P.-E.

v.

WTO

138th Session **Judgment No. 4817**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. P.-E. against the World Trade Organization (WTO) on 30 July 2019, WTO's reply of 14 November 2019, the complainant's rejoinder of 30 January 2020, WTO's surrejoinder of 3 April 2020, the complainant's additional submissions of 25 May 2020 and the complainant's final comments of 30 June 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 impugns a decision ordering a new investigation into her alleged misconduct and suspending the disciplinary measures pending the new investigation and a new decision in the matter. She contests this decision to the extent it maintained the finding that she committed misconduct.

The complainant, a Spanish national, joined the WTO in August 2002 as an internationally recruited staff member. At the time of her recruitment, Costa Rica was determined as her "home" for the purposes of WTO Staff Rule 104.7, on the basis that her husband and their

children had Costa Rican nationality, she owned real estate in Costa Rica and spent time there, and she had no family ties to Spain.

Further to an internal audit of home leave entitlements, the Office of Internal Oversight (OIO) issued, in June 2017, a report concluding, inter alia, that the Human Resources Department's (HRD) guidelines to staff sometimes deviated from WTO's Staff Rules and were not always properly or consistently applied; several internal controls were not in place to ensure the efficient and effective processing of home leave entitlements; and the Travel Unit did not always thoroughly control the travel claims and supporting documents. The report pointed to the complainant's case as deviating from the rule that the home leave destination should normally correspond to the country of nationality and recommended that HRD analyse if the home leave entitlement and destination of the concerned staff member was acceptable and justified and, in the event compelling reasons existed to effect a change in that regard, to seek a decision from the Director-General.

On 14 July 2017, the Director of HRD wrote to the complainant asking her to provide documentation to justify her home designation. Also, at a meeting held that same day with the complainant and her husband, the Director of HRD referred to the incomplete family status report for the 2016 earnings and received assurances that the requested documentation would be submitted the following week. Having received additional requests in that respect on 31 July and 1 August 2017, the complainant wrote an email to the Director of HRD on 25 August 2017, in which she expressed doubts about the legality and legitimacy of the OIO's inquiry and asserted that the decision to designate Costa Rica as her "home" had been made upon her recruitment in 2002 according to the applicable Staff Regulations and Staff Rules and was not subject to change. From 26 August to 26 November 2017, the complainant was on a temporary detachment from the WTO to the University of Hong Kong.

On 13 November 2017, the Head of the OIO wrote to the complainant to request specific documents, as elements of clarification, regarding her designated place of home leave and the exact dates of her 2016 home leave, as well as confirmation that all relevant originals and

copies of airline tickets and boarding passes for herself and accompanying dependants had been submitted to the Travel Unit. The Head of the OIO also requested confirmation that her husband had not received any income that had not been declared in the family status reports submitted for 2015 and 2016. Finally, the Head of the OIO requested information regarding the dates on which her husband had been in Costa Rica since January 2015, along with relevant supporting evidence. The complainant responded the next day that it would be difficult to gather all information requested while in Hong Kong. She nevertheless submitted the requested documents on 27 November 2017 and on two occasions thereafter. On 7 December 2017, she transmitted a signed authorization enabling the OIO to enquire about the income of her husband directly with one employer and she informed HRD of her intention not to renew her husband's *carte de légitimation*, given the doubts raised as to whether they fulfilled the requirements set out in Swiss law. On 11 December 2017, the complainant submitted corrected documents regarding her husband's earnings.

On 14 December 2017, the OIO opened a formal investigation into a possible misconduct by the complainant based on information that she might have failed to declare to WTO information relevant to her family status, home leave entitlements and dependency benefits. The complainant was relevantly informed by a memorandum of the same date. She was interviewed by the OIO in December 2017, and, on 29 January 2018, she made a written submission for consideration and provided contextual information in lieu of comments on the minutes of her interview. The responsible HRD Officer and the complainant's husband were interviewed on 19 January 2018 and subsequently provided comments to the minutes of their respective interviews. Those minutes were not shared with the complainant. The OIO report, issued on 7 February 2018, listed four allegations raised against the complainant; "Allegation 1: Dependency allowance and Health Insurance Plan (HIP) Fraud"; "Allegation 2: Home leave fraud"; "Allegation 3: Residential status of the spouse" (providing contradictory information concerning the residential status of the spouse); and "Allegation 4: Refusal to provide the necessary information for determining the family status and for completing administrative arrangements". The OIO considered that

all four allegations were substantiated and sufficiently supported by evidence, and it recommended that the complainant be requested to reimburse the amounts unduly received. Although it considered that the disciplinary measure of summary dismissal would be adequate and proportionate to the severity of the established misconduct, it recommended that the Director-General may consider a more lenient disciplinary measure, given that the complainant had fully cooperated with the investigation and had voluntarily proposed to reimburse the amounts unduly received.

By a memorandum of 7 March 2018, the complainant was informed that the Director-General agreed with the conclusions of the OIO report and concluded that it had been established beyond a reasonable doubt that the complainant had intentionally or, if not, through gross negligence, seriously abused WTO established procedures on several occasions in order to receive undue benefits. In so doing, she had breached several Staff Regulations and Staff Rules, the WTO Standards of Conduct, and she had caused WTO to be in breach of its obligations under the Headquarters Agreement. Having regard to mitigating factors, the Director-General proposed to apply the disciplinary measure of written censure and loss of six salary increments applicable as from the salary payment following his final decision. On 12 March 2018, the complainant waived her right to have the Director-General's proposed disciplinary measure reviewed by the Joint Disciplinary Body (JDB) and, on 13 March 2018, she reimbursed to the WTO the amounts unduly received in benefits. By a memorandum of 8 May 2018, the Chief of Cabinet informed her of the Director-General's decision to apply the proposed disciplinary measure and to place the relevant decision, along with the proposal and the OIO report, in her personnel file for an indefinite period of time.

On 6 July 2018, the complainant submitted a request for review of the 8 May 2018 decision. This request was rejected on 27 July and, on 24 August 2018, she filed an appeal with the Joint Appeals Board (JAB). In its report of 15 March 2019, the JAB found that the OIO had failed to comply with due process requirements and therefore considered that the OIO report was tainted with serious or major procedural flaws.

The JAB concluded that the Director-General's decision to apply a disciplinary measure could not be sustained to the extent it was based on an OIO report that was tainted with manifest errors of law and serious procedural flaws. The JAB thus recommended that the Director-General take a new decision which would clearly establish the basis for any disciplinary measure by reference to the manner in which the complainant's conduct constituted misconduct or serious misconduct pursuant to the WTO rules. Recognising the additional delays and costs associated with a new investigation, including the necessity to appoint a third-party investigator, the JAB left to the Director-General's discretion to consider whether the admitted facts provided an adequate basis to revise his decision in a manner that did not rely on the OIO report. The JAB further recommended that the Director-General suspend the application of the imposed disciplinary measure and that any new disciplinary measure be proportionate to the established misconduct.

By a memorandum of 2 May 2019, the complainant was informed of the Director-General's decision to order that a new investigation be undertaken with a view to establishing, in accordance with applicable norms, the factual basis for disciplinary measures proportionate to the actual seriousness of her misconduct and to appoint an ad hoc external investigator for that purpose. The complainant was also informed that pending the completion of the new investigation and a new decision, the Director-General had decided to suspend the implementation of his 8 May 2018 decision with immediate effect, and to defer a decision on the appropriate disciplinary measure based on the outcome of the new investigation. Lastly, the memorandum advised the complainant that she could "appeal the present decision before the Administrative Tribunal of the [ILO] in accordance with the relevant provisions of [its] Statute and Rules". This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision to the extent it maintained the Director-General's finding that she committed misconduct, with all legal effects flowing therefrom, including reimbursement of all salary deductions made pursuant to the 8 May 2018 decision and as a consequence thereof. She also asks the

Tribunal to find that she has not been properly found guilty of misconduct (in view of the JAB's recommendation) and that no charges should be maintained against her, if at all, until the completion of a new, external and independent investigation; that the purpose of the new investigation must be fact-finding only; that a less severe disciplinary measure be applied to her than that imposed by the 8 May 2018 decision (in the event the Director-General considers, upon receipt of the new investigation report, that she committed misconduct), pursuant to the principle of double jeopardy; and that the Director-General exhibited bias, prejudice and a lack of duty of care towards her. She seeks an order that the Director-General, upon receipt of the new investigation report, recuse himself from taking any adverse decision against her on account of his bias, and that the new investigation report be submitted to the Chair of the General Council and the Chair of the Committee on Budget, Finance and Administration, as would be the case if the Director-General, a Deputy Director-General, or a member of the Director-General's Office were being investigated. She claims 180,000 Swiss francs in moral damages, reimbursement of all the legal fees she incurred in bringing this appeal, interest at the rate of five per cent per annum on all amounts ordered by the Tribunal as from 2 May 2019 through the date such amounts are paid in full, and such other relief as the Tribunal may deem necessary, just and fair.

The WTO asks the Tribunal to dismiss the complaint as irreceivable or, in the alternative, as unfounded.

CONSIDERATIONS

1. The following discussion proceeds against the background already set out in the facts described above.

2. The complainant advances four pleas under the following headings:

(i) the Director-General did not motivate the impugned decision;

(ii) the impugned decision violated the presumption of innocence principle;

(iii) the impugned decision demonstrated bad faith and prejudice against the complainant; and

(iv) the intention of the Director-General to impose a new disciplinary measure on the complainant on the basis of his finding that she is already guilty of misconduct, irrespective of the outcome of the new investigation, violated the principle of double jeopardy.

In brief, the complainant accepts the conclusions contained in the Joint Appeals Board's (JAB) report and contends that the impugned decision unlawfully departed from the JAB's recommendations. She alleges that the impugned decision misinterpreted the JAB's conclusions, by stating, contrary to such conclusions, that her misconduct had already been proven and also by limiting the scope of the new investigation to the redetermination of the disciplinary measure to be issued. In addition, she contends that the disciplinary measures, issued by the memorandum of 8 May 2018, have been suspended only with prospective effect, whilst she has not been reimbursed for the deductions from her salary which were made prior to the adoption of the impugned decision.

3. The Organization raises a threshold issue. It submits that the present complaint is premature and the complainant does not have a cause of action, as the impugned decision is not an administrative decision adversely affecting her. The impugned decision merely ordered a new investigation and suspended the disciplinary measures, and the complainant must challenge the decision that will be taken upon conclusion of the new investigation, if and when it is adopted. The Tribunal notes that the impugned decision expressly stated, in paragraph 10, that the complainant "may appeal the present decision before the Administrative Tribunal of the International Labour Organization [...] in accordance with the relevant provisions of [its] Statute and Rules". Irrespective of the fact that the threshold issue raised by the Organization is inconsistent with this express statement, the Tribunal holds that the impugned decision is a challengeable decision and the present complaint is not premature. The complainant contends that the impugned decision considered her misconduct as

already proved and limited the scope of the new investigation. In addition, she contends that, even though the disciplinary measures, issued by the memorandum of 8 May 2018, no longer have a legal basis and have been suspended, she has not been reimbursed in full for the deductions from her salary applied from the date of the disciplinary decision until the date of the decision to suspend the disciplinary measures. The Tribunal finds that the impugned decision is potentially apt to immediately and adversely affect the complainant with regard to the alleged non-reimbursement of the salary deductions during the aforementioned period and the alleged improper limitation of the scope of the new investigation. In conclusion, the complaint is receivable and must be assessed on the merits. The Tribunal's case law holds that the necessary, yet sufficient, condition of a cause of action is a reasonable presumption that the decision will bring injury. The decision must have some present effect on the complainant's position (see Judgment 3337, consideration 7). This condition is met in the present case.

4. In order to address the complainant's pleas on the merits, it is useful to recall, in brief, the content of the JAB's report. The JAB found that the disciplinary decision was substantially and procedurally flawed, as the Office of Internal Oversight's (OIO) report contained "manifest errors of law and serious procedural flaws". As a result, in the JAB's view, there were no elements supporting, at the requisite standard of proof, a conclusion that the complainant's conduct amounted to fraud or serious misconduct. The JAB suggested two alternative options to the Director-General:

(i) to rely only upon the facts already admitted by the complainant which, in the JAB's view, amounted to "unsatisfactory conduct", in which case the Organization should only determine the appropriate disciplinary measure, without further investigation; or

(ii) to initiate a further investigation in order to assess whether the complainant's conduct amounted to misconduct or serious misconduct.

With regard to this second option, the JAB clearly stated that a charge of misconduct or serious misconduct could not be based on the OIO's report, as it was seriously flawed. The JAB observed in this regard:

> "Due to the identified concerns with the OIO Report, however, the Board does not consider that the allegations that the [complainant] intentionally - or in a grossly negligent manner - defrauded the Organization can be sustained on the basis of the content of that report. Nevertheless, although the Board is not charged with conducting its own *de novo* assessment of the [complainant]'s conduct, it recognizes that there are legitimate questions regarding the conduct of the [complainant] as evidenced in the record, particularly as it relates to the completeness and timeliness of the information that she provided in support of her claims for benefits."

In the impugned decision, the Administration chose to order a new investigation. However, in so doing, it used ambiguous and misleading expressions, and it seemed to improperly limit the scope of the new investigation to the determination of the disciplinary measure to be applied. Indeed, the impugned decision reads, in relevant part:

> "1. The Director-General firstly notes that the JAB itself recognises that 'to the extent that the Director-General considers that the [complainant]'s conduct merits disciplinary measures under Staff Regulation 11.2, [...] a new decision be rendered which clearly establishes the basis for such measures by reference to the manner in which that conduct constitutes misconduct or serious misconduct as provided for in WTO rules'. In other words, the JAB acknowledged the existence of misconduct in this case and does not recommend that all charges be dropped against [the complainant].
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> [...]
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> 3. However, the OIO finds that the full extent of the misconduct identified or reflected in the record of the case is broader than those admitted facts. [...]
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> [...]
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> 6. In light of the above, the Director-General has decided, in line with the recommendations of the JAB, to request that a new investigation be undertaken in relation to the facts considered in the first investigation. The purpose of this new investigation will be to establish, in accordance with applicable norms, the factual basis for disciplinary measures proportionate to the actual seriousness of [the complainant's] misconduct."

5. The Tribunal holds that, although paragraphs 1, 3, and 6 of the impugned decision (reproduced above) contain three statements which, regrettably, are ambiguous and apparently deviate from the JAB's recommendations, these statements must be read and interpreted in the context of the entire decision and in light of the subsequent action taken by the Organization. Despite the actual wording used in the impugned decision, it is clear enough that the Director-General intended to initiate a new investigation, which aimed at reweighing the evidence and gathering new evidence in order to assess whether the complainant's conduct amounted to misconduct or even serious misconduct. This intention results even more clearly from the subsequent action taken by the Organization, in particular the Terms of Reference concerning the mandate of the new investigator. Such Terms of Reference vested the ad hoc investigator with a broad mandate which included reviewing "the complete dossier" of the complainant's case, namely reviewing allegations, facts, evidence, and gathering new evidence. The Terms of Reference expressly included:

> "• Interviewing the Subject and any relevant witnesses;
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> • Reviewing the allegations originally made against the Subject as well as the related findings and, where necessary, conducting additional research into those allegations and findings to determine whether they are actually founded or not. The investigation shall particularly focus on assessing the nature, quantity and quality of the evidence, having regard to the particularly high standard of proof applied in disciplinary proceedings (i.e. that the existence of a particular misconduct must be proven beyond reasonable doubt);
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> [...]"

The complainant's first plea is unfounded because, contrary to her allegation, the Director-General did not depart from the recommendation of the JAB. The complainant's second plea is also unfounded, because the impugned decision did not make a finding of misconduct against her and, therefore, did not violate the presumption of innocence principle.

6. The complainant's third plea, namely that the impugned decision exhibited bad faith and prejudice against her, as well as a breach of the duty of care, is unfounded. Bad faith and prejudice must be proven, and the complainant bears the burden of proof (see, for example, Judgments 4745, consideration 12, 4478, consideration 13, 4347, consideration 29, and 3927, consideration 12). Mere suspicion and unsupported allegations are clearly not enough, the less so where the actions of the organization, which are alleged to have been tainted by personal prejudice, are shown to have a verifiable objective justification (see Judgment 4745, consideration 12). The fact that the impugned decision contains ambiguous wording does not prove, by itself, that the decision was tainted with bad faith and prejudice against the complainant.

7. The complainant's fourth plea, alleging a breach of the double jeopardy rule, is unfounded. The double jeopardy rule precludes the imposition of further disciplinary measures for acts which have already attracted a disciplinary measure. The complainant has not been sanctioned twice, as the original disciplinary measures have been suspended and no new measures have been issued to date.

8. The complainant requests that she be reimbursed for all deductions from her salary made pursuant to the initial disciplinary decision of 8 May 2018. The Tribunal notes that the impugned decision, in compliance with the JAB's recommendations, suspended the disciplinary measures of written censure and loss of six salary increments. Thus, it should be assumed that no deductions were to be made from the complainant's salary and that, if they had been made, they should have been reimbursed. However, the evidence in the file is unclear in this respect. In its reply, the Organization states that the disciplinary measures have been suspended with immediate effect, and that "the [c]omplainant received once again the salary she would have received but for the adoption of the decision of 8 May 2018". It also states that "by the time the impugned decision was adopted, the [c]omplainant had already regained one salary increment" and that "[s]ince 2 May 2019, there is no evidence of any sanction in relation to

[the complainant's case] in the [c]omplainant's professional records kept by the WTO Human Resources Division". In her rejoinder, the complainant objects that, even if the Director-General suspended the disciplinary sanction, he has not ordered that the amount withheld from her salary be reimbursed to her, nor that the pension contributions due to her corresponding to her full salary be credited to her pension fund. Considering the unclear evidence in this regard, the Tribunal considers that, in the event the deductions have been made and have not already been reimbursed in full, the Organization should immediately reimburse all the deductions made, as they have no legal basis, since the disciplinary measures have been suspended. Considering that to date there are no findings of misconduct, the disciplinary measures cannot stand by themselves and their suspension must be fully retroactive.

9. The complainant further requests that the Tribunal order that the new disciplinary measure to be imposed, if any, be limited to a lesser one than that which the Director-General imposed in his original decision of 8 May 2018, pursuant to the principle of double jeopardy. The Tribunal does not have the power to make orders of this kind, nor can it limit in such a way the discretion of the Director-General to determine the appropriate disciplinary measures, if any, to be imposed, in the event that misconduct is established. As regards the plea of a breach of the double jeopardy principle, as already said, there is no such breach to date. If and when a new disciplinary measure is issued, only then will it be possible to establish whether the double jeopardy principle is infringed.

10. The complainant further requests that the Tribunal:

(i) "Order that the Director-General be recused from taking any adverse decision against [her] upon receipt of the new investigation findings"; and

(ii) "Order that the investigator submit her report to the Chairs of the General Council and of the Committee on Budget Finance and Administration as would be the case if the Director-General, a

Deputy-Director-General or a member of the Office of the Director-General were being investigated".

These claims amount to requests for orders that the Tribunal has no competence to make and are, thus, irreceivable.

11. The complainant's claim that she be granted compensation in an amount of 180,000 Swiss francs for the moral damage she has suffered on account of the biased and prejudicial attitude on the part of the Director-General is rejected. Indeed, as already said, there is no evidence of bias or prejudice against her.

12. In her rejoinder, the complainant submits that the Organization failed to order that she be reimbursed the amount of approximately 19,088 Swiss francs she had voluntarily repaid to the WTO on 13 March 2018 for the spouse allowance, the health insurance subsidy for 2015, and the home leave lump sums for 2016, pursuant to the finding of the OIO report (some of which, she argues, she did not even lawfully owe). This claim seems inconsistent with the complainant's former conduct, as she voluntarily offered to repay to the WTO the amounts which she had acknowledged were not owed to her. In any event, this is a new claim, submitted for the first time before the Tribunal, and it is, thus, irreceivable, pursuant to Article VII, paragraph 1, of the Tribunal's Statute. Additionally, a complainant cannot submit in the rejoinder a claim that was not contained in the complaint (see, for example, Judgments 4504, consideration 5, 4215, consideration 29, and 3086, consideration 3(d)).

13. Since the complaint fails for the most part, the complainant is not entitled to costs.

DECISION

For the above reasons,

1. The Organization shall reimburse the complainant all deductions made from her salary pursuant to the initial disciplinary decision of 8 May 2018, if such deductions have not already been reimbursed.

2. All other claims are dismissed.

In witness of this judgment, adopted on 2 May 2024, Mr Patrick Frydman, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER