Z.

v.

IOM

133rd Session **Judgment No. 4461**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Z. Z. against the International Organization for Migration (IOM) on 29 March 2019, IOM's reply of 15 July 2019, the complainant's rejoinder of 8 November 2019 and IOM's surrejoinder of 10 March 2020;

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 impugns the Director General's decision to summarily dismiss him.

The complainant joined IOM in 1993. At the material time, the complainant was employed under a regular contract as the Chief of IOM's Mission in Russia, located in Moscow. On 6 June 2017 the Director General invited him to a meeting due to take place in Geneva on 13 June. On the morning of 13 June the complainant informed the Administration by email that, due to an "emergency-like" situation, he had to stay in Moscow and would therefore not attend the planned meeting. A few hours later, the Chief of Staff, who had been informed that a fire occurred in the night of 12 June in IOM's premises in Moscow, requested the complainant to provide him with a report on the incident. The complainant replied by email in the evening of 13 June that "[w]e will send the report as soon as possible. All necessary actions

are being taken. The fire was in the accounting rooms where pretty much everything was destroyed."

In the afternoon of 14 June the Chief of Staff sent by email to the complainant an air ticket for a flight to Geneva due to take off at 18:10 of that day. The complainant replied by email at 16:11 that "[p]hysically it is impossible to catch that flight". One hour later, the Chief of Staff replied by email that "[t]he [Director General] is expecting you tomorrow in HQ", attaching an air ticket for the morning of 15 June.

On 15 June the Director General reminded the complainant by email that on 13 and 14 June he had orally instructed him to travel to Geneva for discussions, his office had provided the complainant with the required tickets, and the complainant had been requested to provide a report on the incident. The Director General stated that the fact that the complainant had not complied with these instructions amounted, in his view, to "extreme insubordination" and that he had decided to suspend the complainant from his duties with immediate effect until the complainant travelled to Geneva for discussion. He further stated that "I expect you to travel to Geneva immediately."

By a memorandum of 23 June 2017, the complainant was informed that he was the subject of allegations relating to the events of 12 June and that these allegations would be investigated by the Office of the Inspector General (OIG). He was required to cooperate fully with the OIG. He was also informed that as a participant in an administrative fact-finding process he was not entitled to legal representation during the interview, but in cases of extreme sensitivity or emotional distress a third person may be present at the discretion of the investigators.

On 3 July the Director General informed the complainant by email that, as the complainant had steadfastly refused to come to Geneva, he instructed the complainant to come to Geneva no later than 6 July, and that failure to comply this time might lead to further administrative actions including disciplinary measures. On 4 July the complainant replied to the Director General by email with the subject line "Re: Instructions from Director General of IOM" that he was "framed up" by certain groups in the office, and he wrote at the end "[i]n the meantime I am on certified [sick leave]".

In the evening of 12 July the Chief Investigator notified the complainant by email that the complainant's failure to attend a planned interview constituted a breach of Staff Rule 1.2.1, which provides that

"staff members shall cooperate with duly authorized audits and investigations". He also stated that he had explained to the complainant that his therapist was not able to attend the interview and had advised him of the consequence of non-cooperation.

On 15 July the complainant wrote to the Director General by email that he was unable to participate in the interview for objective reasons and for personal security reasons. He indicated that he would cooperate with the OIG and that "it would also be good to meet personally [so] as to be able to explain in great detail the situation" if his suspension with pay were lifted.

On 8 August the Director General informed the complainant by email that, in view of his failure to comply with instructions, he was removed from his functions as Chief of Mission, Moscow and his suspension with pay was extended until the end of the investigation. The Director General stated that the complainant should cooperate with the OIG and coordinate with MHRO regarding the administrative steps of suspension with pay as well as travel and removal arrangements.

On 13 September the Chief Investigator wrote to the complainant to arrange a second interview. He informed the complainant that an accompanying observer could be present but had no right to participate in the interview, and he advised the complainant of his rights and obligations in the duly authorized investigation. The interview was scheduled for 10 a.m., 20 September. In the evening of 19 September, the complainant wrote to the Chief Investigator that he was ready to cooperate but his participation should be agreed by his lawyer. By an investigator's note dated 20 September 2017, the OIG stated that the complainant had not presented himself as instructed for the interview, which constituted a failure to cooperate with a duly authorized investigation.

By a letter dated 6 October 2017 the complainant was formally charged with failing to comply with the Director General's instructions, repeatedly refusing to cooperate with the OIG and failing to properly report the 12 June 2017 incident to Headquarters. Before any further action was taken, he was requested to provide his comments, which he did on 23 October.

On 12 December 2017 the complainant was notified of the Director General's decision to impose the disciplinary measure of summary dismissal on the basis of the charges set out in the letter of 6 October.

After an unsuccessful request for review of that decision, the complainant lodged an appeal with the Joint Administrative Review Board (JARB) in which he challenged both his suspension and his summary dismissal and claimed compensation for material and moral injury. In its report of 4 December 2018, the JARB found that, to the extent that the complainant sought to contest matters that had arisen between 14 June and 8 August 2017, including his suspension, his appeal was time-barred. It considered that the decision to summarily dismiss the complainant was lawful, emphasizing that the disciplinary measure had been imposed for insubordination and not, as the complainant alleged, pursuant to the investigation into his role in the events of 12 June 2017, which was still ongoing.

On 4 January 2019, IOM's new Director General informed the complainant by email that he agreed with the JARB's findings and that his appeal was therefore dismissed. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision as well as the decision of 12 December 2017 and to order his reinstatement or, alternatively, to award him termination indemnities. He also claims damages for material, moral and professional injury, and legal costs.

In his rejoinder, he asks the Tribunal additionally to order IOM to restore his pension and health insurance rights and to award him damages for the "disdain" shown by IOM in dealing with evidence and requests for documentation disclosure.

IOM asks the Tribunal to dismiss the complaint as partly irreceivable and entirely unfounded. In its reply, IOM states that the OIG issued its report on 2 June 2019 and that, even though the OIG report and its factual findings are not relevant to this complaint, it would submit the report upon request.

CONSIDERATIONS

1. The complainant impugns the 4 January 2019 decision of the Director General of IOM, which endorsed the JARB's findings and recommendations to reject his request for review of the decision dated 12 December 2017 to summarily dismiss him with immediate effect.

The formal charges were:

(1) that he had failed to alert Headquarters immediately of the specifics and gravity of the 12 June 2017 incident, and to provide an adequate report of the incident to the Director General, and he had unjustifiably been absent from the Moscow office on the day immediately following the incident;

(2) that he had failed to comply with the Director General's clear, firm and repeated instructions to travel immediately to Geneva to discuss the incident;

(3) that he had repeatedly refused to cooperate with the investigation by the OIG; and

(4) that he failed to reply to the email of 22 September 2017 of the Chief of Staff, in which he was requested to explain the fact that he had attributed to Russian government counterparts certain statements regarding his suspension from duties.

2. In its report dated 4 December 2018 the JARB found that, to the extent that the complainant sought to contest matters that had arisen between 14 June 2017 and 8 August 2017, including his suspension, his appeal was time-barred. It considered that the decision to summarily dismiss him was lawful in that the disciplinary measure had been imposed for insubordination in the aftermath of the incident, including his failure to report the incident to Headquarters in a timely and adequate manner; his unjustified absence on the day immediately following the incident; his failure to comply with the Director General's instructions to travel to Geneva following the incident; his refusal to cooperate with the investigation by the OIG and his failure to reply the request of the Chief of Staff for an explanation of a statement of the Russian authorities about his suspension from duties, and the complainant had not provided satisfactory explanations for any of the questions related to his behavior. It also found that due process had not been violated and the consultation process set out in Staff Regulation 10(d) had been fulfilled.

3. The complainant bases his complaint mainly on the following grounds:

(1) His challenge to the decision to suspend him was receivable as he had asked by email for the suspension to be lifted as early as 4 July 2017, and IOM should have asked him to formalize this request (he cites Judgments 3754, consideration 11, and 2345, consideration 1);

(2) The accusations leading to his summary dismissal were linked to the suspension and the investigation into the incident of 12 June 2017, thus trying to separate these issues amounts to bad faith;

(3) The suspension was unjustified, premature, and irregular, and no information was provided to him until the 8 August 2017 letter notifying him that the suspension was extended to the end of the investigation;

(4) The investigation process leading to the summary dismissal breached legal requirements and due process, namely:

- No evidence of the incidents, reports and other related information were provided to him;
- He was denied access to IOM's premises on 14 June 2017 without any valid reason;
- An investigation was initiated by a staff committee with no mandate to do so;
- The subject of the investigation was not the alleged insubordination;
- IOM deliberately chose to focus on the charge of insubordination probably in order not to be accountable for the breach of due process during the investigation; and

(5) IOM did not prove its case beyond reasonable doubt, namely:

- The Director General's decision misinterpreted essential facts and breached Staff Regulations and Rules, and he had never failed to comply with the Staff Regulations and Rules;
- The Administration breached its obligation to consult with the Staff Association Committee (SAC) according to Staff Regulation 10(d) (he cites Judgment 2288, consideration 6);
- He had never refused to be interviewed but wanted to be accompanied by his therapist for the interview scheduled on 12 July, or by a lawyer for the interview scheduled on 20 September, which the Chief Investigator had not allowed, and the OIG could and should have provided questions for him to answer in writing;

- He had not committed any disruptive action on 12 and 13 June 2017 and could not reach conclusions as to the cause or extent of the fire;
- Failure to report missing funds was a new charge contained in the 12 December 2017 decision, and he was not aware of the nature of the funds;
- Not complying with the Director General's requests to travel to Geneva did not amount to insubordination, as the tickets for the flight on 14 June were sent to him too late and his health condition prevented him from traveling after 15 June;
- His excellent performance record and commitment to IOM for 24 years were not taken into account;

(6) The final decision was disproportionate, biased and caused serious damage to his health and reputation, particularly, not giving him the benefit of the doubt. It has never been proved that he personally and intentionally committed arson and theft.

4. Grounds 1 to 4 relate to the lawfulness of the complainant's suspension, removal from his duties and the investigation into the 12 June 2017 incident. The Organisation contends that the claims relating to the decisions of suspension and of removal from duties are time-barred as they were raised more than 160 days after the events, and the matters relating to the conduct of the OIG investigation are irreceivable because the impugned decision was not based on the investigation. The Tribunal considers that it is necessary to draw a distinction between, on the one hand, the suspension and removal from duties, and, on the other hand, the investigation. The first two decisions could be challenged immediately but were not challenged in time. Instruction IN/217, entitled "Request for Review and Appeal to the Joint Administrative Review Board", states in paragraph 8: "[t]he staff member must submit the Request for Review within 60 calendar days after he or she received notification of the contested administrative action, decision or disciplinary action". In this case, the decision to suspend the complainant and the decision to remove him from the duties of Chief of Mission occurred respectively on 15 June 2017 and 8 August 2017, but it was not until 31 January 2018 that the complainant submitted his request for review.

5. The complainant alleges that his 4 July 2017 email should be considered as a request for review, by relying on the "duty of care on an organisation which, in relation to the exercise of the right of appeal, obliges the organisation to help a staff member who is mistaken in the exercise of the right" (see, for example, Judgments 2345, consideration 1, and 3754, consideration 11). However, according to these cases, to constitute an appeal the staff member must clearly express her or his intention to contest the decision, notwithstanding that the appeal might be addressed to the wrong authority. In this regard, the Tribunal's case law has also long held that "for a letter addressed to an organisation to constitute an appeal, it is sufficient that the person concerned clearly expresses therein his or her intention to challenge the decision adversely affecting him or her and that the request thus formulated can be granted in some meaningful way" (see Judgment 3423, consideration 9). The 4 July 2017 email was the complainant's reply to the Director General's 3 July email which instructed him to come to Geneva "no later than Thursday, 6 July". A large portion of its content was merely a narrative that the complainant had been "framed up". The complainant did not show the intention to contest the decision to suspend him in the letter; rather, his purpose was to plead with the Director General to lift his suspension in return for him to follow the RSC project and to "permit the investigation". Hence, this argument is unfounded, as are his other arguments.

According to correspondence in evidence, the accusation leading to the suspension and removal from his duties was the complainant's conduct after the incident, that is, his inactivity and non-reaction to the Director General's repeated instructions to him, not based upon the result of the investigation. Since the suspension decision as well as the decision to remove him from his duties had, by themselves, an immediate, material, legal and adverse effect on the complainant, and were not subsumed under the final decision taken at the conclusion of any disciplinary proceedings, they cannot be considered as mere steps leading to the final decision and, according to the Tribunal's case law, must themselves be challenged (see, for example, Judgments 1927, consideration 5, 2365, consideration 4, 3035, consideration 10, and 4237, consideration 8).

As the complainant failed to respect the 60-day time limit, it follows that the claims relating to suspension and removal from his duties were time-barred in the internal appeal, and accordingly irreceivable because

of failure to exhaust internal remedies under Article VII, paragraph 1, of the Tribunal's Statute.

The specific charge against the complainant concerning the investigation is that he failed to attend two interviews scheduled by the Chief Investigator. The complainant's other grounds regarding the investigation are not within the scope of this case.

6. The Tribunal now turns to the merits of the impugned decision. In ground 5, the complainant argues that the decision is flawed because IOM failed to prove his misconduct beyond reasonable doubt. The argument is unfounded. According to the consistent case law of the Tribunal, the burden of proof rests on an organisation to prove the allegations of misconduct beyond reasonable doubt before a disciplinary sanction can be 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 reasonable doubt could properly have been made by the primary trier of fact (see, for example, Judgments 2699, consideration 9, 3882, consideration 14, 3649, consideration 14, and 4227, consideration 6). Also, a staff member accused of misconduct is presumed to be innocent (see Judgment 2879, consideration 11) and is to be given the benefit of the doubt (see Judgment 2849, consideration 16).

7. The Tribunal has considered the evidence that was before the Director General. Having regard to that evidence, he was entitled to conclude that the charge of what was in effect insubordination was established beyond reasonable doubt. Medical evidence furnished by the complainant for the first time before the Tribunal is not relevant to the question of whether the material before the Director General sustained a conclusion of misconduct beyond reasonable doubt.

8. It is undisputed that two investigation interviews did not happen. The complainant argues that he has never declined to be interviewed, rather, the investigator had refused the presence of his therapist and lawyer. It should be noted that to cooperate with the OIG's duly authorized investigation is the complainant's obligation as stated in Rule 1.2.1 of the General Rights and Obligations of the Unified Staff Regulations and Rules, Edition No. 3, which reads:

> "(c) [...] Staff members shall cooperate with duly authorized audits and investigations."

Given that such investigations need not be adversarial in nature (see Judgment 3852, consideration 10), the investigator's refusal to accept the complainant's request for the presence of a therapist and later of a counsel did not violate due process. It was open to the Director General to conclude beyond reasonable doubt that the complainant had refused to cooperate, as alleged in the charge against him.

9. The complainant argues that he was unjustly charged with failure to adequately report to the Director General as he had no further information about the incident and was unable to come to a conclusion before the competent government services had assessed the situation. It must be noted that the complainant was not requested to submit a conclusion as to the cause of the fire, but a report articulating the details of the incident, particularly the context of the fire and the consequent situation in the Office in Moscow, such as whether the fire had been extinguished, the level of safety or security threat posed and whether he was aware that the cash had disappeared from the safe. The complainant was the person who had witnessed the incident, and he had indeed replied in the 13 June email that "[w]e will send the report as soon as possible", showing that he was fully aware of his responsibility to submit a report immediately after the incident. It was open to the Director General to find, based on the evidence available to him, that the complainant had failed to adequately report the incident and otherwise communicate with Headquarters, as alleged in the charge against him.

10. The complainant asserts that the decision of 12 December 2017 contains a new charge relating to his failure to report that a large amount of cash was missing, which was not stated in the charge letter of 6 October 2017. This was not a new charge. The reference to the cash was simply an illustration of what should have been reported but was not.

11. The Tribunal therefore determines that, in the circumstances and based on all the evidence, the disciplinary sanction imposed on the complainant was not disproportionate.

12. Two further matters should be mentioned. The first is that the complainant alleges that the Administration failed to consult the SAC according to Regulation 10(d), which reads:

> "As a rule, the Director General shall bring proposed disciplinary measures to the attention of the Staff Association Committee for consideration. Any recommendations by the Staff Association Committee pertaining thereto shall be considered by the Director General before taking final action."

The Tribunal notes that according to the Reply from the Chair of the SAC, on November 2017 the SAC had been consulted through telephone conversation by the Administration about the proposed decision made by HRD prior to its sharing with the Director General, and the Administration had also responded to the questions raised by the SAC. It is true that the Administration did not send a written draft to the SAC. But the SAC is not an advisory body. Staff Regulation 10(d) does not stipulate the formalities of the consultation. Nor does it impose a mandatory obligation upon the Administration to submit a written draft to the SAC or to obtain recommendations from the SAC in the disciplinary procedure.

The second matter concerns the complainant's assertion that IOM deliberately chose to focus on the charge of insubordination probably in order not to be accountable for breach of due process during the investigation, and trying to separate these related issues leading to his summary dismissal amounts to bad faith. As the case law of the Tribunal stated:

> "If a complainant alleges that a decision was not taken in good faith or was taken for an improper purpose, she or he bears the burden of establishing the lack of good faith, bias or improper purpose (see, for example, Judgments 4146, consideration 10, 3743, consideration 12, and 2472, consideration 9). It is a serious allegation that must be clearly substantiated." (See Judgment 4262, consideration 8.)

The complainant has not provided any probative evidence to establish the Administration's bad faith and improper purpose with respect to the final decision.

13. In the foregoing premises, the Tribunal concludes that the impugned decision is lawful, and the claims for the quashing of the decisions, for ordering his reinstatement, for full restoration of his pension rights and health insurance rights and for compensation for moral, material and professional damages as well as for costs must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 22 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ