

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

G.
v.
IOM

135th Session

Judgment No. 4586

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. G. against the International Organization for Migration (IOM) on 12 May 2020 and corrected on 15 June, IOM's reply of 15 September 2020, the complainant's rejoinder of 17 December 2020, IOM's surrejoinder of 22 July 2021, the complainant's additional submissions of 11 February 2022 and IOM's final comments thereon of 16 May 2022;

Considering the further submissions produced by IOM on 12 February and 3 March 2021 at the Tribunal's request, and the email of 10 March 2021 informing the complainant of those exchanges;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant contests the decision to convert his suspension with pay into a suspension without pay pending an investigation for misconduct against him, as well as the overall length of his suspension.

At the material time, the complainant was serving as Regional Migration Health Assessment Coordinator, Middle East and North Africa, at the IOM Office in Amman (Jordan) at grade P-5. On 2 October 2018 he was informed by the Office of the Inspector General (OIG) that he was the subject of an investigation into allegations of bribery and

corruption. On 4 October the Administration advised him that, considering the gravity of the allegations reported, the high amount of funds allegedly received in bribes and in order to prevent him from engaging in further potential misconduct and from impairing the investigation, it had been decided to place him on suspension with pay for a three-month period with immediate effect, i.e. until 4 January 2019. He was told not to report for duty at IOM Jordan, not to visit any IOM premises or workplaces nor to contact any IOM colleagues, partners, vendors, beneficiaries, or personnel to discuss the allegations against him. His IOM resources, including his email account, were restricted and suspended and his devices and assets recalled. He was also asked to cooperate during the investigation and was denied the right to leave his duty station. On 4 January 2019 he was informed that his suspension had been extended for an additional three months, until 4 April 2019.

By a letter dated 26 March 2019 the complainant was informed that, based on the various interviews conducted by the OIG, including with him, and the strong evidence gathered in the course of the investigation reinforcing the credibility of the allegations raised against him, it had been decided to further extend his suspension until 4 July 2019, but without pay. The letter clarified that such decision did not constitute a disciplinary action against him and was without prejudice to his right to due process. On 24 May the complainant requested a review of the decision to convert his suspension to “without pay” status and extend its duration. On 26 June his suspension without pay was further extended until 30 September 2019. On 23 July the Administration responded to his request for review, upholding the decision to convert his suspension. On 13 August the complainant submitted a second request for review against the Administration’s response, which he considered as “amount[ing] to a constructive dismissal of [his] appointment”, and sought a review of the decision to suspend him without pay.

On 16 August 2019 he lodged an appeal with the Joint Administrative Review Board (JARB). A few days later the Administration informed him that it would not reply to the second request for review. The complainant lodged a second appeal on 16 September. On 26 September

he was informed of the further extension of his suspension without pay until 31 December 2019.

Between October and December 2019 the JARB held two hearings. On 16 December 2019 the complainant's suspension without pay was further extended until 31 March 2020. The OIG issued a draft investigation report in February 2020, on which the complainant provided his comments on 11 March. On 18 March a further extension of the complainant's suspension until 31 May was decided.

On 20 March 2020 the JARB delivered its report to the Director General in which it found that only the first request for review dated 24 May 2019 was receivable. On the merits, it considered that the length of the suspension was unreasonable and that the Administration had breached its duty of care towards the complainant. It recommended *inter alia* that the latter receive material and moral compensation for the prejudice he and his family had suffered, regardless of whether he was ultimately found guilty in respect of the allegations of misconduct investigated.

By a letter of 20 April 2020, which constitutes the impugned decision in these proceedings, the Director General advised the complainant that he was unable to accept the findings and recommendations of the JARB on the merits and that he had decided to reject his appeal in its entirety.

On 4 May 2020 the Administration informed the complainant of the decision to charge him with misconduct, based on the findings and conclusions contained in the final investigation report issued by the OIG on 16 April 2020.

On 12 May 2020 the complainant filed his complaint with the Tribunal asking it to set aside the impugned decision, as well as the findings contained in the OIG report, and to revoke his suspension without pay with immediate retroactive effect. He also seeks retroactive payment of his salary, pension and other entitlements, benefits and emoluments as from 26 March 2019, with 5 per cent interest per annum, and reinstatement to his post with immediate effect, with full pay and benefits. Alternatively, he requests repatriation to his home country (North Macedonia), together with a full household shipment with immediate effect and reimbursement of full pay and benefits. In case of

non-reinstatement, he asks the Tribunal to find that his appointment was constructively terminated on 26 March 2019 and to order IOM to pay him retroactively all salary, benefits, pension contributions, step increases and all entitlements and emoluments that he should have received up to and through his statutory date of retirement. He additionally seeks moral and exemplary damages in an amount of not less than 250,000 United States dollars, as well as legal fees in an amount of not less than 15,000 Swiss francs. He also suggests that the Administration prepare a policy paper or other guidance outlining disciplinary measures and timelines in order to afford staff members protection from abuses of such process. Finally, he requests that interest at the rate of 5 per cent per annum be applied on all amounts awarded from 4 October 2018 through the date all redresses are paid in full and invites the Tribunal to award him such other relief as it deems fair, just and necessary.

On 18 May 2020 the complainant's suspension without pay was further extended until 31 July 2020. As requested by the Administration in its letter of 4 May, the complainant provided a written explanation of his conduct on 25 May 2020. On 7 July 2020 he was informed that the Director General had decided to impose upon him the disciplinary measure of summary dismissal effective from that date.

In its reply before the Tribunal, IOM argues that the scope of the complaint should be limited to the complainant's challenge of the decision to extend his suspension pending completion of the OIG investigation and to convert it to "without pay" status. It considers that issues regarding the subsequent conduct of the disciplinary process based on the outcome of the investigation into the allegations of misconduct should be disregarded. Moreover, it considers that the pleas and arguments advanced by the complainant in connection with constructive dismissal are irreceivable for failure to exhaust the internal means of redress. It asks the Tribunal to dismiss the complaint as partly irreceivable and wholly devoid of merit.

CONSIDERATIONS

1. The complainant requests an oral hearing. However, in view of the ample and sufficiently clear written submissions and evidence provided by the parties, the Tribunal considers that it is fully informed about the case to make a decision on the issues raised in the complaint. It will not therefore grant this request. For essentially the same reasons, the complainant's request for the disclosure of documents is also rejected.

2. In the decision, dated 20 April 2020, which the complainant impugns, the Director General accepted the JARB's conclusion that the complainant's internal appeal was irreceivable concerning the claims which he proffered in his second request for review (and repeated in his second internal appeal), particularly his claim that the conversion of his suspension with pay to suspension without pay amounted to "constructive dismissal" and gave him the right to additional relief. The complainant had submitted the second request for review purportedly against the Administration's rejection of his first request for review and lodged his second internal appeal against IOM's refusal to consider his second request for review. The JARB had concluded, correctly, that the complainant's second request for review (and by extension his second internal appeal) was irreceivable because he could not contest IOM's response to his prior request for review by way of a second request for review. As the Director General correctly accepted that conclusion, the complaint is irreceivable, pursuant to Article VII, paragraph 1, of the Tribunal's Statute, to the extent that the complainant attempts to enlarge the range of remedies sought in the first request for review because he failed to exhaust the internal means of redress that were open to him under the applicable rules.

3. Accordingly, the scope of this complaint is limited to the complainant's challenge to the decision to extend his suspension pending completion of the OIG investigation and to convert it to without pay status. These were the claims and pleas he proffered in his first request for review (submitted pursuant to the procedure set out in Instruction No. 217 Rev.2 of 29 August 2018 entitled "Request for review and

appeal to the Joint Administrative Review Board (JARB)”) and in his first internal appeal. The scope of the complaint does not concern the subsequent conduct of the disciplinary process based on the outcome of the investigation into the allegations of misconduct against the complainant (his summary dismissal). It follows that the complainant’s requests (1) to set aside the findings contained in the OIG report, (2) to reinstate him to his post with immediate effect, with full pay and related benefits, (3) to repatriate him to his home country with related benefits and (4) his suggestion that the Administration prepare a policy paper or other guidance outlining disciplinary measures and timelines, are outside the scope of the present complaint.

4. The Director of the Human Resources Management Division (HRM) had initially, by a letter dated 4 October 2018, informed the complainant of the decision to suspend him with pay pending the OIG’s investigation and until 4 January 2019. As to the reasons for the suspension, after setting out some details of the allegations of misconduct, the Director, HRM, stated that the decision to suspend the complainant was made pursuant to Rule 10.3 of the Unified Staff Regulations and Rules of 1 January 2018 considering the gravity of the allegations and the sum allegedly involved and the need to prevent him from engaging in further potential misconduct and from impairing the investigation. The complainant’s suspension with pay was further extended until 4 April 2019.

5. Rule 10.3, which is entitled “Suspension Pending Investigation and Disciplinary Process”, states as follows:

- “(a) If it is considered at any time that the continued service of a staff member pending investigation of a matter is likely to prejudice the interests of the Organization, the staff member may be suspended from duty subject to conditions specified by the Director General at any time until the completion of the disciplinary process.
- (b) A staff member suspended from duty shall be given a written statement of the reason(s) therefore and its probable duration. Suspension shall be with full pay unless, in exceptional circumstances, the Director General decides that suspension without pay is warranted.

- (c) Suspension shall be without prejudice to the due process rights of the staff member.
- (d) If suspension is without pay and either the allegations against the staff member are subsequently not substantiated, or it is subsequently found that the conduct at issue does not warrant summary dismissal, any pay withheld shall be restored.”

6. The Director, HRM, informed the complainant, by letter of 26 March 2019, that with immediate effect his suspension with pay was converted to suspension without pay until 4 July 2019 (extended subsequently on a number of occasions, eventually until 31 July 2020). That letter informed the complainant that the conversion decision was made because various interviews conducted by the OIG, including with him, and “the strong evidence gathered thus far in the course of the investigation” had “reinforced the credibility of the allegations raised against [him]”. The Director, HRM, also informed the complainant that the decision to extend his suspension from duty was not a disciplinary action against him and was without prejudice to his right to due process.

Rule 10.4 of the Unified Staff Regulations and Rules, which is entitled “Due Process”, states as follows:

“No disciplinary measure may be imposed on a staff member unless he or she has been notified of the allegations against him or her and has been given a reasonable opportunity to respond to those allegations. The notification and the response, if any, shall be in writing, and the staff member shall normally be given ten calendar days from receipt of the notification to submit his or her response. This period may be shortened if the urgency of the situation requires it.”

7. In the impugned decision, the Director General rejected the JARB’s findings and recommendations on the merits of the complainant’s first appeal. The JARB had concluded that the complainant’s suspension from service for about seventeen months by 20 March 2020 (when it submitted its report) was excessive. It also concluded, in effect, that, whilst the reasons the Administration gave for converting the complainant’s suspension to suspension without pay may have been valid at that time on grounds of exceptional circumstances, the fact that the OIG’s draft investigation report was not submitted until ten months later (in February 2020) indicates that the decision to suspend the

complainant without pay as early as March 2019 was not warranted and the duration of his suspension without pay was unreasonable. The JARB further concluded that IOM breached its duty of care to the complainant as it should only have taken the decision to suspend him without pay once it knew, with due regard for his welfare, that the investigation could have been completed quickly and efficiently. The substantial financial strain faced by the complainant was exacerbated by forbidding him, in the letter of 4 October 2018, from leaving the duty station. The JARB further concluded that, in those circumstances, the period of suspension without pay for almost a year (at the time of its report) was unreasonable. The JARB had also concluded that, over one year after the investigation was initiated, the complainant had not been given an opportunity to challenge its findings. In the premises, the JARB recommended, among other things, that the complainant be paid compensation for loss of earnings and entitlements and moral damages.

8. The Tribunal's case law has it that the grounds for reviewing the exercise of the discretionary power to suspend a staff member are limited to questions of whether the decision was taken without authority, in breach of a rule of form or procedure, was based on an error of fact or law, involved an essential fact being overlooked or constituted an abuse of authority and that the suspension of an official is a provisional measure which in no way prejudices the decision on the substance of any disciplinary measure against her or him. However, as a restrictive measure on the staff member concerned, the suspension must have a legal basis, be justified by the needs of the organization and be taken with due regard to the principle of proportionality (see Judgment 4515, consideration 4, and the case law cited therein).

9. The complainant contends that, in rejecting the JARB's findings and recommendations, the Director General (1) erred by concluding that the decision to place him on suspension without pay did not constitute a disguised disciplinary measure; and (2) violated IOM's Unified Staff Regulations and Rules, IOM's duty of care and his right to due process. He further argues that his suspension without pay for an indefinite period was unreasonable and disproportionate. He also

contends that the decision subjected him to unequal treatment and that there was unreasonable delay in handling the investigation.

10. Regarding due process, the complainant contends, primarily by reference to Rules 10.3 and 10.4 of IOM's Unified Staff Regulations and Rules cited above, that his right to due process was violated because there was no valid justification for his suspension. However, the issue of due process in the investigation does not fall under Rule 10.4 (which is concerned with due process in disciplinary proceedings) as the complainant seems to suggest. Moreover, Rule 10.3 does not make any explicit provision for an official concerned to be heard before the decision to suspend her or him is announced. Indeed, suspension is an interim precautionary measure which, in principle, must be adopted urgently, and this will often make it impossible to invite the person concerned to express her or his opinion beforehand. Nevertheless, a person's right to be heard must be exercised before the substantive decision is taken to impose a disciplinary sanction (see Judgments 3138, consideration 10(a), and 2365, consideration 4(a)). The complainant's further submissions that there was no adversarial process; that no information was provided to him; that material evidence was not disclosed to him; that IOM failed to discharge its burden of proof; and that there was a lack of objectivity during the investigation, are unmeritorious as IOM's rules do not require these processes prior to the suspension of a staff member pending an investigation.

11. In assessing whether the decisions to suspend without pay were unlawful having regard to the terms of Rule 10.3, three matters should be noted at the outset. The first is that there was not one decision to suspend without pay but, as the complainant contends, multiple decisions. They were made on 26 March 2019, 26 June 2019, 23 July 2019, 26 September 2019, 16 December 2019, 18 March 2020 and 18 May 2020. Whether each, some or none of these decisions were legally flawed having regard to the principles discussed in consideration 8 above, can be assessed by reference to the circumstances existing at the time each decision was made. As noted earlier, the decisions to suspend without pay had been preceded by a decision to suspend with pay on

4 October 2018 and one subsequent decision to the same effect. The second matter to be noted, and it relates to the first, is that the complainant's challenge to his suspension without pay by way of internal review involved only a challenge to the initial decision of 26 March 2019. However, as the internal appeal process moved forward, both the JARB in its report and the Director General in the impugned decision treated the challenge as relating to all the decisions to suspend without pay and it is appropriate, in these circumstances, for the Tribunal to do likewise. The third thing to be noted, again by reference to the Tribunal's case law referred to in consideration 8 above, is that a decision to suspend either with pay or without pay is a discretionary decision. As such, it is not for the Tribunal to determine, in relation to a decision to suspend without pay, whether there were exceptional circumstances but rather for the Tribunal to assess whether it was reasonably open to the decision-maker to make such a determination to suspend without pay based on her or his assessment of the circumstances.

12. The genesis of the investigation and disciplinary proceedings against the complainant were, it appears having regard to the OIG investigation report, conversations in early September 2018 between the owner of a medical laboratory and clinic in Lebanon and staff members of IOM in that country. The following are the conclusions in that report. What emerged from those conversations was an admission by the owner of the laboratory and clinic that he had been making corrupt payments, by way of secret commissions, to the complainant. These payments totalled approximately 600,000 United States dollars. The complainant had some years earlier, on behalf of IOM, engaged the laboratory and clinic to undertake medical assessments of individuals for the purposes of IOM's activities. The payments were a proportion of the fees paid to the laboratory by IOM for undertaking these assessments.

13. It is convenient to address, initially, the decision to suspend without pay of 26 March 2019, the first such decision. It was made against a background where a decision to suspend (but on pay) had initially been made and communicated by letter dated 4 October 2018. As noted earlier, the four reasons identified in the letter of suspension

with pay were the gravity of the allegations, the high amount of the funds alleged to have been received in bribes, the need to prevent the complainant engaging in further potential misconduct and, lastly, to prevent the complainant from impairing the investigation. The suspension was on terms, set out in the letter, that the complainant was “not authorized to leave [his] duty station”. The complainant did not challenge the suspension decision of 4 October 2018 (or the later decision to suspend with pay) nor has he sought to challenge it (and the justification given) in the pleas in these proceedings. There is no reason to doubt that these four reasons also underpinned the suspension without pay decision of 26 March 2019. Indeed, they are referred to at the beginning of the letter of that date.

14. The reasons given for the suspension without pay from 26 March 2019, and in effect the reason for transforming the suspension as one with pay to one without pay, was, as noted earlier, that: “[t]he various interviews that have been conducted by OIG, including with you, and the strong evidence gathered thus far in the course of the investigation have reinforced the credibility of the allegations raised against you” and later: “the elements gathered by OIG [...] reinforce[d] the credibility of the allegations raised against you”. The letter of 26 March 2019 does not refer to the requirement in the rules that suspension without pay can only occur if the Director General (or a person acting on delegation) considers there are exceptional circumstances. But it can reasonably be inferred that the additional elements just quoted were viewed as constituting exceptional circumstances. The legal question which then arises is whether it was reasonably open to the decision-maker to form that opinion. The word “exceptional”, in this context, denotes circumstances which are beyond, and probably well beyond, circumstances which might simply justify suspension with pay. But apart from that, the expression “exceptional circumstances” is an expression of great width. It must be borne in mind that the power to suspend does not simply arise in circumstances where allegations of serious misconduct are being investigated or pursued in disciplinary proceedings (as it does in some other organisations’ rules). The power to suspend as expressly conferred by IOM’s rules can be exercised in relation to any conduct which might

lead to a disciplinary sanction which could include alleged minor transgressions. But, of course, questions of proportionality can arise as discussed in consideration 8 above. Moreover, under Rule 10.3(d) a person suspended without pay is entitled to receive pay withheld if the allegations against the staff member were not substantiated or later found not to warrant summary dismissal. In this respect, the Rule itself ameliorates what otherwise might be viewed as the severe effect of suspension without pay. What, in substance, the letter of 26 March 2019 was saying was that the case against the complainant involving the receipt of corrupt payments of approximately 600,000 United States dollars (and solicited by him) was one where there was a much-increased measure of certainty, in the eyes of the Organization, that in fact corrupt payments in this amount had been received. If proved it would be a gross misconduct of the most egregious kind and almost certainly criminal behaviour. The decision-maker was entitled, in the Tribunal's view, to treat the highly likely fact that the complainant had received corrupt payments in this amount solicited by him, as giving rise to exceptional circumstances in all the circumstances. The decision to suspend of 26 March 2019 was lawful and was not, as the complainant also contends, a hidden disciplinary sanction.

15. However, as time passed, other considerations bore upon the issue of whether the complainant could reasonably be suspended without pay. It should be noted that all subsequent letters suspending the complainant without pay for a further period do not add to, or alter, the reasons given in the letter of 26 March 2019. One such consideration was that the suspension without pay was made in circumstances where, as required by the original decision of 4 October 2018, the complainant could not leave his duty station. He says in his pleas, and this is not really challenged, this limited his capacity to obtain income from other sources. Whether he could engage in other employment as a member of staff of IOM (albeit suspended), is problematic. Nonetheless, what is undoubtedly true is that having no income as a staff member diminished the complainant's capacity to support his family even allowing for the possibility that he had retained some or all the money alleged to have been received as bribes. Another consideration is that the investigation

by the OIG finally concluded, by the issuing of a report, in April 2020. Its report suggests that its active pursuit of the investigation concluded sometime shortly after mid-March 2020 when the complainant responded to the OIG's draft investigation report of January 2020. At least, by that point, there could be no suggestion of the complainant interfering with the investigation, thus removing one of the foundational elements of the initial decision to suspend as well as the initial decision to suspend without pay. The Organization's failure to take into account the ongoing economic impact on the complainant together with, more importantly, the matter discussed in the preceding sentence, tainted its decisions to suspend the complainant without pay made on 18 March 2020 and 18 May 2020 and they should be set aside to the extent that they suspended the complainant without pay. Accordingly, an order should be made requiring the Organization to pay the complainant his salary from 31 March 2020 (which was the end of the period of suspension without pay effected by the decision of 16 December 2019) to the date of his dismissal, namely 7 July 2020.

16. By prolonging the suspension without pay unlawfully, the Organization caused the complainant moral injury. This must be redressed by way of moral damages as the complainant has articulated the effects which the decision to convert his suspension with pay into a suspension without pay and the length of such suspension had on him. The Tribunal will award him 5,000 United States dollars under this head. However, as the complainant has provided no evidence or analysis to demonstrate that there was bias, ill will, malice, bad faith or other improper purpose on which to base an award of exemplary damages (see, for example, Judgment 4181, consideration 11), his claim for such damages will be dismissed. As the complainant succeeds on the central claim in his complaint, IOM will be ordered to pay him 7,000 Swiss francs in costs.

DECISION

For the above reasons,

1. The decisions of 18 March and 18 May 2020 are set aside to the extent that the complainant was suspended without pay, as is the impugned decision of 20 April 2020 to the extent that it maintained those two earlier decisions.
2. IOM shall pay the complainant material damages as stated in consideration 15 of this judgment.
3. IOM shall also pay the complainant moral damages in the amount of 5,000 United States dollars.
4. IOM shall also pay the complainant costs in the amount of 7,000 Swiss francs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 3 November 2022, 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 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ