Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

N.

v.

Energy Charter Conference

135th Session **Judgment No. 4612**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. N. against the Energy Charter Conference (ECC, hereinafter "the organisation") on 4 November 2019 and corrected on 7 November 2019, the organisation's reply of 14 January 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 suspend her from duties with immediate effect.

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 on 14 January 2019 stating that she would resign. Following a discussion with the Secretary-General, 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 the complainant had prepared that Report, the Secretary-General wrote a note to her on 6 June. 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. He therefore suspended her from duty with immediate effect. The following day, the Report was published together with a news article on a public website.

On 10 June 2019 the complainant requested the Secretary-General to withdraw the suspension decision. He rejected her request two days later. On 25 June 2019 she provided the Secretary-General with a letter from the journalist stating that she had not sent him the Report. The following day the Secretary-General apologised to the complainant and indicated that he had explained to the Advisory Board, in his note of 19 June 2019, which was also sent to her, that he had no written evidence of her leaking the Report and that she had expressly denied it. However, he decided not to lift the suspension decision because she had prepared the Report, which contained intentionally wrongful and misleading information, apart from personal data and confidential information. In addition, she had failed to send the Report to him as required under the Staff Regulations and Rules of the Staff Manual or the Energy Charter Treaty.

One month later, on 12 July 2019, the complainant wrote to the Chairman of the Advisory Board requesting advice on the suspension decision. She asked the Advisory Board to recuse itself on the ground that it generally lacked expertise, independence and impartiality, and that, in her particular case, it was biased and showed conflict of interest. She stressed that, in the Report she wrote, she had questioned its independence and impartiality. On 15 July 2019 the Secretary-General terminated her appointment. A few days later, on 23 July 2019, the

Chairman of the Advisory Board acknowledged receipt of her request for advice and asked her if she still wanted to go forward with that request as she seemed to have sent it before receiving the Board's report on the Secretary-General's proposal to terminate her appointment. He added that if she decided to proceed with her request, she was invited to an oral hearing. She confirmed that same day that she wished to maintain her request, and subsequently informed the Board that she would be unable to attend the oral hearing for health reasons.

In its report of 19 August 2019 the Advisory Board rejected the complainant's request for recusal asserting that, as required by Rule 25.2(d), its members acted with the maximum of dispatch consistent with a fair review of the issue before it and that, as required by Regulation 25(a), its members were completely independent and impartial in the exercise of their duties. It held that the suspension decision was justified given that she had prepared and disseminated the Report, which contained intentionally wrongful and misleading information, apart from personal data and confidential information. In addition, she had not followed applicable rules for sending her Report. The Board therefore advised the Secretary-General not to withdraw or modify the suspension decision. It dismissed her request that all disciplinary action against her be revoked immediately as she had not provided any information in that respect. It also dismissed a range of requests as not being relevant given its advice.

On 4 September 2019 the Secretary-General forwarded the Advisory Board's report to the complainant stating that he had not changed the suspension decision. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and order her reinstatement. She also claims material damages, moral damages and costs.

The organisation asks the Tribunal to reject the complaint as unfounded.

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. Before the termination of her employment, she had been suspended with pay effective 6 June 2019. Shortly thereafter, on 30 August 2019, she submitted a harassment grievance to the organisation's Advisory Board.

2. The complainant has filed three complaints with the Tribunal. The first, filed on 4 November 2019 and which this judgment addresses, concerns her suspension. The second and third complaints concern, respectively, her dismissal and her harassment grievance. The complainant seeks the joinder of her three complaints. If acceded to by the Tribunal, that would be for the purpose of rendering one judgment. The organisation makes no submissions on this question. As will be apparent from this judgment when read with the two related judgments, there is a continuum of linked events which bear upon the suspension, the dismissal and the harassment grievance. Indeed, some of the narrative in this judgment is repeated in the subsequent judgments. However, the relevant facts are not entirely common, and the legal issues raised in the three complaints are discrete. Accordingly, the complaints will not be joined. However, the three complaints will be considered by the same panel of judges of the Tribunal at the same session.

3. Before discussing the parties' specific pleas, it is convenient to set out the legal principles applied by the Tribunal when considering a challenge to a suspension decision. The grounds for reviewing the exercise of the discretionary power to suspend are limited to questions of whether the decision was taken without authority, in breach of a rule of form or procedure, was based on an error of fact or law, involved an essential fact being overlooked or constituted an abuse of authority or if a clearly mistaken conclusion was drawn from the evidence (see, for example, Judgments 4452, consideration 7, 3037, consideration 9, 2698, consideration 9, and 2365, consideration 4(a)). According to the Tribunal's

case law, the suspension of an official is a provisional measure which in no way prejudges the decision on the substance of any disciplinary measure against her or him (see Judgments 2365, consideration 4(a) and 1927, consideration 5). However, as a restrictive measure on the staff member concerned, the suspension must have a legal basis, be justified by the needs of the organisation and be taken with due regard to the principle of proportionality. A staff member does not have a general right to be heard before a decision to suspend is made (see, for example, Judgment 4361, consideration 12).

4. 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. The event which precipitated the complainant's suspension was her creating 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. As noted earlier, the complainant was suspended on 6 June 2019. She requested the withdrawal of the suspension on 10 June 2019, but the request was refused by the Secretary-General two days later.

5. On 12 July 2019, the complainant wrote to the Chairman of the Advisory Board, as the position is described in the Staff Rules, requesting an advice on the suspension decision though, in the same letter, she challenged the impartiality of the members of the Board and asked them to recuse themselves. As noted earlier, the complainant's employment was terminated on 15 July 2019. Correspondence passed between the Board and the complainant concerning the progressing of her request for an advice on the suspension. In due course the Board provided a report, dated 19 August 2019, recommending, firstly, the Secretary-General not withdraw or modify his decision to suspend, secondly, dismissing a request that all disciplinary action against the complainant be revoked and thirdly, dismissing a range of other requests as irrelevant having regard to its first and second recommendation and decision. By

email dated 4 September 2019 the Secretary-General informed the complainant that he had not "change[d] [his] decision on [the complainant's] suspension". This is the decision impugned in these proceedings.

6. The complainant's case in her pleas challenging the impugned decision is advanced under six general headings. Firstly, she contends that the decision to suspend 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 suspension 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 now considers the pleas under each of these headings.

7. The first is that the decision to suspend her involved a misuse of authority and violated the duty to act in good faith. It is convenient to consider this together with the pleas under the fourth heading, namely that the suspension decision was arbitrary, irrational, unjustified and manifestly unreasonable. It is necessary to consider the facts in a little more detail.

8. The Report was created by the complainant and sent by email on 1 June 2019, purportedly to the Vice-Chair (in fact only a Romanian delegate, a fact asserted in the organisation's reply and not later disputed by the complainant) of the Conference. In the complainant's email she said the Report was strictly confidential, for the recipient's eyes only and should not be circulated. However, the complainant said she was sending the Report to six other named "Contracting Parties", five from Europe and Japan. There is no reason to doubt this happened and, in any event, it is admitted by the complainant in her pleas. Moreover, there is no evidence which demonstrates the complainant had a reasonable basis for believing that her exhortation that the Report

was strictly confidential, was for the recipient's eyes only and should not be circulated, would be honoured beyond having made it. Indeed, given the content of the Report there was a risk it would not be, as turned out to be the case.

9. On 6 June 2019 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.

10. Later that day the Secretary-General sent the complainant a note informing her of her suspension. In the note he said that he had learned from Mr S. that the complainant had provided him (and the Secretary-General added "and probably to other external persons") with a copy of the Report and that it contained confidential and personal information, as well as intentionally malicious and false allegations against him and other colleagues of the Secretariat.

11. The European media did publish a lengthy article the following day written by Mr S. clearly based on the contents of the Report and it also placed the Report online. The inescapable inference is that someone leaked the Report to that publication. Indeed, it later emerged Mr S. had obtained the Report from "an EU [European Union] source outside the Energy Charter Secretariat" and believed that it was circulated to all members of the Energy Charter Treaty including the 27 EU Member States representatives and the European Commission.

12. In the 6 June 2019 note to the complainant it is tolerably clear that the "action", said by the Secretary-General 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 the Secretary-General and other colleagues and its probable dissemination to "other external persons".

13. 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 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. 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.

14. Mr S. denied (in a letter dated 19 June 2019 to the complainant's lawyer sent to the Secretary-General by the complainant on 25 June 2019) receiving the Report from the complainant and this was accepted by the Secretary-General who, by letter dated 26 June 2019 sent by covering email, apologised to the complainant for accusing her of sending the Report to the named journalist, adding that he had no written evidence of the complainant leaking the Report and noting that she had expressly denied doing so. In the covering email the Secretary-General asked the complainant who she sent the Report to, but she did not respond to this request then or at any time later.

15. The Secretary-General also said, in the 26 June 2019 letter, that he did not propose to lift the suspension "based on the fact that [the complainant] prepared the [R]eport" and he repeated the characterization of it set out in consideration 10 above. Additionally, he said that he had raised with the Advisory Board in a note of 19 June 2019, a copy of which had been sent to the complainant, that, amongst other things, "the [R]eport was not sent in accordance with the Staff Regulations and Rules". This assumes some importance given the approach adopted by the Advisory Board.

16. Regulation 2 (Staff Circular) of the Staff Manual provides that an official, in the event that she or he "becomes aware of fraud, corruption or misuse of the Organisation's resources", must bring it to the attention of the Secretary-General in writing and, in the event that the allegation has not been properly addressed, she or he should bring it in writing to the attention of the external auditor and may bring it to the attention of the Chair of the Conference or one of the Conference Vice-Chairs. The Tribunal is satisfied that the Report is a document comprehended by this provision. Indeed, in the Introduction to the Executive Summary in the Report, the complainant wrote "[...] the limited available resources [of the organisation] are not [being] used in the most effective way for delivering what Contracting Parties expect and are thus being wasted and possibly misused". The organisation accepts in its pleas that it was unnecessary for the complainant to bring it to the attention of the Secretary-General as a first step in complying with Regulation 2 given that he was the focus of much of the critical analysis in the Report. But that did not absolve the complainant from complying with the other elements of the Regulation.

17. The Advisory Board concluded that the complainant had, by disseminating the Report and not sending it to the external auditor, breached Regulation 2. It also observed that under the Staff Rules, a decision to suspend can be made in the context of an allegation of serious misconduct without the allegation being proven.

18. A material element in the complainant's arguments under the first heading was the statement in the note of 6 June 2019 suspending the complainant that the Secretary-General had been told Mr S. had been provided with the Report by the complainant which, to use the language of the complainant's pleas, "was quite simply and disgracefully a fabrication". That is to say, the Secretary-General knew the statement was false. The first difficulty with this submission is that the complainant bears the evidentiary burden of proving what is in effect an allegation of bad faith (see Judgment 4505, consideration 9). She has not done so. In her pleas the complainant argues that "[i]t is more likely than not the Secretary-General was simply making up false evidence and a serious

allegation to bolster the inadequate grounds upon which he was suspending the complainant and thereby wilfully maximising the damage to her reputation". For the Tribunal to infer this was so, it would require evidence of substance which, in the present case, is singularly lacking.

19. It is true that what was said was false, as duly established by the letter from Mr S. which almost immediately led to an apology from the Secretary-General. However, it is a large step to infer from all the circumstances that at the time the statement was made, the Secretary-General knew it was false. He had, on the day the statement was made, been in discussion with Mr S. who had made clear he had a copy of the Report. The Secretary-General knew that the Report had been written by the complainant. While, as it turns out, Mr S. did not say the Report had been provided by the complainant, it would not have been entirely fanciful for the Secretary-General to have erroneously presumed it had been, given the fact that it had been authored by the complainant and was then in the hands of a journalist.

20. Moreover, by focusing on this question of fabrication, the complainant fails to adequately address the other bases on which the suspension decision was made and maintained, namely the allegations that the Report was written by her, contained confidential and personal information, as well as intentionally malicious and false allegations against the Secretary-General and other colleagues of the Secretariat and was probably disseminated to "other external persons" that is, beyond Mr S.

21. The power to suspend is conferred by Rule 24.2 of the Staff Manual. The condition precedent to the exercise of the power is that an allegation of serious misconduct had been made against an official and the misconduct alleged is of its nature incompatible with her or him continuing in service. It is, as noted in consideration 3, a discretionary power and, under the Rule, does not require proof of the alleged misconduct at any level. The relevant allegations were contained in the note of 6 June 2019 suspending the complainant and satisfy this

condition precedent. If a very senior official creates a document containing confidential and personal information, as well as intentionally malicious and false allegations against the Secretary-General and other colleagues of the Secretariat and disseminates it "to other external persons" (and not in accordance with the rules), that could, if established, constitute misconduct of its nature incompatible with that senior official continuing in service.

22. Under the fourth heading the complainant raises, additionally, the provisions of the Code of Conduct which, relevantly, provide that staff "[s]tay vigilant to any fraud, waste, and abuse that may occur within the Organisation and address and report them appropriately". But the Code cannot derogate from the provisions of the Staff Regulations and Rules and, in any event, the "appropriate" means of addressing those issues was that prescribed by Regulation 2 discussed earlier. The pleas raised under the first and fourth headings are unfounded.

23. Under the second heading, the complainant contends that the Secretary-General was biased and had a conflict of interest. It is true, as noted earlier, that the working relationship between the complainant and the Secretary-General became a tense one. It is described in her brief as "a difficult relationship with considerable disagreements at a personal level". On the material before the Tribunal this appears to be correct. In particular, the evidence reveals the complainant was repeatedly concerned about what she perceived to be the Secretary-General's aggressive behaviour towards her. But, as also noted earlier, the complainant bears the evidentiary burden of proving what is in effect an allegation of bad faith (Judgment 4505, consideration 9). She has not done so.

24. However, one matter of detail should be mentioned. In her pleas in this matter, the complainant points to the fact that the Secretary-General sought the advice of the Advisory Board on 6 June 2019 about terminating the complainant's employment, one and a half hours after the suspension decision (this timing is not disputed by the organisation). This establishes, so it is argued, a "latent intention" on the part of the

Secretary-General to terminate the complainant's employment. 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 proves nothing more than the Secretary-General was contemplating the complainant's termination before he came to know of the existence of the Report, its likely dissemination and believing, incorrectly, its provision to Mr S. It does not prove that the decision to suspend was actuated by bias if, as was the case, there was a basis for the suspension decision in any event.

25. Under her third heading, the complainant contends there was a violation of due process. There should have been, so she argues, some form of investigation of the facts founding the allegation of misconduct before she was suspended. The short answer to this argument is that this is not required by the Tribunal's case law, particularly given that suspension decisions often have to be made urgently (see, for example, Judgment 3502, consideration 17).

26. Under her fifth heading, the complainant contends that the members of the Advisory Board were biased and showed a conflict of interest and under her sixth heading, that the Advisory Board violated the requirement of due process. It is convenient to deal with these pleas together. The Tribunal observes, at the outset, that paradoxically the complainant contends the Advisory Board should have been reconstituted because the existing members should have recused themselves, which on any view would have taken some time, on the one hand, and on the other that the Board failed to determine her request for advice as promptly as provided for by the Staff Regulations and Rules and, accordingly, violated the complainant's right to due process.

27. The second contention is that the Advisory Board failed to make its report within the time limit required by Rule 25.2(a)(ii) of the Staff Manual, and this constituted a violation of the complainant's due process rights. That rule specifies a 30-day period from the date of

receipt of a written request for advice. The complainant's argument is based on a misconstruction of the rule. The 30-day time limit is imposed in relation to the Board meeting, not making its report.

28. However, the organisation, quite properly, points to another provision which did impose such a 30-day limit (from the date of receipt of the request by the Chairman) on the provision of an advice, namely Rule 25.3(b). The complainant's request was sent by email on 12 July 2019 to the Chairman's email address. It requested that receipt of the email be acknowledged. It was impliedly acknowledged in an email from the Chairman on the morning of 23 July 2019 and expressly in an email from the Chairman sent that afternoon. In its report, the Board noted: "On 23 July 2019, the Chairman of the Advisory Board confirmed to [the complainant] the receipt of her request and invited her to a hearing [...]". This was a fair reflection of what had occurred and on any balanced and reasonable view could not be described, as it was by the complainant's lawyer in her brief, as including "a deliberate misrepresentation that constitutes a misuse of authority to conceal the fact that the 30-day period had been violated".

29. Even accepting, as was probably the case, that Rule 25.3(b) was not complied with, the ultimate question is whether, as contended for by the complainant, this constituted a breach of her due process rights. This was an unusual case. It is to be recalled that the complainant, in her 12 July 2019 request for advice (sent at 8 pm on a Friday), asked that all the members of the Advisory Board recuse themselves. She provided detailed reasons as to why that was so for each member, which included reasons referable to details in the Report of which she was the author, and which was provided to the Board with the request. It can reasonably be inferred that some time was taken, in the week following the request, by each of the members of the Board to consider their position and absorb what was said in the Report, and subsequently to do so collectively as was manifest by a collective statement in the Board's report about recusal. It is not possible, in these circumstances, to conclude that a limited breach of the time limit prescribed by the rules constituted a violation of the complainant's due process rights.

30. This leads to a consideration of the complainant's argument that all the members of the Advisory Board were biased, showed a conflict of interest and should have recused themselves. The complainant bears the burden of proving they were and should have recused themselves (Judgment 4523, consideration 8). It is unnecessary to detail fully all the arguments advanced by the complainant, initially in her request for an advice of 12 July 2019 and subsequently in her pleas before the Tribunal, that each member of the Board should have recused themselves. But they included that one member, the Chairman, was a personal friend of the Secretary-General, three of the members were criticised by her in the Report, two of these members were additionally involved in a group harassment claim and another was a very loyal staff member to the Secretary-General. Each of these reasons was not demonstrably and unarguably a reason for each member of the Board to recuse herself or himself. Moreover, the organisation takes issue with each of these reasons for recusal in its pleas.

31. But on the assumption that the complainant could, on closer analysis of the evidence, make good her case that all the members of the Advisory Board were biased, the case fails in any event. It is important not to lose sight of the subject matter of the request for advice. It was a challenge to a decision to suspend the complainant. It needed to be dealt with promptly irrespective of any time constraint imposed by the Regulations and Rules. The Energy Charter Conference is a small organisation with only 24 staff. The process of constituting the Board, or reconstituting it (which was the necessary consequence of her claim of bias made in her request for an advice) by the Secretary-General under Staff Regulation 25 involves identifying a person as Chairman from outside the Secretariat and, in relation to two members, a process whereby they would be nominated by the staff of the Secretariat. This process would doubtless have taken some time and probably beyond any reasonable period to furnish advice on a suspension decision. Additionally, the implicit request of the complainant that the Board be reconstituted was made in circumstances where at a meeting of the general staff on 11 June 2019, 19 staff members (with one further abstention) had resolved to ask the Secretary-General and the Legal

Unit of the Secretariat "to take measures to mitigate the damage caused by the [Report] which was produced and presented solely by [the complainant] without the knowledge or participation of the Staff". The clear import of this resolution was that the 19 staff members supporting it were critical and unsupportive of the action of the complainant in preparing the Report. Any person supporting the resolution at this meeting would doubtless have been amenable to the same allegations of bias and having a conflict of interest, as were made by the complainant in relation to existing members of the Board.

32. The Tribunal has acknowledged a doctrine of necessity (Judgments 4006, consideration 14, and 2757, consideration 19). That is, circumstances can arise where a decision-maker, whether an individual or a body, is lawfully able to make a decision because it is unavoidable and necessary to do so where, in other circumstances, the individual or body should not exercise the decision-making power because to do so might involve a denial of due process. The present circumstances are such a case. The grounds under the fifth and sixth heading are unfounded and are rejected.

33. The complainant has failed to establish any basis to set aside the impugned decision. Accordingly, the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is 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