Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

Y.

v.

ILO

130th Session **Judgment No. 4310**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. C. Y. against the International Labour Organization (ILO) on 19 June 2017 and corrected on 20 July, the ILO's reply of 6 September 2017, the complainant's rejoinder of 5 January 2018 and the ILO's surrejoinder of 30 January 2018;

Considering Articles II, paragraph 1, 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 challenges the decision to apply the sanction of summary dismissal to him.

At the material time, the complainant, who held an appointment without limit of time, was employed in the post of finance assistant and verifier at grade G.6 in the ILO Country Office for Côte d'Ivoire in Abidjan.

From November 2012 to June 2013, the Office of Internal Audit and Oversight (IAO) conducted an audit of the said Country Office's administrative and financial operations for the period January 2010 to November 2012, which was followed by a "second mission in October 2014". A report on that audit was submitted to the Director-General of the International Labour Office, the ILO's secretariat, on 23 December 2014. Since it transpired that the complainant was potentially guilty of

misconduct on several counts, he was interviewed on 3 November 2014. In its report on the investigation into the complainant's alleged misconduct, which was submitted to the Director-General on 13 January 2015, the IAO concluded that the eight allegations against him were well founded. The IAO found that the complainant had failed to disclose a conflict of interest resulting from his wife's professional activities, claimed spousal allowances by submitting falsified or erroneous certificates of earnings, forged his supervisor's signature in order to obtain a bank loan, failed to carry out a bank reconciliation for more than two years, failed to provide school attendance certificates in support of his claims for family allowances for his son, been regularly absent from work without authorisation, allowed a third party access to the Country Office's premises also without authorisation, and received a personal loan from a colleague to cover mission costs although he had already received an advance for that purpose.

The case was referred to the Committee on Accountability, which confirmed, in its report of 27 February 2015, that all the allegations against the complainant were well founded and considered that the first three – namely, those relating to the conflict of interest, submission of falsified or erroneous certificates of earnings in order to receive spousal allowances and the forgery of a signature – constituted fraud.

By letter dated 22 July 2015, the complainant was informed that, in the light of the reports of the IAO and the Committee on Accountability, the Director-General had decided to suspend him without salary with immediate effect and proposed that the sanction of summary dismissal be applied to him. Pursuant to Article 12.2(1) of the Staff Regulations, he was invited to make any observations, which he did on 30 July.

On 24 August 2015 the complainant filed a grievance with the Joint Advisory Appeals Board (JAAB), requesting that the proposed sanction be withdrawn. In its report of 10 February 2017, the JAAB stated that, in its view, the allegations relating to the conflict of interest, the submission of falsified or erroneous certificates of earnings and the forgery of a signature constituted fraud, and it identified several procedural defects. It noted that, in breach of paragraph 13 of the Rules of Procedure of the Committee on Accountability, the complainant had not been notified that his case had been referred to the Committee, he had not been heard by the Committee, he had not received a copy of the IAO report of January 2015 and he had not been treated fairly. Furthermore, it considered

that the allegation concerning the conflict of interest resulting from his wife's professional activities was well founded. As regards the applications for spousal allowances, it found that the complainant had failed to provide the requisite documents concerning his wife's income, even though, given his job in finance, he was aware that he had to provide proof of that income. However, the JAAB took the view that fraud had not been proved since the investigation had not established how much the complainant's wife earned and it had therefore not been shown that he was not entitled to those allowances. It added that the forgery of his supervisor's signature – to which he had admitted – constituted inappropriate conduct amounting to fraud within the meaning of the directive on anti-fraud policy and that, in failing to comply with the procedure for applying for annual leave, the complainant had seriously failed in his obligations under the Staff Regulations. Furthermore, with regard to the allegation concerning applications for family allowances for his son, the JAAB considered that, although the complainant had not received the allowance unduly or forged school attendance certificates for that purpose, he had nevertheless been negligent in failing to submit those certificates, particularly because he worked in finance and had been repeatedly requested to do so. According to the JAAB, the allegation concerning the failure to perform a bank reconciliation for an amount of approximately 140 United States dollars should not be taken into account, since it had not been established whether, as the imprest report manager, the complainant was the only person who could carry out that operation. Finally, it concluded that the complainant had been negligent in insisting that security guards allow a third party access to the Country Office's premises, and that by failing to repay a personal loan, the complainant had not acted with the integrity required of an international civil servant.

The JAAB recommended that, when making his final decision on the sanction to be imposed on the complainant, the Director-General should take into account the fact that only some of the allegations were well founded, the procedural defects that the JAAB had identified, the dysfunctionality of verification procedures for the granting of family allowances, and the lack of an intermediate sanction between censure and dismissal. It also recommended that he request the Human Resources Development Department to provide him with "complete information on all cases which had involved a conflict of interest and/or forgery of

documents" to enable him to take his final decision in line with the principle of equal treatment.

By letter of 21 March 2017, which constitutes the impugned decision, the complainant was notified that the Director-General considered that, although the complainant had not been notified of the referral of his case to the Committee on Accountability owing to a change of practice in that matter, he had had ample opportunity to respond to the allegations of misconduct levelled at him. Furthermore, the complainant was informed that the Director-General, considering that the circumstances put forward by the JAAB were not such as to warrant changing the proposed sanction, remained convinced that summary dismissal was the sanction most proportionate to the gravity of the misconduct of which the complainant was accused, and that this was a final decision.

The complainant requests the Tribunal to set aside that decision, as well as the decision of 22 July 2015 suspending him without salary, and to order that he be reinstated and paid a sum – with interest – corresponding to all the salary, allowances, pension contributions and other emoluments which should have been paid since the date of his suspension. In addition, he claims 50,000 Swiss francs in compensation for the moral injury he considers he has suffered and 10,000 francs in exemplary damages, as well as an award of costs. Finally, he asks the Tribunal to order the production of a number of documents and such other relief as it may deem fit.

The ILO submits that the complaint should be dismissed as unfounded. It states that it provided the complainant with all the documents he requests by September 2017 at the latest.

CONSIDERATIONS

1. The complainant, who held the post of finance assistant and verifier at the Country Office for Côte d'Ivoire in Abidjan ("CO-Abidjan"), seeks the setting aside of the decision of the Director-General of 22 July 2015 suspending him without salary and the decision of 21 March 2017 dismissing him summarily.

2. The complainant contends that the first decision involves a breach of Article 12.9 of the Staff Regulations in that the suspension was not applied "pending consideration of the matter", but at the end

of the audit and investigation procedure and after the Committee on Accountability had examined his case.

Article 12.9(1) states:

> "If the Director-General considers, in circumstances which appear to call for the application of a sanction, that the continuance in service of the official concerned pending consideration of the matter may prejudice the service, the Director-General may suspend the official from his duties pending such consideration, the suspension being without prejudice to the rights of the official."

Common sense dictates that the phrase "pending consideration of the matter" must be understood as covering not only the period of the investigation itself, but also the period during which the internal appeal bodies and, ultimately, the Director-General examine the matter.

This plea must be rejected.

3. As to the decision of 21 March 2017 dismissing him summarily, the complainant begins, in his first plea, by arguing that there was "confusion" between the audit mission and the investigation concerning him personally.

The ILO explains that from November 2012 to June 2013 a first audit mission was conducted concerning the administrative and financial operations of CO-Abidjan, and that in order to clarify certain matters the Office of Internal Audit and Oversight (IAO) conducted a "second mission in October 2014". An audit report on the two missions was compiled in December 2014 and submitted to the Director-General on 23 December 2014 (Report IAO/85/2014 entitled "Report on the Internal Audit of Administrative and Financial Operations of CO-Abidjan"). The Organization states that "[t]he findings of the IAO subsequent to its audit and additional information received by [the Regional Office for Africa]" prompted the IAO to carry out an investigation into the complainant, which resulted in the investigation report submitted to the Director-General on 13 January 2015 (Report IAO/91/2015 entitled "Report on the investigation of alleged misconduct by an ILO staff member, CO-Abidjan"), and that the complainant was interviewed on 3 November 2014 as part of that investigation.

These explanations are not clear. It is difficult to understand how the findings of an audit which was the subject of a report dated December 2014 could have triggered an investigation into the complainant, who was interviewed in that connection on 3 November 2014, that is to say,

before the audit report was drawn up. Moreover, the ILO continues the confusion in its written submissions, stating in the reply that it was "a completely ordinary audit" and that, consequently, the complainant "did not have – at that stage – any special right to procedural safeguards since he was not the subject of an investigation considering the possible imposition of a sanction". Since there appears to have been only one interview, on 3 November 2014, it is unclear whether it took place in the context of the audit of CO-Abidjan or an investigation into the complainant.

4. In order to clarify the situation, the Tribunal requested the Organization to provide it with a copy of:

– the decision to conduct a second mission in October 2014 (leading to report IAO/85/2014);
– the decision to open an investigation – which took place between 27 October and 3 November 2014 – into the complainant's conduct (leading to report IAO/91/2015).

5. In response to that request, the Organization produced neither of the documents requested but submitted a number of explanations by the Chief Internal Auditor which fail to provide the necessary clarification. The latter indicates that the decision to carry out a second mission was taken following a proposal by the Chief Investigator (e-mail of 29 April 2014) to which the Chief Internal Auditor gave his verbal agreement. This suggests that the second mission to Abidjan in October 2014 was, in fact, an investigative mission and not an audit mission. However, that explanation is difficult to reconcile with the explanation provided by the ILO in its written submissions and does not clarify why the October mission was referred to in the audit report of December 2014 or why the complainant was interviewed on 3 November 2014 although the mission took place in October.

Even more surprising is that, together with his response, the Chief Internal Auditor submitted a document that the Organization had not mentioned in its submissions. This is a Minute from the Chief Investigator to the complainant dated 12 July 2013 with the subject line "Allegation of misconduct", which states that "[t]he audit of CO-Abidjan in November 2012 has brought to the attention of the Treasurer and Financial Comptroller and the Chief Investigator an allegation of your misconduct working in the capacity of an official of the [Office]".

The allegations of misconduct against the complainant are listed in the rest of the Minute and largely correspond to those with which he was ultimately charged. He is requested to submit his observations by 5 August 2013.

The Chief Internal Auditor states that he did not find any record of a response from the complainant in the IAO's files. However, that Minute contradicts the assertion that the decision to conduct an investigation into the complainant was taken by verbal decision of the Chief Internal Auditor following an e-mail from the Chief Investigator of 29 April 2014.

Such inconsistencies and, more generally, such an approach are not acceptable. Apart from the question of whether the IAO may *ex officio* carry out an investigation into an official on the basis of the findings of an audit which it is conducting, an investigation must in any event be opened by a formal decision so that the lawfulness of the procedure may subsequently be reviewed. Such review is not possible if the decision is verbal.

6. It is against that background that the complainant asserts that, prior to the interview on 3 November 2014, he was not notified of the allegations against him and was not advised that he was under investigation or that a disciplinary sanction could be imposed on him, which implicitly but undoubtedly means that he denies having received the abovementioned Minute of 12 July 2013.

Curiously, in its submissions, the ILO does not contradict that assertion, nor does it mention the Minute of 12 July 2013, and indeed the ILO would bear the burden of proving that the complainant received it (see Judgments 456, under 7, 723, under 4, 2473, under 4, 2494, under 4, 3034, under 13, 3253, under 7, and 3737, under 7). In these circumstances, the Tribunal will not take account of that Minute, which was supposedly sent more than 15 months before the interview on 3 November 2014.

On the other hand, the ILO submits that the complainant was duly informed of the charges against him at the interview.

Although this is not an indispensable condition for due process (see Judgments 3295, under 8, and 4106, under 9), it is preferable that the subject of an investigation should be notified of the opening of an investigation into her or his conduct and the charges against her or him

before being heard, so that she or he has an opportunity to explain her or his conduct and to submit any exculpatory evidence. If this does not occur, that information must, in any event, be provided at the beginning of the hearing.

According to the transcript of the interview on 3 November 2014, at the beginning of the interview, one of the investigators explained that it was a "follow-up" to the audit report of 2012 and to "certain things" that had come to the IAO's attention. He then emphasised that the interview was confidential, adding that "for example, [the] report goes to the Director-General afterwards. [There's] a committee in Geneva which is responsible for reading reports from the [Investigation] Unit, and then [makes] direct recommendations to the Director-General." Given that the complainant had not been notified in advance and was unaware of the content of the 2012 audit report, such general statements cannot be considered sufficient to inform him of the opening of an investigation and the charges against him. The investigators failed to indicate plainly the allegations against him. They merely questioned him on the events leading to the finding of misconduct on eight counts for which the disciplinary sanction was ultimately imposed. It is true that at the end of the interview, the investigators mentioned, in a very cursory manner, that a report on the interview would be forwarded to the Director of the IAO and the Committee on Accountability, which could recommend "disciplinary action or sanctions or things like that" to the Director-General. However, that explanation had to be clearly expressed at the beginning of the interview.

It follows that the plea is well founded.

7. In his second plea, the complainant alleges procedural defects which, in his view, affected the report of the Committee on Accountability of 27 February 2015. In that document, the Committee concluded that all of the IAO's allegations were well founded and that the matter should be referred to the Human Resources Development Department for appropriate disciplinary action, including dismissal.

The complainant states that, first, he was not notified or informed of the referral to the Committee on Accountability and, second, he was not provided with the IAO investigation report of January 2015, even though that document is the only basis for the Committee's report of 27 February 2015. He points out that the decision proposing the

sanction of summary dismissal rested solely on those two reports. He submits that these omissions constitute a clear breach of the adversarial principle. He adds that the Organization hence disregarded its own procedural rules, in particular paragraph 13 of the Rules of Procedure of the Committee on Accountability and paragraph 8 of Office Directive on the Committee on Accountability, IGDS No. 43 (Version 1), thereby violating the principle *tu patere legem quam ipse fecisti*.

8. In the version applicable at the material time, paragraph 13 of the Rules of Procedure of the Committee on Accountability stated:

> "The official(s) concerned are notified of the referral of the matter to the Committee within one month and are advised of the allegations made. [...] At the time of notification the official(s) concerned are [...] informed of any relevant information at the Committee's disposal. The official(s) are provided with an opportunity to respond either in writing or orally, as the Committee may deem appropriate in the circumstances, to the allegations made. The official(s) will be given one month within which to respond to the Committee [...]."

Paragraph 8 of Office Directive IGDS No. 43 (Version 1) states:

> "Officials are given an opportunity by the Committee to provide explanations or state their views in relation to any matter involving them under consideration by the Committee."

9. It is not disputed that the above rules were not complied with. On this issue the ILO submits that the Committee's Rules of Procedure, and in particular paragraph 13, reflect a practice that has gradually become superfluous following the establishment of the IAO, which is the only unit authorised to conduct investigations. Given that an official under investigation is heard by the IAO and notified of the procedure, she or he is fully informed of the content of the case file forwarded to the Committee, which hence no longer needs to provide it to the official concerned. The Rules of Procedure were being revised and would be published shortly on the Committee's website.

However, the Tribunal observes that, so long as the rules are neither amended nor repealed, the principle *tu patere legem quam ipse fecisti* requires the Organization to apply them (see Judgment 3883, under 20). That principle is particularly applicable in disciplinary matters (see Judgment 3123, under 10).

10. Furthermore, the ILO argues that the adversarial principle was duly observed, having regard to the procedure as a whole. It submits that the complainant must have been aware of the content of the investigation report of January 2015 and the allegations made against him, as one of the investigators had explained to him that a report would be compiled on the basis of the interview he had just held with him. During that interview, the complainant was given ample opportunity to respond to the allegations made against him. Furthermore, it submits that the complainant was given the opportunity to provide additional information when he was invited to submit his observations on the proposal for a sanction, which he did. The ILO hence concludes that the complainant exercised his right to be heard on several occasions during the procedure and, in any case, before the final decision to impose a sanction was taken.

However, the fact that the complainant was interviewed during an investigation into certain events and had the opportunity to answer questions relating to those events does not, as the Organization suggests, imply that he was aware of the content of the investigation report subsequently drawn up on the basis of that interview, or of the allegations ultimately upheld by the IAO and the reasons why they were upheld.

11. Nor can it be argued that the Committee on Accountability's report of 27 February 2015 – communicated to the complainant on 22 July 2015 at the same time as the proposal to dismiss him summarily – constituted adequate information. That very brief report merely listed the headings of the allegations against him.

It is not disputed that the complainant had never seen the IAO's investigation report prior to filing his complaint with the Tribunal on 19 June 2017. Having regard to the Organization's explanations, it seems that the report was not provided to him until 6 September 2017.

The Joint Advisory Appeals Board rightly considered that, in those circumstances, the adversarial principle and, more particularly, the complainant's rights of defence had been breached.

As the Tribunal has repeatedly held, a staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) a decision affecting her or him personally. Such evidence cannot be withheld on grounds of confidentiality unless there is some special case in which a higher interest stands in the way of

disclosure (see Judgments 3732, under 6, and 3755, under 10), which was not the case here.

The fact that the complainant was ultimately able to obtain the IAO investigation report during the proceedings before the Tribunal does not, in this case, remedy the flaw in the procedure. While the case law recognises that, in some cases, the non-disclosure of evidence can be corrected when this flaw is subsequently remedied, including in proceedings before the Tribunal (see, for example, Judgment 3117, under 11), that is not the case where the document in question is of vital importance having regard to the subject matter of the dispute, as it is here (see Judgments 2315, under 27, 3490, under 33, 3831, under 16, 17 and 29, and 3995, under 5).

In conclusion, the plea is well founded.

12. It follows from the foregoing that the impugned decision was taken at the end of a procedure that was unlawful on two counts. As it is therefore tainted with procedural flaws, it must be set aside.

13. The complainant seeks reinstatement at the ILO. As a rule, an official dismissed on disciplinary grounds whose dismissal is set aside is entitled to be reinstated. However, the Tribunal may refuse to make such an order if reinstatement is no longer possible or if it is inappropriate. According to the Tribunal's case law, reinstatement is inadvisable when an employer has valid reasons for losing confidence in an employee (see, in particular, Judgments 1238, under 4, and 3364, under 27), as is the case here. While it is not for the Tribunal to rule on the eight charges brought against the complainant, three of which were allegations of fraud, it is established that the complainant admits to one of the allegations, namely the forgery of his supervisor's signature, which, whatever the reasons he gives in an attempt to justify his action, in itself undermines the necessary relationship of trust between a staff member and the Organization. Therefore, in the circumstances of this case, there is no need to order the complainant's reinstatement or to refer the case back to the Organization to recommence the procedure, especially as it is no longer possible to rerun an investigation in appropriate conditions since the events took place between 2008 and 2013.

14. The Tribunal also considers that neither is there any need to grant the complainant's claim to be paid a sum – with interest – corresponding to all the salary, allowances, pension contributions and other emoluments which should have been paid since the date of his suspension. The setting aside, on procedural grounds, of the disciplinary sanction of summary dismissal cannot, *per se*, have the effect of dispelling the wrongful nature of the forgery of a signature, of which the complainant is rightly accused and the reality of which, as has just been stated, he himself acknowledges.

15. The complainant claims compensation for the moral injury which he alleges he suffered owing to, first, the flaws in the procedure and, second, its excessive length.

As discussed above, the procedural flaws have been established.

As to the length of the procedure, the complainant states that the case started in March 2012 with an audit of CO-Abidjan. The Tribunal finds that the complainant was not affected by the length of the procedure for that audit, which did not directly concern him. He was informed of his suspension without salary with immediate effect and of the Director-General's proposal to summarily dismiss him by letter of 22 July 2015. Although the complainant filed a grievance with the Joint Advisory Appeals Board on 24 August 2015, the final decision is dated 21 March 2017. It is well settled in the case law that internal appeals must be conducted with due diligence and in a manner consistent with the duty of care an international organisation owes to its staff members (see Judgments 3160, under 16, 3582, under 3, and 4100, under 7). The JAAB and the Organization acknowledge the delay in considering the internal appeal, which took more than 18 months. Such a duration is excessive.

The unlawfulness of the procedure which led to the complainant's summary dismissal and its excessive length caused moral injury to the complainant, who was suspended without salary and remained uncertain as to his professional situation for an unacceptably long time. This injury may be fairly redressed by ordering the Organization to pay him compensation of 15,000 Swiss francs under this head.

16. There is no reason to order the Organization to pay exemplary damages.

17. As he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 750 Swiss francs.

18. All other claims must be dismissed.

DECISION

For the above reasons,

1. The Director-General's decision of 21 March 2017 is set aside.
2. The ILO shall pay the complainant moral damages in the amount of 15,000 Swiss francs.
3. It shall also pay him 750 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 22 June 2020, Mr Patrick Frydman, President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ