

G. (No. 2)

v.

UNWTO

133rd Session

Judgment No. 4456

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms A. G. against the World Tourism Organization (UNWTO) on 24 January 2020 and corrected on 16 April, UNWTO's reply of 18 July, the complainant's rejoinder of 19 September and UNWTO's surrejoinder of 14 December 2020;

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 summarily dismiss her for misconduct.

Facts relevant to this case are to be found in Judgment 4455, also delivered this day, on the complainant's first complaint. Suffice it to recall that the complainant was Chief of the Information and Communication Technologies Programme at UNWTO, a grade P5 position, when the new Secretary-General took office on 1 January 2018. Following a review of the internal control systems conducted by an external consultancy firm, she was informed on 4 May that the Secretary-General, on the basis of the report of the consultancy firm, had identified sufficient factual basis indicating that she had engaged in unsatisfactory conduct. The Secretary-General provided details of the established facts that were contrary to applicable rules; these facts had occurred between 2009 and 2018. He indicated that the sanction of summary dismissal was envisaged and that,

in light of that envisaged sanction, the seriousness of the allegations, and her position as Chief of a highly sensitive security area, she was suspended with pay with immediate effect. He stressed that this was not a disciplinary measure. The complainant was asked to leave the premises immediately and to return any equipment belonging to UNWTO.

On 13 July 2018 the Secretary-General notified the complainant of his decision to summarily dismiss her on the grounds that there was ample and unequivocal evidence to sustain that she was guilty of a serious failure to observe the Standards of Conduct of the International Civil Service repeatedly placing UNWTO at legal, financial and reputational risk to benefit third parties. He detailed all the charges made against her. He gave her three working days to submit voluntarily her resignation in view of her 27 years of service and the possibility for her to retire with a “clean record” from the Organization. The complainant did not resign but submitted, on 13 August, a protest to the Secretary-General contesting her summary dismissal. He rejected the protest in September replying in detail to her arguments. She subsequently filed an appeal with the Joint Appeals Committee (JAC). In her detailed appeal of 13 December 2018 the complainant alleged in particular that the investigation and the disciplinary proceedings breached her due process rights, and that the disciplinary proceedings were also discriminatory, unfair and arbitrary. She denied each of the charges made against her, and contended that the sanction of summary dismissal was inappropriate and disproportionate. She produced the written testimony of the former Secretary-General (Mr R.), who certified that the actions she undertook were made within his knowledge and approval, as well as that of her supervisor. She asked to be reinstated, and if that proved impossible she asked to be paid compensation; she also sought material and moral damages.

Having heard the complainant, the JAC issued its report on 11 June 2019. It did not find any flaw with respect to the hiring of the consultancy firm or during the investigation and disciplinary proceedings. It concluded that almost all the charges were proven beyond reasonable doubt. It recommended to the Secretary-General to reconsider his original decision of 13 July 2018 with respect to one of the charges only. The JAC found that the decision to summarily dismiss the complainant should nevertheless be upheld in view of the seriousness of the charges, their cumulative effect and the position she held. It further recommended dismissing the claims for damages and costs. On 24 July the JAC replied

to the Human Resources' request for clarifications on issues raised in its report.

On 28 October 2019 the Secretary-General wrote a letter to the complainant to inform her of his decision to uphold the decision to summarily dismiss her. In his view, she had seriously breached the Detailed Financial Rules, the Ethical Standards set forth in the Procurement Manual, the Staff Regulations and the Standards of Conduct of the International Civil Service. The evidence was overwhelming and unequivocal that she had provided preferential treatment to some suppliers and internal confidential information without disclosing an existing conflict of interest. As recommended by the JAC, he dismissed one of the initial charges based on the evidence she had provided before the JAC. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to order her reinstatement to her post of Chief of the Information and Communication Technologies Programme, and to order paying her the loss in salary, benefits and emoluments (including her pension rights) she incurred from the date of her effective separation up to the date of her reinstatement, together with interest at 10 per cent; this amount should be reduced by the sums already paid to her. She also asks the Tribunal to order UNWTO to remove any mention of the "undue proceedings" from her personal file and to forward a copy of the judgment to all staff. In addition, she claims moral damages, material damages and costs. In the event that she is not reinstated, she seeks the payment of her lost salary, benefits and emoluments (including her pension rights) together with interest at 10 per cent from the effective date of her separation (18 July 2017) until the date of her retirement age at 65 (September 2025); this amount should be reduced by the sums already paid to her.

UNWTO asks the Tribunal to reject the complaint as unfounded. As the complainant duplicates the request for damages submitted in her first complaint concerning the decision to suspend her with pay, it "reminds" the Tribunal of the submissions it made with respect to her first complaint.

CONSIDERATIONS

1. The complainant had been the Chief of the Information and Communication Technologies Programme at UNWTO until her summary dismissal on 13 July 2018. She had then been working at UNWTO for 27 years. For a period of approximately eight years until 31 December 2017, the Secretary-General of the Organization was Mr R. On 1 January 2018 a new Secretary-General, Mr P., assumed the office.

2. The complainant requests an oral hearing under Article 12, paragraph 1, of the Tribunal's Rules. The Tribunal however notes that the parties have presented ample submissions and documents to permit the Tribunal to reach an informed decision on the case. The request for an oral hearing is therefore refused.

3. In this complaint, the complainant challenges her summary dismissal. Her case has salient features which arise in other proceedings considered by the Tribunal in this session concerning the summary dismissal of her supervisor, Mr G.B. (see Judgment 4453). To the extent that the features are common, some of the discussion in this judgment is repetitive of what is said in Judgment 4453.

4. Having regard to the Tribunal's ultimate conclusion and the reasons for it, it is unnecessary to detail and discuss the specifics of all the charges brought against the complainant which mostly were accepted as proved and founded the final decision to affirm the decision to summarily dismiss her. However, by way of general observation, the following can be said. The focus of the charges was the way in which the complainant discharged her obligations as Chief of the Information and Communication Technologies Programme. There were multiple instances in which her conduct was roundly criticised and said to be at odds with her obligations and the express requirements of her post as articulated in various documents internal to the Organization. An additional element was that her conduct involved impropriety. The divergence between what she did (or failed to do) and those requirements was a significant element in the Organization's conclusion that the complainant had engaged in misconduct sufficiently serious to warrant her summary dismissal. Mostly, but not exclusively, this conduct was engaged in during the period Mr R. was the Secretary-General.

5. As part of her case after the original decision to summarily dismiss her had been made but before her appeal against that decision had been finally resolved, the complainant furnished as evidence a statement from the former Secretary-General, Mr R., dated 12 November 2018 and another of 24 April 2019. In its reply UNWTO accepts that the statements were before the JAC when it considered the complainant's appeal and also before the Secretary-General when he made the impugned decision dismissing her appeal.

6. Several points were made in the first statement from the former Secretary-General. The first is that Mr R. had reviewed the charges against the complainant. Mr R.'s view, which he expressed in his statement, was that "[he noted] [the complainant] is not accused of misappropriation of UNWTO's resources. I should also add that none of the facts alleged against [the complainant] constitute, in my opinion, a misconduct liable to result in disciplinary action". Mr R. then explained his approach to management. The substance of the explanation was that in managing a small organisation, his focus had been on results and not necessarily procedures or process. He put it in terms of "[having] exercised [his] functions [...] to ease the implementation of specific bureaucratic procedural steps and processes".

7. Mr R. went on to say:

"In [the] case of [the complainant], I cannot appreciate misconduct in the facts that took place under my mandate. I must also clearly state that these actions were taken with my full knowledge and approval.

I find it therefore very strange to blame the targeted officer for putting the Organization at risk or misuse of funds, when she was simply implementing instructions from her Secretary General, or by her Director under my supervision, which I exercised within my full authority.

If anybody, therefore, has any questions about any decisions taken during my mandate as Secretary General, it is I and I alone that has to answer to them not the professional that carried out my instructions, and I stand perfectly ready to do so."

8. Mr R. concluded his statement by saying he stood ready to expand on his testimony should it be necessary either at the JAC or at this Tribunal. Mr R.'s second statement of 24 April 2019 descended into more detail and concluded with him listing the charges against the complainant and saying "I do not want to go into details of the charges against [the complainant], but it should be clear that I am ready and

prepared to engage in every charge and in details”. This was plainly an intimation that he would, if contacted, provide details supportive of the complainant’s defence of the charges. Mr R. was never interviewed nor asked to appear before the JAC.

9. In the impugned decision of 28 October 2019, the Secretary-General said nothing about this evidence. Nor was it expressly referred to by the JAC in its report of 11 June 2019 or its clarification reply of 24 July 2019. In its pleas, UNWTO relies on a passage in the JAC’s report of 11 June 2019 in which it spoke of “testimonies and allegations set out against other officials of the Organization for actions taken by the [complainant]” and that “these were unfounded” as indicating a consideration and a rejection of all the evidence of Mr R. It is not possible to accept that this is what the passage referred to and, in any event, it does not come to grips with the evidence.

10. Mr R.’s evidence contained several elements. The first was that he had reviewed the charges. The second element was that Mr R. was aware of the complainant’s conduct on which the charges were based. The third and related element was that Mr R. approved the complainant’s conduct. The fourth and again related element was that the complainant was implementing Mr R.’s instructions or the instructions of the Director of Administration and Finance. Mr R.’s account was mostly at a high level of generality and he may well have been unaware of some of the particulars of the complainant’s impugned conduct, such as undisclosed conflict of interest involving a friendship between her and the wife of the administrator of a company supplying IT services to UNWTO and the continuation of patterns of conduct after December 2017 which had occurred before that date. But no attempt was made to ascertain from Mr R. details of his knowledge, approval and instructions. There is no persuasive evidence in the material before the Tribunal to sustain a conclusion that Mr R.’s account was untrue.

11. In its pleas, UNWTO argues that instructions from a hierarchical superior do not constitute an accepted excuse for conduct which might be characterised as misconduct and, as the Organization seemingly argues on the facts of this case, the fact that some actions are approved by supervisors is not an excuse for the complainant’s own wrongdoing.

In support of these propositions, the Organization refers to Judgments 1977 and 3083. It is necessary to consider each judgment.

12. In Judgment 1977, the complainant had claimed and been reimbursed for duty travel in business class where in fact he had travelled in economy class and had pocketed the difference. This was fraud. Part of the complainant's case was that this practice was condoned by the organisation and widespread amongst the other organisation personnel. The Tribunal said there was no evidence of either and, in any event, the first proposition was incredible in the sense of implausible, and the second proposition was wholly irrelevant. This judgment does not establish the more broadly expressed propositions of UNWTO in the preceding consideration.

13. Judgment 3083 concerned a complainant who had been the Project Manager of a UNIDO project and was found to have acted highly inappropriately having regard to the position he held and was summarily dismissed. The actions in question included certifying a significant number of procurement actions in a way that circumvented, and was intended to circumvent, UNIDO's Financial Regulations and Rules and its Procurement Manual by entering multiple contracts with one supplier with the contrived result that the contractual value did not exceed a specified limit whereas, in aggregate, in fact it did. The decision to dismiss the complainant was set aside but only on the basis that unsustainable findings of irregularity had been made about one aspect of the complainant's conduct, namely events concerning bidding documents. The Tribunal said at consideration 20:

“Moreover, and even when regard is had to the fact that the finding with respect to irregular bidding documents must be set aside, it cannot be said either that the Director-General should have taken some less drastic course or that summary dismissal was disproportionate. The complainant was in a position of trust and charged with the responsibility of disbursing large sums of money. Failure to observe the Financial Regulations and Rules entailed risk to the [...] project and to the reputation of UNIDO and, necessarily involved a serious breach of trust.”

Thus, the Tribunal was saying that a member of staff whose duties included dealing with and managing the funds or other property of an organisation should adhere to normative legal or other instructional documents concerning how those funds and property should be disbursed and managed. Moreover, a failure to do so could well warrant summary

dismissal. Additionally, that failure could be characterised as a serious breach of trust.

14. On the specific question of supervisory approval, the Tribunal said in Judgment 3083 that it saw no merit in several of the complainant's arguments that a lesser penalty was warranted, including the fact that his actions had been approved by his supervisors. However, there was no prior summary of the facts or arguments by the Tribunal which suggested that the complainant's supervisors knew what the complainant had been doing was in breach of UNIDO's Financial Regulations and Rules and its Procurement Manual and were aware of the purpose for which it was being done. The most that can be said is that the complainant's supervisors may have been aware of the outcome of his conduct and it was only in that sense that his actions had been approved.

15. In one of the Tribunal's earlier reported cases, Judgment 203 at consideration 2, the principle of proportionality was discussed in the context of the imposition of the disciplinary sanction of summary dismissal. The Tribunal noted that the imposition of the disciplinary sanction of discharge or summary dismissal could cause serious harm to the staff member and her or his family. The Tribunal observed that it was necessary for the penalty to be proportionate to the fault and that, in that case, the complainant's misconduct could not be evaluated without taking into account the extenuating circumstances.

16. In the Tribunal's view, Mr R.'s evidence has a material bearing on the degree of overall culpability of the complainant. Importantly, the JAC viewed the sanction of summary dismissal as proportionate given, as one reason, what it described in its report of 11 June 2019 as the "accumulative effect" of the charges. A similar approach was adopted by the Secretary-General in the impugned decision who spoke, in the conclusion of the letter of 28 October 2019, of the complainant having repeatedly breached the rules and consistently breaching rules. The fact that Mr R., the then Secretary-General, or the Director of Administration and Finance approved most of the complainant's conduct ameliorates her fault and establishes an important extenuating circumstance. It is simply insufficient to say, as UNWTO does in its reply, that both the present Secretary-General and the JAC reviewed the evidence from Mr R. and "rightly rejected [it]". The failure of the complainant to

discharge her duties in the manner specified in the charges had to be viewed in the context of the chief executive officer of the Organization, Mr R., knowing mostly how those duties were being performed, approving of how those duties were being performed and, at least in some respects, having instructed the complainant to perform them.

17. The Tribunal accepts that, generally, the conduct and attitude of a hierarchical superior does not exculpate a member of staff who has engaged in misconduct even though it is approved by that superior. It also accepts, as decided in Judgment 3083, that a member of staff whose duties included dealing with and managing the funds or other property of an organisation should adhere to normative legal or other instructional documents concerning how those funds and property should be disbursed and managed. Moreover, a failure to do so could well warrant summary dismissal. Additionally, that failure could be characterised as a serious breach of trust. But these general observations must be viewed in the context of a particular case. Probably most unusually, in this case most of the complainant's conduct foundational to the charges and the decision to summarily dismiss, was approved or otherwise endorsed at the highest levels of UNWTO. The failure of the Secretary-General to pay any regard to Mr R.'s evidence was a serious flaw in the decision to summarily dismiss the complainant. That decision should be set aside.

18. This leads to the question of relief. At the outset it should be made clear that the damages the complainant had earlier sought as arising from her suspension (which was lawful: see Judgment 4455) do not fall for consideration in these proceedings. The complainant seeks an order of reinstatement and material damages concerning loss of income from the date of dismissal or, in the alternative, material damages if she is not reinstated. She also seeks moral damages and costs. Having regard to the circumstances in which she was summarily dismissed, it is extremely unlikely a satisfactory working relationship could be established between the complainant and those who facilitated that dismissal, including the incumbent Secretary-General (see Judgment 4310, consideration 13). Accordingly no order of reinstatement should be made.

19. The material damages the complainant seeks, if not reinstated, comprise the loss of income and associated losses from the time of her separation until the date she otherwise would have retired at the age of 65, namely September 2025.

20. In its pleas, UNWTO did not come to grips with any of the specifics of the complainant's claims for material damages. The amounts are potentially significant. It is desirable the Tribunal has the benefit of as full an account from the complainant as possible of the amounts claimed and their justification, and submissions from the Organization responding, in detail, to each element of the claim for material damages and the quantification of the amount claimed. An order will be made to facilitate this process. However, the Tribunal should observe that the complainant may well have been found guilty of the misconduct alleged, even taking into account, in a fair and balanced way, the evidence of the former Secretary-General. That may have led to a sanction that had financial consequences for the complainant. It would be appropriate at the end of the day to discount material damages to which the complainant might be entitled for this possibility.

21. The complainant is entitled to moral damages for the undoubted trauma and associated distress arising from and associated with her unlawful summary dismissal after 27 years of service at UNWTO and the consequential need for her to relocate to Mexico. In the circumstances of this case, those damages are assessed in the sum of 50,000 euros.

22. The complainant is entitled to costs which are assessed in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The decision of 13 July 2018 to summarily dismiss the complainant and the decision of 28 October 2019 to dismiss her appeal are set aside.
2. In furtherance of what is said in consideration 20 above, the complainant shall deliver to UNWTO her claim for material damages, UNWTO shall reply within 60 days and within that period UNWTO shall pay to the complainant such sums, if any, it admits to be due. In the event that the complainant's claim for material damages is not satisfied by this process, the parties are to forward to the Tribunal their respective documents to enable the Tribunal to finally determine and assess such material damages as may be payable.

3. UNWTO shall pay the complainant 50,000 euros moral damages.
4. UNWTO shall pay the complainant 8,000 euros costs.

In witness of this judgment, adopted on 29 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ