Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

M. (No. 2)

v.

UNESCO

138th Session **Judgment No. 4884**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms S. M. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 2 June 2022, UNESCO's reply of 26 September 2022, the complainant's rejoinder of 28 October 2022 and UNESCO's surrejoinder of 30 January 2023;

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 close her harassment complaint following an investigation.

The complainant joined UNESCO on 20 December 2010 as a security officer assigned to the Security Unit within the Security and Safety Section, at grade G-3, under a two-year fixed-term appointment that was renewed several times.

On 30 April 2018 she submitted two formal harassment complaints to the Director-General, the first directed against the Assistant Chief of the Security and Safety Section, Mr M., and the second against the Chief of Section himself, Mr D. The first complaint is the subject of Judgment 4883, also delivered in public this day. Regarding the second

complaint – to which the present dispute relates – the complainant referred to an incident that took place on 11 April 2018. During a meeting she had attended on that day in Mr D.'s office – which had taken place at his express request and during which she informed him that the "atmosphere of constant harassment, humiliation and disrespect"[*] created by Mr M. had to stop – she was, in her words, subjected to both verbal and physical aggression that constituted, in her view, harassment by Mr D. On the afternoon of the same day, the complainant, after contacting the Ethics Office, was placed on sick leave until 13 April by UNESCO's Chief Medical Officer. In the end, she remained on leave until 23 July 2018, following successive periods of sick leave prescribed by her treating doctor.

In compliance with the provisions of Item 18.2 of the Human Resources Manual concerning the anti-harassment policy, a member of the Ethics Office talked to the complainant by telephone on 7 May 2018. On 16 May the Ethics Adviser, Ms T., asked Mr D. to respond to the allegations directed against him, which he did on 29 May, denying any brusque physical contact or aggression in respect of the complainant and explaining that he had been concerned by her state of agitation and tried to convince her to go to the Organization's Medical Service. On 6 June Ms T. recommended to the Director-General that an investigation be opened, which she agreed to do on 18 June by instructing the Internal Oversight Service (IOS) to carry out that investigation.

On 11 July 2018 the complainant contacted the Ethics Office to find out whether, in compliance with paragraph 38 of aforementioned Item 18.2, interim measures had been taken by the Director-General while her harassment complaint was being examined.

On 24 July 2018 the complainant – who was on sick leave – was placed, with her agreement, on special leave with pay pending the end of the IOS investigation. This leave was subsequently extended several times.

[*] Registry's translation.

In its report, finalised in October 2018, IOS concluded that Mr D. had not engaged in physical or verbal aggression, and did not find that the incident on 11 April had constituted harassment. Nevertheless, it noted that this incident reflected a "work environment conducive to interpersonal tensions"* and, referring to the Organization's duty of care towards its staff members, stated that the complainant's suffering should not be ignored. In this regard, it recommended that the Bureau of Human Resources Management (HRM) "take administrative action to resolve the relationship problems within the [S]ecurity [and Safety Section] and take account of [the complainant's] situation"*. On 21 November the acting Ethics Adviser recommended to the Director-General that she close the case.

On 26 November 2018 the Director of HRM informed the complainant that, after examining the investigation report and the aforementioned recommendation, the Director-General considered that her allegations of aggression and harassment were insufficiently established and that the case was therefore closed. Nevertheless, the Director considered it necessary to assign her to another post "either permanently or temporarily, while a peaceful work environment [was] restored within the Security [and Safety Section]"*. Pending the implementation of that reassignment decision, her special leave was extended until 24 December 2018. The same day, Mr D. was informed that the Director-General had decided to close the complainant's complaint, that she considered that the Section was suffering from a work environment conducive to interpersonal tensions and that HRM would soon contact him to suggest coaching to help him restore a harmonious work atmosphere.

Also on 26 November 2018 the complainant submitted a protest to the Director-General directed against the decision to close her harassment complaint, then on 27 December she filed a notice of appeal. As her protest went unanswered, on 19 April 2019 she submitted a detailed appeal to the Appeals Board, in which she sought the setting aside of the decision of 26 November 2018, an award of

* Registry's translation.

56,000 euros in compensation for the material and moral injury she considered she had suffered and the reimbursement of costs in the amount of 5,000 euros.

On 14 January 2019 the complainant was reassigned to the grade G-3 post of mail clerk in the Mail Service for a period of seven months, despite her disagreement.

On 31 July 2019 Mr D. left UNESCO.

On 21 October 2019, in response to a request from the complainant to that effect, the new Director of HRM sent her the IOS investigation report – in a redacted version – to which the recommendation issued in the preliminary assessment procedure was appended. On 26 November 2019 the complainant lodged further submissions with the Appeals Board, in which she listed extracts from the report that she considered unfavourable to Mr D.

On 1 January 2020, while the internal appeal procedure was underway, the complainant was reassigned to the post of assistant in the Interpretation Unit of the Conferences and Cultural Events Management Section of the Division of Conferences, Languages and Documents in the Sector for Administration and Management. On 16 February 2022 her post was reclassified at G-4 with retroactive effect from 1 July 2021.

In its opinion of 2 December 2021 – delivered after hearing the parties and granting their various requests for extension of time limits – the Appeals Board recommended that the appeal be dismissed but that the complainant be awarded the sum of 2,000 euros in compensation for the injury arising from the belated disclosure of the IOS investigation report, which the complainant had been unable to consult until the stage of the appeals procedure.

By a letter of 9 March 2022, the complainant was notified of the Director-General's decision to accept the Appeals Board's recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. She also seeks recognition of the "torment" inflicted by the Administration over many months in respect of her professional future, and of the excessive delay in dealing with her internal appeal. Lastly,

she claims compensation in the amount of 56,000 euros for the material and moral injury and the "temporary functional impairment" that she submits she has suffered, less the 2,000 euros already paid.

UNESCO considers that the complainant's claims regarding her placement on sick leave and on special leave with pay – namely, her request for compensation for what she describes as a "temporary functional impairment" – are irreceivable for failure to exhaust the internal means of redress since, in her internal appeal, she only contested the decision of 26 November 2018. It asks the Tribunal to dismiss the complaint as partly irreceivable for that reason and as entirely unfounded in the remainder.

CONSIDERATIONS

1. In addition to compensation for all the material and moral injury she alleges she has suffered owing to UNESCO's attitude towards her, the complainant seeks the setting aside of the Director-General's decision of 9 March 2022 confirming her previous decision of 26 November 2018 that rejected her harassment complaint against Mr D., Chief of the Security and Safety Section. She also asks the Tribunal to recognise, firstly, the violence, verbal and physical, to which Mr D. subjected her during the incident of 11 April 2018 and, secondly, the excessive delay in dealing with her internal appeal.

2. In her rejoinder, the complainant clarifies that, contrary to what the Organization submits, her complaint is "exclusively"[*] directed against the Director-General's aforementioned decision of 9 March 2022 and, subsidiarily, against the initial decision of 26 November 2018, not against the decisions taken during the procedure for assessing her harassment complaint and that relate to her placement on sick leave, her placement on special leave with pay or her reassignments to other posts.

[*] Registry's translation.

The Tribunal will therefore examine the complaint having regard to the scope thus limited by the complainant, which has the effect of rendering the Organization's objection to receivability irrelevant.

3. In the present case, the facts giving rise to the complainant's harassment complaint can, according to her submissions, be summarised as follows:

– during a discussion with Mr D. at the guard post at around 9 o'clock in the morning on 11 April 2018, she told him, in response to a question that he had asked, that she was not doing well on account of the "sexist comments, insults, humiliation, harassment and threats"[*] to which Mr D.'s new Assistant Chief (Mr M.) had subjected her since his arrival in the Security and Safety Section in December 2017;

– she next went to Mr D.'s office, on his orders;

– she arrived in a state of even greater agitation because she had in the meantime received a threatening letter from Mr M., rebuking her behaviour towards him;

– she then explained to Mr D. that she could no longer work in the climate of "constant harassment, humiliation and disrespect"[*] created by Mr M., to which Mr D. replied that she seemed to be somewhat exaggerating the situation and that he would not, in any event, intervene to contradict the decisions taken by his Assistant Chief;

– she then began to cry;

– he then grabbed her arm, shook her, asked her to stop crying and told her that she was suffering from paranoia;

– she decided to leave the office, despite the Chief of Section's orders to remain, and went down the corridor towards the office of Ms M., Mr D.'s Deputy Chief with responsibility for field security coordination;

[*] Registry's translation.

– Mr D. followed her in the corridor and again grabbed her arm to prevent her from entering Ms M.'s office;
– she freed herself and succeeded in entering the office, where Ms M. and a driver were present;
– Ms M. then placed herself between Mr D. and the complainant and asked him to treat the latter with respect, to stop harassing her and not to try entering her office by force;
– despite that, Mr D. continued to try to enter the office by blocking the door with his foot;
– Ms M. then managed to lock the door from the inside and Mr D. subsequently returned to a meeting in another room.

During his interview with IOS, Mr D. emphasised the complainant's state of extreme anxiety on 11 April 2018 and largely minimised all the criticisms that had been made of him, essentially blaming what he considered to be an attitude that was fundamentally "paternalistic"[*], even if it could appear somewhat inept on his part.

4. The Tribunal notes first of all that, as the parties acknowledge, the procedure for examining the complainant's harassment complaint was set out in paragraphs 27 to 43 of Item 18.2 of the Human Resources Manual, concerning the anti-harassment policy, in their version in force at the material time. That procedure can be briefly described as follows: if a formal harassment complaint was submitted to the Director-General, the Ethics Adviser was to take immediate steps to conduct a preliminary assessment of that complaint. That assessment was to include, inter alia, an interview with the complainant to clarify the allegations, ensure that the complaint bore on harassment-related events, make sure that all the available evidence was submitted and consider the possibility of informal resolution. If the case was to be pursued, the alleged harasser was to be given some time to respond to the allegations and provide countervailing evidence. On the basis of the content of the complaint, any such response and the evidence produced, the Ethics Adviser was to evaluate whether there was "*prima facie*

[*] Registry's translation.

evidence of harassment" and, if so, she was to advise the Director-General to refer the case for investigation to the IOS. The designated investigator(s) was/were to document the situation accurately and thoroughly and to produce a confidential report that the Director of IOS was to submit to the Director-General, with a copy to the Ethics Adviser and the Director of HRM. Upon receipt of the investigation report, the Ethics Adviser was to recommend to the Director-General the next course of action. If the facts appeared to indicate that no harassment had occurred, the Director-General was to decide to close the case; otherwise, she could decide to pursue the case in accordance with the disciplinary procedure set out in Item 11.3 of the Human Resources Manual. The Director of HRM was then to notify the final decision to the complainant and the alleged harasser, along with a copy of the confidential investigation report, except where the obligation of confidentiality overrode the interests of the parties in having the investigation report.

The Tribunal observes in this respect that in the present case the procedure thus described was correctly followed by the Organization, even though it is regrettable – as the Director-General acknowledged concerning the delay in sending the IOS investigation report to the complainant – that some time limits in the procedure for examining the complaint were not strictly observed. Reference is made in this regard to considerations 9 to 11 below.

5. The Tribunal recalls its settled case law that the question whether harassment occurred must be determined in the light of a careful examination of all the objective circumstances surrounding the acts complained of (see, in particular, Judgment 4471, consideration 18) and that an allegation of harassment must be borne out by specific facts, the burden of proof being on the person who pleads it, but there is no need to prove that the accused person acted with intent (see, for example, Judgments 4344, consideration 3, 3871, consideration 12, and 3692, consideration 18). Where a specific procedure is laid down by the organisation concerned, it must be followed and the rules correctly applied. The Tribunal has also considered that the investigation must be objective, rigorous and thorough, in the sense that it must be conducted

in a manner designed to ascertain all relevant facts without compromising the good name of the staff member accused, and that she or he be given an opportunity to test the evidence put against her or him and to answer the charge made (see, in particular, Judgments 4663, considerations 10 to 13, 4253, consideration 3, 3314, consideration 14, and 2771, consideration 15). To establish that harassment took place, the alleged facts do not need to be proved beyond all reasonable doubt, contrary to what is required when disciplinary proceedings are initiated against the perpetrator of harassment (see, to that effect, Judgments 4663, consideration 12, and 4289, consideration 10). The main factor in the recognition of harassment is the perception that the person concerned may reasonably and objectively have of acts or remarks liable to demean or humiliate her or him (see Judgments 4663, consideration 13, and 4541, consideration 8).

As regards the scope of the review that it may exercise over a decision to reject a harassment complaint, the Tribunal recalls that it is not its role to reweigh the evidence before an investigative body which, as the primary trier of fact, has had the benefit of actually seeing and hearing many of the persons involved, and of assessing the reliability of what they have said (see, to that effect, Judgments 4291, consideration 12, and 3593, consideration 12). Accordingly, it will interfere only in the case of manifest error (see, in particular, Judgments 4344, consideration 8, 4091, consideration 17, and 3597, consideration 2).

6. In support of her complaint, the complainant firstly cites various passages of the IOS report which, contrary to what that investigatory body found, allegedly show that physical and verbal violence, as well as a specific act of harassment committed by Mr D. in her respect, did indeed take place. She submits that the statements that he made during his interview by IOS contained contradictions that cast doubt on his honesty and the veracity of his allegations.

In the present case, and in the light of the principles just recalled, the Tribunal considers that IOS conducted its investigation objectively, rigorously and thoroughly, and that it was reasonable for that body to

reach the conclusion, subsequently endorsed by the Appeals Board and the Director-General, that the evidence in the file did not allow it to establish that Mr D. had committed physical or verbal aggression during the incident on 11 April 2018, nor that an act of harassment had taken place in respect of the complainant, but that this incident instead reflected a working atmosphere characterised by tensions within the Security and Safety Section at various levels. It must be recalled that, in order to reach that conclusion, IOS interviewed both the complainant and Mr D., gathered numerous witness statements from other members of the Section and carefully examined video footage of the corridor in which part of the incident took place. In the present case, there is therefore nothing to suggest that IOS failed to obtain, refused to accept or ignored relevant evidence, nor that it misconstrued the evidence upon which it based that conclusion (compare with Judgments 3725, consideration 14, 3447, consideration 6, and 2771, consideration 17).

The complainant's first plea is therefore unfounded.

7. The complainant next submits that her further submissions, lodged with the Appeals Board on 26 November 2019, after she had eventually been able to view the IOS investigation report, were not in fact brought to the attention of the members of the Appeals Board and were not subjected to adversarial debate.

However, the Tribunal notes that the submissions and evidence filed with it by the Organization show that the members of the Appeals Board did acquaint themselves with this investigation report when they examined the complainant's appeal and put forward their conclusions and recommendations. Paragraph 27 of the opinion of the Appeals Board of 2 December 2021 expressly mentions on this point that "[o]n 26 November 2019 the complainant submitted to the Secretary of the Board [...] further submissions that she called '(Additional) Incidental Request'"[*]. It is also clear from that opinion that all the complainant's arguments and comments were subjected to adversarial debate, both

[*] Registry's translation.

during the written procedure and during the hearing before the Board that took place by videoconference.

This second plea must therefore be dismissed.

8. The complainant also considers that the impugned decision is tainted by a contradiction in that the Director-General closed the harassment complaint without further action, but at the same time acknowledged the existence of a "work environment conducive to interpersonal tensions"[*] within the Security and Safety Section.

However, the Tribunal observes that, as the complainant acknowledges, the Director-General expressly based this aspect of the reasoning for her decision on the conclusions contained in the IOS investigation report, which the members of the Appeals Board later endorsed unanimously. In that report, following a careful examination of all the facts referred to by the complainant in support of her harassment complainant and a meticulous investigation, IOS considered:

– firstly, that the allegation that Mr D. engaged in physical and/or verbal aggression could not be accepted owing to the lack of sufficient evidence that he had acted aggressively, nor could the existence of an act of harassment within the meaning of the applicable provisions;

– secondly, that the testimony gathered during the investigation indicated that the Security and Safety Section was "plagued by tensions and disputes at all levels: between the officers, between the officers and their management, and within management itself", that "[t]hese tensions [were] illustrated by communication problems and disputes linked to decisions taken by management" and that "[t]hat environment [was] conducive to interpersonal tensions and increase[d] the sensitivity of the various parties involved. Thus, the same event [could] be perceived in the opposite manner, and reactions to tricky situations [could] sometimes be disproportionate";

[*] Registry's translation.

– thirdly, that Mr D.'s behaviour during the incident of 11 April 2018 did not, however, meet what could be reasonably expected of a grade P-5 manager and that it appeared appropriate for him to receive support, which could, in particular, take the form of training or coaching.

In view of the evidence on file, the Tribunal considers that those considerations are not tainted by any contradiction in that it was quite possible to conclude, on the basis of an investigation which the Tribunal has recognised as meticulous and thorough in consideration 6 above, that there was no physical and/or verbal aggression or acts of harassment strictly speaking, while taking the view that there was a climate of generalised tension in the section concerned at all levels. Indeed, it is quite feasible for a behaviour to be considered inappropriate but as not in itself constituting harassment under the applicable provisions.

The complainant's plea in this regard must therefore be rejected.

9. The complainant also takes issue with the length of time that elapsed between the date of submission of her internal appeal and that of the hearing before the Appeals Board by videoconference.

It should be recalled that, under the Tribunal's settled case law, firstly, the unreasonableness of a delay in examining an internal appeal must be assessed in the light of the specific circumstances of a given case and, secondly, the amount of compensation liable to be granted under this head ordinarily depends on at least two considerations, namely the length of the delay and the effect of the delay on the employee concerned (see, for example, Judgments 4727, consideration 14, 4684, consideration 12, 4635, consideration 8, and 3160, consideration 17).

10. In the present case, the Organization itself has recognised that the time taken to respond to the request for the communication of the IOS report – it was more than a year before the complainant could lodge further submissions with the Appeals Board after she had viewed it – was excessively long, which led the Director-General to award the

complainant moral damages in the amount of 2,000 euros under this head. As the complainant has not established in what respect that sum is insufficient to compensate for the injury caused on that account, the Tribunal finds that this redress was adequate.

11. For the remainder, after the complainant had lodged her further submissions with the Appeals Board on 26 November 2019, the Organization submitted its reply on 2 July 2020, while the Appeals Board held a hearing by videoconference on 29 October 2021 before delivering its opinion on 2 December 2021.

In this case, the delay of almost two years between the lodging of the further submissions and the holding of a hearing before the Appeals Board clearly does not observe the applicable provisions and appears obviously long. However, the Tribunal considers that it can be justified in view of the circumstances of the case.

Firstly, the Tribunal notes that the complainant, who asked the Appeals Board to extend the time limit for submitting her detailed appeal, herself caused some of the delay in the procedure, and, moreover, it may seem reasonable, in view of the extensions obtained by the complainant, that such extensions were also granted to the Organization. Secondly, the Organization explains, convincingly in the Tribunal's view, that the functioning of the Appeals Board was considerably disrupted in 2020 and 2021 by the successive lockdowns ordered by the French authorities owing to the Covid-19 pandemic, which, in particular, affected the Board's capacity to hold its hearings as usual. Lastly, the evidence shows that, owing to the persistence of the pandemic, national lockdown measures adopted on this occasion and the health rules put in place at the Organization, it was suggested to the complainant on 27 April 2021 that a hearing be held in the near future before the Appeals Board by videoconference, but that she wished the hearing "to be held in person when the health situation allow[ed]"[*]. Only later did the complainant eventually agree for a

[*] Registry's translation.

hearing to be held by videoconference, which in the end could take place on 29 October 2021.

In the circumstances, the Tribunal can understand the time taken by the Organization to deal with the complainant's appeal and considers that the complainant has not therefore duly established that UNESCO acted wrongfully in that respect.

12. The complainant asks the Tribunal to recognise the reality of the "torment" inflicted on her by the Administration over many months with regard to her professional future and the damage to her professional and personal reputation, as well as her quality of life.

However, the Tribunal notes that the complainant herself enquired on 11 July 2018 about any interim measures that had been taken by the Director-General during the examination of her harassment complaint pursuant to paragraph 38 of Item 18.2 of the Human Resources Manual. Interim measures that could be taken under this provision included, in particular, the possibility of placing the complainant on special leave with pay, identifying different duties for her or temporarily reassigning her.

In the present case, the complainant was at first placed on sick leave for several months by her treating doctor. She was then placed on special leave with pay and, in particular, continued to receive the component of her pay corresponding to an additional half-hour of work that was specific to security officers. Similarly, after her harassment complaint was rejected, the Organization, aware of the fact that the general working climate in the Security and Safety Section was not conducive to the complainant's return to work in that service, initially reassigned her for seven months to the grade G-3 post of mail clerk in the Mail Service, then from 1 January 2020 to the post of assistant in the Interpretation Unit of the Conferences and Cultural Events Management Section of the Division of Conferences, Languages and Documents in the Sector for Administration and Management. The Tribunal observes in this respect, firstly, that the complainant did not object to that latter reassignment and, secondly, that her new post was reclassified at grade G-4 with effect from 1 July 2021. The latter fact is

not insignificant when examining the Organization's attitude towards the complainant, even though she submits that it was due solely to her merits and the quality of her work. Mr D. was, moreover, invited to undertake specific training to help him restore a harmonious work atmosphere within the Section, and, according to the Organization, the development of the working climate was closely monitored by the competent services. Furthermore, the complainant acknowledged in a letter of 7 January 2019 that she had learned that the ethics training had begun to yield results and that efforts were continuing to that end.

Accordingly, and although the Tribunal understands that the complainant may have suffered from the situation in which she was placed while her harassment complaint against Mr D. was being examined, it cannot consider that the Organization failed in its duty of care towards her.

The complainant's submissions must therefore also be dismissed on this point.

13. Since all of the pleas entered by the complainant, both in respect of the Director-General's final decision of 9 March 2022 and, subsidiarily, against the initial decision of 26 November 2018, are unfounded, there is no need to award her the additional compensation she claims for the material and moral injury she submits she has suffered on account of these decisions, above the sum of 2,000 euros that has already been paid to her by the Organization owing to the abnormally long time taken to provide her the IOS investigation report.

14. It follows from the foregoing that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

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

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER