

G.-B. (Nos. 1 and 2)

v.

UNWTO

133rd Session

Judgment No. 4452

THE ADMINISTRATIVE TRIBUNAL,

Considering the first and second complaints filed by Mr J. G.-B. against the World Tourism Organization (UNWTO) on 22 February 2019 and corrected on 5 April, UNWTO's single reply of 12 July, corrected on 2 August, the complainant's rejoinder of 22 November 2019 and UNWTO's surrejoinder of 6 March 2020;

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 contests the decisions to suspend him with pay and then without pay during the disciplinary procedure for misconduct as well as the appointment of a colleague to what he describes as his "job and functions".

The complainant joined UNWTO in 2009. He was Director of Administration and Finance, a grade D2 position, when the new Secretary-General took office on 1 January 2018. Shortly after, the Secretary-General announced the transitory organizational structure. The complainant remained in charge of the programme areas concerning budget and finance, human resources, information and communication technologies and general services. On 12 February, the Secretary-General informed all staff that he would conduct a review of the internal control systems in relation to strategic activities with a view to ensuring

their soundness and compliance with internal procedures and with the overall objective of strengthening internal governance. He added that a consultancy firm involved in the review would start its activities straightaway and that the Deputy-Chief of Cabinet, Mr A., would be responsible for the exercise.

On 7 March the Secretary-General notified the complainant that he had decided to initiate an investigation regarding some irregularities, identified by the consultancy firm, in the performance of his duties. The investigation aimed at establishing the facts in order to determine whether he had engaged in unsatisfactory conduct that could amount to misconduct. The consultancy firm issued its report on 20 April, and the Secretary-General met with the complainant a few days later to inform him that there was substantial evidence to consider that he had engaged in serious misconduct. Hence, disciplinary action would be initiated. Unsuccessful discussions ensued concerning an agreed separation.

On 2 May 2018 the complainant wrote to the Ethics Officer alleging possible misconduct by the Secretary-General in relation to the hiring of the consultancy firm, and asking to be protected against retaliation. On 3 May the complainant informed orally the Human Resources that he was sick. On the same day, all staff were informed that the Secretary-General had appointed, with immediate effect, Mr A. as “Deputy Chief of Cabinet, Administration and Finance” in the Office of the Secretary-General. In the evening, the complainant informed the Human Resources that he was placed on certified sick leave until 16 May. The Secretary-General notified the complainant by a memorandum of 4 May, which he received on 10 May, that he had identified a sufficient factual basis for a finding of serious misconduct; the sanction of summary dismissal was therefore considered. He provided the complainant with details of the charges, and granted him the opportunity to present his defence. He added that the complainant was suspended with pay with immediate effect until the completion of the disciplinary process, but stressed that the suspension was an interim, precautionary action taken in the Organization’s interest. The complainant was asked to return some equipment, to provide his contact details and to remain available to be contacted by UNWTO.

In a memorandum of 8 May, received by the complainant on 10 May, the Secretary-General stated that UNWTO had not yet received his medical certificate and asked him to schedule a meeting with the Medical Adviser. He added that several unfruitful attempts had been

made to deliver his earlier memorandum of 4 May and to reach the complainant on his official mobile phone. He emphasised that being on sick leave did not preclude him from being available to be contacted by UNWTO as prescribed by Circular NS/855/rev. On 11 May the complainant's spouse delivered to the Organization's premises a copy of the memorandum of 8 May initialled by the complainant together with his medical certificate. The complainant requested an extension of the deadline to reply to the charges until he was no longer incapacitated to perform his duties due to illness. On 16 May the Secretary-General advised the complainant that the Medical Adviser had concluded that his current status did not preclude him from being able to attend to his personal interests; there were thus no compelling grounds to postpone or suspend the disciplinary proceedings. He added that UNWTO had not yet received a copy of the memorandum of 4 May initialled by him nor received the requested equipment. The complainant's refusal to acknowledge receipt of communications and to obey instructions constituted a violation of Staff Regulation 3, according to which officials were subject to the authority of the Secretary-General. Consequently, he was suspended without pay with immediate effect until the completion of the disciplinary proceedings. The complainant's sick leave was extended on 16 May for an additional two weeks.

On 21 May the complainant requested that the suspension decisions be cancelled, and that the decision to initiate the process of summary dismissal be suspended until he was fit for work. The suspension decisions deprived him of his entitlements to sick leave and the time he was given to reply to the proposed sanction was unreasonable. All these actions constituted psychological intimidation, aggression, harassment and abuse of power. He replied in detail to the charges brought against him and raised doubts as to the conformity of the investigation conducted by the consultancy firm with the United Nations (UN) standards. He therefore asked that an investigation be conducted by professional UN investigators, that he be protected from retaliation and that the charges be dropped. He sent back the requested equipment stressing that he could not have returned it earlier as he was on sick leave. On 31 May he wrote to the Secretary-General contesting the decision of 3 May to appoint Mr A. to his functions, thus effectively removing him from his functions.

On 20 June the Deputy Secretary-General replied to the complainant's letter of 21 May and subsequent communications concerning the suspension decisions, and the decision to appoint Mr A. He indicated that the Secretary-General had recused himself and delegated his authority to him following the complainant's accusation of misconduct. The Deputy Secretary-General confirmed the suspension decisions and held that the complainant had no cause of action regarding the decision to appoint Mr A., emphasising that the latter was appointed to act as Deputy of both the Chief of Cabinet and the Director of Administration and Finance, and not to replace the complainant. Hence, the decision did not affect the complainant's terms of appointment. He found no retaliation, harassment or abuse of power.

In June the complainant initiated the internal appeal procedure with the Joint Appeals Committee (JAC), contesting the decision to suspend him with pay, the related decision to change his status from sick leave to suspension, the decision to suspend him without pay, and finally the decision to appoint Mr A. He asked that the contested decisions be "reversed" and that he be awarded material, moral and exemplary damages as well as costs.

On 2 August he was informed that he was summarily dismissed effective 16 May, in accordance with the applicable rules.

Having heard the complainant, the JAC issued its report on 5 October. It concluded that the contested suspension decisions were warranted, proportionate and were based on Staff Rules 29(1)(a) and 29(1)(b) respectively. It found no cause of action with respect to the claim to change his status from sick leave to suspension, explaining that sick leave and suspension were not mutually exclusive in the present case. It also concluded that the decision to appoint Mr A. did not conflict with the complainant's contract or any applicable rules relevant to his case.

On 27 November 2018 the Deputy Secretary-General informed the complainant that, based on the JAC's report, he had decided to reject the appeal. The decision to suspend him with pay while he was on sick leave was legally founded and it was deemed necessary to protect UNWTO's interests. The decision to suspend him without pay was also legally founded, based on the envisaged sanction of summary dismissal, and fully justified in light of his behaviour during the disciplinary proceedings. With respect to the decision to appoint Mr A., he had no cause of action as neither his personal status nor his contractual terms

or rights were affected; he did not suffer any injury. The assignment of tasks and responsibilities was at the Secretary-General's discretion. That is the decision the complainant impugns in his first complaint.

On 5 February 2019 the Deputy Secretary-General informed the complainant that a procedural irregularity in the internal appeal proceedings had been brought to his attention: the failure to communicate to the complainant UNWTO's detailed reply to the JAC. He therefore decided to revoke his decision of 27 November 2018 and to reconvene the JAC for a new hearing of his appeal along with the appeal against the decision to summarily dismiss him. The complainant replied on 12 February 2019 that, having now been able to review the detailed reply, which did not add anything significant to the Administration's position, he requested him to either withdraw the decision of 5 February 2019 or to take and communicate a final decision by 22 February so that he could proceed to the Tribunal without any waste of time or resources. He nevertheless asked to be paid moral damages and costs for breach of due process in the internal appeal proceedings. He also asked the Deputy Secretary-General to provide a copy of the delegation of authority he had received from the Secretary-General.

On 18 February 2019 the Deputy Secretary-General notified the complainant that, unless he requested before 23 February that a new hearing be conducted on his appeal, he thereby withdrew his decision of 5 February 2019 and confirmed that of 27 November 2018. He added that the complainant had exhausted all internal means of redress and had the right to appeal this final decision before the Tribunal. He did not reply on the request for proof of delegation of authority. That is the decision the complainant impugns in his second complaint.

The complainant asks the Tribunal in both his first and second complaints to set aside the impugned decision, to award him material damages with interest from due dates together with moral and exemplary damages. He also claims costs.

UNWTO asks the Tribunal to dismiss the complaints as irreceivable insofar as the complainant contests the appointment of the Deputy Chief of Cabinet, Administration and Finance as he does not show a cause of action. It further asks the Tribunal to dismiss the complaints as unfounded.

CONSIDERATIONS

1. The complainant had been the Director of Administration and Finance at UNWTO until his summary dismissal on 2 August 2018, effective 16 May 2018. In June and July 2018 he brought two internal appeals against what were identified as four decisions. These internal appeals culminated in one report of the JAC in October 2018 which, in substance, recommended the appeals be dismissed as either unfounded on the merits or because the complainant had no cause of action. After correspondence between the complainant and the Deputy Secretary-General about, amongst other things, the adequacy of the internal appeal process, the Deputy Secretary-General finally dismissed the appeals by letter dated 18 February 2019. He did so by effectively confirming an earlier decision of 27 November 2018 to the same effect. The complainant has filed two complaints, one impugning the November 2018 decision and the other impugning the February 2019 decision. The complaints are joined so that a single judgment can be rendered.

2. The four decisions the subject of the complainant's claim were firstly a decision of 4 May 2018 to suspend him with pay, secondly an implicit decision flowing from the first to change his sick leave status to suspension with pay, thirdly a decision of 16 May 2018 to suspend him without pay and fourthly the decision effective 3 May 2018 to appoint Mr A. to what the complainant described as "[his] job and functions".

3. The complainant's claim insofar as it involves an allegation of change of status and a challenge to the appointment of Mr A., can be dealt with briefly. As discussed shortly in more detail, a power to suspend a member of staff as an incidence of disciplinary proceedings potentially leading to the application of a sanction is conferred by the Staff Rules. There is no express qualification on the exercise of that power precluding suspension while a member of staff is on sick leave. No reason of substance is advanced as to why that qualification should be implied nor any reference to Tribunal case law leading to the same result. This contention should be rejected.

4. Mr A. was appointed to the position of Deputy Chief of Cabinet, Administration and Finance (in the Office of the Secretary-General) and the appointment was announced on 3 May 2018, a day before the

complainant's suspension. UNWTO argues the complainant has no cause of action to challenge this appointment. That is because it did not involve any alleged non-observance of the complainant's terms of appointment or any staff rule or regulation. Perhaps to avoid this conclusion, the complainant contends that the appointment involved pre-judgement of the disciplinary procedure, was a disciplinary sanction, a breach of the Organization's duty to him of good faith and mutual trust and constituted a failure to respect his dignity. There is no basis of substance in fact for those assertions. Indeed, the complainant appeared to accept that there may have been a need to "provide continuity during [his] suspension" but contended that continuity could have been achieved by other means. However, plainly how it could be achieved was a discretionary decision in the hands of the Secretary-General.

5. This leads to a consideration of the elements of substance in the complainant's claim, namely, the two decisions to suspend him. The power to suspend an official was conferred on the Secretary-General by Staff Rule 29(1), which provided:

- “(a) If the Secretary-General considers, in circumstances that appear to call for the application of a sanction, that the continuance in service of the official concerned pending consideration of the matter may prejudice the service, he may suspend the official from his duties pending such consideration, the suspension being without prejudice to the rights of the official.
- (b) Suspension may be with or without salary provided that an official shall be suspended without salary only in cases that appear to call for the sanction of summary dismissal. If the official is not summarily dismissed, he shall be paid for any period of suspension without salary. If the official is summarily dismissed, the dismissal may be made effective as from the date of the suspension. For purposes of this Rule, ‘salary’ shall mean salary and allowances.”

6. The power to suspend is enlivened when the Secretary-General considers, in the specified circumstances, that continuation in service of the official may prejudice the service. The power is founded on the opinion of the Secretary-General on the question of prejudice. It is tolerably clear that a decision to suspend without salary when there might be summary dismissal, is linked to the power to make the summary dismissal retroactive to the date of suspension. The rationale appears to be that if retroactive summary dismissal is the ultimate outcome, circumstances should not be created where the suspended official has

been paid but for a period when he was not in employment, at least notionally, and recovery of that payment may be problematic.

7. When the complainant was suspended with pay by memorandum dated 4 May 2018, the approach of the Secretary-General was, on its face, quite orthodox and in conformity with Staff Rule 29. First, the Secretary-General said that a sanction was being considered and identified it as summary dismissal. Notwithstanding, a decision was not then made though it could have been, to suspend the complainant without pay. Secondly the Secretary-General addressed the question of prejudice and gave a rational explanation why the interests of the service may be prejudiced if the complainant continued in service. In his brief, the complainant points to eight matters which underpin a submission that the suspension with pay was not lawful. Most concerned the discretionary assessment of the Secretary-General about whether and when suspension should occur. The grounds for reviewing the exercise of the discretionary power to suspend are limited to questions of whether the decision was taken without authority, in breach of a rule of form or procedure, was based on an error of fact or law, involved an essential fact being overlooked or constituted an abuse of authority (see, for example, Judgment 4361, consideration 11). Save for one point raised by the complainant, none establish any of the grounds just enumerated.

8. The point just referred to is an argument that the complainant was on sick leave when the decision was made to suspend him but this was not considered and, implicitly, this was either an error of fact or an essential fact which was overlooked. The material before the Tribunal establishes that the complainant notified the Chief of Human Resources on the morning of 3 May 2018 that he was on sick leave and, that afternoon, obtained a certificate from his doctor that he was on sick leave pending re-evaluation on 16 May 2018. No reference is made to this in the memorandum of 4 May 2018 suspending the complainant. But the actual period of sick leave, as then identified, was not long. Sick leave simply authorises a member of staff not to attend for work. While suspension requires a member of staff not to attend work, its legal effect is much wider and impacts upon the capacity of a member of staff to participate in the workings of the organisation more generally. In the circumstances of this case, the fact that the complainant was on sick

leave for the then identified short period had no material bearing on whether he should be suspended.

9. This leads to a consideration of whether the decision of 16 May 2018 to suspend the complainant without pay was lawful. It was not. In a memorandum of that date from the Secretary-General there is a little over a page of text and then a terse two-line paragraph saying: “[i]n view of the above, and in accordance with Staff Rule 29 (1), I have decided to apply to you suspension without pay with immediate effect and until the completion of the proceedings” (emphasis omitted).

10. That paragraph was preceded by ten paragraphs which were comprehended by the expression “[i]n view of the above”. Much of the content of those paragraphs was a critical commentary of the conduct of the complainant in the preceding fortnight. At the very least implicitly, a criticism was made that the complainant had failed to respond to phone calls and texts and had rejected the delivery of a copy of the memorandum of 4 May 2018, couriered twice by different courier companies to the complainant. The complainant had failed to provide a signed copy of the memorandum of 4 May 2018 as required by the Staff Rules. It was also pointed out that the complainant had failed to return his ground pass, the UN *Laissez-Passer*, and any other UNWTO owned equipment. In the memorandum the Secretary-General went on to say:

“Please note that your refusal to receive or acknowledge communications from the Organization together with your failure to obey the instructions from the Office of the Secretary-General regarding the UNWTO items still in your possession represent a breach of Staff Regulation 3, which provides that the officials of the Organization ‘shall be subject to the authority of the Secretary-General’.

[...]

Deliberately frustrating the communications with the Organization and neglecting to return the UNWTO property in your possession is a matter of grave concern, given that as Director of Administration and Finance, you are expected to serve as a role model in the strict compliance with the rules, the use of UNWTO property and in all your dealings with the Organization.”

11. These paragraphs reveal, at the very least, considerable irritation at the complainant’s conduct. But whether or not it was justified is, for the purposes of the present discussion, irrelevant. As noted above, the discretionary power to suspend depends on an opinion that the continuation in service of the official may prejudice the service. That assessment had

already been made on 4 May 2018. Moreover, at that time and with full knowledge that the ultimate sanction may be summary dismissal, an election was plainly made by the Secretary-General not to suspend without pay. All that had occurred in the intervening period was that the complainant conducted himself in a way that attracted very firm criticism by the Secretary-General. It was the criticism of the conduct that, in the main, was comprehended by the expression “[i]n view of the above” identifying the reason or reasons for the decision to suspend without pay. It is tolerably clear that the alteration of the terms of the suspension was simply a sanction for the criticised conduct. That provided no lawful basis for that decision. The decision to suspend without pay should be set aside.

12. The complainant’s pleas contain a detailed critique of the procedures adopted by the JAC and its report. This, apparently, is in support of relief requesting the payment of 10,000 euros in moral damages “for the breaches of due process in the internal appeal”. In a letter dated 5 February 2019, the Deputy Secretary-General offered to the complainant that the JAC “hear anew [his] Appeal” along with his appeal against his summary dismissal. It is clear from this letter that the offer was being made because the Deputy Secretary-General had been informed by the Secretary of the JAC of procedural irregularities in the conduct of the appeal, at least some of which are now relied on by the complainant in his critique. The Deputy Secretary-General also revoked, by this letter, his earlier decision of 27 November 2018 to dismiss his appeal.

13. Accordingly, the complainant was in a position to have a fresh consideration of his appeal which, potentially, would have purged the appeal process of the matters about which he now complains. The complainant responded to this offer in a letter dated 12 February 2019. He said that he saw “no interest being served for either party by wasting time and resources in preparing for and attending another hearing before the JAC either separately and/or alongside the summary dismissal appeal”. Also, the complainant asked in particular that the Deputy Secretary-General withdraw his decision of 5 February 2019 to revoke the decision to dismiss the appeal. This was duly done in a decision communicated to the complainant by letter dated 18 February 2019.

14. The Tribunal now turns to the question of relief. Even if all or some of the criticisms now made by the complainant about the appeal process are founded, there would not be any justification in the unusual circumstances of this case referred to in the preceding two considerations, to award moral damages on that ground and accordingly, there would be no utility in considering in detail the complainant's pleas on this issue.

15. The complainant would, in the ordinary course, be entitled to material damages being the income he would have received from the date of suspension without pay until the date of his dismissal, if lawful. But, in this case, they are the same date as permitted by Staff Rule 29(1)(b). Accordingly, there was no compensable material loss arising in these proceedings.

16. The complainant also seeks additional moral damages and exemplary damages. These damages are sought on the basis of "the emotional and financial stress placed on [the complainant] and his family [...] and as [the unlawful decisions] severely injured his professional reputation and dignity". There is no obvious relationship, nor any proved, between the matters just referred to and the unlawful suspension without pay for approximately two and a half months being the period between the time of the decision to suspend without pay and the time of the decision to dismiss. No moral or exemplary damages are warranted.

17. The complainant seeks the production of certain documents concerning the engagement of the consultancy firm. He does not establish the potential relevance of these documents to the issues in this proceeding. Accordingly, this request is refused.

18. The complainant has been partly successful and is entitled to costs assessed in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The decision of 16 May 2018 to suspend the complainant without pay is set aside.
2. UNWTO shall pay the complainant 8,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 28 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, 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

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ