

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

R.
v.
UNIDO

123rd Session

Judgment No. 3725

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. C. R. against the United Nations Industrial Development Organization (UNIDO) on 10 March 2014 and corrected on 11 June, UNIDO's reply of 1 October, the complainant's rejoinder of 19 December 2014 and UNIDO's surrejoinder of 9 April 2015;

Considering Articles II, paragraph 5, 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 disciplinary measures imposed on him following an investigation into alleged misconduct.

The complainant joined UNIDO in January 2009 as the Philippines Country Representative at the P-5 level. In June 2011 several staff members supervised by the complainant lodged claims of misconduct against him in relation to a variety of allegations. These were investigated by the Internal Oversight Services (IOS) whose Report was presented to the Director-General in April 2012, concluding that there was evidence of misconduct and recommending that disciplinary proceedings be initiated against the complainant. The Director-General sent the report to the Human Resource Management Branch (HRM) for

action, and the complainant was interviewed. HRM subsequently recommended that the complainant's appointment should not be extended but the Director-General decided to refer the matter to the Joint Disciplinary Committee (JDC). The JDC concluded that there was insufficient evidence in relation to some of the charges but sufficient evidence in relation to the allegations of abuse of authority and of potentially damaging the reputation of the Organization. It considered that the degree of wrongdoing did not justify non-extension of the complainant's contract, but that he had shown ill judgment and managerial incompetence and should be removed from his current position. It also recommended that he not be assigned any further representative or managerial role, that he be demoted to grade P-4 in the most financially neutral manner possible, that he receive a written censure and that his next step increment be withheld. On 8 February 2013 the complainant was notified by an Interoffice Memorandum that the Director-General had decided to accept these recommendations and that he was demoted to grade P-4, step 15, effective 1 February and reassigned to a P-4 position in UNIDO headquarters without managerial duties. The step increment due in January 2013 would not be implemented, and the memorandum was to serve as notice of the written censure for misconduct.

The complainant requested a waiver of the internal appeal process and authorisation to proceed directly to the Tribunal, but this request was declined. On 21 February he informed HRM that he expected to start in the new P-4 position on 1 July and that he accepted the post without prejudice to his right of appeal. He lodged an appeal with the Joint Appeals Board (JAB) on 6 March 2013. In its report of November 2013 the JAB recommended that the complainant's appeal be rejected in its entirety and that the disciplinary measures be maintained. On 12 December 2013 the Director-General accepted the JAB's recommendations and dismissed the appeal. This is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to set aside the impugned decision and to order the removal of any adverse material from his personnel file. He also claims material damages in the amount of three

months' net base salary plus post adjustment at his last grade, moral damages in the amount of 50,000 euros, and costs.

UNIDO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. This complaint raises issues concerning disciplinary proceedings and measures which were taken against the complainant, who contends that they were unlawfully imposed on him.

2. The complainant was the UNIDO Country Representative in the Philippines in 2011 when three subordinate staff members who worked in the Philippines Country Office (PCO) lodged reports of misconduct against him. Their reports caused a team of investigators from IOS to investigate allegations of harassment, sexual harassment, retaliation, abuse of authority, breach of fiduciary duty and damage to the reputation of UNIDO against the complainant. The investigators found that there was sufficient evidence upon which to institute disciplinary proceedings against the complainant on the basis of each of these allegations. HRM subsequently interviewed the complainant and the notes of that interview as well as the IOS report were referred to the JDC established under Administrative Circular UNIDO/DA/PS/AC.87 of 28 May 1992 on Disciplinary Measures (Administrative Circular 87), pursuant to Staff Regulation 11.1, to advise the Director-General in disciplinary cases. The Director-General accepted the JDC's findings and recommendations, as summarized above, and, subsequently, in the impugned decision of 9 December 2013, accepted the JAB's recommendations and imposed the subject disciplinary measures against the complainant. The measures were that he not be assigned any further representative or managerial role; that he be demoted to grade P-4 in the most financially neutral manner possible; that he be given a written censure for misconduct and that his step increment which was due in January 2013 be withheld.

3. In seeking to set aside the impugned decision, the complainant contends that “[it] suffers from numerous defects, including the defective JAB Report, the failure to prove any of the charges beyond a reasonable doubt, and the failure of the IOS and JDC to follow their applicable rules [and that] [m]oreover, multiple disciplinary measures were applied in breach of the staff rules and in breach of double jeopardy, and [the] principle of proportionality”.

4. Article 11.5 of UNIDO’s Constitution requires integrity to be one of the paramount considerations in the employment of staff and in determining the conditions of service. As international civil servants, UNIDO’s staff members are governed by the Standards of Conduct of the International Civil Service. Paragraph 5 of that document states that the concept of integrity enshrined in the Charter of the United Nations embraces all aspects of behaviour of international civil servants. Paragraphs 16 and 17 stress the responsibility of managers and supervisors to ensure a harmonious workplace based on mutual respect and to uphold the highest standards of conduct. Staff Regulation 1.1 of the UNIDO Staff Regulations states that by accepting appointment, staff members pledge to discharge their functions and to regulate their conduct with only the interests of UNIDO in view. Staff Regulation 1.3 states that staff members shall conduct themselves at all times in a manner befitting their status as international civil servants; shall not engage in any activity that is incompatible with the proper discharge of their duties with UNIDO, or action which may adversely reflect on the integrity required by their status. Staff Regulation 11.2 empowers the Director-General to take disciplinary measures against staff members who do not meet the highest standards of integrity or whose conduct is otherwise unsatisfactory. It further states that a staff member may be summarily dismissed for lack of integrity or other serious misconduct. Staff Regulation 11.1 empowers the Director-General to establish administrative machinery for disciplinary proceedings.

Administrative Circular 87 provides that administrative machinery and procedures for appeals. It states that “[d]isciplinary measures may take the form of a summary dismissal or other measures consisting of written censure, suspension without pay, demotion or dismissal for

misconduct (staff regulation 11.2 and staff rule 111.03(a))”. This confirms the provision of Staff Rule 111.03(a) which states that disciplinary measures may consist of “written censure, suspension without pay, demotion or dismissal for misconduct”.

5. The grounds on which the complainant challenges the impugned decision may be stated as follows:

- 1) The JAB made a fundamental error concerning the scope of the appeal which breached the complainant’s due process rights, which in turn tainted the Director-General’s decision notwithstanding that he did acknowledge the JAB error.
- 2) The Director-General erred by not substantiating the impugned decision to justify the disciplinary measures imposed and the presumption of innocence was not respected.
- 3) Misconduct was not proven beyond reasonable doubt.
- 4) The IOS’s investigation was tainted with errors of fact and law since it did not follow its own procedure set out in the Charter of the Office of Internal Oversight Services (UNIDO/DGB/(M).92/Rev.2).
- 5) There was a breach of the rules on discipline and double jeopardy.
- 6) The principle of proportionality was breached by the imposition of various arbitrary disciplinary sanctions.
- 7) The complainant remained in his post during the disciplinary process contradicting the organisation’s claim that he failed to meet the standards of conduct.

6. In addition to seeking to set aside the impugned decision, the complainant seeks orders to remove any adverse material from his “official personnel file”, an award of material and moral damages and costs.

7. UNIDO raises receivability as a threshold issue contending that since the complainant sought the removal of adverse material from his personnel file for the first time in the present complaint, this request is irreceivable because he did not exhaust the internal means of redress in relation to it as required by Article VII, paragraph 1, of the Tribunal's Statute.

The Tribunal rejects this contention as this is an additional request for a remedy arising from existing claims and not a new claim.

UNIDO also notes that the complainant expanded the quantum of his claim for damages on his earlier claims and goes further in the rejoinder to introduce new claims of constructive dismissal. UNIDO submits that these are irreceivable and that the claims for damages should only be admitted to the extent of the earlier amounts which the complainant had sought.

The Tribunal has consistently stated that a new claim which is raised in a rejoinder is irreceivable. All claims which arise on the basis of constructive dismissal will accordingly be dismissed.

8. On the merits, the Tribunal considers that the seventh mentioned ground of the complaint is unfounded. Under Article 25 of Administrative Circular 87, the Director-General had the option to suspend the complainant during the disciplinary proceedings if he thought that there was *prima facie* evidence of misconduct against him and his continuance in service would have prejudiced the interests of UNIDO. The fact that he permitted the complainant to remain in his post during the process does not contradict UNIDO's claim that he failed to meet the standards of conduct, as the complainant asserts. UNIDO had informed the complainant of the conduct that was required of him while he remained in the post during the investigation.

9. The Tribunal determines that the fifth and sixth mentioned grounds are likewise unfounded. The complainant asserts that Staff Rule 111.03(a) provides various possible sanctions as alternatives such that only one measure should be imposed for proven misconduct. The complainant therefore states that the imposition of multiple disciplinary

measures on the same factual circumstances amounts to a breach of the rules on discipline and double jeopardy. The Tribunal discerns nothing in Staff Rule 111.03(a) that limits the Director-General's discretion in such a way that he may impose only one of the disciplinary measures under that rule. Further, as UNIDO submits, Staff Regulation 11.2 provides for disciplinary measures to be taken against a staff member, and additionally, reassigning the complainant to Vienna was a non-disciplinary consequence of the complainant's demotion to P-4. In this regard the following statement in Judgment 3184, under 7, is recalled:

“7. Contrary to the complainant's assertion, the Tribunal is of the opinion that there was no violation of the rule against double jeopardy and that the disciplinary measure was legally justified. The rule against double jeopardy ‘does not prevent disciplinary and non-disciplinary consequences attaching to the same acts or events. However, it does preclude the imposition of further disciplinary measures for acts or omissions that have already attracted a disciplinary sanction’ (see Judgment 3126, under 17). Consequences deriving from separate norms can stem from the same fact. Each measure corresponds to a different interest of the Organization and therefore it is possible that one fact can have numerous consequences without violating the rule against double jeopardy. [...]”

10. The complainant seeks to challenge the IOS process in the fourth mentioned ground. He contends that IOS did not follow its own procedure set out in paragraphs 3, 8, 12 and 19 of the Uniform Guidelines for Investigations (2nd Edition) endorsed by the Conference of International Investigators of the United Nations Organizations in June 2009 (the Uniform Guidelines). These provisions state as follows:

- “3. The Investigative Office shall maintain objectivity, impartiality and fairness throughout the investigative process and conduct its activities competently and with the highest levels of integrity. [...]”
8. Investigative findings shall be based on facts and related analysis, which may include reasonable inferences.
12. The Standard of Proof that shall be used to determine whether a complaint is substantiated is defined for the purposes of an investigation as information that, as a whole, shows that something is more probable than not.
19. The Investigative Office should examine both inculpatory and exculpatory information.”

It is also noted that, concerning fact-finding, paragraph C.15 of UNIDO's IOS Charter states that "IOS establishes the existence (proving) or non-existence (disproving) of the elements that constitute a wrongdoing".

11. The complainant submits that the investigation was not impartial as IOS failed to properly assess countervailing evidence. He further submits that IOS failed to acknowledge that a staff member had misrepresented that she had filed a complaint against the complainant with the Philippine Commission on Human Rights (CHR) and that this should have prompted the dismissal of the testimony of that staff member. He also submits that IOS had failed to respect the investigative procedure provided in paragraph 37 of the Guidelines which states that "[t]o the extent possible, interviews conducted by the Investigative Office should be conducted by two persons". The complainant states that he was interviewed by one person while the impression of impartiality would have been reduced had two persons interviewed him. The complainant argues that, moreover, contrary to paragraph 33 of the Guidelines, IOS did not systematically "seek corroboration of the information in its possession" as it did not interview the complainant's wife, although the JDC thought that this was critical. He insists that IOS thus failed to test the credibility of the evidence. He insists that by mixing information which was corroborated with information which was not, IOS's findings lead to misleading and confusing conclusions.

12. The Tribunal determines that IOS's actions were not contrary to the Uniform Guidelines or its Charter by reason that only one person interviewed the complainant. Paragraph 37 of the Guidelines permits investigation by one officer, but also states that two officers may do so "[t]o the extent possible". Moreover, the fact that IOS did not interview the complainant's wife does not mean that it did not systematically seek corroboration of information which it had collected.

The IOS report shows that IOS generally sought corroboration of the information which emerged from its interviews. It identified the instances in which some aspects of that information were corroborated or not corroborated. The complainant suggests that there was a relationship between his wife and staff members who lodged complaints against

him. The suggestion seems to be that the staff members were influenced to lodge their complaints as a result of that relationship. Even if it existed, the nature of the relationship is vague and would not in itself have negated the evidence which the staff members gave.

13. The IOS report shows that IOS interviewed the three staff members who lodged the complaints, the complainant and twelve other witnesses. The complainant's lawyers provided affidavits and submitted questions. IOS conducted thirteen interviews in person and three by telephone. After interviews, IOS reviewed the statements of the interviews and documents which were submitted. All persons who were interviewed countersigned their statements having reviewed and amended them where necessary. The complainant and his lawyers were given the opportunity to comment upon IOS draft report and they did so. IOS also collected text messages and documents which it considered relevant to the investigation.

14. Essentially, IOS is a fact-finding investigative body. Its task is to collect, collate and analyse information objectively, impartially, fairly and with the highest degree of integrity and to determine thereupon whether there is sufficient information to substantiate a complaint on a balance of probabilities, examining both inculpatory and exculpatory information. The Tribunal finds that IOS acted fairly within the guidance provided for in paragraphs 3, 8, 12, 19, 33 and 37 of the Guidelines and that its conclusion and recommendations were supported by the evidence. The fourth mentioned ground is therefore considered to be unfounded.

15. The complainant seeks to challenge the proceedings and the Report of the JDC in the third mentioned ground in which he contends that misconduct was not proven beyond reasonable doubt. It is well established in the case law that where misconduct is denied, the burden falls upon the Organization to prove misconduct beyond a reasonable doubt and the staff member is to be given the benefit of the doubt (see, for example, Judgment 2879, under 11).

16. The following guidance for the JDC's procedure is provided in Administrative Circular 87:

“31. It is stated in the Staff Rules, appendix J, para. (f) that ‘in considering a case, the [JDC] shall act with maximum dispatch. Proceedings before the [JDC] shall normally be limited to the original written presentation of the case, together with brief statements and rebuttals, which may be made orally or in writing but without delay. [...]”

33. It is stated in the Staff Rules, appendix J, para. (g), that ‘the [JDC] shall permit a staff member to arrange to have his or her case presented before it by a serving staff member or a retired staff member residing at the duty station’. [...]”

35. Wherever feasible, the [JDC] conducts oral proceedings to afford the staff member or his or her representative a full opportunity to present his or her case. Such hearings are held in private and, unless the [JDC] otherwise decides, in the presence of both parties.

36. In its examination of questions of fact as well as questions as to whether a particular act or omission should be deemed to be a breach of conduct, the [JDC] considers and weighs reports of whatever preliminary investigations have been made, together with the statements, answers and evidence presented by or on behalf of the staff member concerned. The [JDC] may also seek information and testimony from other staff members when it considers such information necessary or helpful. For that purpose, it may request the representative of the Director-General to arrange for the presence of such staff members, or if this is not feasible, to arrange for them to answer written questions put by the [JDC].”

17. The complainant submits that inasmuch as paragraph 30 of the IOS Charter provides that IOS’s fact-finding is on the preponderance of the evidence, rather than proof beyond a reasonable doubt, the JDC could not have relied on it as a basis upon which to find misconduct and to impose disciplinary measures.

The Tribunal accepts his assertion that, pursuant to Administrative Circular 87, the task of the JDC is to determine whether the facts and conclusions of IOS provide sufficient bases of proof of misconduct beyond a reasonable doubt, and, in that way safeguards a staff member’s right to due process as it provides a forum in which the staff member may defend herself or himself and test the evidence provided by IOS against the standard of proof beyond a reasonable doubt. The Tribunal however does not accept the complainant’s further assertion that the JDC’s conclusions are vague and ambiguous on the sufficiency of evidence to meet the required standard of proof regarding abuse of authority and the finding that the complainant’s behaviour could

potentially or possibly harm the reputation of UNIDO as there was no proof of such harm beyond a reasonable doubt and there was no proof of such actual harm.

18. It is noted that the JDC did not rely solely upon the IOS report. It also had, among other things, the written statement provided by the complainant. He requested permission to submit the statement, rather than appear in person, as he was about to depart on annual leave. It therefore appears to be disingenuous for the complainant to seek to challenge the JDC's process on the ground that, in breach of his due process rights, the JDC did not conduct a hearing despite the requirement to hold one "whenever feasible". Moreover, a hearing was not a mandatory requirement. The JDC also had HRM's submissions to the Director-General after IOS reported and submissions made to it by HRM and by the complainant.

The Tribunal determines that the reservations which the JDC stated concerning aspects of IOS's investigation and Report do not detract from the JDC's conclusions and recommendations. The stated reservations show the dispassionate approach which the JDC took in analysing the evidence provided in IOS report. It was on the basis of that analysis that, as to the allegations of sexual harassment, the JDC concluded that it "clearly finds incidents and documentation of incorrect behaviour, which could border on harassment under the definition of harassment. However, it finds weak support for the harassment to be sexual harassment." The JDC accordingly recommended that the charge of sexual harassment be dismissed, contrary to IOS's recommendation. The JDC also found that there was insufficient evidence to support the charge of breach of fiduciary duty, contrary to IOS's recommendation.

19. On its analysis, the JDC found that there was sufficient evidence to support abuse of authority and behaviour that was damaging to the reputation of UNIDO. The Tribunal does not consider that its conclusions on these charges are vague. The JDC could have reasonably come to those conclusions on the totality of the evidence beyond a reasonable doubt. The third mentioned ground is therefore unfounded.

20. With regard to the first mentioned ground, the complainant submits that “[t]he JAB confused and misinterpreted the scope of the appeal, and the scope of the disciplinary allegations at issue, the entire analysis by the JAB was flawed [and] the Director-General’s decision is tainted since it relies on the tainted JAB report”. This, according to the complainant, is because the JAB failed to acknowledge that the JDC had determined that the allegations of sexual harassment and retaliation in respect of abuse of authority had not been proved and, notwithstanding this error, which breached the complainant’s right to due process, the Director-General still relied on the JAB’s report.

21. The Tribunal notes that after its review of the allegations against the complainant, in its report of 13 December 2012 to the Director-General, the JDC concluded that the complainant’s conduct fell short of the highest standards of integrity, cultural sensitivity and professionalism. This conclusion was made because it had found that the allegations of abuse of authority and of damaging the reputation of UNIDO were well established. The JDC found, however, that the allegations of sexual harassment and breach of fiduciary duty were not established because of insufficient evidence. It was on these bases that the JDC recommended that the subject disciplinary measures be taken against the complainant.

22. The Tribunal finds that inasmuch as the Director-General had accepted, on February 2012, the finding and recommendations of the JDC, the allegations of sexual harassment and breach of fiduciary duty did not arise for the JAB’s consideration. It is further determined that the JAB was entitled to look at the totality of the evidence of the complainant’s conduct in deciding whether he had misconducted himself by abusing his authority and/or by damaging UNIDO’s reputation.

It was however in error that the JAB based its recommendation on, among other things, “sufficient evidence proving misconduct as highlighted in the IOS report dated 18 April 2012, viz: [a...]. b. The Appellant sexually harassed three members of the office personnel [...]”. The Director-General had already dropped the charge of sexual harassment on the JDC’s recommendation. Even if the JAB included this, there was ample

evidence from which to find there was misconduct beyond reasonable doubt in relation to the charges of abuse of authority and damaging UNIDO's reputation. Moreover, in the impugned decision the Director-General specifically noted in relation to the JAB's findings concerning the allegations of sexual harassment and retaliation that these were outside of the JAB's purview. The first mentioned ground of the complaint is unfounded.

23. The Tribunal also finds that the second mentioned ground is unfounded. The principle concerning the need for the Director-General to motivate the impugned decision requires this to be done where the recommendations of the JAB are not accepted. Inasmuch as the Director-General motivated the aspect of the JAB's findings with which he disagreed, the second mentioned ground of the complaint is also unfounded.

In the foregoing premises the complaint will be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 28 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

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