T.

v.

ITER Organization

136th Session **Judgment No. 4680**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. T. against the International Fusion Energy Organization (ITER Organization) on 20 April 2020, the ITER Organization's reply of 21 July 2020, the complainant's rejoinder of 18 September 2020 and the ITER Organization's surrejoinder of 21 December 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 impugns the decision to impose on him the disciplinary measure of dismissal with forfeiture of an indemnity for loss of job.

The complainant joined the ITER Organization in July 2010 as a Consultant. In March 2018, he was appointed to the position of Buyer, at grade G-4, in the Procurement Engineering, Plant and Support Section of the Procurement and Contract Division. In October 2018, he successfully completed his probationary period, and his contract of employment was confirmed. In February 2019, his Section Leader and line manager, Ms C., gave him an overall positive performance appraisal while also noting that he should "monitor his anger and

frustration and [...] better deal with it", and recommended that he follow "effective communication and negotiation training". Starting around May 2019, various email exchanges between the complainant and Ms C. revealed work-related differences and a strained working relationship.

On 31 July 2019, the Director-General notified the complainant of allegations of professional misconduct that had been made against him and gave him eight working days to reply. The allegations were summarised as follows:

– on 9 and 10 July 2019, the complainant had presented a Restricted Tender for validation by his Division Head. This, however, was not the one signed by his Section Leader, Ms C., with her comments but, rather, a photocopy of the Contract ID Sheet (Contract cover sheet) that the complainant had made showing the Section Leader's signature but not her comments, which had been removed (first allegation);

– he had reproached a colleague in procurement for having consulted the Legal Affairs Section regarding the presence on the ITER Organization premises of a contractor's employee, although such consultation was normal. This issue was not related to his work and he should not have used his position to influence the treatment of the contractor's employee in question (who allegedly was the complainant's girlfriend) by the ITER Organization (second allegation);

– on several occasions, he had behaved aggressively and inappropriately towards Ms C. both in written and verbal communications (third allegation).

The complainant replied in writing on 9 August 2019. He denied the third allegation noting that although he had "robust discussions with Ms [C.]" and "occasional emails [...] may have been considered 'strong'", he had never "behaved aggressively, either in written or in verbal communication". He also denied the second allegation and characterised it as "spurious, false and completely inaccurate". As to the first allegation, although he admitted that the version of the Contract cover sheet presented to the Division Head for his validation was indeed a photocopy and not the paper version originally signed by Ms C., he

explained that the comments made by Ms C. on the Contract cover sheet were not relevant, a fact he had mentioned to Ms C., and had absolutely no impact on the tender process validation or signature. He added that, in general, the cover sheet was a low-level internal document for information purposes, which was normally updated at various stages in the course of a tendering process. The complainant complained that his "work and associated tasks were becoming almost impossible to complete within a time frame due to long document review/approval periods followed by pedantic and non-essential changes to documentation that [were] predominantly personal preferences rather than genuine improvements", a situation he described "disruptive and frustrating". He questioned whether he was "being singled out to be placed under unnecessary duress to the point of harassment" and expressed the view that there appeared to be "a conflict of personalities between Ms C. and [him]self", which could be resolved if he were moved to another Section in the Procurement and Contract Division.

By a letter of 21 August 2019, the Director-General informed the complainant that having duly taken account of his written reply, he considered the first allegation against him to be founded, since the complainant had recognised the underlying facts which, according to the ITER Organization's rules, constituted misconduct. As to the second and third allegations, the Director-General informed him that he considered they might be founded and had thus decided to open an investigation. Referring to the complainant's insinuation that he was being subjected to harassment, the Director-General advised him to follow the relevant procedure if he wished to make a complaint of harassment. In the course of the ensuing investigation, which was carried out by the Legal Affairs and the Human Resources Department, the complainant was heard on 5 November 2019 and, on 12 November 2019, he signed off on the minutes of that hearing.

Prior to that, on 12 August 2019, the complainant's physician wrote to the occupational health doctor to inform him that the complainant's health condition had deteriorated for reasons related to his working environment and he asked that appropriate measures be taken to support the complainant. On 22 August 2019, the occupational health doctor

expressed concern about the complainant's condition and recommended that the complainant be signed off work and that he be transferred to a different Section. In the event, the complainant was placed on sick leave from 23 August until 4 November 2019. Effective 2 January 2020, he was transferred to another Section in the Procurement and Contract Division.

In the meantime, by a letter of 19 December 2019 (notification of allegations), the Director-General informed the complainant that as a result of the investigation, which had been completed on 10 December 2019, he had concluded that, while the second allegation should be abandoned for lack of substantial evidence, the first and third allegations were founded and were to be considered as serious misconduct in breach of Article 2.3 of the Staff Regulations and the Code of Conduct. He invited the complainant to reply within ten working days. In the event, the complainant replied on 14 January 2020 expressing his surprise about the fact that the first and third allegations against him were described as serious misconduct, denying any malice intended in his actions, and appealing to the Director-General to reconsider his conclusion.

On 20 January 2020, the Director-General wrote to the complainant to inform him that within five working days he could request in writing that his case be examined by a Disciplinary Board pursuant to Article 23.2 of the Staff Regulations. The complainant made no such request and, by a letter of 28 January 2020, the Director-General informed him that, in light of the seriousness of the allegations, he had decided to impose on him the disciplinary measure of dismissal with forfeiture of an indemnity for loss of job, as per Article 23.3(a) of the Staff Regulations. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision or, alternatively, if a disciplinary measure is considered necessary, to order the ITER Organization to replace the imposed disciplinary measure with a less severe one. He also asks that he be reinstated in his former position, or another position matching his experience and qualifications, with retroactive effect from the date of separation, and that he be paid all salaries and allowances he would have otherwise received from that date until the date of reinstatement. In the event he

is not reinstated, he claims material damages in an amount equivalent to the salary, allowances and pension benefits he would have received, had he not been dismissed from the date of termination until the expiry of his five-year contract, including any sums he may be required to pay as national tax on the amounts awarded by the Tribunal. He claims 50,000 euros in moral damages for the injury caused to him by the contested decision and he also claims the legal costs he incurred, including, but not limited to, the costs for the preparation of this complaint.

The ITER Organization asks the Tribunal to dismiss the complaint. In the event the Tribunal decides to set aside the disciplinary measure imposed on the complainant, it submits that the complainant should not be reinstated, as he has breached the relation of trust between himself and the Organization, and that the matter should be remitted back to the Organization. As to the claim for the reimbursement of any sums the complainant may be required to pay as national tax on the amounts awarded by the Tribunal on material damages, the ITER Organization submits it is irreceivable for lack of a present cause of action.

CONSIDERATIONS

1. The complainant was a member of staff of the ITER Organization until his dismissal for misconduct by letter dated 28 January 2020 from the Director-General. This is the decision impugned in these proceedings.

2. At relevant times, the complainant held the position of Buyer, at grade G-4, in the Procurement Engineering, Plant and Support Section of the Procurement and Contract Division. His Section Leader and line manager was Ms C. On 31 July 2019, the Director-General wrote to the complainant setting out three allegations of professional misconduct said to contravene various provisions of the Staff Regulations. The first allegation was that he had presented a Restricted Tender for validation by his Division Head which was not the one which had been signed by Ms C. as Section Leader with her comments.

Rather, it was a document containing a copy he had made of the Contract ID Sheet showing Ms C.'s signature but not her comments. These essential facts have never been disputed by the complainant and, objectively, this was not a minor transgression. The second allegation concerned the complainant reproaching a colleague. This allegation did not found, even in part, the decision to dismiss and need not be detailed. The third allegation was that the complainant had on several occasions behaved aggressively and inappropriately towards his Section Leader, Ms C., in his written and verbal communications.

3. Events occurring between this letter of 31 July 2019 and the dismissal letter of 28 January 2020 are set out earlier in this judgment and, mostly, need not be described further having regard to the Tribunal's conclusion in relation to one of the pleas of the complainant which is decisive, though for reasons which are different to those advanced by the complainant. The plea is that he should have been told, but was not, that he was going to be dismissed before the dismissal letter was sent. However, several factual matters of detail should be noted. The Director-General wrote to the complainant on 19 December 2019. He informed the complainant that the first and third allegations of misconduct were founded and constituted serious misconduct. He invited the complainant to reply. The complainant did, by letter dated 14 January 2020, in which he expressed surprise that the first and third allegations were described as being serious misconduct and invited the Director-General to reconsider the characterization of his conduct as serious misconduct. The Director-General responded to this letter, by letter dated 20 January 2020, and noted the request for reconsideration of the characterization of the conduct. In that letter two statements of relevance were made by the Director-General. The first was that he said: "I hereby notify you that a disciplinary measure among those listed in Article 23.2 of the Staff Regulations will be imposed on you". The Director-General did not specify which of the four measures, ranging from written censure to dismissal, was in contemplation. The second statement constituted an intimation to the complainant he could request that his case be examined by a Disciplinary Board and that he had five working days in which to do so. The complainant made no such request.

One matter which was not expressly addressed by the Director-General was whether he adhered to his characterization of the conduct as serious misconduct.

4. The measure of dismissal was first revealed in the letter of 28 January 2020. Thus, at the time the complainant was asked whether he wanted his case examined by a Disciplinary Board he did not know, at least with any certainty, whether the Director-General adhered to his characterization of the conduct as serious misconduct and the complainant certainly did not know what specific disciplinary measure was in contemplation.

5. Article 23 of the Staff Regulations governs disciplinary proceedings. Article 23.2(g) relevantly provides that: "[a]fter receipt of the observations of the staff member concerned [in this case the complainant's letter of 14 January 2020], the Director-General shall notify the staff member concerned in writing within eight working days either that a disciplinary measure among those listed in Article 23.3 of these Regulations will be imposed or that no disciplinary measure will be imposed". Article 23.2(h) confers a right on the staff member thereafter to have the case examined by a Disciplinary Board. Regulation 23.2(k) makes it clear that the Disciplinary Board can make a recommendation, but its opinion is not binding on the Director-General. Article 23.2(j) provides that the procedures of the Disciplinary Board are to be found in Annex VII of the Regulations. Annex VII(2)(c) provides that the Disciplinary Board is to give its reasoned opinion to the Director-General and that "[t]hat opinion shall include a recommendation as to whether a disciplinary measure is warranted, and if so, the severity of that disciplinary measure".

6. The question of interpretation which arises from this framework is whether Article 23.2(g) obliges the Director-General to notify the staff member of the specific disciplinary measure she or he then intends to impose, or it is sufficient to repeat, as happened in this case, that a disciplinary measure of those listed will be imposed. The provision is ambiguous. One meaning is that the words "notify the staff

member [...] that a disciplinary measure among those listed in Article 23.3 of these Regulations will be imposed" requires notification of what disciplinary measure will be imposed, with the words "among those listed in Article 23.3" identifying the four measures from which one can be chosen and nominated. The other meaning is that it is sufficient to repeat that an unidentified disciplinary measure of those listed in Article 23.3 will be imposed. In Judgment 4639, consideration 3, the Tribunal stated:

> "Under the Tribunal's case law, it is a basic rule of interpretation that words are to be given their obvious and ordinary meaning and that words must be construed objectively in their context and in keeping with their purport and purpose (see, for example, Judgments 4066, consideration 7, 4031, consideration 5, or 3744, consideration 8).
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> Should an ambiguity remain in the relevant provision after this method of construction is applied, the regulations or rules of an international organisation must in principle be construed in favour of the interests of its staff and not those of the organisation itself (see, for example, Judgments 3539, consideration 8, 3355, consideration 16, 2396, consideration 3(a), 2276, consideration 4, or 1755, consideration 12)."

It would obviously favour the staff member to treat Article 23.2(g) as requiring disclosure of the specific disciplinary measure which will be imposed (subject, of course, to the procedures in Article 23 itself) in order to arm her or him with information relevant to the question of whether to request that a Disciplinary Board examine her or his case. It would usually be the case that the staff member would be far more inclined to seek such an examination if dismissal was in contemplation rather than, for example, a written censure. As was noted in one of the Tribunal's earlier reported cases, Judgment 203, consideration 2, the imposition of the disciplinary sanction of discharge or summary dismissal could cause serious harm to the staff member and her or his family. This interpretation, namely that the specific disciplinary measure proposed must be notified pursuant to Article 23.2(g), would also give rise to a fairer and more balanced procedure. It would be fairer because it would give the concerned staff member an opportunity to argue before the Disciplinary Board that the specific disciplinary measure in contemplation was disproportionate, or otherwise inappropriate, as well as giving the Disciplinary Board an opportunity to review what is

in contemplation in formulating the recommendation required by Annex VII(2)(c) of the Staff Regulations.

7. The above conclusions turn on the interpretation of specific provisions in Article 23 of the Staff Regulations and, in this respect, general observations such as those found in Judgment 1764, consideration 7, relied on by the defendant organization, are of no real assistance. In the result, the defendant organization failed to comply with Article 23 of the Staff Regulations and this alone justifies setting aside the impugned decision to dismiss the complainant. As the dismissal decision will be set aside, the matter should be remitted to the defendant organization to enable the procedures in Article 23 of the Staff Regulations to be followed correctly including, if the complainant so elects, to have the matter considered by a Disciplinary Board. By this order the Tribunal does not intend to disturb any steps before the letter of 20 January 2020. The order setting aside the 28 January 2020 decision is not intended to reinstate the complainant or confer an entitlement to salary or other emoluments pending the final result of the disciplinary proceedings (see Judgments 4065, consideration 8, and 3731, consideration 9).

8. The complainant is entitled to moral damages for the moral injury occasioned to him by his dismissal without any prior notice through the measure actually implemented and the curtailing, at least as a practical matter, of his right to seek review of his circumstances and the allegations against him by the Disciplinary Board. Those moral damages are assessed in the sum of 20,000 euros. The complainant is also entitled to an order for costs assessed in the sum of 10,000 euros.

DECISION

For the above reasons,

1. The impugned decision to dismiss the complainant is set aside.
2. The matter is remitted to the ITER Organization, as discussed in consideration 7, above.
3. The ITER Organization shall pay the complainant 20,000 euros moral damages.
4. The ITER Organization shall pay the complainant 10,000 euros costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 5 May 2023, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

CLÉMENT GASCON

DRAŽEN PETROVIĆ