension. It is tolerably clear that the "action", said by the Secretary-General in the note to be "serious misconduct", founding the suspension decision was the provision of the Report to the journalist though, on a fair reading of the note, also included the creation of a document containing confidential and personal information and intentionally malicious and false allegations against him and other colleagues and its probable dissemination to "other external persons".

4. Also on 6 June 2019, the Secretary-General sought, by means of a note, the advice of the Advisory Board about terminating the complainant's employment, one and a half hours after making the suspension decision (this timing is not disputed by the organisation). The written request for advice is three pages long and contains a detailed narrative of the complainant's alleged behaviour over many months warranting her dismissal. Even accepting that the document, given its level of detail, was not prepared, in its entirety, on 6 June 2019, it establishes the Secretary-General was contemplating the complainant's termination before he came to know of the existence of the Report, and its likely dissemination and believing, incorrectly, its provision to Mr S.

5. In the beginning of his note the Secretary-General adverted, in general terms, to the complainant's unsatisfactory performance and her breach of the Staff Regulations and Rules and then said:

> "The above mentioned reasons and serious misconduct have gravely undermined the confidence and trust so I have the intention to terminate [the complainant's] contract by 30 June 2019, according to the Regulation 13, a, i."

Towards the end of the note the Secretary-General devotes a brief paragraph to the publication of the Report. It is tolerably clear that in formulating the request for advice the Secretary-General was including in the behaviour of the complainant warranting her dismissal, the alleged misconduct attending the publication of the Report.

It is convenient to set out at this point the provision in Regulation 13 just referred to:

> "a) The Secretary-General may, after consultation with the Advisory Board, terminate the appointment of an official:
>
> i) if he or she considers that the official does not give satisfactory service, fails to comply with the duties and obligations set out in these Regulations, or is incapacitated for service;
>
> [...]
>
> vi) as a result of disciplinary action;
>
> [...]"

and also to set out relevant provisions of Rule 24.1 on disciplinary measures:

> "(a) Disciplinary measures shall take one of the following forms:
>
> [...]
>
> (vi) dismissal [...]
>
> (d) Disciplinary proceedings under sub-paragraphs (a) (iii) to (vi) shall be initiated by the Secretary-General, should the case arise on a report made by the immediate superior of the official concerned and where the report is supported by Administration and Finance. The Secretary-General shall appoint the General Counsel to provide him or her with a report on the matter.
>
> (e) The proceedings in disciplinary matters shall be recorded in writing. No disciplinary measure may be decided unless the official concerned has been informed of the charges made against him or her and has had the opportunity to state his or her case. The official shall be entitled to be assisted by a person of his or her choice in his or her defence and to see all written material relating to the charge."

6. On 10 June 2019 the complainant requested, by email, the Secretary-General to withdraw the suspension decision saying she had not heard of Mr S. or the European media. The Secretary-General responded by email on 12 June 2019 refusing the request and added,

apparently as further grounds for the suspension or particulars of grounds already given, that the Report was not "sent in accordance with the Staff Regulations and Rules" and the complainant had disseminated the Report "to some delegations", which was another serious breach of the Staff Regulations and Rules of the Staff Manual. These matters were also adverted to in the email as reasons why the Secretary-General would terminate the complainant's contract by 30 June 2019.

7. The Advisory Board issued a report, dated 4 July 2019, in response to the Secretary-General's request for advice on termination of 6 June 2019. It concluded that the complainant's service was unsatisfactory and that she failed to comply with the duties and obligations as set out in the Staff Regulations and Rules, repeating the language of Regulation 13a)i). It recommended that the complainant's appointment be terminated. This recommendation was based on a comparatively detailed analysis of the complainant's service and compliance with the Staff Regulations and Rules. Even if discounting the Advisory Board's conclusions having regard to the allegation of bias, its analysis does not appear manifestly unfair or irrational.

8. By letter dated 15 July 2019 the Secretary-General wrote to the complainant dismissing her and, in relation to the power he was exercising said: "I have decided in line with Regulation 13 a)i) to terminate your contract".

9. As will emerge shortly, events following 15 July 2019 are not of particular relevance in determining the outcome of this complaint, though the decision impugned in these proceedings is a decision of the Secretary-General of 23 September 2019 declining to modify his termination decision following upon a further advice of the Advisory Board of 21 September 2019.

10. The complainant's case in her pleas challenging the impugned decision is advanced under six general headings. Firstly, she contends that the decision to dismiss her involved a misuse of authority and violated the duty to act in good faith. Secondly, she contends that the

Secretary-General was biased and had a conflict of interest. Thirdly, she contends there was a violation of due process. Fourthly, she contends that the termination decision was arbitrary, irrational, unjustified and manifestly unreasonable. Fifthly, she contends that the members of the Advisory Board were biased and showed a conflict of interest. Sixthly and finally, she contends the Advisory Board violated the requirement of due process. The Tribunal is satisfied that the contentions advanced by the complainant under the third heading are correct and decisive. Accordingly, it is unnecessary to address the contentions under the other headings.

11. The organisation correctly points to the fact that, in terms, the complainant's dismissal was under Regulation 13a)i). But such a limited characterization of the complainant's termination involves form prevailing over substance. It is true that the grounds for dismissal included unsatisfactory service and the failure to comply with the duties and obligations set out in the Regulations, both grounds for dismissal under Regulation 13a)i). But it is equally true that the dismissal was also based on the complainant's misconduct.

12. First, the note of 6 June 2019 from the Secretary-General suspending the complainant was explicitly based on Rule 24.2. Rule 24.1 providing for the imposition of a disciplinary measure including dismissal, Rule 24.2 providing for suspension and Rule 24.3 concerning removal of reference to a disciplinary measure from the staff member's personal file, are a suite of provisions under the general provision embodied in Regulation 24, Discipline. Thus, on 6 June 2019, the Secretary-General was invoking his power to suspend as an incidence of maintaining disciplinary proceedings against the complainant. Moreover, in the note of 6 June 2019 suspending the complainant, the Secretary-General stated, explicitly, "I consider your action as a serious misconduct".

13. Similarly, the Secretary-General referred in his note to the Advisory Board of the same day (quoted in consideration 5 above) that apart from reasons concerning the complainant's performance set out early in the note, "serious misconduct" had undermined his confidence

and trust and thus he intended to terminate her contract. On 19 June 2019 the Secretary-General send a note to the Advisory Board. Both in the note itself and in a 14-page annexure he detailed "intentionally wrongful, distorted and misleading statements" in the Report. He was thus providing particulars of the complainant's misconduct referred to in the suspension note of 6 June 2019.

14. In its report of 4 July 2019, the Advisory Board made a range of findings about the conduct of the complainant evidencing her unsatisfactory service and a failure to comply with her duties "as per Staff Rules and Regulations". By reference to a Regulation of the Staff Manual that requires officials to "carry out their duties in accordance with the Manual on Data [P]rotection, which establishes a legal framework for data protection and confidentiality at the Secretariat", the Board found that the Report contained intentionally wrongful, misleading and false information which could damage the professional reputation and career development of many officials in the Secretariat. This was much more than a failure to protect data and confidentiality. This was the essence of the allegation of misconduct, as it had by then evolved. That is to say, it was a finding that the complainant had disseminated in the Report, intentionally wrongful misleading and false information. In substance, it was a finding of misconduct.

15. In the Secretary-General's letter of 15 July 2019 terminating the complainant's employment, he repeats the finding made by the Advisory Board about the dissemination of intentionally wrongful misleading and false information as part of the complainant's conduct supporting the termination decision. He was thus relying, in part, on her misconduct as the basis for her termination.

16. Rule 24.2 contains several important safeguards intended to afford due process to a staff member the subject of disciplinary proceedings. The staff rules of many international organisations contain comparable provisions and often in more detail. Nonetheless, Rule 24.1(e) contemplates the formulation of charges and the staff member being informed of them. Typically, and appropriately, they are a precise

statement of the conduct alleged to be misconduct in order to create a clear foundation for the disciplinary proceedings which follow, including the basis on which the affected staff member can defend the proceedings. The charges provide a yardstick and framework for fact finding, defence and ultimately adjudication by the person or body entrusted with the task of determining whether there had been misconduct. In the present case, no charges were formulated or provided to the complainant. It is true that the suspension note of 6 June 2019 contained references to the complainant's conduct which was said to constitute misconduct. But the references were in the most vague and general terms and cannot be characterised as charges. It was probably, initially, an essential element of the conduct complained of, that the complainant provided a copy of the Report to Mr S. When it emerged that the complainant had not done so (leading to an apology from the Secretary-General), it would have almost certainly been necessary to reformulate, by way of charge, the alleged misconduct without including the leaking of the Report to the journalist. None of this was done.

17. While not a model of clear drafting, it is tolerably clear that Rule 24.1(d) mandates, in cases inter alia where the disciplinary measure might be a serious one including dismissal, that the Secretary-General appoint the General Counsel to provide a report on the matter. There is little doubt that this would involve the General Counsel engaging in fact-finding as part of the process of providing a report. The identification of the General Counsel as the person who should undertake this task is probably based, at least in part, on the assumption that the General Counsel would act with honesty and integrity and would approach the evidence with a lawyer's analytical focus. Again, this was not done.

18. In its case law, the Tribunal has recognised that decisions adversely affecting a staff member can constitute a hidden disciplinary sanction and if made without following due process requirements may be unlawful.

If the organisation's rules do provide for formal disciplinary procedures, as is the case here, then they must be followed if proven misconduct founds or partly founds a decision to dismiss. That is not to

say, in a case such as the present, the Secretary-General could not have relied simply and only on the alleged failure of the complainant to give satisfactory service or to comply with her duties and obligations under the Regulations, to use the language of Regulation 13a)i). He could have. But having regard to all the circumstances, it is clear in the present case he relied, additionally, on the complainant's misconduct, which created the obligation to follow the procedures in Rule 24.1 to ascertain whether the misconduct was proved. The organisation's failure to do so vitiated the decision to dismiss and it must be set aside.

19. This leads to a consideration of what is the appropriate relief. The impugned decision as well as the decision of 15 July 2019 should be set aside. The complainant contends she has suffered substantial damage to her mental health, physical injury, emotional harm and reputational harm as well as economic loss. In assessing damages, the Tribunal cannot discount the possibility that the complainant might have lawfully been dismissed for reasons unrelated to her misconduct. The medical evidence furnished by the complainant directed to her mental health, physical injury and emotional harm concerns, more generally, her alleged harassment at work and not, directly, the termination of her employment. However, the Tribunal accepts the termination itself would have had a deleterious effect on the complainant's mental health and well-being for which she is entitled to moral damages assessed in the sum of 20,000 euros. There is no persuasive evidence of reputational damage. She claims compensation for "material loss of earnings for 3 years income". But she intended to leave the organisation in December 2019 in any event. Accordingly, no order for reinstatement should be made. Additionally, she was paid a termination payment of 4.5 months' salary in circumstances where the residue of her contract was of that order in any event. There is no proper basis on which to award her material damages. She is entitled to costs in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The impugned decision as well as the decision of 15 July 2019 to terminate the complainant's employment are set aside.
2. The Energy Charter Conference shall pay the complainant 20,000 euros moral damages.
3. The Energy Charter Conference shall pay the complainant 8,000 euros costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 24 October 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 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ