Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.

v.

Energy Charter Conference

135th Session **Judgment No. 4615**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms Y. S. against the Energy Charter Conference (ECC, hereinafter "the organisation") on 9 October 2019 and corrected on 16 October, the organisation's reply of 14 January 2020, the complainant's rejoinder of 10 April 2020, corrected on 3 August, the organisation's surrejoinder of 12 October 2020, the complainant's further submissions of 6 April 2021 and the organisation's letter of 27 April 2021 informing the Registrar that it did not wish to comment on the complainant's further submissions;

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 terminate her appointment.

The complainant joined the Energy Charter Secretariat – the secretariat of the Energy Charter Conference – on 1 October 2018, under a three-year fixed-term appointment with a six-month probationary period. In early February 2019 she was elected Chair of the Staff Committee.

On 29 March 2019, further to the Advisory Board's recommendation, the Secretary-General extended her probationary period until 30 April 2019 to enable her to provide evidence that she had disassociated herself from external functions and activities deemed by the Administration to be incompatible with her work for the Energy Charter Secretariat. She was asked to agree by 31 March 2019 to the extension of her probationary period. The complainant confirmed in writing on 29 March 2019 that she would renounce the external functions in question upon her return from sick leave. By a letter of 31 March 2019, the Secretary-General informed her that he had decided to terminate her appointment with immediate effect, because she had neither provided clear evidence of having stepped down from the external activities in question nor agreed to the extension of her probationary period in order to provide such evidence. The complainant responded immediately expressing her shock and noting that she had already consented to the extension of her probationary period, further to which the Secretary-General, by another letter of 31 March 2019, retracted his decision to terminate her appointment and confirmed the extension of her probationary period until 30 April 2019. In April 2019 the complainant provided the requested evidence regarding her resignation from external functions and, on 30 April 2019, the Secretary-General confirmed her appointment.

On 13 May 2019, after being issued with a written reprimand by the Secretary-General for creating an inappropriate work environment and harassing Mr A., one of her subordinates, the complainant sent an email to several staff members, including Mr A. and Mr T., previously Chair of the Staff Committee, in which she accused them of continuously discrediting and intimidating her in her role as Chair of the Staff Committee ("group harassment claim"). The next day, on 14 May 2019, the complainant and Ms N., in their respective capacities as Chair and A-grade staff representative to the Staff Committee, sent to staff an external note stating that the election of the B/C-grade staff representative had been sabotaged by an intimidation campaign against the 2019 Staff Committee, led by Mr T. On 5 June 2019 a new Staff Committee was elected which, in a communication of 6 June, stated that the external note of 14 May 2019 was not representative of staff opinion and was sent without prior consultation with staff. Between 19 May and

12 June 2019, the complainant sent emails to several staff members accusing them of harassment and, on 21 June 2019, she formally lodged with the Advisory Board five harassment complaints against the staff members she had previously accused of harassment, including the Secretary-General, Mr A. and Mr T. These harassment complaints were dealt with jointly ("group harassment complaint") and eventually dismissed by the Advisory Board in July 2019 for lack of evidence and as "non receptive under the applicable rules".

In the meantime, on 21 May 2019, Mr T. had lodged a harassment complaint against the complainant with the Advisory Board. The complainant was relevantly informed on 27 May 2019, while on sick leave, and was invited to a hearing scheduled for 6 June 2019. In the event, she responded in writing on 4 and 12 June 2019 rejecting Mr T.'s harassment claim and contesting the Advisory Board's composition by reason of its alleged lack of independence and impartiality as well as the conflicts of interest of some of its members. In its report of 13 June 2019, the Advisory Board found the complainant's attitude in the incidents described by Mr T. to be inappropriate and not in line with the code of conduct for international civil servants. It regarded as an aggravating factor that the complainant had pursued some of the offensive acts in her capacity as Chair of the Staff Committee. Considering her accusations against Mr T. and other staff members to be unfounded, malicious and damaging to their reputation, as well as that of the organisation as a whole, the Advisory Board advised the Secretary-General to terminate the complainant's appointment.

By a letter of 17 June 2019, the Secretary-General informed the complainant of his decision to terminate her appointment with immediate effect, under Regulation 13a)i), and to pay her four months' salary in lieu of the statutory notice period. On 27 June 2019 the complainant contested this decision but on 7 July 2019 the Secretary-General informed her that he had decided to maintain it and, on 11 July 2019, he invited her to consider his 7 July 2019 decision as a final decision she could contest directly before the Tribunal, should she wish to do so. The complainant, notwithstanding, seized the Advisory Board which, in its report of 19 August 2019 advised the Secretary-General to

maintain his 17 June 2019 decision. By an email of 4 September 2019, the Secretary-General informed the complainant that his decision to terminate her appointment stood. This is the decision impugned by the complainant in the present complaint (her first).

The complainant asks the Tribunal to annul the impugned decision of 4 September 2019 as well as the earlier decision, dated 17 June 2019, to terminate her contract with effect from the same date. She claims material damages in an amount equal to the remuneration, including pension rights, which she would have received from 17 June 2019 until 30 September 2024, or at the very least until 30 September 2021, had she not been unfairly dismissed. She also claims moral damages, *ex aequo et bono*, in the amount of 80,000 euros for the affront to her personal and professional integrity and the damage to her health. She seeks the costs of retaining counsel, as well as travel and subsistence costs.

The organisation submits that the complainant is not entitled to redress as her claims are unfounded. Should the Tribunal consider any of the complainant's claims to be founded, the organisation requests that redress be limited to material damages, that is to the payment of the remuneration which the complainant would have received until the expiry of her initial appointment on 30 September 2021, as it cannot be assumed that her appointment would have been extended beyond that date.

CONSIDERATIONS

1. The complainant impugns the 4 September 2019 decision taken by the Secretary-General. This decision confirmed the previous decision, dated 17 June 2019, which, taking into account the recommendation of the Advisory Board dated 13 June 2019, terminated the complainant's contract as of 17 June 2019. The complainant claims the annulment of both decisions, compensation for material and moral damages, and reimbursement of costs.

2. The complainant advances several pleas alleging procedural and substantive violations.

Her pleas alleging procedural violations may be summed up as follows:

(a) "Misuse of Regulation 25-bis and Regulation 13 [of the Staff Manual]";

(b) "Violation of [her] right to be heard" in the procedure for the termination of her appointment;

(c) "Violation of her rights on sick leave", as the procedure was carried out and finalized while the complainant was on sick leave and the date scheduled for her hearing was not postponed;

(d) "Violation of Rule 25.1 [of the Staff Manual]", as the decision to terminate her appointment was taken without proper consultation with Senior Management;

(e) "Violation of Regulation 25 [of the Staff Manual]" for "[l]ack of independence and impartiality of the [Advisory Board]".

The complainant puts forward four pleas alleging substantive violations that she identifies as follows:

(f) "Wrong application of the legal definition of 'harassment' – Manifest error of appreciation";

(g) "Abuse of power";

(h) "Violation of Rule 4.3(b) [of the Staff Manual] – Violation of the rights of the Staff Committee and of the [complainant] as Chair of the Staff Committee";

(i) "Violation of the principle of good administration and of the duty of care – Denial of justice – Violation of the principle of non-discrimination".

3. In her rejoinder and in her further written submissions, the complainant partly reiterates the same submissions contained in her complaint and partly tries to offer new elements based on subsequent events (the outcome of an international audit, some articles appearing in the press). She also requests the disclosure of a significant number of documents.

4. The request for disclosure of documents submitted in the complainant's rejoinder shall be dismissed. The Tribunal observes that this request constitutes an impermissible "fishing expedition". It is aimed at obtaining documents related to issues that are either irrelevant (since the Tribunal has already been provided with all the official documents of the termination procedure) or outside the scope of the present complaint (such as documents related to the outcome of the international audit triggered by the report of Ms N., the complainant's line manager).

5. Before dealing with the pleas summed up in consideration 2 above, it is useful to reproduce the relevant Staff Regulations and Rules contained in the Staff Manual of the organisation.

As to the termination of an appointment, the relevant rules are encompassed in Regulation 13, Rule 13.1(a), Rule 25.1, Regulation 24, and Rule 24.1.

The relevant parts of Regulation 13 read as follows:

"a) The Secretary-General may, after consultation with the Advisory Board, terminate the appointment of an official:

i) if he or she considers that the official does not give satisfactory service, fails to comply with the duties and obligations set out in these Regulations [...];

[...]

vi) as a result of disciplinary action;

[...]

b) The termination of an appointment by the Secretary-General shall be notified in writing to the official concerned, with a statement of the grounds for such termination and on a period of notice, according to grade and length of service.

[...]

d) If an official is on sick leave [...] at the time of the notification of the termination of his or her appointment, the period of notice provided for in accordance with paragraph (b) shall be increased by the number of days during which such official is actually on sick [...] leave after the notification."

Rule 13.1(a) reiterates that:

> "The Advisory Board shall be consulted by the Secretary-General before he or she terminates the appointment of an official."

Rule 25.1 adds that:

> "The Secretary-General shall consult with Senior Management officers (the Deputy Secretary-General, the Assistant Secretary-General and the General Counsel) before personnel decisions are taken in accordance with Staff Regulations and Staff Rules, in particular regarding [...] termination of employment.
>
> Conclusions shall be recorded in writing."

Since Regulation 13a)vi) refers to the outcome of disciplinary action as a possible ground for termination of contract, also Regulation 24 and Rule 24.1 are relevant.

According to Regulation 24:

> "Any failure by an official [...] to comply with his or her obligations under these Staff Regulations and Staff Rules, whether intentional or through negligence on his or her part shall make him or her liable to disciplinary action."

As to disciplinary measures, Rule 24.1(a)(vi) provides for dismissal:

> "[D]ismissal, accompanied, in duly justified circumstances, by forfeiture of part or all of the contractual period of notice."

As to disciplinary proceedings, the relevant parts of Rule 24.1(e) read:

> "The proceedings in disciplinary matters shall be recorded in writing. No disciplinary measure may be decided unless the official concerned has been informed of the charges made against him or her and has had the opportunity to state his or her case."

As to the composition and role of the Advisory Board, the relevant parts of Regulation 25 provide as follows:

> "a) The Secretary-General shall establish an Advisory Board comprising a Chairman from outside the Secretariat (initially the Chairman of the Conference), and four other members, two of whom shall be nominated by the staff of the Secretariat. [...] The members of the Advisory Board shall be completely independent and impartial in the exercise of their duties; they shall not receive any instructions nor be subject to any constraint. This Board shall advise the Secretary-General, at the request of the official concerned:
>
> [...]

iii) when the official considers that he or she is exposed to harassment, as defined in Regulation 25-bis b)(i), by another member of the Secretariat, and has already made a communication required by Regulation 25-bis c)."

As to the procedure before the Advisory Board, the relevant parts of Rule 25.2 read as follows:

"(d) The Advisory Board shall act with the maximum of dispatch consistent with a fair review of the issue before it. Normally, proceedings before the Board shall be limited to the original written presentation of the case, together with brief statements and rebuttals. The Board may also call for any additional document or information relevant to the decision and may require any official to furnish evidence orally or in writing.

(e) The official concerned shall have the right to present his or her case to the Board orally and in writing [...]

[...]

(h) The official concerned shall be informed of any document or new factor produced during the Board's investigation."

As to the definition of harassment, Regulation 25-bis reads:

"a) Any official shall not conduct any harassment.

b) i) Harassment is defined as any deliberate conduct, in the workplace or in connection with the work of the Secretariat, which is reasonably perceived as offensive or unwelcome by the subject person and has the purpose or effect of: an affront to the identity, dignity, personality or integrity of the subject person; or the creation of an intimidating, hostile, humiliating or offensive work environment."

As to formal harassment complaints, Rule 25-bis.3 reads:

"(a) Contrary to the informal and mediation procedure, the advisory board is able to record facts and to apply penalties. Any person who feels victim of harassment is entitled to initiate a formal procedure, either immediately, without first going through the informal procedure, or in the course of or at the end of the informal procedure.

(b) Any person who feels they are the victim of sexual harassment must provide all details which might support their allegations to the Advisory Board, which will conduct an investigation. The complaint should describe the specific offensive acts, the time, location and circumstances under which they took place and any other information relevant to the case. The complaint should identify the alleged harasser/respondent as well as any witness to the acts or anyone else who may have information relevant to the complaint. The complaint should also specify whether and in which circumstances the complainant made it

clear to the respondent that his/her behaviour was unwelcome and, where appropriate, any reasons that prevented the complainant from doing this. The complaint must be signed and dated by the complainant and the information provided should be as precise and concise as possible.

(c) The Advisory Board will send within five days written acknowledgement of receipt of the complaint to the respondent, who will be given the right to respond in writing to the allegations within 10 working days of receipt of the copy of the complaint."

6. In light of the relevant Staff Regulations and Rules, the first plea of the complainant, summarized in consideration 2, point (a), above, is unfounded. The complainant alleges that, according to Regulation 13 of the Staff Manual, the decision to terminate an appointment requires the previous advice of the Advisory Board; she argues that the Advisory Board's recommendation to terminate her appointment was the outcome of a different procedure, carried out in accordance with Regulation 25-bis, related to a harassment claim, even though termination of contract is not an outcome provided for in the procedure governed by Regulation 25-bis.

Regulation 13a) and Rule 13.1(a) require, for the termination of an appointment by the Secretary-General, consultation with the Advisory Board. The Tribunal finds that, whilst consultation is mandatory, the procedural steps for such consultation are not detailed. The relevant Staff Regulations and Rules do not specify whether the Secretary-General has to initiate the termination procedure by seeking the Advisory Board's advice or can also decide to terminate an appointment after having received a report sent by the Advisory Board on its own motion. It is also acceptable that the Advisory Board's advice is issued, as in the present case, in a different procedure, taking place during the same period. In the present case, on 13 June 2019, at the end of the procedure in the harassment complaint filed by Mr T., the Advisory Board advised the Secretary-General to terminate the complainant's appointment. There would have been no point in the Secretary-General consulting again with the Advisory Board on the same issue in the same time span, before adopting the 17 June 2019 decision.

The complainant's allegation that termination of contract is not an outcome provided for in the procedure governed by Regulation 25-bis, is unfounded.

Regulation 25-bis only lists, in paragraph d), the procedures available in case of harassment claims, namely: "i) an informal counselling; ii) mediation; or iii) a complaint to the Advisory Board".

The measures that can be adopted by the Advisory Board in case of a harassment complaint are provided for in Rule 25-bis.3 as follows: "(a) Contrary to the informal and mediation procedure, the advisory board is able [...] to apply penalties". The word "penalties", without further specifications, is a general expression. It must be interpreted in relation to the disciplinary sanctions provided for by Regulation 24 and Rule 24.1(a) (which include dismissal) and may well comprehend the Advisory Board's power to recommend the termination of an appointment, if this appears a proper and proportionate measure. No other provisions of the Staff Manual, related to the Advisory Board's "advice", limit the type of measures that the Board can recommend. As will be clarified in consideration 7 below, the central question, in the present case, is not the content of the Advisory Board's recommendation but the kind of procedure to be followed by the Secretary-General after such recommendation in order to dismiss an official.

7. In light of the relevant Staff Regulations and Rules, the complainant's second plea, summarized in consideration 2, point (b), above, is well founded. The complainant alleges that her right to be heard in the procedure for the termination of her appointment was violated.

Firstly, the Tribunal recalls that in the procedure for the termination of an appointment, the formal steps required by Regulation 13, Rule 13.1 and Rule 25.1 are: (i) consultation with the Advisory Board; (ii) consultation with Senior Management officers; (iii) notification of the decision in writing to the official concerned; and (iv) a proper period of notice. No provision in Regulation 13, Rule 13.1 or Rule 25.1 formally and expressly requires that the official concerned be allowed to be heard and to comment prior to the decision to terminate her or his appointment. Nonetheless, the Tribunal observes that termination of

contract can be, inter alia, the outcome of disciplinary action (Regulation 13a)vi)). In such a case, the procedure for termination must follow not only the formal steps encompassed in Regulation 13, Rule 13.1 and Rule 25.1, but also those provided for in Rule 24.1. For the purpose of the present complaint, it is noteworthy that pursuant to Rule 24.1(e), no disciplinary measure may be decided unless the official concerned has been informed of the charges made against her or him and has had the opportunity to state her or his case.

In the case at hand, the decision of termination was formally based only on Regulation 13a)i) (unsatisfactory service or non-compliance with the duties and obligations set out in the Regulations). It can be read in the 17 June 2019 decision: "I consider that you failed to comply with the duties and obligations set out in the Staff Regulations and Rules. [...] I have decided in line with Regulation 13(a)(i) to terminate your contract [...]". However, this was not the real reason for the termination of the complainant's contract; that decision was based on the Advisory Board's report on the harassment complaint filed by Mr T. that found the complainant's conduct amounted to harassment. Since the complainant's termination of appointment was based on disciplinary grounds, the termination should have been the outcome of disciplinary proceedings, in accordance with Regulation 13a)vi). As said earlier, in disciplinary proceedings the official concerned has a right to be informed of the charges made against her or him, as well as of the potential penalty, and has also the right to be heard or to comment thereon. It is true that the complainant was given the opportunity to be heard and to comment during the procedure that followed Mr T.'s harassment complaint, but she was not informed of what was at stake, or even that she was subject to disciplinary proceedings. After the Advisory Board's recommendation, and prior to the termination of her contract, the Secretary-General should have initiated disciplinary proceedings and should have informed the complainant of the charges against her and of the potential penalties. The Tribunal notes that the organisation's behaviour not only failed to comply with the Staff Regulations and Rules, but was also inconsistent with its own behaviour in the previous complaint of harassment reported by Mr A. (which is the subject of the complainant's second complaint before this Tribunal). In that case, after the conclusion of the harassment

procedure before the Advisory Board, the Secretary-General adopted separate decisions that were the outcome of separate procedures: on the one hand, measures aimed at the protection of the victim of harassment (Mr A.) and, on the other hand, a disciplinary sanction (written reprimand) against the complainant. Also, in the present case, prior to deciding the termination of the complainant's contract, which was in essence a dismissal on disciplinary grounds, the Secretary-General, after having received the Advisory Board's recommendation, should have initiated disciplinary proceedings, including by informing the complainant of the charges and the potential penalties.

8. The failure by the Secretary-General to give the complainant the opportunity to be heard before the termination of her contract affects the Secretary-General's decision of termination (with the consequences that shall be stated later in this judgment) and is decisive regarding its annulment by the Tribunal. Therefore, there is no need to address the further pleas challenging the Secretary-General's decision on procedural grounds. However, since this flaw in the Secretary-General's decision does not affect the previous procedure conducted by the Advisory Board on Mr T.'s harassment complaint, the Tribunal shall also examine in the following considerations the complainant's pleas challenging the Advisory Board's recommendation. Indeed, the complainant has an interest in demonstrating that the termination decision is unlawful both due to the lack of a proper disciplinary procedure and due to the unlawfulness (if proven) of the Advisory Board's findings on harassment.

9. The complainant's third plea, summarized in consideration 2, point (c), above, is unfounded. She contends that the procedure was carried out and finalized while she was on sick leave and the date scheduled for her hearing was not postponed.

It is not completely clear to which procedure the complainant refers in alleging that it was carried out while she was on sick leave.

If reference is made to the appointment termination procedure governed by Regulation 13 and Rule 13.1, there is no need to address the plea, as the Tribunal has already recognized, in considerations 7 and 8

above, that the decision of termination is flawed for the reason stated therein.

If reference is made to the harassment complaint lodged against the complainant by Mr T., the Tribunal notes that the complainant was informed in due time (on 27 May 2019) of the proceeding and was invited to a hearing to be held on 6 June 2019. On 4 June 2019 she replied that she was on sick leave but nonetheless she commented on the harassment claim and did not ask for a postponement of the hearing. On 8 June 2019 the Chairman of the Advisory Board invited the complainant to provide the Board with further documentation. The complainant reacted on 12 June 2019, again asserting that she was on sick leave but nonetheless commenting on the merits of the harassment claim and not asking for a rescheduling of the procedure. According to Rule 25.2(e), "[t]he official concerned shall have the right to present his or her case to the Board orally and in writing [...]". Consequently, the complainant did have the right to be heard orally and to request a postponement of the hearing and/or an extension of the time limit for providing the documentation required along with any other evidence. Nonetheless, she never made such a request and, in the circumstances of this case, the Advisory Board did not have to reschedule the hearing *ex officio*.

Finally, if reference is made to the appeal proceedings against the 17 June 2019 decision, the Tribunal observes that the complainant was invited by the Advisory Board to a hearing to be held on 19 August 2019. She expressly declined the invitation, by an email of 17 August 2019, again citing her health condition, but nonetheless not requesting postponement of the hearing, and, moreover, highlighting that the Advisory Board could decide on the basis of the written presentation of the case.

10. There is no need to address the complainant's fourth plea, summarized in consideration 2, point (d), above, alleging the lack of proper consultation with Senior Management prior to the decision of termination.

11. The complainant's fifth plea, summed up in consideration 2, point (e), above, is unfounded. She alleges a violation of Regulation 25 of the Staff Manual for lack of independence and impartiality of the Advisory Board. The Tribunal has examined the pleas and the evidence concerning this allegation and is satisfied they are of no substance, as explained in Judgments 4616 and 4617, also delivered in public this day.

12. At this juncture, the Tribunal will examine the four substantive pleas submitted by the complainant.

13. In her second substantive plea, mentioned in consideration 2, point (g), above, under the heading "Abuse of power", the complainant claims that she was the victim of a strategy deliberately aimed at terminating her appointment by "four steps", namely:

(i) the accusation of being in a conflict of interest with the organisation, due to her external activities;

(ii) the accusation of harassment lodged by Mr A.;

(iii) "well-engineered attacks" against her in her role as Chair of the Staff Committee, led mainly by Mr T.; she lodged group harassment grievances, but to no avail;

(iv) the harassment complaint lodged by Mr T.

This strategy was allegedly initiated and developed due to her convictions and conclusions on climate change and the need for rapid phase-out of fossil energy, not in line with the policy of the Secretary-General and his interpretation of the Energy Charter Treaty as fuel neutral. The complainant submits that, while she was working for the Secretariat, she never took a public position detrimental to the organisation and that, in any case, her ideas, published after the termination of her contract, were taken seriously by the European Union "Energy Minister" and by the European Commission.

The complainant also submits that the "compelling need" to dismiss her was reinforced after the publication, on 1 June 2019, of a report by her line manager, Ms N., containing criticism of the Secretary-General,

the Advisory Board, Mr T., and Mr A. This report allegedly triggered an international audit.

Most of the complainant's submissions are outside the scope of the present complaint, namely:

(i) the accusation of her having a conflict of interest, as the Secretary-General's decision on this matter has not been challenged before the Tribunal;

(ii) the harassment grievance lodged by Mr A., the outcome of which is the subject matter of a different complaint filed with the Tribunal (the complainant's second complaint);

(iii) the group harassment grievances lodged by the complainant, as their outcome is not impugned by means of the present complaint. It is appropriate to recall that the complainant firstly complained about harassment by means of five emails addressed to the alleged authors of harassment and then seized the Advisory Board with a formal group harassment complaint on 21 June 2019. The Advisory Board concluded in favour of the dismissal of the group harassment complaint on 4 July 2019. The complainant wrote again to the Advisory Board on 7 and 12 July 2019, and the Advisory Board replied on 8 and 23 July 2019. No decision by the Secretary-General, endorsing or denying the Advisory Board's conclusions of 4 July 2019 and/or its further responses of 8 and 23 July 2019, followed. Neither the Advisory Board's conclusions of 4, 8, and 23 July 2019, nor the implicit decision of the Secretary-General to endorse the Advisory Board's conclusions, have been impugned before the Tribunal in the present complaint. They are the subject matter of the complainant's third complaint to the Tribunal, adjudicated in a separate judgment also delivered in public this day;

(iv) her convictions and conclusions on climate change and fossil fuels;

(v) Ms N.'s report of 1 June 2019.

These elements could be relevant in the present case only if it were demonstrated that they were taken into account in the decision to terminate the complainant's appointment. On the contrary, there is no express trace of these elements in the decisions that are the subject

matter of the present complaint nor any indication of a "hidden strategy" against the complainant. The complainant fails to demonstrate that a link existed among the "four steps" outlined above and that the alleged elements are all part of a strategy aimed at getting rid of her.

14. In her third substantive plea, mentioned in consideration 2, point (h), above, under the heading "Violation of Rule 4.3.b) [of the Staff Manual] – Violation of the rights of the Staff Committee and of the [complainant] as Chair of the Staff Committee", the complainant alleges that the election of the B/C-grade staff representative, organized by the Staff Committee chaired by the complainant, was "sabotaged" and that despite having lodged a group harassment claim on 13 May 2019, no action was taken by the organisation.

The plea is unfounded.

There is no evidence of a "sabotage" of the election nor is there evidence of intimidating acts towards the B/C-grade officials.

As to the outcome of the complainant's group harassment grievances, it is outside the scope of the present complaint, for the reasons already explained in consideration 13 above.

15. In her fourth substantive plea, mentioned in consideration 2, point (i), above, under the heading "Violation of the principle of good administration and of the duty of care – Denial of justice – Violation of the principle of non-discrimination", the complainant alleges that:

(i) her harassment grievances were not investigated and finalized;

(ii) she was invited to participate in the harassment procedure against her while she was on sick leave;

(iii) she was refused the right to telework that was granted to another colleague in the same period.

The first allegation is outside the scope of the present complaint, for the reasons already expressed in consideration 13 above.

The second allegation has already been addressed by the Tribunal and dismissed in consideration 9 above.

The third allegation is outside the scope of the present complaint, as no decision regarding the alleged refusal of telework has been impugned before the Tribunal.

16. In her first substantive plea, mentioned in consideration 2, point (f), above, under the heading "Wrong application of the legal definition of 'harassment' – Manifest error of appreciation", the complainant alleges that:

(i) unsatisfactory conduct does not automatically amount to harassment;

(ii) it is not proven that she harassed Mr T.;

(iii) the evidence gathered by the Advisory Board was not sufficient;

(iv) some of the officials heard as witnesses are not named and, as a result, the complainant is not in a position to refute their statements;

(v) some officials are not named because, according to the Advisory Board, they fear retaliation by the complainant but she is not in a managerial position that would enable her to engage in retaliation;

(vi) the Advisory Board's advice is based on the written report submitted by Mr T.; during the oral hearing, according to the Advisory Board, Mr T. did not submit new information; the Advisory Board ignored the complainant's written response sent on 12 June 2019 by which she provided the emails received by Mr T. which, allegedly, prove that the complainant was the victim and not the harasser;

(vii) the Advisory Board's advice is based on Mr B.'s testimony with regard to offensive act no. 1, described in Mr T.'s harassment complaint, but the Advisory Board did not provide the complainant with a written statement of Mr B. or with a record of his oral statement;

(viii) the Advisory Board's advice is based on the circumstance that, contrary to the complainant's allegations, there was no evidence that the B/C-grade officials were "intimidated" during the election of the Staff Committee; the Advisory Board gathered evidence by sending emails to the B/C-grade officials and only one reacted; the only one who reacted by email did not offer relevant elements; this email was not disclosed to the complainant; as to the remaining

B/C-grade officials, it may be presumed, according to the complainant, that they did not reply to the Advisory Board due to the "lack of independence of the Advisory Board"; moreover, according to the complainant, as the harassment complaint was lodged by Mr T., the question regarding the intimidation of the B/C-grade officials was outside the scope of the harassment procedure;

(ix) the Advisory Board, in its advice, considered as an aggravating factor that some of the offensive acts were conducted by the complainant in her capacity as Chair of the Staff Committee; again, the Advisory Board did not take into account the complainant's reply as the victim and not the harasser;

(x) the Advisory Board refers to the 14 May 2019 note sent by the complainant and Ms N. (the complainant's line manager), in their capacity, respectively, as Chair and member of the Staff Committee; said note was considered by the Advisory Board as damaging to the reputation of a number of colleagues and of the Energy Charter Secretariat as a whole, but it was, in the complainant's view, outside the scope of the harassment proceedings, which were initiated by Mr T. and not by other colleagues;

(xi) the Advisory Board refers to the 7 June 2019 (*recte* 6 June 2019) note of the new Staff Committee but, in the complainant's view, the new Staff Committee was elected with irregularities and its note includes wrong and misleading statements and interpretations that the complainant submitted to the Advisory Board and that remained unanswered.

17. In relation to her first substantive plea, the complainant asks for the disclosure of the following documents:

(a) the written statement of Mr B. or the written record of his oral statement;

(b) the email sent by a B/C-grade official to the Advisory Board;

(c) the written statements or the written record of the oral statements made by the other officials heard as witnesses.

18. With regard to the complainant's request for disclosure, the defendant organisation replies that the Advisory Board "does not record oral evidence" and included the content of the witness statements in its 13 June 2019 report. The organisation refers to the Tribunal's case law (see Judgment 2771, consideration 18) in order to assert that there was no need for a written record.

Since the organisation admits that the Advisory Board did not record oral evidence, an order to disclose would be useless with regard to the documents listed in consideration 17 above, under (a) and (c). As to the request for disclosure of the document listed in consideration 17 above, under (b), the Tribunal rejects it, as the content of this email is already reported, in quotes, in the organisation's reply and an annex thereto.

19. Firstly, the Tribunal notes that the Advisory Board's findings that the conduct of the complainant amounted to harassment against Mr T. were based on multiple episodes and testimonies and, more specifically:

(a) the written grievance of Mr T.;

(b) the testimonies of Mr B. (with regard to offensive act no. 1), Mr P., and Mr A. (with regard to offensive act no. 6), who confirmed the "unfriendly" and "disrespectful" behaviour of the complainant towards the other officials and in particular towards Mr T., and the "sarcastic comment" reported in offensive act no. 6;

(c) the testimony of two further officials (with regard to offensive act no. 5), who were not named because they had expressed fear of retaliation by the complainant;

(d) with regard to offensive acts nos. 7 and 8, the declaration made in writing by eight B/C-grade officials after the cancellation of the election of the B/C-grade representative who, contrary to the complainant's allegation that Mr T. intimidated them during the election of the Staff Committee, stated that "they were not subject to intimidation by anyone during the elections";

(e) the fact that, with regard to offensive act no. 8, related to the note sent on 14 May 2019 by the complainant and Ms N. in their capacity, respectively, as Chair and member of the Staff Committee, the annexes to this note were not shared with the other staff members, including Mr T., and both the complainant and Ms N. did not comply with the Advisory Board's request, made during the harassment procedure, to provide the Advisory Board with these annexes;

(f) the fact that the new Staff Committee, elected on 5 June 2019, issued, on 6 June 2019, a communication aimed at dissociating itself from the note of 14 May 2019, because it was sent without prior consultation of the Staff Committee and did not represent the opinion of the whole staff.

20. Secondly, the Tribunal notes that the complainant alleges a lack of a written record only with regard to the testimony of Mr B. (which concerned offensive act no. 1) and not with regard to the other testimonies (which concerned offensive acts nos. 5, 6 and 7). Although the organisation replied before the Tribunal that there was no written record of the testimonies gathered during the harassment procedure, the complainant has not enlarged, neither in her rejoinder nor in her further written submissions, the scope of her plea, which remains limited to Mr B.'s statement. Therefore, the Tribunal shall address the plea only to this (limited) extent.

With regard to the issue of whether a written record of oral statements was required, two rules encompassed in the Staff Manual are relevant:

(i) Rule 25.2(h) states that "[t]he official concerned shall be informed of any document or new factor produced during the Board's investigation";

(ii) Rule 24.1(e), under the heading "Disciplinary measures", states that "[t]he proceedings in disciplinary matters shall be recorded in writing".

In turn, Rule 25-bis.3, referring to the formal harassment procedure, contains no express provision compelling the Advisory Board to record in writing the oral evidence gathered. Nonetheless, Rule 25.2(h) clearly requires that the official concerned be informed of any document or new factor produced during the investigation. This provision has to be interpreted in the sense that a harassment procedure is adversarial and both the alleged victim and the alleged harasser have the right to be informed in a timely manner of the evidence gathered, and to be given an opportunity to comment on it. In addition, as the Tribunal found in consideration 7 above, even though in the present case no formal disciplinary proceedings were carried out against the complainant, the outcome of the harassment procedure was, in essence, a disciplinary sanction, and the Staff Manual requires, as said, that the proceedings in disciplinary matters be recorded in writing.

The case law relied upon by the organisation (see Judgment 2771, consideration 18, cited below), correctly interpreted, does not allow exceptions to the necessity of a written record being made available to the concerned official, but only approves of a written record as an alternative to cross-examination or to a verbatim record. Indeed, the Tribunal held in that judgment:

> "The complainant points to cases in which the Tribunal observed that the complainant had not been present when statements were taken and not given the opportunity to cross-examine witnesses [...], to object to evidence [...] or to have a verbatim record of the evidence [...] These are matters that, in the cases concerned, would have ensured that the requirements of due process were satisfied. However, they are not the only means by which due process can be ensured. In the present case, the complainant was informed of the precise allegations made against him [...], and provided with the summaries of the witnesses' testimonies relied upon by the Investigation Panel, even if not verbatim records. He was able to and did point out [...] inconsistencies in the evidence, its apparent weaknesses and other matters that bore upon its relevance and probative value, before the finding of unsatisfactory conduct was made [...] In this way, the complainant was able to confront and test the evidence against him, even though he was not present when statements were made and not able to cross-examine the witnesses who made them."

In the precedent quoted above, the complainant was informed of the content of the witnesses' testimonies by written records before the decision; in the present case, the complainant acknowledged the content of the witnesses' testimonies by means of the Advisory Board's report, not during the proceedings but only when that report was provided to her attached to the termination decision, that is to say at a stage when she could no longer usefully comment on them.

It can be inferred from the quoted case law that two principles must be respected in an adversarial procedure: (i) not only must the oral evidence gathered be recorded in writing, even though not necessarily by a verbatim record; (ii) but also any evidence gathered must be submitted to the person concerned, for her or his comment, before the decision is adopted.

In the present case, the organisation failed to comply with both principles, as there was no written record of Mr B.'s statement and this statement was not disclosed to the complainant before she was notified of the decision endorsing the Advisory Board's report.

Furthermore, the organisation started the process as a harassment complaint procedure and finalized it with the outcome of a different procedure, that is "termination of appointment" under Regulation 13a)i). Consequently, the organisation failed to follow a proper disciplinary procedure.

In conclusion, the assessment of offensive act no. 1 is flawed, as there is no written record of Mr B.'s oral statement. However, this conclusion is not decisive for the outcome of the case, as will be made clear below.

21. Even though the Advisory Board also failed to record in writing the testimonies related to offensive acts nos. 5 and 6, witnessed, respectively, by two unnamed officials as well as by Mr P. and Mr A., the Tribunal cannot conclude that the procedure was flawed in this respect, as the complaint contains no plea in this regard.

22. The further arguments submitted by the complainant with her first substantive plea are unfounded. The Advisory Board's finding that the complainant harassed Mr T. was justified by the evidence gathered

during the investigation, which had the limited scope of protecting the victim of harassment.

With regard to offensive act no. 5, the Tribunal observes that the right of defence of the complainant was not affected by the fact that the officials heard as witnesses were not named. It was sufficient for the complainant to know the content of the statements and it was not necessary for her to know the witnesses' names. Furthermore, the Advisory Board redacted some names for reasons of confidentiality, since some officials feared retaliation by the complainant: this was a reasonable step to strike a balance between the right of defence of the accused person and the right of the witnesses to be protected against retaliation. The circumstance alleged by the complainant, namely that she was not in a managerial position and therefore could not engage in retaliation is not a sound argument. She had been the Chair of the Staff Committee and this is a sufficient element in order to find that the fear of retaliation was reasonable and justified the redaction.

With regard to offensive act no. 6, the Tribunal finds that the contents of the statements of Mr P. and Mr A. were summarized in the Advisory Board's report and the complainant did not specifically contest them.

With respect to offensive act no. 7, firstly, the Tribunal rejects the complainant's argument that it was outside the scope of the harassment procedure, as Mr T., in reporting harassment, also referred to the B/C-grade staff representative election. The complainant's allegation that B/C-grade officials were intimidated is unsubstantiated because, when interviewed by the Advisory Board, none of them mentioned having been intimidated. All B/C-grade officials but one ignored the email sent by the Advisory Board's Chairman during the investigation. The one who responded only observed that he was not in office at the relevant time and could therefore not report on the facts. In addition, the Advisory Board's report relies also on the circumstance that eight B/C-grade officials, after the cancellation of the election of the B/C-grade staff representative, stated in writing that "they were not subject to intimidation by anyone during the elections". In conclusion, the complainant's allegation of "intimidation" remains unproven.

Finally, the assessment of offensive act no. 8, based on written evidence made available to the complainant, is lawful and reasonable.

All these elements, considered as a whole, are sufficient to support the finding that harassment took place, whilst, as said above, in order to adopt a termination of contract as a disciplinary measure, disciplinary proceedings should have been followed.

The complainant does not offer sound and convincing counterarguments.

Her written reply and annexes thereto submitted during the harassment procedure were duly taken into account by the Advisory Board, but failed to convincingly refute the Board's findings and to demonstrate that her conduct did not amount to harassment. Even her submissions to the Tribunal are not supported by evidence; she fails to substantiate her allegations that:

(i) B/C-grade officials were intimidated during the Staff Committee's election;

(ii) B/C-grade officials did not reply to the request of the Advisory Board's Chairman due to the lack of independence of the Advisory Board;

(iii) the note of 14 May 2019 is outside the scope of the investigation;

(iv) the election of the new Staff Committee was irregular;

(v) the communication issued on 6 June 2019 by the new Staff Committee is wrong and misleading.

All these allegations remain mere personal conjecture.

23. In light of consideration 20 above, the Advisory Board's recommendation is flawed with regard to the assessment of offensive act no. 1 for lack of written record. However, this flaw is not decisive in order to declare that the Advisory Board's recommendation was unlawful in its entirety. As noted in considerations 21 and 22 above, the Advisory Board's finding that the complainant's conduct amounted to harassment was based on multiple episodes and related evidence sufficient for the purpose of the adoption of measures aimed at the protection of the victim of harassment. Therefore, the Board's report

deserves considerable deference (see Judgments 4488, consideration 7, and 4180, consideration 7).

24. For the reasons stated above, the impugned decision and the decision to terminate the complainant's appointment are unlawful for failure to follow a proper disciplinary procedure, notwithstanding that the Advisory Board's finding is lawful. Therefore, the termination decision is vitiated with regard to the procedural flaw.

25. Accordingly, the impugned decision and the termination decision will be set aside. However, the complainant expressly states that she does not request reinstatement and therefore the Tribunal shall not order it.

26. The complainant requests material damages in an amount equal to the remuneration she would have received at least until 30 September 2021 (date of expiry of her three-year contract). She adds that, if she had not been dismissed, her contract could have been renewed until 30 September 2024 and asks for damages accordingly.

The Tribunal notes that the complainant's appointment was due to end on 30 September 2021 (three-year contract) and it was terminated on 17 June 2019. Firstly, there is no evidence that the complainant's contract was likely to be renewed. On the contrary, in the circumstances of this case, such a prospect was purely hypothetical and even highly unlikely. Therefore the Tribunal, in assessing the amount of material damages, will not take into account a possible renewal of the complainant's contract (see Judgment 4139, consideration 10). Regarding the period from 17 June 2019 to 30 September 2021, the Tribunal takes into account that there is a real possibility that the complainant would have been dismissed as a result of disciplinary proceedings prior to the expiry of her appointment.

The material damages should be determined on an equitable basis as an amount equivalent to the salary and various indemnities the complainant would have received if her employment had continued for one year subsequent to the date of termination, net of any income from

other employment received during that year. The organisation shall also pay the complainant the equivalent of the pension contributions that it would have had to pay for her during the same period. All these amounts shall bear interest at the rate of 5 per cent per annum as from the date on which they fell due until the date of payment.

27. The complainant requests moral damages. The Tribunal finds that the unlawful imposition of the termination measure deprived the complainant of the requirements of due process that would have been open to her in adversarial proceedings, had a disciplinary measure been imposed (see Judgments 3848, consideration 9, and 2861, consideration 105). In the circumstances of this case, moral damages are assessed in the amount of 5,000 euros.

28. The complainant also alleges damage to her health and produces a medical certificate to prove her allegation. Said medical certificate describes her symptoms in general terms but does not prove that they are work-related.

29. The complainant is also entitled to costs, set at 4,000 euros.

DECISION

For the above reasons,

1. The impugned decision and the decision to terminate the complainant's contract are set aside.
2. The Energy Charter Conference shall pay the complainant material damages, with interest, quantified as set out in consideration 26 above.
3. The Energy Charter Conference shall pay her 5,000 euros in moral damages.
4. It shall also pay her 4,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 25 October 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Ms Rosanna De Nictolis, 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

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ