

S. (No. 3)

v.

Energy Charter Conference

135th Session

Judgment No. 4617

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms Y. S. against the Energy Charter Conference (ECC, hereinafter “the organisation”) on 28 April 2020, the organisation’s reply of 13 July 2020, the complainant’s rejoinder of 22 September 2020, the organisation’s surrejoinder of 27 November 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 to reject her claim of harassment dated 6 December 2019 or, otherwise, the implicit confirmation, on 29 January 2020, of the decision to reject her 6 December 2019 claim.

Some of the background facts to the present complaint are to be found in Judgments 4615 and 4616, also delivered in public this day.

Suffice it to recall that on 13 May 2019, after being issued with a written reprimand by the Secretary-General for creating an inappropriate work environment and harassing Mr A., one of her subordinates, the

complainant sent an email to several staff members, including Mr A. and Mr T., previously Chair of the Staff Committee, in which she accused them of continuously discrediting and intimidating her in her role as Chair of the Staff Committee (“group harassment claim”). The next day, on 14 May 2019, the complainant and Ms N., in their respective capacities as Chair and A-grade staff representative to the Staff Committee, sent to staff an external note stating that the election of the B/C-grade staff representative had been sabotaged by an intimidation campaign against the 2019 Staff Committee led by Mr T. On 5 June 2019 a new Staff Committee was elected which, in a communication of 6 June, stated that the external note of 14 May 2019 was not representative of staff opinion and was sent without prior consultation with staff. Between 19 May and 12 June 2019, the complainant sent emails to several staff members accusing them of harassment and, on 21 June 2019, she formally lodged with the Advisory Board five harassment complaints against the staff members she had previously accused of harassment, including the Secretary-General, Mr A. and Mr T. These harassment complaints were dealt with jointly (“group harassment complaint”) and eventually dismissed by the Advisory Board in July 2019 for lack of evidence and as “non receptive under the applicable rules”.

In the meantime, on 21 May 2019, Mr T. filed a harassment complaint against the complainant. In its report of 13 June 2019, the Advisory Board considered the complainant’s actions in the incidents described by Mr T. to be in breach of the code of conduct for international civil servants and advised the Secretary-General to terminate her appointment. On 17 June 2019 the Secretary-General informed the complainant of his decision to terminate her appointment with immediate effect, under Regulation 13a)i). The complainant contested this decision with the Advisory Board which, in its report of 19 August 2019, advised the Secretary-General to maintain it. On 4 September 2019 the Secretary-General informed the complainant that his decision to terminate her appointment stood. The complainant impugned this decision in her first complaint to the Tribunal.

Some three months later, on 6 December 2019, the complainant wrote to the Secretary-General to inform him that she was lodging, under Regulation 25-bis of the Staff Manual, a complaint against him for continuation of harassment on the basis that documents shared with delegates from all Contracting Parties in November 2019 contained statements aimed at tarnishing her professional reputation. Those documents were a draft international audit report and two messages from the Secretariat stating that she had created a negative working environment (messages 1608 and 1610). In an email of 13 December 2019, the Secretary-General rejected the complainant's harassment allegations, noting that her letter could not be considered a harassment complaint and, if she wished to lodge one, she should follow the proper procedure. The Secretary-General added that the documents relied upon by the complainant were restricted and confidential and the complainant had not explained how she had obtained copies of them. On 16 December 2019 the complainant lodged, under Regulation 25-bis d), a harassment complaint with the Advisory Board against the Secretary-General. By an email of 24 December 2019, the Chairman of the Advisory Board informed her that there was no evidence that the alleged harassment towards her by the Secretary-General continued and therefore the Advisory Board had decided to reject her harassment claim on a *prima facie* basis. On 8 January 2020 the complainant wrote to the Secretary-General requesting him to indicate whether he endorsed the Advisory Board's opinion on her harassment claim and whether this was his final decision. Her request remained unanswered. On 28 April 2020 the complainant filed the present complaint with the Tribunal (her third) impugning the implied rejection of her claim notified to the Secretary-General on 8 January 2020.

The complainant asks the Tribunal to set aside the Secretary-General's decision of 13 December 2019 rejecting her harassment claim of 6 December 2019. She also asks the Tribunal, if necessary, to set aside the confirmation, dated 29 January 2020, of the Secretary-General's decision to reject her 6 December 2019 harassment claim as well as the Advisory Board's report of 24 December 2019. 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 damage to her health. She

also claims 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. In her third complaint, filed with the Tribunal on 28 April 2020, the complainant requests the annulment of:

- (i) the Secretary-General's 13 December 2019 decision which rejected her claim of ongoing harassment against the Secretary-General, submitted on 6 December 2019;
- (ii) the opinion expressed by the Advisory Board on 24 December 2019 regarding her formal harassment complaint against the Secretary-General, lodged on 16 December 2019;
- (iii) the Secretary-General's implied decision rejecting her request of 8 January 2020, by which she asked the Secretary-General whether he endorsed the Advisory Board's opinion of 24 December 2019.

She also requests compensation for moral prejudice in the amount of 80,000 euros and the reimbursement of costs.

2. The complainant advances several pleas alleging procedural and substantive violations that 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 the duty to state reason[s]";
- c) "Manifest error of appreciation – The [complainant] was indeed harassed";
- d) "Abuse of power";
- e) "Violation of Rule 4.3(b) [of the Staff Manual] – Violation of the rights of the Staff Committee and of the [complainant] as Chair of the Staff Committee";

f) “Violation of the principle of good administration and of the duty of care – Denial of justice”.

3. In her rejoinder and further written submissions, the complainant reiterates the same submissions contained in her complaint and asks for the disclosure of a significant number of documents that she had already requested from the defendant organisation.

4. The organisation raises a threshold issue alleging that the complaint is receivable only to the extent that it impugns the decision on the harassment complaint lodged on 16 December 2019, whilst it is irreceivable in the part aimed at contesting the decision on the complainant’s harassment complaint lodged on 21 June 2019.

The complainant replies in her rejoinder that in her harassment complaint of 16 December 2019 she reported being the victim of “continuing” harassment and therefore asked the Advisory Board to also investigate her 21 June 2019 harassment complaint. She adds that according to Regulation 25-bis e), the time limit for reporting harassment is six months as of the occurrence of the alleged harassment, therefore her report on 16 December 2019 was timely even for episodes that occurred prior to December 2019.

5. There is no need to deal with the receivability issue raised by the organisation, as the complaint is unfounded on the merits.

6. The request for disclosure of documents, listed in the complainant’s rejoinder, shall be dismissed. The Tribunal observes that this request constitutes an impermissible “fishing expedition”. It is aimed at obtaining documents related to issues that are either irrelevant (since the Tribunal has already been provided with all the official documents of the relevant harassment procedure), or outside the scope of the present complaint (for example, the full report of the hiring committee and an email sent by the Secretariat to the International Energy Agency).

7. In her pleas, the complainant refers to the annexes to her complaint and to testimonies nos. 1, 2, 3, and 4. The Tribunal notes that there is only one testimony in the annexes, that of Mr D. The Tribunal presumes that the complainant's reference to "[nos.] 1, 2, 3, and 4" has to be interpreted as indicating the four paragraphs of Mr D.'s testimony.

8. 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 organisation.

As to the composition and role of the Advisory Board, the relevant parts of Regulation 25 state 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.”

9. 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; she provides the Tribunal with the written testimony of Mr D. expressing an evaluation concerning the Presidency of Mr P.;
- (ii) as shown in the audit report produced 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 Advisory Board's independence;
- (iii) 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;
- (iv) 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]"; she reports further circumstances related with the tasks assigned to Ms C. and Ms Nos. that, in her view, undermined their independence;
- (v) 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, as her contract was not terminated when she lost the citizenship requirement; the complainant provides the Tribunal with a written statement of Mr D. aimed at explaining the reasons of loyalty of Ms Nov. towards the Secretary-General.

The complainant fails to provide evidence of her allegations against the members 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 documents 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, as 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 to be irrelevant; moreover, this latter allegation has not been proven.

As to the assertion that Mr P. participated in events organized by Mr T. (who had lodged a formal complaint of harassment against the complainant), the complainant does not provide documentary evidence. 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 friendship relationship between Mr P. and Mr T.

The Tribunal deems irrelevant the written testimony of Mr D. produced by the complainant. On the one hand, Mr D. was an official of the organisation from 2010 to 2016, therefore he cannot be a direct witness of events that occurred long after he left. On the other hand, Mr D. does not report facts but only his personal assessment of the independence of Mr P.

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 public 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”.

As to the contention that two members of the Advisory Board, namely Ms C. and Ms d.M., were involved in the group harassment claim lodged by the complainant, the Tribunal notes that the group harassment claim was 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.]”. The alleged circumstances, related to the tasks assigned to Ms C. and Ms Nos. that would undermine their independence, are not supported by persuasive evidence.

On the other hand, the alleged “sabotage” of the election remains unproven and the conduct described by the complainant appears rather 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.

The Tribunal deems irrelevant the written testimony of Mr D. concerning Ms Nov., produced by the complainant, for the reasons already explained above with regard to Mr D.’s testimony concerning Mr P.

10. By her second plea, mentioned in consideration 2, point (b), above, under the heading “Violation of the duty to state reason[s]”, the complainant submits that, on the one hand, the decision taken by the Secretary-General on the basis of the Advisory Board’s recommendation fails to give reasons and, on the other hand, the Advisory Board has only the power to issue advice and not final decisions.

This plea is misguided. There is no express decision of the Secretary-General. The complainant has indeed impugned what she considered to be the Secretary-General’s implied decision to endorse the Advisory Board’s conclusions. Clearly, an implied decision does not contain reasons.

11. By her third and fourth pleas mentioned in consideration 2, points (c) and (d), above, under the headings “Manifest error of appreciation – The [complainant] was indeed harassed” and “Abuse of power”, the complainant claims that she was the victim of harassment within the organisation, whilst she was employed and even after she left, through a “strategy” based on “four steps”.

She refers to the five harassment claims that she sent to the alleged harassers before seizing the Advisory Board with a formal group harassment complaint on 21 June 2019.

The plea is unfounded with regard to the Advisory Board's finding on her complaint of group harassment. 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 "EU [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.

The Tribunal notes that the Advisory Board's finding that the complainant was not the victim of group harassment is reasonable in the circumstances of the case and deserves deference, as the complainant did not present to the Advisory Board persuasive reasons and elements to be investigated. The initial accusation of her having a conflict of interest due to external functions and activities was not proven to be unsubstantiated. The harassment complaints lodged against her by Mr A. and Mr T. have been proven to be substantiated and the Advisory Board's findings were judged lawful by the Tribunal in Judgments 4615 and 4616, also delivered in public this day. There is no evidence that the staff representatives' election was sabotaged to the detriment of the

complainant, nor is there evidence of intimidating acts towards the B/C-grade officials.

In addition, her convictions and conclusions on climate change and fossil fuels, and Ms N.'s report of 1 June 2019, were elements that could be relevant in the present case only if it were demonstrated that they were taken into account in the decision to dismiss her harassment complaint lodged on 16 December 2019. On the contrary, there is no express trace of these elements in the decision that is the subject matter of the present complaint nor any indication of a "hidden strategy" against the complainant. The complainant fails to demonstrate that a link existed among the "four steps" and that the alleged elements outlined above were all part of a strategy aimed at getting rid of her.

12. The complainant makes further reference to two events that occurred after she left the organisation and which are the subject matter of her harassment complaint lodged with the Advisory Board on 16 December 2019. For this purpose, she notes:

- (i) "message 1608", which contains "the comments inserted by the Secretariat in the draft report of the international public audit which was conducted in October 2019 and completed on 5 November 2019 [...]. According to these comments, the [complainant] would have created or participated [in] the *'far under par and unsustainable'* working atmosphere within the [o]rganization and her departure from the [o]rganization would have apparently allowed the Secretariat to retrieve a positive working environment. [The Secretary-General] also breached data protection rules by mentioning her initials in his reply";
- (ii) "message 1610" related to her appeal about the unlawful termination of her contract which indicates that she would have created a "negative work environment (as confirmed by the Advisory Board)".

The plea is unfounded.

The first "message" is a comment of the Secretariat inserted in the draft of the audit report. An international audit took place in the organisation in October 2019, following which the auditors, before issuing the final report, requested the Secretariat to provide comments

on the draft report. The comment regarding the working atmosphere being impacted by the complainant's presence in the workplace referred to the complainant only by the initials "YS" and was not specifically attributable to the Secretary-General but to the Secretariat as a whole. Moreover, it was not included in the final version of the report. The draft report was a confidential document not available to the public. Considering the nature of the document (a confidential draft) and its content, the comment cannot amount to harassment.

The second "message" was sent by the organisation on 8 November 2019 to the delegates of the Member States of the Conference in order to inform them of the complainant's complaint pending before the Tribunal and concerning the termination of her contract (the complainant's first complaint). The message reads as follows: "A former official whose contract was terminated in June 2019 for creating a negative work environment (as confirmed by the Advisory Board) has introduced a case before the [Tribunal] against the decision to terminate her contract. Another three official restricted documents were leaked and provided to the [complainant]."

The context of this "message" is a report from the Secretariat to the delegates of the Member States, which only refers to "facts" (about the pending complaint and the leaking of redacted documents) and does not even name the complainant. There is no hint or indication of harassment.

13. By her fifth plea, mentioned in consideration 2, point (e), above, under the heading "Violation of Rule 4.3(b) [of the Staff Manual] – Violation of the rights of the Staff Committee and of the [complainant] as Chair of the Staff Committee", the complainant alleges that the election of the B/C-grade staff representative, organized by the Staff Committee chaired by the complainant, was sabotaged. In support of these assertions, she relies on "testimony 1, 2, 3". She further complains that, despite having lodged a group harassment claim on 13 May 2019, no action was taken by the organisation. These pleas are unfounded for the reasons stated in consideration 11, above.

14. By her sixth plea, mentioned in consideration 2, point (f), above, under the heading “Violation of the principle of good administration and of the duty of care – Denial of justice”, the complainant submits that her five harassment grievances were not investigated and finalized.

This plea fails because the Advisory Board actually examined the complainant’s grievances and concluded that they were unfounded.

15. Since the complainant’s pleas are all unfounded, the complaint will be dismissed in its entirety.

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