J. (No. 3)

v.

IOM

138th Session **Judgment No. 4839**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms J. J. against the International Organization for Migration (IOM) on 13 May 2021 and corrected on 28 May and 4 June, IOM's reply of 6 September 2021 and the complainant's rejoinder of 10 December 2021, IOM having chosen not to file a surrejoinder;

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 impugns the decision to reject her sexual harassment claim.

Facts relevant to the present case are to be found in Judgments 3948 and 4211, respectively arising from the complainant's first and second complaints to the Tribunal.

In her first complaint to the Tribunal, the complainant impugned the decision not to renew her fixed-term contract. In Judgment 3948, delivered in public on 18 November 2016, the Tribunal set aside the impugned decision and awarded her 50,000 United States dollars in material damages, 30,000 dollars in moral damages, and 6,000 dollars in costs.

In her second complaint to the Tribunal, the complainant impugned the implied rejection of her claims of moral and sexual harassment, and abuse of authority. In Judgment 4211, delivered in public on 10 February 2020, the Tribunal remitted the matter to IOM to take such steps as were necessary to reach a motivated express final decision in relation to the complainant's claims of harassment and abuse of authority within 30 days from the date of the public delivery of that judgment. The Tribunal awarded the complainant 20,000 euros in moral damages for IOM's failure to make a final decision on those claims and it also awarded her 7,000 euros in costs.

On 27 February 2020, in execution of Judgment 4211, IOM paid the complainant the damages ordered by the Tribunal in that judgment. Following an unsuccessful attempt to settle the matter, the Deputy Director General informed the complainant, by a letter of 11 March 2020, that he had decided to reject all her harassment and abuse of authority claims. The Deputy Director General pointed out that all the complainant's allegations had been investigated and that the complainant, along with eight witnesses, including the subject of the allegations, the then IOM's Chief of Mission in Peru, had been duly interviewed. Referring to the conclusions in paragraphs 88 to 90 of the report of the Office of the Inspector General (OIG), namely that the complainant's allegations against the Chief of Mission remained unsubstantiated due to reasonable doubt, the Deputy Director General took the view that these conclusions were well founded and that there was no element in the investigation report which would dictate not to act accordingly.

On 8 May 2020, the complainant submitted a request for review of the 11 March decision. She asserted, inter alia, that the fact she had been sexually assaulted by the Chief of Mission was proven by the preponderance of evidence (the applicable standard of proof) and she offered to provide the Administration with relevant medical records to show she had been treated for the trauma related to the sexual assault she had experienced. She also asserted that the investigation report ignored critical evidence; in particular, the interview transcript (record of interview) of Mr E., her supervisor at the time of the events giving rise to the complaint, did not accurately reflect his testimony, as it was

redacted and omitted substantial portions of his interview, a fact which pointed to some irregularity and breach of due process in the OIG investigation. The complainant requested 150,000 United States dollars in compensation for the abuse of authority, harassment and sexual assault she had suffered by the Chief of Mission, an order that he participate in anti-harassment training, and reimbursement of legal costs; alternatively, she requested a complete copy of the interview transcript (record of interview) of Mr E., along with its audio recording, and two other documents used in the OIG investigation.

By a letter of 6 July 2020, the Director, Human Resources Management (HRM), informed the complainant, in response to her request for review, that upon a "fresh review" of the available evidence the Administration had decided to set aside the 11 March 2020 decision, on the basis that the investigation report did not meet the required standard and any decision based thereon would necessarily be tainted; that it saw no useful purpose in reopening or recommencing the investigative process, given the time that had elapsed; that it had decided the evidence submitted to the Ethics and Conduct Office (ECO) and OIG was sufficient to allow the conclusion that the complainant's allegations of abuse of authority (relating to the non-renewal of her contract) and her allegations of workplace harassment (in the form of professional isolation) had been substantiated; that the same conclusion could not be reached in respect of her allegations of sexual harassment, which were unsupported by any material or other type of evidence, and had therefore not been substantiated; and that based on these findings, the Administration had decided to award her moral damages in the amount of 50,000 United States dollars.

On 5 August 2020, the complainant submitted an appeal with the Joint Administrative Review Board (JARB) against the 6 July 2020 decision, requesting material damages, moral damages, and costs; alternatively, she requested a recommendation that the investigation into her sexual harassment allegations be reopened and assigned to an external independent investigator, and she also requested moral damages for mishandling her complaint and costs.

The JARB reviewed the evidence considered by the Administration in its "fresh review" leading to the 6 July 2020 decision. In particular, it reviewed the complainant's 14 December 2015 testimony to ECO; the transcript of the complainant's 11 April 2016 interview with OIG; the summary and audio recording of Mr E.'s 21 April 2016 interview with OIG; and the Chief of Mission's 11 May 2016 interview with OIG. However, the JARB was not able to review the analysis and advice which was provided by the Office of Legal Affairs (LEG) to the Office of the Director General and which informed the 6 July 2020 decision, as its request for access to that information was denied on the basis that it was "privileged" information. The JARB held four meetings to review the complainant's case. In its report to the Director General, submitted in February 2021, it concluded that by disregarding critical evidence provided by Mr E. in his testimony and by refusing, without valid ground, to admit the additional evidence proposed by the complainant in her 8 May 2020 request for review, the Administration had breached due process. It further concluded that the evidence already available to the Administration in July 2020, when it rejected the complainant's sexual harassment claim, including relevant evidence in Mr E.'s testimony, was sufficient to prove the sexual harassment allegation on a balance of probabilities, which it identified as the applicable standard of proof. The JARB unanimously found that the standard of proof had been met and that the complainant's sexual harassment claim was substantiated. It thus recommended that the Director General grant the remedies requested by the complainant. Alternatively, in the event the Director General decided not to follow this course of action, the JARB recommended that the Administration invite the complainant to submit the additional evidence she had collected so that, if warranted, the investigation could be reopened.

By a letter of 5 March 2021, the Director General informed the complainant that he had decided to reject her appeal and all requests for redress, as he considered that his decision to close her case, on the basis that there was insufficient proof to substantiate her complaint of sexual harassment, was lawful and justified in the circumstances. He added that he did not consider that the additional information she had provided constituted grounds for the investigation to be reopened, as such course

of action would not be feasible given the time that had elapsed. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award her material and moral damages, costs, as well as any other relief it deems appropriate. She asks the Tribunal not to refer the matter back to IOM, as the passage of time and the flaws of the initial investigation preclude such course. Instead, she asks the Tribunal to review the JARB report and to confirm its findings and conclusions, including that she has proven she was sexually harassed, as per the definition contained in Instruction IN/90 "Policy for a Respectful Working Environment".

IOM asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. Facts relevant to the present case are to be found in Judgments 3948 and 4211, respectively arising from the complainant's first and second complaints to the Tribunal. In the present complaint, her third, the complainant impugns the 5 March 2021 decision, in which the Director General rejected the findings and conclusions of the Joint Administrative Review Board (JARB) and confirmed the decision to close her complaint of sexual harassment on the basis that there was insufficient proof to substantiate it. The decision also rejected all of the complainant's requests for redress.

2. In seeking to set aside the impugned decision, the complainant advances several grounds of challenge, one of which is decisive in the Tribunal's view. She submits that the Administration's argument that the review carried out by the Office of Legal Affairs (LEG) was "privileged and confidential" was contrary to due process.

3. IOM submits that it is not obliged to produce the documents pertaining to the review as prepared by LEG. According to IOM, these are confidential communications prepared for the purpose of providing

legal advice to the Director General and, as such, are protected by legal advice privilege.

4. It is useful to summarize IOM's legal framework for sexual harassment complaints, as well as the sequence of events in the present case.

5. IOM's policy on sexual harassment is contained in Instruction IN/90 of 22 August 2007, entitled "Policy for a Respectful Working Environment". Instruction IN/90 defines, in paragraph 7, sexual harassment as "any unwelcome sexual advance, request for sexual favours or other verbal or physical conduct of a sexual nature which is made a condition of employment or creates an intimidating environment through subtle repeated pressure for sexual activities". Instruction IN/90 also provides, in paragraph 2, that "IOM is committed to the principle that every staff member has a right to work in a respectful, harassment-free environment" and that "[a]ny form of harassment and abuse of authority in the workplace, or in connection with official duties, is prohibited".

Instruction IN/275, entitled "Reporting and Investigation of Misconduct Framework", provides, in Section 5, paragraph 18, for a two-phase investigative process: a preliminary assessment and an investigation. Section 4.2 provides, in paragraph 13, that "LEG will review all investigation reports and may request [the Office of the Inspector General (OIG)] or other offices for clarifications and additional investigative steps, fully respecting the independence of OIG" and, in paragraph 14, that "LEG will review all available evidence to determine whether the standard of proof has been met [...]".

6. IOM's legal framework does not specify the applicable standard of proof for a finding of harassment. Regarding this point, the Tribunal's case law states that, while the standard of proof required to impose disciplinary measures on an individual charged with misconduct is that of "beyond a reasonable doubt", the applicable standard of proof for a finding of harassment is a less onerous standard (see, for example,

Judgments 4663, consideration 12, 4289, consideration 10, and 4207, consideration 20).

7. In her 14 December 2015 response to the questions put to her by the Ethics and Conduct Office (ECO) as part of its preliminary assessment of her claim of workplace harassment and abuse of authority, the complainant mentioned for the first time that she had been sexually harassed by the Chief of Mission in late 2013. ECO submitted its preliminary assessment report to OIG on 26 January 2016. The report confirmed that there was *prima facie* evidence to initiate an investigation into the workplace harassment and abuse of authority allegations, and mentioned, in a footnote, the complainant's new allegation that she had also been sexually harassed, but did not examine the allegation any further. Following an investigation into the complainant's allegations of abuse of authority, workplace harassment, and sexual harassment, OIG issued a "Closure Report" on 15 November 2016. The report found that the complainant's allegations, including the sexual harassment allegation, had not been proven beyond a reasonable doubt. On 18 November 2016, OIG informed the complainant of its conclusions that her allegations were found to be unsubstantiated and that it therefore considered the case closed. The complainant requested a copy of the report but the Administration rejected her request on confidentiality grounds. Only later, in September 2017, the Administration shared the report with the complainant for her comments. On 20 October 2017, the complainant filed her second complaint with the Tribunal against the implied rejection of her claims of abuse of authority, workplace harassment and sexual harassment. On 10 February 2020, the Tribunal delivered Judgment 4211, ordering IOM to take a final decision on the complainant's claims by 11 March 2020. On 11 March 2020, the Deputy Director General informed the complainant that her claims of abuse of authority and harassment, including sexual harassment, had been rejected based on the conclusions of the OIG Closure Report. On 8 May 2020, the complainant requested a review of the Deputy Director General's 11 March 2020 decision, to which the Administration replied in a letter, dated 6 July 2020, informing the complainant that after "a fresh review of [her] claims and all available evidence", it was found

that the OIG Closure Report "[did] not meet the required standard, and that any decision based thereon would necessarily be tainted". As a result, the 11 March 2020 decision was set aside. The letter confirmed that the Administration's decision to reject the complainant's sexual harassment claim would remain unchanged, as it was "found that this allegation [had] not been supported by sufficient evidence, and [had] therefore not been substantiated". On 5 August 2020, the complainant appealed to the JARB the Administration's 6 July 2020 decision to reject her sexual harassment claim.

8. The JARB examined the evidence that had been considered in the "fresh review", including: (1) the complainant's 14 December 2015 testimony to ECO; (2) the transcript of the complainant's 11 April 2016 interview with OIG; (3) the summary and audio recording of Mr E.'s 21 April 2016 interview with OIG; and (4) the record of the Chief of Mission's 11 May 2016 interview with OIG. In its report, the JARB noted:

> "The Administration was not able to provide the JARB with any report of the 'fresh review' which informed the impugned decision. In their response to the JARB's request for documentation and email correspondence related to the 'fresh review', the Administration referred the JARB to the Statement of the Administration for their 'position on the fresh review of the [complainant]'s claims'. In the same email dated 5 November 2020, the Administration also denied the JARB's access to the legal analysis and advice provided by IOM's [LEG] to the Office of the Director General, which they considered 'privileged information which cannot be communicated to the JARB'. The JARB therefore relied on the analysis of the evidence included in the reply to the [request for review] and the Statement of the Administration."

The JARB concluded that the Administration had breached due process by refusing, without a valid ground, to admit the additional evidence proposed by the complainant in her request for review, including medical records, and by disregarding critical evidence provided by Mr E. in his testimony. The JARB considered that, in line with Instruction IN/275, the Administration should have reviewed the additional evidence that the complainant was ready to submit and, if warranted, it should have reopened the case. Regardless of any new

evidence, the JARB found that the evidence which was available to the Administration when it rejected the complainant's sexual harassment claim in July 2020 was sufficient to prove the sexual harassment allegation on a balance of probabilities, which was the required standard of proof in that case.

9. As regards the complainant's allegation of a breach of due process resulting from the non-disclosure of LEG's legal analysis, mentioned in consideration 2 above, it is the Tribunal's well-settled case law that a staff member must, as a general rule, have access to all the evidence on which an authority bases (or intends to base) a decision that adversely affects her or him (see Judgments 4663, consideration 6, 4471, consideration 14, and 4217, consideration 4). Under normal circumstances, such evidence cannot be withheld on grounds of confidentiality unless there is some special case in which a higher interest stands in the way of the disclosure of certain documents. But such disclosure may not be refused merely in order to strengthen the position of the Administration or one of its officers (see, for example, Judgments 3755, consideration 10, 3688, consideration 29, and the case law cited therein).

10. The Tribunal firstly notes that the "fresh review" of the relevant evidence was carried out by LEG, which was authorized to do so in accordance with paragraph 13 of Section 4.2 of Instruction IN/275. In its reply, IOM indicates that LEG reviewed all available evidence in order to remedy OIG's errors in applying the "beyond a reasonable doubt" standard of proof in its investigation and to counsel the Director General on the final determination to be made on the alleged sexual harassment. In light of the above, LEG's legal analysis was not a mere legal advice to the Director General, but an important document that was foundational to the 6 July 2020 decision, consistent with Section 4.2 of Instruction IN/275 (see, for example, Judgment 4745, consideration 3). The Tribunal accepts that, ordinarily, communications between an organisation and its legal advisers should be considered as privileged information, not subject to disclosure, by analogy to the communications between the parties and their counsels. However, it

cannot be so where, as in the present case, these communications are conceived by the applicable rules as a formal step in an administrative process (see Instruction IN/275, in particular, paragraphs 13, 14, 23, 49 and 58). In accordance with the Tribunal's case law cited in consideration 9 above, it was incumbent upon IOM to disclose LEG's legal analysis to the complainant, when she requested it during the internal appeal proceedings, and to the JARB for its informed opinion. This was essential to ensure that the complainant had a fair opportunity to understand the basis for the decision affecting her and that the JARB was able to fulfil its role. The Tribunal finds that IOM was wrong not to disclose LEG's legal analysis to the complainant and the JARB. By failing to do so, IOM violated the complainant's right to due process. This flaw radically vitiated the impugned decision, which will be set aside on this basis, without it being necessary to address the complainant's other pleas.

11. Where the investigation into a harassment complaint is found to be flawed, the Tribunal will ordinarily remit the matter to the organisation concerned so that a new investigation can be conducted (see, for example, Judgment 4313, consideration 8). However, the complainant asks the Tribunal not to refer the matter back to IOM, but to award her material and moral damages. In view of this and the time that has elapsed, the Tribunal considers it inappropriate to refer the case back to IOM. Although in some specific situations the Tribunal may determine whether the harassment occurred (see, for example, Judgments 4241, consideration 15, and 4207, consideration 21), in the present case, the Tribunal is not in a position to determine whether the complainant's complaint of sexual harassment is well founded, as neither the parties' written submissions nor the evidence presented before it allow it to do so.

12. In the absence of a finding of sexual harassment, all of the complainant's claims related to such harassment, including the claim for material damages, will be rejected. However, in compensation for the violation of her right to due process, the complainant is entitled to an award of moral damages which, in the circumstances of this case, the Tribunal assesses in the amount of 5,000 euros.

13. The complainant is entitled to costs in the amount of 10,000 euros.

DECISION

For the above reasons,

1. The Director General's 5 March 2021 decision is set aside.
2. IOM shall pay the complainant moral damages in the amount of 5,000 euros.
3. IOM shall pay the complainant costs in the amount of 10,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 3 May 2024, Mr Patrick Frydman, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER