Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

E.

v.

IOM

137th Session **Judgment No. 4745**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Y. E. against the International Organization for Migration (IOM) on 14 June 2021, IOM's reply of 8 October 2021, corrected on 14 October, the complainant's rejoinder of 13 December 2021, IOM's surrejoinder of 16 March 2022, the complainant's additional submissions of 27 April 2022, IOM's comments thereon of 31 August 2022, the complainant's further additional submissions of 5 October 2022 and IOM's final comments of 24 January 2023;

Considering the document produced by IOM on 7 November 2023 at the Tribunal's request, the complainant's comments thereon dated 10 November 2023 and IOM's final observations of 14 November 2023;

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 to discharge him after due notice.

The complainant is an Egyptian national with 35 years continuous experience in Safety and Security, Investigations and Field Operations within the United Nations system. On 1 November 2019, he was recruited by IOM on an inter-agency transfer, serving as Senior Field

Security Officer at grade P-4 at the duty station in Tripoli, Libya. He effectively began his assignment on 11 November, after relocating to Tripoli from his previous post with the United Nations Department of Safety and Security (UNDSS) in Tunis, Tunisia. On 26 November, he travelled to Manila, Philippines, to attend the IOM Office of Security and Safety annual global retreat. Upon the conclusion of the retreat on 6 December 2019, he returned to Tunis and undertook his duties on a remote basis, due to limitations placed by UNDSS on the presence of international staff in IOM Libya because of the prevailing security situation.

On 28 February 2020, the complainant informed the Chief of Mission (his supervisor) that he had been selected for a position with UNDSS in Islamabad, Pakistan, a family duty station, which he intended to accept for personal reasons. The Chief of Mission acknowledged receipt of this information on 29 February and expressed his support. On 20 April 2020, Ms G., Human Resources Officer in IOM Libya, asked the complainant to provide an official resignation letter to the Chief of Mission in order to allow separation formalities to commence in connection with his transfer to UNDSS.

On 2 May 2020, the complainant sent an email to the Chief of Mission, copied to Ms G., requesting approval for "some [annual] leave days" prior to his departure to UNDSS Pakistan later that month. Ms G. asked him to provide the separation date from IOM and advised him that, if he was planning to go on annual leave and proceed to transfer, he would need to do "Mission clearance" before leaving. On 4 May, the complainant explained that, due to issues related to the COVID-19 pandemic, his transfer to UNDSS would be delayed for a month and that, pending the finalization of all administrative and travel formalities by Human Resources Management (HRM) and UNDSS Headquarters, "[his] current plan [was] to start [his] leave and to return to the [M]ission area by mid-May 2020". He did not receive any confirmation that his annual leave had been formally granted.

On 8 May, the complainant travelled to Egypt. He then informed the Chief of Mission and Ms G. that he had arrived in Cairo, Egypt – his home country – that very day and would continue to work remotely

from there and follow up on work-related issues and online meetings as required. He also informed them that the process of his inter-agency transfer was in progress. On 9 May, the Chief of Mission requested him to send his signed travel authorization, medical clearance and other necessary supporting documentation regarding his travel to Cairo. The complainant responded on the same day, apologizing "for any misunderstanding that may have [been] caused by [his] personal travel to Egypt" and referring to his previous email of 2 May. He stated that he "was under the impression that [their previous] exchanges were sufficient to explain [his] current [annual leave] plans and current situation". He further stated that he intended to submit the absence request officially through the Integrated Process and Resource Management System (PRISM) once the whole absence period was confirmed. He requested approval for his absence from 9 May to 17 May, this latter being the date of his proposed departure from Cairo. This request was refused on 11 May 2020.

Meanwhile, Ms G. had informed HRM of the complainant's situation and had requested information about the appropriate course of action to be taken. The Policy Officer of HRM had indicated that additional advice should be sought from the Office of Legal Affairs (LEG), including the possibility of pursuing disciplinary action. After receiving the relevant information, LEG informed the Chief of Mission of the applicable procedure under Instruction IN/275 of 1 August 2019, entitled "Reporting and Investigation of Misconduct Framework", requiring the referral of the allegations to the Office of the Inspector General (OIG) for preliminary assessment.

By memorandum of 14 May, OIG informed LEG of its conclusions that sufficient evidence existed to directly refer the case to it for consideration. Following its review of the OIG preliminary assessment and all available evidence, and in coordination with HRM, LEG determined that the initiation of a disciplinary process was warranted and prepared the formal charges letter, which was sent to the complainant on 22 May. Specifically, it was alleged that the latter had left his post and his duty station without authorization with no apparent intention to return in light of his upcoming inter-agency transfer to

UNDSS Pakistan. The complainant submitted his comments on 1 June 2020, rejecting the charges against him and apologizing for any "unintentional error or miscommunication".

By letter of 12 June, the complainant was informed by the Director, HRM, that the charges were deemed to be established and that the Deputy Director General had decided to impose on him the disciplinary sanction of discharge after due notice. His last day of service would be 11 July 2020, which is the date on which he separated from IOM.

On 17 June, the complainant submitted a request for review of this decision requesting that it "be revoked with immediate effect", that he be paid his "salary, pension, and all other payments and emoluments from 12 June 2020 to present, with interest [at the rate of] 5 [per cent]", as well as all the salary, entitlements and emoluments he would have received at his post with UNDSS for the length of his "would-be contract period, had [he] not been erroneously dismissed", that IOM be ordered to convey to UNDSS the "error" of having dismissed him so that he may attempt once again to gain employment with the latter and that he be compensated in an amount of 50,000 United States dollars for the moral injury he allegedly suffered. The request was rejected on 15 September 2020.

On 9 October 2020, the complainant lodged an appeal reiterating substantively the claims formulated in his request for review. After having heard the parties, the Joint Administrative Review Board (JARB) issued its report on 3 March 2021. It recommended that the appeal be dismissed as without merit. Specifically, it concluded that the complainant had left the duty station in Libya without approved annual leave or approved working modalities, against IOM's applicable rules, that the Organization had met its burden of proof with regard to the finding of misconduct and that the sanction imposed was proportionate and consistent with actions previously taken by IOM in comparable cases. By letter of 24 March 2021, the complainant was informed of the Director General's decision to endorse the JARB's recommendation. That is the impugned decision.

In his complaint before the Tribunal, the complainant asks:

– that the impugned decision be set aside;

– that he receives the same payments sought in his request for review and in his appeal, (i.e. that he be paid his "salary, pension, and all other payments and emoluments from 12 June 2020 to present, with interest [at the rate of] 5 [per cent]", as well as all the salary, entitlements and emoluments he would have received at his post with UNDSS for the length of his "would-be contract period, had [he] not been erroneously dismissed", that IOM be ordered to convey to UNDSS the "error" of having dismissed him so that he may attempt once again to gain employment with the latter and that he be compensated in an amount of 50,000 United States dollars for the moral injury he allegedly suffered); and

– that he be awarded no less than 7,000 Swiss francs in costs.

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

CONSIDERATIONS

1. The following discussion proceeds against the background already set out in the facts described above. The complainant contests the disciplinary sanction of discharge after due notice which was imposed on him based on an assessment of his behaviour as serious misconduct. The complainant's serious misconduct was described in the disciplinary decision as follows:

(i) he departed his duty station without prior authorization, and with no apparent intention to return in light of his upcoming inter-agency transfer to the United Nations Department of Safety and Security (UNDSS) in Pakistan;

(ii) he left the IOM Mission in Libya without a Senior Field Security Officer (as he was the only one) during a difficult period due to local fighting and the global COVID-19 pandemic, in circumstances where it was not known when and if he would be able to return; and

(iii) he worked remotely from Cairo, Egypt, without prior approval for that flexible working arrangement.

According to the Organization, the complainant's role required "significant in person engagement" and working from home was not an option; in so doing, he put the IOM Mission in Libya at risk. The Organization held that the complainant, in taking these actions, had placed his own interests before those of the Organization, in violation of IOM's internal rules and in breach of the duty of integrity incumbent upon him as an international civil servant and that this had called into question his continued suitability for service.

The complainant contends, in brief, that the disciplinary proceedings were affected by procedural flaws, that his behaviour did not amount to serious misconduct and that, in any event, the sanction was disproportionate and tainted by bias and prejudice against him.

2. The complainant firstly alleges that the impugned decision was affected by procedural flaws, namely:

(i) the disciplinary proceedings breached "all the rules and jurisprudential principles", and, more specifically, the rules enshrined in Instruction IN/275 entitled "Reporting and Investigation of Misconduct Framework";

(ii) the entire disciplinary process was managed by the Director, Human Resources Management (HRM) alone, without due intervention of the Office of the Inspector General (OIG) and of the Office of Legal Affairs (LEG);

(iii) the Director, HRM, was not competent either to conduct the disciplinary process by himself or to impose the disciplinary sanction; and

(iv) the charges letter contained a mistaken reference to Instruction IN/90 of 22 August 2007 (entitled "Policy for a Respectful Working Environment").

First, it is appropriate to note that the mistaken reference, made in the formal charges letter to Instruction IN/90, was acknowledged by the Organization in the disciplinary decision of 12 June 2020, and in the

review decision of 15 September 2020. This mistaken reference had no bearing on the outcome of the process, and is therefore irrelevant.

3. In order to address the remaining pleas summed up in consideration 2 above, it is appropriate to quote the relevant Staff Regulations and Rules.

According to Rule 10.4 of the IOM Unified Staff Regulations and Rules, in the version in force as from 1 January 2020:

> "**Due process**
>
> 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. [...]"

According to paragraphs 18, 20, 59, 60, 65 and 66 of Instruction IN/275:

> "18. The investigative process may comprise two phases: a preliminary assessment and an investigation. [...] OIG conducts a preliminary assessment of all allegations of misconduct [...] and, when circumstances warrant, conducts an investigation into the alleged misconduct [...]
>
> [...]
>
> 20. In cases where evidence of misconduct is found at the preliminary assessment stage and OIG does not consider that an investigation is warranted, OIG shall refer the case directly to LEG which will, on the basis of the preliminary assessment and all available evidence and in coordination with HRM, consider and advise the [Director General (DG)] or [the Deputy Director General (DDG)], as appropriate, on possible disciplinary measures, unless LEG considers that an investigation is in the interest of IOM.
>
> [...]
>
> 59. If [...] LEG considers that the initiation of a disciplinary process is warranted, LEG will prepare a charges letter in coordination with HRM pursuant to which the staff member will be formally charged.
>
> 60. The staff member is notified in writing of the formal charges and is normally given ten (10) calendar days to respond to the charges.
>
> [...]

> 65. If, following the staff member's response to the charges, LEG is of the view that the staff member's conduct warrants recommendation of a disciplinary measure against such staff member LEG will, in consultation with HRM [...], determine which measure is appropriate for recommendation. LEG shall submit a recommendation on disciplinary measures to the DG or the DDG, as appropriate, for his or her consideration and decision.
>
> 66. The decision to impose a disciplinary measure [...] shall be notified in writing by the Director, HRM, to the staff member. [...]"

The documentary evidence in the file reveals that:

(i) the complainant was notified by a charges letter issued on 22 May 2020 by the Director, HRM;

(ii) he was given ten calendar days to respond to the charges letter;

(iii) he submitted his response on 1 June 2020; and

(iv) he was notified by the Director, HRM, of the disciplinary sanction of discharge after due notice, imposed on him by the Deputy Director General's 12 June 2020 decision.

In its reply, the Organization submits that, prior to the issuance of the charges letter:

(i) OIG conducted a preliminary assessment and concluded that there was sufficient evidence to substantiate the allegations against the complainant without the need for an investigation;

(ii) therefore, OIG referred the matter directly to LEG for its review and appropriate action; and

(iii) LEG determined that disciplinary proceedings should be commenced and prepared charges to be issued to the complainant, conveyed under cover of the 22 May 2020 charges letter from the Director, HRM.

The Organization also submits that LEG reviewed the complainant's response to the charges letter and took the view that his conduct warranted the recommendation of a disciplinary measure. Following consultation with HRM on the appropriate sanction, LEG submitted a recommendation to the Deputy Director General, which was considered and duly approved.

The Organization has disclosed the OIG's 14 May 2020 preliminary assessment, by appending it to its reply before the Tribunal.

The Tribunal holds that the OIG's preliminary assessment is not strictly part of the disciplinary proceedings (see, in this connection, Judgment 3944, consideration 4), and Instruction IN/275 does not provide for its disclosure. Therefore, its non-disclosure does not vitiate the disciplinary process. In any case, a complainant is entitled to receive the preliminary assessment, if she or he requests it (see Judgment 4659, consideration 4). In the present case, the complainant did not request the disclosure of the OIG's preliminary assessment either in his request for review or in his internal appeal. He raised this issue for the first time before the Tribunal and the Tribunal is satisfied that, since the Organization has disclosed it in its submissions before it, the complainant has had ample opportunity to comment on it.

Regarding LEG's recommendation on disciplinary measures, the Tribunal notes that Instruction IN/275 contains no provision requiring the disclosure of this recommendation to the subject of the disciplinary proceedings. Nevertheless, pursuant to paragraph 20 of Instruction IN/275, LEG's recommendation is a mandatory step in the disciplinary proceedings and, as such, it is plainly foundational to the disciplinary decision taken at the end of those proceedings.

In the present case, the complainant never requested the disclosure of LEG's recommendation, either in his request for review or in his internal appeal. Nor did he request the disclosure of that recommendation before the Tribunal. IOM indicated in its reply that it was willing to produce LEG's recommendation if requested by the Tribunal. After an order by the Tribunal, the Organization has provided the Tribunal with a document (an email) sent by LEG on 12 June 2020, recommending the disciplinary measure of discharge after due notice.

Contrary to the complainant's allegation that the Deputy Director General failed to seek LEG's advice, the Tribunal is satisfied that the Organization did, as demonstrated by the document provided by the Organization, albeit in a redacted version. The Tribunal does not accept the complainant's assumption that the author of the document was not LEG. There are no reasonable grounds to doubt that the Organization

provided the Tribunal with the original document and that its author was LEG. This document recommended the disciplinary measure of discharge after due notice, the one adopted by the disciplinary decision.

In these circumstances, the complainant's arguments concerning a procedural flaw based on the absence of LEG's involvement in the disciplinary process are rejected.

Moreover, pursuant to paragraphs 20, 59 and 65 of Instruction IN/275 cited above, the actions of OIG and LEG are taken in coordination with HRM. Therefore, the complainant's allegation that the Director, HRM, was not competent, is unfounded. The Tribunal adds that, contrary to the complainant's contention, the 12 June 2020 decision to impose a disciplinary sanction was adopted by the Deputy Director General, and not by the Director, HRM, who merely notified the complainant of the Deputy Director General's decision (paragraph 12 of the said decision, reads as follows: "the Deputy Director General has decided to impose on you the disciplinary measure of discharge with due notice").

In the present case, the complainant:

– was notified of the charges against him;
– had ample opportunity to comment on them;
– was then notified of the decision to impose on him a disciplinary measure;
– submitted on 17 June 2020 a request for review pursuant to paragraph 5 of Instruction IN/217 Rev.3 of 20 December 2019 (entitled "Request for Review and Appeal to the Joint Administrative Review Board (JARB)"), to which the Organization replied on 15 September 2020;
– lodged an internal appeal; and
– in addition, he was provided with the OIG's preliminary assessment, even though only before the Tribunal.

Therefore, the Tribunal is satisfied that the disciplinary proceedings were conducted in compliance with the applicable internal rules (Staff Rule 10.4, Instructions IN/275 and IN/217), and consistent with the due

process and the adversarial principles (see, for example, Judgments 4011, consideration 9, 3872, consideration 6, and 2771, consideration 15).

In his rejoinder, the complainant adds that a mere preliminary assessment was insufficient to take a just decision and that a proper investigation should have been conducted. The Tribunal notes that, pursuant to paragraphs 18 and 19 of Instruction IN/275:

– "[t]he investigative process may comprise two phases: a preliminary assessment and an investigation"; and
– the preliminary assessment will take into account, inter alia, "[t]he gravity of the allegations [...]; [t]he risks to the Organization [...]; [t]he complexity of the matter", and whether "the available information constitute[s] *prima facie* or [...] conclusive evidence of misconduct".

Having regard to the circumstances of the case, the Tribunal is satisfied that the Organization correctly considered the OIG's preliminary assessment to have been sufficient to initiate disciplinary proceedings and that no further investigation was needed. Considering the simplicity of the charges brought against the complainant and the supporting documentation (appended to the charges letter), there was no need to hear witnesses or gather further evidence.

In conclusion, the allegation of procedural flaws is unfounded.

4. Under the heading "[t]he impugned decision is unlawful", the complainant advances a considerable number of pleas aiming to demonstrate that the impugned decision was unlawful on the merits as it was affected by errors of fact, overlooked essential facts, and was not based on valid reasons. He submits, in detail, that:

(i) after he asked for "some [annual] leave days" on 2 May 2020, he did not receive an express refusal;
(ii) pursuant to an existing practice in the IOM Mission in Libya, staff members were allowed to record their annual leave after their departure or even upon their return from travel; therefore, he assumed, in good faith, that the lack of response was tantamount to an approval of his request;

(iii) for technical reasons he was unable to enter his request for annual leave in the Integrated Process and Resource Management System (PRISM) prior to 9 May;

(iv) at most, due to the confusing situation fuelled by the pandemic, there was a misunderstanding on his part, for which he promptly apologized;

(v) there were no valid reasons for denying him the annual leave, also considering that the "Guidance on Annual Leave during COVID-19", issued on 29 May 2020, encouraged taking annual leave days during the pandemic;

(vi) the Organization's argument that, according to that Guidance, travelling outside the duty station was discouraged, is unacceptable because he received it only on 29 May 2020;

(vii) he did not depart from his duty station in Libya as, although he was assigned to the IOM Mission in Tripoli, he had actually worked in Libya only for two weeks between November and December 2019. Afterwards, he was requested to perform his duties for the IOM Mission in Libya by working remotely from Tunis, Tunisia, and, since February 2020, due to the pandemic, he had been working remotely from his house in Tunis; as a result, he merely continued to work remotely, from his house in Cairo rather than from his house in Tunis; and

(viii) there is no evidence supporting the charge that he put the IOM Mission in Libya at risk because he satisfactorily worked from Cairo, and he was never requested to return to Tunis or Tripoli; his supervisor did not object to his teleworking; the "Guidance on Annual Leave during COVID-19", in the part regarding teleworking is not applicable to his case as he received it only on 29 May 2020; he also makes reference to the "Administrative Guidelines for Offices on the Novel Coronavirus (COVID-19) Pandemic" issued on 17 April 2020 and contends that he did not receive them until 29 May 2020.

5. In order to address the pleas summed up in consideration 4 above, it is appropriate to quote the relevant Staff Regulations and Rules.

As to the conduct required from a staff member, Staff Rule 1.2.1(b) read as follows:

> "Staff members shall follow the directions and instructions issued by the Director General and by their supervisors."

Staff Rule 1.2.2(a) read as follows:

> "Staff members are required to uphold the highest standards of integrity, competence and efficiency in the discharge of their functions."

Paragraph 6 of IOM Standards of Conduct read as follows:

> "It is of paramount importance that international civil servants [...] place [IOM's] interests above their own."

As to annual leave, Staff Rule 5.3.1(a) and (b) read:

> "(a) All arrangements pertaining to annual leave shall be subject to the exigencies of service. The personal circumstances and preferences of the individual staff member shall, as far as possible, be considered.
>
> (b) Leave may be taken only when authori[z]ed. Without prejudice to any disciplinary measures that may apply, any unauthorized absence may be deducted from the accrued annual leave of the staff member concerned. If he or she does not have any accrued annual leave, payment of salary and allowances shall cease for the period of unauthori[z]ed absence."

As to working arrangements, Staff Regulation 5.1(a) and (b), dealing with "General Working Conditions", read in relevant part as follows:

> "(a) The Director General shall establish the working week and the normal working hours for duty stations [...]
>
> (b) The Director General may require the work and travel of a staff member at any time."

Staff Rule 5.1.1(a) read in relevant part as follows:

> "Within the normal working week, the Director General may establish flexible working arrangements."

Paragraph 6 of Instruction IN/257 Rev.1 of 19 July 2019, entitled "Flexible Working Arrangements", explained in detail the requirements and procedures for telecommuting as one of the available working arrangements. In the relevant part, it read:

> "6.1 Telecommuting allows a staff member to perform part or all of his/her regular work schedule in an alternative work site away from the office (e.g. at home, in another IOM office or in another country). A telecommuting arrangement for one or two days on an ad hoc basis may be agreed by the staff member and his/her supervisor, subject to prior approval by the supervisor and exigencies of service. Any arrangement which involves telecommuting for more than two days a week is subject to the approval of the Director, HRM, which will be provided only on an exceptional basis.
>
> 6.2 Telecommuting shall be authorized only when all of the following conditions are met:
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> (a) The nature of the work allows for it to be undertaken away from the office;
>
> [sic: (b) omitted in original version]
>
> (c) An individual work plan is established with specific measurable outputs to be achieved by the staff member within fixed time-frames; and
>
> (d) The work of the staff member can easily be integrated with the work of colleagues at the office."

It is also appropriate to recall the Tribunal's well-settled case law on disciplinary decisions. Such decisions fall within the discretionary authority of an international organization and are subject to limited review. The Tribunal must determine whether or not a discretionary decision was taken with authority, was in regular form, whether the correct procedure was followed and, as regards its legality under the organization's own rules, whether the organization's decision was based on an error of law or fact, or whether essential facts had not been taken into consideration, or whether conclusions which are clearly false had been drawn from the documents in the file, or finally, whether there was a misuse of authority. Additionally, the Tribunal shall not interfere with the findings of an investigative body in disciplinary proceedings unless there was a manifest error (see, for example, Judgment 4579, consideration 4, and the case law cited therein).

6. In light of the above-quoted Staff Regulations and Rules, the Tribunal will firstly address the complainant's allegation that his annual leave had been approved. The complainant denies that he took annual leave without authorization, alleging that he complied with a practice

and that he, in good faith, assumed that his leave had been implicitly approved.

The evidence in the file reveals that:

(i) the complainant requested annual leave by an email sent on 2 May 2020, in which he wrote "[u]pon your [i.e. the Chief of Mission] approval, I would kindly request some leave days before my departure this month to UNDSS Pakistan". However, he did not specify the number of days or the starting day of his leave;

(ii) the Human Resources Officer responded that same day informing him that, in order to take annual leave, he needed to obtain clearance from the Mission before he left;

(iii) on 4 May 2020, the complainant replied by email that his "plan [was] to start [his] leave and to return to the [M]ission area by mid-May 2020", without specifying a start and end date for the period of leave;

(iv) on 8 May 2020, the complainant informed HRM and his Chief of Mission, by email, that he had reached Cairo that very day and that he would "continue to work online from home";

(v) on 9 May 2020, he was requested to send the signed travel authorization, medical clearance from the Occupational Health and Insurance Unit, and other necessary supporting documentation regarding his travel;

(vi) on 9 May 2020, the complainant reiterated his request for annual leave, specified its duration, from 9 to 17 May 2020, and informed the Organization that "[i]n case [he] couldn't catch any return flight to Tunis on time, due to the current flights' restrictions, a separate request to work from home [would] be submitted based on [IOM's] advice, consistent with HR rules and guidelines in this regard";

(vii) his request for annual leave from 9 to 17 May 2020 was expressly rejected by an email sent to him on 11 May 2020; and

(viii) the complainant also requested annual leave from 18 to 25 May 2020 and for 26 May 2020, and these two requests were also expressly rejected by two separate emails dated 3 July 2020.

The Tribunal considers that it is clear from the evidence above that:

(a) the complainant was aware that he needed prior approval for his annual leave, considering that he made reference to "approval" in his 2 May 2020 email;

(b) he was promptly informed, on 2 May 2020, that he needed a clearance note from the Mission before leaving;

(c) since the complainant informed the Organization, only on 8 May 2020, that he was already in Cairo, he left without prior approval;

(d) in his 9 May 2020 email, the complainant was aware that his leave had not been authorized yet, and he asked again for annual leave, specifying the period from 9 to 17 May 2020; and

(e) all of his requests for annual leave were expressly rejected.

Based on this documentary evidence, the Tribunal is satisfied that the Organization correctly found that the complainant was never authorized to take annual leave in May 2020, and that he could not presume the contrary. Contrary to the alleged implied approvals, there were express rejections provided shortly after receiving his requests. Moreover, there is clear evidence that he left his duty station and flew home without prior approval.

The Tribunal does not accept the complainant's assertion of an existing established practice allowing staff members to enter their annual leave request after its commencement or even at the end of it, upon their return from travel. There is no evidence of such a practice and, in any case, a practice of this kind, which does not comply with the clear and unambiguous Staff Rule requiring prior approval of any annual leave, would not be legally binding. According to the Tribunal's case law, a practice cannot become legally binding where, as in the present case, it contravenes specific rules which are already in force (see, for example, Judgment 4555, consideration 11, and the case law cited therein).

Nor does the Tribunal accept the complainant's contention that he was not able to enter his leave request in the PRISM system until 9 May 2020, due to technical issues. Indeed, the complainant has not provided the Tribunal with satisfactory evidence of the obstacles that impeded

him from following the proper and required procedure for the entire period from 2 May 2020 until 8 May 2020. He has only provided the Tribunal with the transcription of phone messages sent and received on 5 May 2020, in which he requested and received assistance with regard to the PRISM system. The fact that the PRISM system was not working on 5 May 2020 does not entail that it was not operational the days before and after 5 May 2020. Therefore, the only reliable evidence in the file is that the complainant actually accessed the PRISM system on 9 May 2020, that is after his arrival in Cairo and not before leaving his duty station. Lastly, the Tribunal does not accept the complainant's contention that there were no valid reasons for denying him the annual leave. Contrary to what appears to be an assumption of the complainant, there were valid reasons for the refusal of the annual leave, as revealed by the email chain of 9 May 2020, appended to the Organization's reply. In any event, the mere fact that the annual leave, had it been properly requested, would have been probably, or even certainly, granted, even if it were proven – and it is not – did not exempt the complainant from his duty to seek prior approval. It does not fall to a staff member to assess whether their annual leave can be granted or not, considering that, pursuant to the relevant rules, all arrangements pertaining to annual leave shall be subject to the exigencies of service. Thus, annual leave can be granted only following an assessment and approval by a competent officer when compatible with the exigencies of service. The complainant relies on the "Guidance on Annual Leave during COVID-19", contained in an email dispatched on 29 May 2020, in order to contend that annual leave was encouraged during the pandemic. The Tribunal notes that the rules regarding annual leave did not change during the pandemic. The Guidance took into account the difficulties encountered by staff members in taking annual leave during that period and addressed the issue of whether or not staff members could be allowed to carry over annual leave accrued in the year 2020 beyond 31 December 2020 in a higher amount than usual. In this context, the Guidance encouraged staff members to take accrued annual leave in the year 2020 and not to carry it over in the following year. In the same vein, it also encouraged managers to support annual leave requests, maintaining at the same time adequate coverage of the

services concerned. However, this did not change the rule that annual leave required prior approval.

7. The Tribunal will now address the complainant's contention that he continued working satisfactorily from his home country. The Tribunal notes that the Organization lawfully found that teleworking arrangements require prior approval and that the complainant could not unilaterally decide to work remotely from outside the duty station. In light of the Staff Regulations and Rules quoted in consideration 5 above, the usual working arrangement required that staff members perform their duties at their assigned duty station. A teleworking arrangement, being exceptional, is subject to prior approval by the Organization. It fell within the Director General's discretionary power to "establish flexible working arrangements" (Staff Rule 5.1.1(a)). The JARB noted, and the Organization reiterates in its reply before the Tribunal, that the complainant never submitted a request for flexible working arrangements in compliance with Instruction IN/257 Rev.1 of 19 July 2019. The Tribunal notes that the complainant, in his 9 May 2020 email, stated that he would request a teleworking arrangement were he not able to fly back to Tunis on 17 May 2020, but he never submitted such a request. Moreover, telecommuting for more than two days per week would have required the approval of the Director, HRM, which could have been provided only on an exceptional basis (see paragraph 6.1 of Instruction IN/257 Rev.1). The Tribunal notes that the complainant worked remotely on a *de facto* basis for around five consecutive weeks, from 8 May 2020 to 12 June 2020 (the date of the disciplinary decision, when he was also put on unauthorized absence and requested "not to work [...] from outside the duty station").

For the purpose of the present complaint, it is not relevant that the complainant's duty station, in May 2020, was Tunis and not Tripoli. What is relevant is that the complainant's tasks had to be performed at the duty station assigned by IOM (at that time, in Tunis) and he was not allowed to work remotely from another city without prior approval. Although the complainant had been working remotely from Tunis since February 2020, his allegation that, had he remained in Tunis in May 2020, he would have continued working remotely from Tunis, is mere

supposition and, in any case, does not allow him to disregard the requirements for prior approval for changes to his teleworking situation. In contrast to the complainant's allegations, the evidence in the file reveals that, on 8 May 2020, an email sent by the Human Resources Officer informed all staff of the gradual return to the workplace and that, on 11 May 2020, he replied to this email stating that another colleague or himself would be in the office as from 18 May 2020. He was specifically requested, by an email of 12 May 2020, to specify on which days he would be in the office in person.

The complainant contends that the rules on teleworking contained in the "Guidance on Annual Leave during COVID-19" and in the 17 April 2020 "Administrative Guidelines for Offices on the Novel Coronavirus (COVID-19) Pandemic" are not applicable to his case, as he did not receive either of them until 29 May 2020.

It is useful to point out that, in the relevant part, the "Guidance on Annual Leave during COVID-19" contained in an email dispatched on 29 May 2020:

(i) discouraged staff from travelling outside their duty station during the pandemic;

(ii) allowed teleworking during any quarantine period, in addition to the cases of teleworking granted by the Staff Regulations and Rules and by Instruction IN/257 Rev.1; and

(iii) confirmed that, in any further case other than the one concerned with quarantine, teleworking outside the duty station remained subject to the rules ordinarily applicable, requiring the dual approval of the supervisor and of the Director, HRM.

In turn, the "Administrative Guidelines for Offices on the Novel Coronavirus (COVID-19) Pandemic", issued on 17 April 2020, encouraged teleworking, at the request of the staff member concerned, granting the possibility of telecommuting "on a full-time basis", provided that it took place at the duty station, whilst, conversely, "[t]elecommuting from outside the duty station [wa]s strongly discouraged".

The complainant's contention that the above-quoted "Guidance on Annual Leave during COVID-19" is not applicable to his case as he received it only on 29 May 2020, is inconsistent with his allegation, addressed in consideration 6 above, that the Guidance encouraged annual leave. The complainant cannot rely on the Guidance to support one of his pleas and, at the same time, contend that it is not applicable to him. As to the complainant's contention that he did not receive the 17 April 2020 Administrative Guidelines prior to 29 May 2020, the Tribunal notes that these Guidelines were not addressed to staff members, but only to the Chiefs of Missions and Managers in charge of overseeing the administrative arrangements of staff members, and they could not derogate to the Staff Regulations and Rules. The introduction of the Guidelines expressly read:

> "These guidelines are intended for Chiefs of Missions, [Resources Management Officers] and other administrative staff in IOM, including human resources, who oversee the administrative arrangements of staff members and their recognized family members. They are meant for information only and do not take the place of IOM's Staff Regulations and Staff Rules, and other duly promulgated administrative issuances such as IOM Instructions. To the extent that the below provisions are in conflict with the Staff Regulations and Rules of IOM and other duly promulgated administrative issuances such as IOM Instructions, IOM's Staff Regulations and Rules and other duly promulgated administrative issuances are applicable."

As the complainant was not entitled to receive the 17 April 2020 Administrative Guidelines, he cannot complain that he did not receive them and, considering that they did not derogate from the Staff Regulations and Rules, they are irrelevant to the outcome of the present judgment.

In any event, the Tribunal notes that the charges letter and the disciplinary decision did not rely either upon the Administrative Guidelines issued on 17 April 2020 or upon the Guidance dispatched on 29 May 2020. The complainant was neither charged with a breach of the Administrative Guidelines or the Guidance nor sanctioned for such a breach. The complainant made reference to these acts in his request for review and in his internal appeal and, therefore, the Organization mentioned them in the review decision and in the JARB's report, but only in response to his contentions.

Moreover, neither the Administrative Guidelines nor the Guidance departed from the rule that teleworking required prior approval. The Administrative Guidelines encouraged teleworking, at the request of the staff member concerned, granting the possibility of telecommuting "on a full-time basis", provided that it took place at the duty station, whilst, conversely, "[t]elecommuting from outside the duty station [wa]s strongly discouraged". The Guidance, in turn, only allowed a further case of teleworking for any quarantine period, but this is irrelevant in the present case considering that the complainant never submitted that he had to respect a quarantine. Thus, the Administrative Guidelines and the Guidance confirmed the Staff Regulations and Rules, which the complainant was expected to be familiar with and respect (see, for example, Judgment 4324, consideration 11, and the case law cited therein).

Lastly, considering the lack of authorization for teleworking outside Tunis, it is irrelevant to assess when the 17 April 2020 Administrative Guidelines and the 29 May 2020 Guidance became available to the complainant. Irrespective of the content of such texts, annual leave and teleworking required prior approval according to the Staff Regulations and Rules. The Administrative Guidelines and the Guidance did not depart from such general rules, and thus, the fact that he acknowledged them only on 29 May 2020, after his departure, had no negative effect.

Again, considering the lack of authorization for teleworking, there was no need to investigate whether or not the complainant performed his duties "impeccably", as he asserts. According to the applicable Staff Rule already quoted above, staff members "shall follow the directions and instructions issued by the Director General and by their supervisors". Since the directions and instructions required the complainant to discharge his duties in Tunis, and not remotely from his home country, the Organization was entitled to consider unauthorized teleworking as serious misconduct, with no need for further appraisal.

8. The Tribunal will now address the complainant's allegation that there was no evidence supporting the charge that he put the IOM Mission in Libya at risk as he satisfactorily worked from Cairo and was never requested to return to Tunis or Tripoli.

The Tribunal firstly notes that the fact that he was never expressly requested to return to Tunis or Tripoli is immaterial. Indeed, his requests for annual leave were expressly rejected and, considering that there was no preapproved teleworking arrangement from Cairo, he was reasonably expected to be in the office in person, with no need for the Organization to expressly request his presence. Secondly, he did not refute the Organization's evidence that he put the IOM Mission in Libya at risk. The Organization has demonstrated that he was the only Senior Field Security Officer in the IOM Mission in Libya, during a very difficult period because of the fighting in Libya and due to the pandemic, and that he was not easily replaceable. Thirdly, the decision imposing the disciplinary measure also makes reference to a "reputational risk" for the Organization, and the complainant does not convincingly refute such a risk stemming from his conduct. The fact that a staff member took unauthorized leave and worked remotely without approval reasonably entailed, by itself, a reputational risk for the Organization.

9. In light of considerations 6, 7 and 8 above, the Tribunal is satisfied that the Organization's finding that the complainant committed serious misconduct is lawful.

10. Under the heading "[t]he standard of proof was not correctly applied", the complainant reiterates that his remote work was satisfactory and that the lack of authorization for his annual leave was not proven beyond reasonable doubt. In essence, he reiterates pleas already examined by the Tribunal in considerations 6 and 7 above, which do not require further detailed analysis. The Tribunal merely adds that, according to its well-settled case law regarding the standard of proof in cases of misconduct, the burden of proof rests on an organization, which has to prove allegations of misconduct beyond reasonable doubt before a disciplinary sanction can be imposed (see, for example, Judgments 4697, consideration 22, 4491, consideration 19, 4461, consideration 6, 4364, consideration 10, and the case law cited therein). In the present case, the Tribunal is satisfied that it was open to the Organization to find, on the evidence, that the complainant's misconduct was proved beyond reasonable doubt.

11. The complainant further submits that the disciplinary measure imposed on him was disproportionate and that relevant mitigating factors were not taken into consideration, namely his previous work experience, his medical condition, his family situation, the confusion regarding applicable procedures due to COVID-19 and the fact that he promptly apologized for what he considers was a mere "misunderstanding". He further contends that he was subject to a double punishment: not only was he separated from IOM, but he was also not employed by UNDSS.

The Tribunal notes that, according to the relevant part of Staff Regulation 10:

> "(a) The Director General may impose disciplinary measures on a staff member if:
>
> [...]
>
> (ii) his or her conduct is proven to be unsatisfactory or of such character as to bring the Organization in disrepute;
>
> [...]
>
> (b) Disciplinary measures may take the form of any one or a combination of the following: written reprimand; reduction of step(s); fine; discharge after due notice; summary dismissal.
>
> (c) Disciplinary measures shall be imposed in accordance with the requirements of due process and shall be commensurate with the gravity of the act committed."

Based on these provisions, serious misconduct may, potentially, be sanctioned with the measure of discharge after due notice. However, considering the wide range of possible disciplinary measures, the above-quoted Regulation requires that the sanction be commensurate with the gravity of the conduct, which means that it must be proportionate. The Tribunal's well-settled case law has it that the choice of the appropriate disciplinary measure falls within the discretion of an organization, provided that the discretion be exercised in observance of the rule of law, particularly the principle of proportionality (see, for example, Judgments 4660, consideration 16, 4504, consideration 11, 4247, consideration 7, 3640, consideration 29, and 1984, consideration 7). In reviewing the proportionality of a sanction, the Tribunal cannot substitute its evaluation for that of the disciplinary authority, and it

limits itself to assessing whether the decision falls within the range of acceptability. Lack of proportionality is to be treated as an error of law warranting the setting aside of a disciplinary measure even though a decision in that regard is discretionary in nature. In determining whether disciplinary action is disproportionate to the offence, both objective and subjective features are to be taken into account (see Judgment 4504, consideration 11, and the case law cited therein). Since, as assessed in considerations 6, 7 and 8 above, the Organization lawfully considered the complainant's behaviour to be serious misconduct, which put the Organization's operation and reputation at risk, the chosen sanction was not disproportionate to the charges.

The evaluation of the weight, if any, of the extenuating circumstances falls within the discretion of the Organization. In this case, the exercise of such discretion was not affected by errors of fact or law or by disregard of essential facts. All the alleged mitigating factors were considered by the Organization, in particular in the 15 September 2020 decision adopted on the complainant's request for review, but they were deemed insufficient to counterbalance the gravity and the potential consequences of the complainant's serious misconduct. The Tribunal finds that the Organization's assessment was open to it. Considering that the complainant was an experienced Senior Field Officer in the area of Security, he should have verified the requirements for annual leave and for teleworking before availing himself of them. Thus, his previous period of "15 years of unblemished service with the [United Nations]" is not, by itself, a mitigating factor. His health condition and his family situation were not submitted and proven at the relevant time and, thus, they could not be considered as mitigating factors.

Apologizing after the event is not a mitigating factor in the absence of concrete action by the complainant to remedy the difficult situation he created. By leaving his duty station during a period with flight shortages and travel restrictions, he put himself in the position of not being able to return promptly to his duty station once he had become aware that he had been denied the requested annual leave, and therefore he never mitigated the consequences of his conduct. As to the

complainant's contention that he was "doubly punished", the Tribunal notes that his non-appointment at UNDSS is not the subject matter of the impugned decision and is beyond the scope of these proceedings.

12. In his last plea, the complainant alleges that the impugned decision was tainted by bias and prejudice against him. He recalls that he had had a disagreement with his Chief of Mission in the past and since then he had the feeling of "be[ing] targeted".

According to the Tribunal's well-settled case law, complainants bear the burden of proof with regard to allegations of bias (see, for example, Judgment 4010, consideration 9). Although evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances, that does not relieve complainants, who bear the burden of proving their allegations, from introducing evidence of sufficient quality and weight to persuade the Tribunal. Mere suspicion and unsupported allegations are clearly not enough, the less so where, as here, the actions of the Organization, which are alleged to have been tainted by personal prejudice, are shown to have a verifiable objective justification (see Judgment 4608, consideration 7, and the case law cited therein). In the present case, the complainant has not established that the alleged former isolated episode of disagreement concerning a work-related issue triggered or affected the disciplinary process. Moreover, the disciplinary proceedings involved different officers than his Chief of Mission in the decision-making.

13. The complainant has applied for oral proceedings and, in his rejoinder, has listed witnesses in order to demonstrate that:

(i) he did not expose the IOM Mission in Libya to security risks;

(ii) his work from Cairo – that is to work remotely rather than in person in Tunisia – had no serious implications for the IOM Mission in Libya;

(iii) all programmes were on hold due to the restriction of movement in Libya; and

(iv) the Administrative Guidelines issued on 17 April 2020 were not promptly communicated to the IOM Mission in Libya staff members, and were circulated for the first time on 29 May 2020.

The parties have presented ample written submissions and documents to permit the Tribunal to reach an informed and just decision on the case. Thus, the request for oral proceedings is rejected.

14. In his rejoinder, the complainant requests that the Tribunal order the Organization to disclose documents to demonstrate that his work from Cairo did not put the security of the IOM and its staff members at risk. This circumstance has no bearing on the outcome of the disciplinary proceedings and of the present complaint. Therefore, there is no need for the disclosure of such documents, and the complainant's request is rejected.

The complainant also asks for the disclosure of the Administrative Guidelines issued on 17 April 2020. Even though, for the reasons already stated in consideration 7 above, these Guidelines are not relevant, they have been appended by the Organization to its reply and, thus, the complainant has had the opportunity to comment on them.

15. In conclusion, the complaint will be dismissed in its entirety as all the complainant's pleas are unfounded and his claims are rejected.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 November 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER