Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

P.

v.

ILO

130th Session **Judgment No. 4313**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms V. P. against the International Labour Organization (ILO) on 15 August 2017 and corrected on 21 September, the ILO's reply of 28 November 2017, the complainant's rejoinder of 12 February 2018 and the ILO's surrejoinder of 16 March 2018;

Considering Articles II, paragraph 1, 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, a former official of the International Labour Office ("the Office"), the ILO's secretariat, challenges the decision to dismiss her harassment grievance.

Following negotiations between the Office and its Staff Union, Article 13.4 of the Staff Regulations was amended with effect from 1 January 2015 and a procedure for the administrative resolution of harassment grievances was introduced. Article 13.4(5) now provides that in the case of a harassment grievance requiring investigation, the Director of the Human Resources Development Department is to nominate an independent investigator, who, pursuant to Article 13.4(8), is to carry out the investigation promptly and with the highest standards of impartiality, objectivity, fairness and due process. To this end, Article 13.4(9) provides that the investigator is to conduct any inquiry

necessary to investigate the case, including by reviewing the grievance, statements of the parties and any documents supplied and conducting interviews with the parties and any witnesses or staff members deemed relevant to the investigation. Article 13.4(11) provides that both the claimant and the respondent are to be informed of witness testimony so that they can exercise their right of reply, rectify erroneous information by furnishing evidence where necessary, or have their disagreement put on record. Under Article 13.4(13), the investigation is normally to be concluded within 60 working days of the receipt of the grievance by the investigator, except where, in the investigator's opinion, exceptional circumstances require additional time. Finally, Article 13.4(18) provides that the claimant and the respondent are entitled to file a complaint against the express or implied decision taken on the basis of the investigation report directly with the Tribunal, excluding the stage of an appeal before the Joint Advisory Appeals Board.

The complainant held a fixed-term technical cooperation contract with the Procurement Bureau. She was placed on sick leave from 24 June 2015. On 28 September 2015 she resumed her duties on a part-time basis, working half-time to begin with and then, from February 2016, on an 80 per cent basis.

On 24 November 2016, pursuant to Article 13.4 of the Staff Regulations, the complainant submitted a grievance relating to harassment by her line manager and her responsible chief. She was again placed on sick leave between 7 and 16 December.

On 22 December 2016 the Human Resources Development Department notified the complainant and the alleged harassers that an external firm had been appointed to conduct an investigation into the allegations in the grievance. In January 2017 the complainant submitted an "additional minute" containing further details and information regarding her grievance and recounting recent events that had taken place after it was filed. In late January the two officials under investigation received a copy of the grievance and its annexes for their response.

On 26 January the complainant submitted a request for special leave without salary for March and April, which was granted.

She was interviewed for the first time on 2 February by the two investigators who had been appointed. On 15 March she acknowledged receipt of the responses of the two officials under investigation, who were in turn interviewed on 16 and 17 March. On 24 and 29 March the

complainant submitted her observations on those responses. She was interviewed again on 7 April. Several other people who worked or had worked for the ILO were interviewed between February and April 2017.

The final investigation report, which was submitted to the Director-General on 25 April 2017, found that the allegations of harassment were not substantiated. By letter of 23 May 2017, the complainant was informed of the Director-General's decision to accept the findings of the investigation report and to dismiss her grievance. That is the impugned decision. The complainant resigned on medical grounds on 25 May 2017 with effect from 1 June.

The complainant asks the Tribunal to set aside the impugned decision, to examine her allegations of harassment and declare them to be well founded, to order that disciplinary measures be taken against the alleged harassers and to award her compensation for the material, physical and psychological injury she considers she has suffered. As she was placed on special leave without salary in May 2017 without her consent, she requests payment of her monthly salary, as well as reimbursement for the nine days she spent on activities relating to the investigation in March and April. Finally, she requests the Tribunal to award her 10,000 Swiss francs in costs and to take any action it deems fit to remedy the situation completely.

The ILO asks the Tribunal to dismiss the complaint in its entirety and, should it set aside the Director-General's decision owing to irregularities in the investigation procedure, it requests that the case be referred back to it for further consideration.

CONSIDERATIONS

1. The complainant impugns the decision of the Director-General of 23 May 2017 endorsing the findings of the investigation report that the allegations of harassment which she had made in her grievance of 24 November 2016 were not substantiated.

2. Several new features were introduced by the amendment of Article 13.4 of the Staff Regulations on the procedure to be followed in cases of harassment. While the introduction of the duty to conduct an independent investigation, unless the grievance is irreceivable or the Director of the Human Resources Development Department is satisfied

that the facts have already been fully established, is indisputably in line with the Tribunal's case law, the same cannot be said of the exclusion by the new Article 13.4(18) of the Staff Regulations of the right to file an internal appeal against the decision of the Director-General with the Joint Advisory Appeals Board.

3. First of all, as the Tribunal has repeatedly stated, it is desirable that an official should have the opportunity to lodge an internal appeal against a decision concerning her or him (see Judgments 3732, under 2, and 4257, under 12). The right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority (see, for example, Judgments 2781, under 15, and 3067, under 20). This is especially true since in most matters, internal appeal bodies may normally allow an appeal on grounds of fairness or advisability, whereas the Tribunal must essentially give a ruling on points of law (see Judgment 3732, under 2).

Next, the existence of an internal appeal procedure allows the organisation, if need be, to remedy an omission or rectify an error and, if necessary, to alter its position before a final decision is taken. Moreover, it allows the staff member concerned to understand the final decision better and perhaps accept that decision as being warranted in the light of the findings of the internal appeal body, even if the outcome is unfavourable to her, thus dissuading her from filing a complaint with the Tribunal.

Finally, internal appeal procedures play a fundamental role in the resolution of disputes, owing to the guarantees of objectivity derived from the composition of the appeal bodies and their extensive knowledge of the functioning of the organisation. One of the main justifications for the mandatory nature of such a procedure is to enable the Tribunal, in the event that a complaint is ultimately filed, to have before it the findings of fact, items of information or assessment resulting from the deliberations of appeal bodies, especially those whose membership includes representatives of both staff and management, as is often the case (see Judgments 3424, under 11(b), 4072, under 1, and 4168, under 2). In this case, it appears to the Tribunal that the input of an internal appeal body would have been particularly essential given that a large number of facts have to be taken into consideration.

In conclusion, the Tribunal deeply regrets that it is no longer possible to bring an internal appeal against a harassment-related decision before the Joint Advisory Appeals Board, even though it is normally the rule at the ILO for such an appeal to be available.

4. In one of her many pleas, the complainant contends that Article 13.4(11) of the Staff Regulations, and, more generally, the adversarial principle were infringed because she did not have the opportunity to respond to witness statements that concerned her directly.

Article 13.4(11) provides that:

> "The claimant and respondent shall both be informed of witness testimony in order to exercise their right of reply, to rectify erroneous information by furnishing evidence where necessary, or to have their disagreement put on record."

The complainant states, without contradiction by the Organization, that during the investigation she was not informed of the witness statements that had been gathered. It was only on reading the investigation report, forwarded to her together with the impugned decision, that she learned that 14 witnesses, whose names were not stated, had been interviewed.

5. The Organization replies that the report wrongly states that there were 14 witnesses. In fact, of the 14 people interviewed, four were ILO officials who explained the ILO's regulatory and administrative context to the investigators, but who did not give statements on specific facts related to the complainant's grievance. The ILO appends to its reply the records of the interviews with the 10 other officials who were heard as witnesses. It contends that as information on the witness statements has thus been provided to the complainant, the complaint has become moot in this respect, as the Tribunal found in Judgment 2767, in a situation where information that ought to have been made available to a complainant in accordance with the right to due process, namely the composition of an internal panel, was not provided until the reply stage.

However, in the present case, the fact that the complainant was ultimately able to obtain a copy of the witness statements during the proceedings before the Tribunal does not remedy the flaw in the investigation procedure. While the Tribunal's case law recognises that, in some cases, the non-disclosure of evidence can be corrected when this flaw is subsequently remedied in proceedings before it (see, for example, Judgment 2767, cited by the ILO, and Judgment 3117, under 11),

that is not so where the document in question is of vital importance having regard to the subject matter of the dispute (see Judgments 2315, under 27, 3490, under 33, 3831, under 16, 17 and 29, and 3995, under 5). That is the situation here. The witness statements were crucial items of evidence which essentially formed the basis for the findings of the investigation report and hence the impugned decision in which the Director-General endorsed those findings. The failure to provide these documents constitutes a serious breach of the adversarial nature of the procedure set out in Article 13.4(11) of the Staff Regulations which cannot be remedied after the final decision has been taken.

6. The ILO also refers to Judgment 3071, in which the Tribunal held that the failure to disclose witness statements gathered in the course of a harassment investigation could have been corrected in the proceedings before the Joint Advisory Appeals Board. The Organization points out that the new procedure for the administrative resolution of harassment grievances does not allow internal appeals to be filed with the Joint Advisory Appeals Board when an investigation is required and seeks to argue that it may therefore rectify the investigators' omission during the proceedings before the Tribunal.

The Tribunal cannot accept that reasoning. As discussed in consideration 3 above, one of the advantages of the internal appeal procedure is that it allows the organisation to rectify certain irregularities in time. This is why, in Judgment 3071, the Tribunal stated that the witness statements gathered in the course of the investigation could have been disclosed to the person concerned during the proceedings before the Joint Advisory Appeals Board. In that case, the evidence was disclosed before the final decision was taken and thus the adversarial principle was observed. The fact that such proceedings are not available means that it is no longer possible to remedy the flaw arising from the late disclosure of witness statements since they constitute crucial evidence on which the impugned decision rests and, by definition, proceedings before the Tribunal take place only *a posteriori*.

7. It should be borne in mind that, in the two judgments referred to by the Organization, the Tribunal emphasised that a staff member is entitled to be apprised of all material evidence that is likely to have a bearing on the outcome of her or his claims (see Judgment 2767, under 7(a)) and that failure to disclose that evidence constitutes a

serious breach of the requirements of due process (see Judgment 3071, under 37). Those two judgments are fully consistent with the Tribunal's settled case law according to which, in the context of an investigation into allegations of harassment, a complainant must have the opportunity to see the statements gathered in order to challenge or rectify them, if necessary by furnishing evidence (see Judgments 3065, under 8, 3617, under 12, 4108, under 4, 4109, under 4, 4110, under 4, and 4111, under 4).

That did not occur in this case.

It follows that the plea is well founded and that the impugned decision must be set aside, without it being necessary to examine the other pleas.

8. Where the investigation into a harassment complaint is found to be flawed, the Tribunal will ordinarily remit the matter to the organisation concerned so that a new investigation can be conducted. However, the complainant does not wish for it to do so since she left the ILO on health grounds and, in her view, a fresh investigation would cause her additional suffering and might further jeopardise her health. She requests that the Tribunal itself consider the merits of her grievance concerning the alleged harassment. In that regard, she cites Judgment 3170, under 25.

9. In view of the time which has elapsed since the disputed events, and as the complainant has now left the Organization, it would no longer serve any useful purpose to order the holding of a fresh investigation.

As discussed under consideration 3 above, the internal appeal procedure allows the Tribunal to have before it the findings of fact, items of information or assessment resulting from the deliberations of a body presenting guarantees of objectivity derived from its composition and extensive knowledge of the functioning of the organisation. However, as a result of the amendment to the Staff Regulations referred to above, the Tribunal does not have before it the informed opinion of that body and, in this case, with its particularly voluminous file, neither the parties' written submissions nor the evidence tendered allow the Tribunal to determine the existence of harassment with certainty; that would be possible only if the findings of an investigation that was duly

carried out at the material time and the informed opinion of the Joint Advisory Appeals Board were available.

It must therefore be found that the complainant has been deprived of her right to have her harassment grievance properly investigated.

10. The Tribunal considers it fair to redress the moral injury so caused by ordering the Organization to pay her 25,000 Swiss francs in compensation.

11. The complainant requests the Tribunal to order that disciplinary action be taken against the officials whom she accuses of harassment. In addition to the fact that in this case harassment could not be established, the Tribunal points out that such a request is, in any event, outside its jurisdiction (see Judgment 3318, under 12, and the case law cited therein).

12. The complainant, whose fixed-term technical cooperation contract expired on 31 August 2017, resigned on 25 May with effect from 1 June 2017. She claims damages for the material injury suffered owing to the loss of income and career prospects within the Organization and the fact that she was "forced" to resign, as well as for the physical and psychological injury caused by the alleged harassment.

The Tribunal notes that the complainant does not allege that the Organization requested her, in any manner, to resign. The fact that the complainant concluded of her own accord that she had to resign owing to the harassment which she allegedly suffered is not sufficient to establish that she was compelled to resign by the Organization. In those circumstances, she cannot, in any event, be awarded damages for the loss of income and career prospects resulting from her resignation.

It cannot be found that the complainant suffered physical and psychological injury since, for the reasons set out above, the question of whether the alleged harassment actually took place cannot be settled conclusively.

13. The complainant claims payment of her salary for the month of May 2017, during which she was placed on special leave without salary without her consent, and reimbursement of the nine days which she states were spent working on the investigation during the special leave without salary that had been granted her for March and April 2017.

Since the complainant did not file internal appeals against the decisions refusing to pay her salary for those periods, these claims are irreceivable on the grounds of failure to exhaust internal means of redress as required under Article VII, paragraph 1, of the Statute of the Tribunal.

14. As she succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 750 Swiss francs.

15. All other claims must be dismissed.

DECISION

For the above reasons,

1. The Director-General's decision of 23 May 2017 is set aside.
2. The ILO shall pay the complainant 25,000 Swiss francs in moral damages.
3. It shall also pay her 750 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 22 June 2020, Mr Patrick Frydman, President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ