Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

O.

v.

WHO

123rd Session **Judgment No. 3757**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. O. against the World Health Organization (WHO) on 24 June 2014 and corrected on 18 July, WHO's reply of 22 October 2014 and the e-mail of 11 March 2015 by which the complainant informed the Registrar of the Tribunal that he did not wish to file a rejoinder;

Considering Article II, paragraph 5, 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 summarily to dismiss him.

The complainant was accused by a contractor of having demanded the payment of commission in return for awarding contracts for renovation work on WHO premises. On 19 and 20 January 2010 WHO organised hearings and face-to-face meetings between the contractor, the complainant and one of his colleagues who had also been accused. The complainant, who held a two-year fixed-term contract expiring on 1 January 2011, was invited by a memorandum of 29 January 2010 to reply in writing to the allegations against him and advised that he had been suspended from duty with pay for a month. On 8 February he submitted his comments, contending that he was the victim of a "settling of scores".

He was informed by a letter of 15 February 2010 that the Regional Director had decided "summarily to dismiss [him] for misconduct" pursuant to Staff Rules 1075.2* and 1110.1.5**, since his conduct precluded further employment with the Organization.

On 8 April 2010 the complainant filed an appeal with the Regional Board of Appeal (RBA) in order to challenge the decision of 15 February. In its report the RBA found that the complainant's submissions did not refute the "very serious" accusations against him and that the decision to dismiss him was therefore warranted and not open to criticism. It concluded that the appeal was groundless. The complainant was informed by a letter of 2 February 2011 that the Regional Director upheld his decision to dismiss him.

The complainant filed an appeal with the Headquarters Board of Appeal (HBA) on 3 May 2011. The HBA held that the decision of 2 February was unlawful because it "rested on what was manifestly a biased and incomplete examination of the facts" and had "breached the law and the provisions on disciplinary measures". With reference to the latter point, it found *inter alia* that the complainant had been summarily dismissed for "misconduct", whereas Staff Rule 1075.2 concerned "serious misconduct". It recommended the cancellation of that decision, the complainant's reinstatement or, failing that, the award of equivalent financial compensation and the payment of damages.

By a letter of 26 March 2014, which constitutes the impugned decision, the Director-General informed him that she had decided to dismiss his appeal, as she was of the opinion that the procedure which had been followed complied with the provisions governing disciplinary measures, that the clerical error of referring to misconduct did not alter the lawfulness of the decision to dismiss the complainant and that the acts of which he was accused "could be ascribed to [him]".

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* Staff Rule 1075 deals with the notion of "serious misconduct".

** Staff Rule 1110.1 lists the various disciplinary measures which may be applied to a staff member who has failed to observe the required standards of conduct. They include dismissal for misconduct (Staff Rule 1110.1.4) and summary dismissal for serious misconduct (Staff Rule 1110.1.5).

On 24 June 2014 the complainant filed a complaint with the Tribunal seeking the quashing of the impugned decision, his reinstatement, compensation for the moral and material injury which he considers he has suffered and an award of costs. If he is not reinstated, the complainant requests not only the setting aside of the impugned decision, but also the award of damages and costs.

WHO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant entered the service of WHO on 2 January 2009 as an Administration and Finance Assistant in the Intercountry Support Team for West Africa in Ouagadougou (Burkina Faso). He held a two-year fixed-term contract which was due to expire on 1 January 2011.

On 16 January 2010 a contractor sent an e-mail to the WHO Office in Ouagadougou to alert it to some financial irregularities connected with a tendering procedure and to an attempt by the complainant and one of his colleagues to intimidate him. WHO immediately organised a hearing and a face-to-face meeting between the persons concerned, the record of which was forwarded to the WHO Regional Office for Africa, in Brazzavillle (Congo). On 29 January the complainant was notified of the charges against him and invited to respond to them in writing within eight days. He did so on 8 February. On 15 February 2010 the Regional Director decided "summarily to dismiss [him] for misconduct". This decision was confirmed on 2 February 2011, the Regional Director having decided to endorse the conclusion of the RBA that the complainant's internal appeal should be dismissed.

On 26 March 2014 the Director-General of WHO rejected the complainant's appeal against the decision of 2 February 2011. She departed from the recommendations of the HBA, which had considered that that decision had "been taken in breach of the law and the provisions on disciplinary measures" and that it "rested on what was manifestly a biased and incomplete examination of the facts which placed the entire burden of proof in his defence on the appellant".

2. The Tribunal notes that in his submissions in these proceedings the complainant does not echo all the critical comments made by the HBA with regard to the contested disciplinary measure. Indeed, the pleas in his complaint are confined to some of those entered in his internal appeal to the HBA.

3. It is necessary to examine whether the disciplinary measure to which the complainant was subjected was adopted in accordance with the Organization's Staff Rules.

4. In the two successive decisions summarily dismissing the complainant, the Regional Director accused him of "misconduct". The consequences of a breach of the standards of conduct which staff members of WHO must observe, as defined inter alia in Staff Rule 110, differ depending on whether the person in question has committed "misconduct" or "serious misconduct". At the material time, Staff Rule 1075 read:

> "**1075. MISCONDUCT**
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> **1075.1** A staff member may be dismissed for misconduct as defined in Rule 110.8 and subject to the notification of charges and reply procedure required by Rule 1130. The staff member shall be given one month's notice. The Director-General may grant him an indemnity not exceeding one-half of that payable under Rule 1050.4. No end-of-service grant is payable.
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> **1075.2** A staff member may be summarily dismissed for serious misconduct, if the seriousness of the situation warrants it, subject to the notification of charges and reply procedure required by Rule 1130. In such a case the staff member shall not be entitled to notice of termination, indemnity, repatriation grant or end-of-service grant."

If the conduct of which the complainant was accused was only "misconduct", the Organization would have breached Staff Rule 1075.2 by applying it to a situation not covered by that provision. The wording of the report of the RBA, dated 30 November 2010, is even more confusing in this respect, since it refers in some places to "misconduct" within the meaning of Staff Rule 1075.2 (in paragraphs 26 and 31) and elsewhere to "serious misconduct" within the meaning of Staff Rule 1075.1 (paragraph 34).

However, it is clear from the terms of the Regional Director's decisions that the inadvertent use of the expression "misconduct" was due to the inappropriate wording of Staff Rule 110.8 and the heading of Staff Rule 1075, which show that the author of these provisions subsumed the notions of "misconduct" and "serious misconduct" in the general notion of "misconduct", although they were treated differently in paragraphs 1 and 2 of that rule. This oversight is of no consequence in the instant case, because in both of the above-mentioned decisions, the Regional Director referred not only to Staff Rule 1075.2, but also to Staff Rule 1110.1.5. The complainant could not, therefore, be unaware of the fact that he was accused of serious misconduct which could entail his summary dismissal.

5. A staff member may be summarily dismissed for serious misconduct only after the procedure defined in Staff Regulation 1130, which states:

> "**1130. NOTIFICATION OF CHARGES AND REPLY**
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> A disciplinary measure listed in Rule 1110.1 may be imposed only after the staff member has been notified of the charges made against him and has been given an opportunity to reply to those charges. The notification and the reply shall be in writing, and the staff member shall be given eight calendar days from receipt of the notification within which to submit his reply. This period may be shortened if the urgency of the situation requires it."

There is no doubt that, in this case, the Organization complied with the formalities required by this provision and with all its duties stemming from the complainant's right to be heard, the full extent of which, in the context of disciplinary proceedings, was recently recalled by the Tribunal (see Judgment 3295, under 11).

As soon as a contractor informed it of the complainant's alleged conduct, the Organization arranged an adversarial procedure in which the complainant was able express his opinion as freely as his accuser and to exercise his right of defence. Both the oral and the written procedures were lawful and conducted in a satisfactory manner. In particular, the complainant takes the Organization to task for not submitting to him for his signature the record of the hearings and face-to-face meetings, whereas this formal step is required by paragraph 11 of the note on the

investigation process constituting Annex 11.B of Section III.20.1 of the electronic version of the Human Resources Manual. This plea is of no avail, since the investigation process governed by the note applies only to investigations carried out by the Office of Internal Oversight Services, whereas in this case the hearings and face-to-face meetings were not held in the context of an investigation undertaken by that Office.

6. In this case, could the Organization consider, without displaying bias or reversing the burden of proof, that the facts alleged in the e-mail of 16 January 2010 were established?

The impugned decision rightly emphasises that adducing material evidence is especially difficult in cases of corruption or market manipulation where nothing is put in writing by either party and everything often takes place without the involvement of third persons who might be called as witnesses. A staff member who is accused of such dealings is certainly entitled to due process offering him every opportunity to defend his interests, and the burden of proof always falls upon the Administration. However, the latter's investigation will not be required to culminate in the establishment of absolute proof. All that is needed is a set of precise and concurring presumptions removing any reasonable doubt that the acts in question actually took place (see Judgments 1384, under 10, 3137, under 6, and 3297, under 8).

Moreover, it is not the Tribunal's role to reweigh the evidence collected by an investigative body the members of which, having directly met and heard the persons concerned or implicated, were able immediately to assess the reliability of their testimony. For that reason, reserve must be exercised before calling into question the findings of such a body and reviewing its assessment of the evidence. The Tribunal will interfere only in the case of manifest error (see Judgments 3682, under 8, and 3593, under 12).

7. The impugned decision clearly rests on findings reached during an investigation where the persons concerned were duly heard before meeting face to face shortly after the accusations had been levelled at the complainant. He has not proved the existence of any manifest error of fact

in the findings of the panels which conducted these hearings and face-to-face meetings. In particular, it cannot be held that the Organization acted arbitrarily in giving credence to the allegations contained in the e-mail of 16 January 2010. The Tribunal finds it reasonable to consider that the author of that e-mail did not act with the intention of harming the two staff members of whom he complained, especially in view of the fact that by spontaneously stating that he had bribed them, he in effect accused himself of participating in a corrupt transaction.

As all the complainant's pleas challenging the impugned decision are therefore groundless, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2016, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ