

G.-B. (No. 3)

v.

UNWTO

133rd Session

Judgment No. 4453

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr J. G.-B. against the World Tourism Organization (UNWTO) on 26 September 2019 and corrected on 12 November 2019, UNWTO's reply of 12 February 2020, the complainant's rejoinder of 22 May, UNWTO's surrejoinder of 18 August, the complainant's additional submissions of 16 September and UNWTO's final comments thereon of 17 November 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 decision to summarily dismiss him.

Facts relevant to this case are to be found in Judgment 4452, also delivered this day, concerning the complainant's first and second complaints. Suffice it to recall that the complainant, who joined UNWTO in 2009, was the Director of Administration and Finance, a grade D2 position, when the new Secretary-General took office on 1 January 2018. In February, the Secretary-General informed all staff that he had decided to 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 the Organization's internal governance. He added that a

consultancy firm involved in the review would start its activities straightaway.

Early March 2018 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. On 4 May the Secretary-General informed him that, on the basis of the report of the consultancy firm, he had identified sufficient factual basis indicating that he had engaged in unsatisfactory conduct as per UNWTO Staff Rules and Regulations. Hence the sanction of summary dismissal was envisaged. He gave details of the irregularities that concerned actions taken between 2013 and early 2018. He added that, in view of the seriousness of the allegations, the sanction under consideration and his position, he was suspended with pay until the end of the disciplinary process. On 16 May the Secretary-General informed the complainant that he was suspended without pay with immediate effect until the end of the disciplinary process. On 21 May the complainant replied to the charges and asked inter alia that the suspension decisions be cancelled.

The Deputy Secretary-General, acting on delegation of authority from the Secretary-General, informed the complainant on 20 June 2018 that he was still under investigation, and that his request to have the suspension decisions cancelled was rejected. He indicated that an additional charge was brought to his attention in relation to the proposal to apply the summary dismissal, and asked him to provide his comments thereon. He indicated that this additional charge would be considered with those brought against him on 4 May. The complainant replied on 2 July to the new charge.

On 2 August the complainant received the memorandum dated 1 August by which the Deputy Secretary-General, acting on delegation of authority from the Secretary-General, informed him that he was summarily dismissed with effect from 16 May, the date of his suspension without pay. He referred to the communications of 4 May and 20 June 2018, which contained the charges made against him and took note of his reply to these charges. He concluded that there was ample and unequivocal evidence that the complainant had failed to observe applicable rules, repeatedly placed UNWTO at legal and reputational risks, and harmed

its financial interests. In his view, all the charges mentioned in the communications of 4 May and 20 June were proven. On 24 August 2018 the complainant submitted a protest to the Secretary-General contesting the 1 August decision and denying all the charges made against him. The Deputy Secretary-General rejected the protest in September recalling that the Secretary-General had delegated his authority to him to deal with the case. Late October the complainant initiated the internal appeal procedure with the Joint Appeals Committee (JAC). In his detailed appeal of 21 November 2018 he referred to the testimony of Mr R., the former Secretary-General, according to which he did not commit misconduct during his mandate. Mr R. made an additional testimony on 26 March 2019 after he had become aware of the Administration's position before the JAC.

Having heard the complainant, the JAC issued its report on 7 May 2019. It specified that it would not consider any duplication of proceedings already exposed in the complainant's previous appeal. It found no procedural flaws, bias or breach of due process rights during the investigation and disciplinary procedures leading to the decision of summary dismissal. In its view, the charges that were the bases of the summary dismissal were proven beyond a reasonable doubt, and the sanction was proportionate in light of the seriousness of the charges, their cumulative effect and the complainant's position. On 24 May the Administration wrote to the JAC requesting some clarifications on its report. More specifically, it sought explanations regarding the JAC's finding that the former Secretary-General had confirmed that the actions alleged to constitute misconduct on the part of the complainant took place during his mandate, under his full knowledge and authority and were discharged by the Executive Council and the General Assembly both programmatically and financially. The JAC replied on 13 June copying the Deputy Secretary-General. It stated that the testimonies of the former Secretary-General did not exclude the personal responsibility of the complainant for the actions taken by him under delegation of authority or under his area of responsibility.

On 1 July 2019, the Deputy Secretary-General notified the complainant that based on the report of the JAC and his pleas, he rejected his appeal on the ground that it was established that he had failed to comply with the terms of his delegation of authority and to perform adequately as Authorising Officer. He added that, upon receipt of the report, the representative of the Secretary-General had requested further clarifications

to the JAC. The clarifications, which were received on 13 June, were attached to the decision. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to order his “notional reinstatement”; or, to award him material damages in the amount of his “lost salary, including all salary, benefits and emoluments from 16 May 2018 until his date of retirement”, with interest from due dates. He also claims damages for the loss of pension benefits incurred by him and his spouse. He further seeks an award of “consequential damages” as he was deprived of “after service” health insurance. He further asks, in his rejoinder, the Tribunal to order that UNWTO take the necessary steps to enrol him and his dependents in the “after service health insurance plan”; if that is not possible he maintains his claim for monetary damages. He further claims moral and exemplary damages, as well as costs. He asks the Tribunal to order UNWTO to remove all materials relating to the disciplinary procedure from his personal file and destroy them, and to order UNWTO to publish the judgment, that will be rendered, on its website. Lastly, he seeks any other relief the Tribunal considers just and proper.

UNWTO asks the Tribunal to reject the complaint as unfounded. It adds that the claim for compensation is not substantiated stressing that the complainant has never been unemployed as he was reinstated in the Spanish Civil Service following his separation from duties.

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. He had held that post since 2009. From a time shortly after the complainant’s appointment until 31 December 2017, the Secretary-General of the Organization was Mr R. On 1 January 2018 a new Secretary-General, Mr P., assumed the office.

2. Having regard to the Tribunal’s ultimate conclusion and the reasons for it, it is unnecessary to detail and discuss the specifics of all the charges brought against the complainant which mostly were accepted as proved and, save as to two, founded the decision to summarily dismiss him. However, by way of general observation, the following can be said. The focus of the charges was the way in which the complainant

discharged his obligations as the Director of Administration and Finance particularly having regard to the fact that he was, amongst other things, the Authorising Officer, by delegation, for programs under his charge and Chief Procurement Officer responsible for the award and signature of contracts. There were multiple instances in which his conduct was roundly criticised and said to be at odds with his obligations and the express requirements of his post as articulated in various documents internal to the Organization. The divergence between what he did (or failed to do) and those requirements was a significant element in the Organization's conclusion the complainant had engaged in misconduct sufficiently serious to warrant his summary dismissal. Mostly, but not exclusively, this conduct was engaged in during the period Mr R. was the Secretary-General.

3. As part of his case after the original decision to summarily dismiss him had been made but before his appeal against that decision had been finally resolved, the complainant furnished as evidence two statements from the former Secretary-General, Mr R. The first is dated 12 November 2018 which was in evidence before the JAC. Several points were made in the statement. The first is that Mr R. had reviewed the charges against the complainant. Mr R.'s view, which he expressed in his statement, was that "none of the facts alleged against [the complainant] constitute[d], in [his] opinion, a misconduct liable to result in disciplinary action". Mr R. then explained his approach to management. The substance of the explanation was that in managing a small organisation, his focus had been on results and not necessarily procedures or process. He put it in terms of "[having] exercised [his] functions [...] to ease the implementation of specific bureaucratic procedural steps and processes".

4. Mr R. went on to say:

"In the case of [the complainant], I cannot appreciate misconduct in the facts that took place under my mandate. I must also clearly state that these actions were taken with my full knowledge and approval.

I find it therefore very strange to blame the targeted officer for putting the Organization at risk or misuse of funds, when he was simply implementing my instructions which I exercised within my full authority.

If anybody, therefore, has any questions about any decisions taken during my mandate as Secretary General, it is I and I alone that has to answer to them not the professional that carried out my instructions, and I stand perfectly ready to do so."

5. Mr R. concluded his statement by saying he stood ready to expand on his testimony should it be necessary either at the JAC or at this Tribunal. In a further statement of 26 March 2019 (seemingly in response to a submission of the Organization to the JAC concerning his first statement), Mr R. repeated the gist of what he had said in that first statement and provided some detail. Again he repeated he remained available to provide any further clarification of his testimony. Mr R. was never interviewed.

6. In the impugned decision of 1 July 2019 rejecting the complainant's appeal, the Deputy Secretary-General said the following about the evidence of Mr R.:

“To support your allegations, you presented testimonies from the former Secretary-General. However, the impartiality of these testimonies is questionable as the former Secretary-General is evidently personally offended by what he considers to be an attack to his mandate and he has a vested interest that prevents him from being a reliable and objective witness.

[...] Indeed, and as noted by the JAC, the former Secretary-General has decided to elude in his testimonies the responsibilities that he vested on you as Director of Administration and Finance, Chief Procurement Officer and Authorizing Officer for ICT, Finance and Travel by virtue of your Delegation of Authority 2010-2017.”

These remarks do not come to grips with what Mr R. said nor provide a sound basis for rejecting his evidence. To say someone is “evidently personally offended by what he considers to be an attack to his mandate” is firstly equivocal and secondly and more importantly does not provide, of itself, a firm foundation for saying that Mr R.'s account of past events cannot, or even should not, be accepted as true. It is not at all obvious that if a person is personally offended in the circumstances just discussed, that would “[prevent] [her or] him from being a reliable and objective witness” let alone someone who is giving a false account of past events.

7. Mr R.'s evidence contained several elements. The first was that he had reviewed the charges. It can be inferred, in the absence of evidence to the contrary, that Mr R. had read a memorandum of 4 May 2018 setting out the then charges against the complainant and the facts on which they were based which focussed in detail on the complainant's conduct. In view of what is then said by Mr R., it cannot be inferred that he read a memorandum of 20 June 2018 which contained an additional charge concerning the complainant's conduct in 2018. The second element

was that Mr R. was aware of the complainant's conduct on which the initial charges were based. The third and related element was that Mr R. approved of the complainant's conduct. The fourth and again related element was that the complainant was implementing Mr R.'s instructions. While Mr R.'s account was at a high level of generality, no attempt was made to ascertain from him details of his knowledge, approval and instructions. There is no persuasive evidence in the material before the Tribunal to sustain a conclusion that Mr R.'s account was untrue.

8. It is necessary to mention one charge which concerned the complainant's conduct after Mr R. left the position of Secretary-General in December 2017. Plainly enough this aspect of the complainant's conduct could not then have been sanctioned or otherwise approved by Mr R. in any relevant respect. This charge was levied against the complainant in a memorandum dated 20 June 2018. The gist of the charge was that he had recently hidden from the external auditor relevant information concerning the financial accounts of the Organization. Also, that the complainant had presented the new Secretary-General with a Representation Letter signed by the complainant on 28 March 2018 to be countersigned by the Secretary-General. The complainant allegedly falsely certified in the Representation Letter that "[he] was not aware of any relevant breach of the applicable rules [...], that the internal controls of the Organization [had] worked accurately and that [he was] not aware of any indication of fraud [...] and that there was no fact arising after the year-end closing that could affect significantly the Financial Statements as presented". Moreover, the complainant did not warn the Secretary-General about the implications of signing the Representation Letter.

9. In the original decision to summarily dismiss the complainant the Deputy Secretary-General wrote in the conclusion of his memorandum of 1 August 2018 that all the charges against the complainant had been proved and the "cumulative effect thereof warrant[ed] the disciplinary measure of summary dismissal" though with the caveat that "some of the charges, constitute[d] serious conduct warranting on their own the most severe sanction". Even if, in context, the expression "the most severe sanction" can be taken to be a reference to summary dismissal, the Deputy Secretary-General does not identify which of the proven charges were of this character. It is true that in the memorandum of 20 June

2018 laying the final charge referred to in the preceding consideration, the Deputy Secretary-General said, in effect, that the conduct the subject of that charge alone warranted the sanction of summary dismissal, but that observation was made at the outset of the disciplinary process and not at its conclusion.

10. In its report, the JAC concluded that the decision of the Deputy Secretary-General of 24 September 2018 (rejecting a request in a protest to reverse the decision of summary dismissal) be upheld and that summary dismissal “was proportionate in view of the seriousness of the charges [and] their accumulative [*sic*] effect [...]”. In the impugned decision of the Deputy Secretary-General of 1 July 2019, no express reference is made to the cumulative effect of the proven charges but implicitly the Deputy Secretary-General accepted the approach of the JAC by saying his decision was, in part, based on its report. That is to say, the Deputy Secretary-General continued to view the sanction of summary dismissal as proportionate having regard to the cumulative effect of the proven charges.

11. In its pleas, UNWTO argues that instructions from a hierarchical superior do not constitute an accepted excuse for conduct which might be characterised as misconduct and, as the Organization seemingly argues on the facts of this case, the fact that some actions are approved by supervisors is not an excuse for the complainant’s own wrongdoing. In support of these propositions, the Organization refers to Judgments 1977 and 3083. It is necessary to consider each judgment but it should first be noted that in the impugned decision of 1 July 2019, the Deputy Secretary-General did not say he accepted the evidence of Mr R. as establishing the matters referred to in consideration 7 above and then seek to demonstrate those matters were legally irrelevant or inconsequential having regard to the Tribunal’s case law. Rather he was entirely dismissive of that evidence.

12. In Judgment 1977, the complainant had claimed and been reimbursed for duty travel in business class where in fact he had travelled in economy class and had pocketed the difference. This was fraud. Part of the complainant's case was that this practice was condoned by the organisation and widespread amongst the other organisation personnel. The Tribunal said there was no evidence of either and, in any event, the first proposition was incredible in the sense of implausible, and the second proposition was wholly irrelevant. This judgment does not establish the more broadly expressed propositions of UNWTO in the preceding consideration.

13. Judgment 3083 concerned a complainant who had been the Project Manager of a UNIDO project and was found to have acted highly inappropriately having regard to the position he held and was summarily dismissed. The misconduct of which he was accused included certifying a significant number of procurement actions in a way that circumvented, and was intended to circumvent, UNIDO's Financial Regulations and Rules and its Procurement Manual by entering multiple contracts with one supplier with the contrived result that the contractual value did not exceed a specified limit whereas, in aggregate, in fact it did. The decision to dismiss the complainant was set aside but only on the basis that unsustainable findings of irregularity had been made about one aspect of the complainant's conduct, namely events concerning bidding documents. The Tribunal said at consideration 20:

“Moreover, and even when regard is had to the fact that the finding with respect to irregular bidding documents must be set aside, it cannot be said either that the Director-General should have taken some less drastic course or that summary dismissal was disproportionate. The complainant was in a position of trust and charged with the responsibility of disbursing large sums of money. Failure to observe the Financial Regulations and Rules entailed risk to the [...] project and to the reputation of UNIDO and, necessarily involved a serious breach of trust.”

Thus, the Tribunal was saying that a member of staff whose duties included dealing with and managing the funds or other property of an organisation should adhere to normative legal or other instructional documents concerning how those funds and property should be dispersed and managed. Moreover, a failure to do so could well warrant summary dismissal. Additionally, that failure could be characterised as a serious breach of trust.

On the specific question of supervisory approval, the Tribunal said in Judgment 3083 that it saw no merit in several of the complainant's arguments that a lesser penalty was warranted including the fact that his actions have been approved by his supervisors. However, there was no prior summary of the facts or arguments by the Tribunal which suggested that the complainant's supervisors knew what the complainant had been doing was in breach of UNIDO's Financial Regulations and Rules and its Procurement Manual and were aware of the purpose for which it was being done. The most that can be said is that the complainant's supervisors may have been aware of the outcome of his conduct and it was only in that sense that his actions had been approved.

14. In one of the Tribunal's earlier reported cases, Judgment 203 at consideration 2, the principle of proportionality was discussed in the context of the imposition of the disciplinary sanction of summary dismissal. The Tribunal noted that the imposition of the disciplinary sanction of discharge or summary dismissal could cause serious harm to the staff member and her or his family. The Tribunal observed that it was necessary for the penalty to be proportionate to the fault and that, in that case, the complainant's misconduct could not be evaluated without taking into account the extenuating circumstances.

15. In the Tribunal's view, Mr R.'s evidence has a material bearing on the degree of overall culpability of the complainant. The fact that Mr R., the then Secretary-General, approved the complainant's conduct (save for the conduct occurring in 2018) ameliorates his fault and establishes an important extenuating circumstance. That is to say, the failure of the complainant to discharge his duties in the manner specified in the charges had to be viewed in the context of the chief executive officer of the Organization, Mr R., knowing how those duties were being performed, approving of how those duties were being performed and, at least in some respects, having instructed the complainant to perform them. The Tribunal accepts that, generally, the conduct and attitude of a hierarchical superior does not exculpate a member of staff who has engaged in misconduct even though it is approved by that superior. It also accepts, as decided in Judgment 3083, that a member of staff whose duties included dealing with and managing the funds or other property of an organisation should adhere to normative legal or other instructional documents concerning how those funds and property should be disbursed

and managed. Moreover, a failure to do so could well warrant summary dismissal. Additionally, that failure could be characterised as a serious breach of trust. But these general observations must be viewed in the context of a particular case. Probably most unusually, in this case most of the complainant's conduct foundational to the charges and the decision to summarily dismiss, was approved or otherwise endorsed at the highest levels of the Organization. The failure of the Deputy Secretary-General to pay any regard to Mr R.'s evidence and peremptorily dismissing it on unsustainable grounds, was a serious flaw in the decision to summarily dismiss the complainant. That decision will be set aside.

16. This leads to the question of relief. At the outset it should be made clear that the damages the complainant had earlier sought as arising from his suspension with pay (which was lawful: see Judgment 4452) and suspension without pay (which was unlawful: also see Judgment 4452) do not fall for consideration in these proceedings. The complainant seeks an order of reinstatement, though only notionally, and material damages concerning loss of income from the date of dismissal or, in the alternative, material damages if he is not reinstated. He also seeks moral damages, exemplary damages and costs. Having regard to the circumstances in which he was summarily dismissed, it is extremely unlikely a satisfactory working relationship could be established between the complainant and those who facilitated that dismissal including the incumbent Secretary-General and, in any event, the complainant accepts reinstatement is not possible because of the passage of time since his dismissal and his reintegration into the Spanish Ministry of Foreign Affairs. Accordingly, no order of actual reinstatement should be made.

17. The material damages the complainant seeks in his submissions if not reinstated, or reinstated only notionally, comprise the loss of income and associated losses, from the time of his separation until the date he otherwise would have retired at age 65 as well as health insurance for him and his dependents together with pension benefits both for him and his spouse. At the time of his summary dismissal the complainant was approximately four years away from reaching that age in November 2022.

18. In its reply, UNWTO does not come to grips with these claims other than to say, as a generalisation, they are not substantiated and that all the amounts claimed are, in aggregate, 1,632,434 euros which represent over 10 per cent of UNWTO's 2020 budget. Plainly the amounts are potentially significant. It is desirable the Tribunal has the benefit of as full an account from the complainant as possible of the amounts claimed, taking into account his employment with the Spanish Civil Service, and their justification and submissions from the Organization responding, in detail, to each element of the claim for material damages and the quantification of the amount claimed. An order will be made to facilitate this process. However, the Tribunal should observe that the complainant may well have been found guilty of the misconduct alleged, even taking into account, in a fair and balance way, the evidence of the former Secretary-General. That may have led to a sanction that had financial consequences for the complainant. It would be appropriate at the end of the day to discount material damages to which the complainant might be entitled for this possibility.

19. The complainant is entitled to moral damages for the undoubted trauma and associated distress arising from and associated with his unlawful summary dismissal after almost ten years of service at UNWTO. Those damages are assessed in the sum of 40,000 euros. In addition, the complainant claims 40,000 euros in exemplary damages. This claim is rejected as the complainant has provided no persuasive evidence or analysis to demonstrate that there was bias, ill will, malice, bad faith or other improper purpose on which to base an award of exemplary damages (see, for example, Judgment 4181, consideration 11). Additionally no basis is established for orders the complainant seeks in relation to the modification of his personal file and the publication of this judgment. The complainant is entitled to costs which are assessed in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The decision of 1 August 2018 to summarily dismiss the complainant and the decision of 1 July 2019 to dismiss his appeal are set aside.
2. In furtherance of what is said in consideration 18 above, the complainant shall deliver to UNWTO his claim for material damages, UNWTO shall reply within 60 days and within that period UNWTO shall pay to the complainant such sums, if any, it admits to be due. In the event that the complainant's claim for material damages is not satisfied by this process, the parties are to forward to the Tribunal their respective documents to enable the Tribunal to finally determine and assess such material damages as may be payable.
3. UNWTO shall pay the complainant 40,000 euros moral damages.
4. UNWTO shall pay the complainant 8,000 euros costs.

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