

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

N.
v.
ITU

134th Session

Judgment No. 4519

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. N. against the International Telecommunication Union (ITU) on 1 November 2021, ITU's reply of 6 December, the complainant's rejoinder of 17 December 2021 and ITU's surrejoinder of 19 January 2022;

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 challenges the decision to suspend her without pay.

The complainant joined ITU's Human Resources Management Department in 2010 and received a continuing appointment in 2015.

In February 2020 allegations against her of fraud and breach of private obligations were reported to ITU, which the Secretary-General instructed the Internal Audit Unit to investigate. On 1 May 2020 the complainant was informed of the investigation and the Secretary-General's decision to suspend her from duty with pay until further notice. On 2 September she was invited to submit her observations on the preliminary version of the investigation report, which she did. In a letter of 10 November 2020 she received the final investigation report,

which included her observations and concluded that the allegations were well founded. She was informed that the Secretary-General intended to initiate disciplinary proceedings against her and that he had decided to convert the suspension with pay into a suspension without pay “as of November 2020”.

On 23 November 2020 the complainant requested that this decision be reconsidered and her salary paid as soon as possible, even if her suspension were maintained. On 10 December 2020 she was notified that her case would be submitted to the Joint Advisory Committee for its opinion pursuant to Chapter X of the Staff Regulations and Staff Rules, which deals with disciplinary measures.

Following the rejection of her request for reconsideration on 6 January 2021, the complainant lodged an appeal with the Appeal Board on 8 March 2021 seeking the withdrawal of the decision to suspend her without pay, payment in full of her salary and other financial benefits with interest, and compensation for the injury she considered she had suffered.

In its report of 16 June 2021, the Appeal Board considered that the decision of 10 November 2020 complied with the applicable rules and regulations and that nothing prevented the Secretary-General from withholding the complainant’s salary while the disciplinary procedure was under way. However, it held that the complainant was entitled to receive her salary for the first nine days of November 2020, before the contested decision was adopted, and recommended that the corresponding payment be made. It recommended that all other claims be rejected.

On 30 July 2021 the complainant was informed of the Secretary-General’s disciplinary decision – taken on the basis of the report of the Joint Advisory Committee – to dismiss her with effect from the following day and to grant her a termination indemnity equivalent to five months’ salary. She therefore left ITU on 31 July.

By a letter of 2 August 2021, which constitutes the impugned decision, the Secretary-General endorsed the Appeal Board’s recommendations regarding the appeal against the decision of 10 November 2020. On 2 October 2021 the Human Resources Management Department sent

the complainant a statement detailing her end-of-service entitlements, which she approved.

The complainant requests the Tribunal to set aside the impugned decision together with the earlier decisions of 6 January 2021 and 10 November 2020, and to order ITU to pay her the salary arrears with interest at the rate of 5 per cent per annum (unless the case law has been updated on this point) from each due date. She also claims compensation for all the moral injury she considers she has suffered, which she assesses at 20,000 euros, and an award of 8,000 euros in costs.

ITU asks the Tribunal to dismiss the complaint as unfounded in its entirety and observes that, were the claim for the payment of salary arrears to be granted, the amount of pension and health insurance contributions should be deducted.

CONSIDERATIONS

1. The complainant impugns the decision of 2 August 2021 in which the Secretary-General of ITU principally rejected her internal appeal against the decision of 10 November 2020, suspending her without pay when an investigation into allegations of fraud and breach of private obligations in relation to her daughter's education expenses concluded that these allegations were well founded.

That decision, which also notified the complainant that disciplinary proceedings were to be initiated against her, followed the decision of 1 May 2020, which had initially suspended the complainant with pay until further notice when she was told that the investigation in question would be carried out.

2. According to the Tribunal's case law, the suspension of a staff member is an interim measure which need not necessarily be followed by a substantive decision to impose a disciplinary sanction (see Judgments 1927, consideration 5, and 2365, consideration 4(a)). Nevertheless, since it imposes a constraint on the staff member, suspension must be legally founded, justified by the requirements of the organisation and in accordance with the principle of proportionality.

A measure of suspension will not be ordered except in cases of serious misconduct. Such a decision lies at the discretion of the organisation's executive head. It is subject therefore to only limited review by the Tribunal and will not be set aside unless it was taken without authority or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the evidence (see aforementioned Judgment 2365, consideration 4(a), and Judgments 2698, consideration 9, 3037, consideration 9, and 4452, consideration 7).

3. In this case, the disputed measure was adopted pursuant to ITU Staff Rule 10.1.3, concerning “[p]rovisional suspension from duty” in cases of suspected misconduct, which reads 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.”

4. Among the many pleas entered by the complainant in support of her complaint, there are three which, since they relate to errors of law, fall within the limited scope of the Tribunal's power of review defined above and are decisive for the outcome of this dispute.

These pleas are based on the breach of each of the three paragraphs of the abovementioned Staff Rule 10.1.3 respectively.

5. First, the complainant alleges a breach of Staff Rule 10.1.3(a) in that it was decided to suspend her without pay at the end of the disciplinary investigation and, more generally, to continue her suspension beyond the conclusion of that investigation until the end of the disciplinary proceedings subsequently brought against her.

This plea is well founded.

The wording of Staff Rule 10.1.3(a) makes plain that the suspension provided for under Staff Rule 10.1.3 is intended as a measure that may be taken “pending an investigation” and that the staff member concerned may thus be suspended – whether with or without pay – only until its end. As the Tribunal has already held concerning the application of similarly worded staff rules in another organisation, such a reference to the possibility of suspending a staff member until the end of the investigation into the actions 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 brought against the staff member concerned (see Judgment 3880, consideration 20).

Contrary to what the Organisation submits, this approach does not contradict that adopted in previous cases concerning ITU. Although in Judgment 3138 the Tribunal accepted the lawfulness of a suspension ordered after the delivery of the report into the investigation of the acts of which the complainant was accused in that case, it did so on the ground, set out in consideration 11 of that judgment, that an “additional investigation” was planned when the decision was taken. Nor is Judgment 2601, also quoted by ITU, relevant since it concerned a challenge to decisions taken at the end of a disciplinary procedure and, as pointed out in consideration 13 thereof, did not call into question the lawfulness of the prior suspension. Finally, although ITU also refers to Judgment 3502, concerning another organisation where the suspension of staff members is governed by similar provisions, the Tribunal observes that the suspension at issue in that judgment was ordered pending the outcome of an investigation and that, although the suspension was extended until the end of the subsequent disciplinary procedure, the plea was not framed in the same way in the other case.

6. ITU argues in its submissions that the reference to the duration of the investigation in the aforementioned Staff Rule 10.1.3(a) should be interpreted flexibly, since the intention behind that provision is to allow the organisation to continue a staff member's suspension until the end of any disciplinary proceedings initiated as a result of the investigation itself.

However, it is well established in the case law that where the wording of a provision is clear, the Tribunal will not engage in any constructive interpretation of this kind (see, for example, Judgments 1125, consideration 4, or 3358, consideration 5). The reference to the duration of the investigation in Staff Rule 10.1.3(a) is unambiguous. Furthermore, the Tribunal considers that, contrary to what ITU submits, there may be a rationale behind the limitation of the length of the suspension to that of the investigation that explains the content of the provision in question. Indeed, the main aim of suspending a staff member suspected of misconduct is often to prevent her or him taking any steps to destroy evidence or place witnesses under pressure. However, the issue of preserving the evidence no longer exists in the same way once the investigation is over. Lastly, while the Tribunal is aware of the difficulty that the return to duty of a staff member after her or his provisional suspension may cause in some cases, it is not the Tribunal's role to palliate any defects in a provision, it being for the competent authorities of ITU to remedy them if need be.

7. In the present case, the decision of 10 November 2020 converting the complainant's suspension with pay into suspension without pay was taken after the delivery of the investigation report, at which point any continuation of the complainant's suspension – even in its initial form – was contrary to Staff Rule 10.1.3(a). The impugned decision is therefore unlawful on this ground alone.

8. Second, the complainant submits that the conversion of her initial suspension into a suspension without pay breached the requirement of Staff Rule 10.1.3(b) that a suspension “should normally not exceed three months”.

The Tribunal considers that this plea must also be accepted.

Admittedly, as ITU points out, the three-month limit is merely a guideline. It is not mandatory as it applies only “normally” and a suspension may well be longer in certain cases. Nevertheless, if the provision in question is not to be rendered meaningless, it cannot be considered that the Organisation may disregard the objective of complying with this maximum guideline period without restriction or justification. Here again, ITU misconstrues the Tribunal’s case law, and in particular abovementioned Judgment 3138, by essentially inferring that it has no particular obligation to act quickly.

In the present case, the complainant had already been suspended for more than six months – twice as long as the guideline period – when the contested decision of 10 November 2020 was taken, but ITU provides no explanation whatsoever in its submissions for that unusually long initial suspension. Nor does the evidence show that the investigation carried out during that period encountered any particular difficulties liable to slow its progress.

The Tribunal therefore considers that, in the circumstances of the case, the extension of the suspension beyond that six-month period – in the form, moreover, of a conversion into a suspension without pay and irrespective of the fact that it unlawfully covered the period after the investigation – cannot be regarded as complying with the objective set for ITU in Staff Rule 10.1.3(b).

9. The Tribunal further observes that a total of 15 months elapsed between the start of the complainant’s suspension, on 1 May 2020, and the end of the suspension, which in this case coincided with the date on which her dismissal took effect, namely 31 July 2021. That is an unreasonably long time. It not only grossly exceeded the aforementioned three-month period, but also disregarded the inherently short-term nature of such a suspension (see, for comparable cases, abovementioned Judgment 2698, consideration 14, or Judgment 3035, consideration 18). This duration, which can largely be explained by the likewise unusually slow disciplinary procedure, is all the more egregious in the present

case because the complainant was deprived of any professional income from 10 November 2020, that is to say for most of the period in question.

10. Third, the complainant submits that the decision to suspend her without pay was taken in breach of the requirement of Staff Rule 10.1.3(c) that such a suspension only be ordered “in exceptional circumstances”. She argues that such circumstances are not evident in the present case.

According to ITU’s explanations in its submissions, it was the gravity of the allegations against the complainant that principally persuaded the Secretary-General to suspend her without pay once the investigation had found them proven. The Organisation points out that the complainant was suspected of having repeatedly committed two types of misconduct. One of them – the submission of false documents or information with a view to obtaining an allowance – constitutes fraud, in respect of which ITU pursues a “zero tolerance” policy. The other – failure to fulfil private financial obligations – had already led to previous warnings. The Organisation submits that the conduct in question had damaged its interests and reputation, and the gravity of the misconduct was exacerbated by the fact that the complainant worked in the Human Resources Management Department, which required her to be particularly stringent in such matters.

11. It is doubtful whether those circumstances constitute exceptional circumstances, within the meaning of the abovementioned Staff Rule 10.1.3(c), justifying the imposition of a suspension without pay, since, while the gravity of the charges against the complainant is undisputable, it should be borne in mind that even a suspension with pay is not possible unless serious misconduct is suspected. Therefore, the mere fact that an act of misconduct can be considered serious does not suffice to justify the imposition of a more severe measure and exceptional circumstances can be recognised only in highly specific situations.

However, in any event, the Tribunal notes that, by initially ordering that the complainant be suspended with pay in the decision of 1 May 2020, the Secretary-General had already made his assessment on that point. Indeed, the various facts discussed above were all already known at that date and, in taking that decision, the Secretary-General therefore implicitly but necessarily accepted that they did not constitute exceptional circumstances justifying a suspension without pay. Accordingly, in the absence of any relevant new facts, the Secretary-General could not subsequently alter that assessment (see Judgment 4452, consideration 11).

The confirmation in the investigation report that the allegations against the complainant were substantiated does not, in itself, constitute a relevant new fact. It had no bearing on the nature of the misconduct of which the complainant was accused and could not therefore allow the circumstances of the case to be treated as exceptional when they had not been before. Moreover, it should be observed that the findings of the investigation in question merely corroborated the view that the ITU authorities must be deemed to have held when the initial decision was taken to suspend the complainant with pay as, under Staff Rule 10.1.3(a), the Secretary-General may suspend a staff member only “if [she or he] or the Director of the Bureau concerned is of the opinion that the charge is well-founded”, and that is a prerequisite for a measure of this type to be lawful (see, for example, Judgment 2892, consideration 14).

In considering that, in this case, he could convert the initial suspension with pay into a suspension without pay in the light of the findings of the investigation, the Secretary-General therefore committed an error of law, in addition to those already criticised above.

12. It follows from the foregoing that the Secretary-General’s decision of 2 August 2021, as well as the decision of 10 November 2020, and that of 6 January 2021 rejecting the complainant’s request for reconsideration, must be set aside without there being any need to examine her other pleas.

13. Consequently, ITU will be ordered to pay the complainant, in compensation for the material injury caused, the equivalent of the salary and allowances of all kinds which she should ordinarily have received between 10 November 2020 and 31 July 2021 inclusive. The contributions to the United Nations Joint Staff Pension Fund and the ITU staff health insurance scheme paid by the Organisation on the complainant's behalf during the period in question, as well as the sums paid to her – including in the form of advances – corresponding to the education grant which she continued to receive during the same period for her daughter's education, will of course be deducted from this amount.

The sums due to the complainant in respect of each monthly salary will bear interest at the rate of 5 per cent per annum from the date on which they fell due until their date of payment.

14. Furthermore, the unlawful decision to suspend the complainant without pay caused her considerable moral injury.

The Tribunal observes that the conversion of the initial suspension with pay – which, in the light of the evidence, was in itself entirely legitimate – into a suspension without pay did not have the effect of significantly exacerbating the damage already inevitably done to the complainant's professional reputation, since, when a member of staff is suspended, that damage arises primarily from the very fact that she or he is removed from duty. However, the sudden and prolonged loss of all pay resulting from that measure was bound to cause the complainant severe anxiety and hardship. Moreover, the unreasonable length of the suspension, considered as a whole, had the effect of keeping the complainant in a protracted state of uncertainty about her professional future, which was especially difficult since she was responsible for a child.

In view of all the circumstances of the case, the Tribunal considers that this moral injury will be fairly redressed by awarding the complainant compensation in the amount of 15,000 euros.

15. As the complainant succeeds, she is entitled to an award of costs, which the Tribunal sets at 8,000 euros.

DECISION

For the above reasons,

1. The decision of the Secretary-General of ITU of 2 August 2021 is set aside, as are the decisions of 10 November 2020 and 6 January 2021.
2. ITU shall pay the complainant material damages and interest thereon, calculated as indicated in consideration 13, above.
3. ITU shall pay the complainant 15,000 euros in moral damages.
4. It shall also pay her 8,000 euros in costs.
5. 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.

(Signed)

PATRICK FRYDMAN HUGH A. RAWLINS CLÉMENT GASCON

DRAŽEN PETROVIĆ