

S. (No. 2)

v.

Energy Charter Conference

135th Session

Judgment No. 4616

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms Y. S. against the Energy Charter Conference (ECC, hereinafter “the organisation”) on 2 December 2019, the organisation’s reply of 14 February 2020, the complainant’s rejoinder of 11 May, 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 finding that she had harassed another staff member and imposing a written reprimand on her.

Some of the background facts to the present complaint are to be found in Judgment 4615, also delivered in public this day.

Suffice it to recall that on 15 March 2019, Mr A., a subordinate of the complainant, filed a harassment complaint against her. Following an unsuccessful mediation attempt, the matter was referred to the

Advisory Board which, in its report of 4 April 2019, found that in many of the incidents described by Mr A. the complainant's attitude could be considered as inappropriate and not in line with the Energy Charter's Code of Conduct or with commonly accepted standards of conduct for an international civil servant. The Advisory Board concluded that those incidents had created a work environment as defined in Regulation 25-bis, that is to say an intimidating, hostile, humiliating or offensive work environment, and it recommended a strict separation of Mr A.'s workplace, tasks and deliverables from those of the complainant as well as a change in reporting lines and in appraisal responsibilities so that Mr A. would no longer report to or be appraised by the complainant. The Advisory Board also recommended that the complainant be reminded in writing of her responsibility to observe the commonly accepted standards of conduct and to ensure a harmonious workplace. By a decision of 11 April 2019, the Secretary-General implemented the Advisory Board's recommendations.

Soon after, on 15 April 2019, the Secretary-General informed the complainant of his intention to issue her with a written reprimand for having created an inappropriate work environment. He invited her to submit a written comment, which the complainant did on 21 April 2019, contesting the conclusion that she had exercised any form of harassment against Mr A. and inviting the Secretary-General to revise his intention to impose upon her the disciplinary measure of a written reprimand. On 30 April 2019 the Secretary-General informed the complainant that he maintained his 11 April 2019 decision finding, *inter alia*, that she had harassed Mr A. and on 2 May 2019 he informed her of his decision to issue her with a written reprimand for having created an inappropriate work environment. On 9 May 2019 the complainant contested the 30 April and 2 May 2019 decisions and asked the Secretary-General to cancel the written reprimand and to remove from her personal file any reference to her having harassed Mr A. On 17 May 2019 the Secretary-General informed her of his resolve to maintain both decisions. On 9 June 2019 the complainant contested with the Advisory Board the Secretary-General's decisions to find that she had harassed Mr A. and to issue her a written reprimand.

In its report of 4 July 2019, the Advisory Board, considering that the contested decisions were based on its recommendations and made in consultation with senior staff and that the disciplinary measure of a written reprimand was within the discretionary authority of the Secretary-General and taken in accordance with the provisions of the Staff Manual and the principle of proportionality, advised the Secretary-General to maintain his decisions. By an email of 2 September 2019, the Secretary-General informed the complainant that he maintained his decisions of 30 April and 2 May 2019. This is the decision impugned in the present complaint.

The complainant asks the Tribunal to annul the impugned decision and to also annul the earlier decisions of 11 and 30 April 2019, by which the Secretary-General found that the complainant had harassed Mr A., as well as the decision of 2 May 2019, by which the Secretary-General issued the complainant a written reprimand. She 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 injury to her health, 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.

CONSIDERATIONS

1. The complainant impugns the Secretary-General's 2 September 2019 decision, which confirms two earlier decisions dated 30 April and 2 May 2019, which respectively held that the complainant had harassed Mr A. and issued her a written reprimand. She requests the annulment of the impugned decision and of all the earlier decisions confirmed thereby, compensation for moral prejudice in the amount of 80,000 euros, and reimbursement of legal costs.

2. The complainant advances a number of pleas alleging procedural and substantive violations.

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

- (a) “Violation of Regulation 25 [of the Staff Manual] – Lack of independence and impartiality of the [Advisory Board]”;
- (b) “Violation of [her] rights of defence, notably [her] right to be heard – Violation of [her] rights on sick leave”;
- (c) “Violation of Rule 25.1 [of the Staff Manual]”, as the decision on the harassment complaint and the disciplinary decision were taken without proper consultation with Senior Management.

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

- (d) “Violation of the duty to state reason[s]”;
- (e) “Wrong application of the legal definition of ‘harassment’ – Manifest error of appreciation”;
- (f) “Abuse of power”.

3. In her rejoinder and in her further written submissions, the complainant reiterates the same arguments contained in her complaint and requests the disclosure of a significant number of documents.

4. The request for the disclosure of documents contained in the complainant’s rejoinder shall be dismissed. The Tribunal observes that the request constitutes an impermissible “fishing expedition”. It is aimed at obtaining documents related to issues which are either irrelevant (since the Tribunal has already been provided with all the official documents of the harassment procedure), or outside the scope of the present complaint (such as the 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 defendant organisation.

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.”

As to disciplinary proceedings, Rule 25.1 reads:

“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 [...] disciplinary actions [...]

Conclusions shall be recorded in writing.”

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 complains about the “Lack of independence and impartiality of the [Advisory Board]” alleging that:

- (i) the Chairman of the Advisory Board, Mr P., was in a friendly relationship with the Secretary-General and with Mr T., who had lodged a harassment complaint against the complainant that triggered the termination of her contract;
- (ii) two members of the Advisory Board, namely Ms C. and Ms d.M., were involved in the group harassment claim lodged by the complainant on 13 May 2019;
- (iii) Ms C. and Ms Nos., members of the Advisory Board, were in charge of an energy project which allegedly “triggered the claim for harassment lodged by Mr [A.] against the [complainant]”;
- (iv) Ms Nov., another member of the Advisory Board, took part in a “sabotage” of the election of the B/C-grade representative in the Staff Committee chaired by the complainant and, furthermore, was not independent of the Secretary-General, since her contract was not terminated when she lost the citizenship requirement;
- (v) as shown in the audit report conducted in October 2019, the Chairman of the Advisory Board should have been appointed by the Conference, and not by the Secretary-General, in order to ensure the independence of the Advisory Board.

The complainant bears the burden of proof of bias and conflict of interest (see Judgments 4099, consideration 11, and 3380, considerations 9 and 10), and she fails to discharge it.

The allegation of bias against the Chairman of the Advisory Board is not demonstrated. The complainant has provided the Tribunal with a document aimed at proving that Mr P. was a special envoy of the Secretary-General. The Tribunal finds it irrelevant that Mr P. was a special envoy of the Secretary-General since this happened during 2013-2014, that is long before the relevant facts of the case, and being a special envoy is not in itself a basis for a conflict of interest. Similarly, the Tribunal finds the circumstance that Mr P. “campaigned” for the Secretary-General’s nomination in 2011 irrelevant; moreover, this latter allegation has not been proven.

The complainant does not provide documentary evidence that Mr P. participated in events organized by Mr T., who had lodged a formal complaint of harassment against the complainant. In any case, even if it were proven, and it is not, the allegation would be irrelevant. Indeed, the participation of the two staff members at the same conferences does not of itself demonstrate a relationship of friendship between Mr P. and Mr T.

The group harassment claim was initially lodged informally by the complainant by means of an email of 13 May 2019, after two officials had accused her of harassment, Mr A. on 15 March 2019 and Mr T. on 21 May 2019. The complainant lodged a formal group harassment complaint only later, on 21 June 2019.

The informal harassment claim contained in the 13 May 2019 email, addressed, *inter alia*, to Ms C. and Ms d.M., was only a preliminary step required by Regulation 25-bis c) before the initiation of the proper proceedings pursuant to Regulation 25-bis d): informal counselling; mediation; or complaint to the Advisory Board. It was not supported by any evidence and did not specify the role of Ms C. and Ms d.M. in the alleged group harassment. The complainant seized the Advisory Board with a formal group harassment complaint only on 21 June 2019, after the Advisory Board had already issued its 13 June 2019 report on Mr T.'s harassment complaint. The Tribunal observes that, as a matter of principle, a staff member accused of harassment or, more generally, of misconduct cannot impede the competent body from investigating and giving advice by means of a vague and informal report of harassment or misconduct against the members of the body itself. The allegation of bias, partiality, and conflict of interest must be serious, substantiated, and based on credible evidence.

The further allegations of conflict of interest with reference to Ms C., Ms Nos., and Ms Nov. are not supported by sufficient evidence. Indeed, on the one hand, it remains completely obscure how the energy project, of which Ms C. and Ms Nos. were in charge, “has triggered the claim of harassment lodged by Mr [A.]”. On the other hand, the alleged “sabotage” of the election remains unproven and the conduct described by the complainant rather appears to be part of the ordinary “rules of

the game” in electoral competitions. Nor is it clear why Ms Nov. should be biased against the complainant since she had been granted a transitional solution for employment until obtaining Belgian citizenship.

As to the circumstance that the Chairman of the Advisory Board was appointed by the Secretary-General and not by the Conference, the Tribunal observes that pursuant to Regulation 25a) “[t]he Secretary-General shall establish an Advisory Board comprising a Chairman from outside the Secretariat (initially the Chairman of the Conference) [...]”. This provision entitles the Secretary-General to appoint the Chairman of the Advisory Board, and only the first Chairman of the Advisory Board, when the Staff Manual was first issued, was *ex lege* the Chairman of the Conference. The considerations entailed in the international audit report on Energy Charter, issued on 4 November 2019, concerning the competence to appoint the Chairman of the Advisory Board in order to best ensure the independence of the Board, have only a prospective value with regard to future appointments but do not affect retroactively the appointment of the current Chairman. Indeed, the audit report, in the relevant part, contains only a prospective recommendation expressed as follows: “[t]here is a need for change [in] the appointment rule for the [C]hair of the Advisory Board. The [C]hair of the Advisory Board shall be appointed by the conference [as a] way to increase the guarantees for the Contracting Parties and Signatories”.

7. The complainant’s second plea, summarized in consideration 2, point (b), above, is unfounded.

The complainant alleges a violation of her right of defence, notably her right to be heard, as well as a violation of her right to sick leave, as:

- (i) the proceedings were carried out and finalized while the complainant was on sick leave and the date scheduled for her hearing was not postponed;
- (ii) the Advisory Board failed to interview the officials mentioned in the report of harassment lodged by Mr A.;
- (iii) the Advisory Board ignored the email sent by Ms N., the line manager of the complainant, describing former misconduct of Mr A.;

(iv) the Advisory Board failed to investigate former harassment claims against Mr A.

As to the alleged violation of her right of defence, the Tribunal notes that the complainant was informed in a timely manner (by an email of 18 March 2019) of the proceedings and was invited to a hearing to be held on 27 March 2019. On the same day of the scheduled hearing, namely on 27 March 2019, she replied that she was on sick leave, but she did not ask for a postponement of the hearing. Furthermore, she commented on the harassment claim, by an email of 22 March and another email of 26 March 2019. On 28 March 2019, the Advisory Board replied to the complainant's email of 26 March 2019, also sending her, in attachment, a copy of the document that Mr A. had handed over to the Advisory Board during the hearing held on 27 March 2019.

According to Rule 25.2 “[t]he official concerned shall have the right to present his or her case to the Board orally and in writing [...]”. Consequently, she had 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, or 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*.

The complainant was given ample opportunity to comment on the case by the two emails addressed to her by the Advisory Board on 18 and 28 March 2019, and she did so by her emails of 22 and 26 March 2019. On 27 March 2019, she again forwarded her email of 26 March 2019. Furthermore, although she could have, she never reacted to the Advisory Board's email of 28 March 2019.

The complainant also contends that the Advisory Board did not interview the officials indicated by Mr A.

Pursuant to Rule 25.2 of the Staff Manual, the Advisory Board shall act with the maximum of dispatch and, normally, proceedings before the Board shall be limited to the original written presentation. The Advisory Board is not compelled to hear witnesses, where it is not deemed necessary. Both parties, Mr A. and the complainant, had commented on

the case and the facts were sufficiently clear. The complainant could have requested the interview of witnesses, but she never did. Even in the present complaint, she does not explain which witnesses would have been useful to interview, and regarding which facts they would have been interviewed.

Lastly, the complainant asserts that the Advisory Board wrongly ignored a written statement sent by Ms N., the complainant's line manager, and failed to investigate former harassment claims against Mr A.

The Tribunal notes that Ms N. sent an email to the Advisory Board on 1 April 2019, after the hearing of 27 March 2019 had taken place. This email was unsolicited by the Advisory Board and Ms N. had not been listed as a witness by the parties. Furthermore, Ms N.'s email referred to episodes that were outside the scope of the proceedings. Therefore, the Advisory Board was right not to take it into account. Moreover, the Advisory Board correctly declined to investigate former claims of harassment against Mr A., as they were not lodged by the complainant and were therefore outside the scope of the proceedings initiated by Mr A.

8. The complainant's third plea, summarized in consideration 2, point (c), above, is unfounded. The complainant argues that there was no written record of the consultation with Senior Management. On the contrary, consultation with Senior Management took place in compliance with Rule 25.1, as evidenced by the conclusions that were recorded in writing at the meeting held on 8 April 2019.

9. At this juncture, the Tribunal will examine the three substantive pleas submitted by the complainant. In her first substantive plea, mentioned in consideration 2, point (d) above, under the heading "Violation of the duty to state reason[s]", the complainant submits that the decisions taken by the Secretary-General on the basis of the Advisory Board's recommendation failed to give reasons.

This plea is unfounded. As the Tribunal's case law establishes, the executive head of an organisation, when adopting the recommendations of an internal appeal body, is under no obligation to give any further

reasons than those given by the appeal body itself. The obligation to give reasons is affirmed only where the executive head of an organisation rejects the conclusions and recommendations of the appeal body (see Judgments 4307, consideration 15, and 3994, consideration 12). Accordingly, having accepted the advice of the Advisory Board, the Secretary-General was under no obligation to provide further reasons for his decision.

10. In her second substantive plea, mentioned in consideration 2, point (e), 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 she harassed Mr A.;
- (iii) the evidence gathered by the Advisory Board was not sufficient;
- (iv) the 13-page document provided by Mr A., whilst including 50 bullet points, described his feelings without providing any evidence;
- (v) the complainant was the victim and not the author of harassment; she was harassed by Mr A., she complained about it, but to no avail;
- (vi) Mr A. was promoted by the Secretary-General, in the new structure for 2020, from C to A grade, that is to the position occupied by the complainant before the termination of her appointment; this would prove that the claim lodged by Mr A. against the complainant was “engineered” to her detriment.

All the arguments alleged by the complainant to support her plea of the application of a wrong definition of harassment and insufficient evidence are unfounded. The harassment procedure followed by the Advisory Board complies with the relevant Staff Regulations and Rules, the evidence gathered satisfies the standard of proof required by the Tribunal, and therefore the Advisory Board’s findings deserve considerable deference (see Judgments 4488, consideration 7, and 4180, consideration 7). Accordingly, it was open to the Secretary-General to reach the conclusion he did in the circumstances of the case.

Firstly, the Tribunal has already addressed and rejected the plea that the Advisory Board did not hear witnesses. There is no need to reiterate that, having regard to the circumstances of the case, the hearing of witnesses was unnecessary.

Secondly, the elements gathered by the Advisory Board, considered as a whole, are sufficient to support its findings.

The complainant does not adduce persuasive counter-arguments.

According to the definition of harassment encompassed in the Staff Manual, harassment is any deliberate conduct which is reasonably perceived as offensive or unwelcome by the subject person. The complainant's conduct towards Mr A., as detailed in Mr A.'s submissions and not contradicted in its essence by the complainant, is reasonably perceivable as offensive and/or unwelcome by any person and, therefore, Mr A.'s submissions do not reflect only his personal feelings.

The complainant's written submissions were duly taken into account by the Advisory Board, but they failed to convincingly refute the Board's findings and to demonstrate that her conduct did not amount to harassment. Even the submissions made by the complainant to the Tribunal are not supported by persuasive evidence.

Finally, the circumstance that, after the termination of her contract, the vacancy was covered by the appointment of Mr A. does not by itself demonstrate that Mr A.'s harassment complaint was aimed at getting rid of the complainant. Indeed, the termination of her contract was the outcome of a different harassment complaint, the one lodged by Mr T., and not the one lodged by Mr A. It must be recalled that the outcome of Mr A.'s complaint consisted in measures designed to enforce a strict separation between Mr A. and the complainant in the workplace, and in a disciplinary sanction not involving dismissal (a written reprimand).

11. In her third substantive plea, mentioned in consideration 2, point (f), 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, because the Secretary-General’s decision on this matter has not been challenged before the Tribunal;
- (ii) the harassment complaint lodged by Mr T., the outcome of which is the subject matter of a different complaint filed with the Tribunal (the complainant’s first complaint) decided by a separate judgment, delivered in public the same day as the present one;
- (iii) the group harassment complaint lodged by the complainant, as its 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 grievance 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 of 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 Secretary-General's implicit decision to endorse the Advisory Board's conclusions, have been impugned before the Tribunal in the present complaint. They are the subject of the complainant's third complaint, adjudicated by a separate judgment, delivered in public the same day as the present judgment;

- (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 disciplinary decision and in the decision on the harassment grievance lodged by Mr A. 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. She 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.

12. Since the complainant's pleas are unfounded, the claim for annulment of the impugned decision, as well as the claims for moral damages and costs, shall be dismissed.

DECISION

For the above reasons,
The complaint is 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