Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

F.

v.

IOM

139th Session **Judgment No. 4936**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. K. F. against the International Organization for Migration (IOM) on 8 July 2022 and corrected on 15 September 2022, IOM's reply of 10 January 2023, the complainant's rejoinder of 6 April 2023, IOM's surrejoinder of 6 July 2023, the complainant's additional submissions of 15 September 2023 and IOM's final comments thereon of 2 November 2023;

Considering the document produced by IOM on 27 February 2023 at the Tribunal's request;

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

Having examined the written submissions;

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

The complainant challenges the decision to discharge him after due notice.

The complainant joined the Organization in March 2000 and was granted a regular contract in March 2016. At material times, he served as Senior Information Technology Security Officer/Head of Unit, at grade P-3, at the IOM Manila Administration Centre (MAC) in the Philippines.

In January 2019, MAC hosted a cybersecurity product presentation delivered by an external contractor, Ms C. The complainant obtained her phone number by accessing IOM data and contacted her on many occasions, initially on work-related issues and, as from mid-February 2019, for private purposes essentially. He kept contacting her regularly until June 2019, using the phone which IOM had issued him in the context of his employment. The tenor of the private messages he sent was initially of a romantic nature, including messages alluding to her beauty and containing expressions of affection ("Such a beautiful girl call me sir can't digest", "Happy Valentine's Day beautiful", "Why you ignore me [...] you are beautiful and I am ugly that is why?", "Seems you are too proud of your beauty", "I am heartbroken [...] trust me when you were presenting my concentration was you. Anyways may be I am ugly but my heart can fall for someone too", "Still I beg you for a dinner. I promise I will not eat you", "If I am ugly and you are beautiful is this my fault"); subsequently, as Ms C. showed discomfort towards his messages, the tone changed. When she told him that his messages were making her uncomfortable and to stop messaging her, he replied with a middle finger emoji. The complainant also contacted Ms C. using his official IOM address. He asked her to keep their exchanges confidential. Ms C. requested him to stop messaging her on several occasions and eventually blocked all communications from him.

On 18 June 2019, Ms C. filed a complaint with the IOM Ethics and Conduct Office about the complainant's conduct. On 16 July 2019, her complaint was forwarded to the Office of the Inspector General (OIG) which, after having conducted a preliminary assessment and concluded that there was sufficient evidence to support her allegations without further investigation, referred the complainant's case to the Office of Legal Affairs (LEG) on 26 December 2019. Following LEG's review and analysis, the Director of Human Resources Management (HRM) initiated a disciplinary procedure against the complainant.

By a letter of 23 March 2020, the Director of HRM notified the complainant that he had been charged with misconduct and that a disciplinary procedure would be initiated against him. More specifically, he was charged with having engaged in "inappropriate, unwelcome

sexually harassing behaviour, thus not showing the highest standards of conduct, integrity and loyalty expected from an IOM staff member", having misused IOM information and communication technology assets, and having used the personal data of an IOM external partner for private purposes. A copy of the screenshots of the messages he had sent to Ms C. through various text and messaging applications was attached to the charges letter. The complainant was given the opportunity to answer those charges and put forward evidence for his defence, which he eventually did on 23 and 25 March 2020. He argued that his behaviour towards women had been irreproachable during his 20 years of service with IOM and denied having made inappropriate sexual comments or requests to Ms C. In regard to the misuse of IOM assets, he explained that he had no private mobile phone and paid for any personal communications made using his IOM-issued mobile phone. He finally apologized for his behaviour, which he qualified as nothing more than "a stupid flirting".

By a letter of 5 October 2020, the complainant was informed of the decision of the Deputy Director General to discharge him after due notice based on the conclusion that he had engaged in misconduct. The specific provisions of IOM's internal legal framework which he had breached were listed and he was reminded that the Organization had a zero tolerance policy against any form of harassment, which was why his behaviour could not be tolerated. He was advised that a notice period of three months would be paid to him and that his last day of service was the date of receipt of the letter.

On 6 October, the complainant submitted an initial request for review challenging the disciplinary sanction imposed upon him. He requested the Administration to issue a "reprimand warning letter" instead. On 12 October, the complainant's counsel informed IOM that his client was "taking legal measures" in order to clear his reputation and disprove the allegations against him and that he had informed Ms C. of the complainant's intention "to file criminal cases for libel and extortion" before the national authorities, and that it was hoped that this would persuade her to retract her statements to IOM. On 22 October, the Director of HRM replied that, while it was the complainant's

prerogative to report a matter to the local authorities, he was concerned about the remarks concerning his interaction with Ms C.

On 28 October, the complainant's newly appointed counsel indicated that an amended request for review would be submitted by her within the applicable deadline. On 3 November 2020, she sought the disclosure of a copy of "all documents and evidence collected in [her client]'s case", including Ms C.'s initial complaint and its annexes, the entirety of the transcripts of all the interviews conducted and all other documents in the Administration's possession. She also requested a copy of the full set of the applicable IOM Rules, Regulations and Instructions. On 20 November and 2 December 2020, the Director of HRM sent her a copy of the relevant rules and a copy of the OIG's direct referral memorandum to LEG. On 4 December, the amended request for review was submitted. The complainant sought the setting aside of the discharge decision, his reinstatement with all legal consequences flowing therefrom, and an award of moral damages and costs. He also requested access to the entirety of the information on his disciplinary case. Subsidiarily, he asked that a less severe sanction be imposed upon him.

The complainant's request for review was rejected on 2 February 2021. On 4 March 2021, the complainant appealed to the Joint Administrative Review Board (JARB).

On 8 March 2022, the JARB issued its report, after having heard the parties. It concluded that the complainant's actions amounted to harassment and that the decision to discharge him after due notice was proportionate. It recommended rejecting the appeal. By a letter dated 11 April 2022, the complainant was informed of the decision of the Director General to accept the conclusions and recommendation of the JARB. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to order his reinstatement in his former post in Manila or in such other position within IOM suitable with his experience and qualifications as of 5 October 2020 and payment of all of his entitlements and benefits since that date, together with 5 per cent interest. He also seeks the award of actual, consequential, material, moral and exemplary damages in an

amount of not less than one year's salary, as well as at least 40,000 Swiss francs in legal fees, and such other relief as the Tribunal deems necessary and appropriate. Should the Tribunal find that a sanction is warranted, he requests that it order that a written reprimand or a reduction in step or, at the very utmost, a fine would be proportionate. In his rejoinder, the complainant seeks reimbursement of his medical costs and other costs related to his discharge.

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

CONSIDERATIONS

1. The complainant was a member of staff of IOM until his discharge after due notice by decision of the Deputy Director General on 5 October 2020. Sufficient of the general background is already set out in this judgment. He challenged internally the initial decision to discharge him culminating in a consideration of his position by the Joint Administrative Review Board (JARB) which, in its report of 8 March 2022, recommended that his internal appeal be rejected. This recommendation was accepted by the Director General who, by decision of 11 April 2022, rejected the appeal. This is the decision impugned in these proceedings.

2. He seeks the setting aside of the impugned decision and consequential relief on a number of grounds. One ground is headed "IOM's Policy for a Respectful Working Environment (IN/90) [was] not applicable to the present case".

3. It is convenient to deal with this at the outset. It involves a mixed question of fact and law. The factual issue concerns the proven status of Ms C. and the legal issue is the scope of the operation of Instruction IN/90 of 22 August 2007 ("the Policy"). Paragraphs 2, 3 and 11 of the Policy provided:

> "2. IOM is committed to the principle that every staff member has a right to work in a respectful, harassment-free environment. As stated in IOM Standards of Conduct (General Bulletin No.1278 of 5 January 2001, revised in June 2002), staff members shall not 'threaten, intimidate or

otherwise engage in any conduct intended, directly or indirectly, to interfere with the ability of other staff members to discharge their official duties' or 'use their official function for personal reasons to prejudice the positions of colleagues they do not favour'. Any form of harassment and abuse of authority in the workplace, or in connection with official duties, is prohibited.

3. This policy applies to all persons employed by IOM whether at [Headquarters] or in the field, internationally or locally recruited, and regardless of the type or duration of the contract. It also covers non-IOM staff working with the Organization, such as interns or consultants.

[...]

11. **Every staff member and non-staff personnel** has the right to be treated fairly and respectfully in the workplace. Each staff member and non-staff personnel has the responsibility to treat co-workers in a way that respects individual differences." (Original emphasis.)

4. While the central focus of the Policy is harassment by and of staff members at the workplace, the above provisions make clear that its operation is intended to extend to non-staff personnel of the type identified in paragraph 3, namely, "staff working with the Organization, such as interns or consultants". But additionally, it is the non-IOM staff working at the workplace being the workplace of IOM either at Headquarters or in the field. While it is doubtless correct that these provisions should be given broad effect, there will nonetheless be limits on the scope of the operation of the Policy as declared by IOM.

5. Ms C.'s status, in the context of her interaction with the complainant, was described by her in her complaint of 18 June 2019. She said that, in January 2019, she was working for a cybersecurity company and visited the IOM Manila Administration Centre (MAC) in the Philippines on a "product presentation/courtesy visit". By May 2019, she was working with another cybersecurity company and once again visited the IOM MAC in the Philippines for a "courtesy visit/product presentation" and IOM was "one of [her] prospective clients [at] that time". In substance, she was, on both occasions, giving a brief sales presentation. In a letter of 26 May 2021 to the JARB, the Administration described Ms C.'s position in the following terms: "[T.] (the company for which Ms [C.] had worked) provided cybersecurity

trainings to MAC in January 2019 and May 2019. IOM does not have a current contract with [T.].” This description is almost certainly wrong having regard to the much more limited role described by Ms C. herself involving two brief visits to the IOM MAC in the Philippines.

6. It is improbable that Ms C. could accurately be described as a contractor or otherwise a person working at the IOM MAC in the Philippines. If so, the Policy had no application to her. The harassing conduct towards her was not proscribed by the Policy. She was beyond its reach. A decision-maker imposing a disciplinary sanction, including the serious sanction of discharge, must be satisfied that the factual foundation for the finding of misconduct is proven beyond reasonable doubt. It is open to the Tribunal to assess whether there was probative evidence warranting this conclusion (see, for example, Judgments 4832, consideration 36, 4364, consideration 10, and the case law cited therein). Neither the Deputy Director General nor the Director General could have been satisfied beyond reasonable doubt that Ms C. had been a contractor or otherwise a person working at the IOM MAC in the Philippines and the Policy applied. Thus, they could not have been satisfied the complainant contravened the Policy having regard to his conduct directed to Ms C.

7. The original charges in the charges letter of 23 March 2020 alleged a range of breaches of the Staff Regulations and Staff Rules and other normative legal documents. Many of the charges were certainly sustainable having regard to the conduct of the complainant. However, in the impugned decision of 11 April 2022, it was the conduct constituting sexual harassment as addressed in the Policy which was at the forefront of the decision to discharge the complainant. Indeed, it was pivotal. The Director General relevantly said:

> “Your actions amounted to harassment in all of the circumstances. [...] [Y]our conduct amounted to sexual harassment within the scope of the definition set out in [Instruction] IN/90 [...]

> The disciplinary measure of discharge after due notice was proportionate to the gravity of your misconduct in view of IOM's zero tolerance policy on any type of harassment."

In his decision of 5 October 2020, the Deputy Director General had also relied on contravention of Instruction IN/90.

8. The flaw in the decision making discussed in the preceding four considerations would warrant the setting aside of the impugned decision and the decision of the Deputy Director General of 5 October 2020. However, it is necessary to determine whether this relief is appropriate in all the circumstances. Article VIII of the Tribunal's Statute provides that if a complaint is well-founded then the impugned decision can be rescinded though, if this is not possible or advisable, compensation can be awarded for the injury caused to her or him. There is little room to doubt that the relationship between the complainant and IOM has broken down and it would not be advisable to set aside the decisions dismissing the complainant and ordering his reinstatement, as sought by him in his brief (see, for example, Judgments 4674, consideration 23, 4456, consideration 18, 4310, consideration 13, and 3364, consideration 27).

9. In addition, it must be borne in mind that the complainant's conduct is not in dispute in the sense that he does not deny, indeed, in the circumstances, cannot deny, what he said to Ms C. nor the context in which it was said. The complainant's conduct directed towards Ms C. in his repeated messaging of her was highly inappropriate. In his pleas, he shows no real remorse and rejects any suggestion that such a characterization is correct. In his brief, the complainant says that "[he] started messaging [Ms C.], in the belief that she wanted him to seduce her and with the firm intent of winning her love and marrying her". He earlier said in the brief that he had "seriously fallen in love" with her. In a submission to the JARB dated 26 October 2021, the complainant said: "my conduct cannot reasonably be characterized as constituting sexual harassment, but merely as (maybe awkward and unsuccessful) acts of flirting and of attempts to win Ms [C.]'s heart". Even assuming his conduct was not sexual harassment in the broadest sense, which may

be doubted, it was nonetheless harassment in the form of unsolicited messages of a substantially personal nature directed towards a woman with whom the complainant had only ever had a professional relationship. There is no probative evidence that she encouraged these unsolicited messages or condoned them being sent.

10. The question which now arises is what compensation should be awarded to the complainant for the injury occasioned by his unlawful dismissal. He has lost the opportunity for continued future employment with IOM and the Tribunal is satisfied he suffered moral injury as a result of his dismissal which should sound in moral damages. However, the amount of compensation must reflect the fact that it is highly likely that the complainant would have been dismissed lawfully had IOM been alive to the problems occasioned by relying on Instruction IN/90. The Tribunal determines that material damages in the sum of 15,000 euros should be awarded for the loss of opportunity for continued future employment and 10,000 euros should be awarded as moral damages.

11. The complainant seeks exemplary damages but does not advance detailed arguments as to why they should be ordered. This claim is rejected.

12. As the complainant has been substantially successful, he is entitled to costs which the Tribunal assesses in the sum of 10,000 euros.

13. The complainant seeks oral hearings. The Tribunal is satisfied it is able to decide the case fairly and appropriately on the written material presented by the parties. This request is rejected.

DECISION

For the above reasons,

1. IOM shall pay the complainant 15,000 euros in material damages.

2. IOM shall pay the complainant 10,000 euros in moral damages.

3. IOM shall also pay the complainant 10,000 euros in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 23 October 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER