

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B.
v.
UNIDO

138th Session

Judgment No. 4815

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. B. against the United Nations Industrial Development Organization (UNIDO) on 1 July 2021, UNIDO's reply of 12 October 2021, the complainant's rejoinder of 12 November 2021 and UNIDO's surrejoinder of 14 February 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 contests his summary dismissal.

The complainant is a former staff member of UNIDO, which he joined in August 2013 at the P-4 level. In July 2019, his appointment was extended, for one year, with effect from 11 August 2019.

On 30 January 2020, the Director of the Office of Evaluation and Internal Oversight (EIO) notified the complainant by memorandum that EIO had initiated an investigation into allegations of fraud in relation to the recruitment of consultants under his projects. He added that the list of allegations did not limit the scope of the investigation, which may evolve depending on the collection and analysis of evidence.

By a memorandum of 24 July 2020, the Director of Human Resources Management (HRM) informed the complainant that, on the basis of the EIO report, the interview transcript and his comments, HRM had concluded that his actions constituted serious misconduct, which warranted his summary dismissal. He was given the possibility to provide additional information in his defence, and he did so on 29 July 2020. While acknowledging the charges outlined in the memorandum, the complainant alleged that they did not warrant his “immediate and final separation from services”, that every effort was made to add aggravating circumstances to the charges and that the process leading up to the charges constituted institutional harassment. He asked, in particular, that HRM observed the provisions outlined in UNIDO/DA/PS/AC.87 on disciplinary measures and he sought authorisation to refer his case to the Joint Disciplinary Committee in accordance with the established practice.

By an email of 5 August 2020, the Director of HRM gave the complainant “advance notice” that following the Internal Oversight Division (IOD)’s findings, the review of these findings by HRM and the Office of Legal Affairs, and the complainant’s comments thereon, the Director General had decided to summarily dismiss him with immediate effect for lack of integrity and serious misconduct. More detailed information about the decision, the separation formalities, his entitlements and “due process” would be sent to him separately as soon as possible.

By a letter of 10 August 2020, HRM informed the complainant that further to the email of 5 August 2020, the Director General had decided to summarily dismiss him on the grounds that he had “defrauded in relation to the recruitment of a consultant” in exchange for the recruitment of his wife by another organisation, and that he had falsified three employment certificates. Shortly thereafter, the complainant asked to be provided with the Director General’s written decision of 5 August 2020. On 17 August 2020, HRM replied that the email of 5 August 2020 and the letter of 10 August 2020 constituted notification of the Director General’s decision and were “sufficient” to allow him to lodge an appeal.

On 3 September 2020, the complainant lodged an internal appeal with the Joint Appeals Board (JAB) against the decision of 10 August 2020 stressing that he had never received in writing the Director General's decision referred to in the email of 5 August 2020. He alleged procedural irregularities, and asserted that his conduct did not constitute fraud because he did not receive any personal gain and did not wilfully jeopardise UNIDO's reputation. In his view, the sanction imposed was disproportionate and the investigation and disciplinary process amounted to institutional harassment and retaliation. He therefore asked, as a "preliminary measure", that the decision to summarily dismiss him be suspended, and then that it be quashed. He sought reinstatement, and compensation for material and moral injury.

In its report of 17 March 2021, the JAB found that the contested recruitment made by the complainant was not an act of fraud and that there was no malicious act emphasising that there was an "un-written rule" in the United Nations system that allowed recommending co-workers, acquaintances or friends to vacant positions. The complainant was in an urgent need to fill a position and the consultant he had recruited had the required qualifications and language expertise. The JAB also noted that the complainant had issued employment certificates with wrong dates but did so to facilitate the granting of a visa or securing a place in a kindergarten. Although his actions were not "correct", they did not warrant a summary dismissal; a letter of reprimand would have been sufficient. Hence, it recommended not to maintain the sanction of summary dismissal.

On 8 April 2021, the Director General informed the complainant that his appeal was rejected on the ground that the investigation and the process leading to the contested decision were conducted in line with applicable rules. He found that the contested recruitment constituted fraud and that the complainant had risked causing material damage to UNIDO's reputation when issuing false employment certificates. Hence, the decision to summarily dismiss him was lawful, justified, proportionate and complied with due process. That is the impugned decision.

The complainant asks the Tribunal to order his immediate reinstatement to his post under “a regular three years contract” and to award him compensation for the salary and benefits lost as of August 2020 until the delivery of the judgment plus interest. He also claims “punitive damages”, equivalent to two years’ salary, “for material damages” consisting in a loss of career opportunity, a “loss of job”, and procedural irregularities in the handling of his case. He further claims moral damages. Lastly, he claims costs, and any other “orders” the Tribunal considers appropriate.

UNIDO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant challenges, on various grounds, the Director General’s decision, initially communicated to him on 5 August 2020, to summarily dismiss him with immediate effect for lack of integrity and serious misconduct, as well as the impugned decision, dated 8 April 2021. He states that the purpose of his complaint is to demonstrate that the impugned decision is unlawful, arbitrary and constitutes an abuse of authority and discretion in complete disregard of the Joint Appeals Board (JAB)’s recommendation to impose the lightest disciplinary measure of reprimand instead. He alleges that to summarily dismiss him was not justified, unfounded and “beyond extremely harsh”.

2. In his complaint, the complainant contends, in effect, as a first ground of challenge, that the disciplinary measure of summary dismissal is totally disproportionate and the Director General should instead have upheld the JAB’s recommendation to impose the reprimand which is proportionate in the circumstances of the case. As a second ground, the complainant contends that the impugned decision is unlawful because, having made the initial decision to dismiss him, the Director General was not a neutral party to the case and should not have made a final decision after the JAB’s recommendation, thereby violating the principle, *nemo iudex in causa sua* (no one can be the judge of their own cause).

3. In what is an apparent third ground, in his complaint, the complainant contends that “[t]here have been gross procedural irregularities and breaches that have not been considered by the JAB in light of the positive recommendation on the merits [and] the Tribunal is asked to review the overall management of the case by [the Internal Oversight Division (IOD), Human Resources Management (HRM)] and [the Director General]’s office, which is well detailed in [his] appeal [to the JAB]”. The complainant asks the Tribunal to review this on the basis of the documents he filed in his internal appeal. However, according to the Tribunal’s case law, Article 6(1)(b) of its Rules requires a complainant’s arguments of fact and law to appear in the complaint itself and may not consist of a mere reference to other documents as this manner of proceeding is contrary to the Rules and makes it impossible for the Tribunal and the other party clearly to understand the complainant’s pleas (see, for example, Judgment 3692, consideration 4). The Tribunal therefore rejects the request to review the overall management of the case by the IOD, HRM and the Director General’s office on the basis of those documents.

A second matter arising from his abovementioned contention, is that there have been procedural irregularities and breaches that were not considered by the JAB. Apparently taking this statement to be a challenge to the investigative process, UNIDO addresses it as such in its reply. However, in his rejoinder, the complainant states that he did not seek to reopen the case to contest the findings of the investigative body, the Office of Evaluation and Internal Oversight (EIO), IOD. He states that there was no need to do so given the JAB’s analysis and conclusions that the sanction of summary dismissal was disproportionate, which he accepts. He makes clear that he is not asking the Tribunal to reassess the facts, but to hold that the Director General exercised his discretion to impose the disciplinary sanction of summary dismissal upon him by improperly disregarding the JAB’s analysis and recommendation to impose a reprimand instead. This is an apparent reference to the complainant’s submissions that the impugned decision is unlawful, in effect, because the Director General did not give reasons for departing from the recommendations of the JAB and failed to accept its reasoning and conclusions, thereby showing bias, arbitrariness and

abuse of authority. The Tribunal will treat this as the complainant's fourth ground. For convenience, the complainant's submission that the burden of proof was not satisfied will also be considered under this ground.

4. Notably, however, having provided the foregoing clarification, the complainant repeated allegations he made in his appeal concerning issues arising out of the investigative process. He cites them as aspects of procedural irregularities on the part of UNIDO and contends, among other things, that it had thereby completely disregarded his due process rights rendering his dismissal unlawful. The Tribunal will consider this to be part of his third ground of challenge to the impugned decision.

5. As this complaint challenges a disciplinary decision determining penalty, the Tribunal recalls its settled case law, that the burden of proof in such cases rests on an organization to prove the underlying allegations beyond a reasonable doubt before a disciplinary sanction can be imposed (see, for example, Judgment 3649, consideration 14). It also recalls its consistent precedent which states that such decisions are within the discretionary authority of the executive head of an international organisation and are subject to limited review. "The Tribunal must determine whether a decision taken by virtue of a discretionary authority was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the organisation's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority" (see, for example, Judgment 4460, consideration 8).

There is also a general principle in the case law that the severity of the sanction that is imposed on a staff member of an international organization whose misconduct has been established is in the discretion of the decision-making authority who must however exercise it in observance of the rule of law, particularly the principle of proportionality

(see, for example, Judgments 3953, consideration 14, and 3640, consideration 29).

Additionally, the Tribunal will not interfere with the findings of an investigative body in disciplinary proceedings unless there is manifest error (see, for example, Judgment 4444, consideration 5).

6. To support his contention in the second ground, the complainant argues, in effect, that as the Director General made the initial decision to dismiss him, the principle *nemo iudex in causa sua* (no one can be the judge of their own cause) precluded him from subsequently deciding upon the correctness of the JAB's analysis and recommendations. He further argues that the JAB's recommendation to impose upon him a reprimand, instead of summary dismissal, should have been the final decision appealable directly to the Tribunal. This, he states, is because it was a conflict of interest for the Director General, having made the initial decision, also to make the final decision based on the JAB's report. According to the complainant, permitting the JAB's recommendation to be the final decision is necessary to ensure due process and to provide fair access to justice for all staff members. He relies upon a judgment of the United Nations Appeals Tribunal to support these arguments.

7. First, the Tribunal has stated, in consideration 9 of Judgment 4593, for example, that it is not bound by the case law of other international or regional courts. Moreover, the complainant's arguments do not accord with the Tribunal's case law, stated, for example in consideration 6 of Judgment 3352, according to which, there is no violation of the principle of *nemo iudex in causa propria* in the arguments the complainant raises. The reason, according to the Tribunal, is that the administrative, quasi-judicial nature of the internal appeal proceedings results in a non-binding recommendation and the final decision by the head of an international organization is a final administrative decision which can be appealed before the Tribunal for a final, neutral, judicial decision. Notably, Staff Regulation 12.1 empowers the Director General to take administrative decisions on internal appeals (see also Judgment 4540, consideration 4). The complainant's second ground of challenge is therefore unfounded.

8. The complainant proffers various submissions to support the fourth ground. He submits that UNIDO committed procedural irregularities because it shortened his contract of employment to one year, instead of the usual three years, with the caveat that the three-year extension depended upon a pending issue under review by the EIO, without further information or proper justification. This, he states, was tantamount to a “preventive punitive action”. This submission is unfounded. As UNIDO explains, the complainant’s contract was not shortened. He was offered a one-year extension in July 2019 and was informed that the duration of that extension was related to the EIO’s investigation. Moreover, as the complainant did not appeal that decision within the stipulated time, or at all, he cannot now raise it in the context of this complaint, which centrally challenges his summary dismissal from UNIDO’s service.

9. The complainant’s submission that there were procedural irregularities in the investigation process because UNIDO reported his alleged misconduct two to three years after the underlying facts had occurred is also unfounded. The complainant cites no authority for this submission or of a time limit for reporting such an allegation. In fact, the investigation was opened nine months after the first alleged “unlawful” action was reported. Indeed, Ms M.-N.’s started her first contract on 1 August 2018 and the alleged misconduct relating to that recruitment was referred to EIO in May 2019. The complainant also cites no authority for his further submission which suggests that there was procedural irregularity because the circumstances surrounding the reporting of allegation of misconduct against him remain “highly unclear” as UNIDO never clarified whether the report was made by an anonymous source or not. He thereupon concludes that no report was made, but that UNIDO had itself embarked upon a “fishing exercise” in order to find possible wrongdoing and dismiss him. The complainant cites no authority that requires the disclosure of the source of a report of misconduct and the case law does not require it. Moreover, the evidence taken during the course of the investigation into the allegations against him, which is contained in the EIO report, does not bear out his suggestion that there was merely a “fishing exercise”.

10. The complainant further submits that there was a procedural irregularity because he received the notice of investigation eight months after the alleged wrongdoings were reported when paragraph 24 of the Office of Internal Oversight Services (IOS) Investigation Guidelines (which came into effect on 16 January 2012) provides that an alleged offender will be notified immediately after IOS's decision to initiate an investigation unless the circumstances warrant a notification at a later stage, but no such circumstances existed in the present case. Paragraph 24 states that "IOS will generally notify a staff member that he or she has been identified as an alleged wrongdoer immediately after IOS's decision to initiate an investigation, when the staff member's identity is already known, or as soon as findings lead IOS to focus on that particular staff member". However, paragraph 25 of the Investigation Guidelines creates an exception. It relevantly states that the Director of IOS, may, at his or her discretion, decide that the subject of an investigation should not be notified thereof, taking into account the nature of the alleged wrongdoing, the evidence that needs to be collected and the possibility that advance notice would jeopardize the fact-finding process. In such case, IOS will notify the subject at the latest at the beginning of their first interview by IOS. It is obvious that the Director General properly exercised his discretion under paragraph 25 of the Investigation Guidelines to notify the complainant when he did, given the sensitive nature of the case and the fact, as UNIDO explains, that some of the evidence that was needed in the investigation (emails and other electronic documents) were under the complainant's control.

11. The complainant also submits that there was procedural irregularity because the IOS's decision to interview him just one day after he was notified of its investigation into the allegation of fraud with no choice of a later date despite the seriousness of the allegations, was biased. According to paragraph 50 of the Investigation Guidelines, IOS conducts interviews to give a person who is interviewed an opportunity to be heard and to elicit information about the matter under investigation. Paragraph 53 of the Investigation Guidelines, which essentially sets out the interview procedure, does not provide any timeframe within which an interviewee shall be notified that she or he

is invited to an interview, but it indicates that she or he should be notified in advance. The one day's notice the complainant was given is understandable in a case of this nature. Moreover, as UNIDO points out, the complainant did not object to being notified at short notice, and, pursuant to paragraph 53 of the Investigation Guidelines, the EIO authorized an observer to be present at the interview at his request. The complainant was shown some 20 documents to assist him to recollect the events, and when asked whether he had any objections or comments concerning how the interview was conducted, he replied, "No, absolutely not". The Tribunal finds that neither the decision to interview the complainant one day after he was notified of the allegation of fraud against him, nor the transcript of his interview reflect bias, as the complainant alleges.

12. The complainant submits that there was an irregularity in the investigative process because, in violation of UNIDO/DA/PS/AC.87 on disciplinary measures, the Joint Disciplinary Committee (JDC) was not convened prior to the imposition of the disciplinary measure upon him. The submission is unfounded as Staff Rule 111.03(b) provided an exception to referral to the JDC in cases of summary dismissal for serious misconduct. It states that, except in cases of serious misconduct requiring summary dismissal, no staff member shall be subject to disciplinary measures until the matter has been referred for advice to the JDC, provided that referral to the JDC may be waived by agreement of the staff member concerned and the Director General.

13. The complainant submits that there were irregularities in the disciplinary process as he was not properly notified in writing of the Director General's decision to summarily dismiss him. The record however shows that on 5 August 2020, pursuant to Staff Regulation 11.2, the Director of HRM, gave the complainant advance notice of his summary dismissal from UNIDO's service effective immediately. This was confirmed in a more detailed letter from HRM, dated 10 August 2020. As the complainant provides no other vitiating ground, his submission that he was not properly notified is unfounded. It also

follows that the complainant's submission that his due process rights have been completely disregarded, is also unfounded.

14. The complainant submits that there were procedural irregularities in the investigative process owing to the anonymity of the persons who made the allegations; no witness statements, transcripts or summaries of the interviews were provided, and there was no clear information regarding the allegations resulting in a breach of his due process rights. The case law has it that a staff member is entitled to due process before a disciplinary sanction is imposed. In this regard, he or she must be given, at the very least, an opportunity to test the evidence on which the charges are based, to give his own account of the facts, to put an argument that the conduct in question does not amount to misconduct and that, even if it does, it should not attract the proposed sanction (see Judgment 3137, consideration 6, and the case law referred to therein). Importantly, however, in light of the complainant's foregoing pleas concerning the violation of due process, it is notable the Tribunal determined, in consideration 22 of Judgment 4615, that the right of defence of a complainant was not affected by the fact that the officials heard as witnesses were not named; it was sufficient for the complainant to know the content of the statements and it was not necessary for her to know the witnesses' names; that furthermore, the Advisory Board redacted some names for reasons of confidentiality, since some officials feared retaliation by the complainant, which was a reasonable step to strike a balance between the right of defence of the accused person and the right of the witnesses to be protected against retaliation.

15. In its opinion, the JAB did not consider this issue, as the Director General noted in the impugned decision, however stating that both the investigation and the process which led to the impugned decision were conducted in line with the applicable rules, procedures and case law. In the Tribunal's view, that conclusion was available to the Director General and borne out by the stated facts of this case, by the record and was in line with the case law referred to above. It is notable that, contrary to his allegations, as suggested in consideration 8

of this judgment, the complainant was aware for some time of an impending investigation as a result of which his last appointment was extended for only one year. He was informed by the memorandum of 30 January 2020 that the investigation to which he was invited to be interviewed on the following day had been initiated to investigate allegations that he engaged in fraud in relation to the recruitment of consultants under his projects. The particulars were provided when he was interviewed and he had the opportunity to give his explanations. He was subsequently given the opportunity to respond to the draft investigation report and provided detailed explanations in his 6 March 2020 communication. The complainant was given another opportunity to provide any additional information or evidence in his defence in the Director of HRM's memorandum of 24 July 2020, which communicated to him HRM's conclusions and the particulars of the charges of fraud and issuing of the three falsified certificates, in light of the final investigation report. The complainant's right to due process was therefore not violated.

16. The complainant submits that there were irregularities in the investigative process because UNIDO relied on policies that were not applicable to his case. He states that it tried to apply a policy contained in Administrative Instruction AI/2020/04, issued in August 2020, after his summary dismissal, and insisted throughout the internal appeal procedure that he should have disclosed his apparent conflict of interest in the subject recruitment. This is not borne out by the record and there is no evidence that UNIDO relied on it, as the complainant alleges. His submission is therefore unfounded.

17. Regarding his third ground of challenge, the complainant submits, in effect, that contrary to the Tribunal's case law, the Director General failed to take into account the JAB's conclusions, gave no reasons for departing from them, and, in particular, for concluding that his conduct was a "collusive arrangement" concerning Ms M.-N.'s recruitment. This submission is unfounded. In the impugned decision, the Director General explained why he disagreed with the JAB's conclusions that the recruitment of Ms M.-N. was inconsistent with the facts established in the investigation report. While the Director General

agreed with the JAB that the issuance of the false certificates was an incorrect action, he explained why he disagreed with the JAB's conclusion that it was not so serious as to render not proportionate the disciplinary measure of summary dismissal. The Director General further explained why, in his view, that measure was warranted. That the Director General considered the complainant's conduct a "collusive arrangement" concerning Ms M.-N.'s recruitment is obvious from his analysis in the impugned decision. The complainant's submissions on this issue are therefore unfounded. It follows from the foregoing that the complainant's submissions that the impugned decision is tainted by "errors [...] in law" because the Director General failed to accept the well-reasoned criticisms concerning the handling of his case, failed to rectify the unlawful situation and therefore showed bias, "arbitrariness" and abuse of authority, are also unfounded.

18. In submitting that the burden of proof beyond a reasonable doubt was not satisfied, the complainant notes that, in its report, the EIO stated that the allegations against him had been established on "a balance of probabilities". As UNIDO explains, this is what the applicable rules requires the EIO to do. The complainant submits, in effect, that in the disciplinary procedure following the EIO's investigation report, there was no statement that the charges were proved beyond a reasonable doubt. This submission overlooks that the complainant had himself admitted issuing the falsified certificates (which was done through his official UNIDO email address, on UNIDO's letterhead and signed under his official UNIDO designation) albeit explaining that he issued them to help a friend in distress. It is notable that in one certificate he issued in November 2017, the complainant misrepresented that Ms A. had been employed with UNIDO for a period of almost two years when she had been actually employed for 25 days. The certificate was to be used to support her application to work with the IAEA. Such issuances were proscribed by paragraph 7 of UNIDO's Policy on Fraud Awareness and Prevention, which stated that "[f]raud, in its broadest definition may include, [...] violations of UNIDO regulations, rules, policies, and procedures for personal or third party gain". The complainant's statement also overlooks the Tribunal's case law, in consideration 10 of

Judgment 3964, for example, that in cases of found misconduct based on allegations of fraud resulting in dismissal, the Tribunal has adopted the approach, in order to determine whether a finding of guilt beyond a reasonable doubt could have been made, it “will not require absolute proof, which is almost impossible to provide on such a matter [involving allegations of fraud or similar conduct]. It will dismiss the complaint if there is a set of precise and concurring presumptions of the complainant’s guilt”, which in the Tribunal’s view are obviously present in this case, leading the Tribunal to conclude that the complainant had committed fraud in relation to the recruitment of consultants in that he was instrumental in recruiting Ms M.-N., whose husband, then employed at another international organisation, was in turn instrumental in recruiting the complainant’s wife in that other organisation. This was also proscribed by paragraph 7 of UNIDO’s Policy on Fraud Awareness and Prevention, which relevantly stated “[f]raud, in its broadest definition may include, [...] obtaining contracts through collusive arrangements and similar devices [...]”. Based on the foregoing, the complainant’s submission that the charges were not proved beyond a reasonable doubt is unfounded.

19. Regarding the proportionality of the disciplinary measure imposed upon the complainant, Staff Regulation 11.2 states that the Director General may take disciplinary measures against staff members who do not meet the highest standards of integrity required by Article 11.5 of UNIDO’s Constitution or whose conduct is otherwise unsatisfactory. He or she may summarily dismiss a staff member for such lack of integrity or other serious misconduct. Staff Rule 111.03(a) states that disciplinary measures referred to in Staff Regulation 11.2 shall consist of written censure, suspension without pay, demotion or dismissal for misconduct, provided that suspension pending investigation under Staff Rule 111.04 shall not be considered a disciplinary measure. The Tribunal stated in consideration 10 of Judgment 3578, that if, in fact, the complainant had engaged in fraud then it would be surprising if the sanction of summary dismissal was not imposed subject, of course, to whatever may have been, if any, extenuating circumstances. While the general circumstances of that case are not identical to the

present, the Tribunal discerns no extenuating circumstances in this case. In fact, it observes that when initially questioned in the investigation about issuing the falsified certificates, the complainant made false statements, which, in the view of the EIO/IOD, were intended to hinder the investigation and constituted an aggravating circumstance. Accordingly, the complainant's submission that the disciplinary measure of summary dismissal was disproportionate is unfounded.

20. Based on the Tribunal's foregoing findings, the complaint is unfounded and will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 1 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER