

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

A.
v.
IOM

139th Session

Judgment No. 4934

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. A. against the International Organization for Migration (IOM) on 20 July 2022 and corrected on 26 August 2022, IOM's reply of 16 January 2023, the complainant's rejoinder of 26 April 2023 and IOM's surrejoinder of 27 July 2023;

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 the decision to summarily dismiss him for serious misconduct.

The complainant joined IOM in March 2016. At the material time, he was appointed to the G-6 Security Assistant position in the Regional Office in Kenya under a special fixed-term contract. Late 2019, he travelled on mission to the Philippines and stayed at a hotel where, on 30 November 2019, he invited two guests to his room. Shortly after their departure, he noticed that a certain amount of money was missing and alerted the security of the hotel. The security checked the two guests but did not find the complainant's money.

An investigation was initiated by IOM against the complainant in December 2019. According to IOM, the investigation was initiated by the Office of the Inspector General (OIG) following receipt of allegations by the Ethics and Conduct Office from the then Director, Office of the Staff Security, in connection with the complainant's actions on 30 November 2019, which could constitute sexual exploitation and abuse.

The complainant was informed on 27 December 2019 and 5 March 2020 that the OIG was conducting a formal investigation based on a preliminary assessment. The OIG issued a draft investigation report in June 2020, which was provided to the complainant for comments. The final investigation report was issued on 31 August 2020.

By a letter of 4 December 2020, the Director of the Human Resources Management (HRM) informed the complainant that a disciplinary procedure was initiated against him for misconduct. He was charged with three counts of misconduct. Firstly, he had failed to conform with the high standards of personal conduct expected of a staff member by inviting two guests to his hotel room on 30 November 2019 while on mission in the Philippines. His actions compromised IOM's interests and placed its reputation at risk, and resulted in a security incident involving management and security guards at the hotel. Secondly, he engaged in sexual exploitation and abuse by using the services of prostitutes, that is to say, by soliciting the sexual services of one or both of the guests who went to his hotel room. Thirdly, the forensic analysis of his official laptop and mobile phone showed that he had misused information and communication technologies (ICT) resources by viewing and storing prohibited material, including pornographic websites, sexually explicit photographs and videos, and offensive and excessively violent images. The Director, HRM, indicated that if the allegations were established, they would amount to a breach of Staff Regulation 1.4, Staff Rules 1.2.1 and 1.4.1, Instruction IN/15 Rev.1 of 1 December 2014 on Standards of Conduct, Instruction IN/234 of 5 February 2016 establishing the Policy and Procedures for Preventing and Responding to Sexual Exploitation and Abuse, Instruction IN/123 Rev.1 of 14 November 2017 regarding ICT Policies and Guidelines. He added

that the complainant could reply to the charges before a decision was taken. The OIG final report was attached to the letter.

On 1 January 2021, the complainant replied to the charges denying the allegation of having paid for sexual services and of having knowingly downloaded any sexually explicit photographs and videos on electronic devices issued by IOM or on his personal devices.

On 14 April 2021, the Director, HRM, informed the complainant that the Director General had decided to impose on him the disciplinary measure of summary dismissal on the ground that he had displayed a fundamental lack of judgment and had failed to fulfil his obligations to IOM by inviting two guests into his hotel room, engaging in sexual exploitation and abuse by paying for their sexual services, a conduct that was expressly prohibited by IOM. His actions placed IOM's reputation at risk and compromised its interests and did not meet the exemplary standards of personal behaviour required from staff members. In addition, the numerous breaches of the ICT Policies and Guidelines evidenced by the forensic analysis of the material viewed and stored on his official electronic devices demonstrated a failure to adhere to IOM Standards of Conduct. That conduct constituted serious misconduct.

The complainant requested a review of that decision on 10 June 2021, which was rejected by the Director of HRM on the ground that he had not provided countervailing material or satisfactory explanations or proof that would mitigate the gravity of his actions. On 8 September 2021, the complainant lodged an appeal with the Joint Administrative Review Board (JARB) challenging the 14 April 2021 decision.

In its report of 22 March 2022, the JARB found that the investigation process was thorough and transparent. It concluded that the complainant had engaged in sexual exploitation and abuse, misused ICT resources and thus failed to conform to the high standards of personal conduct expected of IOM staff members. He also compromised the Organization's interests and placed its reputation at risk. It also found that the appeal had not put to light any new evidence that he was wrongfully accused.

By a letter of 21 April 2022, the Director General notified the complainant that he endorsed the JARB's findings and recommendation to dismiss his appeal on the ground that the disciplinary measure was proportionate to his established actions, which constituted serious misconduct under IOM's zero tolerance policy for sexual exploitation and abuse. He agreed with the JARB's findings. That is the impugned decision.

The complainant asks the Tribunal to find that the impugned disciplinary measure was unlawful and disproportionate, and to quash with retroactive effect the impugned decision to dismiss him for misconduct with all legal effects flowing therefrom. He also asks the Tribunal to order his reinstatement in his former position with full retroactive effect or, alternatively, the payment of the salaries (and all related legal entitlements) for a period of two years from the date of his separation. In addition, he asks the Tribunal to order that he be imposed, if necessary, a lesser sanction, allowing him to continue in his previous position in the duty station in Kenya. Lastly, he seeks an award of moral damages in the amount corresponding to six months of his last salary as well as costs.

IOM asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. At relevant times, the complainant was a member of staff of IOM until his summary dismissal in April 2022. The general factual background is set out earlier in this judgment and need not be repeated.

2. The charges against the complainant which led to his summary dismissal were threefold. They were laid by letter dated 4 December 2020 and had been preceded by an investigation by the Office of the Inspector General between December 2019 and June 2020 which reported on 31 August 2020. In summary, the charges were firstly, that the complainant had failed to conform with the high standards of personal conduct expected of IOM staff by inviting two guests to his hotel room while on duty travel to the Philippines,

secondly, had engaged in sexual exploitation and abuse by using the services of prostitutes or sex workers, namely one or both of the guests, and thirdly, had misused IOM resources by viewing and storing prohibited material including pornographic websites, sexually explicit photographs and videos, and offensive and excessively violent images, on his IOM laptop and IOM mobile phone and SD card.

3. The charges were proved to the satisfaction of IOM leading to the complainant's summary dismissal. The complainant was informed of his dismissal by letter dated 14 April 2021. An application to review the decision to dismiss the complainant was unsuccessful. This led to an internal appeal which resulted in a report of the Joint Administrative Review Board (JARB) of 22 March 2022 concluding that the complainant's requests for redress were clearly unfounded. Acting on the JARB report, the Director General dismissed the appeal by letter dated 21 April 2022 which is the impugned decision in these proceedings.

4. One logical starting point is an issue raised by the complainant about the internal appeal linked to the question of what the applicable standard of proof is and whether it was, in fact, applied. The complainant contends that the internal appeal process "was unlawful". The argument, putting to one side an issue about the provision of documents, involves several propositions though their order is not immutable. The first is a general proposition that an internal appeal body should address pleas of substance (see, for example, Judgment 4534, consideration 17). The second is that the applicable standard of proof, in a case such as the present potentially involving a disciplinary sanction including dismissal, is "beyond reasonable doubt" (see, for example, Judgment 4491, consideration 19). The third is that, in fact, the complainant raised in the internal appeal the issue of whether the appropriate standard had been identified and applied. The fourth is that this issue was not considered by the JARB, as it should have been.

5. The first two legal propositions in the preceding consideration are correct. The factual contention that the complainant had raised the issue of whether there had been a failure to identify and apply the requisite standard of proof, is also correct. This argument is noted by the JARB in its report of 22 March 2022 when summarizing the position of the complainant in relation to the first two of the three charges. It said: “The [complainant] asserts that the decision is not based on established facts and has resulted from a failure to apply the requisite standard of proof.” Under the heading “On the merits of the appeal” there is no discussion by the JARB about whether or not the requisite standard of proof had been identified and applied.

6. This was an issue legitimately raised by the complainant. That is because the standard of proof was only adverted tangentially in the letter of 14 April 2021 (dismissing the complainant) in which the Director of Human Resources Management said, on behalf of the Director General, in relation to the second charge (that the complainant “had sexual relations with either or both of the guests”):

“[...] having regard to the circumstances surrounding these events, it is considered that they amount to a set of precise and concurring presumptions of your guilt. As such, the allegations of sexual exploitation and abuse against you are found to be established to the required standard.”

7. No similar observation was made in relation to the first charge. It may be accepted that the expression “[existing] set of precise and concurring presumptions” can be viewed as a circumstance, in appropriate contexts, which leads to establishing proof beyond reasonable doubt. This is illustrated, for example, in Judgment 3875, consideration 8, in which the Tribunal said:

“In disciplinary matters, the burden of proof lies with the employer, which must demonstrate that the employee did indeed engage in the conduct of which she or he is accused. If the facts are disputed and there is no persuasive material evidence, the facts of the dispute must be appraised on the basis of conclusive circumstantial evidence. Thus, the facts may be held to be established when a set of precise presumptions and concurring circumstantial evidence enable the decision-making authority to conclude beyond reasonable doubt that the person concerned is guilty [...]”

It was said in Judgment 3757, consideration 6, that:

“[...] a set of precise and concurring presumptions removing any reasonable doubt that the acts in question actually took place”.

8. But the way the level or degree of proof was actually expressed in the above passage from the letter of 14 April 2021 without reference to removal of doubt, provided a basis for the complainant to raise the issue as one of substance. There are judgments in which the failure of a decision maker to expressly identify the standard of proof has led the Tribunal to consider the decision regarding misconduct unlawful (see, for example, Judgments 4633, considerations 9 to 11, and 4360, consideration 12). Whether the contention, in this case, that the standard of beyond reasonable doubt was not identified and applied, was correct is an entirely different matter. The JARB could probably have dealt with this issue in a relatively short compass, but it did not at all. In the result, there was, as the complainant contends, a violation of his right to an effective internal appeal.

9. In the event that a complainant establishes a violation of her or his right to an effective internal appeal, the Tribunal can send the matter back to the Organization for the reconsideration and redetermination of the internal appeal, or directly address the pleas concerning the impugned administrative decision (see, for example, Judgment 4841, consideration 3). The latter course might, in the present case, ultimately involve the Tribunal itself determining whether the complainant was guilty of the conduct charged. The Tribunal has set its face against undertaking this task (see, for example, Judgment 4362, consideration 7).

10. The appropriate course is to remit the matter to IOM to have the internal appeal considered again by a differently constituted JARB and for a further decision to be made by the Director General having regard to the report of JARB unless, of course, the matter settles in the meantime. The impugned decision should be set aside. However, having regard to the way the case has been argued and decided, no steps should be taken in these proceedings to disturb the original decision to

dismiss the complainant. The charges against him are serious and the ultimate decision may prove to be, though may not, to dismiss his appeal effectively preserving the decision to dismiss him. It would be inappropriate to entertain in these proceedings the complainant's request for an order of reinstatement and related orders concerning loss of income.

11. The complainant seeks moral damages but does not identify, let alone establish, any moral injury (see, for example, Judgments 4893, consideration 8, and 4801, consideration 7). Indeed, the claim for moral damages is for, expressly, an amount equal to six months' salary. What is the linkage between income and moral injury is unexplained. This plea is unfounded and should be rejected.

12. The complainant has partly succeeded and is entitled to an order for costs. They are assessed in the sum of 10,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 21 April 2022 is set aside.
2. The matter is remitted to IOM to be dealt with in accordance with consideration 10.
3. IOM shall pay the complainant 10,000 euros costs.

In witness of this judgment, adopted on 15 October 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER