

B.

v.

CTBTO PrepCom

129th Session

Judgment No. 4213

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. B. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom, hereinafter “the Commission”) on 10 November 2017 and corrected on 24 January 2018, the Commission’s reply of 7 May, the complainant’s rejoinder of 30 August, the Commission’s surrejoinder of 13 December 2018, the complainant’s additional submissions dated 28 February 2019 and the Commission’s final comments of 21 May 2019;

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 reject his claims of harassment and constructive dismissal.

The complainant joined the Commission in March 2014 as Unit Head in the Human Resources Section of the Division of Administration under a three-year fixed-term appointment. In his first Performance Appraisal Report (PAR) his supervisor, the Director of Administration, stated that he did not meet expectations. As a result, his probationary period was extended from 31 August 2014 to 28 February 2015.

On 6 January 2015 the complainant submitted his resignation with effect from 28 February 2015 and, on 24 February, he asked the Executive Secretary to order that his first PAR be removed from any file maintained by the Commission, that his final PAR indicate that he had performed satisfactorily, and that he be compensated for the loss incurred in relation to his “forced departure”. The Administration agreed on 27 March to adjust his final PAR and to compensate him for the costs he had incurred upon his “early departure”. While refusing to “destroy” his first PAR, it undertook not to share it with a third party without his written permission. The complainant refused that offer.

In July 2015 he wrote to the Chief of the Internal Audit Section alleging harassment on the part of the Director of Administration. He contended that the hostile working environment he had to face resulted in his constructive dismissal. In September 2016 the Executive Secretary informed him that he had reviewed his requests concerning his work situation together with the findings of the internal investigation that was undertaken as a result. He agreed to remove his first PAR and to replace it by a neutral PAR showing satisfactory service, and to pay him 10,500 euros to cover the expenses he had to face in relation to his separation. The Executive Secretary added that he had not yet drawn any conclusions regarding the complainant’s allegations of harassment but that the internal investigation gave him cause to pursue the matter further. He stated that he would inform the complainant as soon as he had reached a conclusion. In November 2016 the complainant was provided with an updated PAR indicating satisfactory performance; the agreed compensation was not paid at that time.

On 15 May 2017 the Executive Secretary wrote to the complainant stating that, in his view, there had been no harassment. He had nevertheless decided to inform the Director of Administration that he disapproved of the way he had acted in some of the instances at issue. In a letter of 13 July the complainant requested a review of that decision on the grounds that two years had elapsed since he had filed his harassment complaint, that he had not been formally informed of the completion of the investigation nor of its outcome, that he had not been

given the reasons for the Executive Secretary's decision of May, and had not been provided with the documents he relied on to make his decision.

By a letter of 14 August 2017 the Executive Secretary informed the complainant that he had decided to provide him with the review he had requested, even though he was no longer a staff member at the time of lodging his request for review, which meant that the internal appeal procedures were not available to him. As to the substance of the request for review, he indicated that in May 2017 he had informed the complainant about the outcome of the harassment investigation process. Being a "reporter" of the alleged misconduct, he was not entitled to receive the report, but the Executive Secretary agreed to communicate it to him under certain conditions. He agreed with the factual findings of the investigation but did not find that it was appropriate to characterise the behaviour of the Director of Administration as harassment. He further found that the "claims for restitution" were time-barred as they were the subject of the September 2016 decision, which the complainant had not challenged in time. The Executive Secretary attached to his letter a copy of some of the rules the complainant had requested. That is the decision the complainant impugns before the Tribunal.

In September 2017, before filing his complaint with the Tribunal, the complainant received the investigation report. In that report the Internal Audit Section recommended in particular that consideration be given to taking appropriate action against the Director of Administration for "engaging in harassing conduct".

The complainant asks the Tribunal to order the Commission to pay him the 10,500 euros that it had agreed to pay him, to confirm in writing that the 2014 PAR has been removed from his personal file and that no adverse material will be in his "official file" or in any file maintained by the Commission, and to pay him material damages for constructive dismissal. He seeks reimbursement of any United States federal income tax that he would have to pay with respect to an award of damages ordered by the Tribunal, and the payment of interest on all "damages" due from the date of separation. He further seeks moral damages and costs. In his rejoinder, he indicates that he was paid 10,500 euros in compensation (as promised) on 9 July 2018 after the filing of the

Commission's reply, and agrees that the Tribunal should take into account that amount when determining the amount of damages he should be granted.

The Commission asks the Tribunal to dismiss the complaint as irreceivable on the ground that the impugned decision is not a "decision". It submits that the claims for compensation for misconduct and alleged constructive dismissal are irreceivable as they are new claims. In the alternative, it asks the Tribunal to dismiss the complaint as devoid of merit. It states that the amount claimed in damages is significantly overstated.

The complainant filed additional submissions contesting the Commission's allegation that he has wilfully misrepresented his financial loss. He provides information as to the loss suffered pursuant to his separation from service.

In its final comments the Commission contests the amounts put forward.

CONSIDERATIONS

1. The complainant impugns the 14 August 2017 letter from the Executive Secretary responding to his 13 July 2017 request for review of the Executive Secretary's 15 May 2017 decision. In the letter of 15 May, the Executive Secretary informed the complainant of his "final dispositions regarding [the complainant's] claims about misconduct by [the Director of Administration]". The Executive Secretary reiterated that, regarding the complainant's 2014 PAR, "a neutral PAR, showing satisfactory service, ha[d] been issued and that the PAR at the end of the initial probationary period was ordered expunged from [the complainant's] file". In his assessment, he found that no issue of harassment arose, though he did consider that the 9 January 2015 email from the Director of Administration "was ill-advised" and he informed the complainant that he had communicated his disapproval of the 19 August 2014 incident to the Director of Administration. He closed by stating: "With this I consider the matter closed."

2. In the complainant's 13 July 2017 request for review, he asked for "the underlying reasoning and justification for the Executive Secretary's decision" as well as all documentation relied on to reach the decision, and an award of moral damages "due to the CTBTO's denial of [the] right [to be given reasons] and due to the irregularity of being forced to assert this well-established right through a formal process". He argued that he suffered harassment which forced him to resign; that he was not provided with a copy of the investigation report; that the Commission violated its duty of care and did not respect his dignity; that there was undue delay in dealing with his annual PAR as well as in the overall procedure; and that the Commission failed to disclose the outcome of the investigation in a timely manner. He therefore asserted that he was "entitled to significant material and moral damages, including but not limited to lost wages, lost benefits and entitlements, lost earning potential, and damage done to [his] career, which have not been taken into account in the Executive Secretary's decision in this matter".

3. The complainant filed the present complaint on the following grounds:

- (a) the 14 August 2017 decision is flawed as it constitutes a serious breach of his right to procedural fairness given that the Commission delayed the delivery of the investigation report to the complainant and failed to provide all evidence upon which the investigation report was based;
- (b) the 14 August 2017 decision, in particular with regard to not assessing the 19 August 2014 incident and the 9 January 2015 email as harassment, lacks proper justification;
- (c) the Commission failed to provide adequate assessment of his performance and failed to complete his 2014 PAR in a timely manner;
- (d) he was subjected to harassment and humiliating treatment; and
- (e) he was subjected to constructive dismissal.

4. At the end of his first probationary period, the complainant received a PAR, which assessed his performance as “does not meet expectations” and recommended that his probationary period be extended. The complainant signed the PAR on 5 November 2014, and did not contest it, or the extension of his probationary period until 28 February 2015, through the internal procedures available. The complainant submitted his resignation in January 2015, without any comment regarding his 2014 PAR, or the extension of his probationary period.

5. On 24 February 2015, the complainant wrote a memorandum to the Executive Secretary noting the rules and procedures for contesting a PAR, reiterating the comments that he had written on his PAR prior to its finalisation and his signing of it, and concluding that he was left “with no other choice than to find new employment”, which he considered amounted to constructive dismissal. He therefore requested that: “[his] probationary PAR indicating unsatisfactory performance be removed from [his] Official Staff File and from any other official or unofficial file maintained by the CTBTO and destroyed”; his final PAR be completed indicating satisfactory performance; and he be compensated in the amount of 10,050 euros, “which [was] only the amount of loss [he had] incurred due to the unexpected termination of [his] apartment lease”. He went on to state: “This amount does not come close to fully compensating me for the direct financial losses I am incurring as a result of this forced departure from CTBTO and Vienna, which also includes one month of out-of-pocket expenses for medical insurance (EUR 500); penalties for terminating contracts with [a private company] for phone and internet service (approximately EUR 1,000); loss of salary and entitlements for the month of March before I begin my new position in April (approximately EUR 10,000). This amount also does not take into account the profound moral injury I, and my family with me, have suffered.” He separated from service on 28 February 2015.

6. By email dated 27 March 2015, following discussions with the complainant, the Commission offered to meet the complainant’s requests in part. Specifically, it stated that his final PAR would be adjusted to indicate that he had met performance expectations satisfactorily and the

Commission would pay him 5,000 euros “in light of the extraordinary costs incurred for medical and household issues which arose upon [his] early departure”. It was noted that with regard to his first PAR, as it was the basis for the decision to extend his probationary period, it would be kept in a confidential file, would not be shared with a third party without his written permission, and any other copies held elsewhere would be destroyed. The complainant refused that offer by email dated 27 April 2015. In that email he argued essentially that his supervisor, the Director of Administration, abused his power and left him feeling very vulnerable, which led to his decision to leave the Commission prematurely. He reiterated his request regarding his PARs and his request for payment of 10,050 euros stating that the amount was “far less than remedies ordered by the [Tribunal] in similar cases”. He went on to state:

“Settling this matter also saves everyone a significant amount of ongoing discomfort and pain related to this. I honestly have little concern [about] the money at this point, but the more this lingers and the more I think about what happened to me and my family as a result of CTBTO’s actions (specifically by [the Director of Administration’s] actions), the more upset and disappointed I become. Aside from any possible appeal, I have also considered filing an abuse of power complaint against [the Director of Administration] and would not be surprised if other (current and former) staff would support this.”

In response, the Commission informed him, by email dated 11 June 2015, that the previous settlement offer stood and that if he wished to accept it the Administration would appreciate being advised by 20 June 2015.

7. On 10 July 2015, the complainant wrote a letter to the Chief of the Internal Audit Section to “formally initiate a complaint against [the Director of Administration]” alleging “harassment, creating a hostile work environment, which resulted in [his] constructive dismissal”. He did not make any request for personal remedies, stating instead that he hoped that his complaint “[would] help ensure that the CTBTO [took] necessary corrective measures so that current and future staff members [would] never be subjected to the unprofessional and grossly unjustified degradation and humiliation that [he] suffered during [his] time with the [Commission]”. This 10 July letter triggered an investigation into the alleged harassment. The investigation report was subsequently submitted to the Executive Secretary.

8. Following a series of emails between the complainant and the Commission with regard to the complainant's harassment complaint, requests for satisfactory PARs, and payment of 10,050 euros, the Executive Secretary informed the complainant of his conclusions by letter dated 7 September 2016. Specifically, his conclusions were as follows:

- “(1) Your Performance Appraisal Report (PAR) for the initial period of probation will be expunged from your official staff file, and replaced by a neutral annual PAR, showing satisfactory service.
- (2) You will be paid an amount of Euro 10,500 to cover expenses associated with your departure from Vienna.
- (3) The [Commission] shall implement a formal performance improvement framework for use in appropriate cases.
- (4) The [Commission] shall remind staff about their obligations under Administrative Directive 52 on the Prevention of Harassment and Resolution of Harassment-Related Grievances, and provide additional training in this respect.
- (5) Regarding the specific allegations of misconduct mentioned by you, I have not yet drawn any conclusions, but the internal investigation gives me cause to pursue this matter further, whilst, of course, respecting the rights also of those accused. I shall get back to you as soon as I have concluded on this specific issue.”

9. In the present complaint, the complainant mentions several actions and decisions (listed under consideration 3 above) which he considers to have caused him harm, but he has not shown evidence that he challenged them through the proper procedures and within the relevant time limits. To wit, the complainant's claims against the PAR at the end of his first probationary period could have been raised within five weeks of his signing the PAR through the procedure laid out in Administrative Directive No. 2 (Rev. 5). He also could have requested a review of the decision to extend his probationary period, but he did not do so. All the while, he was pursuing discussions with the Commission on a settlement as per his initial request found in the memorandum of 24 February 2015.

10. The Tribunal finds that the Executive Secretary's letter of 7 September 2016 must be considered as a settlement of the complainant's requests outlined in his 24 February 2015 memorandum (removal of his original probationary PAR and its replacement by an amended PAR,

payment of the sum of 10,050 euros for the loss due to the unexpected termination of his apartment lease).

11. Regarding the complaint he submitted on 10 July 2015 against the Director of Administration alleging “harassment, creating a hostile work environment, which resulted in [his] constructive dismissal”, the Tribunal observes that the Executive Secretary, in his letter of 7 September 2016 quoted above in consideration 8, stated that he had not yet drawn any conclusions and that he would inform him as soon as he had reached a conclusion.

By letter of 15 May 2017 the Executive Secretary informed the complainant about his “final dispositions” regarding his claims that the Director of Administration committed misconduct. In his view, there was no issue of harassment by the Director of Administration. In the same letter the Executive Secretary stated:

“Regarding the email of 9 January 2015 on [the Human Resources] inertia, I have informed [the Director of Administration] that I consider that the email was ill-advised.

Regarding the incident on 19 August 2014 concerning, in particular, a certain allowance I have communicated to [the Director of Administration] my disapproval of the way he acted.”

In the letter of 14 August 2017 the Executive Secretary acknowledged receipt of the complainant’s July 2017 request for review and stated *inter alia*:

“You state that you seek this review in accordance with Staff Rule 11.1.02(a). In response I want to note that the review you seek is part of the internal appeals procedures set out in Article 11 of the Staff Regulations and Rules. These procedures are, *expressis verbis*, available to staff members - and thus not to former staff members. In the interest of clarity and understanding, I shall, nevertheless, provide you with the review you seek and the results are set out below. However, you will not have access to the other internal appeals mechanisms set out in Article 11 of the Staff Regulations and Rules, including those set out in Staff Rule 11.1.02(b). Hence, if despite the explanation below and all measures that we have taken already you should intend to take your complaint further you will not be in a position to do so through the internal appeals process. Further, a complaint to the [Tribunal] would not be receivable beyond 90 days after your receipt of this memorandum.

[...]

[...] I accepted the factual findings of the investigation, but did not find that characterising the behaviour of [the Director of Administration] in the two instances in question as harassment was appropriate, even if I did find that [the Director of Administration's] 'HR inertia' email was ill-advised and I disapproved of his behaviour in the instance regarding a certain allowance. I concluded the matter accordingly, and I maintain the decisions involved, having reviewed the matter and carefully considered the inputs contained in your communication of 14 July 2017.

In line with my reasoning above, I thus also consider the matter closed vis-a-vis you. You ask for a copy of the investigation report, and since you have asked for the current review I shall forward you a copy, provided you, in advance, provide a written confirmation that you will treat this report confidentially and use it only for purposes of assessing and, should you so choose, pursuing a complaint to [the Tribunal]."

12. Considering the sequences and the wording of the Executive Secretary's communications, the Tribunal interprets the 14 August 2017 letter as a decision by which the Executive Secretary reviewed his previous decision, communicated to the complainant by the 15 May 2017 letter, that no harassment had occurred. The Tribunal finds that by his letter of 15 May 2017 the Executive Secretary informed the complainant about his conclusions regarding the harassment complaint as he said he would do in the letter of 7 September 2016.

13. The Tribunal observes that the investigation report contained detailed fact findings and explanations, which led to the conclusion that harassment had occurred in relation to the email of 9 January 2015 concerning the inertia of the Human Resources and to the incident of 19 August 2014.

14. The Tribunal finds that the Executive Secretary did not give the reasons for his disagreement with the conclusions contained in the investigation report. Accordingly the impugned decision of 14 August 2017 must be set aside and the case sent back to the Commission for the Executive Secretary to take a new decision concerning the alleged harassment, in light of two instances referred to in consideration 13, and the linked issue of constructive dismissal.

15. The Tribunal considers that the time spent to reach the decision on the complaint of harassment, and the stress stemming from the lack of motivation of the Executive Secretary's decision to disagree with the conclusions contained in the investigation report, entitle the complainant to an award of moral damages in the amount of 7,000 United States dollars. The complainant is also entitled to costs in the amount of 5,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is sent back to the Commission for a new decision to be taken in accordance with consideration 14, above.
3. The Commission shall pay the complainant 7,000 United States dollars in moral damages.
4. It shall also pay him 5,000 Swiss francs in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ