

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

H. (No. 2)

v.

ITU

134th Session

Judgment No. 4516

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr K. H. against the International Telecommunication Union (ITU) on 1 October 2021, ITU's reply of 24 December 2021, the complainant's rejoinder of 3 February 2022 and ITU's surrejoinder dated 7 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 decision not to investigate his allegations of harassment.

Facts relevant to this case are to be found in Judgment 4515 on the complainant's first complaint, also delivered in public this day. Suffice it to recall that the complainant joined ITU on 1 December 2014 under 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 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 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 mid-September 2020.

On 11 September 2020, while that investigation was ongoing, the complainant submitted a complaint alleging harassment by various ITU staff members, particularly his supervisor, as well as institutional harassment pursuant to Service Orders Nos. 19/08 and 05/05 dealing with the ITU policy on harassment and abuse of authority. He requested that his complaint be investigated “promptly and thoroughly” and that the accused persons be subjected to the same pre-investigation restrictions imposed on him so as to avoid any undue influence or bias in the conduct of the investigation.

On 12 November 2020 he was informed that, following a recommendation from the Ethics Officer dated 11 November, the Secretary-General had decided that the matter would not be investigated and thus would be closed.

The following day, the complainant submitted a request for reconsideration of the decision not to investigate his harassment complaint. He requested to be provided with the Ethics Officer’s recommendation and the detailed reasons for the dismissal of his claims.

On 5 January 2021 the Secretary-General rejected the complainant’s request for reconsideration but provided him with a copy of the Ethics Officer’s recommendation. The complainant appealed on 5 March 2021, requesting inter alia the setting aside of the contested decision and an award of moral and exemplary damages in an amount of not less than 250,000 Swiss francs, as well as costs, plus interest on all these amounts.

On 30 March 2021 the complainant submitted a new formal complaint alleging harassment and abuse of authority by the Secretary-General. No investigation was undertaken and the case was closed in April.

In its report dated 5 July 2021 on the first harassment complaint, the Appeal Board, considering that it did not have the mandate to investigate harassment itself, limited its review to the observance of the processes relevant to the appeal and the arguments put forward by the parties. It recommended that the appeal be dismissed. By a letter dated 19 July 2021, which constitutes the impugned decision, the complainant was informed that the Secretary-General had accepted the Appeal Board's recommendation.

The complainant asks the Tribunal to set aside the impugned decision, as well as the Ethics Officer's recommendation, and to examine the merits of his harassment claims without sending the matter back to the organization. He also seeks an award of 250,000 Swiss francs by way of moral and exemplary damages, with interest at the rate of 5 per cent per annum from 11 September 2020 through the date remedies are paid in full, as well as costs for the internal appeal procedure and the present proceedings.

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

CONSIDERATIONS

1. The central question to be determined on this complaint is whether the Secretary-General's decision to close the complainant's harassment complaint without ordering a formal investigation was unlawful, as the complainant contends. The Secretary-General had informed the complainant on 12 November 2020 that following a recommendation by the Ethics Officer, he (the Secretary-General) had decided that the matter would not be investigated and thus would be closed. On the complainant's internal appeal against the Secretary-General's rejection of his request for reconsideration of that decision, the Chief of the Human Resources Management Department (HRMD) informed the complainant, in the impugned decision, dated 19 July 2021, that the Secretary-General had accepted the Appeal Board's recommendation to dismiss his appeal.

2. The complainant challenges the impugned decision on various grounds. He contends, among other things, that the decision to close his case was procedurally flawed because there was no valid reason for the Secretary-General's refusal to undertake an investigation into his harassment complaint. He also contends that the decision not to undertake an investigation breached the legal framework and the jurisprudential principles on harassment. He refers, in particular, to paragraph 15 of Service Order No. 19/08 of 2 May 2019 dealing with the ITU's applicable policy on harassment and abuse of authority and to the legal principles which, he argues, were not respected in this case.

3. Before considering the arguments and the merits of the complaint, two procedural matters will be addressed. The complainant requests oral proceedings but withdraws the request in his rejoinder. In any event, the written pleadings, documents and submissions which the parties provide are sufficient to enable the Tribunal to reach an informed decision on the issues to be resolved in this case.

4. The ITU's request for the joinder of this complaint with the complainant's first complaint and other subsequent cases (opposed by the complainant) is also rejected for the reasons which the Tribunal gives in consideration 5 of Judgment 4515, which is also delivered in public on this day.

5. Paragraph 15 of Service Order No. 19/08 relevantly states that "[w]ithin three weeks of receiving a complaint in writing, the Secretary-General must launch a formal investigation. He may appoint one or several external investigators, entrust the inquiry to in-house officials with investigation functions or set up [a] commission of inquiry convened for the specific case in question [...]".

6. ITU's arguments, in opposition to the complainant's contention that, under paragraph 15 of Service Order No. 19/08, the Secretary-General was duly bound to institute an investigation prior to closing his case, may relevantly be summarized as follows: paragraph 15 cannot be interpreted in a blindly literal manner, as it would lead to an absurd

result, inconsistent with the intent and purpose of the ITU's harassment policy. The intent and purpose of that policy "cannot be that of obliging the Secretary-General to conduct unwarranted investigations [...] investing the [ITU]'s scarce resources in allegations that a mere initial verification already reveals to be not founded and/or not credible, to the detriment of other cases". Paragraph 15 is to be interpreted in light of the Tribunal's case law, stated in consideration 4 of Judgment 4039, for example, according to which "[t]he decision to open an investigation, which in no way prejudices the decision on [the] merits of a possible sanction, lies at the discretion of the competent authority". Read in the context of this statement, "it appears that the aim of [paragraph 15] was [to ensure] that, when a complaint that was sufficiently founded and credible was indeed submitted, the investigation had to be launched promptly. Any other interpretation would defy [logic] and any notion of good management." Paragraph 15 requires that, within three weeks of the submission of a complaint, the allegations of harassment be initially reviewed to assess whether there is a *prima facie* case, so that a decision may be made whether to launch an investigation or not.

7. The foregoing arguments are unfounded. In the first place, paragraph 15 contains the word "must". Often provisions conferring a power use the word "must" or "shall" or, alternatively, "may". Ordinarily the word "must" is, in such a context, construed as imposing a duty on the repository of the power to exercise the power. Ordinarily the word "may" is construed as creating a discretion in the repository of the power whether to exercise the power. Occasionally, the context in which either word is used might result in a construction of the provision conferring the power which is at odds with its ordinary meaning.

In the present case, the context in which the word "must" is used is consistent with its ordinary meaning. Paragraph 15, in a part of the Service Order addressing procedures for dealing with claims of harassment and abuse of authority, is part of the prescribed formal procedure but which is preceded by what is described as "the informal approach" containing, under that heading, four paragraphs. Not only do those paragraphs declare that the best way to deal with harassment or abuse of authority is to discourage it at an early stage but they also set out a comparatively

detailed mechanism to achieve that objective. Thus, it is only if the informal approach has failed (and there is a clear bias in the Service Order in favour of it succeeding) that an aggrieved staff member can engage the formal procedure and it is only then that the Secretary-General is required to exercise her or his power to launch a formal investigation.

8. In the second place, the case law stemming from consideration 4 of Judgment 4039, upon which ITU relies, was expressly premised on paragraph 30 of the Uniform Guidelines for Investigations (2nd Edition) endorsed by the 10th Conference of International Investigators held in June 2009. It stated that “[o]nce a complaint has been registered, it will be evaluated by the Investigative Office to determine its credibility, materiality, and verifiability. To this end, the complaint will be examined to determine whether there is a legitimate basis to warrant an investigation.” Critically, the rules of the defendant organization in Judgment 4039 did not contain a provision similar to paragraph 15 of Service Order No. 19/08, which mandated the Secretary-General to order the conduct of an investigation by an investigator or investigators specified in the paragraph, within three weeks of receiving a complaint in writing. ITU cannot ignore its own clear rule whilst seeking to rely on case law that is irrelevant or which will lead to a strained interpretation of the words of paragraph 15. The Secretary-General contravened paragraph 15 of Service Order No. 19/08 by closing the case before an investigation was conducted. In view of the fact that in the impugned decision the Secretary-General maintained the decision to close the complainant’s case without an investigation, the impugned decision will be set aside.

9. The complainant seeks an order to set aside the initial recommendation by the Ethics Officer upon whose advice the Secretary-General closed his harassment complaint without the conduct of an investigation. Whilst it is true that the Ethics Officer had no purview to provide such advice under the ITU’s statutory and regulatory regime, it is doubtful that his advice can be considered as a decision which warrants being set aside.

10. Having set aside the impugned decision, the Tribunal will remit the case to ITU in order that the complainant's harassment complaint can be investigated. The investigation shall commence within sixty days of the public delivery of this judgment.

11. As the complainant has not substantiated his allegations that the decision to close the case was taken for an improper purpose amounting to abuse of authority (see, for example, Judgments 3172, consideration 16, and 3939, consideration 10) or that it was based on bias (see, for example, Judgment 4010, consideration 9); that it was tainted by personal prejudice (see, for example, Judgment 3912, consideration 13) or bad faith (see, for example, Judgment 3902, consideration 11), there is no basis on which to grant exemplary damages which he claims (see, for example, Judgment 3092, consideration 16).

12. The complainant seeks moral and exemplary damages for "the inexplicable delay in the initiation of any investigation". His request is rejected. With respect to the claim for exemplary damages, the Tribunal notes that in general these awards are meant to sanction bias, ill will, malice, bad faith, and other improper purpose (see, for example, Judgment 3092, consideration 16). The complainant presents no basis from which it may be inferred that any of these elements is met. Moreover, the complainant has not articulated the adverse effects which the delay in ordering an investigation had upon him to warrant an award of moral damages (see, for example, Judgment 4316, consideration 20).

The Tribunal will however award him 7,000 Swiss francs in 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 do not exist in the present case.

DECISION

For the above reasons,

1. The impugned decision, dated 19 July 2021, is set aside.
2. The matter is remitted to ITU in accordance with consideration 10 of this judgment.
3. ITU shall pay the complainant costs in the amount of 7,000 Swiss francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 20 May 2022, 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 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ