

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K.

v.

WHO

124th Session

Judgment No. 3872

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. K. against the World Health Organization (WHO) on 20 October 2014 and corrected on 19 December 2014, WHO's reply of 16 April 2015, the complainant's rejoinder of 10 July and WHO's surrejoinder of 2 November 2015;

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 to dismiss him for misconduct.

At the relevant time, the complainant was working as a security guard at UNAIDS – a joint and co-sponsored United Nations programme on HIV/AIDS administered by WHO. Following the loss of stock items from the UNAIDS cafeteria in 2011, a video camera was set up in one of the storage rooms. The recordings obtained from the camera showed the complainant entering the room on two occasions in October, using his keys, and removing five unopened bottles of wine from cartons. The recordings were sent to WHO's Internal Oversight Services (IOS) for review and, if appropriate, investigation.

IOS heard the complainant and Mr M., the Manager of the UNAIDS cafeteria, and issued its report on 14 December 2011. It considered that, despite the complainant's assertion that he had been granted permission to take the bottles of wine, he was not authorized to remove items from the UNAIDS storage room. IOS recommended that the Director-General consider appropriate disciplinary action against the complainant.

By letter of 23 December 2011 the complainant was notified that a disciplinary procedure had been initiated against him for failure to observe the standards of conduct. He was provided with a copy of the IOS investigation report and was informed of his right to reply to the charges against him prior to the imposition of any disciplinary measure. On 11 January 2012 the complainant replied that there was a practice within the Organization of sharing food and drinks left over from receptions with the security staff and that he had been authorized to take the five bottles of wine. He offered to pay for the wine and pledged to do everything to avoid a similar situation in the future. On the same day, the complainant's counsel raised some procedural concerns related to the surveillance operation in October 2011 and IOS's investigation report. On 15 February 2012 the complainant was informed that the charges against him amounted to "serious misconduct", which might lead to the termination of his contract.

By letter dated 23 August 2012, the complainant was notified of the decision to dismiss him for misconduct in accordance with Staff Rules 1110.1.4 and 1075.1. He was advised that the nature of his functions as a security guard constituted an aggravating circumstance in the disciplinary case against him.

The complainant filed an appeal with the Headquarters Board of Appeal (HBA) on 3 September 2012. In his statement of appeal, he requested the setting aside of the decision of 23 August, his reinstatement, compensation for moral injury and the reimbursement of legal fees. Subsidiarily, he claimed three years' salary in compensation.

The HBA issued its report on 23 June 2014. It considered that, by removing bottles of wine from the storage room, the complainant had breached his obligations as a WHO staff member and committed

misconduct, and that his dismissal was proportional to his action. The HBA recommended that the appeal be dismissed. By a letter dated 21 July 2014, which constitutes the impugned decision, the complainant was informed that the Director-General had decided to follow the HBA's recommendation.

The complainant filed his complaint with the Tribunal on 20 October 2014, asking it to set aside the impugned decision, to reinstate him retroactively or, failing that, to grant him three years' salary, including post adjustments and all applicable benefits. He seeks additional compensation for material and moral injury and he claims costs.

WHO invites the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant was dismissed for misconduct following an investigation by IOS and subsequent disciplinary proceedings. The decision was communicated to him by letter dated 23 August 2012. The HBA recommended that his appeal against that decision be dismissed. The Director-General accepted the recommendation and confirmed the decision to dismiss him in the impugned decision dated 21 July 2014. The complainant appeals that decision in the present complaint and seeks an order to set it aside. He also seeks to be reinstated retroactively or, alternatively, to be awarded three years' salary, including post adjustments and all applicable benefits, together with interest, by way of material damages for unlawful dismissal. He also seeks moral damages for damage to his dignity and reputation, as well as for breach of due process, punitive damages and costs.

2. Consistent precedent has it that decisions which are made in disciplinary cases are within the discretionary authority of the executive head of an international organization and are subject to limited review. The Tribunal will interfere only if the decision is tainted by a procedural or substantive flaw (see Judgment 3297, under 8). Moreover, where there is an investigation by an investigative body in disciplinary proceedings, the Tribunal's role is not to reweigh the evidence collected

by it, as 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 Judgment 3757, under 6).

3. Procedurally, the complainant contends that the decision to dismiss him was made in breach of due process and his right to be heard; by failure to ascertain all relevant facts, and in breach of the right to confrontation. Substantively, he contends that there was no evidence that he committed theft; that there was a breach of the presumption of innocence leading to bias because his guilt was presumed; that there was a conspiracy against him; and that WHO did not discharge its burden of proof and unlawfully shifted the burden of proof to him.

At the outset, the Tribunal determines that the complainant's plea that there was a conspiracy against him is unfounded as he has not produced sufficient evidence to substantiate it. The Tribunal recalls that WHO bears the burden of proof in a case such as this. However, inasmuch as the Tribunal will not reweigh the evidence, its approach when the issue of the burden of proof is raised is to determine whether a finding of guilt beyond a reasonable doubt could properly have been made (see Judgment 3649, under 14).

4. Article 1.1 of the Staff Regulations states, among other things, that by accepting appointment, staff members of WHO pledge to discharge their functions and to regulate their conduct with the interests of the organization only in view. Article 1.5 requires staff members to conduct themselves in a manner compatible with their status as international civil servants and to avoid any action which may adversely reflect on their status. WHO's "Ethical principles and conduct of staff" states that integrity and honesty in actions and decisions that may affect WHO is a core value of its ethical principles.

Staff Rule 1110 states that staff members who fail to observe the standards of conduct outlined in Article 1 of the Staff Regulations and Staff Rule 110 shall be subject to disciplinary measures, which may, in ascending order of gravity, be any one or a combination of the

following: an oral reprimand; a written reprimand; reassignment with or without reduction in grade; dismissal for misconduct (as in the present case), and summary dismissal for serious misconduct. Under Staff Rule 110.8, “[m]isconduct” means: any improper action by a staff member in her or his official capacity; any conduct by a staff member, unconnected with her or his official duties, tending to bring the Organization into public discredit or any improper use or attempt to make use of her or his position as an official for her or his personal advantage; or any conduct contrary to the terms of her or his oath or declaration.

Pursuant to Staff Rule 1075.1, a staff member may be dismissed for misconduct following the notification of charges and the reply procedure under Staff Rule 1130, which relevantly states as follows:

“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.”

5. The disciplinary procedures in cases in which misconduct is alleged commence with an investigation by IOS pursuant to the provisions outlined in the note on the investigation process constituting Annex 11.B of Section III.20.1 of the electronic version of the Human Resources Manual. It provides, among other things, that an investigation is an administrative fact-finding exercise which may be conducted at the request of a senior official and that, to facilitate its preliminary fact-finding mandate, IOS is empowered to conduct interviews and be given unfettered access to records. Staff members are mandated to cooperate with the investigator(s). Paragraph 7 of the note on the investigation process makes it clear that IOS is not responsible for deciding whether to initiate disciplinary action, as this is the responsibility of the Director-General in matters involving WHO’s Headquarters.

Paragraphs 21 to 28 of the note on the investigation process provide for fairness during an investigation. They require, among other things, that a staff member who is subject to an investigation should be given an opportunity to respond; that the investigator must approach the matter with an open mind as allegations “are simply claims which will be

investigated by interviewing witnesses, establishing facts, and gathering any evidence”. The note also provides for further interviews of the subject of an investigation where there are inconsistencies between evidence gathered by IOS and the subject’s explanations. During any such interviews, the subject is to be informed of the inconsistencies that arose in relation to a prior interview and she or he is to be given a reasonable opportunity to comment and present any further evidence. This latter procedure was used in the present case when there were inconsistencies between the complainant’s evidence and that of Mr M., the Manager of the UNAIDS cafeteria, concerning the question of whether the latter had authorized the complainant to take the subject items from the storage room.

The note further provides for the disposition of the case in the IOS process. IOS is required to prepare a report which presents the established facts and all of the evidence gathered, making it clear that a report and the resultant recommendation that a staff member may have engaged in misconduct are not charges of misconduct. The report is to be submitted to the Director-General who, after reviewing it, decides whether to initiate disciplinary proceedings by asking the Director of the Human Resources Department to lay a formal written charge of misconduct against the staff member concerned.

6. The Tribunal’s case law requires due process to be observed in disciplinary proceedings prior to imposing a disciplinary sanction against a staff member. As to due process in the context of an investigation in such proceedings, the Tribunal stated as follows in Judgment 2771, consideration 15:

“The general requirement with respect to due process in relation to an investigation – that being the function performed by the Investigation Panel in this case – is as set out in Judgment 2475, namely, that the ‘investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made’. At least that is so where no procedure is prescribed. Where, as here, there is a prescribed procedure, that procedure must be observed. Additionally, it is necessary that there be a fair investigation, in the sense described in Judgment 2475, and that there be an opportunity to answer the evidence and the charges.”

7. The Tribunal rejects, as unfounded, the complainant's submission that his rights to due process and to be heard were violated because, as he states it, the Administration ignored the fact that his supervisor had initiated an unlawful surveillance operation in a room where no surveillance was required, without any formal request or authorization and with privately-owned equipment, amounting to a criminal offence. The complainant provides no authority for this assertion. Moreover, an international organization is entitled to implement appropriate security measures to secure its property. The operations of UNAIDS are carried out in accordance with the administrative and financial regulations, rules and procedures of WHO. WHO is responsible for administrative matters concerning the employment of UNAIDS staff, including security aspects. The Tribunal is satisfied that UNAIDS had every authority to conduct the surveillance at the subject facilities in order to address the incidence of missing items from its property.

8. The Tribunal also rejects, as unfounded, the complainant's submission that his rights to due process and to be heard were violated because WHO failed to afford him an opportunity to comment on the HBA's report to the Director-General. The complainant acknowledges that there is no provision for this in WHO's Staff Regulations or Rules. In fact, WHO's Staff Rule 1230.3.3 mandates the HBA to submit its report with its recommendations to the Director-General. It is within the Director-General's discretion to decide whether to accept the recommendation(s) of the HBA, as she did in the present case, or to reject it. The complainant's recourse was to appeal the Director-General's decision to this Tribunal, under Staff Rule 1240.2, as he did on 20 October 2014.

9. The Tribunal also rejects, as unfounded, the complainant's submission that his rights to due process and to be heard were violated because WHO disregarded some of the evidence, including his evidence which showed the contradictions in Mr M.'s evidence concerning whether he had authorized the complainant to take the items from the storage room. It is inaccurate for the complainant to assert that his evidence on the issue was disregarded, rather than that it was not accepted. The HBA expressly considered it.

10. The complainant's allegation that his rights to due process and to be heard were violated because IOS refused to disclose the reason(s) why he was being interrogated prior to the interrogation is also rejected as unfounded. In the Tribunal's view, the reason was made obvious to the complainant when he was shown the surveillance footage by IOS on 28 November 2011.

11. The complainant contends that his rights to due process and to be heard were violated in that the IOS investigation officer prejudged the case from the outset and disregarded the presumption of innocence; WHO failed to take into account evidence of a key witness (Mr K.) whom he presented and who had provided a statement that he (the complainant) "had been authorized [by Mr M.] to take leftover wine and who [...] offered to testify to this fact orally"; failed to investigate case-relevant facts, such as the existence and extent of the practice of allowing the security staff to "help themselves to leftovers"; put "untampered faith" in its sole witness, Mr M., who denied having authorized the complainant to take the items, notwithstanding that Mr M. had contradicted himself on several elements of fact; failed to test the veracity of Mr M.'s statements, and breached his right to confront Mr M., which the complainant states was the only means through which the authorization issue could have been clarified.

12. The Tribunal observes that in its report the HBA noted the violations in the IOS investigation process and paragraph 22 of the note in particular. This is doubtless correct. However, the Tribunal's view is that these violations ultimately had no effect on the impugned decision.

13. The Tribunal has carefully reviewed the Director-General's reasoning in the impugned decision. That reasoning did not depend upon whether the complainant's taking of the wine constituted theft or whether the complainant was a thief. The Director-General's approach means that the question of whether the complainant was authorised to take the wine is of no real significance. That is because the Director-General concluded that, as a security guard, the complainant should not have used the privileged access keys, with which he was entrusted to carry out his assigned duties, to unlock the storage room and take the

wine which was the property of the Organization for his personal benefit. The Director-General agreed with the HBA that that action was a violation of trust and of the complainant's responsibilities, and that the fact that his sole responsibility was the protection of security and safety of WHO premises was an aggravating factor. The Director-General further agreed with the HBA that his action in those circumstances amounted to misconduct under Staff Rule 110.8, that there was no evidence of personal prejudice against the complainant and that the sanction of dismissal was proportionate to his conduct. The Tribunal is satisfied that that decision was within the discretion of the Director-General and that it discloses no error which would occasion the Tribunal to intervene. Accordingly, the complaint is unfounded and will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 17 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ