Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.

v.

ILO

127th Session **Judgment No. 4106**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. K. M. S. against the International Labour Organization (ILO) on 31 July 2017 and corrected on 19 September, the ILO's reply of 20 October, the complainant's rejoinder of 29 November and the ILO's surrejoinder of 15 December 2017;

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 contests the decision to apply to him the sanction of discharge.

The complainant joined the ILO Country Office in Bangladesh (CO-Dhaka) in September 2008 on a fixed-term technical cooperation contract as National Programme Officer of the "Technical and Vocational Education and Training System Reform in Bangladesh" project (TVET project). This contract was extended six times until the closure of the TVET project on 11 December 2013. He was then employed as a Programme Officer for another technical cooperation project in CO-Dhaka. His contract was extended ten times and he separated from

service on 30 June 2017 further to the Director-General's decision to apply to him the sanction of discharge.

In the period between February and June 2015 the Office of Internal Audit and Oversight (IAO) carried out an investigation into a whistle-blower's allegations of misconduct against the complainant. According to these allegations, the complainant had: (1) drafted on behalf of a Bangladeshi agro-processors' association a project proposal for submission to the European Union (EU) Grant Scheme and had been paid a high fee for this – part of the money had allegedly been paid to his spouse's bank account; (2) submitted two project proposals to that association whereby he would be paid to provide training; and (3) forged the signature of the Director of CO-Dhaka in a Memorandum establishing a company. In the context of the investigation, the complainant was interviewed on 30 April 2015 and he was subsequently provided with a non-verbatim record of the interview for his review. He made some modifications to the text and he added statements which the IAO contested.

The Investigation Report, which was submitted to the Director-General and the Treasurer and Financial Comptroller in June 2015, concluded that the first two allegations were substantiated. The third allegation was not found to be substantiated.

The Director-General endorsed the Investigation Report and the matter was referred to the Human Resources Development Department (HRD), which proposed the imposition of the sanction of discharge pursuant to Article 12.8 of the Staff Regulations. The Director-General decided to accept HRD's proposal and, by a memorandum of 17 July 2015, the Director of HRD informed the Director of CO-Dhaka of the Director-General's decision to implement the sanction of discharge and requested him to properly notify the complainant thereof. By a letter of the same day, the Director of CO-Dhaka communicated in duplicate to the complainant the Director-General's decision to propose the sanction of discharge against him. Referring to the findings of the Investigation Report, the Director of CO-Dhaka indicated that there was a conflict of interest between the outside activities in which the complainant had engaged and his position in CO-Dhaka, and that the seriousness of his

actions was compounded by the fact that the proposal he had submitted to the EU on behalf of the agro-processors' association was contrary to the ILO's strategy in the relevant area. The Director of CO-Dhaka asked the complainant to initial and return one copy of the proposal within eight days of its receipt, adding to it any observations he wished to make on the proposed sanction. The complainant provided his observations in a letter dated 1 August 2015.

On 25 August 2015 the complainant submitted a grievance to the Joint Advisory Appeals Board (JAAB) requesting, inter alia, the withdrawal of the proposed sanction of discharge, and a review of his workplace situation at the material time, in particular his job insecurity and the harassment by his supervisor. The JAAB issued its report on 16 March 2017. Although it unanimously found the complainant's actions to be in breach of the Staff Regulations and other applicable rules, two of its members considered that the sanction of discharge was out of proportion to the gravity of his acts. One member of the JAAB, nevertheless, considered that the complainant's misconduct warranted the proposed sanction. The JAAB also noted that the absence in the ILO Staff Regulations of an intermediate sanction between censure and discharge rendered it difficult to apply duly proportionate sanctions and it urged the Administration to adopt a broader range of sanctions. By a letter of 3 May 2017, the complainant was informed that the Director-General had determined that the sanction of discharge was entirely proportionate to the gravity of his proven misconduct. That is the impugned decision.

The complainant asks that the impugned decision be set aside, that he be reinstated with retroactive effect from the date of expiry of his last contract and that he be paid all salary, emoluments and allowances, together with interest, from that date. Subsidiarily, in the event that his reinstatement is not possible, he asks that he be properly compensated for the material damages he suffered, including the loss of future income. He also claims moral damages and costs. He asks the Tribunal to order any other relevant corrective measures.

The ILO asks the Tribunal to dismiss the complaint as partly irreceivable and, in any event, as entirely devoid of merit.

CONSIDERATIONS

1. The complainant impugns the Director-General's 3 May 2017 decision to maintain the sanction of discharge applied to him on 17 July 2015 in accordance with Article 12.8, paragraph 1, of the Staff Regulations.

2. The complainant asks the Tribunal to set aside the impugned decision and to order his reinstatement with retroactive effect together with the payment of all salary, emoluments and allowances, plus interest, from the date of expiry of his last contract; subsidiarily, if reinstatement is not possible, to order the payment of material damages, including for the loss of future income, to award him moral damages in the amount of 20,000 Swiss francs and costs, and to order any other relevant corrective measures.

3. On 2 February 2015 allegations of misconduct against the complainant were made by a whistleblower to the Chief Internal Auditor. An investigation was conducted by the IAO, which resulted in an Investigation Report submitted to the Director-General on 9 June 2015, in which it was found that two of the three allegations had been substantiated and that the complainant had "admitted to receiving money for carrying out outside activities on one occasion, and for trying to obtain additional work by preparing project proposals, without requesting the approval of ILO management, on a further two occasions". In the Investigation Report, the IAO stated that it had also found that the complainant had used materials (including copyrighted materials) belonging to the ILO without "prior approval from ILO management to use these materials to allow him to conduct these proposals for outside activities." It also noted that, according to an official of the project where the complainant worked, the proposal prepared by the complainant was "contrary to ILO's strategy in this area". Under the heading "Investigative Conclusions", it indicated, inter alia: "[b]ased on the free admissions of guilt made by [the complainant] above, IAO concludes that such actions are not in accordance with that expected of an ILO official and represent misconduct. Furthermore, [the complainant] risked causing reputational damage to the ILO."

4. The complainant was notified by a letter dated 17 July 2015 of the Director-General's proposal to impose on him the sanction of discharge in accordance with Article 12.8, paragraph 1, of the Staff Regulations. In that letter it was stated, inter alia, that "the IAO investigation revealed that [the complainant] had engaged in a number of outside activities without seeking the necessary approvals, which were in direct conflict of interest with [his] position as an ILO National Programme Officer and for which [he had] received significant sums of money. The seriousness of [his] actions is compounded by the fact that the content of the proposal prepared by [him] and submitted to the EU on behalf of [a Bangladeshi agro-processors' association] contradicted ILO policy in this field and has directly undermined the work of the Organization in Bangladesh."

5. The complainant filed a grievance with the JAAB against the proposal to impose the sanction of discharge against him. In its report dated 16 March 2017, the JAAB detailed its review of the complainant's grievance with regard to the basis for the decision to conduct an investigation, the investigation by the IAO, the proposed sanction in light of the context of the case and the complainant's comments thereon, and the proportionality of the sanction. The JAAB found that there was sufficient *prima facie* evidence to justify that an investigation be conducted and recognized that the complainant had "clearly admitted that: (1) without requesting prior approval from the Office, he had engaged in outside activities with [a Bangladeshi agro-processors' association] and had received a significant amount of money for developing a project proposal to obtain an EU grant for [that association]; and that (2) without having sought prior permission of the Office's management, he had tried to obtain additional work and money by submitting two training project proposals to [the aforementioned association]". The JAAB noted that the complainant had sought to justify his misconduct based on his job insecurity but that at the relevant time he in fact held a one-year fixed-term technical cooperation contract. With regard to the proportionality of the sanction, the JAAB stated as follows:

> "The Board considers that the absence of an intermediate sanction between censure and discharge in the Staff Regulations renders difficult the act of applying duly proportionate sanctions. The Board underlines the urgent need

> for the Office to adopt a broader range of sanctions, which would allow the Director-General to ensure that disciplinary sanctions are truly commensurate with the degree of misconduct. The Staff Regulations should offer a greater range of penalties, in order to allow the disciplinary authority to propose intermediate sanction(s) between a censure and a discharge, as is already the case in other national and international civil service organisations. [...] As regards the case at hand, and bearing in mind the seriousness of the substantiated breach of conduct, two Panel members consider that, while censure may be inadequate, sanctioning the [complainant] with discharge nonetheless outweighs the gravity of his acts. [...] A member of the Board [...] considers that the misconduct of the [complainant] was of such gravity that it warranted the proposed sanction."

6. In the 3 May 2017 letter communicating the Director-General's final decision to the complainant, the Deputy Director-General for Management and Reform stated, inter alia, that

> "[a]fter careful consideration of the report of the JAAB and the case file, the Director-General asked me to inform you that while duly noting the views of the members of the JAAB regarding the proportionality of the proposed sanction, he remains of the view that you have been responsible for serious breaches of the Standards of Conduct for the International Civil Service, the ILO Staff Regulations and relevant rules of the ILO accountability framework, including the Office Directive on outside activities and occupations. In particular, it has been established beyond reasonable doubt that you engaged in a number of unauthorized and amply remunerated outside activities, which were in direct conflict of interest with your position as an ILO National Programme Officer. Considering that the ILO has a policy of zero tolerance to dishonesty and unethical practices, the Director-General has determined that the sanction of discharge is entirely proportionate to the gravity of proven misconduct. Moreover, he considers that the explanations you have provided do not warrant any reconsideration of the proposed sanction."

7. The complainant's grounds for complaint are the following:

(a) flaws in the investigation;

(b) violation of due process and the right to be heard;

(c) failure to meet the burden of proof;

(d) disproportionality of the sanction; and

(e) failure to consider mitigating factors.

8. The complaint is receivable insofar as it challenges the 3 May 2017 decision to maintain the sanction of discharge.

Any claims related to the complainant's allegations of harassment are irreceivable for failure to exhaust the internal means of redress. The complainant was given ample opportunities and reminders to initiate the procedures available to him under the Staff Regulations in order to have his allegations of harassment investigated properly. As he has not (as of the date of the filing of this complaint) availed himself of those procedures, he cannot bring any claims or submissions relating to those allegations before the Tribunal at this time, as there is no final decision with regard to those claims, in accordance with Article VII, paragraph 1, of the Statute of the Tribunal.

9. The complaint is unfounded. The claims that the investigation was flawed, as the complainant was not informed in advance that he was under investigation, and also that the investigation did not properly consider his allegations of harassment as a mitigating factor, are unfounded. The investigation was carried out pursuant to the investigative mandate set out in Rule 14.10(b) of the Financial Rules, according to which "[t]he Chief Internal Auditor is responsible for internal audit, inspection, monitoring and evaluation of the adequacy and effectiveness of the Organization's system of internal control, financial management and use of assets as well as investigation of financial or administrative misconduct and other irregular activities. All systems, processes, operations, functions, programmes and activities within the Organization are subject to the Chief Internal Auditor's independent review, evaluation and oversight." Furthermore, the requirement spelled out in the Tribunal's case law that "an investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made" (see Judgments 2475, under 7, 2771, under 15, 3200, under 10, 3315, under 6, 3682, under 13, 3872, under 6, and 3875, under 3) was respected in the present case. At the outset, it is observed that there is no obligation to inform a staff member that an investigation into certain allegations will be undertaken (see Judgment 2605, under 11). The evidence shows that

the complainant was informed at the outset of the investigation interview that the interview related to allegations of misconduct and that he was given the opportunity to weigh the evidence presented, respond to the allegations, and to provide any evidence or name any witnesses to support his responses. He was also given the opportunity to submit any further evidence or information in his defence prior to the conclusion of the investigation. There is no principle in the Tribunal's case law which supports the complainant's claim that he should have received detailed information about the allegations prior to the investigation interview.

10. The complainant claims his right to be heard and his right to due process were violated because the ILO does not have a disciplinary committee. This claim is unfounded. The ILO procedure relating to disciplinary matters, summarised in Information Note, "Disciplinary cases 2014–15 ", IGDS No. 499 (Version 1), is as follows: an allegation of misconduct is referred to the IAO and if there is *prima facie* evidence warranting further investigation, an investigation is conducted by the IAO (this includes a fact-finding investigation, interviews, and giving the staff member an opportunity to weigh the evidence and respond to the allegations), and a detailed investigation report is then submitted to the Director-General, who refers the matter to the Treasurer and Financial Comptroller or HRD for further action as necessary, including a recommendation regarding the appropriate disciplinary sanction. If the Director-General endorses the recommended sanction, it becomes a proposal to apply a disciplinary sanction in accordance with Article 12.2, paragraph 1, of the Staff Regulations. Article 12.2 reads as follows:

"*Procedure for application of sanctions*

1. Before the application of any sanction other than warning, a proposal to apply it, stating the reasons for which it is made, shall be communicated in duplicate to the official concerned. The official shall initial and return one copy of the proposal within eight days of its receipt, adding to it any observations the official may wish to make.

2. Subject to the provisions of article 12.8 of the Staff Regulations, in the case of any sanction other than warning or reprimand the official shall have the right to refer the proposal, together with any observations made in accordance with paragraph 1 above to the Joint Advisory Appeals Board within one month from receipt of the proposal, said period to include the eight

days referred to in paragraph 1 above. Reference to the Joint Advisory Appeals Board may also be waived with the agreement of the official concerned.

3. The decision to apply a sanction shall be communicated in duplicate to the official concerned, who shall initial and return one copy. [...]"

In accordance with those provisions, the complainant was notified by a letter dated 17 July 2015 of the proposal to impose on him the sanction of discharge, in accordance with Article 12.8 of the Staff Regulations. He then exercised his right to add to the proposal any observations he wished to make and, more importantly, to have the matter reviewed by the JAAB in a proper adversarial proceeding prior to the Director-General taking the final decision. The complainant's right to be heard and to be afforded due process was fully respected.

11. The complainant claims that the ILO failed to prove the misconduct beyond a reasonable doubt, because it did not verify the exact amount of money received by him nor did it establish how his actions "undermined the ILO's strategy". This claim is unfounded. As the Tribunal said in Judgment 3649, under 14, "it is useful to reiterate the well settled case law that the burden of proof rests on an organization to prove the allegations of misconduct beyond a reasonable doubt before a disciplinary sanction is imposed. It is equally well settled that the 'Tribunal will not engage in a determination as to whether the burden of proof has been met, instead, the Tribunal will review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made'."

The allegations against the complainant were set out in the Investigation Report as follows:

(a) "It is alleged that [the complainant] was [the business development advisor of an EU Grant Scheme project for a Bangladeshi agro-processors' association] and a member of three other committees of [said association], and that he received a very high fee for developing a project proposal to obtain [for the association] an EU grant.

(b) [the complainant] is also alleged to have submitted two project proposals to [said association] whereby he would be paid for acting as a master trainer.

(c) It is further alleged that [the complainant] was involved in forging the signature of the Director of CO-Dhaka [...].”

The IAO investigation found that the first two allegations (as listed above) were substantiated by the evidence compiled as well as by the complainant’s free admission of guilt. The third allegation was not substantiated and was not raised again in any further proceedings. The Tribunal finds no flaw in the evaluation of the evidence by the Director-General in reaching the conclusion that the burden of proof was met. The complainant’s assertion that the exact amount of money paid was unverified does not negate the fact that he did receive payments for outside activities without authorization from the ILO. The complainant claims the assessment of his unauthorized outside activities being contrary to the ILO’s strategy was false and based solely on a statement made by the Chief Technical Adviser who “was new and had limited knowledge of the TVET project”. The Tribunal notes that the Director-General agreed with the Chief Technical Adviser’s assessment noting that the proposals prepared by the complainant and submitted to the EU on behalf of the agro-processors’ association contradicted ILO policy in the particular field. The Tribunal also notes the Director-General’s conclusion that the complainant’s unauthorized outside activities were in a direct conflict of interest with his position as an ILO National Programme Officer, and that he is the proper authority for deciding what could potentially be considered harmful to the ILO’s interests and/or reputation.

12. The complainant claims that the sanction was disproportionate to the misconduct and that “the Director-General’s discretion to determine the severity of the disciplinary measure could not be properly exercised” because the ILO Staff Regulations only provide for five possible sanctions: warning, reprimand, censure, discharge, or summary dismissal. This claim is unfounded. As the Tribunal stated in Judgment 3872, under 2, “[c]onsistent precedent has it that decisions which are made in disciplinary cases are within the discretionary authority of the executive head of an international organization and are subject to limited review. The Tribunal will interfere only if the decision is tainted by a procedural or substantive flaw (see Judgment 3297, under 8).

Moreover, where there is an investigation by an investigative body in disciplinary proceedings, the Tribunal's role is not to reweigh the evidence collected by it, as reserve must be exercised before calling into question the findings of such a body and reviewing its assessment of the evidence. The Tribunal will interfere only in the case of manifest error (see Judgment 3757, under 6)". The Tribunal finds no such flaw in the Director-General's 3 May 2017 decision, and considers that the imposed sanction, which was not the most severe sanction available to the Director-General, was not disproportionate.

13. The complainant claims that the ILO erred in not considering the mitigating factors, which he asserts "affected [his] judgment and led [him] to commit a fault". This claim is unfounded. The complainant relies on a long history of precarious employment under technical cooperation contracts; significant professional stress due to a conflictual relationship with his immediate supervisor; and his health issues. None of these can excuse the complainant's misconduct, in particular as the complainant was on a one-year fixed-term technical cooperation contract at the time, and the alleged conflictual relationship with his immediate supervisor has not been evaluated under the procedure for harassment grievances provided for in the Staff Regulations. They also cannot outweigh the aggravating factor that the complainant sought to conceal his misconduct, in particular by setting up a company for carrying out the outside activities in his wife's name and having payments made to her bank account, which indicates that he was conscious of the unlawfulness of his actions. The Director-General was entitled to conclude that the complainant's explanations did not mitigate the seriousness of the misconduct when choosing the appropriate sanction. In light of the above, the Tribunal finds the complaint to be irreceivable in part, and unfounded in the remainder, and decides that it must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ