

N. (No. 2)

v.

WHO

129th Session

Judgment No. 4241

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms S. C. N. against the World Health Organization (WHO) on 15 December 2017 and corrected on 20 January 2018, WHO's reply of 2 May, the complainant's rejoinder of 9 August and WHO's surrejoinder of 13 November 2018;

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 complaint challenges the decision to dismiss her complaint of harassment as unsubstantiated.

Facts relevant to this case can be found in Judgment 4240 on the complainant's first complaint, also delivered this day, in which she challenged the decision to reassign her from the post of Director, Technology and Innovation Department (TIN), to the post of Senior Advisor on Innovative Strategic Information, Strategic Information and Evaluation Department (SIE).

On 19 January 2016 the complainant submitted a formal complaint of harassment to the Director, WHO Internal Oversight Services (IOS), against her first-level supervisor, the then Deputy Executive Director, Management and Governance (the DXD/MER) at UNAIDS – a joint and co-sponsored United Nations programme on HIV/AIDS administered

by WHO. She also made allegations of harassment against two other staff members, Ms E. (the DXD/MER's Senior Advisor) and Ms F. (the Director of the DXD/MER's Office).

The complainant alleged that from September 2012, while she occupied the post of Director, TIN, at grade D.1, the DXD/MER engaged in behaviour that violated the Policy on the Prevention of Harassment at WHO. In particular she alleged that the DXD/MER isolated her, inappropriately delegated management responsibility to her subordinates Ms E. and Ms F., imposed an excessive workload on her, and engaged in conduct she described as "gaslighting and mobbing", which ultimately led to her sick leave from June 2015 to January 2016 and to her reassignment to the post of Senior Advisor, SIE, as of 1 February 2016.

IOS conducted an investigation into her allegations of harassment and, in its report submitted to the UNAIDS Executive Director on 13 July 2017, it concluded that there was insufficient evidence to support the complainant's allegations and recommended to close the case.

Meanwhile, the complainant was informed in March 2017 that her appointment would be terminated following the abolition of the post to which she had been reassigned. She was separated from UNAIDS on 24 July 2017.

On 14 August 2017 the Executive Director submitted the IOS report to the Global Advisory Committee on Harassment (GAC), which agreed with the findings and conclusions of the IOS's report and recommended, on 6 September, that the Executive Director close the case.

By a letter of 13 September 2017 the Executive Director informed the complainant that, based on the reports of the IOS and the GAC, he had decided to close the case without further action pursuant to paragraph 7.19(i) of the Policy on the Prevention of Harassment at WHO. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to find that she was subjected to harassment, and to order that her harassers be subjected to disciplinary sanctions for misconduct. She claims material, moral and exemplary damages for the failure to protect her from harassment, for the excessive delay in investigating her

allegations and for the retaliation suffered after reporting harassment in an amount of no less than 550,000 Swiss francs, as well as costs, with interest on all sums awarded. She further asks that her first and second complaints be joined, and requests that WHO be ordered to disclose the information it sent to the United Nations in order to allow it to vet her first-level supervisor prior to her promotion as Under-Secretary General for Management.

WHO submits that the complainant's arguments and claims concerning events which are the subject of other internal appeal proceedings should be dismissed as irreceivable. It asks the Tribunal to dismiss the complaint as entirely devoid of merit. In the event that an award of costs is granted by the Tribunal, WHO requests that a maximum amount be established and that the payment be made conditional upon receipt of invoices, proof of payment, and the complainant not being eligible for reimbursement via other sources. It is not in a position to comment on the process used by the Secretary-General of the United Nations to select his senior staff and, in any case, it argues that the process leading to the promotion of the complainant's former first-level supervisor is irrelevant to the present complaint.

CONSIDERATIONS

1. The complainant, who had initiated the underlying internal proceedings by submitting a formal harassment complaint on 19 January 2016, impugns the decision dated 13 September 2017 by the UNAIDS Executive Director, to close the case without further action, as recommended by the IOS and the GAC. In her harassment complaint, she stated that the alleged harassment occurred from September 2012 to 20 August 2015. She later stated that the harassment occurred up to 1 February 2016 while she held the post of Director, TIN. The allegations, which are briefly stated in the facts, are specifically directed against the DXD/MER, who was her first-level supervisor at the material time, and two senior staff members in the DXD/MER's Office, Ms E. and Ms F.

2. The complainant applies for the joinder of this complaint with her first complaint in which she alleges that the decision to reassign her to the post of Senior Advisor, SIE, with effect from 1 February 2016 was unlawful. The application will be rejected as there is no nexus between that matter and the present complaint. There is no evidence that the persons against whom the complainant's allegations of harassment are made played any part in the decision to reassign her. The complaints do not raise the same or similar issues of law.

3. The complainant submits that the impugned decision should be set aside because it is tainted by conflict of interest on the part of the UNAIDS Executive Director. She further submits that that decision is vitiated by error of law because the IOS, whose recommendation it accepted, had conducted a flawed investigation in violation of its investigative procedures and general principles of law identified in the Tribunal's case law for determining allegations of harassment. The complainant also alleges that the IOS's investigation and its resulting report were "biased and flawed" and that the review of the IOS's report by the GAC "was tainted by errors of law and mistakes of fact"; so that the impugned decision is similarly tainted and that the facts and circumstances of the case objectively establish that she was harassed. She asks the Tribunal to set aside the impugned decision and to find that she was harassed.

4. By way of further relief, the complainant also seeks an order that her harasser(s) be subjected to disciplinary sanctions for misconduct. The request is rejected as the imposition of such a measure lies outside of the Tribunal's jurisdiction (see Judgment 3318, consideration 12). Her allegation that she was subjected to unequal treatment also fails, as she provides no evidence from which the Tribunal may definitively conclude that she was treated unequally in relation to the other three Department Directors who were in the same circumstances as she was in. However, her claim for moral damages on the ground that there was excessive delay in the investigation process is well founded. The Tribunal has consistently stated that harassment cases 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 (Judgment 3447, consideration 7), and that the moral injury caused to the complainant by excessive delay will be fairly redressed by awarding her or him compensation (see, for example, Judgment 4111, consideration 9). The complainant submitted her harassment complaint on 19 January 2016. The IOS called the first witness on 24 October, some nine months later. On 13 July 2017 it submitted its report to the Executive Director, who informed the complainant by correspondence of 13 September 2017 that the matter was closed. The duration of the process was excessive both in light of the Tribunal's case law and paragraph 2.1 of the Policy on the Prevention of Harassment at WHO, as outlined in considerations 8 and 9 of this judgment.

5. The complainant applies for an oral hearing. She states, in her brief, that this should be granted as there are essential contradictions between her allegations and the assertions of staff members interviewed, especially the DXD/MER and the two staff members in the latter's Office, Ms E. and Ms F., whom she has alleged mobbed her. She states that considering that the facts of the case are in dispute and that she was not able to adduce all the relevant evidence in writing, the Tribunal should conduct an oral hearing and investigate the issues submitted herein. She reserved her right to call witnesses after receiving WHO's reply and surrejoinder.

The application is rejected. The complainant named no witnesses and did not refer to an oral hearing in her rejoinder or subsequently. Neither has she identified the aspect(s) of the case for which she was not able to adduce evidence. Additionally, it is not within the Tribunal's purview to conduct harassment investigations. WHO/UNAIDS constituted the IOS and tasked it to conduct such investigations. Moreover, the issues raised in the proceedings can be resolved having regard to the detailed pleas and the voluminous documentary evidence which the parties have provided. It is noteworthy that the complainant states, in her rejoinder, that she has "provided ample evidence, consisting of hundreds of emails, for each of the allegations of harassment she submitted to the IOS [and that] [s]uch emails extensively demonstrated the instances of harassment committed against her for nearly three (3) years on a regular

and persistent basis [and that] it is rather ironic [for] the Respondent to allege that [she] had not provided sufficient evidence to support [her] allegations, despite the 1000 pages she submitted [...]”. She also states that she provided ample evidence and concrete examples of the way in which the applicable rules have been violated by the IOS during its investigation.

6. The complainant’s request, in her rejoinder, that WHO be ordered to produce documents relating to her supervisor’s vetting process leading to the latter’s promotion to another post before the end of the investigation of the harassment allegations is rejected as it is irrelevant to the complainant’s harassment complaint.

7. WHO raises receivability as a threshold issue. It argues that matters which are raised in this case are irreceivable insofar as they are covered by separate proceedings, including the complainant’s first complaint contesting the decision to reassign her as Senior Advisor, SIE, and other proceedings that are being pursued by the complainant independently of the challenge to the impugned decision to close her harassment complaint. However, it is relatively clear that the allegations insofar as they may concern those other matters are intended to establish an aspect of the unlawfulness of the decision to close the harassment complaint and the complainant’s claims are cast no wider. It is open to the complainant to follow this course (see, for example, Judgment 4149, consideration 7).

8. The applicable harassment rules regime is guided by the relevant WHO Staff Regulations and Staff Rules, read with UNAIDS Introduction to the WHO Staff Regulations and Rules, as well as the Policy on the Prevention of Harassment at WHO (the Policy). Their provisions describe the responsibilities of staff, supervisors/managers and the organization; identify informal and formal conflict resolution procedures; and identify the formal resources available to all staff. By their guiding principles, WHO/UNAIDS assumed the duty to ensure that their staff members are treated, and treat one another, with dignity and respect, free from abuse and harassment. The Policy states that it

seeks to promote a work environment free from harassment, in which staff members at all levels avoid behaviours that may create an atmosphere of hostility or intimidation; provides a process for considering harassment claims and provides for due process for all concerned. It also states that the Organization will not tolerate any type of harassment within the workplace or associated with work performed on its behalf. It also states that allegations of harassment will be fully, fairly and promptly dealt with in a confidential manner.

9. Regarding the applicable general principles, the Tribunal has stated 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. There is no need to prove that the perpetrator of these acts intended to engage in harassment, the main factor being the perception that the person concerned may reasonably and objectively have of acts or remarks liable to demean or humiliate her or him. The Tribunal's case law has always recognised that an allegation of harassment has to be borne out by specific facts, the burden of proof being on the person who pleads it, it being understood that an accumulation of events over time may be cited in support of such an allegation (Judgment 4034, consideration 16). An unlawful decision or inappropriate behaviour is not enough to prove that harassment has occurred (Judgment 2861, consideration 37). The Tribunal has also held that behaviour will not be characterised as harassment or mobbing if there is a reasonable explanation for the conduct in question (Judgment 2370, consideration 17). It further stated that, on the other hand, an explanation which is *prima facie* reasonable may be rejected if there is evidence of ill will or prejudice (see, for example, Judgment 3996, consideration 7B).

10. The complainant challenges the investigative process on the grounds that it violated the rules and principles which govern that process. The Tribunal observes that paragraph 7.15 of the Policy makes the IOS responsible for the conduct of all investigations initiated by a formal harassment complaint in accordance with its guidelines set out in a document entitled "The Investigation Process". The complainant notes

that under these provisions the IOS's investigation is an administrative fact-finding exercise, which is specifically required to observe fairness during the process by interviewing witnesses, establishing facts and gathering any evidence. The complainant submits that there was a lack of fairness, objectivity and impartiality during the investigation process because the IOS did not interview the witnesses whom she suggested and that all the witnesses initially interviewed were staff who were under the supervision of her alleged harasser. She also submits that the IOS failed to interview important witnesses, failed to establish the facts and failed to gather evidence. This plea is well founded.

11. Although the complainant did not provide a list of witnesses in her harassment complaint, she stated therein that she had named witnesses throughout that complaint wherever relevant. She identified about twenty-four persons with reference to various allegations of harassment which she proffered. Initially, between October and November 2016, the IOS interviewed seven of those persons and then transmitted a summary of their testimony to the complainant in December 2016 for her comment. In her response, dated 13 January 2017, the complainant noted that the IOS had not interviewed her or other witnesses whom she had identified. In March 2017, the IOS called five other witnesses. It called the complainant for oral testimony in May 2017. The IOS did not call some of the persons whom the complainant had identified concerning specific allegations, the UNAIDS Chief of Staff and the UNAIDS Executive Director in particular. This was in breach of proper procedure, particularly given that the IOS has not explained why it did not hear those persons (see Judgment 4111, consideration 3).

12. There was also a breach of proper procedure when, notwithstanding the clear discrepancies between critical aspects of the evidence given by the complainant and the three persons whom she accused of harassment (some of which the complainant had detailed in her response of January 2017 and later in her oral testimony), the IOS did not call those persons again to clear the discrepancies (as contemplated by Article 24 of the Investigation Process) in order to determine the truth and properly establish the facts. Moreover, the IOS erred when

contrary to the indication contained in paragraph 3.1.5 of the Policy, that harassment is normally prolonged and persistent, as well as the settled principle that an accumulation of events over time may be cited in support of an allegation of harassment, the IOS rejected each allegation of harassment separately without considering whether cumulatively they provided proof of harassment.

13. The Tribunal has stated that it is by no means abnormal that the investigations conducted with a view to ascertaining the truth of the statements contained in a complaint should be widened to encompass other similar behaviour on the part of the alleged harasser. It noted that it is in fact often the best means of corroborating the allegations of the complainant in an area where it may be impossible to produce material evidence. It has further stated that, more generally, the question whether or not harassment has occurred must be determined in the light of a careful examination of all the objective circumstances surrounding the events complained of by the alleged victim (see, for example, Judgments 3233, consideration 6, and 3640, consideration 14). The Tribunal notes that notwithstanding that Mr F.C. had testified that he sustained treatment that was similar to that which the complainant alleged at the hands of the DXD/MER, who was then his second-level supervisor, his testimony found no place in the IOS's analysis.

14. In the foregoing premises, the IOS's report and recommendation therein to close the case as unsubstantiated are flawed, as well as the GAC's recommendation of 6 September 2017. The result is that the impugned decision of 13 September 2017 which accepted the IOS's recommendation to close the case will be set aside. These breaches entitle the complainant to moral damages.

15. In the normal course, this matter would have been remitted to WHO/UNAIDS for the IOS to conduct a proper investigation. However, this will not be done given the effluxion of time and the fact that the evidence presented is sufficient to permit the Tribunal to determine that the complainant's harassment complaint is well founded.

16. Paragraph 3.1.1 of the Policy defines harassment as any behaviour by a staff member that is directed at another staff member that has the effect of offending, humiliating or intimidating that other staff member; and which that person knows or reasonably ought to know would offend, humiliate or intimidate that person; and which interferes with that staff member's ability to carry out her or his functions at work and/or creates an intimidating or hostile work environment. Paragraph 3.1.3 states that for harassment to occur, it is not necessary that the perpetrator actually intended the behaviour to be offensive, humiliating or intimidating, and that in their interactions with others, staff members should always consider the point of view of the other person in evaluating whether their conduct may be regarded as unacceptable under the Policy. Paragraph 3.1.5 states that harassment is normally prolonged and persistent.

17. Contrary to the IOS's findings, the Tribunal finds that there is sufficient evidence that the complainant suffered harassment over a period of time. The Tribunal appreciates that the DXD/MER took some of the actions complained of in the performance of her managerial and supervisory functions or out of the managerial necessity of the organization. The Tribunal also appreciates that the DXD/MER intended her Senior Advisor and the Director of her Office, Ms E. and Ms F. respectively, to assist her to coordinate her work with her four Department Directors, including the complainant. However, the actions were done in a manner which reasonably caused the complainant to feel that Ms E. and Ms F. were reviewing and supervising her work. It is also apparent from the evidence that misunderstandings occurred as to how Ms E. and Ms F. were to communicate with the complainant and the Tribunal accepts the complainant's evidence that on occasions she did not receive responses to matters which she raised. In the Tribunal's view, in these circumstances the complainant would have reasonably felt offended and humiliated. Ultimately, however, Ms E. and Ms F. were merely executing the orders of the DXD/MER, which also created an intimidating work environment for the complainant.

The circumstances also lead to the conclusion that, given her administrative experience and knowledge, the DXD/MER ought reasonably to have known that the complainant would be offended and humiliated by the actions. Under paragraph 3.1.3 of the Policy, it was not necessary that the actions complained of were intended to have had that effect. There is evidence, which the Tribunal accepts, that the complainant raised some of the matters that concerned her with the DXD/MER. For example, she raised her concern about the role that the Director of the DXD/MER's Office, Ms F., played in relation to her which occasioned a meeting between the complainant, the DXD/MER, Ms E. and Ms F.

18. It is apparent from the evidence that, based on the orders of the DXD/MER, Ms E. and Ms F. did not operate within boundaries that the complainant was aware of, which could have prevented encroachment upon the functions set out in her job description. It is understandable that this caused the complainant to feel that the DXD/MER had inappropriately delegated some of her managerial duties to staff members in her Office. They held meetings with her in instances in which the DXD/MER, as her first-level supervisor, should have met on a one-on-one basis with the complainant as a Department Director. For example, the IOS noted the complainant's statement that one of the most humiliating moments of her career occurred when she had to meet with Ms E. in April 2014 to discuss her individual work objectives "without the mandatory meeting" between the DXD/MER and her. The IOS noted that the applicable rules required the DXD/MER to schedule a planning discussion with the complainant to clarify the expected results of the Department and to discuss her work objectives, competencies and learning objectives. The IOS correctly found that the DXD/MER had departed from the policy by having Ms E. meet with the complainant for this. It however excused the departure on the ground that, as the complainant agreed to receive the DXD/MER's comments from the Senior Advisor, the DXD/MER could not have reasonably known that using the Senior Advisor to communicate her comments to the complainant would offend, humiliate or intimidate her. The IOS further found that although doing so was "unconventional", it was consistent with the DXD/MER's exercise of her managerial and

supervisory responsibilities and that there was no evidence to support the complainant's allegation that the action constituted harassment. The IOS was mistaken.

19. The uncontroverted evidence is that the Senior Advisor had informed the complainant by email that she (the Senior Advisor) and the DXD/MER had reviewed the complainant's objectives together and that she would share their feedback with her at a short meeting. The DXD/MER had thereby clearly delegated her responsibility under the rules to the Senior Advisor, a junior to the complainant, to undertake that critical task which the DXD/MER was required to perform. In the Tribunal's view, given the latter's experience in senior management roles in international organizations and the leading role which she played in reforming performance management and the introduction of the new performance management system, the DXD/MER ought reasonably to have known that this action would have offended and humiliated the complainant. The complainant stated that she was flabbergasted but agreed to the meeting because of past harassing events. It is reasonable to think that she felt even more offended and humiliated by the practical execution of this task. This is because the short meeting (as the Senior Advisor had prior mirrored) to discuss the matters ended without the Senior Advisor providing feedback on the complainant's work objectives. The Senior Advisor later transmitted them by email to the complainant and they were settled, in the complainant's words, by "written back and forth" exchanges between her and the Senior Advisor.

20. The evidence shows that some of the complainant's managerial responsibilities were circumscribed in a manner that was humiliating. This included her preclusion from communicating directly with Human Resources Management (HRM) as she had done previously on some personnel matters without first raising the matter with the DXD/MER. The complainant gives, as an example, her work on job profiles for recruitment. Her evidence, which the Tribunal accepts, is that in the past she did the "leg work" preparing the profiles working in conjunction with personnel in HRM before putting the options and ramifications before the DXD/MER for consideration and decision. She was however

asked not to communicate with HRM on this and other personnel matters without first discussing with the DXD/MER and felt, in effect, that she was being isolated as she could not freely communicate with the Director, HRM, on this matter in order to prepare a report for the benefit of the DXD/MER. She was similarly precluded from responding to audit enquiries and from engaging in chaperone discussions with the DXD/Programmes.

21. In the Tribunal's view, the humiliating circumstances were exacerbated on the evidence, which the IOS correctly accepted, that the DXD/MER did not invite the complainant for whom she was the first-level supervisor to regular one-on-one meetings. This was an essential supervisory duty. The IOS found that the DXD/MER could not have reasonably known that neglecting to invite the complainant to such meetings regularly would offend, humiliate or intimidate her and that her harassment complaint did not state that the DXD/MER "persistently refused to meet with her" on that basis. According to the IOS, it was open to the complainant to request such meetings if she believed that they were warranted, and it noted that the complainant was also said to be reluctant to meet with the DXD/MER. It therefore concluded that there was no evidence to support the allegation that the latter's conduct constituted harassment in this respect. This finding was mistaken.

22. Regular one-on-one meetings with the complainant as a Department Director to discuss technical and administrative matters, was an essential management requirement for the DXD/MER as her first-level supervisor. It was not dependent upon a request and justification by the complainant. The fact is that the incidence of such meetings diminished over time. The complainant's uncontroverted evidence is that from one-on-one meetings once a quarter they became "almost non-existent" with only a single such meeting between September 2013 and the end of December 2014 and that the management of her work was left to Ms E. The evidence is that in the latter years, when the complainant wished to have a meeting with the DXD/MER, she instead had to meet with her Senior Advisor even, as indicated above, to discuss her performance objectives in April 2014. The Senior Advisor and Director of the DXD/MER's Office were also invariably present at times

when the complainant met with the DXD/MER. The complainant's uncontroverted evidence is that at the meeting which she had requested to discuss the difficulties between her and the Director of the DXD/MER's Office, Ms F., she suggested that the four meet regularly to discuss the matter going forward and everyone agreed. However, future meetings were conducted with the other Senior Advisor, Ms E., as the mediator. The IOS was satisfied that that immediate problem was thereby allayed. This did not, however, in the Tribunal's view, negate the systemic managerial problem that reasonably caused the complainant to have felt offended and humiliated by the manner in which this matter was dealt with.

23. In view of the foregoing findings, although the Tribunal concludes that there is nothing in the evidence to suggest that the DXD/MER intentionally set out to unsettle the complainant, the fact remains that taking all the circumstances of the case into account, the actions taken by or on the orders of the DXD/MER were liable to offend and humiliate the complainant. Moreover, in the Tribunal's view, a reasonable person would have found the actions offensive and humiliating. The DXD/MER ought reasonably to have known that those actions would have offended and humiliated the complainant, and that they interfered with the complainant's ability to carry out her work and created a hostile work environment for her, thus constituting harassment in the terms set out in the Policy. This entitles the complainant to moral damages, but she is not entitled to material damages as she has not proved material injury or loss in the context of this complaint. Neither is she entitled to an award of exemplary damages.

24. However, the finding of harassment, which has been reached at the end of proceedings to which the persons called into question are not party and in which they have therefore been unable to comment, may not under any circumstances be used against them in any context other than that of the instant judgment. The conclusion is, however, that WHO/UNAIDS, which have a duty to protect each of their officials, have incurred liability towards the complainant on account of this harassment and must therefore be ordered to redress the injury which she has thus suffered.

25. The complainant will be awarded moral damages in the amount of 50,000 Swiss francs for the breaches identified in considerations 4, 11, 12, 14 and 17 to 23 of this judgment and on account of the harassment which she sustained. She will also be awarded 8,000 Swiss francs in costs.

DECISION

For the above reasons,

1. The impugned decision of 13 September 2017 is set aside.
2. WHO shall pay the complainant 50,000 Swiss francs in moral damages.
3. WHO shall pay the complainant 8,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 24 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ