

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

H. (No. 5)

v.

ITU

135th Session

Judgment No. 4578

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr K. H. against the International Telecommunication Union (ITU) on 20 January 2022, ITU's reply of 17 March, corrected on 1 April, the complainant's rejoinder of 19 July and ITU's surrejoinder dated 19 August 2022;

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 challenges the decision not to investigate his allegations of harassment.

Facts relevant to this case are to be found in Judgments 4515 and 4516 on the complainant's first and second complaints, delivered in public on 6 July 2022. Suffice it to recall that, on 11 September 2020, the complainant, who had been suspended from duty with full pay as of 14 October 2019 pending an investigation into allegations of misconduct against him, submitted a complaint alleging harassment by various ITU staff members, particularly his supervisor, as well as institutional harassment pursuant to Service Orders Nos. 19/08 and 05/05 dealing with the ITU policy on harassment and abuse of authority. He requested that his complaint be investigated "promptly and thoroughly". On 12 November he was informed that, following a recommendation from

the Ethics Officer, the Secretary-General had decided that the matter would not be investigated and thus would be closed. The following day, he was notified of the conversion of his ongoing suspension with full pay into suspension without pay.

On 30 March 2021 the complainant, by way of his counsel, submitted a new formal complaint alleging harassment and abuse of authority by the Secretary-General. Being unsure to whom a complaint against the Secretary-General was to be sent, he addressed it to the Deputy Secretary-General, with copy to the Chairman of the Independent Management Advisory Committee and the Chair of ITU's Council. His complaint was referred to the Ethics Officer, who informed him on 19 April that the Deputy Secretary-General had decided that no investigation would be undertaken and that the case was closed. On 22 April, the complainant submitted a request for reconsideration to the Secretary-General, which was rejected by the Deputy Secretary-General on 9 June. He appealed this decision on 15 June 2021 requesting inter alia that a new formal investigation regarding his harassment complaint be launched pursuant to Service Order No. 19/08, that he be compensated for the moral injury he claimed to have suffered and, alternatively, that he be recognized as a victim of harassment and abuse of power.

On 19 November 2021 the Appeal Board issued its report. It concluded that it did not have the mandate to investigate a harassment complaint. It found that the actions undertaken by the Deputy Secretary-General to handle the case were in line with the applicable rules and that the decision to close the case after assessment and recommendation by the Ethics Officer was lawful. It rebutted any kind of conflict of interest by the Deputy Secretary-General, whom it considered as having acted with impartiality and integrity. It recommended that the appeal be dismissed. By a decision of 1 December 2021, the complainant was informed that the Deputy Secretary-General had accepted the Appeal Board's recommendation. This is the impugned decision in the present complaint.

The complainant asks the Tribunal to set aside the impugned decision with all legal effects flowing therefrom, to order that the ITU Secretary-General, the Deputy Secretary-General and any other ITU staff member subordinate to the Secretary-General be barred from taking any final administrative or disciplinary decision affecting him and that any and all of such decisions be referred to and taken by an appropriate party who is not in any conflict of interest, to revoke his suspension without pay with immediate effect and to order retroactive payment of his salary, pension and all other entitlements, benefits and emoluments from 13 November 2020 to present, with interest at 5 per cent per annum through the date such payments are made in full. He further requests reinstatement to his post with immediate effect, with full pay and benefits and, alternatively, repatriation to his home country together with a full household shipment with immediate effect until such time as the investigation has been completed. In the event that he is not immediately reinstated, he asks the Tribunal to order that he be paid as from 13 November 2020 all salary, benefits, pension contributions, step increases, entitlements and emoluments that he would have received up to and through his statutory date of retirement on account of de facto constructive dismissal of his appointment. He also seeks an award of minimum 250,000 United States dollars by way of moral and exemplary damages “due to the immense pressure and emotional difficulty the irregular actions of ITU has had on [him] and his family”, with interest at the rate of 5 per cent per annum from 14 October 2019 through the date remedies are paid in full, as well as costs and any other relief as deemed fair, just and necessary.

ITU asks the Tribunal to dismiss the complaint in its entirety.

In his rejoinder, filed shortly after the Tribunal issued Judgments 4515 and 4516 on his first two complaints, the complainant further requests that the matter be remitted to ITU so that his harassment complaint can be investigated within a timeframe set by the Tribunal and/or that an order be made for a new independent external investigation to be undertaken within three weeks in accordance with the applicable legal framework. He also seeks costs for the internal appeal procedure in an amount of 3,500 Swiss francs and quantifies the amount of legal fees

for the present proceedings up to 10,500 Swiss francs. Finally, he seeks an award of 250,000 Swiss francs by way of moral and exemplary damages in order to sanction bias, ill will, malice, bad faith and other improper purposes.

In its surrejoinder, ITU maintains its claims and states that, should legal costs be awarded, they must cover reasonable legal expenses necessary to bring the case forward, not superfluous services or excessive fees.

CONSIDERATIONS

1. In this complaint, the complainant raises issues and seeks relief which he raised in other complaints and internal appeals he has lodged. However, this complaint is concerned only with the formal complaint which he lodged against the Secretary-General on 30 March 2021 alleging harassment and abuse of authority and the subsequent related procedures.

2. ITU's request for the joinder of the present complaint with the complainant's first and second complaints is moot as those complaints were considered in Judgments 4515 and 4516, respectively. ITU's request for the joinder of the present complaint with other complaints which the complainant subsequently filed (which the complainant opposes) is also rejected as they do not raise the same or similar legal issues. For reasons which will become obvious in this judgment, it is unnecessary to consider the complainant's request for oral proceedings.

3. On 15 June 2021, the complainant lodged his internal appeal underlying the present complaint against the Deputy Secretary-General's decision (communicated to him by the Ethics Officer on 19 April 2021) not to launch an investigation into his 30 March 2021 harassment and abuse of authority formal complaint against the Secretary-General and to close the case. In that 30 March 2021 complaint, the complainant's counsel reminded the Deputy Secretary-General, to whom the complaint was addressed, of the requirement in paragraph 15 of Service Order

No. 19/08 to appoint one or several external investigators, entrust the inquiry to in-house officials with investigation functions or set up a commission of inquiry to conduct a formal investigation into the allegations in the complaint within three weeks of the receipt of the said complaint.

4. The Ethics Officer stated, in the 19 April 2021 communication to the complainant, that the decision to close the case was made following recommendations from the Ethics Office “which ha[d] found that the allegations [of harassment and abuse of authority] appear[ed] to be unfounded when checked against information and records available [...]”. In recommending that the Secretary-General dismiss the complainant’s internal appeal against the decision of 9 June rejecting his request for consideration of the 19 April decision, the Appeal Board stated that Service Orders Nos. 19/08 and 19/10 should be implemented with the necessary flexibility required by the specific context of the case and with the aim of ensuring the best protection of the rights of all the parties involved. The Board further stated that instructing the Ethics Officer to perform an initial assessment of the complaint and reaching the conclusion not to open an investigation because the allegations appeared unfounded did not prejudice the rights of the complainant. The Board concluded that automatically opening any investigation into allegations of harassment when they appear to be unfounded, would, among other things, be an unnecessary drain on resources and time. This analysis and the recommendation to close the complainant’s harassment complaint were wrong, as was the Deputy Secretary-General’s decision to endorse them in the decision of 1 December 2021, which the complainant impugns.

5. Paragraph 15 of Service Order No. 19/08 relevantly states that “[w]ithin three weeks of receiving a complaint in writing, the Secretary-General must launch a formal investigation. He may appoint one or several external investigators, entrust the inquiry to in-house officials with investigation functions or set up [a] commission of inquiry convened for the specific case in question [...]”. In considerations 7 and 8 of Judgment 4516, in circumstances that are relevantly identical to those in the present case, the Tribunal noted that paragraph 15

contains the word “must” which, in its ordinary meaning, mandated the Secretary-General to order the conduct of an investigation by an investigator or investigators specified in the paragraph, within three weeks of receiving a complaint in writing. Stating that ITU could not ignore its own clear rule, the Tribunal concluded that, by closing that harassment complaint before an investigation was conducted, the Secretary-General contravened paragraph 15 of Service Order No. 19/08. Similarly, in the present case, the Deputy Secretary-General erred when, in the impugned decision, he endorsed the Appeal Board’s recommendation to dismiss the complainant’s internal appeal against the decision to close the 30 March 2021 harassment complaint before an investigation was conducted. The impugned decision of 1 December 2021 will therefore be set aside.

6. ITU contends that the applicable provision in the present case was not paragraph 15 of Service Order No. 19/08 but paragraph 7 of Service Order No. 19/10, which states as follows:

“Where allegations are raised involving potential misconduct by [the] Secretary-General, the matter will be referred by the Chairman of the Independent Management Advisory Committee (IMAC) to the Chair of [the] Council for decision on how to proceed.”

7. ITU submits, in effect, that there is nothing to support the complainant’s contention that this paragraph is to be read with paragraph 15 of Service Order No. 19/08 to require the Council’s Chair to follow the latter provision which mandates that a formal investigation be launched into the allegations of harassment and abuse of authority against the Secretary-General. ITU notes that the two subject provisions are inserted in two different sets of rules, which it states do not include cross-references. It accordingly submits, in effect, that paragraph 7 of Service Order No. 19/10 in extremely open language describes that the decision by the Chair of the Council on how to proceed is not constrained by the mandate in paragraph 15 of Service Order No. 19/08 to launch an investigation where misconduct allegations are made against the Secretary-General because in such a case paragraph 7 of Service Order No. 19/10 takes precedence over paragraph 15 of Service Order No. 19/08.

8. The Tribunal rejects the foregoing submissions as, in the first place, there is nothing which renders the subject provisions mutually exclusive. Service Order No. 19/10, which was promulgated subsequently to Service Order No. 19/08 did not abrogate or supersede it. In the second place, it is noteworthy that whilst Service Order No. 19/10 provides general guidelines for the process of administrative investigations, Service Order No. 19/08 specifically sets out “the procedures for dealing with cases of harassment, including [...] abuse of authority”, which are the allegations made in the complaint he submitted against the Secretary-General on 30 March 2021. Without exploring the question how the complaint of harassment was considered by the Chair of the Council, it appears that the Deputy Secretary-General was entrusted with the task of determining the complaint. The Deputy Secretary-General could not ignore paragraph 15 of Service Order No. 19/08 and wrongly informed the complainant, through the Ethics Officer’s communication of 19 April 2021 that the matter was closed without a formal investigation. The Deputy Secretary-General further erred when, in the impugned decision, he endorsed the Appeal Board’s recommendation to dismiss the complainant’s internal appeal against the decision to close the 30 March 2021 harassment complaint before an investigation was conducted. Accordingly, the initial decision of 19 April 2021 and the impugned decision of 1 December 2021 will be set aside.

9. Having set aside the impugned decision, the Tribunal will remit the case to ITU in order that the complainant’s harassment complaint can be investigated in accordance with the applicable rules and the Tribunal’s case law. The investigation shall commence within sixty days of the public delivery of this judgment.

10. As the complainant has not substantiated his allegations that the decision to close the case was taken for an improper purpose amounting to abuse of authority (see, for example, Judgments 3939, consideration 10, and 3172, consideration 16) or that it was based on bias (see, for example, Judgment 4010, consideration 9); that it was tainted by personal prejudice (see, for example, Judgment 3912, consideration 13) or bad faith (see, for example, Judgment 3902, consideration 11), there is no basis on

which to grant exemplary damages which he claims (see, for example, Judgment 3092, consideration 16).

11. The complainant's request for moral damages for the delay in the initiation of an investigation is rejected as he has not articulated the adverse effects which the delay in ordering an investigation had upon him to warrant an award of damages (see, for example, Judgment 4316, consideration 20).

The Tribunal will however award him 8,000 Swiss francs in costs for the present proceedings. Based on the complainant's counsel's explanation that the complainant was ill and could not defend himself, as well as the medical certificates he provides stating that the complainant experienced difficulties concentrating and with his memory, the Tribunal concludes that there were exceptional circumstances for awarding costs to him in respect of the internal appeal proceedings. Accordingly, ITU will be ordered to reimburse the costs the complainant incurred up to 3,500 Swiss francs upon his presentation of the related receipts. The Tribunal notes that Staff Rule 11.1.1(1), which provides that "[a] staff member shall at all times during the internal appeal procedure be entitled to be assisted by a person of his/her choice, but not to any form of representation", appears to prohibit representation in internal appeal proceedings. However, in this case that provision was ignored by the organization.

DECISION

For the above reasons,

1. The impugned decision, dated 1 December 2021, is set aside.
2. The matter is remitted to ITU in accordance with consideration 9 of this judgment.
3. ITU shall pay the complainant costs in the amount of 8,000 Swiss francs.

4. ITU shall also pay the complainant the costs he incurred in the internal appeal proceedings as indicated in consideration 11 of this judgment.
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 Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 28 November 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

CLÉMENT GASCON

DRAŽEN PETROVIĆ