S.

v.

ILO

133rd Session **Judgment No. 4481**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs K. S. against the International Labour Organization (ILO) on 3 February 2020 and corrected on 5 March, the ILO's reply of 9 April, the complainant's rejoinder of 28 May and the ILO's surrejoinder of 25 June 2020;

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

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

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

The complainant contests the decision not to extend her appointment at the end of her period of probation.

The complainant joined the International Labour Office, the ILO's secretariat, on 1 May 2016 as an Administrative Clerk, at grade G.4, in the Administrative and Finance Unit of the ILO Decent Work Team/Country Office in Santiago, Chile (DWT/CO-Santiago). Her initial short-term contract was converted on 14 June 2016 to a fixed-term contract, which was subsequently renewed on 1 May 2017. According to the applicable rules, she was on probation during the first two years of her appointment.

On 17 March 2017 the complainant's Direct Supervisor completed the Mid-term Review (MtR) for her 1st probationary appraisal (1 May 2016 to 30 April 2017) and noted that by common agreement an improvement plan would be prepared and executed as soon as possible. The complainant's Second Level Manager, who reviewed the MtR for

the complainant's 1st probationary appraisal that same day, suggested that the complainant adhere to the comments made by the Direct Supervisor. A Performance Improvement Plan was accordingly established.

On 4 May 2017 the Direct Supervisor prepared the End of Cycle (EoC) report for the complainant's 1st probationary appraisal, noting that the improvement plan was already underway and expressing the hope that it would be fruitful. The Second Level Manager reviewed the EoC report for the complainant's 1st probationary appraisal on 20 May 2017 and he invited the complainant to attend to the improvement plan agreed upon. The overall performance rating given to the complainant in the 1st probationary appraisal was "Did not fully meet the performance requirements". In its review of the EoC report for the complainant's 1st probationary appraisal on 7 August 2017, the Reports Board took note of the overall performance rating and the diverging views between the complainant and the Direct Supervisor regarding her performance assessment, and requested that the Performance Improvement Plan be updated to include an assessment of performance for each activity.

The Beginning of Cycle (BoC) report for the complainant's 2nd probationary appraisal (1 May 2017 to 31 January 2018) was prepared by her Direct Supervisor on 24 October 2017 and reviewed by the Reports Board on 29 November 2017. In its comments and recommendations of 6 December 2017, the Reports Board noted, inter alia, that the complainant was not performing at the level required for the role. The Direct Supervisor completed the MtR for the complainant's 2nd probationary appraisal on 23 February 2018 and indicated, inter alia, that the complainant did not have the necessary competences to perform the assigned role. The Second Level Manager reviewed the MtR for the complainant's 2nd probationary appraisal on 7 March 2018. The complainant reviewed it on 8 March 2018 and expressed the view that there was an intention to undermine her work.

On 10 April 2018 the Reports Board reviewed the MtR for the complainant's 2nd probationary appraisal. In its comments and recommendations of 16 April 2018, the Reports Board expressed concern regarding the performance issues raised by the Direct Supervisor and noted the diverging views between the latter and the complainant regarding her performance assessment. The Board requested the Second Level Manager to provide more detailed comments in the EoC report.

On 11 April 2018 the complainant was placed on certified sick leave, initially until 10 May, then until 9 June and, ultimately, until 30 June 2018.

Meanwhile, on 18 April 2018, the Reports Board reviewed the EoC report for the complainant's 2nd probationary appraisal and the compiled results of a multiple-rater exercise. The Board noted that the Direct Supervisor had recommended against the extension of her appointment and that the Second Level Manager had endorsed that recommendation. The Board requested the Second Level Manager to provide a detailed justification of his reasons for endorsing that recommendation.

In a memorandum of 20 April 2018, the Second Level Manager submitted to the Reports Board additional comments regarding the complainant's performance and reaffirmed the recommendation not to extend her contract beyond the period of probation.

On 26 April 2018 the complainant's contract was extended for two months from 1 May until 30 June 2018. The letter of extension stated that the extension was granted to ensure that the Reports Board had the time it needed to review the complainant's case and issue a final recommendation regarding her appointment.

On 27 April 2018 the Reports Board reviewed for a second time the EoC report for the complainant's 2nd probationary appraisal, together with the compiled results of the multiple-rater exercise and the Second Level Manager's additional comments of 20 April. The conclusions of that review were set out in its comments and recommendations of 14 May 2018, in which the Reports Board concurred with the view that the complainant had not been able to meet the requirements of the position and it endorsed the recommendation not to extend her contract beyond the period of probation.

By a letter of 22 May 2018, the complainant was informed of the Director-General's decision to accept the Reports Board's recommendation not to extend her contract beyond 30 June 2018. In an attachment to that letter, the complainant was provided with copies of the Reports Board's comments and recommendations of 14 May 2018 and her Second Level Manager's additional comments to the Reports Board.

On 9 October 2018 the complainant submitted a grievance to the Director of the Human Resources Development Department (HRD) against the 22 May 2018 decision. Having received no response, she filed a grievance with the Joint Advisory Appeals Board (JAAB) on 11 February 2019. The JAAB submitted its report to the Director-General

on 11 October 2019. A majority of its members considered that the grievance was devoid of merit and recommended that it be rejected. A minority of its members recommended that the Director-General consider an award of moral damages for the Office's failure: (i) to extend the complainant's period of probation pursuant to Article 5.1(c) of the Staff Regulations; and (ii) to fully observe due process and ensure that the complainant was heard by the Reports Board and that she was able to provide her views on her Second Level Manager's additional comments to the Board prior to the latter making its recommendations of 14 May 2018.

By a letter of 5 November 2019, the complainant was notified of the Director-General's decision to reject her grievance to the extent that it concerned the non-extension of her appointment and to award her 3,000 United States dollars for the failure to transmit to her the Second Level Manager's additional comments to the Reports Board prior to the latter's review of her performance. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, as well as the decision conveyed in the letter of 22 May 2018, and to order the ILO to reintegrate her, to extend her contract as of 1 July 2018 to cover for any period of certified sick leave, and to allow her to return to work and complete her period of probation once certified fit to work. She claims retroactive payment of all salaries, allowances, entitlements and any other amounts owed to her as of 1 July 2018, together with interest at the rate of 5 per cent per annum. She also claims compensation for moral prejudice and an award of costs.

The ILO asks the Tribunal to dismiss the complaint as partly irreceivable and, in any event, as entirely devoid of merit. In the event that the Tribunal finds in the complainant's favour, the ILO invites the Tribunal to order a fair and equitable compensation, instead of setting aside the impugned decision or ordering reinstatement.

CONSIDERATIONS

1. The complainant initiated the procedure which has culminated in the present complaint proceedings by contesting the decision of the Director-General not to extend her contract beyond 30 June 2018. That decision was communicated to the complainant in a letter, dated 22 May 2018, by the Director, ILO Office for the South Cone of Latin America.

The Director also informed the complainant that in order to ensure she benefitted from the required two months' prior notification of the non-renewal of her contract, she would be paid salary for an additional month, that is to the end of July 2018.

2. In the decision of 5 November 2019, which the complainant impugns, the Deputy Director-General for Management and Reform informed the complainant that the Director-General agreed with the JAAB's conclusions and had therefore decided to dismiss her grievance "to the extent that the non-extension of [her] appointment was validly decided". The Deputy Director-General further informed her that notwithstanding this conclusion, the Director-General agreed with the JAAB's minority view that the more detailed comments of her Second Level Manager, dated 20 April 2018, should have been transmitted to her (the complainant) for her comments before the review of her performance by the Reports Board was completed and that the Director-General had therefore decided to award her 3,000 United States dollars as fair redress for this.

3. According to the Tribunal's case law, the decision not to confirm the appointment of a probationer is a discretionary one and is subject to limited review. The Tribunal will set the decision aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or overlooked some essential fact, or amounted to an abuse of authority, or clearly mistaken conclusions were drawn from the facts. The case law also states that the decision not to confirm a probationer's appointment may be set aside if it was made in breach of her or his contract, of the organization's own regulations and rules, or of applicable general principles of law as enunciated by the Tribunal. It also states that the general principles are intended to ensure that an international organization acts in good faith and honours its duty of care towards probationers and to respect their dignity (see, for example, Judgment 3440, consideration 2).

4. Regarding the ambit of the discretion to confirm the appointment of a probationer, the Tribunal's case law states that the competent authority will determine on the evidence before it whether or not to confirm the appointment and must be allowed the utmost measure of discretion in deciding whether someone it has recruited shows, not just

the professional qualifications, but also the personal attributes for the particular post in which she or he will be working. Only where the Tribunal finds the most serious or glaring flaw in the exercise of the Director-General's discretion will it interfere (see, for example, Judgment 2599, consideration 5). The Tribunal also recalled, for example, in Judgment 4282, consideration 2, that the reason for probation is to enable an organisation to assess the probationer's suitability for a position. For this reason, it has recognised that a high degree of deference ought to be accorded to an organisation's exercise of its discretion regarding decisions concerning probationary matters, including the confirmation of appointment, the extensions of a probationary term, and the identification of its own interests and requirements.

5. The complainant contends that the decision not to extend her contract and period of probation was unlawful and caused her severe harm, as she lost her employment while she was on certified sick leave and unfit for work. In challenging the impugned decision she puts forward the following pleas:

(i) The decision not to extend her contract violated her right to an extension of probation due to a period of sick leave as per Article 5.1(c) of the Staff Regulations;

(ii) The decision not to extend her contract violated her statutory right to sick leave under Article 8.6 of the Staff Regulations;

(iii) The decision not to extend her contract violated the general principle of non-discrimination; due to her illness she was subjected to differential treatment, which constituted discrimination in employment;

(iv) The ILO violated her right to procedural fairness in the performance appraisal procedure; and

(v) The ILO has not provided any documentary evidence to prove that on 14 May 2018 the Reports Board communicated to the Director-General its recommendation or that this was approved or endorsed by the Director-General.

6. The complainant argues that the decision not to extend her contract violated her right to an extension of probation due to a period of sick leave under Article 5.1(c) of the Staff Regulations. This provision reads as follows: "If an official is absent on special leave, sick leave or

parental leave in accordance with articles 7.7, 8.6 or 8.7 for consecutive periods of one month or more, the period of probation will be extended accordingly." The complainant's probation period ended on 30 April 2018, as clearly determined by the Reports Board. The extension of her contract beyond the period of probation did not extend the probation period since only the Reports Board could order that pursuant to Article 5.2 of the Staff Regulations. It is indeed regrettable that the Reports Board could not complete its work in a timely manner and communicate its findings before 14 May 2018. However, a two-month extension of contract cannot be taken as an extension of her probation period. It was only an administrative measure taken in favour of the complainant, consistent with the duty of care that the Organization owed to her, to allow for the completion of the probationary performance appraisal evaluation procedure and a proper termination of employment. In any event, since the complainant's absence on sick leave (commencing 11 April 2018) was not "for consecutive periods of one month or more" on 30 April 2018, the ILO did not violate Article 5.1(c) of the Staff Regulations.

7. As the complainant's fourth plea is decisive in relation to this complaint, it is convenient to address it at this stage. In the impugned decision, the Director-General correctly agreed with the JAAB's minority view that the additional comments of the complainant's Second Level Manager to the Reports Board, dated 20 April 2018, should have been transmitted to the complainant for her comments before the review of her performance by the Reports Board was completed. Having done so and having awarded the complainant compensation therefor, the Director-General should have, by extension, concluded that the performance appraisal procedure upon which the decision was taken not to extend her contract was tainted by procedural error, as the JAAB's minority had, in effect, recommended.

8. Article 5.1 of the Staff Regulations is under the rubric "Period of probation". By application to the complainant, who held a fixed-term contract, Article 5.1(a) relevantly stated as follows:

> "[...] The official's performance and conduct shall be evaluated by the responsible chief, at 12 and 21 months of service, with a mid-term review taking place after six and 18 months of service. This shall be done in accordance with the procedure established in article 5.5. [...]"

Article 5.5, which is under the rubric "Probationary performance appraisal" relevantly stated as follows:

> "1. After 21 months of probationary service a performance appraisal shall be established in accordance with the provisions of article 6.7(1) and 6.7(2) for an official to whom article 5.1(a) applies; [...]
>
> 2. The performance appraisal in paragraph 1 will be considered as the second appraisal for the purpose of article 6.7."

Articles 6.7(1) and 6.7(2), which are under the rubric "Performance appraisals" relevantly stated as follows:

> "1. The performance and conduct of each official shall be appraised on a form prescribed by the Director-General after consulting the Joint Negotiating Committee. The appraisal shall be carried out by the official's responsible chief who may obtain the views of the official's supervisor or where appropriate, any other official under whose supervision the official has worked during the period under review. [...]
>
> 2. The appraisal shall be communicated to the official, who shall initial and return it within eight days of its receipt, attaching to it any observations the official may wish to make. These observations shall be filed with the appraisal unless the Director-General decides otherwise. The appraisal, together with any observations which may have been made by the official, shall then be transmitted to the official to whom the responsible chief reports, who may add observations to it, in which case it shall be returned to the responsible chief and to the official for initialling. It shall then be transmitted to the secretary of the Reports Board."

It is apparent that, compendiously, these provisions align with the case law stated, for example, in Judgment 2468, consideration 17, that the procedures used to assess the performance of international civil servants must be both transparent and adversarial.

9. Having observed that terminating or not renewing an official's appointment is a serious matter, the minority of the JAAB concluded, correctly in the Tribunal's view, that procedural fairness and due process were not observed when the Reports Board recommended not to renew the complainant's contract after it received additional comments on her final performance appraisal from her Second Level Manager, without seeking to have the complainant initial or comment upon those additional comments. This failure to observe procedural fairness and due process also violated Article 6.7 of the Staff Regulations.

10. Additionally, the ILO also violated Articles 5.1 and 5.5 of the Staff Regulations in that it did not carry out the complainant's 18-month MtR and 21-month EoC reviews in a timely manner. The JAAB observed this in statements made in its report which may be relevantly summarized as follows: while the complainant's performance was appraised in a timely manner during her first year of probationary service, it appears that the 18-month MtR that was due by October 2017 was not completed until March 2018, and the 21-month EoC review that was due by January 2018 was not completed until April 2018. The Reports Board reviewed the 18-month MtR on 10 April 2018 and the EoC review eight days later. The JAAB noted that statutory timelines should have been adhered to as a matter of course, particularly during a probation period, as probationary appraisal reports determine whether or not an official's contract is extended beyond the probation period. The JAAB also noted that it is only right and fair that the Office should observe the provisions by which it is bound since doing so is also in its own interest.

11. The last sentence aligns with the Tribunal's case law, which requires an international organization to comply with its own procedures that govern performance appraisals. Accordingly, the following was stated in Judgment 2414, consideration 24:

> "The fundamental considerations which lead to the conclusion that an organisation must comply with the rules which it has established also dictate the conclusion that it cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance. Just as the decisions to withhold the complainant's salary increments could not be justified on the basis of her unsatisfactory performance because the relevant rules had not been complied with, so also, for the same reason, the decisions neither to convert nor renew her contract cannot be justified on that basis."

12. In the foregoing premises, the impugned decision will be set aside.

13. In addition to other relief, the complainant asks the Tribunal to order the ILO to reintegrate her and to extend her contract as of 1 July 2018 to cover any period of certified sick leave, to which she may have been entitled, and to allow her to return to work and complete her period of probation once she is certified fit to work. However, having regard to the time that has passed since the complainant separated from service and the fact that it cannot be said with certainty that her appointment

would have been confirmed but for the irregularities noted above, the Tribunal considers that it is not appropriate to order the reinstatement that the complainant seeks. The complainant was aware that the probation period was intended to assess her suitability for her post and that her appointment was on a trial basis.

14. The complainant is, however, entitled to material damages for the loss of an opportunity to have her appointment confirmed and contract extended. For this she will be awarded 5,000 United States dollars. As accepted by the ILO, she is also entitled to moral damages for the breach of due process but, in the Tribunal's assessment, in the sum of 5,000 United States dollars. She will also be awarded 1,000 United States dollars in costs.

DECISION

For the above reasons,

1. The impugned decision of 5 November 2019 is set aside.
2. The ILO shall pay the complainant material damages in the amount of 5,000 United States dollars.
3. The ILO shall also pay the complainant moral damages in the amount of 5,000 United States dollars, subtracting therefrom the 3,000 dollars she was awarded in the impugned decision, if already paid.
4. The ILO shall pay the complainant costs in the amount of 1,000 United States dollars.
5. All other claims are dismissed.

In witness of this judgment, adopted on 18 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ