

O.

v.

Energy Charter Conference

139th Session

Judgment No. 4916

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms D. O. against the Energy Charter Conference (“the organisation”) on 28 May 2021, the organisation’s reply of 27 September 2021, the complainant’s rejoinder of 6 January 2022 and the organisation’s surrejoinder of 23 February 2022;

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 contests her Performance Appraisal Report for the period from 1 November 2019 to 31 October 2020 and the decision not to renew her appointment due to unsatisfactory performance and loss of trust.

The complainant joined the Energy Charter Secretariat, the secretariat of the Energy Charter Conference, on 1 January 2018, as an Investment Co-ordinator, at grade C4. She was granted a one-year appointment as a temporary official which was subsequently renewed from 1 January to 31 December 2019 and, again, from 1 January to 31 December 2020, at which point she separated from service following a decision not to further renew her appointment allegedly due to unsatisfactory performance and loss of trust.

On 19 and again on 24 May 2020, the complainant informed the Secretary-General that she perceived the behaviour of Ms P., also a C-grade official in the Investment Unit, as harassment directed towards her and requested that he clearly communicate this to Ms P. as per the applicable rules. The Secretary-General denied the complainant's request, noting that he was under no obligation to communicate an official's belief that he/she was exposed to harassment and he invited the complainant to communicate her concerns to Ms P. directly or through another colleague. On 10 June 2020, the complainant communicated her concerns directly to Ms P. and, on 12 June 2020, she wrote to the General Counsel asking whether the Secretary-General, who was then also acting Assistant Secretary-General, was not bound, under the applicable rules, to communicate her concerns to Ms P. and to act as "informal counsellor" in the dispute. In his response of 13 June 2020, the General Counsel noted that the complainant had, in any case, already directly communicated her concerns to Ms P., as per Regulation 25-bis c), and he shared his interpretation of the applicable rules.

As from 24 July 2020, the Secretary-General replaced the Head of the Investment Unit as the complainant's immediate supervisor.

On 29 October 2020, the complainant received her Performance Appraisal Report for the period from 1 November 2019 to 31 October 2020 (2020 PAR), completed and signed by the Secretary-General. In the section of the PAR entitled "Immediate Superior's Review of Performance" as well as in the section entitled "Immediate Superior's General Assessment", the Secretary-General made several negative comments on the complainant's performance for the period under review. He characterised a testimony she had given before the Advisory Board in support of a colleague's harassment claims as "misleading and untrue" and relevantly concluded in the "Immediate Superior's General Assessment" section of the PAR that the complainant's "false statements before the Advisory Board in supporting alleged harassment claims affected the necessary trust in the official working at the Secretariat". In the section of the PAR entitled "Proposals", the Secretary-General recommended the non-renewal of the complainant's contract due to unsatisfactory performance and the loss of necessary

trust. The complainant provided her comments and signed her 2020 PAR on 29 October 2020. Responding point by point to the Secretary-General's negative comments, the complainant sought to defend her performance and to refute the Secretary-General's criticisms. She asserted that the Secretary-General's assessment of her performance was based on misleading information he had received from Ms P., who had continuously and systematically tried to discredit her professional integrity and to influence negatively her superiors' opinion of her, and that the Secretary-General was "punishing" her for complaining of harassment, for exercising her rights in that regard, and for "personal reasons". She strongly denied making a "misleading and untrue" testimony before the Advisory Board and asserted that her testimony in support of a colleague's harassment claims was "honest and objective" and that the Secretary-General was "using against [her] information he [had] obtained in confidential proceedings" pursuant to Rule 25.2, purportedly because he "perceive[d] [her] truthful and unbiased testimon[y] as a personal attack".

By a letter of 31 October 2020, the Secretary-General informed the complainant that, further to her recent performance appraisal and after consultation with Senior Management, he had decided not to renew her appointment upon its expiry on 31 December 2020.

On 7 December 2020, the complainant submitted to the Advisory Board a request for advice contesting the content of her 2020 PAR and the Secretary-General's resultant decision not to renew her appointment, but also the Secretary-General's unlawful and inappropriate "use" in her 2020 performance appraisal of her confidential testimony to the Advisory Board in recent proceedings unrelated to her performance appraisal, and his "inaction" with respect to her harassment claims. She requested the annulment of her 2020 PAR, the re-opening of the related performance appraisal procedure in a fair and impartial manner, material and moral damages, as well as appropriate action for the misuse of data and abuse of power by the Secretary-General.

The Advisory Board submitted its report on 6 January 2021. It noted that it was not in a position to evaluate the complainant's performance as this was the task of her immediate superior, namely the

Secretary-General, who in the current state of affairs, exercised both the function of the Head of the organisation and the complainant's immediate superior, a situation that was not precluded by the organisation's Staff Regulations and Rules. Considering that the complainant's overall performance appraisal procedure had been conducted in accordance with the Staff Regulations and Rules, the Advisory Board advised the Secretary-General (i) not to annul the complainant's 2020 PAR and not to re-open the performance appraisal procedure; and (ii) not to withdraw the 31 October 2020 decision regarding the non-renewal of her appointment. As regards the complainant's allegations of harassment, the Advisory Board noted that it had never received a complaint of harassment from the complainant, in accordance with Regulation 25-bis d) of the Staff Regulations and Rules.

By an email of 1 March 2021, the Secretary-General forwarded to the complainant the report of the Advisory Board and informed her that, following the Board's advice, he had decided to maintain his previous decision regarding her 2020 PAR and the non-renewal of her contract. This is the impugned decision.

The complainant asks the Tribunal to set aside the decision not to renew her appointment, to annul her 29 October 2020 PAR and to re-open the performance appraisal procedure so as to correct the substantive and procedural errors committed in her PAR. She claims compensation for the wrongful decision not to renew her appointment in an amount equivalent to the remuneration, including benefits and allowances, she would have received had her contract been renewed for one year (her contract's standard renewal period). She also claims 10,000 euros in moral damages for the mental distress and moral injury she suffered, costs, and any other relief deemed just and necessary by the Tribunal.

The organisation asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant impugns the 1 March 2021 decision of the Secretary-General, which dismissed her appeal following the recommendations of the Advisory Board (i) that her Performance Appraisal Report of 29 October 2020 (2020 PAR) not be annulled and that the relevant performance appraisal procedure not be re-opened; and (ii) that the Secretary-General's decision of 31 October 2020 regarding the non-renewal of her appointment not be withdrawn.

2. The complainant appears to request oral proceedings, as she lists Mr K., the former Head of the Investment Unit, as a witness. This request is rejected, as the Tribunal considers the written submissions and the evidence produced by the parties to be sufficiently clear and detailed to enable it to render an informed decision.

3. The Tribunal finds that the complainant's ground of challenge that, in assessing her performance in her 2020 PAR, the Secretary-General took into account her confidential testimony before the Advisory Board in a harassment case brought by another staff member, is well founded. It is decisive for the outcome of the present case.

In support of this ground of challenge, the complainant argues, *inter alia*, that the Secretary-General improperly used, against her, information (her testimony) he obtained in confidential proceedings, that he never sought or obtained her consent to use her testimony outside the proceedings in which it was made, and that this improper use of her testimony constituted a violation of Rule 25.2(g) of the Staff Manual.

4. It must be recalled that the Tribunal has consistently held that a decision not to renew the appointment of a staff member of an international organisation lies within the discretion of its executive head and is therefore subject to only limited review. It may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were

drawn from the facts, or if there was abuse of authority (see, for example, Judgment 4654, consideration 16). However, under the Tribunal's case law applicable to contractual relationships generally, a decision not to renew a contract must be based on objective, valid reasons, and not on arbitrary or irrational ones (see, for example, Judgments 4495, consideration 15, 3769, consideration 7, 3353, consideration 15, and 1128, consideration 2). The Tribunal also recalls its well-established case law regarding its limited power of review of decisions relating to performance evaluations. As stated in Judgment 4267, consideration 4, "assessment of merit is an exercise that involves a value judgement, signifying that persons may quite reasonably hold different views on the matter in issue. Moreover, because of the nature of a value judgement, the grounds on which a decision involving a judgement of that kind may be reviewed are limited to those applicable to discretionary decisions. Thus, the Tribunal will only interfere if the decision was taken without authority, if it was based on an error of law or fact, a material fact was overlooked, or a plainly wrong conclusion was drawn from the facts, if it was taken in breach of a rule of form or procedure, or if there was an abuse of authority (see, for example, Judgments 3006, consideration 7, and 3062, consideration 3) [...]"

5. Rule 25.2 of the Staff Manual provided, in paragraph (f), that "[t]he members of the Advisory Board shall be bound to secrecy" and, in paragraph (g), that "[p]ersons who have attended a meeting of the Board or have been called before it as a witness shall be bound to total secrecy in respect of any facts brought to their knowledge and any opinions expressed".

6. The complainant correctly points out that there was a violation of the confidentiality of her testimony before the Advisory Board. The rationale behind this confidentiality, as foreseen by Rule 25.2, paragraphs (f) and (g), of the Staff Manual, is not only to protect witnesses' personal data, but also to ensure that their testimonies remain confidential and that they are neither used against them nor have a negative impact on them, so that witnesses can speak freely without fear of reprisal or retaliation. The Secretary-General improperly used the

complainant's confidential testimony in Advisory Board proceedings concerning an entirely different matter as a basis to assess her performance. This was an error of law. Even if Rule 25.2, paragraphs (f) and (g), of the Staff Manual did not directly apply to the Secretary-General, the latter was bound by the general principle of confidentiality underlying this rule.

As this ground of challenge is well founded and sufficient to set aside the impugned decision, the Tribunal finds it unnecessary to examine the other grounds of challenge put forward by the complainant.

7. The complainant does not seek reinstatement, but she seeks the annulment of her 29 October 2020 PAR, covering the period from 1 November 2019 to 31 October 2020, and the re-opening of the performance appraisal procedure for that period to correct the substantive and procedural errors committed in her PAR. However, given the time that has elapsed since the complainant's separation from the organisation, the Tribunal finds no useful purpose to order the re-opening of the performance appraisal procedure for the aforementioned period.

As the complainant has established that her 29 October 2020 PAR and the resulting decision not to renew her appointment were tainted by an error of law, the impugned decision and the earlier decision of 31 October 2020 are unlawful and must be set aside, and the complainant's 29 October 2020 PAR must be annulled.

8. The complainant seeks material damages equivalent to the remuneration, including benefits and allowances, she would have received had her contract been renewed for one year. It should be noted that the complainant held a temporary appointment which, according to its terms and the Tribunal's case law, carried no expectation of renewal (see, for example, Judgments 4588, consideration 19, 4587, consideration 19, 4462, consideration 18, 3586, consideration 6, and 3448, consideration 7). Even if the complainant's 2020 PAR had been properly conducted and there was no flaw in the procedure, there is no guarantee that it would have resulted in a favourable outcome for the

renewal of her appointment. However, since the complainant lost a valuable opportunity to have her contract renewed, she is entitled to material damages, which the Tribunal assesses in the amount of 30,000 euros.

9. As the complainant has established moral injury occasioned by the negative appraisal of her performance in her 2020 PAR and the resulting recommendation not to renew her appointment, she is also entitled to 10,000 euros in moral damages, as per her claim.

10. The complainant's claim to be awarded any other relief the Tribunal deems just and necessary is too vague to be receivable (see, for example, Judgment 4719, consideration 7).

11. As the complainant succeeds, she is entitled to costs in the amount of 10,000 euros.

DECISION

For the above reasons,

1. The impugned decision and the earlier decision of 31 October 2020 are set aside.
2. The complainant's 29 October 2020 PAR is annulled.
3. The organisation shall pay the complainant material damages in the amount of 30,000 euros.
4. It shall pay her moral damages in the amount of 10,000 euros.
5. It shall also pay her costs in the amount of 10,000 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 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 6 February 2025 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER