

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**H.**  
**v.**  
**ITU**

**134th Session**

**Judgment No. 4515**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr K. H. against the International Telecommunication Union (ITU) on 28 September 2021, ITU's reply of 20 December 2021, the complainant's rejoinder of 31 January 2022, ITU's surrejoinder dated 3 March, the complainant's additional submissions of 8 March and ITU's final comments thereon of 31 March 2022;

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 conversion of his suspension with pay into a suspension without pay pending an investigation for harassment undertaken against him.

The complainant joined ITU on 1 December 2014 on a two-year fixed-term contract, which was extended several times, at grade D.1. On 14 October 2019 he was informed of the Secretary-General's decision to suspend him from duty with full pay effective from the same date, until further notice, on the grounds that allegations of misconduct, including sexual harassment and improper behaviour, had been reported to the Ethics Office against him and that a formal investigation would be undertaken. The complainant was requested to return all ITU items

and devices put at his disposal and to cooperate fully in the investigative process. His access to the ITU resources, including his professional email accounts, was suspended and he was no longer authorized to access ITU premises unless expressly invited by the investigator during the process.

The investigation formally started in late October 2019. As the complainant was found by his doctor to be medically unfit to participate in an interview with the investigator, he was eventually heard by the investigator almost one year later, in September 2020. Meanwhile, he had inquired about his contractual status and asked that his appointment be converted into a continuing one, which was rejected. He had also submitted on 11 September a complaint alleging harassment by various ITU staff members, particularly his supervisor, as well as institutional harassment.

On 19 October 2020 the investigator sent a pre-final version of the investigation report to the complainant for comments. Simultaneously, the Secretary-General requested the investigator to provide him with an interim report on the status of the investigation, which she did on 3 November 2020, using the same format as the pre-final version of the report, but deleting her conclusions so as to provide only the descriptive and analytical part of the investigation. On 13 November 2020, having reviewed the interim report, the Secretary-General, who considered that there was significant evidence supporting the seriousness and credibility of the allegations against the complainant, decided to reconsider the provisional measure in place and to suspend the complainant from duty without pay until further notice. On the following day, the complainant – who had not yet given his comments on the pre-final version of the investigation report – requested that such decision, which he considered as amounting to constructive dismissal, be annulled. The Secretary-General decided to maintain his decision. On 30 November 2020 the complainant's fixed-term appointment expired. Thereafter, as the investigation was ongoing, it was renewed on a monthly basis.

The complainant submitted his comments on the pre-final version of the investigation report on 14 December 2020. The investigator rendered her final report on 18 February 2021 and transmitted it to the

complainant for his comments. On 19 February 2021 the complainant lodged an appeal against his suspension without pay requesting, *inter alia*, that it be converted to a suspension with pay with retroactive effect from 13 November 2020, the consecutive payment of all salary, benefits, entitlements and other emoluments, the closure of the investigation against him, as well as an award of moral damages and the reimbursement of legal fees, with interest. On 31 March he submitted his comments on the final investigation report.

In its report dated 29 May 2021, the Appeal Board concluded that the Secretary-General should have waited until the receipt of the final investigation report before reviewing the type of suspension and that he did not provide enough justification to support “exceptional circumstances” warranting a suspension without pay. It recommended to reinstate the complainant’s suspension with pay from the date the suspension without pay was imposed until, at least, the date of receipt of the final investigation report; to proceed with the corresponding payment for that period, with 5 per cent annual interest on the amount withheld; not to pay the complainant any other financial redress; and to promptly initiate a review of the relevant legal framework. By a letter dated 15 July 2021, which constitutes the impugned decision, the complainant was informed that the Secretary-General had agreed to reinstate his suspension with pay from November 2020 until 18 February 2021, with no interest being awarded on the resulting payment of his salary.

The complainant asks the Tribunal to set aside the impugned decision, to order that his suspension without pay be retroactively converted to one with pay as from 18 February 2021 and pay him all salaries, benefits, entitlements and other emoluments he should have been paid as from that date, and to determine that his appointment was constructively terminated as from 13 November 2020 with all legal effects flowing therefrom or, alternatively, as from 18 February 2021, and order that he be paid an amount equal to all salaries, benefits, step increases, pension contributions, entitlements and all other emoluments he would have received had he remained in ITU for five years from the date of his constructive dismissal through the date of his statutory retirement (30 September 2025). He further requests that ITU be ordered

to immediately terminate and close the misconduct investigation against him. He seeks an award of 400,000 Swiss francs by way of moral and exemplary damages, as well as 25,000 Swiss francs in costs for the internal appeal procedure and the present proceedings. Finally, he asks that all amounts bear interest at the rate of 5 per cent per annum from due dates until the date of payment, and such other relief the Tribunal may deem necessary, fair and just.

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

### CONSIDERATIONS

1. This is one of the cases arising out of an investigation into misconduct initiated by ITU against the complainant. He was informed of the investigation by the Chief of the Human Resources Management Department (HRMD), on behalf of the Secretary-General, in the letter dated 14 October 2019. The Chief of HRMD also informed the complainant of the Secretary-General's decision to provisionally suspend him from duty with full pay with effect from 14 October 2019 until further notice, pursuant to Staff Rule 10.1.3. This rule states as follows:

- “a) When a charge of serious misconduct is made against a staff member, and if the Secretary-General or the Director of the Bureau concerned is of the opinion that the charge is well-founded and that the official's continuance in office pending an investigation of the charge would be prejudicial to the service, he or she may be suspended from duty by the Secretary-General, with or without pay, pending investigation, without prejudice to his rights. Such suspension shall not constitute a sanction in the meaning of Rule 10.1.2.
- b) A staff member suspended pursuant to paragraph a) above shall be given a written statement of the reason for the suspension and its probable duration. Suspension should normally not exceed three months.
- c) Suspension shall be with pay unless, in exceptional circumstances, the Secretary-General decides that suspension without pay is appropriate. If a suspension pursuant to paragraph a) above is without pay and the charge of misconduct is subsequently not sustained, any salary withheld shall be restored.”

2. In the letter dated 13 November 2020, which contained the underlying decision to this complaint, the Chief of HRMD informed the complainant, on behalf of the Secretary-General, that having reviewed the interim investigation report, the Secretary-General had reconsidered the provisional measure and decided to suspend him from duty without pay until further notice. The letter further stated that this decision did not constitute a sanction within the meaning of Staff Rule 10.1.2, but a provisional measure pursuant to Staff Rule 10.1.3. The complainant was advised that, for the avoidance of any doubt, ITU would continue making the payments for pension and health insurance purposes for the duration of the measure.

3. Eventually, in the impugned decision, dated 15 July 2021, the Chief of HRMD informed the complainant of the Secretary-General's decision to reinstate his suspension with full pay with effect from 13 November 2020 until 18 February 2021, the date on which the final investigation report was received. This was in keeping with one of the Appeal Board's recommendations. The Board had correctly concluded that the Secretary-General did not provide enough justification to support "exceptional circumstances" warranting a suspension without pay (as required by Staff Rule 10.1.3c)). The Chief of HRMD also informed the complainant that the Secretary-General did not accept the Appeal Board's further recommendation to pay him interest at the rate of 5 per cent per annum on the outstanding amount but had accepted the Board's recommendation not to pay him any further amounts.

4. The power to suspend a staff member under Staff Rule 10.1.3 is within the discretion of the Secretary-General. 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, Judgments 2365, consideration 4(a), 2698, consideration 9, 3037, consideration 9, and 4452, consideration 7). According to the Tribunal's case law, the suspension of an official is a provisional measure which in no way prejudices the decision on the

substance of any disciplinary measure against him (see Judgments 1927, consideration 5, and 2365, consideration 4(a)). However, as a restrictive measure on the staff member concerned, the suspension must have a legal basis, be justified by the needs of the organisation and be taken with due regard to the principle of proportionality. In order for a suspension measure to be taken, the official must be accused of serious misconduct.

The complainant contends that the impugned decision is unlawful, arbitrary and abusive.

5. Preliminarily to considering the arguments and the merits of the complaint, two procedural matters will be addressed. The complainant requests oral proceedings. The request is rejected as the central question concerning the lawfulness of the decision which the complainant challenges turns primarily on issues of law. ITU's request for the joinder of this complaint with the complainant's second complaint and other subsequent cases (opposed by the complainant) is also rejected as they do not raise the same issues of fact and law.

6. The complainant argues that his suspension without pay was triggered by no valid grounds or "exceptional circumstances", particularly as there were no interests to protect nor need to prevent any future act of harassment as he complied with the obligations arising from his suspension with pay. He further argues that his suspension without pay was an act of bias/prejudice, abuse of authority by the Secretary-General, which equals a hidden disciplinary measure and a clear constructive dismissal, and breached his right to be presumed innocent. He also argues that the interim report on which the Secretary-General relied in making the conversion of his suspension was illegal, prejudicial and grossly biased and that the Secretary-General gave no valid reasons for departing from the Appeal Board's recommendations, both with respect to the duration of the retroactive suspension with pay (i.e. the Board recommended a reinstatement until at least the date of receipt of the final investigation report) and the recommended payment of 5 per cent interest on the salaries to be paid retroactively. The complainant further argues that his suspension without pay was manifestly disproportionate

and was a disguised disciplinary sanction as there was no new element whatsoever justifying the change from a suspension with pay to one without pay. He also argues that the measure of suspension without pay was in retaliation for his filing of a harassment complaint (leading to his second complaint before the Tribunal, for which a judgment is also delivered in public this day) and amounted to *de facto* constructive dismissal, constituted a breach of his due process rights, was taken in bad faith and in breach of ITU's duty of care and was an abuse of power by the Secretary-General, who decided to impose a harsher sanction on him without considering all the circumstances.

7. The complainant's suspension with full pay was, in the context of the misconduct proceedings, within the discretionary power of the Secretary-General pursuant to Staff Rule 10.1.3 and did not constitute a sanction within the meaning of Staff Rule 10.1.2. However, when in the impugned decision the Secretary-General accepted the Appeal Board's recommendation to reinstate the complainant's suspension with full pay, with effect from the date on which his suspension with full pay was converted to a suspension without pay until 18 February 2021, he in effect conceded, correctly, that the decision of 13 November 2020 was not sufficiently substantiated with respect to the exceptional circumstances required by Staff Rule 10.1.3c).

8. Moreover, whilst in the impugned decision the Secretary-General accepted the Appeal Board's recommendation to reinstate the complainant's suspension with full pay until the date when the final investigation report was received, he did not explain why this measure was to terminate on that date, and, in the end, the complainant's suspension without pay after 18 February 2021 remained in place. The suspension provided for under Staff Rule 10.1.3a) is intended to be a measure that may be taken "pending [the outcome of the] investigation" and a staff member subject to it may thus be suspended – whether with or without pay – only until the investigation is completed. As the Tribunal has already had the occasion to hold in relation to the application of similarly worded regulations of another organisation, such a reference to the possibility of suspending an official until the end of the investigation

into the facts of which she or he is suspected cannot be interpreted as authorising an extension of that suspension beyond the end of the investigation in question and, in particular, during any disciplinary proceedings subsequently instituted against the official concerned (see Judgment 3880, consideration 20).

9. As the Secretary-General did not establish that there were exceptional circumstances warranting a suspension without pay from 19 February 2021, the decision to suspend the complainant without pay from that date until such time as a decision was taken to dismiss him for misconduct was wrong and will be set aside to that extent. The initial decision of 13 November 2020, which converted the complainant's suspension to suspension without pay, and the decision of 16 November 2020 rejecting the complainant's request for reconsideration will also be set aside. ITU will be ordered to pay the complainant his unpaid full salary and other benefits for the period of his suspension from 19 February 2021 until the effective date of his dismissal, deducting therefrom the contributions to the United Nations Joint Staff Pension Fund and the ITU staff health insurance scheme paid by the organisation on behalf of the complainant during the period in question.

10. The impugned decision will also be set aside to the extent that the Secretary-General did not accept the Appeal Board's recommendation to pay the complainant interest at the rate of 5 per cent per annum on the salary and benefits that he should have received during his suspension without pay to 18 February 2021. On 17 August 2021 ITU paid the amounts due up to that date, without interest. In the absence of any valid justification for withholding the complainant's pay during that period, he ought to have received it on the due dates, and the delay in making the relevant payments is, in itself, sufficient to entitle him to the payment of interest. The Secretary-General gave no reason to justify not accepting the Appeal Board's recommendation to pay the complainant the subject interest. ITU will be ordered to pay the complainant interest at the rate of 5 per cent per annum on the amounts which it paid him on 17 August 2021, as well as on the additional amount which ITU has now been

ordered to pay him in the foregoing consideration of this judgment from the date on which they fall due until the date of their payment.

11. The conversion of the complainant's suspension into a suspension without pay did not, as he alleges, amount to constructive dismissal within the meaning of the Tribunal's case law (see, for example, Judgment 4383, consideration 15). Neither did it breach the complainant's due process rights in the proceedings as there is no requirement that a person against whom disciplinary action is initiated has a right to be heard prior to suspension under Staff Rule 10.1.3a) (see Judgment 3138, consideration 10(a)). The complainant provides no evidence from which it may be deduced that the measure of suspension without pay was in retaliation for his filing of a harassment complaint against various ITU staff members, particularly his supervisor (see, for example, Judgment 4357, consideration 9). Neither has he substantiated his allegations that the decision to convert his suspension into a suspension without pay was taken because of abuse of authority (see, for example, Judgment 3939, consideration 10); bias (see, for example, Judgment 4010, consideration 9); personal prejudice (see, for example, Judgment 3912, consideration 13) or bad faith (see, for example, Judgment 3902, consideration 11) or in breach of the concomitant duty of care which ITU owed him (see, for example, Judgment 3861, consideration 9). The complainant provides no evidence to prove that the conversion decision was a hidden disciplinary measure (see, for example, Judgment 2907, consideration 23). There is therefore no basis on which to grant exemplary damages which the complainant claims (see, for example, Judgment 3092, consideration 16).

12. As the complainant has articulated the effects which the decision to convert his suspension with pay into a suspension without pay had on him, and, given the serious hardship that he suffered, which ITU itself acknowledges, he is entitled to moral damages. The Tribunal will award him 15,000 Swiss francs on this account. As the complainant succeeds on the central claim in his complaint, he will also be awarded 8,000 Swiss francs costs. The Tribunal considers that there are no grounds for awarding costs in respect of the internal appeal proceedings, since

such costs may only be awarded under exceptional circumstances, which were not demonstrated in the present case.

13. The additional submissions which the complainant provided in March 2022 concern a “new plea” raised in the surrejoinder about the disciplinary sanction imposed on him on 3 March 2022. The plea is rejected as it is beyond the scope of the present complaint.

### DECISION

For the above reasons,

1. The impugned decision is set aside to the extent stated in considerations 9 and 10 of this judgment. The decisions of 13 November 2020 and 16 November 2020 are also set aside.
2. ITU shall pay the complainant material damages as stated in consideration 9 of this judgment.
3. ITU shall pay the complainant interest as stated in consideration 10 of this judgment.
4. ITU shall pay the complainant moral damages in the amount of 15,000 Swiss francs.
5. ITU shall pay the complainant costs in the amount of 8,000 Swiss francs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 6 May 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

HUGH A. RAWLINS

CLÉMENT GASCON

DRAŽEN PETROVIĆ