S.

v.

ILO

134th Session **Judgment No. 4549**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs R. S. against the International Labour Organization (ILO) on 29 January 2019 and corrected on 2 March, the ILO's reply of 4 April, the complainant's rejoinder of 24 June and the ILO's surrejoinder of 17 July 2019;

Considering Articles II, paragraph 1, 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 Director-General's decision to reject her harassment complaint.

In June 2011 the complainant joined the ILO office in Jordan under a fixed-term contract. On 15 June 2018 she filed a grievance alleging harassment by her immediate supervisor, Mr A. In August 2018 an investigator was appointed to examine the allegations of harassment. In the investigation report, dated 4 October 2018, it was concluded that, on the balance of probabilities, the weight of evidence indicated that the complaint of harassment and the allegations of retaliation by the complainant's supervisor were unsubstantiated.

By a letter of 30 October 2018 the complainant was informed of the Director-General's decision to accept the findings and conclusions contained in the investigation report and to reject her grievance. The letter contained an offer to provide mediation and related assistance in order to support the re-establishment of a constructive working relationship and indicated that the complainant could challenge that final decision directly before the Tribunal in accordance with the Staff Regulations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision of 30 October 2018 and to consider her initial complaint of harassment in order to determine that she has been subjected to harassing behaviour under the applicable ILO legal framework. She seeks compensation for the injury suffered in the amount of 50,000 Swiss francs as well as costs in the amount of 3,000 Swiss francs.

The ILO asks the Tribunal to dismiss the complaint as entirely devoid of merit.

CONSIDERATIONS

1. The complainant impugns the Director-General's decision of 30 October 2018, accepting the findings and conclusions contained in the investigation report of 4 October 2018 and rejecting her grievance of harassment and retaliation as unsubstantiated. The Director-General determined that no disciplinary action or other administrative measures were warranted in relation to the complainant's grievance.

2. The complainant submits that the investigation report contains manifest errors of law and, consequently, the impugned decision is based on an unsound report and must be set aside. She mainly bases her complaint on the following grounds:

(a) the applicable ILO legal framework has been disregarded;

(b) the standard of evidence used was not in accordance with applicable international administrative law;

(c) the investigator disregarded essential facts and failed to interview witnesses mentioned by the complainant; and

(d) the complainant suffered extensive prejudice.

3. It is desirable to recall, at the outset, the legal framework governing the examination of harassment grievances at the ILO. The policies and rules are set out in the ILO Staff Regulations, in particular Article 13.4, which was introduced following the conclusion in November 2014 of the Collective Agreement on Anti-Harassment Policy and Investigation Procedure between the International Labour Office and the ILO Staff Union (Collective Agreement). The Collective Agreement includes clauses on guiding principles, scope of application, a non-exhaustive list of examples and clarifications on the definition of harassment, the Office's role and responsibilities, and prevention. The amendments to the Staff Regulations contained in the Appendix of the Collective Agreement that were subsequently incorporated into the Staff Regulations, effective 1 January 2015, include provisions concerning the resolution of harassment grievances, the definition of harassment and the investigation procedure.

4. As stated in Article 1 on Guiding Principles in the Collective Agreement, "[t]he ILO is committed to ensuring a safe working environment which is free from all forms of harassment which is a serious form of misconduct", "[a]nyone subjected to any form of harassment has a right of redress", and "[t]he [p]arties have agreed to an investigation process which is designed to deal with complaints expeditiously and independently in article 13.4 of the Staff Regulations".

Importantly, Article 3, paragraph 5, of the Collective Agreement states that "[i]n determining whether or not harassment has taken place, intent is irrelevant. Even where the alleged harasser had no ill will or intent, the reasonable perception of the recipient shall be the primary factor in determining cases of harassment."

Article 13.1, paragraph 1, of the Staff Regulations accords with the ILO's commitments by stating that:

> "An official who considers that s/he has been treated in a manner incompatible with her/his terms and conditions of employment, including the right to work in a place that is free of harassment, may at any time, without prejudice to the right to file a grievance in accordance with article 13.2.1 or article 13.2.2 [...]"

Article 13.4, paragraph 1, of the Staff Regulations defines harassment as follows:

> "The term 'harassment' is defined as 'any form of treatment or behaviour by an individual or group of individuals in the workplace or in connection with work, which in the perception of the recipient can reasonably be seen as creating an intimidating, hostile or abusive working environment or is used as the basis for a decision which affects that person's employment or professional situation'."

Paragraphs 9 and 14 of the same Article relevantly provide for the investigator's mandate as follows:

> "9. The investigator shall conduct any inquiry necessary to investigate the case including the review of the grievance and any additional statements of the claimant; review of the statements of the respondent; interviews with the parties and any witnesses or staff members deemed relevant to the investigation; as well as the review of any documentation supplied by the claimant, the respondent and the witnesses and gather any additional information needed to complete the investigation.
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> [...]
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> 14. At the end of the investigation, the investigator shall prepare a report comprising:
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> (i) a summary of the allegations;
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> (ii) the investigative procedure undertaken;
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> (iii) the persons interviewed;
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> (iv) the documentation and additional information considered;
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> (v) the established facts and an opinion as to whether or not the allegations of harassment were founded.
>
> [...]"

5. The central issue of the present case is whether the investigation was conducted in compliance with the applicable rules. For convenience of the analysis, the relevant parts of the investigation report are quoted below. The investigation report found that "on the balance of probabilities, the weight of evidence indicates the complaint

of harassment and of retaliation by [Mr A.] towards [the complainant] are unsubstantiated." In the report, the investigator stated that "[t]he evidence gathered has been assessed using the ILO's own definition of harassment as contained at Article 13.4 para[graph] 1"; consequently, against the following five elements of this definition: "[w]hether or not the evidence established the behaviour or conduct had taken place; [w]hether or not the behaviour or conduct had the purpose or effect of creat[ing] an intimidating, hostile, or abusive working environment for the individual [o]r; was used as the basis for a decision which affected that person's employment or professional situation; [w]hether or not the behaviour or conduct was related to a protected characteristic; [w]hether or not it was reasonable, in all the circumstances for the behaviour to have had that effect."

As to the methodology, paragraph 2.2 of the report relevantly states that "[s]even witnesses were selected by the Investigating Officer from the names mentioned in [the complainant]'s grievance [...] The final witnesses were selected from the list of people supplied by [Mr A.]. It should be noted that there was an overlap between both lists." Paragraph 2.3 further states that "[c]haracter witnesses and ex-employees were considered inappropriate individuals from whom evidence could be sought".

6. In her third plea, the complainant submits that the investigator arbitrarily excluded certain facts and incidents from the scope of the investigation even though these incidents fell within the scope of her complaint and within the ILO's definition of harassment. She further contends that the investigator's decision to exclude some witnesses without any justification constitutes an arbitrary decision which vitiates the conclusions of the report.

The ILO argues that the exclusion was in accordance with Article 13.4, paragraph 9, of the Staff Regulations, which requires the investigator to conduct any inquiry necessary to investigate the case, and "the Tribunal's case law permitting an investigator to limit an investigation where multiple incidents are invoked to the facts that are of great significance". It also submits that the fact that detailed explanations

were not provided in the investigation report does not compromise the validity of the report, and according to the investigator's 3 April 2019 email, "[c]haracter witnesses or former employees are generally not interviewed because their testimonies would not directly relate to the actual facts and specific incidents of the case".

7. The investigator only interviewed seven witnesses mentioned in the complainant's grievance. However, in her grievance, the complainant identifies a number of people who would, on her account, be able to give relevant evidence about her allegations of harassment.

Dealing with a similar situation, in Judgment 4241, consideration 11, the Tribunal stated the following:

> "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, [...] the complainant noted that the IOS had not interviewed her or other witnesses whom she had identified. [Subsequently], the IOS called five other witnesses. It called the complainant for oral testimony [...] The IOS did not call some of the persons whom the complainant had identified concerning specific allegations [...] 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)."

In the present case, the investigation report merely stated that "[c]haracter witnesses and ex-employees were considered inappropriate individuals from whom evidence could be sought". The investigator did not consider the question of whether these witnesses should be heard from the perspective of the potential relevance of their testimony to the grievance. Nor did it explain why it was inappropriate to interview ex-employees in circumstances where their evidence may bear upon the question of whether harassment took place. Although the investigator explained afterwards in her 3 April 2019 email that "if [she] had not been able to reach a conclusion, [she] may have approached ex-employees who were potential direct witnesses", this reason was not stated in the

investigation report and, in any event, is logically flawed. It assumes a final conclusion but one not based on all potentially relevant evidence.

8. The consequences of this approach can be illustrated in the following way. The complainant's grievance is 29 pages long. Generally, it takes the form of a chronological narrative of events establishing, as the complainant perceived it, her harassment by [Mr A.]. In relation to many of those events, the complainant identifies who was involved and, in many instances, she makes notations in parentheses of individuals who she says could confirm her account of a particular event. At the conclusion of the narrative is a table headed "LIST OF CHARACTER WITNESSES IN ADDITION TO ILO OFFICIALS ALREADY MENTIONED IN THE DECLARATION" (a list of fourteen). Fairly clearly the complainant was identifying, as potential witnesses, at least all those individuals noted in parentheses who could confirm her account, if not all of the individuals mentioned in her narrative.

Early in the narrative is an account of events associated with the parking of cars. A new additional team leader, AAS, joined the office in 2016 and Mr A. took the view that he and the two team leaders (ZY and AAS) should occupy the management parking. On the complainant's account, she was ordered by Mr A. to park outside and not use the management parking. Based on what is said in her narrative, the complainant found this extremely humiliating, so much so that she stopped driving to work and got a lift from her daughter.

In her narrative, the complainant recounts how the new team leader AAS had said, at the time (and as quoted in the narrative), "I am not interested in the management parking". After setting out this quotation, the complainant observed "([ZY] and [AAS] can confirm that)". ZY was interviewed by the investigator as a witness, AAS was not. Had AAS been interviewed and confirmed that, at the time, he was not interested in management parking, it could well have placed an entirely different complexion on Mr A.'s insistence on the complainant not using one of the management parking places because it was to be used by AAS. The investigator may not have concluded, as she did, "that there is no evidence that [Mr A.] targeted the [complainant]" in relation

to parking. Indeed the opposite conclusion may have been reached, pointing to harassing conduct.

Indeed, by addressing the question of whether Mr A. was targeting the complainant, the investigator may have erroneously been focusing on Mr A.'s intentions. Such an approach would be misconceived given that Article 3, paragraph 5, of the Collective Agreement requires consideration of the effect of allegedly harassing conduct and not the intention of the alleged harasser. But it is unnecessary to explore this issue any further given the antecedent procedural flaw in the investigation concerning witnesses as just discussed.

9. The failure, without valid grounds and notwithstanding the discretion conferred by paragraph 9 of Article 13.4 of the Staff Regulations, to hear witnesses potentially supportive of the complainant's allegations constituted a breach of due process (see Judgment 4111, consideration 3). The complainant's allegation is therefore well founded. As this error of law vitiates the validity of the investigation report, which forms the basis of the impugned decision, that decision must be set aside, without there being any need to address the complainant's other pleas (see Judgments 4313, consideration 7, and 4110, consideration 5).

10. The complainant requests that no new investigation be ordered, and that she should instead be compensated for the prejudice suffered. According to the Tribunal's case law, where an investigation into allegations of harassment is seriously flawed, the Tribunal in principle remits the matter to the organization concerned so that a new investigation can be conducted (see, for example, Judgment 4313, consideration 8, and Judgment 4111, consideration 8). In some specific situations the Tribunal may determine whether the harassment occurred (see, for example, Judgment 4241, consideration 15, and Judgment 4207, consideration 21). But in the present case, the Tribunal is satisfied it would not be appropriate to do so. In particular, given that the complainant is still employed by the ILO, in the event that a properly conducted investigation demonstrates that she was the victim of harassment, appropriate measures from the ILO may be warranted. The complainant's above request is therefore rejected.

11. In light of the above, the impugned decision will be set aside, and the case will be remitted to the ILO for a new investigation of the complaint's grievance by a different investigator in accordance with the applicable rules and the requirements of due process.

12. As the complainant partially succeeds, she is entitled to costs in the sum of 3,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision of 30 October 2018 is set aside.
2. The matter is remitted to the ILO in accordance with considerations 10 and 11 for a new investigation.
3. The ILO shall pay the complainant costs in the sum of 3,000 Swiss francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 25 May 2022, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ