

The Administrative Tribunal,

Considering the complaint filed by Mr J. d. W. against the International Organization for Migration (IOM) on 10 April 2006, the Organization's reply of 8 June, the complainant's rejoinder of 12 July and the IOM's surrejoinder of 17 August 2006;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an American citizen born in 1946, joined the IOM in 1993. Since September 2003 he has held the post of Chief of Mission, IOM London.

In January 2005, during a visit to the IOM's London office, the Director of the Department of Resources Management discussed with the complainant a number of financial and administrative irregularities, concerning travel and representation expenses in particular, which had been reported to the Regional Accountant of the Department of Resources Management by staff of the London office. On returning to Headquarters in Geneva, he wrote to the complainant on 2 February 2005, detailing the areas in which he felt that the latter was not complying with the Staff Regulations and Staff Rules for Officials, and inviting him to take appropriate action. He added that it would be in the complainant's interest to do so, given that the Office of the Inspector General planned to carry out an internal audit of the London office in the near future. An exchange of e-mails ensued, in which the complainant indicated that most of the Director's concerns had been addressed, but that he disagreed with the Director's position regarding representation expenses.

At the request of the Director General's Office, a review of the complainant's travel expense claims for 2004 was conducted by the Inspector General. In her report dated 28 February 2005, the Inspector General found that on several occasions the complainant had omitted to declare that he had taken days of leave during periods of official duty travel. As a result, he had wrongly received a *per diem* in respect of days on which he had not been on official duty. Moreover, this amounted to taking unauthorised leave, in breach of the Staff Regulations and Staff Rules. In some instances, the complainant had travelled to or via Geneva and had received a full *per diem* for days spent in that city, whereas he was entitled to only half the *per diem* in view of the fact that he had maintained a residence near Geneva and therefore had no accommodation expenses. The Inspector General also found that the complainant had twice received a high rate hotel *per diem* without having sought the approval of the Executive Officer, and that on one occasion the purchase of his airline ticket had not been coordinated with Staff Travel Services, as a result of which his air fare had been 40 per cent higher than it ought to have been. Two other issues were addressed in the Inspector General's report. Firstly, in addition to eight days of unauthorised leave taken during periods of duty travel, the complainant had taken 17 days of compensatory leave in respect of overtime which had not been authorised. Secondly, he had charged the IOM for two days' accommodation in London, the city where he was posted. The Inspector General recommended that the complainant be ordered to reimburse the overpaid amounts and that disciplinary action be taken against him.

On 9 March 2005 the Director of Management Coordination sent a copy of the Inspector General's report to the complainant and invited him to submit his comments. The complainant replied on 31 March that he very much regretted any inaccuracies and was ready to make all necessary reimbursements. He pointed out that he had in fact already corrected one of the expense claims mentioned by the Inspector General. He strongly objected to the inference that he had been wilfully dishonest or that he had attempted to defraud the Organization, insisting that the incorrect claims were honest mistakes largely resulting from his misplaced reliance on inexperienced subordinates who had prepared his travel authorisations and leave records. On the issue of unauthorised leave, he regretted any mistakes that might have been made in his travel authorisations, whilst pointing out that at the time of his transfer to London it had been agreed with the Administration that he would be allowed to accumulate compensatory leave

in respect of hours worked beyond a 40-hour week, so as to be able to spend time with his family, who would be remaining in Geneva.

The Inspector General was invited to comment on the complainant's rebuttal. On 6 April 2005 she sent a detailed reply to the Director of Management Coordination, maintaining her position in full.

On 11 May 2005 that Director submitted to the Staff Association Committee a proposed disciplinary letter, dated 10 May 2005, asking the Committee to comment by 13 May, failing which the letter would be signed by the Director General and sent to the complainant without modification. The Staff Association Committee made no comment and the disciplinary letter, duly signed and still bearing the date 10 May 2005, was sent to the complainant by e-mail on 20 June and in hard copy on 6 July. In that letter, the Director General stated that, after having reviewed the reports of the Director of the Department of Resources Management and the Inspector General regarding irregularities in his travel, leave and representation accounts, as well as the correspondence on these matters between the complainant and the Director of Management Coordination, he had reached the conclusion that the complainant had committed "serious infractions against the Organisation's rules and regulations as regards the proper use of the Organisation's funds". He emphasised that any official who makes a claim against the funds of the Organization is responsible for the accuracy of that claim. He had therefore decided that 2,085 United States dollars should be deducted from the complainant's salary in respect of unwarranted daily subsistence allowance payments, and a further 3,318 dollars in respect of the high rate hotel *per diem* he had received without approval. In addition, the 25 days when he had been absent from work without following the proper procedures were to be deducted from his annual leave balance. As far as representation expenses were concerned, the complainant was reminded of the need to follow the applicable rules and to keep expenses within approved budgets. In view of the fact that the complainant's services had not been fully satisfactory with regard to financial responsibility, a situation falling under the provisions of Staff Regulation 10.1, the Director General had decided to impose on him the disciplinary measure of a one-step reduction of salary within grade. On 14 July the complainant was informed that the deductions from his salary would be effected in six monthly instalments.

By a letter of 20 July 2005 the complainant requested a review by the Director General of the decision to impose a disciplinary measure, on the grounds that his explanations had not been taken sufficiently into account and that the sanction in question was disproportionate. Having received no reply, he lodged an appeal with the Joint Administrative Review Board on 21 September 2005. In its report dated 12 December 2005 the Board found that the investigation into the irregularities allegedly committed by the complainant did not meet the requirements of due process. It noted in this regard that the complainant had not been made aware of the nature of the investigation conducted by the Inspector General, and might have been led to believe that it was simply a "review" in preparation for the forthcoming audit of the London office. Moreover, he had not been given an opportunity to respond to the Inspector General's rebuttal of his comments on the report. The Board considered that since the investigation process had been seriously flawed, the Inspector General's report should be set aside. It recommended that the Director General's disciplinary letter, being based on that report, should likewise be set aside, and that the decision to deduct 25 days from the complainant's annual leave balance should be reversed. The Board also recommended that the Organization pay the complainant's legal costs. Lastly, it recommended that he be paid the sum of 825 dollars because, as the Organization acknowledged, the amount to be reimbursed by him in respect of unwarranted *per diem* payments had been miscalculated.

By a letter of 10 January 2006, to which a copy of the Board's report was attached, the Director of Human Resources Management informed the complainant that, except as regarded the payment of 825 dollars, the Director General had decided to reject the Board's recommendations, which he considered to be based on an incorrect appreciation of the principle of due process. The Director of Human Resources emphasised that the reported irregularities had been brought to the complainant's attention, that he had been given the opportunity to comment on the Inspector General's report, and that he had admitted to having disregarded IOM regulations and rules. That is the impugned decision.

B. The complainant contends that the impugned decision is fundamentally flawed because it is based on a report containing significant mistakes of fact. In particular, he points out that the Inspector General wrongly accused him of having taken unauthorised leave, despite the existence of an agreement as to compensatory leave, and that she repeatedly asserted that the errors had been committed wilfully, without producing any evidence of an intention to defraud.

The disciplinary sanction imposed on him is, in his view, disproportionate given the mitigating circumstances that

exist in this case. He argues that he should be presumed innocent until proven guilty, and he denounces the absence of an independent inquiry.

He contends that the evidence that he produced has not been taken into consideration, and that the rules relating to disciplinary sanctions have been breached, insofar as the opinion of the Staff Association Committee was not obtained. The Administration's failure to consider the evidence suggests prejudice against him, from which he concludes that the impugned decision was taken for an improper purpose.

Lastly, the complainant argues that the Director General has exceeded his authority by disregarding the findings of the Joint Administrative Review Board. Referring to the Tribunal's case law he submits that in the absence of an independent investigation of the facts, the Director General could not simply overrule the Board's findings.

The complainant seeks the quashing of the Director General's decision of 10 May 2005 with retroactive effect; a letter of apology; reimbursement of an amount withheld from his salary in respect of an incorrect daily subsistence allowance claim which he had already corrected; reimbursement of the amount withheld in respect of a high rate hotel *per diem* which he had never requested; reversal of the decision to deduct 25 days from his annual leave balance; "appropriate" moral damages; costs; and interest on all the above amounts. He also asks the Tribunal to order that the Organization "demonstrate[s] that effective managerial action has been taken to prevent such an irregular investigation from occurring again".

C. In its reply the IOM asserts that the investigation procedure was in no way flawed or irregular, and that the complainant was well aware of the nature and scope of the investigation. It emphasises that he had the opportunity to respond to the allegations against him, to examine the evidence and to put forward a defence, as required by the principle of due process. Moreover, the Director General took into account all the available evidence.

As regards the proportionality of the sanction, the Organization draws attention to the fact that, under the Staff Regulations and Staff Rules, officials are deemed to be personally responsible for the truth of any statements they make for the purpose of obtaining an allowance or benefit, and that untruthful statements, such as those made by the complainant, which resulted in his obtaining payment of an allowance, afford grounds for severe disciplinary measures. The IOM adds that in this context the word "untruthful" does not necessarily mean being dishonest, and that the complainant's intent is therefore irrelevant.

The Organization states that the Staff Association Committee was duly consulted prior to the imposition of the disciplinary measure. It also points out that recommendations of the Joint Administrative Review Board are not binding on the Director General, and that the reasons why the Director General had decided to reject the Board's recommendations were clearly indicated in the impugned decision.

D. In his rejoinder the complainant presses his pleas. He observes that, despite the fact that he offered to correct the mistakes that were brought to his attention, the Organization chose to pursue the matter "in an exaggerated and vindictive way", and the investigation was conducted with "unusual zeal".

E. In its surrejoinder the Organization notes that the complainant's rejoinder contains no new facts or arguments. It maintains that the facts presented in the Inspector General's report are correct and that they form the basis of the imposed disciplinary measure.

CONSIDERATIONS

1. During a visit to the IOM's London office, the Regional Accountant of the Department of Resources Management had been informed of irregularities relating in particular to the complainant's misuse of the representation fund and to his duty travel arrangements. It was initially decided that the Inspector General would travel to London to look into these matters, but that visit was postponed because the Director of the Department of Resources Management was due to visit the London office in January 2005 to deal with various unrelated administrative matters.

2. Upon his return from London, that Director informed the Inspector General that he had in fact addressed the irregularities with the complainant and would continue to work on the issues raised and would write a report. Consequently, it was agreed that the Office of the Inspector General would conduct a more limited review, focusing on the complainant's travel expense claims. In the process of that review, other irregularities with respect to the

complainant's compensatory leave and absence from the workplace without leave were uncovered.

3. In her report of 28 February 2005, the Inspector General identified a number of problems – as set out in Part A of this judgment – and made a series of recommendations. In relation to the absences without leave, a serious offence under the Staff Regulations and Staff Rules, she recommended that the Administration should apply disciplinary action. With respect to “having made untruthful statements and omissions in connection with some of his travels and having thereby collected excess per diem for days when he was not working”, she recommended that the Administration should apply severe disciplinary action.

4. On 9 March 2005 the complainant was given a copy of the Inspector General's report on which he was invited to provide his comments. He was also asked to give some clarification regarding a particular trip. Finally, he was alerted to the fact that the Inspector General was recommending “severe disciplinary action” in addition to repayment of some expenses and a re-adjustment of the complainant's annual leave balance.

5. The complainant submitted a detailed response on 31 March 2005 stating, in part:

“I very much regret any and all inaccuracies, and completely accept responsibility for documents I sign. Of course I am ready to reimburse any amounts necessary, and to make any retroactive adjustments in leave allotments thereby required. [...]

I strongly object, however, to the explicit charge that these mistakes have been willfully dishonest. I do not believe there is the slightest hint of such conduct on my part [...].”

The complainant's response was sent to the Inspector General for her comments. In her response of 6 April 2005, she rejected the complainant's explanation of honest mistake and did not change the stance she had previously taken.

6. A proposed disciplinary letter from the Director General, dated 10 May 2005, was submitted for comment to the Staff Association Committee, as required by the Staff Regulations and Staff Rules. In that letter the Director General states that the complainant is responsible for serious infractions against the Organization's rules and regulations and, accordingly, he is compelled to take corrective action. In addition to requiring the complainant to refund certain amounts to the Organization and to deduct a number of days from his annual leave balance, the Director General stated that a salary reduction of one step within grade would be imposed. The Committee did not respond.

7. The letter of 10 May was sent to the complainant by e-mail on 20 June and in hard copy on 6 July. The complainant's request for a review by the Director General of the decision to impose a disciplinary measure was unsuccessful. On 21 September 2005 the complainant appealed to the Joint Administrative Review Board.

8. In its report of 12 December 2005, the Board found that the Administration had not followed due process prior to imposing a disciplinary sanction and recommended, inter alia, that the decision of 10 May 2005 should be set aside, that the deduction from the annual leave balance should be reversed and that the complainant should be reimbursed his legal costs.

9. On 10 January 2006 the Director of Human Resources Management informed the complainant that the Director General did not agree with the Board's finding regarding due process and that he had decided to maintain the disciplinary measure. That is the impugned decision.

10. Before turning to a consideration as to whether the requirements of due process were complied with in the present case, the Tribunal observes the following with regard to the articulation by the Joint Administrative Review Board of the relevant principles. In its reasons, the Board expressed concern regarding the nature of the exercise, variously described as a “review”, “desk review”, and “investigation” being conducted by the Inspector General and the fact that the nature of the exercise was never communicated to the complainant prior to it having been undertaken. The Board also drew a distinction between two functions of the Inspector General, namely, “internal audit” and “investigation and inspection”, which it viewed as being relevant to the complainant's appeal. With respect to the latter function, the Board observed that it focuses on specific irregularities and that serious consequences in the form of disciplinary measures could be anticipated in the event that allegations were substantiated.

In the Board's view, the principle of due process required at a minimum that "a person to be investigated be informed in advance of the commencement of the investigation and that [he or she] be given opportunities to defend [himself/herself] adequately and appropriately before the conclusion of the investigation is drawn".

11. The Tribunal considers that informing a person in advance that an investigation into certain allegations will be undertaken is not a requisite element of due process. Although notification prior to the start of an investigation may well be the preferred course of action, in certain circumstances alerting an individual to the fact that an investigation is to be undertaken may well compromise the investigation. As well, it may be through a routine review or audit that irregularities are encountered. It is once irregularities have been identified that the individual must be informed of the allegations of irregularities with sufficient precision to enable him to respond adequately; he should then be given an opportunity to respond, in particular to defend himself against the allegations, and to make such further response as the circumstances require prior to any conclusions being reached.

12. In the present case, the Tribunal finds that the requirements of due process were not observed. It is evident from a reading of the first Inspector General's report, that she had drawn a number of conclusions regarding the complainant's guilt and went so far as to recommend severe disciplinary action before informing the complainant about the allegations of the various irregularities and before affording the complainant an opportunity to respond and defend himself. Furthermore, the complainant was not given, prior to the impugned decision, an opportunity to respond to the second report, in which the Inspector General rejected out of hand his defence of innocent mistake or negligence, since he was not provided with a copy of that report.

13. The conclusion is that the Director General's decision, being grounded on a process in which the fundamental requirements of due process were ignored, must be set aside. However, given the complainant's acknowledgement of responsibility for certain irregularities, the Tribunal rejects his claim for moral damages. With respect to the complainant's claims for full reimbursement of the amounts withheld from his salary and owed to him as a consequence of the present judgment, and for a reversal of the order relating to his days of absence from work, these matters are remitted to the Organization for review. It is clearly beyond the competence of the Tribunal to order an organisation to apologise or to demonstrate that "managerial action has been taken to prevent such an irregular investigation from occurring again", as requested by the complainant. Lastly, having succeeded, the complainant is entitled to an award of costs in the amount of 2,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision is quashed.
2. The claims for relief in connection with the amounts deducted from the complainant's salary and owed to him as a consequence of the present judgment, and with days of absence from work, are remitted to the Organization for determination.
3. The claim for moral damages is rejected.
4. The requests for an apology and for appropriate "managerial action" are rejected.
5. The Organization shall pay the complainant 2,000 Swiss francs in costs.

In witness of this judgment, adopted on 10 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Agustín Gordillo

Dolores M. Hansen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.