D.

v.

ILO

122nd Session **Judgment No. 3704**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms I. M. S. D. against the International Labour Organization (ILO) on 18 June 2013 and corrected on 30 August, the ILO's reply of 20 December 2013, the complainant's rejoinder of 26 February 2014 and the ILO's surrejoinder of 2 June 2014;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant contests the decision of the former Director of the ILO Office in Berlin (ILO-Berlin) to apply to her the sanction of a warning.

The complainant joined ILO-Berlin in 2004. At the material time she was employed as an Administrative and Finance Assistant.

In February 2012 the Director of ILO-Berlin concluded a service contract between ILO-Berlin and an external mediator. Under this contract, the mediator undertook to conduct three interviews and to prepare a report. When the initial interview had to be cancelled, the Director agreed with the mediator that the latter would submit an invoice in respect of the cancelled interview. The invoice reached ILO-Berlin while the complainant was on leave and the Director transmitted the invoice to

the complainant with the instruction to settle it as soon as she returned from leave.

When the complainant returned to the office on 15 March 2012 she did not settle the invoice because she considered that it did not comply with the ILO rules, insofar as it was below the threshold required for the reimbursement of the Value Added Tax (VAT) by the German tax authorities and exceeded the amount of the mediator's fee stipulated in the service contract. She therefore scanned it and kept a copy but discarded the original invoice. In April the mediator sent a new invoice which corresponded to a higher amount and was thus suitable for VAT reimbursement. This invoice was settled on 24 April 2012.

On 2 April 2012 the Director learnt that the complainant had not settled the initial invoice as instructed and on 23 April 2012 she issued the complainant with a warning letter alleging that the complainant had exceeded her authority and taken arbitrary action in relation to the unpaid invoice. The warning letter, a copy of which was placed in the complainant's personal file, was written in German and the word used by the Director for "warning" was *"Abmahnung"*. It made no reference to the ILO Staff Regulations.

The complainant replied in writing on 2 May 2012, rejecting the allegations and asserting that she had acted in line with her duties as an Administrative and Finance Assistant. She noted that she had explained to the Director in March that the invoice in question was unusable, because it was below the threshold required for VAT reimbursement by the German tax authorities, and that she had therefore decided to discard it, pursuant to the ILO's usual practice. She specified that the service contract signed between ILO-Berlin and the mediator was for three interviews and a report, but that it did not make provision for additional charges in case of cancellation. She added that she had observed the ILO Financial Regulations and Financial Rules and that she had made it possible for ILO-Berlin to obtain a VAT reimbursement as regards that particular service contract.

On 23 May 2012 the complainant filed a grievance with the Human Resources Development Department (HRD), contesting the warning applied to her by the Director of ILO-Berlin. By a letter of 8 August 2012,

HRD rejected the complainant's grievance on the grounds that the warning was proportionate and had been applied properly to her. The complainant received a scanned copy of this letter by an e-mail of 10 August 2012, which informed her that "the original [would] be sent to [her] by normal mail". She received the original hard copy of the letter sent by regular mail on 5 September 2012. On 13 September 2012 she filed a grievance with the Joint Advisory Appeals Board (JAAB). In its report of 28 January 2013, the JAAB considered that the warning applied to the complainant was proportionate and it recommended that the Director-General dismiss her grievance as devoid of merit. For the sake of transparency and good governance, it also recommended that an English translation of the 23 April 2012 warning be placed in the complainant's personal file. By a letter of 20 March 2013, the complainant was notified of the Director-General's decision to endorse the JAAB's recommendations and reject her grievance. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the ILO to remove the warning from her personal file. She claims compensation and 2,000 Swiss francs in costs.

The ILO invites the Tribunal to dismiss the complaint as irreceivable *ratione temporis* and, subsidiarily, as unfounded in its entirety.

CONSIDERATIONS

1. The complainant seeks to have the impugned decision set aside. She challenges the sanction of warning that was applied to her on the grounds that it was invalid, as it was formally defective and substantively unlawful and unjustified.

2. The ILO raises receivability as a threshold issue contending that the complainant's internal grievance was filed out of time. In Judgment 3311, considerations 5 and 6, the Tribunal reiterated the consistently stated principle that the time limits for internal appeal procedures and the time limits in the Tribunal's Statute serve the important purposes of ensuring that disputes are dealt with in a timely

way and that the rights of parties are known to be settled at a particular point of time.

3. The Tribunal's rationalisation of this general principle may be summarized as follows: time limits are an objective matter of fact and strict adherence to them is necessary for the efficacy of the whole system of administrative and judicial review of decisions. An inefficacious system could potentially adversely affect the staff of international organisations. Flexibility about time limits should not intrude into the Tribunal's decision-making, even if it might be thought to be equitable or fair in a particular case to allow some flexibility. To do otherwise would "impair the necessary stability of the parties' legal relations". This general principle applies to internal appeals, even if the internal appeal body considers the appeal on its merits, notwithstanding that time limits have not been complied with. It would be wrong for an internal appeal body to hear an appeal that was time-barred and the Tribunal would not entertain a complaint challenging the decision taken on a recommendation by that body. However, there are exceptions to this general approach expressed in the Tribunal's case law. One such exception is where a defendant organisation has misled the complainant thus depriving her or him of the possibility of exercising her or his right of appeal, in breach of the principle of good faith (see, for example, Judgment 2722, consideration 3, and Judgment 3311, considerations 5 and 6).

4. The ILO argues that the complaint is irreceivable, under Article VII, paragraph 1, of the Statute of the Tribunal, as the complainant has not exhausted the internal means of appeal. This, according to the ILO, is because she failed to submit her grievance to the JAAB within the prescribed time limit, as required by Article 13.3.2 of the Staff Regulations. This Article sets a one-month time limit from the notification of the HRD's decision for the filing of a grievance with the JAAB.

5. It was by the letter dated 8 August 2012 that HRD rejected the complainant's grievance on the ground that the warning was lawfully applied to her and was proportionate. A scanned copy of the letter was transmitted to the complainant by an e-mail on 10 August 2012. It informed

the complainant that the original would be sent by normal mail. The ILO states that the complainant received and opened the e-mail on the same day, as recorded by the ILO's e-mail system. The complainant has not denied this. She received the original hard copy of the letter by mail on 5 September 2012 and filed her grievance with the JAAB on 13 September 2012.

6. The ILO submits that the complainant was notified of the decision on 10 August 2012 and her grievance should have been filed with the JAAB within one month from that date. The Tribunal has consistently stated, as in Judgment 2966, consideration 8, for example, that a decision may be validly notified by e-mail and that time runs from the date on which a complainant learns of the decision.

7. The complainant insists that her grievance was receivable, as it falls within one of the exceptions to the general rule for strict adherence to specified time limits, because the ILO misled her into thinking that the time limit for filing her grievance with the JAAB would not run until she received the original letter informing her that HRD had dismissed her grievance thereto. Her reasons for this assertion are stated as follows in the rejoinder:

> "First of all, […] I wonder why it was then necessary to send an original letter by regular mail if the scanned copy was sufficient to trigger the time limit to submit an appeal to the JAAB. Second, […] I was misled by the drafting of the [e-mail] accompanying the scanned copy of the original letter. Indeed, I was informed that "the original will be sent to [me] by normal mail". The use of the word "original" gave me the impression that submitting a grievance before receiving the original would be premature. Thus I started counting the days upon receipt of the original letter and not upon receipt of an electronic mail informing me that the original would come later by normal mail. It would have not been the first time the Office would have considered a complaint as premature, and therefore irreceivable before the JAAB, because the final decision had not yet reached the complainant."

8. This was a conclusion which the complainant could reasonably have drawn in all the circumstances of this particular case. The message that the original decision would be sent by post could possibly and reasonably have confused and misled the complainant causing uncertainty as to when she was being notified of the decision and whether the time

limit for filing her grievance ran from 10 August 2012, when she received the e-mail. It is accordingly determined that this is an exception which permitted the complainant to file her grievance with the JAAB when she did. The complaint is therefore receivable. The Tribunal considers that a statement in HRD's decision, or in the e-mail by which it was sent, making it clear that the time limit for filing a grievance with the JAAB would have run from the date on which the complainant received the scanned copy, would have put the matter beyond doubt.

The merits of the complaint will be considered against the background of the applicable legal provisions and principles.

9. The disciplinary sanction of warning, which is the least severe such sanction, is provided for in Articles 12.1 and 12.3 of the Staff Regulations. Article 12.1 states as follows:

> "1. An official who fails to observe the standards of conduct required of an international civil servant may be subjected to any one of the sanctions provided for in this chapter, as appropriate to the gravity of the case.
>
> 2. Failure to observe the standards of conduct required of an international civil servant shall mean –
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> (a) failure to observe any of the provisions of articles 1.1 to 1.7 of the Staff Regulations;
>
> (b) misconduct by an official in his official capacity;
>
> (c) dereliction of duty."

Article 12.3 states as follows:

> "The sanction of warning may be applied to an official by his/her responsible chief, or by the Director-General. If, during a period of three years following the application of such a warning the official does not receive a new sanction, that warning shall be withdrawn from his/her personal file."

10. The complainant's submissions in support of her claim that the warning issued by the Director of ILO-Berlin was formally flawed may be summarized as follows: it was neither correct nor appropriate for the Director to write the warning in German, a non-official ILO language. Neither was it correct or appropriate for the Director to use the word *"Abmahnung"* in reference to the warning. She should instead have used the word *"Ermahnung"*, which corresponds to "warning" or

"avertissement". The word *"Abmahnung"*, under German labour law, is always a prerequisite for the cancellation of a contract and the Director's use of this specific term was deliberate. The use of it in the original warning letter could give the impression that the sanction that the complainant faced was far more severe than a mere warning. The Director ought to have used official ILO terminology and ought to have drafted the warning letter in an ILO official language. German is widely spoken in the ILO, also among managers, and the presence of the word *"Abmahnung"* in the complainant's personal file could be detrimental to her career prospects. Those having access to her personal file may perceive the sanction applied to her as the last step before the sanction of dismissal. This is not consistent with the Staff Regulations as regards the definition of warning.

The complainant admitted that the ILO placed an English translation of the warning letter in her personal file but stated that it did so only after she had filed a grievance.

11. It is determined that the complainant's claim that the warning is invalid because it is formally flawed is unfounded, and will accordingly be dismissed. The fact that it was written in German did not invalidate it. In the first place, in the impugned decision the Director-General accepted the JAAB's recommendation to place an English translation of the letter on the complainant's personal file. As the JAAB observed, this is an official record of the complainant's career that is used by HRD officials and internal administrative bodies, particularly for decisions concerning assessment and promotions. Since English is one of the three official languages of the ILO, while German is not, the decision to place the English translation of the letter on her personal file had the effect of obviating any misunderstanding as to the reasons and legal basis of the warning.

In the second place, the complainant's written observations to the warning were also placed on her personal file. This would have provided to persons who subsequently read the file the complainant's perspective on the matter. In the third place, the warning was not invalidated because the German word, *"Abmahnung"*, which in German labour law refers to a warning that is a prerequisite for the cancellation of an

employment contract, was used. The complainant did not suffer any detriment as a result. The ILO Staff Regulations, not German law, apply to the case. In the fourth place, the warning letter should properly have contained, in addition to the reasons, the legal basis of the warning by specific reference to Articles 12.1 and 12.3 of the Staff Regulations. This was particularly necessary in order to facilitate the complainant in making her grievance. That deficiency was however cured when, in its reply to the complainant's initial grievance, HRD specifically stated that the warning was issued pursuant to these provisions.

12. Regarding the claim that the warning was substantively irregular, a guiding principle for setting aside a disciplinary sanction was stated, for example, in Judgment 3430, consideration 3, as follows:

> "Where […] a decision lacks proportionality, there is an error of law which warrants setting aside the impugned decision (see Judgment 2944, under 50, and the judgments cited therein)."

13. The complainant submits that the warning was unjustified because she made no mistake in not paying the invoice. She explains the reasons for this submission as follows: the invoice was unusable, as the sum claimed in it was below the threshold required for the reimbursement of the VAT by the German tax authorities. She did not file the invoice and threw it away expecting the correct invoice on the overall amount stated in the service contract, which was for three interviews and a report and which set the mediator's fee at 520 euros. The service contract did not provide for the payment of an additional amount in the event of cancellation and had she settled the invoice, the contract amount would have been exceeded. She had explained to the Director the procedure followed for the reimbursement of the VAT by the German tax authorities and the Director had already signed original invoices, their true copies and two letters sent to the German tax authorities, together with a list of all invoices with recoverable VAT. The correctness of her actions is borne out by the fact that eventually an invoice for the whole amount of the mediator's fee, 520 euros, was received and settled on 24 April 2012. Problems in respect of the initial invoice arose from the fact that she was not allowed to explain directly

to the mediator how the invoice should be prepared, as she had been instructed by the Director not to contact the mediator.

14. The terms of the subject service contract show that the parties agreed that the mediator would have done three interviews and a report upon which there were to be discussions and follow-up with the ILO mediator. The mediator had submitted the initial invoice for the first scheduled interview, which was cancelled because the complainant, who was one of two mediation clients for that interview, had reported ill on the scheduled date. The mediator was present for the interview. In the circumstances, the Director agreed to pay the mediator for the cancelled interview. The Director sent the initial invoice to the complainant for processing on her return from leave on 15 March 2012. The Director was surprised when, on 2 April 2012, she enquired and the complainant told her that she had not paid it and she had thrown it away.

15. However, the complainant's plea that she had done nothing wrong cannot be circumscribed in these considerations alone. Conduct is also an important consideration. The question is whether the manner in which the complainant went about her concern was compatible with the standards of conduct that are expected of an international civil servant. It is considered that the complainant's conduct did not meet the required standard.

16. The complainant was subject to the authority of the Director, who, having made the request for the invoice to be processed, should not have had to contact the complainant on 2 April 2012 to be informed that she had not processed it and had thrown it away. The Tribunal stated as follows in Judgment 2861, consideration 81:

> "[T]he complainant was obliged to accept directives from the Director of IOO as he was her immediate supervisor. She had no right to dictate what she would and would not do. Rather, Article 18 of the Standards of Conduct for the International Civil Service makes it clear that, in such circumstances, if agreement cannot be reached with the supervisor, written instructions may be requested and they may then be challenged but that the instructions must be obeyed. […]"

17. This statement is intended to facilitate order in the implementation of administrative instructions given by persons in authority, while ensuring that the person in authority maintains responsibility for such instructions and their consequences. If the complainant did not agree with the Director's instruction, her recourse was to ask for written instructions. If the Director confirmed the instruction, she was obliged to obey the instruction she had received. As the complainant did not follow the instruction, the Director had the discretion to issue the warning to the complainant, which she did. Moreover, the warning was not a disproportionate sanction, as it is the least severe sanction under the Staff Regulations and it would have been withdrawn from her personal file, if she did not receive a new sanction within three years following the warning. Accordingly, it is also determined that the claim that the warning is substantively irregular is unfounded and will accordingly be dismissed.

18. In the foregoing premises, the complaint is unfounded in its entirety and will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 May 2016, Mr Giuseppe Barbagallo, Vice-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 6 July 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ