Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

L.

v.

WHO

135th Session **Judgment No. 4598**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs S. L. against the World Health Organization (WHO) on 5 October 2020 and corrected on 21 January 2021, WHO's reply of 20 April 2021, the complainant's rejoinder of 22 July 2021 and WHO's surrejoinder of 21 October 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 the decision to impose on her the disciplinary measure of loss of three steps in grade for her failure to observe the standards of conduct expected of staff members.

The complainant joined WHO in 1996. At the time of the events giving rise to the present complaint, she was Director of Management at the European Observatory on Health Systems and Policies (EU/OBS).

Another official, Ms M., joined EU/OBS as an Administrative Officer in June 2006 under the direct supervision of the complainant. In June 2011 Ms M. returned to work following an extended period of leave without pay. From June 2011 to September 2013, she switched between periods of full-time and part-time work and, on 1 September 2013, she went back to full-time work. From 4 September 2013 to

14 February 2014 she was on certified sick leave and, subsequently, on sick leave under insurance cover, annual leave and special leave until May 2015, at which point she was reassigned to a position outside EU/OBS.

On 23 June 2014 Ms M. submitted to the Advisory Committee on Compensation Claims (ACCC) a claim for compensation for a service-incurred illness, allegedly arising from the complainant's harassing behaviour towards her in the period from June 2011 to September 2013. In her report of accident, illness and condition, Ms M. asserted that upon her return from an extended period of leave in June 2011, the complainant objected to her resuming full-time work, asked to be informed of her family plans, assigned her to duties unrelated to her position as Administrative Officer, excluded, isolated and ignored her, told her that her post was to be abolished and asked her to get in touch with the Human Resources Department (HRD) regarding the procedure for its abolition, did not give her any direction regarding her work, ignored her requests to review her tasks, yelled at her and intimidated her by banging her fists on the table. Ms M. explained that the complainant's conduct created a hostile work environment and damaged her physical and mental health, but that she was too sick and felt too weak at the time to file a formal complaint of harassment.

On 17 November 2014 Ms M. requested the Director of HRD to extend the time limit for the filing of a formal harassment complaint on the basis that her medical condition had prevented her from doing so within the applicable time limit. The Director of HRD rejected this request on 10 February 2015.

Having reviewed Ms M.'s case at three separate meetings on 24 March, 30 April and 9 July 2015, the ACCC accepted that the reasons given by her for the late submission of her compensation claim were valid and recommended that the Director-General consider it receivable. Although the ACCC was able to confirm some of the facts communicated by Ms M., it considered itself limited in looking into the totality of the facts in need of confirmation. It therefore recommended that the Director-General ask the Office of Internal Oversight (IOS) to conduct a fact-finding review on the basis of Ms M.'s claim form and

attached report of accident, illness and condition, or to outsource this fact-finding review under its oversight, and to report its findings to the ACCC normally within three months. On 4 August 2015 the Director-General accepted the ACCC's recommendations and, on 5 August 2015, the ACCC Secretary referred the matter to IOS.

By memorandum of 13 December 2016, IOS informed the complainant that she was the subject of an investigation and it notified her of the allegations against her. She was interviewed by IOS on 19 December 2016. Prior to that IOS had interviewed Ms M. and 12 staff members from EU/OBS and the Regional Office for Europe. By memorandum of 28 March 2017, IOS forwarded to the complainant copies of several documents relied upon during the investigation and asked her to provide her comments thereon, which she did on 24 May 2017.

In its investigation report, issued in November 2017, IOS concluded that there was sufficient evidence to support that the complainant had engaged in conduct which had created an intimidating and hostile work environment, and thereby violated the Policy on the Prevention of Harassment at WHO (Policy on Harassment). IOS recommended that the Director-General review the report with a view to taking appropriate action. Under cover of a memorandum of 7 November 2017, the investigation report was forwarded to the Regional Director for Europe and, on 18 May 2018, it was forwarded to the Global Advisory Committee on Harassment (GAC) which, in its final report of 14 February 2019, unanimously agreed with the findings of IOS and recommended that the Administration initiate disciplinary proceedings against the complainant pursuant to the Staff Rules and paragraph 7.19(iii) of the Policy on Harassment.

By memorandum of 27 March 2019, entitled "Notification of charges of misconduct", the complainant was notified of the charges against her, namely (i) violation of Article I of the Staff Regulations, in particular Staff Regulations 1.5 and 1.10; (ii) violation of paragraphs 4.2, 4.3 and 4.4 of the WHO Policy on Harassment; (iii) violation of paragraph 21 of the WHO Code of Ethics and Professional Conduct; and (iv) violation of paragraphs 16, 17 and 18 of the Standards of Conduct for the International

Civil Service. The complainant was also informed that a decision had been made to remove *ad interim* her supervisory duties – these were subsequently reinstated by a decision of 25 November 2019 – and that the investigation report, along with supporting documents and the GAC recommendation, were provided to her on a confidential basis. She was invited to respond to the charges, which she did by memorandum of 31 May 2019, after being granted an additional period to prepare her response.

By memorandum of 18 June 2019, the Regional Director for Europe informed the complainant of her decision to impose on her, with effect from 1 October 2019, the disciplinary measure of loss of three steps in grade, pursuant to Staff Rule 1110.1.3, as through her actions the complainant had failed to observe the standards of conduct expected of staff members.

The complainant appealed this decision with the Global Board of Appeal (GBA) on 18 September 2019. In its report of 24 April 2020, the GBA found that the time that had elapsed between the events surrounding the harassment allegations and the initiation of the IOS investigation had impacted on the reliability of the evidence and had compromised the integrity of the IOS findings. It held that it was no longer feasible to carry out an investigation at the time that the investigation was actually carried out, and that this rendered the ensuing decision flawed. The GBA also held that the complainant's due process rights had been breached because of (i) the delay in notifying her of the IOS investigation; (ii) the non-disclosure of documentary evidence during the disciplinary proceedings; and (iii) the excessive delay in concluding the investigation. The GBA recommended setting aside the contested decision and awarding the complainant 12,000 euros in moral damages, and 4,000 euros in legal fees.

By letter of 7 July 2020, the Director-General informed the complainant of his decision to maintain the disciplinary measure of a loss of three steps in grade with effect from 1 October 2019, and to award her 18,500 euros in moral damages for the delay in the investigation and disciplinary proceedings, as well as up to 4,000 euros in legal fees,

subject to the submission of invoices and proof of payment. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision dated 7 July 2020 and to also set aside the Regional Director's decision dated 18 June 2019. She requests that the Tribunal recognise Ms M.'s harassment claim as frivolous and that it cancel the IOS investigation report. She claims up to 40,000 euros in material damages, up to 50,000 euros in moral damages for the injury to her reputation over a five-year period, as well as up to 40,000 euros in moral damages for the stress which affected her health. She also claims reimbursement of legal costs.

WHO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant was, at relevant times, a member of staff of WHO. By memorandum dated 18 June 2019, she was informed by the Regional Director that a disciplinary measure would be imposed on her of "loss of three steps at grade". On 18 September 2019 she lodged an appeal against this decision to the GBA. It issued its report on 24 April 2020, recommending that the appeal be allowed and that the complainant be awarded 12,000 euros in moral damages and 4,000 euros in legal fees. The recommendation concerning the appeal was rejected by the Director-General who, by letter dated 7 July 2020, informed the complainant that the disciplinary measure of loss of three steps in grade was maintained but that she would be awarded moral damages for delay in the amount of 18,500 euros and legal fees up to 4,000 euros. This is the decision impugned in these proceedings.

2. In order to understand the approach of the GBA, to consider the decision of the Director-General and to deal with some of the issues raised in these proceedings, it is necessary to detail the chronology of some central events leading to, and following, the laying of the charges of misconduct. In doing so, the Tribunal draws upon the uncontroverted chronology of the GBA. Between June 2011 and September 2013, the

complainant interacted with a junior member of staff, an Administrative Officer (Ms M.), under her supervision. The complainant was then the Director of Management at the EU/OBS. These dates are relevant because in June 2014, Ms M. submitted a claim to the ACCC for recognition of service-incurred illness arising from, on Ms M.'s account, what was, in substance, her harassment by the complainant in that period, namely between June 2011 and September 2013. In November 2014 Ms M. requested the Director of HRD extend the time in which she could file a harassment complaint. This request was refused in February 2015. However, the ACCC, after meeting three times, in August 2015 decided to recommend to the Director-General that IOS conduct a fact-finding review of, effectively, the facts underpinning Ms M.'s claim for compensation and report its findings to the ACCC. The Director-General agreed with this recommendation.

3. Ms M.'s allegations were referred to IOS on 5 August 2015. IOS interviewed Ms M. on 14 October 2015. Between February 2016 and January 2017, IOS interviewed 12 staff members from EU/OBS, the EURO Human Resources Office and the EURO harassment focal point. On 13 December 2016, IOS wrote to the complainant informing her she was under investigation and outlining the conduct alleged against her. The conduct was described in the following terms:

> "▪ That [the complainant] isolated Ms [M.] by not allowing her to support the administration team.
> ▪ That [she] failed to assign to Ms [M.] an appropriate amount or type of work.
> ▪ That [she] informed Ms [M.] that she should work elsewhere and that her post would be abolished.
> ▪ That [she] fostered a hostile work place and acted aggressively towards Ms [M.].
> ▪ That [she] inappropriately inquired into Ms [M.'s] private life regarding her intention to stay in Brussels."

4. On 19 December 2016 the complainant was interviewed. She signed the interview transcript on 24 March 2017 and on 28 March 2017 IOS provided her with the evidence it had and invited her to comment. The complainant did so on 24 May 2017 raising, amongst

other things, that the delay in investigating the allegations had impacted her ability to defend herself. On 7 November 2017 IOS issued its report. The GBA summarised, accurately, in paragraph 22 of its 24 April 2020 report, the IOS's conclusions:

> "i. The [complainant] was under stress, had a reputation for being inconsistent and witness testimony supported that she was prone to verbal outbursts. Her conduct fostered a climate of fear and unpredictability that negatively impacted several staff, including [Ms M.], and created an intimidating and hostile work environment.
>
> ii. The [complainant] did not follow the proper process to abolish [Ms M.'s] post despite it being explained to her. By advising [Ms M.] of her intention to abolish her post and communicating this decision to all EU/OBS staff, and by asking [Ms M.] to ascertain from HR the process to be followed to abolish her own post, the [complainant] interfered with [Ms M.'s] ability to carry out her work and contributed to the fostering of an intimidating and hostile work environment.
>
> iii. The [complainant] resisted [Ms M.'s] return to work to 100% full time equivalent [...] As her first-level supervisor, it was incumbent on her to be aware of the return to 100% [full time equivalent] and given the stress over the proposed abolition of post, she ought to have reasonably known that this would intimidate, offend and humiliate [Ms M.] and contribute to an already hostile workplace. This conduct interfered with [Ms M.'s] ability to carry out her functions.
>
> iv. IOS did not find evidence to support the allegation that [Ms M.] was isolated or that her exclusion from issues relating to the administration team and her reassignment to an office on a different floor were pernicious.
>
> v. IOS did not find evidence to support the allegation that the [complainant] intruded into [Ms M.'s] private life. Given the latter's propensity to undertake periods of leave without pay and switch between part-time and full-time employment, it was not unreasonable for the [complainant] to attempt to establish her intentions, particularly in a small organization where the exchange of personal information was a regular feature of the workplace."

5. It is unnecessary to set out, in detail, all the events which followed the issuing of the IOS's report. Suffice it to note that by memorandum dated 27 March 2019 the complainant was charged with misconduct. Thus, the charges were being laid well over five years after the last of the events to which the charges related had taken place, and

almost eight years after the beginning of the period in which the harassing conduct underpinning the charges was alleged to have occurred. The charges themselves were formulated by reference to the violation of various normative legal documents. The factual allegations underpinning the alleged violations were, to the extent they were particularised, contained in three numbered paragraphs:

> "1. During the period between June 2011 and September 2013, you were prone to verbal outbursts, which fostered a climate of fear and unpredictability that negatively impacted several staff, including Ms [M.], who was then Administrative Officer at [...] EU/OBS, and created an intimidating and hostile work environment.
>
> 2. On 6 June 2013, you met with Ms [M.] and advised her of your intention to abolish her post, communicated this decision to all staff of EU/OBS, and tasked Ms [M.] with ascertaining the proper procedure to be followed to abolish her own position. Ultimately, you did not follow the proper procedures to abolish her post, despite them being explained to you, including obtaining the required decision of the Regional Director. Your actions interfered with Ms [M.'s] ability to carry out her work, contributed to an intimidating and hostile work environment, and were not consistent with generally accepted principles of managerial and supervisory responsibilities.
>
> 3. You resisted the transition of Ms [M.'s] return to 100% Full-Time Equivalent [...] on 1 August 2013 and, given the stress caused to her over the proposed abolition of her position, your actions were intimidating, offensive and humiliating to her, interfered with her ability to carry out her functions at work, and contributed to an already hostile work environment."

6. By memorandum dated 18 June 2019, the complainant was informed by the Regional Director that she had concluded the alleged misconduct was established and that the disciplinary measure was the loss of three steps at grade. It is unnecessary to set out the reasoning of the Regional Director supporting this conclusion. However, one matter should be noted. Towards the beginning of the memorandum, the Regional Director said she "acknowledge[d] and regret[ted] the length of time the procedure [had taken]". Towards the conclusion of the letter, when addressing the consequences of the decision that the charges were proved, the Regional Director identified as mitigating factors "the considerable length of time required for the investigation and related actions". Generally, mitigating factors, as well as aggravating factors, are relevant to what penalty should be imposed after a finding of

misconduct has been made. At least in the context of this case, the delay was not a mitigating factor. The delay was relevant to the anterior and more fundamental question of whether accounts given by witnesses, years later, about the conduct of the complainant were sufficiently reliable to prove, beyond reasonable doubt, that the alleged misconduct had occurred.

7. The report of the GBA in the appeal from the decision discussed in the preceding consideration is a thoughtful and balanced consideration of the issues and evidence. In these circumstances, its findings of fact need to be given considerable deference (see, for example, Judgments 3608, consideration 7, 3593, consideration 12, 3400, consideration 6, and 2295, consideration 10). One particular conclusion of the GBA is pivotal in the present case. In paragraph 39 of its report, the GBA observed that "the fact that [the investigation by IOS] was only started two years after the last event took place calls into question the likelihood of gathering reliable evidence, facts and testimonies needed to establish that the incidents in question occurred and how these were perceived".

8. In the following paragraph, paragraph 40, the GBA undertook a careful and considered analysis of some of the evidence to explore the question of whether the evidence was reliable. It quoted several passages from the evidence of two members of the "EU/OBS team" in which admissions or concessions were made that their recollections were probably not reliable. It also quoted passages from the IOS report in which it said it was unable to corroborate specific instances of conduct about which a staff member of EU/OBS had complained but that the complainant "had a propensity to engage in this type of behaviour". Lastly, the GBA referred to other evidence of two witnesses effectively saying that, as to one, no aggressive behaviour of the complainant was observed or experienced and, as to the other, she or he had had a good and productive relationship with the complainant. Having undertaken this analysis the GBA indicated at the conclusion of this paragraph "[t]his does not rule out that the events did not happen, but the evidence that the [complainant's] conduct was inappropriate is not conclusive".

9. In paragraph 41, the GBA firstly noted, correctly, that IOS was a fact-finding body ascertaining whether there was sufficient information to substantiate a complaint on a balance of probabilities. Then, secondly, and again correctly, it noted that establishing misconduct at the disciplinary stage requires a sufficient basis of proof of misconduct beyond reasonable doubt. Thirdly, and immediately following, the GBA concluded "in this case, it was not possible to reach a conclusion with such certainty, given the passage of time".

10. In the impugned decision, the Director-General focussed, in large part, on the specific question of whether the complainant's conduct in relation to the purported abolition of Ms M.'s post constituted misconduct. He said: "I further note your lack of authority, failure to adhere to established procedures for abolition of post, and the announcement of your intentions to abolish [Ms M.'s] position to herself and to other staff via your email communication of 6 March 2013, all of which remain unrefuted". He then explained how this conduct contravened various normative legal documents. His conclusion was that "[c]onsequentially, I consider that the findings and conclusions of IOS, as reflected in paragraphs 128 and 130 of its report in particular, are substantiated beyond a reasonable doubt, and I disagree with the [GBA's] conclusions in this regard".

11. It is not entirely clear from the above, whether the Director-General was endorsing the findings and conclusions of IOS in all respects or only in relation to what it said in paragraphs 128 and 130 of its report. The clause in the passage just quoted concluding with the words "in particular", obscures the extent of his agreement or endorsement. Paragraph 128 is devoted almost exclusively to events surrounding the purported abolition of Ms M.'s post which, as the Director-General noted, were unrefuted. However, that paragraph also included a conclusion that the complainant's conduct in relation to the purported abolition, "contributed to the fostering of an intimidating and hostile work environment". Thus, the specific conclusion about the purported abolition embraced a broader notion that, more generally, the complainant had created or fostered an intimidating and hostile work environment.

Indeed, paragraph 130, expressly endorsed by the Director-General, was in the most general terms concerning the conduct constituting misconduct, namely:

> "130. IOS concludes that there is sufficient evidence to support that [the complainant] engaged in conduct that had the effect of offending, humiliating, and intimidating Ms [M.] and created an intimidating and hostile work environment and thereby violated the Policy on the Prevention of Harassment at WHO."

12. There are two related problems with the approach of the Director-General. Firstly, a mere declaration, in this case, that he was satisfied of misconduct beyond reasonable doubt without explaining why, involves a failure to motivate a conclusion at odds with the conclusion of the internal appeals body. This failure, alone, would justify the setting aside of the impugned decision (see Judgments 4400, consideration 10, 4062, consideration 3, and 3969, considerations 10 and 16). What, at a minimum, the Director-General needed to have done was explain why the analysis of the GBA in paragraph 40 was flawed, or did not sustain the ultimate conclusion of the GBA, or both. He did neither.

13. Secondly, the Director-General endorsed the conclusions of IOS in paragraph 130 of its report notwithstanding it simply said, "there is sufficient evidence". There is an obvious tension, if not inconsistency, between endorsing a conclusion based on findings of fact about misconduct on the basis of sufficient evidence and a declaration that the misconduct was proved beyond reasonable doubt. There are several judgments of the Tribunal deprecating reliance simply on the sufficiency of evidence as establishing misconduct in disciplinary proceedings. One illustration is found in Judgment 3880, consideration 9, in which the Tribunal said:

> "Whether there is sufficient evidence to support a finding of misconduct is a far less onerous evidentiary burden than the requisite 'beyond a reasonable doubt' standard of proof. The application of the incorrect standard of proof is a fundamental error of law and requires, on this ground alone, that the impugned decision be set aside."

Similarly in Judgment 4360, consideration 12, the Tribunal said, "[t]here is a material difference between being satisfied there was sufficient evidence establishing a fact and being satisfied beyond reasonable doubt that the fact existed". Having regard to the matters referred to in this and the preceding consideration, it can be inferred, in this case, that the mere declaration of the Director-General that the misconduct was proved beyond reasonable doubt did not reflect a genuine and considered evaluation of the evidence, and an assessment of it by reference to the applicable standard of proof.

14. In the result, the impugned decision should be set aside, as should the earlier decision of the Regional Director of 18 June 2019. It is unnecessary to address the multiplicity of other arguments raised by both the complainant and WHO. However, one further matter should be noted. The import of some of the pleas of WHO was that the Tribunal should, itself, determine whether the complainant's conduct constituted misconduct. This is not the Tribunal's role (see Judgments 4491, consideration 19, 4362, consideration 7, and 3831, consideration 28).

15. The complainant is entitled to material damages reflecting the loss of income arising from her losing three steps in grade.

16. The complainant seeks moral damages. It should first be noted that in the impugned decision she was awarded 18,500 euros for the delay in investigating the harassment claim and initiating and finalising the disciplinary proceedings. This amount is adequate. She also seeks "financial compensation for the emotional anguish and suffering endured since the IOS claim, the impact on her health and reputation". Save for the delay for which the complainant has already been compensated, she should not be awarded moral damages for any impact on her (and her reputation in respect of which there is no evidence) of the investigation of the harassment claim and the subsequent disciplinary proceedings. It was not a frivolous claim and the Organization was under a duty to investigate it (see, for example, Judgments 4219, consideration 11, and 3608, consideration 6), even having regard to the circuitous route taken for the making of the harassment complaint.

Moreover, her being charged with misconduct was likewise not vexatious or an abuse of power having regard to the findings of IOS. The claim for moral damages is, on the bases advanced, unfounded.

17. The complainant seeks other relief, namely that the Tribunal declare Ms M.'s harassment complaint as frivolous and cancel the IOS report. This is relief the Tribunal cannot grant even if grounds for granting that relief were made out. The complainant is entitled to costs which the Tribunal assesses in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 7 July 2020 is set aside, as is the earlier decision of the Regional Director of 18 June 2019.
2. WHO shall pay the complainant material damages in an amount equal to all salaries and emoluments the complainant would have received if the disciplinary measure of loss of three steps in grade had not been imposed on her.
3. WHO shall pay the complainant 8,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 18 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