Registry's translation, the French text alone being authoritative.

NINETY-SEVENTH SESSION

Judgment No. 2370

The Administrative Tribunal,

Considering the complaint filed by Mrs M. H. L. d. M. against the International Labour Organization (ILO) on 20 February 2003 and corrected on 23 May 2003, the Organization's reply of 20 January 2004, the complainant's rejoinder of 5 March and the ILO's surrejoinder of 2 April 2004;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, who was born in 1953 and has Brazilian nationality, joined the International Labour Office – the ILO's secretariat – in April 2000 under a short-term contract as a Policy Analyst at grade P.5. As from 1 September 2000 she worked as a Senior Policy Economist under a fixed-term contract in the InFocus Programme on Socio-Economic Security. The first two years of her appointment were probationary. She was transferred twice, in April and September 2002, and left the service of the Organization on 31 May 2003 when her contract expired.

In November 2001 the complainant submitted a grievance to the Ombudsperson under Article 13.15 of the Staff Regulations of the ILO, alleging that her supervisor had subjected her to moral harassment. The Ombudsperson conducted an investigation and issued a report on 2 April 2002, in which she concluded that two of the specific allegations of harassment made by the complainant were well-founded but that the other two were not supported by the evidence. The Ombudsperson also made a series of recommendations which, in the absence of any agreement between the complainant and her supervisor, were not implemented. Nevertheless, in the light of the Ombudsperson's findings, the Office provisionally transferred the complainant to a different post, whilst the Reports Board decided that her forthcoming performance appraisal should not be conducted by her supervisor.

On 10 May 2002 the complainant submitted her harassment grievance to the Joint Panel in accordance with Article 13.16 of the Staff Regulations. Having examined the case from scratch on the basis of the grievance as originally submitted to the Ombudsperson, the Joint Panel held, in its report dated 7 October 2002, that although there was insufficient evidence to conclude that the sequence of events described by the complainant amounted to harassment, her supervisor's conduct had been ambiguous and had been perceived by the complainant as "discriminatory, humiliating and intimidating". In the Panel's opinion, the supervisor's conduct constituted a breach of his duty to "treat colleagues with dignity" and "avoid causing them unnecessary or excessive hurt". It recommended, inter alia, that the complainant be transferred to another post and that her supervisor, "in the absence of intensive coaching on the exercise of staff management functions", be assigned a position where "his manifest abilities as a researcher [...] are untrammelled by preoccupations relating to human resources management".

By a letter of 18 November 2002, the Director of the Director-General's Office informed the complainant that, on the basis of the Joint Panel's finding that her supervisor's conduct did not amount to harassment, the Director-General had decided to dismiss her grievance. That is the impugned decision. Subsequently, she filed an application for review by the Joint Panel of its findings on her harassment grievance, which the Panel rejected in summary conclusions dated 4 August 2003, as well as two further grievances concerning the non-renewal of her contract and retaliatory action allegedly suffered by her since the filing of her harassment grievance, respectively.

B. The complainant contends, firstly, that the Joint Panel's recommendations, and hence the impugned decision which was based on them, were tainted by mistake of fact, erroneous conclusions and omissions of pertinent facts. In particular, she identifies several passages in the Joint Panel's report where the latter's account of the facts is less

detailed than the corresponding account in the Ombudsperson's report and argues that the Panel's omissions led it to draw erroneous conclusions.

Secondly, she submits that the Joint Panel's findings, and by extension the Director-General's decision, were flawed in that they were based on false or unreliable testimony. According to the complainant, many of the signatories of a letter of support for her supervisor refuting her allegations of harassment were dependent on him for the renewal of their contracts of employment, whilst others were not even in a position to comment on the events, having joined the Programme after they had occurred. She also asserts that certain witnesses heard by the Joint Panel had collaborated in preparing their statements after having read the Ombudsperson's report, which ought not to have been disclosed to them in view of its confidentiality.

Thirdly, the complainant contends that the Organization violated its own rules – particularly Chapter XIII of the Staff Regulations – as well as the law of the international civil service, by "engaging in harassing behaviour" against her through the actions of one of its staff members. Having analysed the definition of harassment given in Article 13.10 of the Staff Regulations, which she describes as "rather restricted" compared with the definitions contained in a WHO booklet on the subject,* she points out that the Joint Panel confirmed that she had suffered repeated incidents of mobbing and psychological aggression by her supervisor but failed to label the supervisor's conduct as harassment. Referring to the case law, she adds that even if the Tribunal were to share the view that his conduct did not constitute harassment, the Organization would nevertheless have a duty to compensate her for injury resulting from conduct that was an affront to her personal and professional dignity.

The complainant asks the Tribunal to set aside the impugned decision and to conclude that she suffered injury as a result of psychological harassment by her supervisor or, alternatively, as a result of the latter's breach of his duty to respect her dignity. She also asks the Tribunal to make recommendations to the Director-General on the reassignment of her supervisor, on disciplinary sanctions against the latter and against others who participated in the harassment, and on the implementation of a policy for the supervision of managers; to order the Organization to renew her fixed-term contract for a further two years and to reassign her to a post commensurate with her skills, training and experience; and to order the Director-General to confirm publicly that her reputation has been "unjustly tarnished" and that he has full confidence in her personal and professional capabilities. She claims 100,000 United States dollars in damages for physical and psychological injury; 250,000 dollars in moral damages; two years' salary and emoluments in respect of retaliatory action suffered since the filing of her harassment grievance and of the "irregular non renewal" of her fixed term contract; and 25,000 dollars in costs, with interest on all sums awarded. Lastly, she claims "such other relief which the Tribunal feels is fair, necessary, and equitable". The complainant requests hearings and asks the Tribunal to order the defendant to produce various documents.

C. In its reply the Organization submits that the complaint is receivable to the extent that it concerns the Director-General's decision of 18 November 2002. However, the claims pertaining to subsequent events to which the complainant refers, namely her application for review by the Joint Panel, the non renewal of her contract and the alleged retaliatory action, are irreceivable for failure to exhaust the internal remedies. It considers that many of her claims for redress are also irreceivable, either for failure to exhaust internal remedies, or because they go beyond the scope of the present proceedings, or because they aim at "replacing the administrative functions of the Organization's bodies by the operation of a judgment", or because they are simply unsubstantiated.

The Organization emphasises that the relevant legal framework is that which is defined by the ILO Staff Regulations, so that the complainant's reference to definitions of harassment from other sources is incorrect. It also recalls the Tribunal's case law confirming that the burden of proof lies with the party alleging harassment.

According to the ILO, the main reason why the Joint Panel concluded that the conduct of the complainant's supervisor did not constitute harassment was that the element of intent was lacking. Referring to Article 13.10 of the Staff Regulations and to Judgment 2100, it argues that intent is an essential element of harassment, and that since there was no evidence of intent in this case, the Panel correctly determined that harassment had not been proved.

In response to the complainant's first argument, the defendant explains that where fact findings made by the Ombudsperson are contested by the parties to a dispute, it cannot give effect to recommendations based on those findings without violating the parties' procedural rights. Under such circumstances, the facts have to be established by means of proceedings complying with the basic principles of justice and offering the safeguards required by the

case law, and whilst the proceedings before the Joint Panel satisfy those criteria, those before the Ombudsperson do not. For that same reason, the Organization considers that a comparison with the "more complete" account of the facts provided in the Ombudsperson's report does not afford a valid basis for concluding that the Joint Panel's findings, which it views as correct, were incomplete or erroneous. It nevertheless examines in turn each of the alleged errors or omissions identified by the complainant and concludes that there are no grounds for departing from the findings of the Joint Panel.

The Organization dismisses as irrelevant the complainant's argument based on alleged false and unreliable testimony, noting that the testimonies in question were not relied on by the Joint Panel as grounds for its decision. It points out that this was confirmed by the Joint Panel in its summary conclusions on the complainant's application for review.

The ILO submits that the complainant's allegation that it harassed her via the actions of one of its staff members is unsubstantiated, and observes that she has made no attempt to establish the element of intent.

It considers that hearings would not be useful and asks the Tribunal to reject the complainant's request for the production of numerous documents identified only in general terms.

D. In her rejoinder the complainant argues that neither the Staff Regulations nor the Tribunal's case law support the view that intent is a component of harassment. She queries the assertion that the proceedings before the Joint Panel provide the procedural safeguards required by the case law, noting in particular that the Panel is not independent from the Organization.

The complainant contends that since the evidence she has produced in support of her allegations is sufficient to support a presumption that she was harassed, the burden of proof is reversed, so that the Organization should now bear the burden of proving that the physical and psychological injury she suffered was not due to any fault on its part.

E. In its surrejoinder the Organization maintains its position, emphasising that whilst the Office benefits from the Ombudsperson's analysis, the absence of adversarial guarantees in her fact-finding action precludes reliance on her findings when the facts are contested. Regarding the complainant's criticism of the proceedings before the Joint Panel, it submits that adversarial guarantees are ensured before the Joint Panel as far as the fact-finding process is concerned, given that witnesses are cross-examined during the Panel's hearings and that all material submitted to the Panel is open to comment by both parties.

CONSIDERATIONS

1. The complainant, who joined the ILO on 1 April 2000 and left the Organization on 31 May 2003, filed a grievance alleging moral harassment against the Director of the InFocus Programme on Socio-Economic Security, to which she was assigned until 3 April 2002. On 1 November 2001 she submitted her grievance to the Ombudsperson in accordance with Article 13.15 of the Staff Regulations. Having prepared a preliminary draft of her report in March, which she issued to the Director General, to the complainant and to the official concerned, the Ombudsperson modified some of her considerations in her final report dated 2 April 2002. She concluded that some of the complainant's allegations were well founded but that others were not, and she ended her report with 11 recommendations; in particular, she considered that the complainant should be transferred, because the personal and professional relationship between her and her supervisor had to be viewed as "irreparably broken", and that the Office should compensate her for the personal and professional damage caused by the harassment.

2. On receiving the report, the Office immediately decided to transfer the complainant. Considering that the Organization had taken no measure which, in accordance with the Ombudsperson's recommendations, might have brought a positive solution to the harassment proceedings she had initiated, on 10 May 2002 the complainant submitted her grievance to the Joint Panel in accordance with Article 13.15, paragraph 10, of the Staff Regulations. She emphasised that, in her view, the Administration's passive attitude towards her supervisor's widely-recognised conduct "amount[ed] to tacit tolerance of moral harassment [and was] particularly unacceptable in an organisation established to protect the dignity and defend the rights of workers throughout the world". She asked the Joint Panel to recommend that the ILO Administration:

– confirm publicly, to all staff members and to all other individuals with whom she had professional relations, that for a period of at least one year she had suffered moral harassment, that her reputation had been unjustly tarnished and that the Administration continued to hold her in high esteem and retained full confidence in her;

– award her two payments of 100,000 United States dollars in damages for, on the one hand, the injury to her reputation and the adverse effect on her health and, on the other hand, the Administration's failures in this matter, these amounts being doubled in the event that the ILO failed to accede to her request for public rehabilitation;

– revoke the transfer decision taken in April; and

– restore her functions as a researcher in her fields of specialisation and enable her to pursue her work.

Failing the last two measures, she asked the Panel to declare that her contractual relationship with the ILO is terminated for fault on the part of the Organization and to award her various indemnities amounting to a total of 415,000 dollars.

3. On 7 October 2002, having heard the parties and several witnesses, the Joint Panel adopted a report in which it discussed the complainant's allegations against her supervisor in detail and concluded that, whilst the latter had acted ambiguously in his working relations with the complainant, and although errors were apparent in his management of those relations, it did not have sufficient elements from which to conclude that the facts as a whole could be regarded as revealing harassing behaviour. Nevertheless, the Joint Panel considered that the complainant's supervisor had failed in the obligation of every official with management and director functions to treat colleagues with dignity and avoid causing them unnecessary or excessive hurt. Taking into account all the circumstances of the case, the Joint Panel recommended that the Administration transfer the complainant to a post suited to her profile, which had recently been done, provide her with training to enable her to familiarise herself with the Office's *modus operandi* and ensure that her situation would not be affected by the fact that she had lodged a grievance. It further recommended that the complainant's supervisor be assigned a position where "his manifest abilities as a researcher of great skill and international reputation [would be] untrammelled by preoccupations relating to human resources management".

Following the issuing of that report, the complainant lodged an application for review with the Joint Panel, which was rejected on 4 August 2003.

4. On 18 November 2002 the Director of the Director-General's Office informed her of the Director-General's decision: the Joint Panel having reached the conclusion that "the various aspects of [her] supervisor's conduct [did] not constitute harassment", the Office could not allow her "harassment claim". She was also informed that the Human Resources Development Department would be willing to provide her with assistance "to enable [her] better to overcome [her] distress and to familiarize [herself] with the *modus operandi* of the Office".

5. The complainant asks the Tribunal to set aside the Director-General's decision and to acknowledge that her supervisor, against whom she requests disciplinary sanctions and a transfer, harassed her, or failing that, injured her dignity. Her claims are set out under B, above. She criticises the Joint Panel, and also the Director-General, who endorsed the Panel's conclusions on this issue, for considering that she did not suffer harassment, and she relies extensively on the findings presented in the Ombudsperson's report.

6. A debate has arisen as to the legal framework in which harassment grievances are to be examined. The complainant considers that victims of harassment ought not to have to bear the burden of proof. She cites various legislative texts which reflect that position and which, in her view, ought to be adhered to even though they are not binding on the defendant. She also emphasises that, since the facts were established by the Ombudsperson in an impartial report, the findings of the Joint Panel, which in her view does not offer the necessary guarantees of independence, cannot be taken into account. For its part, the defendant argues that in the absence of an element of intent, an official against whom an accusation of harassment is made cannot be held guilty of such conduct.

7. On these issues the Tribunal shall refer only to the applicable texts and to its case law.

8. In the present case, the applicable text is Article 13.10 of the Staff Regulations, which, in paragraph 3, defines harassment as follows:

"the expression 'harassment' encompasses any act, conduct, statement or request which is unwelcome to the

claimant and could, in all the circumstances, reasonably be regarded as harassing behaviour of a discriminatory, offensive, humiliating, intimidating or violent nature or an intrusion of privacy. It includes, but is not limited to, the following, which may occur singly, simultaneously or consecutively:

(a) bullying/mobbing: namely, repeated or persistent aggression, by one or more persons, whether verbal, psychological or physical, at the workplace or in connection with work, that has the effect of humiliating, belittling, offending, intimidating or discriminating against the claimant, such as:

(i) measures to exclude or isolate the claimant from professional activities;

(ii) persistent negative attacks on personal or professional performance without reason or legitimate authority;

(iii) manipulation of the claimant's personal or professional reputation by rumour, gossip and ridicule;

(iv) abusing a position of power by persistently undermining the claimant's work, or setting objectives with unreasonable or impossible deadlines or unachievable tasks;

(v) unreasonable or inappropriate monitoring of the claimant's performance; and

(vi) unreasonable or unfounded refusal of leave and training.

[…]"

The foregoing non-exhaustive list shows that the type of behaviour that is liable to be viewed as constituting harassment need not necessarily be intentional. It should be borne in mind that some supervisors, without intending to harm their colleagues, may act in such a way that "the effect", if not the aim, of their conduct is to injure the dignity of their colleagues and infringe the rights protected under Chapter XIII of the Staff Regulations. The Organization is therefore wrong in maintaining that, in the absence of intent, the behaviour of the complainant's supervisor cannot be considered as satisfying the definition of harassment given in Article 13.10 of the Staff Regulations.

9. However, allegations of harassment must be supported by specific facts, and on this point the Tribunal can only confirm its case law (see especially Judgments 2067 and 2100) to the effect that it is up to the person alleging that he or she has suffered harassment to prove the facts. That proof will, of course, often be difficult to establish, and in this context both internal appeal bodies and the Tribunal itself must be particularly careful to take into account all the elements resulting from an adversarial examination of the alleged facts; but the burden of proof cannot be reversed, as suggested by the complainant, who refers in her complaint to judgments of the European Court of Human Rights which she considers as supporting her view, although she acknowledges in her rejoinder that they are not relevant. The findings which the Ombudsperson thought fit to make are factual elements which are to be taken into account, but which are not to be considered binding in any sense.

10. Two aspects of the definition of harassment in the above-mentioned provision need emphasising: firstly, the definition given is very broad, the only limitation being that the unwelcome act, conduct, statement or request on the part of the person accused of harassment "could, in all the circumstances, reasonably be regarded as harassing behaviour". That requirement implies an objective assessment, which depends not on the subjective analysis of the supervisor concerned, or on whatever intentions he or she may harbour, but on whether the behaviour the supervisor is accused of may reasonably, in all the circumstances, be regarded as harassing.

11. Secondly, while most of the examples of harassing behaviour given in Article 13.10 concern "repeated or persistent aggression", the definition does allow for the fact that harassment may encompass any of the types of behaviour listed, whether they occur "singly, simultaneously or consecutively".

12. On the merits, the complainant reiterates point by point the accusations that she made throughout the internal proceedings as well as before the Ombudsperson. She argues that her supervisor isolated her from her professional environment and seriously discredited her in the eyes of her colleagues, particularly by cancelling on several occasions – and often at the last minute – her participation in scientific meetings at which she was to speak, and by humiliating her in public during a conference before an audience that consisted of members of the international scientific community drawn from her field of specialisation.

13. In its report, the Joint Panel noted that certain facts had been "sufficiently demonstrated and [were] not contested", such as the behaviour of the complainant's supervisor at a meeting in November 2000, at which heated discussions took place, and at a conference in May 2001, the cancellation of a mission to Bari also in May 2001, and the delay in the preparation of her performance appraisal report. But other incidents – such as the last-minute cancellation of missions abroad or the complainant's recall to Geneva while taking part in missions arranged with the agreement of her supervisor – are not explicitly analysed or even mentioned at all.

14. On the basis of the facts it took into consideration, the Joint Panel considered that the behaviour of the complainant's supervisor had been "ambiguous" in his work relations, noting, for example, that he had withheld her appraisal for "unclear or even contradictory" reasons. However, despite the ambiguous nature of the behaviour of the official against whom the grievance had been lodged, it felt that it was able to conclude that it did not have sufficient evidence to infer that the sequence of events as a whole could be regarded as harassing behaviour. It added that the evidence produced and the witness hearings did not lead it to conclude that each incident described formed part of a pattern of conduct which might amount to a "process of harassment".

15. But, at the same time as it reached that conclusion, the Panel noted that the sequence of events leading up to the grievance had led to psychological and physical suffering by the complainant, who had perceived her supervisor's conduct as being of a "discriminatory, humiliating and intimidating nature", and that the official concerned had "failed in the obligation on every official with management and director functions to treat colleagues with dignity and avoid causing them unnecessary or excessive hurt".

16. The Joint Panel's approach raises a number of difficulties, the first being that the definition of harassment encompasses single acts and does not necessarily require a "process of harassment". The second difficulty is that, when considering that the behaviour of the official concerned had been perceived as being of a "discriminatory, humiliating and intimidating nature", the Panel obviously meant to refer to the definition of harassment given in the above-mentioned Article 13.10. The third difficulty arises from the use of the word "ambiguous" to describe the behaviour of the complainant's supervisor, without specifying what harmful consequences that ambiguous behaviour had had on the complainant's perception of her working relations with her supervisor.

17. The Joint Panel ought to have ascertained whether, in view of the complainant's psychological and physical suffering, which it recognised, the acts for which the official concerned was blamed could "reasonably, in all the circumstances," be regarded as constituting harassing behaviour. Yet the Panel did not specify which circumstances could be considered as explaining or excusing the "ambiguous" conduct of the official concerned, so that, while the reasons given to justify the complainant's accusations are obvious, the elements which might have mitigated or excluded the official's liability are nowhere to be seen. The Joint Panel should also have examined those circumstances and weighed and balanced the various factors surrounding the "ambiguous" conduct so as to determine whether there had been harassment. Thus, for example, if in the light of the circumstances one could conclude that the conduct had a valid managerial purpose or was the result of honest mistake, or even mere inefficiency, such finding would properly lead to the conclusion that it could not, "in all the circumstances", reasonably be regarded as harassment. On the other hand, if the conduct was such that it affected only the complainant or, because of her special vulnerability as a probationary employee, it affected her more severely than her fellow workers, it might follow that it was discriminatory and, even if not intentional, that would lead to the conclusion that the conduct could reasonably be regarded as harassment. These examples are of course not intended to be limitative.

18. It appears from the above that the Joint Panel's conclusions were not based on all the circumstances which should have been taken into consideration in order to enable the deciding authority to take a decision in full knowledge of the facts. The Director General's decision of 18 November 2002, informing the complainant that, since the Joint Panel had reached the conclusion "that the various aspects of [her] supervisor's conduct [did] not constitute harassment" the Office could not allow her "harassment claim", must therefore be set aside and the case must be sent back to the Organization and referred again to the Joint Panel, unless a settlement is reached between the complainant and the Office. The Tribunal exceptionally refers to the possibility of a settlement, since there is no doubt that the complainant has not been shown the respect or allowed the dignity to which international civil servants are entitled, and because in any event she deserves compensation for the injury she has suffered.

19. The Tribunal must reject the claims for injunctions, since it is not for the Tribunal to issue injunctions against the organisations, as well as those concerning the non-renewal of the complainant's contract and the "retaliatory action" that she allegedly suffered, which are irreceivable as they stand, and considers it unnecessary to

grant her request for hearings.

20. The complainant is entitled to costs, which the Tribunal sets at 7,000 Swiss francs.

DECISION

For the above reasons,

1. The Director-General's decision of 18 November 2002 is set aside.

2. The case is referred back to the Organization for a new decision to be taken under the conditions and with the reservation indicated under 18, above.

3. The Organization shall pay the complainant 7,000 Swiss francs in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 21 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G Gaudron

Catherine Comtet

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*"Psychological Harassment at Work" (Protecting Workers' Health Series No. 4) published by the World Health Organization.

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