Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

B. S.

v.

WTO

135th Session **Judgment No. 4601**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. B. S. against the World Trade Organization (WTO) on 9 May 2019 and corrected on 28 May, the WTO's reply of 9 August 2109, the complainant's rejoinder of 4 October 2019 and the WTO's surrejoinder of 25 November 2019;

Considering the documents produced by the WTO and the complainant on 23 and 27 June 2022 respectively at the Tribunal's request for further submissions;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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

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

The complainant challenges the decision to summarily dismiss him after an internal complaint of harassment was made against him.

The complainant joined the WTO (then known as the General Agreement on Tariffs and Trade (GATT)) in 1979. In 1998 he was appointed as Chief of the Graphic Design, Printing and Documents Distribution Section (GDPDD) in the Languages, Documentation and Information Management Division (LDIMD). At the material time he held grade G.9.

On 3 August 2018 the WTO's Office of Internal Oversight (OIO) received a request for an investigation into harassment and abuse of authority by the complainant, submitted by one of his former subordinates, Ms F., and relating to events that took place between 2001 and the beginning of 2014. A memorandum prepared by an individual working in the Legal Affairs Division containing a legal analysis in support of the allegations made by Ms F., who herself had recently been transferred to that same division, was annexed to the request. On 6 August 2018 the OIO also received a memorandum from the head doctor in the WTO Medical Service describing the impact of the allegedly inappropriate conduct of the complainant on the physical and mental health of several other staff members working, or having worked, under his supervision since 2001.

Following a preliminary review of the allegations and evidence received, the Head of the OIO informed the Director-General on 11 September 2018 that an administrative investigation had been opened, in accordance with the provisions of Administrative Memorandum No. 974 of 30 November 2015 on the OIO. On 17 September he handed a copy of the notice of investigation, the oath of confidentiality and the investigation procedure to the complainant. The complainant refused to sign these documents "for [his] own reasons". That same day, the documents were sent to him by email. The complainant was invited to a meeting with the OIO on 19 September to obtain further information about the allegations received and the conduct of the investigation. In addition, he was informed that, if the accusations were proven, he was liable to face disciplinary sanctions. He was asked to cooperate with the investigation and not to discuss the matter with anyone without the prior consent of the OIO. Lastly, he was given the option of taking special leave with full pay to allow him sufficient time to prepare his defence.

The complainant met with the Head of the OIO and the Director of the Human Resources Division on 19 September 2018 and informed them of his intention not to participate in the investigation and to take early retirement with effect from 31 December 2018. He refused to hear details of the allegations made against him or the name of the accuser but undertook not to take any retaliatory action against his colleagues.

On 20 September he submitted his notice of resignation to the Director-General, to take effect on 31 December, which was accepted by the Director-General on 21 September. On 24 September he received notification of the executive head's decision to place him on special leave with full pay until the end of the investigation, as a preventative measure. The next day, he was placed on 100 per cent sick leave by his treating physician. On 5 October the Head of the OIO contacted him to remind him of his duty to cooperate with the investigation and to invite him to review the allegations made against him. No response to that letter was received. On 30 October the complainant asked to take early retirement on 30 November, which was refused due to the pending administrative investigation against him.

At a meeting with the OIO, held on 15 November, the complainant confirmed his intention not to participate in the investigation, made it known that he disagreed with the decision to place him on special leave and expressed concerns about the confidentiality of the investigation. On 3 and 4 December, Ms F. and the complainant received the draft investigation report in order that they could make any observations on it, which they submitted on 10 December. The complainant annexed to his observations a medical report from his treating physician, dated 7 December 2018, in which the physician explained the changes in the fluctuating and fragile state of health of her patient from June 2015 to December 2018, which had necessitated several periods of sick leave during those years.

The OIO presented its final report to the Director-General on 13 December 2018, in which it concluded that the allegations of harassment and abuse of authority were substantiated. The report stated that the investigation related to incidents of harassment that had taken place since 2002, more specifically between 2002 and 2003, in 2007, 2011 and 2014. A recommendation was made that the complainant should receive a sanction commensurate with his misconduct, either by way of summary dismissal or by termination of contract without notice or compensation in lieu thereof. Given that the complainant had submitted his notice of resignation on 20 September 2018, the Director-General was invited to consider the option of a financial sanction,

bearing in mind that several payments, notably separation entitlements, had been temporarily withheld by the Human Resources Division pending receipt of a final decision, amounting to 63,764 Swiss francs. The OIO considered, however, that the WTO had failed to fulfil its duty of care towards the numerous victims of the complainant's behaviour and invited the Organization to "send a strong signal" in acknowledgement of the suffering endured.

On the basis of that report, the complainant received notice the following day, that is, on 14 December 2018, of the Director-General's proposal to impose on him the sanction of summary dismissal without compensation. He was invited to submit any comments no later than 6 p.m. on Wednesday 19 December. He did so, through his counsel, but not until 25 January 2019 since he had been granted an extension to the time limit on 21 December 2018, having agreed that his resignation date be postponed to 15 February 2019.

By a memorandum of 12 February 2019, the complainant was informed of the Director-General's decision to summarily dismiss him with immediate effect for serious misconduct and to withhold the sum of 63,764 Swiss francs representing the various separation entitlements which would have been payable to him. It was made clear that he could appeal directly to the Tribunal against the disciplinary sanction imposed. That is the impugned decision. The complainant was entitled to draw his pension from13 February 2019.

By email of 8 April 2019, the complainant asked the Director of the Human Resources Division for the badge given to WTO pensioners so that he could participate in the activities of the Pensioners' Assembly, of which he was a member. On 18 April he received the reply that, in view of the circumstances of his departure from the Organization, it was not possible to provide him with such a badge.

In his complaint, the complainant asks the Tribunal to set aside the impugned decision and to draw all the legal consequences therefrom, in other words to order the WTO to reimburse him the sum of 63,764 Swiss francs, which he considers to have been unduly withheld, and to issue him with the badge provided to pensioners to enable him

to participate in the activities of the Pensioners' Assembly. He also claims moral damages and costs.

The WTO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant seeks the setting aside of the decision of the Director-General of the WTO of 12 February 2019 which imposed on him the disciplinary sanction of summary dismissal without compensation for serious misconduct. As a consequence, he asks the Tribunal to order the payment of the sum of 63,764 Swiss francs, which he considers to have been unduly withheld, and to provide him with the badge given to pensioners of the Organization. He also claims compensation for the moral injury which he alleges he suffered, in an amount to be determined by the Tribunal, and reimbursement of the legal costs incurred.

2. The complainant alleges that there were several flaws in both the investigation procedure followed by the OIO when examining the harassment complaint lodged by Ms F. and in the ensuing procedure which led to the decision to impose the contested disciplinary sanction.

3. The complainant observes first of all that certain members of staff working under him who were unable to perform their duties satisfactorily or to keep up with the pace he set lodged internal complaints of psychological harassment against him on various occasions. In fact, no fewer than fourteen members of staff lodged such a complaint between 2002 and 2003 and in 2007, 2011 and 2014. However, the complainant notes that none of those complaints was regarded by the WTO as sufficient to justify a disciplinary sanction against him. On each occasion it was considered that there was insufficient evidence to support the allegations of harassment and abuse of authority made against him. On the contrary, the various internal complaints were, in general, resolved amicably, for example by restructuring the section or by arranging transfers for some of the individuals concerned, with their consent. Among the five members of staff who had lodged an internal

complaint between December 2013 and January 2014 was Ms F., who was subsequently given such a transfer. This is the same person who, in 2018, by which time she had not been working under the complainant's supervision for more than four years, lodged a new complaint based on the same events as those alleged in 2014. In addition, the Director-General, on the basis of the investigation report prepared by the OIO, found that the complainant had subjected his subordinates to various forms of psychological harassment and abuse of authority for more than ten years, from 2003 to 2014, and concluded that he should receive the disciplinary sanction of summary dismissal without compensation.

The complainant infers from this that the investigation carried out by the OIO in 2018 related to the same events that had been the subject of the preliminary investigation conducted in 2014. That preliminary investigation had not led to disciplinary proceedings and the internal complaint had, according to the complainant, been closed without further action, meaning that the new complaint of moral harassment and abuse of authority lodged by Ms F. in 2018 could not be based on those events from 2014. He asserts that both the OIO, in its investigation report, and the Director-General, in the impugned decision, wrongly relied on those events. As the complainant submitted in his observations on the proposed sanction and as he repeats in his complaint, the Organization breached the rule against double jeopardy, according to which nobody may be tried a second time for the same conduct nor receive a new sanction for that same conduct nor, as in the present case, a first sanction following the closure of the initial procedure without further action. The complainant also considers that, in so doing, the WTO unlawfully reversed the position it had adopted in the 2014 decisions, which were taken as a result of the contemporaneous decision to close the internal complaints lodged collectively in December 2013 and January 2014 without further action.

4. To justify the new investigation launched in 2018, the Director-General stated, in the decision of 12 February 2019, that the events that took place between 2003 and 2014 had not "led to any legal classification and, consequently, could not give rise to any sanction". He also considers that, for events occurring prior to 2014, there was only, at most, a

preliminary investigation rather than a full investigation or thorough examination of the situation. Hence the informal warning given to the complainant at the time by the person in charge of the preliminary investigation, which stated that any new complaint made against him would lead to disciplinary proceedings being opened immediately, should be viewed in that context, as a result of which that warning should be understood as an admission that there was an error of assessment of the seriousness of the accusations that had been made at the time.

In its reply, the WTO submits as follows on this point. The reason why the OIO was able to go back ten years from 2014, and its investigation cover events that had already given rise to earlier complaints, whether formal or informal, is, first of all, that those complaints were never the subject of investigations as such. According to the Organization, in 2018 there was no "re-investigation" of facts that had already been established and that had given rise to formal decisions, but rather, a new, rigorous and professional examination of facts that had been examined too superficially in the past. It could therefore not be said that the matter had been closed without further action and the WTO denies having reversed its position in this case.

5. In his rejoinder, the complainant maintains that the WTO authorities reversed the position they adopted towards him. He points out that the internal complaints collectively lodged in December 2013 and January 2014 gave rise to concrete measures, such as transferring some of the accusers to other divisions, in particular Ms F., and that he had not received any disciplinary sanction at the time. In the complainant's view, he therefore had reason to consider the matter closed. Any new complaint could therefore only relate to new events and not to events that had been the subject of the preliminary investigation in 2014. At the time of Ms F.'s internal complaint in 2018, nothing new had occurred subsequent to the events examined at the time of the complaints of December 2013 and January 2014. In fact, the only new matter was the significant improvement in the working environment in the GDPDD Section which the complainant directed, as is acknowledged by the accuser herself. There was therefore nothing to justify the opening of

disciplinary proceedings in 2018, which renders the disciplinary sanction against him null and void.

6. Having observed that no limitation period applies here, the WTO also denies that there was, in this case, any breach of the double jeopardy rule or of the principle *nemo auditur propriam turpitudinem allegans*, in that the events prior to 2014 were the subject of a new administrative investigation in 2018. The five accusers in 2014 had been heard in the context of a preliminary investigation; as the Tribunal has recalled in its case law (see Judgments 4101, consideration 16, and 3640, consideration 5), "the sole purpose of the preliminary assessment of such a complaint is to determine whether there are grounds for opening an investigation." The note drawn up by the person who had carried out the preliminary assessment of the internal complaints lodged collectively did not constitute an investigation report. It cannot be inferred therefrom that the complainant had been exonerated from any misconduct or that any limitation period applied to the allegations concerning events prior to 2014.

7. First of all, the Tribunal wishes to note that the WTO accepts that, until 2018, there was a persistent lack of written procedures relating to the manner in which administrative investigations and disciplinary actions were carried out. The Organization's approach to dealing with incidents of harassment or abuse of authority changed dramatically following the 2014 Strategic Review, which aimed to promote a more efficient work environment through the improved protection of staff members' individual rights. It was at that time that various texts were adopted in order to elaborate on the relevant provisions of the WTO Staff Regulations, including the WTO Standards of Conduct and the Staff Rules. These are as follows:

– Administrative Memorandum No. 973 on Good offices, Mediation, Conciliation;
– Administrative Memorandum No. 974 on the OIO;

– Administrative Memorandum No. 985 on the Right to Work in an Environment free from Discrimination, Harassment and Abuse of Authority (which came into force on 30 April 2018); and
– Notice to Staff OFFICE (14)/17 of 16 October 2014 on the "Provisional Procedure for Administrative Investigations and Disciplinary Actions".

8. According to paragraph 5 of the aforementioned Administrative Memorandum No. 985, harassment normally implies a series of incidents over a period of time, so it is not impossible for a harassment complaint to be based on relatively old events. That provision reflects the Tribunal's case law, according to which, first, conduct over a period of time can inform the characterisation of particular conduct as harassment (see, in particular, Judgments 4288, consideration 3, and 4233, consideration 3) and, secondly, an accumulation of repeated events, as well as a long series of examples of mismanagement and omissions, can be such as to have compromised the dignity and career objectives of a staff member (see, in particular, Judgment 4286, consideration 17). Indeed, harassment may involve a series of acts over time and can be the result of the cumulative effect of several manifestations of conduct which, taken in isolation, might not be viewed as harassment (see Judgment 4233, consideration 3, and the case law referred to therein), even if they were not challenged at the time (see Judgment 4253, consideration 5, and the judgments cited therein).

It is therefore not in itself unusual that the OIO also took into account incidents of harassment which had already been reported in previously-lodged internal complaints, whether formal or informal, in particular the incidents referred to in the complaints lodged collectively in December 2013 and January 2014. The fact that the latter complaints did not lead to a full investigation being launched or, following such an investigation, to disciplinary proceedings being taken against the complainant, is irrelevant, since there was nothing to prevent the Organization from relying on those allegations of harassment, amongst other things, during the examination of a later complaint that reported new incidents. Equally irrelevant is the fact, relied on by the complainant,

that none of the accusers behind those allegations complained at the time that the concrete measures decided on by the Organization were insufficient.

The complainant's reliance on a potential breach of the rule against double jeopardy is therefore not substantiated in the circumstances of the case, since no disciplinary proceedings were brought against him following the preliminary investigation in 2014 and he had, therefore, not already been punished for the acts of harassment alleged in support of those complaints and reiterated in the context of the internal complaint lodged in 2018.

9. On the other hand, what renders the impugned decision fundamentally unlawful is the set of factual circumstances in which it was adopted in the present case.

The investigation was launched on the basis of the internal complaint lodged in 2018 by one of the five people who had made the complaints in December 2013 and January 2014, in other words, four years after the review of those complaints had been concluded and after several internal organisational measures had been decided upon at the time, such as Ms F.'s transfer to another division from mid-January 2014. By force of circumstance, therefore, that accuser was in principle no longer capable of being the subject of new incidents of harassment on the part of the complainant following her transfer. This is also clear from the new complaint lodged in 2018 by the individual in question, in which she merely set out the acts of harassment which had already been alleged either by her or by the other accusers in the complaints of December 2013 and January 2014.

It is also apparent from a careful reading of the OIO's investigation report, the testimonies of the various individuals heard by the OIO and the impugned decision itself that the acts of harassment and abuse of authority of which the complainant was accused took place prior to 2014 and that he was not accused of any later incidents of harassment. The assertion by the Director-General in the impugned decision that the conduct of which the complainant is accused occurred over a period of more than ten years and that it continued despite the warning given to

him in 2014 is therefore manifestly unsubstantiated. On the contrary, it is clear from the investigation report drawn up by the OIO that the witnesses heard, as well as the accuser, acknowledged that the situation within the GDPDD Section which the complainant directed had improved significantly since 2014.

Similarly, even though the memorandum written by the head doctor in the WTO Medical Service and dated 6 August 2018 stated that various consultations carried out by her in 2018 had enabled her to identify the impact of the complainant's allegedly inappropriate behaviour on the physical and mental health of several staff working or having worked under his supervision since 2001, no actual incident of harassment after 2018 was mentioned by that doctor.

In those circumstances, when examining the internal complaint lodged by the accuser on 3 August 2018 relating to the same incidents of harassment as those that already been alleged in the complaints of December 2013 and January 2014, the WTO did indeed reverse its position, for which there is no lawful justification.

In that regard, the WTO's assertion that those complaints did not lead to a full or thorough examination of the situation at the time because the procedure for dealing with harassment complaints was deficient is clearly not an argument capable of justifying that reversal. First, even assuming that the procedure at the time was inadequate, that cannot be relied on by the WTO since the Tribunal has consistently stated that international organisations are required to investigate accusations in this area and to provide protection for persons who claim they are the victims of harassment (see Judgments 2706, consideration 5, and 2552, consideration 3) and also to ensure that their investigative and internal appeal bodies for this purpose are functioning properly (see Judgments 3314, consideration 14, and 3069, consideration 12), these obligations being are part of a more general duty owed by those organisations to provide a safe and adequate environment for their staff, free from physical and psychological risk (see Judgments 4299, consideration 4, and 4171, consideration 11). Secondly, the Tribunal sees no basis on which to hold that the procedure applicable at the time to the examination of the complaints of December 2013 and January

2014 was in fact ineffective. In this regard it should be noted that there were three Administrative Memoranda relevant to this matter at the time, namely No. 858 of 19 September 1994 ("Prevention of Sexual harassment"), No. 941 of 23 January 2003 ("Procedures for Dealing with Staff Members' Complaints and Grievances") and No. 967 of 23 February 2010 ("Performance Management"). In particular, Memorandum No. 941 provided for the possibility of a first mediator who had found that there was a need for a full investigation to transfer the matter to a panel of three mediators, which could, therefore, have been done at the time. It should be noted in this regard that a collective complaint lodged in 2002 and 2003 by eight staff members working in the GDPDD Section directed by the complainant had indeed led to a full investigation of this type, but the panel of mediators concluded that there was, at that time, insufficient evidence to justify the application of a disciplinary measure.

10. Taking into account all of the foregoing considerations, the Tribunal finds that the impugned decision is unlawful and must, therefore, be set aside.

11. As a consequence of the impugned decision being set aside, it must be held that the complainant should, with retroactive effect, be deemed to have begun his retirement on 13 February 2019, the date which had been mutually agreed upon prior to the adoption of the impugned decision.

12. The complainant asks that, in the event that the impugned decision is set aside, the Tribunal should also order the payment of 63,764 Swiss francs, representing the total of the various separation entitlements which would have been payable to him if he had actually been able to begin his retirement as originally agreed between the parties.

In a letter of 23 June 2022, in which the WTO, at the request of the President of the Tribunal, provided the Registry with certain supplemental information, the WTO expressly recognises that the complainant would have been entitled, on presentation of the necessary

evidence, to be paid 63,764 Swiss francs, had he been regarded as having resigned on 13 February 2019.

Provided that all the necessary evidence is in fact presented by the complainant, the Tribunal will order that the sum of 63,764 Swiss francs be paid to him.

13. The complainant also asks the Tribunal to award him moral damages "in an amount to be determined by the Tribunal". However, in his various written submissions, he does not justify the relevance of this request.

In the particular circumstances of the case, the Tribunal considers that the moral injury that the complainant alleges to have suffered is sufficiently compensated for by the setting aside of the impugned decision.

14. The complainant also asks that, as a result of the impugned decision being set aside by the Tribunal, the WTO should be ordered to issue him with the badge provided to pensioners to enable him to participate in the activities of the WTO Pensioners' Assembly. It is, however, clear from the case law that the Tribunal is not competent to make orders of that kind.

This is all the more so given that the complainant does not point to any obligation on the WTO to issue the "pensioner" badge arising from the terms of his employment contract or under the provisions of the Staff Regulations and Staff Rules. The Tribunal does not, therefore, in any event, have any competence in the matter, pursuant to Article II, paragraph 5, of its Statute.

The Tribunal notes only that, given that the impugned decision has been set aside as the result of this judgment, the refusal to issue the badge in question can no longer be justified.

15. As he succeeds for the most part, the complainant is entitled to costs, which the Tribunal sets at 8,000 Swiss francs.

DECISION

For the above reasons,

1. The decision of the Director-General of the WTO of 12 February 2019 is set aside.
2. The WTO shall pay to the complainant, as stated in consideration 12 above, the sums that would have been paid to him had he retired in February 2019.
3. It shall also pay him 8,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ