Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

112th Session **Judgment No. 3065**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms R. M. against the International Labour Organization (ILO) on 11 March 2010, the Organization's reply of 14 May, the complainant's rejoinder dated 10 June and the ILO's surrejoinder of 14 September 2010;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this dispute are to be found in Judgment 3064, also delivered this day, concerning the complainant's third complaint. In his report of 8 December 2009 on the complainant's allegations of harassment, the investigator stated that he had interviewed the complainant, her immediate supervisor, "various persons directly involved in the case at some time" and "witnesses who could help to establish the facts". He also stated that as the Staff Regulations of the

International Labour Office, the ILO's secretariat, did not define harassment, he had decided to use the definition provided in the French Labour Code. Referring to this definition, he had concluded, on the basis of the facts as established from the written evidence and testimony given in interviews, that the complainant had not been harassed. The complainant was sent a copy of this report under cover of a letter of 15 January 2010 informing her that the Director-General considered her allegations to be groundless. It was explained that this was a final decision within the meaning of Article 13.3, paragraph 4, of the Staff Regulations. The complainant impugns this decision in the instant complaint which she filed on 11 March 2010. That same day, she also challenged this decision in a grievance submitted to the Director of the Human Resources Development Department (HRD). The Director then informed her that when the same appeal is filed with two competent bodies simultaneously, one must relinquish jurisdiction in favour of the other, but the complainant maintained both her complaint and her grievance. By a letter of 26 April 2010 the Director informed her that no action would be taken on her grievance since it was "legally incompatible" with the maintaining of her fourth complaint.

B. The complainant deplores the fact that the investigation into her allegations of harassment was not opened and conducted swiftly.

She also takes issue with the failure of her supervisors to take any action to improve working relations within her section.

The complainant states that the investigation report is tainted with various flaws. In her opinion, the investigator should have based his inquiry on the definition of harassment which existed in the Collective Agreement on the Prevention and Resolution of Harassment-Related Grievances between the International Labour Office and the ILO Staff Union of 26 February 2001, rather than on the far more general definition to be found in French law. She adds that the "terms of reference given" by the Joint Advisory Appeals Board in its report of 17 January 2008 have not been respected. Whereas the Board recommended the holding of an in-depth investigation, the

investigator confined himself to "repeating the opinions of the persons concerned and of a few colleagues", without examining the facts which she had set forth in her grievance. The complainant also criticises the investigator for overlooking essential facts, particularly by not interviewing witnesses whom she had asked to be heard, and for drawing wrong conclusions. Relying on Judgment 1675, she also denounces a breach of the adversarial principle, because the investigator interviewed witnesses in her absence or without inviting her to attend. Lastly, she contends that the "internal procedure" has been breached in that the investigation report has not been forwarded to the Board.

The complainant seeks the setting aside of the impugned decision, redress for the injury suffered and costs in the amount of 3,000 Swiss francs.

C. In its reply the Organization asks the Tribunal to join the complainant's third and fourth complaints with that which she will undoubtedly file against the decision of 16 March 2010 by which the Director-General dismissed the grievance she had submitted against her performance appraisal report for the period 1 August 2005 to 31 July 2007. It states that, should the Tribunal deem the grievance of 11 March 2010 to be receivable, the complaint must be dismissed for failure to exhaust internal means of redress.

On the merits, the defendant contends inter alia that the six months needed for the submission of the investigation report constitute a reasonable period of time in view of the "volume and the content of the claim".

Moreover, it says that the Administration "spared no effort" to improve working relations within the German Section, but that the complainant preferred to lodge an appeal.

The Organization then replies to the submissions regarding the alleged flaws in the investigation report. It informs the Tribunal that the Collective Agreement of 26 February 2001 is no longer in force, since it was replaced by another agreement, dated 24 February 2004, which no longer contains the definition of harassment on which the

complainant relies. It considers that the investigator was therefore right to refer to another definition which, being much more general, is more favourable to claimants. The ILO adds that the alleged failure to abide by the "terms of reference" which the Joint Advisory Appeals Board merely "recommended" does not justify the setting aside of the impugned decision, which was taken by the Director-General in the exercise of his discretionary authority. In the Organization's opinion, the investigator, who was free to interview any witnesses he wished, established the facts after examining "a considerable number of documents" and analysing the testimony he had gathered. Since the complainant was accusing her immediate supervisor of harassment, she did not necessarily have to be informed of the contents of this testimony. It considers that the complainant has furnished no proof that the investigator drew wrong conclusions.

D. In her rejoinder the complainant criticises the investigator for having interpreted the facts in a biased fashion and having heard witnesses without giving her the opportunity to exercise her right of reply. Citing the Tribunal's case law, she points out that, when an accusation of harassment is made, an international organisation must hold a prompt and thorough investigation and must accord full due process.

E. In its surrejoinder the ILO maintains its position. It asserts that the investigation report rests on an objective analysis of the facts and is not tainted with any procedural flaw.

CONSIDERATIONS

1. The relevant facts are to be found in Judgment 3064, delivered this day, to which reference should be made.

Suffice it to recall that the official appointed on 15 May 2009, with the complainant's agreement, to conduct an in-depth investigation into her allegations of harassment issued his report on 8 December 2009. In this report he concluded that "[t]he facts as established from

the written evidence and interviews do not lead to a finding of harassment in this case".

In the light of this report, by a letter of 15 January 2010 the Director-General notified the complainant of his decision to dismiss her allegations of harassment, and he pointed out that this was a final decision within the meaning of Article 13.3, paragraph 4, of the Staff Regulations of the International Labour Office.

2. The complainant, who impugns this decision, asks the Tribunal to set it aside, to order redress for the injury which she allegedly suffered and to award her costs in the amount of 3,000 Swiss francs. She enters several pleas in support of her complaint: she takes issue with the long delay in holding the investigation, the "lack of action by [her] […] supervisors to remedy the management of the section" to which she belonged, the "failure to abide by the terms of reference given by the [Joint Advisory Appeals Board]" and the "breach of internal procedure". She also submits that the investigator disregarded the definition of harassment provided in an agreement of 26 February 2001, overlooked essential facts and drew wrong conclusions and that the adversarial principle was breached during the investigation.

3. Referring to the application which it made in its reply to the third complaint, the Organization requests that the third complaint be joined with the present one and, should a complaint against the decision of 16 March 2010 be filed with the Tribunal, it asks the Tribunal to join it with these two complaints.

However, for the reasons already set forth in Judgment 3064, the Tribunal will not accede to this request for joinder.

4. The ILO draws attention to the fact that on 11 March 2010 the complainant simultaneously challenged the decision of 15 January 2010 in this fourth complaint and in a grievance submitted to the Joint Advisory Appeals Board. It states that, should the Tribunal consider this grievance to be receivable, the instant complaint must be

dismissed as irreceivable on the grounds that internal means of redress have not been exhausted.

At this stage of the proceedings, the Tribunal cannot rule on the receivability of a grievance on which no final decision has yet been referred to it. At all events, it considers that the Organization cannot validly raise this objection to receivability, since it was the Director-General himself who informed the complainant that his decision of 15 January 2010 was a final decision within the meaning of Article 13.3, paragraph 4, of the Staff Regulations.

5. The complainant contends in particular that the impugned decision rested on an investigation that was flawed, inter alia because the adversarial principle was not respected. She submits that the investigator interviewed witnesses when she was not present, or when she had not been invited to attend, without offering her an opportunity to comment on this testimony.

6. The ILO answers this plea by saying that, since the complainant had accused her immediate supervisor of harassment, it was lawful for the investigator to interview him and witnesses without necessarily informing her of the content of this testimony.

7. The Tribunal notes that the evidence does not show that the complainant could have attended the witnesses' interviews, or that she was offered an opportunity to comment on their testimony, in order to have certain items of information rectified where necessary, or to have it put on record that she disagreed with witnesses.

8. The Tribunal considers that even if, in the instant case, the investigator could not invite the complainant to attend all the interviews, she ought to have been allowed to see the testimony in order that she might challenge it, if necessary, by furnishing evidence.

Since this was not the case, the Tribunal finds that the adversarial principle was not respected.

It follows from the foregoing, without there being any need to examine the other pleas, that the decision of 15 January 2010, which thus rested on a flawed investigation report, must be set aside.

9. In such circumstances the Tribunal will ordinarily refer the case back to the organisation in order that a fresh investigation may be conducted. In this case, however, bearing in mind the considerable delay in holding the investigation and the fact that the complainant retired in October 2009, the Tribunal considers it inadvisable to refer the case back to the ILO.

10. According to the Tribunal's case law, an accusation of harassment requires that "an international organisation both investigate the matter thoroughly and accord full due process and protection to the person accused". Furthermore, "[i]ts duty to a person who makes a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context […], that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed not be stigmatised or victimised on that account […]" (see Judgment 2973, under 16, and the case law cited therein).

11. In the present case, as stated above, due process was not observed. Hence the Organization acted in breach of its duty of care to the complainant and its duty of good governance, thereby depriving the complainant of her right to be given an opportunity to prove her allegations (see Judgment 2654, under 7).

The Organization's attitude has therefore caused injury which must be redressed by an award of damages for moral injury in the amount of 20,000 Swiss francs.

12. The complainant is entitled to the sum of 2,000 francs in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The ILO shall pay the complainant compensation in the amount of 20,000 Swiss francs for moral injury.
3. It shall also pay her 2,000 francs in costs.

In witness of this judgment, adopted on 18 November 2011, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

SEYDOU BA
CLAUDE ROUILLER
PATRICK FRYDMAN
CATHERINE COMTET

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