

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

O.
v.
IOC

133rd Session

Judgment No. 4447

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms L. O. against the International Olive Council (IOC) on 9 May 2018 and corrected on 16 July, the IOC's reply of 29 October, corrected on 12 November 2018, the complainant's rejoinder of 1 October 2019, corrected on 9 December 2019, and the IOC's surrejoinder of 28 February 2020, corrected on 9 March 2020;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant challenges the withdrawal of some of her functions, arguing that such removal amounted to *de facto* demotion.

The complainant joined the IOC in 1992. Upon the approval of the International Agreement on Olive Oil and Table Olives in 2005 and the subsequent adoption of a new organisation chart entailing the creation of new job descriptions, she was appointed to the post of Head of the Department of Production and Publication of Promotional Documents with effect from 1 January 2006. According to the corresponding job description, the main responsibilities assigned to her were coordinating the dissemination of the scientific findings on the properties of olive oil and preparing, publishing and disseminating IOC publications.

As from February 2016 she was entrusted, by the new Executive Director, with new temporary press coordination functions which she shared with Ms C. She performed those functions until June 2016, when she was placed on sick leave as a result of a road traffic accident. When she resumed work at the beginning of August 2016, she found that her temporary coordination functions had been assigned to Ms C. She asked for an explanation and met with the Executive Director but was not satisfied with what she was told.

On 24 November 2016 the complainant formally requested an explanation for the changes in her duties, arguing that the situation was humiliating and detrimental to her health, her professional image and reputation. She asked inter alia that “all [her] functions” be returned to her. Having received no reply, she reiterated her request on 12 December. On 14 December 2016 the Legal Department informed her that her case was being studied and that she had the possibility to submit a complaint to the Joint Committee. On 31 January 2017 the complainant asked the Head of the Administrative Unit to forward her case to the Committee. She requested that Ms C. be excluded from the process and that the Chairman of the Committee recuse himself.

On 1 March 2017 she submitted her appeal to the Joint Committee challenging, amongst other things, the withdrawal of some of her functions without prior advice and consultation, taking advantage of her sick leave, the refusal to provide any justification for the changes in her tasks, the lack of any response to her queries and the fact that the Administration had allowed her to be exposed to prolonged harassment and bullying by other staff members. She requested that “all [her] functions” be restored and claimed financial compensation in an amount equal to two years’ gross salary, plus any other compensation for damage to her health. She also asked that the Chairman of the Committee convene a date for a hearing.

In the absence of any formal acknowledgement of her appeal, the complainant sent several letters to the Committee to enquire about the status of her case. Meanwhile, she informed the Executive Director that she had been prescribed sick leave as from 2 March by her doctor but that she had nevertheless decided to continue working in order to finalize some tasks entrusted to her.

By a letter of 26 April 2017 she asked the Executive Director to instruct the Joint Committee to expedite the proceedings and to set a date for a hearing no later than 31 May 2017. On 8 June 2017 she was informed by the Chairman of the Committee that her appeal was under examination. When she again complained about the delay in setting a date for a hearing, the Executive Director explained that this was due to an overload of work. The complainant contested that explanation, reiterated her request for a hearing and asked to be informed of the reason why some confidential documents and medical certificates had been given to the Committee without her knowledge or approval. Meanwhile, her health continued to deteriorate and her doctor prescribed that she should be placed on a half-day schedule.

Between November and December 2017 the complainant asked to be informed of all previous reports from the Joint Committee and decisions starting from 2012, complained about the dual incompatible functions entrusted to the Chairman – who had been appointed as *ad interim* Head of the Administrative Unit – and requested to be advised of the reasons why her personal documents had been released to her. Her requests remained unanswered.

Having held a hearing on 5 February 2018, the Joint Committee issued its report on 19 February recommending by a majority of its members to dismiss the appeal as unfounded. One member issued a dissenting opinion in which she considered that the complainant had suffered from a lack of good faith and communication on the part of the Executive Secretariat.

By a letter dated 14 March 2018 the complainant was notified the Executive Director's decision to follow the majority view and dismiss her appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and the Joint Committee's report. She also asks the Tribunal to order the IOC to restore her functions as from August 2016 and claims moral and material damages in the amount of two years' salary and allowances, plus additional financial compensation for damage to her health, including reimbursement of all medical expenses not paid by the health insurance. She also seeks costs and, should the case be sent back to the IOC, she requests that no new hearing be held by the Joint Committee. In her rejoinder, she specifies that "[t]he deceitful, neglectful, misleading, confusing and abusive attitude of the Defendant,

towards [her] and the Tribunal itself [...] should be taken into account by the judges when deciding on [her] case”.

The IOC asks the Tribunal to dismiss the complaint in its entirety, arguing additionally that all new factual elements and allegations included in the rejoinder should be disregarded.

CONSIDERATIONS

1. In the decision, dated 14 March 2018, which the complainant impugns, the Executive Director accepted the opinion of the majority of the Joint Committee to dismiss the complainant’s internal appeal submitted on 1 March 2017. In that appeal, the complainant alleged that, in 2016, the Executive Director withdrew some of her functions without any prior notification, consultation or justification, taking advantage of her sick leave in June 2016 to do so; refused to provide any justification for the changes in her duties; disregarded and failed to respond to various queries she made about the matter; allowed the Head of the Environment Department (who was not her supervisor) and Ms C., who had been given most of her functions, to harass and bully her, causing her humiliation and professional discredit as well as severe injury and harm to her health; prevented her from participating in promotional events; disregarded her several requests for an internal settlement of the dispute; and adopted a dismissive attitude to the good faith she had shown in waiting for several months for a reply before she could appeal to the Joint Committee.

2. In the complaint form, the complainant signifies that she wants oral proceedings under Article 12, paragraph 1, of the Tribunal’s Rules. The application is rejected as the Tribunal is satisfied that the detailed submissions and documents which the parties have provided are sufficient to permit it to resolve the issues in this case.

3. The complainant challenges the impugned decision on various substantive and procedural grounds. Substantively, she maintains that the basis of her complaint is the unlawful removal of some of her functions without any justification or due process. The complainant also alleges that the IOC breached its duty of care towards her and violated her dignity and the principle of good faith.

4. Procedurally, the complainant challenges the internal appeal procedure mainly on the basis that her right to have her internal appeal heard by a properly functioning appeal body was violated. She alleges that there were unjustifiable delays in the procedure, particularly in scheduling the hearing which the Joint Committee eventually conducted on 5 February 2018; there were unacceptable breaches of confidentiality; the Joint Committee's mandate had expired at the material time; its composition was biased in favour of the Administration; the Chairman of the Committee had a conflict of interest and showed "bad faith and misleading conduct" in performing his administrative duties, for example, by not responding to her many queries and correspondences and by rejecting her request for a copy of the Joint Committee's reports on previous cases, as foreseen by the rules governing the Committee's procedure. The complainant further alleges that, in contravention of its mandate, the rules governing its procedure and past practice, the Joint Committee was assisted by an external lawyer, violating her right to due process; that although the rules governing the procedure of the Joint Committee made no provision for it to conduct *in camera* meetings before the hearing of an appeal, it conducted such meetings without informing her, delivered the minutes of those meetings to the external lawyer to prepare the Administration's defence, but denied her access to the minutes; that notwithstanding her request, she was unlawfully denied access to a copy of the document which the external lawyer prepared for the Administration and for the Joint Committee even as a copy of the dossier prepared for her case, which contained her confidential documents (her employment letter and medical certificates), was given to the external lawyer.

5. The complainant also asks the Tribunal to set aside the report of the Joint Committee on various bases. This request is however irreceivable as the Joint Committee has authority to make only recommendations, not decisions (see, for example, Judgment 4392, consideration 5). The Tribunal will merely determine whether, on the basis of the complainant's allegations, the procedure of the Joint Committee was flawed, which may have had an impact on the impugned decision and warrant its setting aside.

6. Although the complainant's submissions are replete with allegations of harassment, she makes it clear, in her rejoinder, that she is not pursuing a harassment complaint and that she does not expect the Tribunal to rule on the illegality of the alleged harassing events pleaded. However, she states, in effect, that inasmuch as those events affected her work, dignity and health, but were never investigated, she presents them to support her plea that the IOC failed in its duty of care towards her.

7. The complainant's allegation that the internal appeal process was flawed because the Joint Committee's mandate expired on 31 December 2017, before it conducted the hearing, delivered its report and before the Executive Director's impugned decision of 14 March 2018 was taken is unfounded. The IOC provides evidence showing that the Committee was appointed on 1 January 2017 for a two-year term, pursuant to Article 2(a) of the rules governing the Procedure of the Joint Committee and Article 50(3) of the Staff Regulations. Its term therefore expired on 31 December 2018.

8. The complainant's argument that the Chairman of the Joint Committee had a conflict of interest because he also held the post of Head of the Administrative Unit in which he may have been called upon to take administrative decisions and subsequently to hear appeals against such decisions is premised on hypothetical grounds. These grounds therefore provide no basis for finding vitiating bias or disqualifying interest.

9. Regarding the complainant's allegation that the internal appeal procedure was flawed because her right to have her internal appeal heard by a properly functioning body was violated, the Tribunal recalls its statement, in Judgment 2671, consideration 11, that an internal appeal procedure that works properly is an important safeguard of staff rights and social harmony in an international organisation and, as a prerequisite of judicial review, an indispensable means of preventing disputes from going outside the organisation. It further stated that the notion of "working well" necessarily encompasses the requirement that the members of an internal appeal body should not only be impartial and objective in fact, but that they should so conduct themselves and be so circumstanced that a reasonable person in possession of the facts would not think otherwise. In this last regard, it is necessary only to observe that staff confidence in internal appeal procedures is essential to the workings of

all international organisations and to preventing disputes from going outside those organisations.

10. However, certain events that occurred during the internal appeal procedure lead the Tribunal to conclude that the complainant's right to have her internal appeal heard by a properly functioning body was violated. The evidence does not reveal that the Joint Committee was not constituted in accordance with Article 2 of its Procedure. Nonetheless, its composition bears out the complainant's observation that it could not be seen as an internal appeal body which was objective or impartial owing to the "contamination between professional tasks" and the overlapping of roles and functions. The uncontroverted evidence is that a Committee member, Ms P., chosen to replace a member who resigned from the Committee, was substantively the Secretary of the Chairman of the Joint Committee. Another member, Ms A., was senior and first Executive Secretary of the Executive Director. The Executive Director played a pivotal administrative role in the case on behalf of the IOC. The complainant initiated the internal appeal on the central allegation that the Executive Director had unlawfully withdrawn some of her functions and had given them to Ms C. The record is replete with communications (which were not always cordial) between the complainant and the Executive Director concerning her case. The Executive Director also issued the impugned decision. Additionally, when, at the complainant's request, Ms C. stepped down as a member of the Joint Committee, she was replaced by Ms B., whom the complainant rightly described as "hierarchically dependant on" Ms C. The Tribunal concludes that the obvious close administrative roles of some of the members of the Joint Committee violated the complainant's right to have her internal appeal heard by a properly functioning body.

11. Regarding the complainant's allegations about the engagement of the external lawyer, the IOC states that the decision was made to engage a lawyer to assist the Joint Committee and the Legal Department because of the complexity of the case, the serious nature of the complainant's allegations and the numerous and voluminous documents involved in the case. The decision was intended to relieve the administrative burden which the case created and to clarify the questions which the Joint Committee needed to resolve. Thus, in June 2017, the Committee proposed to the Executive Director to authorize it to obtain the support

of the external lawyer to perform a preliminary analysis of the appeal. It was necessary, in the IOC's view, to clarify the scope of the complainant's allegations. The Legal Department engaged the lawyer who was provided with part of the documentation filed in the appeal for study and analysis. The documents to which the lawyer had access were, according to the IOC, always subject to the strictest confidentiality. They were documents in the administrative dossier which the complainant herself had included or asked to be included therein.

12. However, the mere fact that the internal rules of the IOC did not provide for the engagement of an external lawyer to assist in an internal appeal procedure and that there was no past practice of such an engagement does not preclude such a possibility. However, what is critical is the role which such a lawyer plays in the internal appeal process, as borne out in Judgment 3909, with particular reference to consideration 6. In the first place, it is anomalous that a Legal Department, which is responsible for presenting the organization's defence to a staff member's internal appeal, should appear to work in concert with the appeal body (in this case the Joint Committee) whose duty is to fairly hold the balance of justice between the parties. The IOC's statement that the complainant provides no evidence that the Legal Department gave any kind of orders to the external lawyer is of no moment.

13. The critical pointer to the role which the lawyer played is encapsulated in the IOC's statements that, given the enormity of the information the complainant sent, the lawyer was engaged to provide the Joint Committee with a useful tool to take decisions well founded in law concerning the appeal and that the lawyer's task was to review and organize the information and provide a professional opinion on the factual aspects of the case; that the lawyer's report did not contain facts of which the Committee was not already aware since it held preparatory meetings before the 5 February 2018 hearing. Even against this narrative, the IOC's further statement that it cannot be argued that the Joint Committee based its decision on the lawyer's opinion is untenable. Its own statements lead to the conclusion that the Committee had and considered the opinion in its deliberations and for the purpose of its report. It is also apparent that the Legal Department, which presented the Administration's defence, also had a copy of the opinion but, at the time of the February 2018 hearing, the complainant had not been given

a copy of it. When she requested it at the hearing, the Committee permitted her and her legal representative to consult it briefly at the meeting, but forbade them from making any copies, informing them they could only have a copy on a written request after the hearing. Even so, their written request was not acknowledged and they had not received a copy at the time the complaint was filed with the Tribunal.

14. It is well established in the Tribunal's case law that a staff member must, as a general rule, have access to all evidence and other materials on which an authority bases or intends to base its decision against her or him, and, under normal circumstances, such materials cannot be withheld on grounds of confidentiality, unless there is some special case in which a higher interest stands in the way of the disclosure of certain documents (see, for example, Judgment 4412, consideration 14). It is also well established that the principle of equality of arms must be observed by ensuring that all parties in a case are provided with all of the materials an appeal body uses in an internal appeal, and that the failure to do so constitutes a breach of due process (see, for example, Judgment 3586, consideration 17). These principles were violated when the complainant was not provided with her own copy of the external lawyer's opinion before the hearing.

15. In the foregoing premises and without it being necessary to consider the complainant's other pleas, the impugned decision of 14 March 2018, which endorsed the report of the majority of the Joint Committee adopted pursuant to Article 5(g) of its Procedure, was procedurally irregular and will be set aside. Given this irregularity in the internal appeal procedure, the case will be remitted to the IOC to be heard by a newly constituted Joint Committee and for a new decision to be taken by the Executive Director on its opinion. The complainant's claim for material damages may only be realized if she prevails on her substantive pleas (set out in consideration 3 of this judgment). Inasmuch as the present complaint succeeds on procedural grounds and the case will be remitted to the IOC, her claim for material damages remains in abeyance. However, as the Tribunal is not satisfied that the complainant has articulated the injury she suffered as a result of the procedural irregularities leading to the setting aside of the decision, no award of compensation for moral damages which she seeks will be made.

As she has prevailed in this complaint, she will be awarded 8,000 euros in costs.

DECISION

For the above reasons,

1. The impugned decision dated 14 March 2018 is set aside.
2. The case is remitted to the IOC in accordance with consideration 15 of this judgment.
3. The IOC shall pay the complainant costs in the amount of 8,000 euros.

In witness of this judgment, adopted on 17 November 2021, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ