

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

A.-O.

v.

IAEA

122nd Session

Judgment No. 3649

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. A.-O. against the International Atomic Energy Agency (IAEA) on 30 December 2013 and corrected on 11 March 2014, the IAEA's reply of 26 June, the complainant's rejoinder of 21 July, the IAEA's surrejoinder of 29 October 2014, the complainant's further submissions of 4 March 2015, the IAEA's comments thereon of 11 June, the complainant's further submissions of 24 June and the IAEA's final comments of 25 November 2015;

Considering Article II, paragraph 5, 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 impugns the decision of the Director General of the IAEA to summarily dismiss him for serious misconduct.

The complainant joined the IAEA as an IT support technician in July 2001. At the material time he held a fixed-term appointment. In May 2013 he forwarded an email with 12 pornographic attachments to the Director of Human Resources and the Director of the Office of Internal Oversight Services (OIOS) as well as another Director and a Team Leader, alleging that this had been sent to him by a female colleague and asking them to take appropriate action. An investigation was opened by OIOS and both the complainant and the colleague, with whom he

had pursued a relationship for several years, were subjects of the investigation. A preliminary investigation report indicated that there was *prima facie* evidence of serious misconduct on the part of the complainant, based inter alia on forensic analysis of his computer. In particular, there was evidence that the complainant had sent the offensive email to himself by secretly accessing his colleague's account, that he had falsified a medical certificate in order to justify a period of sick leave and that he had engaged in external commercial activities without informing the IAEA. On 1 August 2013 the complainant was suspended from duty with pay based on this *prima facie* evidence. He appealed the suspension decision but the Director General upheld it.

On the basis of the findings made by OIOS in its Final Investigation Report, on which he was given an opportunity to comment, the complainant was charged with serious misconduct on 25 September 2013 and was invited to respond by 11 October. He did so on 8 October, offering inter alia to demonstrate relevant logs of his email account. A meeting was held with the Director of the Division of Human Resources to this end on 16 October. However, by letter dated 1 November 2013 the complainant was informed that the Director General had decided to summarily dismiss him for serious misconduct pursuant to Staff Regulation 11.01.

On 12 December the complainant wrote to the Director General indicating that he wished to appeal the decision to summarily dismiss him. By letter dated 19 December 2013 the complainant was informed that as he had been dismissed under Staff Regulation 11.01 without reference to the Joint Disciplinary Board, he could either request the Board to review the decision or seek permission from the Director General to appeal directly to the Tribunal. The complainant was granted permission and filed his complaint on 30 December 2013 impugning the decision to summarily dismiss him.

The complainant claims compensation for loss of employment as well as unquantified damages, and he asks the Tribunal to "clear his name".

The IAEA requests the Tribunal to dismiss the complaint in its entirety and to deny all of the claims therein.

CONSIDERATIONS

1. The complainant joined the IAEA in 2001 as an IT Service Support Technician. In October 2012, following a series of fixed-term appointments with periods of separation and extension, the complainant entered into a one-year Temporary Assistance appointment at the G-5 level in the Department of Safeguards.

2. In this proceeding, he challenges the Director General's 1 November 2013 decision to summarily dismiss him for serious misconduct. The action that precipitated the investigation and ultimately led to the impugned decision occurred on 16 May 2013. On that day, the complainant sent an email containing 12 attachments of allegedly pornographic material to three IAEA directors. In the body of the email, the complainant stated that the pornographic material was sent to his official Agency account by Ms M., an IT Systems Technician at the IAEA. The complainant added that Ms M. sent the emails from her Hotmail account and her official Agency account. The complainant asked for the necessary action to be taken.

3. At this juncture, it is convenient to point out that during the course of the investigation that ensued, it was discovered that the complainant and Ms M. had been involved in a personal relationship for eight years that had ended around the time of the email sent by the complainant to the IAEA directors.

4. Subsequently, on 30 May 2013, the Office of Internal Oversight Services (OIOS) informed both the complainant and Ms M. that they were the subjects of a preliminary misconduct investigation. On the same day, the OIOS temporarily seized their respective computers and connected devices and made forensic copies of the data on the computers and devices.

5. On 29 July 2013 a preliminary investigation report was sent to the Director of the Division of Human Resources (Director-MTHR). The report stated that the data obtained from a number of documents,

interviews, and the initial forensic analysis of the data copied from the two computers and connected devices provided *prima facie* evidence that the complainant had:

- Used another staff member's private Hotmail account without his or her permission to send pornographic material to his Agency email account;
- Falsely alleged in a formal complaint of misconduct that another staff member had sent pornographic material to his Agency email account;
- Attached personal electronic devices to his Agency computer without authorization and in contravention of Agency policies, with consequential implications for information security; and
- Engaged in outside activities without requesting or receiving the necessary approval.

The report states that these actions evidenced serious misconduct on the part of the complainant which required further investigation.

6. On 1 August the complainant was informed of the findings of the preliminary investigation and that he would be suspended with pay, pending the completion of the misconduct investigation and any ensuing disciplinary proceedings. The complainant's appeal against the decision to suspend him with pay was rejected by the Director General.

7. On 12 September 2013 the OIOS sent the complainant a copy of the draft Final Investigation Report, including seven annexes, for his comments, to which the complainant responded on 20 September. On 23 September the OIOS sent the Final Investigation Report to the Director-MTHR. The report stated that based on all of the evidence gathered during the investigation, the OIOS and the Forensic Analysts concluded that the various allegations of misconduct made against the complainant were substantiated and amounted to serious violations of the Staff Regulations and Rules. Specifically, the complainant had:

- Accessed Ms M.'s Hotmail account and had sent the emails referenced in his 16 May 2013 complaint to himself, and had

reported it to the Agency management as having been sent by her in an attempt to cause harm to Ms M. In addition, the OIOS had recovered emails of a threatening nature sent to Ms M. from the complainant's official Agency account;

- Left the duty station on two occasions while on approved certified sick leave without prior authorisation;
- Engaged in an outside activity while in the employ of the Agency; and
- Produced his own sick leave certificate which he claimed was from his own doctor, forged the signature of his doctor, and then uploaded this certificate into the Time, Attendance and Leave Management System as evidence of his illness in March 2013.

8. On 25 September the Director-MTHR gave the complainant a copy of the OIOS Final Investigation Report and an opportunity to respond to the report before 11 October 2013. On 8 October the complainant submitted his response to the Final Investigation Report in which, among other things, the complainant offered to demonstrate relevant logs of his Hotmail account that were apparently relevant to issues addressed in the report. The Director-MTHR met with the complainant on 16 October, however, the Director-MTHR found that the information provided had no bearing on the findings in the report.

9. In his letter of 1 November 2013, the Director General informed the complainant of his decision to summarily dismiss him for serious misconduct, pursuant to Staff Regulation 11.01. In the letter, the Director General cited eleven violations of various provisions of the Staff Regulations and Rules stemming from the following instances of misconduct:

- The complainant deliberately made false allegations of misconduct against Ms M.;
- The complainant sent a threatening email to Ms M.;
- The complainant was absent from the duty station on two occasions while on certified sick leave without prior authorization;

- The complainant provided a forged sick leave certificate as evidence of his illness in March 2013;
- The complainant engaged in outside activities without prior authorization; and
- The complainant connected unauthorized personal devices to his Agency computer.

10. The Director General granted the complainant's request to appeal the 1 November decision directly to the Tribunal.

11. The complainant submits the OIOS investigation was conducted in a biased and discriminatory manner. In support of his submission, the complainant alleges he was a victim of "institutional discrimination" and a "hate campaign" which was carried out by individuals, including the OIOS Forensic Analysts and the OIOS Senior Investigator, who were partial to the interests of Ms M. As evidence of the institutional bias, the complainant contends that the Director of the Department of Safeguards, Office of Information and Communication Systems authorized the disabling of his email account after he reported the alleged misconduct of Ms M. on 16 May 2013; denied him access to all the department floors and to the facilities on his floor; did not respond to his emails; and informed him that if he had any complaints, they should be directed to the Deputy Director General Safeguards, which the complainant considered to be a "massive escalation" of the situation.

12. The complainant notes that he was suspended pending the outcome of the misconduct investigation but Ms M. was not suspended. Further, when he was suspended on 1 August, he was escorted from his office in a humiliating manner by two Human Resource officers and a security officer, and was ordered to surrender his grounds pass. Additionally, although it had already been determined that his contract would be extended for another year, the IAEA refused to do so despite the fact that he had not been found guilty of misconduct at the relevant point in time.

13. The complainant's allegations that the misconduct investigation was biased and discriminatory and part of a broader smear campaign against him are unsubstantiated and without merit. A review of the record reveals an investigation that was thorough and conducted in a manner that at all times was consistent with provisions of Appendix G to Administrative Manual, Part II, Section 1, "Procedures to be followed in the Event of Reported Misconduct". The allegations of bias and favouritism on the part of the OIOS Forensic Analysts and the OIOS Senior Investigator are without foundation. As well, the fact that Ms M. was not suspended does not reflect bias in her favour. Rather, it was not warranted on the basis of the OIOS's investigation of her involvement in the matter. As to being escorted from his office by three officers, by its very nature being escorted out of the workplace is a humiliating experience. However, there is no evidence that the officers engaged in any conduct that would exacerbate the humiliation. The disabling of the complainant's email account and the denial of access to certain floors and facilities are simply matters of sound business practice on the part of the IAEA in the circumstances, as is the withholding of a decision in relation to the complainant's contract extension until the completion of the investigation.

14. The complainant also submits that the evidence gathered by the OIOS does not substantiate a number of the allegations of misconduct. In particular, he points to the findings that he "sent false emails", left the duty station while on certified sick leave, submitted a forged sick leave certificate, engaged in outside activities and attached devices to IAEA computers without authority. At this juncture, it is useful to reiterate the well settled case law that the burden of proof rests on an organization to prove the allegations of misconduct beyond a reasonable doubt before a disciplinary sanction is imposed. It is equally well settled that the "Tribunal will not engage in a determination as to whether the burden of proof has been met, instead, the Tribunal will review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made" (see Judgment 2699, consideration 9). Having reviewed the evidence gathered during the course of the investigation and the complainant's statements in response, the findings of guilt

beyond a reasonable doubt in relation to each allegation of misconduct are fully supported by the evidence and were properly made.

15. The complainant does not provide extensive submissions on the proportionality of the sanction imposed but he does note that his summary dismissal was taken without consideration of his twelve years of service “without complaint and very good appraisals”. As the IAEA observes, when viewed separately, certain of the offences demonstrate a serious lack of integrity and unethical behaviour on the part of the complainant. When viewed together, the complainant’s actions show a continuum of serious misconduct compounded by his lack of candor during the course of the investigation. In the circumstances, the sanction imposed was not disproportionate.

16. The complainant also submits that the IAEA denied him access to his emails and computer during the investigation and following his summary dismissal. Additionally, he was denied access to the audio/video recordings of his 23 July 2013 interview and his 16 October 2013 meeting with the Director-MTHR. The complainant claims that these actions prevented him from accessing the information necessary to counter the accusations against him during the misconduct investigation and to prepare his complaint to the Tribunal and constitute a breach of his due process rights. This complaint that there had been a denial of access was first raised by the complainant in his response of 8 October to the Final Investigation Report but no request had been made during the course of the investigation. Moreover, contrary to the complainant’s submissions, he was given all of the evidence relied upon by the Director General in reaching the decision to summarily dismiss him.

17. The complainant also claims a breach of his due process rights through the IAEA’s failure to give him sufficient time to respond to the allegations made against him. Specifically, the complainant points to the OIOS’s email of 2 September 2013 where he was asked to provide answers to eight questions related to the misconduct investigation by 4 September 2013, as well as the OIOS’s email of 12 September 2013,

where he was asked to provide his comments on the draft Final Investigation Report by 16 September 2013.

18. There are four instances where the IAEA requested responses from the complainant in relation to the allegations of misconduct. As to the request of 2 September, the complainant met the deadline and in relation to the 12 September request he was granted an extension of time to 20 September, at which time he provided his comments. A third request was made on 10 September in connection with the alleged forging of the medical certificate. The complainant met the response deadline of 11 September 2013. The final request occurred on 25 September when the complainant was asked to provide his comments on the Final Investigation Report by 11 October 2013. The complainant submitted his comments on 8 October 2013.

19. It is true that the amount of time given to the complainant to respond to the 2 September and 10 September requests was very short. However, the complainant has not established any adverse consequences in terms of his ability to adequately respond stemming from the amount of time allocated to respond. It is also observed that he was granted an extension of time when requested and he was able to meet all the stipulated deadlines.

20. Based on the above observations, the Tribunal concludes that the complainant's various allegations of breaches of his due process rights are all unfounded.

21. Lastly, in his rejoinder the complainant submits that the IAEA's decision to block his access to the Vienna International Centre following his summary dismissal was taken in order to further destroy his career and any future employment opportunities with international organizations. This claim is clearly beyond the scope of the present complaint and is irreceivable.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

ANDREW BUTLER