

119th Session

Judgment No. 3447

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms K. B. against the International Labour Organization (ILO) on 8 February 2012 and corrected on 24 September, the ILO's reply of 20 December 2012, the complainant's rejoinder dated 15 March 2013 and the ILO's surrejoinder of 29 May 2013;

Considering Article II, paragraph 1, 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 and the pleadings may be summed up as follows:

A. The complainant is a former ILO official. She was appointed as Legal Officer at grade P.3 in the ILO Programme on HIV/AIDS and the World of Work (ILO/AIDS) in April 2005 under a one-year fixed-term contract. In July 2005 Ms K. was appointed as the new Director of ILO/AIDS. The complainant's contract was renewed in March 2006 for one year and again from March 2007 to December 2007 following the Director's instruction to align all contracts of ILO/AIDS staff on the calendar year.

Between April 2007 and November 2007 the complainant was on sick leave, then maternity leave and annual leave. During her absence, she was replaced temporarily by Ms R., a Legal Officer hired on short-term contract. By the time the complainant came back from maternity leave, the focus of the Programme had changed significantly. In March 2007 the ILO Governing Body had decided that the adoption of an autonomous Recommendation on HIV/AIDS in the World of

Work would be placed on the Agenda of the International Labour Conference for 2009 and 2010. In light of this decision the Director of ILO/AIDS had recruited in May 2007 another Legal Officer at grade P.3, Ms S.-J., to work on the Recommendation. The Director of ILO/AIDS also decided to restructure the Research and Policy Analysis Unit (RPAU) and to strengthen its legal capacity by creating a new position of Principal Legal Officer at grade P.5. The complainant was asked to work closely with Ms S.-J. However, difficulties quickly arose and persisted with respect to the division of work between the complainant and Ms S.-J. The Director frequently requested that they work together, but the complainant asked for the work to be divided between her and Ms S.-J.

In an e-mail of 31 January 2008 the complainant wrote to the President and the Legal Counsel of the Staff Union expressing her fear that her contract would not be renewed. She stated that the Director wanted to get rid of her. The complainant also started to look for work elsewhere within the Organization.

In November 2008 Ms T. was appointed as Principal Legal Officer of ILO/AIDS and became the complainant's direct supervisor. In 2009 conflicts emerged between the complainant and Ms T. with respect to substantive issues. The complainant contacted the Mediator as well as the Human Resources Development Department (HRD) and the Legal Office to seek advice on her difficulties at ILO/AIDS. On 15 October 2009 she asked HRD to initiate an independent investigation into alleged harassment by her supervisors. She was informed that, in order for an investigation to be initiated, she first needed to substantiate her allegations.

On 22 December the complainant declined the offer of a one-year extension of her contract in ILO/AIDS. In January 2010 she obtained a six-month short-term contract in another unit of the ILO. She left the ILO in July 2010.

Meanwhile, in May 2010, the complainant submitted a harassment grievance to HRD. Having been informed in June of the identity of the selected investigator (Ms A.), she expressed reservations about the investigator's independence and impartiality given her status as an

ILO official holding a fixed-term contract. HRD replied that unless she had objective reasons to oppose the choice of the investigator, HRD would proceed with her nomination. In August the complainant was informed that the choice of Ms A. as investigator had been confirmed.

The investigator's report was sent to HRD on 21 February 2011. The investigator concluded that the complainant had not been harassed, but found that there were weaknesses in the management of the ILO/AIDS Programme. On the basis of that report HRD rejected her grievance by a decision of 7 March 2011, noting that her professional behaviour had in large part contributed to the deterioration of her relations with her supervisors and her colleagues. It also rejected her claims related to the withdrawal of a performance evaluation report and of a warning from her personal file, as well as her request to re-qualify her rejection of the offer to renew her fixed-term contract as a termination of contract. She appealed against that decision before the Joint Advisory Appeals Board (JAAB). In its report of 22 September the JAAB unanimously found that there had been no harassment and recommended that her internal appeal, together with all related claims for redress, be dismissed as devoid of merit. By a decision of 8 November 2011 the Director-General followed the JAAB's recommendation and dismissed her appeal as devoid of merit. That is the impugned decision.

B. The complainant contends that the internal investigation was flawed, as the selected investigator was not in a position to be impartial or independent, and that her objections to the choice of the investigator were ignored. She submits that the method of investigation was also flawed with respect to the choice of witnesses and the manner in which their testimonies were reflected in the investigator's report. She alleges that the adversarial principle was breached, as she was not offered an opportunity to challenge the summaries of the interviews, nor to challenge the investigator's report. Further, the ILO failed in its duty to conduct a prompt and thorough investigation, as there was excessive delay and the investigation was biased. In her view, these fundamental flaws are sufficient to justify setting aside the

impugned decision. The complainant also argues that there were flaws in the JAAB proceedings, because no oral proceedings were held and the JAAB relied exclusively on the flawed investigator's report, without giving her the opportunity to challenge the assertions made therein. She asks the Tribunal to examine her allegations of harassment.

The complainant claims that she was harassed from January 2008 to December 2009 by the Director of ILO/AIDS and, subsequently, by her supervisor, Ms T., due to her connection with her former supervisor, Ms F., who had filed a harassment grievance against the Director. The harassment took the form of measures to exclude or isolate her from professional activities; persistent negative attacks on personal or professional performance without reason or legitimate authority; manipulation of her personal or professional reputation by rumor, gossip or ridicule; abuse of power by setting objectives with unreasonable or impossible deadlines or unachievable tasks; and unreasonable or unfounded refusal of her requests for leave or training.

The complainant asks the Tribunal to order that all documents that are prejudicial to her professional reputation be removed from her personal file and destroyed, and to acknowledge the harassment to which she was subjected in 2008 and 2009. She further asks that her refusal in December 2009 to accept the offer of a one-year renewal of her fixed-term contract be reclassified as a termination of contract, with all attendant consequences; that violations of the Staff Regulations of the International Labour Office and of the Standards of Conduct for the International Civil Service be acknowledged; that the ILO be ordered to put in place protective measures designed to prevent further harassment by the officials concerned; and that all the administrative consequences be drawn, including possible disciplinary action, in respect of these officials. She also claims material and moral damages.

C. In its reply the ILO argues that the impugned decision is lawful, both as to form and procedure, as well as on the merits. It is consistent with the general principle of the independence of international organizations that investigatory functions be carried out internally, and no rule or general principle of law precludes it from assigning

harassment investigations to one of its staff members. It rejects the complainant's allegations of partiality and bias and denies that there was any breach of the adversarial principle. The complainant was provided with all testimonies and attached materials, and was given the opportunity to comment. While the investigation took three months longer than foreseen, a nine-month timeframe was reasonable in the circumstances and does not constitute an unreasonable delay. Further, the delay in completing the investigation did not cause any harm to the complainant, as she filed her grievance well after she had left ILO/AIDS and the investigation took place after she had left the ILO.

Regarding the proceedings before the JAAB, the ILO recalls that, according to the case law, internal appeal bodies enjoy a broad discretion in assessing the evidence, and the right to be heard only requires that the complainant be free to put her case, either in writing or orally. The JAAB made an extremely careful and in depth examination of the voluminous documents it had received. It found that there was no evidence of harassment and that both the complainant and her superiors had suffered from the deterioration of the work environment but that, to the extent that the complainant was partly responsible for that situation, she was not entitled to compensation. The complainant fails to show any flaws in the work of the JAAB.

The ILO recalls that the Tribunal's role is not to re-weigh the evidence before the JAAB. In its view, the allegations of harassment are not proven, and the Director-General's agreement with the conclusions of the investigator and the JAAB was reasonable and without flaw.

D. In her rejoinder the complainant acknowledges that she received the witnesses' testimonies and was given an opportunity to comment on them. However, she maintains that the adversarial principle was breached because of the manner in which this information was communicated. She asserts that the circumstances surrounding the non-renewal of the appointment of her former supervisor, Ms F., in November 2007 are directly relevant to her present complaint.

E. In its surrejoinder the ILO maintains its position in full. It points out that the complainant seeks to have her harassment case considered in the same way as the case leading to Judgment 3071, although they are in no way comparable.

CONSIDERATIONS

1. The complainant filed a grievance for harassment with HRD in May 2010. The internal procedure for investigation of the grievance started with the selection of the investigator in June 2010 and concluded with the investigator's report which was sent to HRD in February 2011. The investigator found that no harassment had taken place but that there were some weaknesses in the management of the ILO/AIDS Programme. On the basis of that report, HRD rejected the complainant's grievance by a decision of 7 March 2011. The complainant appealed that decision before the Joint Advisory Appeals Board (JAAB), which found, in its report of 22 September 2011, that there was no harassment and recommended that the appeal be dismissed as devoid of merit. The Director-General, in a decision dated 8 November 2011, followed the JAAB's recommendation and rejected the appeal as unfounded. The complainant impugns that decision in the present complaint.

2. The complainant's grounds for complaint stem from the investigation into her claim of harassment and the JAAB's analysis of that claim. With regard to the investigation she contends that it was flawed as she objected to: the choice of investigator; the investigation methods used; the duration of the investigation; and the veracity of the investigation. She also contends that the investigation was biased towards the Organization and that it breached her right to be heard. With regard to the JAAB's analysis of her appeal, she objects to the lack of oral proceedings, the lack of analysis of her claims, and the JAAB's refusal to reinvestigate the harassment allegations. She also submits that the appeal process was flawed for "not address[ing]

the basic complaint”, “not examin[ing] its foundations”, and “not responding to the matter referred to it” by the complainant.

3. The complainant cites the following as grounds for her harassment claim:

- (a) isolation from professional activities;
- (b) exclusion of her name from the staff list during her maternity leave;
- (c) her exclusion to the benefit of the legal officer originally hired on a short-term basis, who was attributed senior status;
- (d) exclusion from basic information essential to her work;
- (e) exclusion from work on the ILO Recommendation concerning HIV and AIDS and the World of Work;
- (f) isolation from professional activities and colleagues in the field of human rights and HIV/AIDS;
- (g) ignoring her proposals to volunteer for work;
- (h) persistent negative attacks on her personal and professional performance without reason or legitimate authority;
- (i) manipulation of her personal and professional reputation “by rumour, gossip and ridicule”;
- (j) abuse of power by persistently undermining her work, setting unreasonable objectives and assigning unachievable tasks and impossible deadlines; and
- (k) unreasonable refusal of leave and training.

4. The complainant asks the Tribunal to order that all documents which are prejudicial to her professional reputation be removed from her personal file and destroyed; that the harassment that she was subjected to in ILO/AIDS during the years 2008 and 2009 be recognized; that her refusal to accept the one-year renewal of contract on 22 December 2009 be reclassified as a termination of contract, with all attendant consequences; that the violations of the provisions

of the Staff Regulations and of the Standards of Conduct for the International Civil Service be acknowledged; that she be awarded material and moral damages; that the ILO put in place protective measures designed to prevent future harassment of employees by the officials concerned; and that all the administrative consequences, including possible disciplinary action, be drawn in respect of the officials concerned.

5. The complaint is unfounded in its entirety. The complainant relies heavily on conjecture, unsubstantiated claims, hypotheses, and her personal perceptions to substantiate her allegations of harassment. But, the Tribunal has consistently held that allegations of harassment must be supported by specific facts and it is up to the person alleging harassment to prove the facts (see Judgment 2370, under 9, and the case law cited therein). As she did not raise any valid objection to the choice of the investigator, in particular any possible conflict of interest which would have justified her disqualification, the Tribunal finds that the Organization properly considered the investigator's selection to be valid. The fact that she was not asked to supply a list of witnesses is not a flaw in the procedure and cannot be considered sufficient proof of bias on the investigator's part, nor does it constitute a denial of the complainant's right to be heard. She could have submitted a list of witnesses for consideration at any time during the investigation, and knowing that it was her responsibility to prove her allegations of harassment, it is peculiar that she did not.

6. The complainant asserts that the investigator erred in showing the complainant's grievance to the Director of ILO/AIDS (Ms K.), to the complainant's direct supervisor (Ms T.), to her co-worker (Ms S.-J.) and to the Director's Secretary (Ms G.), and in allowing them to submit written responses rather than questioning them. The complainant is mistaken. The four persons mentioned above were all accused by the complainant of participating in the harassment. It was reasonable and appropriate in the circumstances for the investigator to let the four individuals know who the accuser was and to know the details of the accusations in order for them to respond to the

accusations. Furthermore, the complainant's claims against the veracity of the investigation are not convincing and must be disregarded. It is consistent case law that bad faith must be proven and cannot be presumed (see, for example, Judgments 2472, under 9, and 1775, under 7). In the present case, there is nothing to suggest that the investigator failed to obtain, refused to accept or ignored relevant evidence, took account of irrelevant evidence or misconstrued the evidence upon which she acted (see Judgment 2771, under 17). The complainant's allegation that she was not given the opportunity to respond to any of the witness statements is belied by the email from the investigator, dated 1 February 2011, attaching the last witness statement and asking the complainant for her comments before finalising the report.

7. Finally, the complainant submits that the investigation took over nine months to complete and that this constitutes an excessive delay. The Tribunal finds that harassment cases in particular should be treated as quickly and efficiently as possible, in order to protect staff members from unnecessary suffering, but attention must also be paid to thoroughness and procedure (see Judgment 2642, under 8). In the present case, the Tribunal is of the opinion that nine months to complete a harassment investigation is by no means excessive considering the length of the grievance itself and the over 300 annexes attached to be considered. Her claims against the investigation are dismissed as groundless.

8. With regard to the claims against the JAAB's analysis of the investigation, the Tribunal recalls that it will only interfere in the case of a manifest error in the JAAB's assessment of the facts (see Judgment 2295, under 10). Though it has read and considered all the elements submitted to it, the Tribunal will not reweigh the evidence that was presented to the JAAB. The complainant's plea concerning the absence of oral hearings is unfounded. As the Tribunal stated in Judgment 2893, under 5, in relevant part: "the general principles applicable to [...] an appeal body [do not] require that a complainant be given an opportunity to present oral submissions in person or

through a representative. As the Tribunal has already had occasion to state in Judgment 623, all that the right to a hearing requires is that the complainant should be free to put his case, either in writing or orally; the appeal body is not obliged to offer him both possibilities.” (See also Judgment 3023, under 11.) The complainant was indeed allowed to submit her written appeal in full, and in fact she also attached hundreds of annexes to be considered. The Tribunal finds that to be more than sufficient opportunity to present her case and considers that the JAAB was fully informed about the case and did not need to grant her request for oral proceedings.

9. As for the complainant’s claim that the JAAB did not properly consider her initial grievance, the Tribunal finds this unfounded. In its detailed report, the JAAB clearly referred to the complainant’s numerous submissions and allegations and demonstrated in its findings and conclusions that it had indeed understood and considered all the evidence before it, but that it simply found no flaw in the investigation procedure nor in the conclusion that no harassment had occurred. The complainant does not provide persuasive evidence to show that the JAAB’s findings, or the procedure, suffered any material flaw. “Consistent case law holds that ‘harassment and mobbing do not require malice or intent, but that behaviour cannot be considered as harassment or mobbing if there is a reasonable explanation for it’ [...]. The complainant did not show that the [JAAB’s] finding and conclusions involved any reviewable error. The situations and events that she cites as examples of mobbing and harassment cannot be considered as such because there is a reasonable explanation for each example.” (See Judgment 3192, under 15.) It is clear from the submissions of both parties, that the situations which the complainant perceived as harassment were quite reasonably explained by the managerial necessities of the Organization. Essentially, the conflict that resulted in the allegations of harassment lay in the poor working relationships that existed between the complainant and other members of the ILO/AIDS team. Considering this, the Tribunal holds that her pleas relating to the procedure before the JAAB are dismissed as unfounded.

10. As in Judgment 3192, under 13, the Tribunal notes that “[c]onsistent case law holds that: ‘Although evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances, that does not relieve the complainant, who has the burden of proving his allegations, from introducing evidence of sufficient quality and weight to persuade the Tribunal. Mere suspicion and unsupported allegations are clearly not enough, the less so where [...] the actions of the Organization which are alleged to have been tainted by personal prejudice are shown to have a verifiable objective justification.’ (See Judgment 1775, under 7.)” The Tribunal finds many similarities between the present case and the complaint which led to Judgment 3192. In particular, in that Judgment the Tribunal found, under consideration 16, that “[a]s her supervisor, it was his responsibility to direct her work and it was not unreasonable of him to request work-related actions and/or to comment on what she was working on. There is nothing to indicate that this was done in a demeaning or humiliating manner, or that his requests were not made in good faith or were made with any intention other than the proper execution of his managerial duties. [...] It is worth pointing out in this regard Judgment 318, in which the Tribunal stated: ‘The main grounds for the impugned decision are that the complainant, who would brook no challenge to his views, proved unable to obey his supervisor’s instructions and adapt to the methods of the Organization.’”

This holds true in the current case as well. A lot of the tension that the complainant perceived was in fact due to her refusal to accept the authority of her direct supervisor and that of the Director of ILO/AIDS, as well as her inability to work as a team with her co-worker, Ms S.-J. Indeed, it appears from the evidence presented before the Tribunal that the complainant did not give proper regard to the office hierarchy. An example of this is her failure to consult the Director of ILO/AIDS prior to undertaking to participate in a conference. In addition, her refusal to respect the Director’s repeated requests that she work with Ms S.-J. as a team caused some breakdowns in communication and contributed to office tensions. Essentially, the complainant’s refusal to recognise the authority of the

Director of ILO/AIDS and of her new direct supervisor largely accounts for a situation which did not constitute harassment.

11. In view of the foregoing, the Tribunal concludes that the complainant has failed to establish that harassment has occurred and finds that there was no manifest error in the JAAB's weighing of the evidence. The working relations were tense, but not due to misconduct or abnormal behaviour by the complainant's superiors. It should be noted that the situation could have been avoided if management had been more sensitive to the complainant's personal needs and history when dealing with her requests and formulating their replies. However, the Tribunal recognises that it is not always possible to cater to the needs of each individual employee, as the product or result of the work being done is often justifiably considered a higher priority over the individual's personal interests, and therefore it cannot declare that any breach of care has occurred (see for example Judgments 2587, under 10, and 3192, under 22).

12. As the complaint is unfounded in its entirety, it must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ