

N. (No. 3)

v.

Energy Charter Conference

135th Session

Judgment No. 4614

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms M. N. against the Energy Charter Conference (ECC, hereinafter “the organisation”) on 23 December 2019, the organisation’s reply of 23 March 2020, the complainant’s rejoinder of 30 June 2020 and the organisation’s surrejoinder of 18 September 2020;

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

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

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

The complainant contests the decision to reject her harassment claim.

The complainant joined the Energy Charter Secretariat, the secretariat of the organisation, in January 2017 under a three-year fixed-term appointment as Assistant Secretary-General. Owing to a tense working relationship with the Secretary-General, the complainant wrote to him on 14 January 2019 stating that she would resign. Following a discussion with him, she informed him, on 8 February, that she had decided to postpone her resignation until the end of her contract, that is to say December 2019. She also acknowledged his recent efforts to address issues amicably and she considered her “harassment claim, workload issues, and miscommunication in 2018 resolved”.

On 15 July 2019 the Secretary-General informed the complainant that he had decided, in line with Regulation 13a)i) of the Staff Manual and after consultation with the Advisory Board and “Senior Management”, to terminate her appointment as of that date. His decision was based on what he characterized as her unsatisfactory service as well as her repetitive serious failure to comply with her duties and obligations, which he detailed in the letter. He added that she would be paid four months’ emoluments in lieu of notice.

On 30 August 2019 the complainant submitted a harassment complaint to the Advisory Board against the Secretary-General, alleging that his actions had been intimidating, hostile, humiliating, offensive and discriminatory for some time. She alleged that the situation started to deteriorate in August 2018 and that, although they agreed in February 2019 to postpone her resignation, the harassment continued, the latest examples being her suspension from duties based on false accusations and then the unlawful termination of her appointment. She also expressed concern at the Board’s competence, independence and impartiality, asking that all its current members recuse themselves. She further stressed that the Board had already examined and rejected her submissions on many issues presented in her harassment complaint when examining her appeal against the termination decision. She also objected to any intervention and decision by the Secretary-General on her harassment complaint, asking that her complaint be referred to the Energy Charter Conference for determination.

In its report of 27 September 2019 the Advisory Board explained that it was bound to act with the maximum of dispatch consistent with a fair review of the issue before it, and that its members were independent and impartial. Therefore, its members did not recuse themselves. The Board found that harassment as defined in the Staff Manual could not be established. The evidence provided by both parties rather pointed to manifestations of work-related conflict due to miscommunication, diverging opinions and different perceptions of duties.

On 27 September 2019 the Secretary-General forwarded the Advisory Board's report to the complainant, stating that he considered the Board's opinion as "final with the understanding that it [could] be [the] object of an appeal" to the Tribunal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order her reinstatement. She seeks the payment of 563,175.37 euros in damages, which corresponds to the earnings she would have received had her appointment been extended for three years plus one and a half month's pay which, according to the complainant, is still owed to her. In addition, she claims damages for "reputational harm", moral damages and costs.

The organisation asks the Tribunal to reject the complaint as unfounded. It asserts that the complainant has received the "end-of-service payments" she was entitled to.

CONSIDERATIONS

1. The complainant was a member of the staff of the Energy Charter Secretariat until her dismissal on 15 July 2019. She commenced employment with the Secretariat on 1 January 2017 as Assistant Secretary-General, which was a three-year fixed-term appointment. Before the termination of her employment, she had been suspended with pay effective 6 June 2019. On 30 August 2019 she submitted a harassment grievance to the organisation's Advisory Board. The complainant has filed three complaints with the Tribunal. The third, which this judgment addresses, was filed on 23 December 2019, and concerns her harassment complaint.

2. The complainant's grievance was first considered by the Advisory Board. The Secretary-General indicated, because he was centrally the focus of her allegations, he then would abide by the conclusions of the Board. The Advisory Board issued a report on 27 September 2019 concluding that harassment as defined in the Staff Manual and alleged by the complainant could not be established. The Secretary-General sent an email to the complainant on 27 September 2019 which, in substance,

rejected her claim of harassment. This is the decision impugned in these proceedings.

3. It appears to be common ground that after the complainant's appointment to the position of Assistant Secretary-General, her working relationship with the Secretary-General became a tense one. So much so that in January 2019 the complainant informed him she would resign. After discussion, the complainant decided to postpone her resignation until the end of her contract, namely December 2019.

4. The event which precipitated the complainant's suspension was her creating in June 2019 a document entitled "Report on the Misfunctioning of the Energy Charter Secretariat" (the Report) and disseminating the document though on the basis that it was confidential. On 6 June 2019 the Secretary-General was contacted by phone by Mr S., a journalist from a European media, seeking comments on the Report. There had been prior email exchanges between them. This was how the Secretary-General came to know of the existence of the Report.

5. Later that day the Secretary-General sent the complainant a note informing her of her suspension. In the note he said that he had learned from Mr S. that the complainant had provided him with a copy of the Report and that it contained confidential and personal information, as well as intentionally malicious and false allegations against him and other colleagues of the Secretariat.

6. The European media did publish a lengthy article the following day written by Mr S. clearly based on the contents of the Report and it also placed the Report online. The inescapable inference is that someone leaked the Report to that publication. Indeed, it later emerged Mr S. had obtained the Report from "an EU [European Union] source outside the Energy Charter Secretariat" and believed that it was circulated to all members of the Energy Charter Treaty including the 27 EU Member States representatives and the European Commission.

7. On 10 June 2019 the complainant requested, by email, the Secretary-General to withdraw the suspension decision saying she had not heard of Mr S. or the European media. The Secretary-General responded by email refusing the request and added, apparently as further grounds for the suspension or particulars of grounds already given, that the Report was not “sent in accordance with the Staff Regulations and Rules” and the complainant had disseminated the Report “to some delegations”, which was another serious breach of the Staff Regulations and Rules. These matters were also adverted to in the email as reasons why the Secretary-General would terminate the complainant’s contract by 30 June 2019.

8. Mr S. denied (in a letter dated 19 June 2019 to the complainant’s lawyer, sent to the Secretary-General by the complainant on 25 June 2019) receiving the Report from the complainant and this was accepted by the Secretary-General who, by letter dated 26 June 2019 sent by covering email, apologised to the complainant for accusing her of sending the Report to the named journalist, adding that he had no written evidence of the complainant leaking the Report and noting that she had expressly denied doing so. The Secretary-General also said, in the 26 June 2019 letter, that he did not propose to lift the suspension “based on the fact that [she] prepared the [R]eport”. Additionally, he said that he had raised with the Advisory Board in a note of 19 June 2019, a copy of which had been sent to the complainant, that, amongst other things, the Report was not “sent in accordance with the Staff Regulations and Rules”. She requested the withdrawal of the suspension on 10 June 2019, but the request was refused by the Secretary-General two days later.

9. On 12 July 2019, the complainant wrote to the Chairman of the Advisory Board requesting an advice on the suspension decision though, in the same letter, she challenged the impartiality of the members of the Board and asked them to recuse themselves. As noted earlier, the complainant’s employment was terminated on 15 July 2019. Correspondence passed between the Board and the complainant concerning the progressing of her request for an advice on the suspension. In due course the Board provided a report, dated 19 August 2019, recommending,

firstly, the Secretary-General not withdraw or modify his decision to suspend, secondly, dismissing a request that all disciplinary action against the complainant be revoked and thirdly, dismissing a range of other requests as irrelevant having regard to its first and second recommendation and decision. By email dated 4 September 2019 the Secretary-General informed the complainant that he had not “change[d] [his] decision on [the complainant’s] suspension”.

10. It has been necessary to repeat an account of events concerning the complainant’s suspension given, as shortly discussed, the particular way the complainant frames her case in these proceedings concerning harassment.

11. The complainant’s case in her pleas challenging the impugned decision is advanced under six general headings. Firstly, she contends that the Secretary-General’s conduct amounted to harassment and any finding to the contrary is arbitrary and unreasonable. Secondly, she contends that the Secretary-General’s conduct involved an abuse of authority and violated the duty to act in good faith. Thirdly, she contends that the Secretary-General was biased and had a conflict of interest. Fourthly, she contends there was a violation of her due process rights. Fifthly, she contends that the members of the Advisory Board were biased and showed a conflict of interest. Sixthly and finally, she contends the Advisory Board violated the requirement of due process.

12. Harassment is defined in Regulation 25-bis b)i) of the Staff Manual in the following terms:

“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.”

13. In her harassment complaint filed with the Advisory Board, the complainant detailed a multitude of instances in which she alleged the Secretary-General had harassed her. In relation to a material number

of those instances it may be doubted that the Secretary-General's conduct amounted to harassment. But it is certainly beyond doubt that on a number of occasions she complained to him in writing about his aggressive behaviour towards her. If such correspondence could be taken to have been a genuine reflection of the complainant's perception (and there is no reason to doubt it), then it would evidence the effect of the Secretary-General's conduct as creating, for the complainant, an intimidating, hostile, humiliating or offensive work environment. However, this would not satisfy the definition of harassment unless the complainant's perception was a reasonable one.

14. But it is unnecessary to explore this issue by reference to the multitude of instances chronicled in the complainant's harassment complaint of 30 August 2019. That is because under the first heading referred to in consideration 11 above, the conduct complained of in the complainant's pleas in these proceedings as amounting to harassment was solely the Secretary-General's suspension decision of 6 June 2019 and a central element in this characterization was that he had fabricated (meaning invented in order to deceive) the asserted fact that Mr S. had told him, the Secretary-General, he had been provided with a copy of the Report by the complainant. While it emerged that this was not true, the evidence does not sustain a conclusion that the Secretary-General had deliberately lied about what Mr S. said about how he obtained a copy of the Report. But that is not the end of the matter.

15. In its report of 27 September 2019, the Advisory Board set out the definition of harassment quoted above. In relation to some of the complainant's allegations of harassment after 8 February 2019, it said:

“[The complainant] describes some incidents as alleged acts of harassment by the Secretary General. Among them:

[...]

- ‘unlawful suspension’

[The complainant] already challenged the Secretary General's decision on suspension before the Advisory Board. In its report issued on 19 August 2019, the Advisory Board concluded that the Secretary General took his decision on suspension in accordance with existing Staff Regulations and Rules.”

This analysis fails to consider the alleged conduct by reference to the definition of harassment as argued by the complainant. One grievance of the complainant both at the time of the suspension and in her later harassment complaint of 30 August 2019 was that the Secretary-General had informed all staff of her suspension on 7 June 2019. She alleged that informing staff was unlawful and malicious. She then contended that after the Secretary-General became aware that she had not provided Mr S. with a copy of the Report (an important element in his initial decision to suspend), he communicated with staff saying that “[t]he leaked [R]eport [was] authored by the [complainant]” and that this involved (to use the language of the complainant’s claim of 30 August 2019) circulating “ambiguous and unproven allegations about [her] in this manner [and] the Secretary General was deliberately seeking to harm [her] reputation to all staff”. This was an argument of substance which should have been addressed by the Advisory Board. It could have been harassment had the Board concluded, as it may well have, it involved conduct on the part of the Secretary-General which had the effect of creating a humiliating work environment, was perceived by the complainant to be offensive and her perception was reasonable.

16. The forgoing analysis concerns but a small part of the conduct of the Secretary-General which was alleged to be harassment. But the failure of the Advisory Board (whose conclusions were adopted by the Secretary-General in making the impugned decision) to consider properly the conduct by reference to the definition appears to permeate much of its reasoning on other allegations of harassment made by the complainant. The complainant’s pleas under the first heading are founded and that is sufficient to set aside the impugned decision without considering the pleas under the other headings.

17. Accordingly, the impugned decision should be set aside. Given the effluxion of time and the fact that the complainant no longer works for the organisation and would no longer need protection from any harassment (see, for example, Judgment 4286, consideration 19), it is not appropriate to remit the matter to the organisation to reconsider the complainant’s harassment grievance. In any event, she does not seek

such an order. As the moral injury is evident from the circumstances of the case, the complainant is entitled to moral damages (see Judgment 4541, consideration 11) which the Tribunal assesses in the sum of 10,000 euros.

18. The failure to properly consider the complainant's harassment claim did not cause her material damage. It is true that she claims material damages on the footing that the Secretary-General's conduct, including his alleged harassing conduct, caused a material deterioration in her health and particularly her mental health which has had an incapacitating effect on her ability to work. She claims 563,175.37 euros. She also claims damages in the sum of 288,000 euros for harm to her reputation. The difficulties with these submissions are threefold. Firstly, there have been no findings of fact establishing harassment. It is not for the Tribunal to undertake that task (see Judgment 4291, consideration 12). Secondly, while there is some medical evidence which speaks of the complainant's illness resulting from harassment, it is medical evidence which is comparatively superficial and does not establish a sufficiently firm nexus between the complainant's ill health and its incapacitating effect, and the alleged harassing conduct, even if it was proved. Thirdly, there is no persuasive evidence of reputational damage supporting her assertion there was. The claim for material damages is rejected.

19. The complainant is entitled to 8,000 euros costs.

DECISION

For the above reasons,

1. The impugned decision of 27 September 2019 is set aside.
2. The Energy Charter Conference shall pay the complainant 10,000 euros as moral damages.
3. The Energy Charter Conference shall pay the complainant 8,000 euros costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 24 October 2022, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, 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

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ