Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

N. (No. 2)

v.

ITU

137th Session **Judgment No. 4779**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms M. N. against the International Telecommunication Union (ITU) on 22 August 2022 and corrected on 22 September, ITU's reply of 3 November 2022, the complainant's rejoinder of 20 February 2023 and ITU's surrejoinder of 24 April 2023;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges her dismissal for misconduct.

Facts relevant to the present case are set out in Judgment 4519, delivered in public on 6 July 2022, which related to the complainant's first complaint. Suffice it to recall that the complainant joined ITU in 2010 and received a continuing appointment in 2015. In February 2020 allegations against her of fraud in relation to the payment of an education grant and breach of private obligations were reported to the organisation. On 1 May 2020 she was informed that the Secretary-General had instructed the Internal Audit Unit to investigate those allegations and that he had decided to suspend her from duty with pay until further notice. On 2 September she was invited to submit her

observations on the preliminary version of the investigation report, which she did.

By a letter of 10 November 2020, the complainant was informed that the investigation had reached an end and received the final report, dated 5 October 2020, which concluded that some of the allegations against her were well founded. She was invited to respond in writing no later than 2 December 2020. She was also informed that the Secretary-General intended to initiate disciplinary proceedings against her and that he had decided to convert the suspension with pay into a suspension without pay "as of November 2020". On 23 November the complainant requested that this decision be reconsidered, asked for a "legible copy" of some of the annexes to the investigation report and requested more time to respond to the allegations made against her, which she was granted. On 7 December she stated that she regretted the Secretary-General's intention to initiate disciplinary proceedings against her and could not understand to what these could relate.

By a letter of 10 December 2020, the complainant was notified of the charges against her and was informed that her case was going to be submitted to the Joint Advisory Committee for its advice. A disciplinary chamber consisting of five members of the committee was set up to examine the charges in accordance with Staff Rule 8.2.1(c). The complainant was informed of the composition of this chamber on 16 December 2020, was heard by the chamber on 11 March 2021 and submitted her written comments on 26 April 2021.

In the meantime, following the rejection of her request for reconsideration of the decision to suspend her without pay, the complainant lodged an appeal with the Appeal Board, which, in its report of 16 June 2021, recommended that she be paid her salary for the first nine days of November 2020, before the contested decision was adopted, and that all other claims be rejected. By letter of 2 August 2021, the Secretary-General endorsed these recommendations. That was the decision impugned in the complainant's first complaint, which led to Judgment 4519.

Meanwhile, on 30 July 2021, the complainant was informed of the Secretary-General's decision – taken on the basis of the report of 11 June 2021 from the disciplinary chamber of the Joint Advisory Committee – to dismiss her with effect from the following day, that is on 31 July, and to grant her a termination indemnity equivalent to five months' salary. She left ITU on that later date. On 13 September 2021 she made a request for that decision to be reconsidered, denying any misconduct and claiming that the sanction imposed was disproportionate. She also asked, in the event that the Secretary-General decided to maintain his decision, that the statutory three months' notice be given to her. Her request for reconsideration was rejected on 15 October 2021. On 14 December 2021 she lodged an internal appeal with the Appeal Board, seeking the withdrawal of her dismissal, reinstatement to her post and compensation for the injury allegedly suffered.

In its report of 20 May 2022, the Appeal Board found that the decision to dismiss the complainant was well founded, proportional and without procedural flaws, and recommended that the appeal be rejected. By letter of 24 May 2022, the complainant was notified of the Secretary-General's decision to follow this recommendation. That is the impugned decision in the present complaint.

The complainant asks the Tribunal to set aside the impugned decision, as well as the earlier decisions of 30 July and 15 October 2021, and to order ITU to reinstate her in her post or in a similar post. Failing reinstatement, she seeks the award of damages for the material injury she considers she has suffered and which she quantifies as a sum equivalent to the remuneration she would have received, without deduction of internal tax, if her employment had continued for five years, to include pension and health insurance contributions, together with interest at the rate of 5 per cent per annum (unless the case law has been updated on this point). Lastly, she claims moral damages of at least 50,000 euros and an award of 8,000 euros in costs.

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

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 24 May 2022 by which the Secretary-General of ITU, acting in accordance with the Appeal Board's recommendation, rejected her appeal against her dismissal on 30 July 2021 for misconduct.

This sanction was imposed on the grounds that, according to the organisation, the complainant had, firstly, "attained entitlements by misrepresentation [or by] providing false information", in taking fraudulent advantage of overpayments of the education grant she received for her daughter's education, and, secondly, "failed to honour private financial obligations relating to [her] daughter's schooling", owed to two schools successively attended by the child, "despite having received [the] reimbursements of [corresponding] education grants from ITU".

2. It must be recalled that, in Judgment 4519, delivered in public on 6 July 2022, the Tribunal, ruling on the complainant's first complaint, set aside the decisions regarding the complainant's suspension without pay made in the context of the disciplinary proceedings and ordered ITU to pay her damages for the material and moral injury caused thereby. The approach thus adopted by the Tribunal, the basis for which was a breach of the requirements under the Staff Rules specifically governing provisional suspension from duty in cases of suspected misconduct, did not call into question the lawfulness of the sanction imposed on the complainant at the conclusion of the proceedings and therefore has no bearing, in itself, on the outcome of the present case.

3. In support of her claims, the complainant first of all disputes the lawfulness of the investigation carried out by the Internal Audit Unit into the substance of the allegations of fraud and other acts of misconduct made against her.

4. Under this head, the complainant argues, first, that the time limit within which such an investigation must normally be carried out was exceeded.

Service Order No. 19/10 of 2 May 2019 on "ITU Investigation Guidelines" provides as follows in paragraph 43:

> "The investigative body will seek to submit its investigation report to the Secretary-General within 120 days of initiating the investigation. Delays in completing the investigation may occur in exceptional circumstances. In such circumstances, the investigative body will justify the reasons for the delay."

In the present case, a period of around 190 days elapsed between the referral of the matter to the Internal Audit Unit and the delivery of the investigation report, which very substantially exceeds the 120 days provided for. While it is clear from the wording of the aforementioned provision that the time limit referred to is intended as a guideline only, and although ITU has grounds for maintaining that the investigations necessary to verify the veracity of the allegations in question were, by their nature, somewhat difficult, such a delay nonetheless appears to be unjustified given that there is nothing on the file to suggest that, in this case, the investigative body was faced by truly "exceptional circumstances" within the meaning of that provision. The Tribunal notes in addition that, as the complainant rightly observes, the investigation report did not, contrary to the wording of the provision, state any reasons for the delay.

However, neither the time limit within which the investigation should normally be completed, nor the requirement to state the reasons why that time limit has been exceeded, is intended to have the effect of invalidating the investigation report in the event of a breach. However regrettable they may be, the anomalies in question are therefore not such as to render unlawful the sanction imposed at the conclusion of the disciplinary proceedings on the basis of the findings contained in that report.

5. The complainant also submits that the Internal Audit Unit had no right to access private emails in her professional email account, as it did, and then to retain them or reproduce them in the investigation report. She regards this as an intrusion into her private life amounting to a breach of her fundamental freedoms.

However, Service Order No. 09/07 of 4 August 2009, entitled "Use of ITU Computing Resources", provides, respectively in paragraphs 5.1 and 5.3 of Section 5, which deals with the use of those resources in investigations by the ITU Internal Auditor, that the auditor, "in accordance with his or her mandate, shall carry out [i]nvestigations and otherwise discharge his or her responsibilities without any hindrance" and "shall have the authority to access all ITU computing resources without informing [u]sers". In the present case, the investigative body was, therefore, fully entitled under the applicable internal ITU rules to access the complainant's private messages and then to retain and reproduce them in its report, particularly since the nature of the allegations against the complainant clearly necessitated the use of such procedures for the efficient conduct of the investigation.

In her rejoinder, the complainant essentially claims that the provisions of that Service Order are unlawful as they breach the right to a private life enjoyed by international civil servants. However, although it is indeed a matter of principle under the Tribunal's case law that an organisation must respect the confidentiality of private messages stored in a professional email account (see, in particular, Judgment 2183, consideration 19), that requirement must clearly be balanced against the requirements intrinsic to the need to combat fraud and, more generally, to the need to tackle misconduct on the part of officials. The Tribunal considers that Service Order No. 09/07, under which only the Internal Audit Unit has permission to access private emails, and even then only for the purposes of its investigations, and, moreover, that permission is subject to certain safeguards such as the keeping of a written record of each access to ITU computing resources, thus strikes an appropriate balance between these various requirements.

It follows from these considerations that the arguments in question must be rejected as unfounded, without there being any need to rule on the objection to receivability which ITU appears to raise.

6. The complainant next challenges the lawfulness of the disciplinary proceedings which followed the investigation, claiming that the proceedings were tainted by six irregularities, which will each be examined in turn below.

7. In this regard, the complainant submits, in the first place, that, contrary to the requirements of Staff Rule 10.2.1 and the case law of the Tribunal, she was not given clear and precise information about the allegations forming the basis for the disciplinary proceedings brought against her, leaving her unable to properly respond to them and defend her case.

However, the Tribunal notes that the letter sent to the complainant on 10 December 2020 notifying her of disciplinary charges did set out the two allegations, as referred to in consideration 1, above, which led to the initiation of the disciplinary proceedings and later formed the basis for the dismissal decision of 30 July 2021. Admittedly, that letter did not itself include a detailed description of the facts substantiating each of the allegations. But it did expressly refer, in that regard, to the findings of the investigation report, which had been duly sent to the complainant for her comments on 10 November 2020. Contrary to what the complainant maintains, the use of a reference such as this to supplement the allegations cannot, in itself, be regarded as an irregularity. Of course, things might have been different if the procedure adopted in this case had created any ambiguity as to the matters on which the Secretary-General intended to base the disciplinary proceedings. This was not, however, the case since it was clear from the letter of 10 December 2020 that disciplinary proceedings had been initiated on the basis of all the allegations regarded by the investigatory body as well founded in the report in question.

As a result, the requirement to inform the complainant of the allegations made against her was met and, as this enabled her to adequately defend her case, the plea in question must be rejected.

8. In the second place, the complainant submits that the procedure followed was irregular in that the case was not submitted to the Joint Advisory Committee established under Staff Regulation 8.2 and Staff Rule 8.2.1, but only to a disciplinary chamber composed of some of the members of that committee.

However, this revolves purely and simply around the application of Staff Rule 8.2.1(c), which provides, notably in relation to disciplinary measures, that "[c]ases submitted to the [Joint Advisory] Committee [...] shall be examined by a chamber on behalf of the Committee composed of five members selected by and in the Committee" – including, in particular, two staff representatives.

The interpretation that the complainant attempts to give to this text, according to which disciplinary cases should first be examined by the chamber referred to and then by the Committee in a plenary session, is manifestly incorrect.

Neither has the complainant any good reason to object, as she attempts to do subsidiarily, to the lawfulness of the aforementioned Staff Rule 8.2.1(c) as interpreted – correctly – by ITU. The Tribunal fails to see how this provision could, as the complainant maintains it does, breach Staff Regulation 10.1(b), under which "[t]he Secretary-General shall establish administrative machinery with staff participation, which may be consulted in disciplinary cases".

9. In the third place, the complainant submits that the procedure followed before the disciplinary chamber did not respect the adversarial principle, nor did it meet the requirement for transparency, since the case file was sent to her in the form of electronic files available on a platform accessed via a link. She considers that "[t]his method […] does not afford sufficient visibility as to the conduct of the procedure".

However, the Tribunal considers that there is nothing to preclude the contents of a disciplinary file from being communicated to the official concerned in this format, as long as care is taken to ensure that the official can actually access it via the link provided. It appears from the file that this precaution was indeed taken as the secretary of the disciplinary chamber checked with the complainant that she was able

to access the documents in question. Although the complainant did point out, when additional documents were added on 8 March 2021, that she was unable to open them on the platform, this technical difficulty was immediately resolved and the argument in her complaint that "it cannot be ruled out that other errors occurred", which is purely speculative, cannot be accepted. Furthermore, there is nothing to corroborate the complainant's allegation in her submissions that the file made available to her was incomplete. The plea put forward to this effect must therefore be rejected.

10. In the fourth place, the complainant complains that the disciplinary chamber did not comply with the time limit prescribed by Staff Rule 10.2.2(d), pursuant to which, "in considering a case, [it] shall normally provide its advice to the Secretary-General within four weeks after the case has been submitted to it".

In the present case, it is apparent from the file that the procedure before the disciplinary chamber actually lasted around 22 weeks, which considerably exceeds the four-week period provided for in that paragraph. Although it is clear from the wording of the text that the reference to a period which must "normally" be complied with is merely a guideline, and although the chamber provided in its report reasons to explain the delay, which are relevant in part, it remains that the procedure was abnormally long. What is more, the Tribunal had already commented on this in the aforementioned Judgment 4519, when it took account of the duration of the procedure in question – which represented most of the period during which the complainant was suspended without pay – in determining the damages to be awarded to the complainant as compensation for the injury suffered as a result of this suspension.

However, the fact that the prescribed time limit within which the disciplinary chamber must in principle deliver its advice was exceeded does not have the effect of invalidating that advice, and therefore – as with the failure to comply with the time limit applicable to investigations, discussed above – it has no bearing on the lawfulness of

the sanction imposed at the conclusion of the disciplinary proceedings. The plea must therefore be rejected.

11. In the fifth place, the complainant alleges a breach of due process in that the sanction imposed on her was based on matters other than those of which she was initially accused. The basis for this plea is a remark in the decision of 30 July 2021, stating that "[w]hile not in the Investigation Report (as the investigation came to an end in late 2020), the Administration [was] aware that [the complainant] had outstanding debts beyond 2020" because a school had contacted ITU, while the disciplinary proceedings were underway, to seek help for the settlement of those debts.

It is true that these specific facts were not referred to as such in the letter sent to the complainant on 10 December 2020 notifying her of the disciplinary charges – a letter which, as stated, made reference to the investigation report for a detailed statement of the facts on which the allegations were based – and indeed this would, by definition, have been impossible since those facts post-dated the sending of the letter. But they were closely connected with the general allegation, itself duly mentioned in the letter, of the complainant's failure to honour private financial obligations relating to her daughter's schooling. Furthermore, it is apparent from the decision of 30 July 2021 that those facts were only mentioned in order to emphasise the recurrent pattern of the defaults in question, which went back to 2012, and to address a consideration contained in the disciplinary chamber's report that no disciplinary measures needed to be taken in respect of those defaults since the complainant had eventually settled the majority of her debts. In these circumstances, the Tribunal considers that the reference in that decision to the new debts of which the organisation had in the meantime become aware did not render that decision irregular.

12. In the sixth and last place with regard to this series of pleas, the complainant submits that ITU, by failing to comply with the provisions referred to above governing the disciplinary proceedings, breached the principle of *tu patere legem quam ipse fecisti*, under which an organisation is bound by the rules which it has itself laid down.

However, since her arguments relating to the alleged breach of the provisions in question have been rejected in their entirety, this plea is unfounded and must, therefore, be also rejected.

13. Continuing her line of argument criticising the substance of the impugned decision, the complainant submits first of all in that regard that disciplinary measures could not lawfully be taken against her for the late payment of her daughter's school fees since her relations with the schools attended by her daughter formed part of her private life and could therefore not result in professional misconduct.

However, it should be recalled that, while international organisations cannot intrude on the private lives of their staff members, those staff members must nonetheless comply with the requirements inherent in their status as international civil servants, including in their personal conduct. This principle is, for example, laid down in the Standards of Conduct for the International Civil Service, which applies to ITU by virtue of Service Order No. 17/07 of 27 April 2017, paragraph 42 of which provides that "[i]nternational civil servants must [...] bear in mind that their conduct and activities outside the workplace, even if unrelated to official duties, can compromise the image and the interests of the organizations". Furthermore, the Tribunal has repeatedly stated in its case law that some private conduct may, on this account, legitimately lead to disciplinary action (see, for example, Judgments 4400, consideration 24, and 3602, consideration 13, and, with specific regard to a failure to honour private financial obligations, Judgments 2944, considerations 44 to 49, 1584, consideration 9, and 1480, consideration 3).

In the present case, the Tribunal considers that, in view of the large amount and recurrent nature of the debts incurred by the complainant in connection with her daughter's school fees, which had led the educational establishments in question to seek assistance from ITU itself to obtain payment and, in one case, to resort to a debt recovery process under local law, the facts involved were liable to undermine the dignity of the status of international civil servant and tarnish the reputation of the organisation. The plea must, therefore, be rejected.

14. In connection with the failure to honour private obligations, the complainant also claims that the Secretary-General criticised her for abusing the privileges and immunities enjoyed by ITU staff members, which, she argues, she did not.

However, the Tribunal notes that, as ITU correctly submits, that accusation of abuse did not form the basis for the disputed disciplinary measure, which was founded entirely on the two allegations referred to above.

It is true that the decision of 30 July 2021 stated in this regard that, given that her status of international civil servant led to the enforced collection procedure initiated by one of the educational establishments concerned proving unsuccessful, the complainant, "whether or not [she was] aware of it, [...] concretely benefited from [her] ITU staff member status" and that "[p]resumably, [she] [...] avoided recovery of the monies claimed, ultimately, because [she] indirectly benefited from ITU's privileges and immunities". But those remarks were made simply to illustrate that the complainant had without a doubt objectively benefited from the privileges and immunities inherent in her status, rather than to claim that she knowingly abused them to avoid having to pay her debts.

The plea disputing the existence of such an abuse is therefore irrelevant.

15. The complainant further submits that the allegation that she fraudulently obtained overpayments of the education grant for her daughter's studies is not based on duly established facts.

However, it is apparent from the evidence on file, and in particular from the investigation report, that, although the allegations initially made against the complainant in that regard were not all corroborated by the investigations carried out, two specific facts constituting fraud were formally established.

Firstly, the investigation conducted by the Internal Audit Unit showed that, for the academic year 2017-2018, when her child changed school, the complainant had provided to ITU an attestation previously issued to her on a provisional basis by the former school, whereas the

school fees she actually incurred were those invoiced by the new school.

Secondly, it was also shown that, for the academic year 2018-2019, the complainant had submitted a falsified attestation to the organisation, which she had fabricated from the one she should normally have produced for 2017-2018 but with the details fraudulently altered in order to make it appear to relate to the following year.

In both cases, the provision of false information to ITU led to education grant payments being made in a greater amount than that to which the complainant was entitled, and it must be noted that, contrary to what she maintains, she could not fail to be aware of this since it was evident from a simple comparison of the figures in the documents in question.

The complainant, who submits that, at the material time, her personal situation was very difficult due to her daughter's fragile state of health and her deteriorating relationship with her spouse which ended in divorce, asserts that it was her ex-husband who gave her all the supporting documentation to be submitted to ITU and that she simply forwarded it "without suspecting that it could be inaccurate or false".

However, the Tribunal will not accept this line of argument. It is clear from the file that, in relation to the false information supplied for the academic year 2017-2018, the complainant herself acknowledged during the investigation that she was aware, at the time she forwarded it, that she was submitting a document that did not reflect the reality of the school fees that she had incurred. In addition, for the year 2018-2019, the investigation established that it was the complainant herself, and not her husband, who had obtained from the school in question the attestation that was then falsified, and that she had obtained it just before the fraudulent declaration was made. Furthermore, even supposing that the complainant was not personally responsible for committing the forgery, she was still accountable for its use, since it was she who submitted the document in question, on her own account, to the organisation. Lastly, although the personal difficulties experienced by the complainant at the material time are of course regrettable, the Tribunal does not consider it in the least credible that they caused the

complainant to lose all common sense and left her unable to understand the highly reprehensible nature of the actions in question.

16. In a last plea, the complainant submits that the decision to dismiss her was a disproportionate sanction in view of the seriousness of the facts of which she was accused.

According to the Tribunal's case law, the disciplinary authority within an international organisation has a discretion to choose the disciplinary measure imposed on an official for misconduct. However, its decision must always respect the principle of proportionality which applies in this area (see, in particular, Judgments 4400, consideration 29, 3944, consideration 12, 3927, consideration 13, and 3640, consideration 29).

In the present case, the Tribunal considers that the fraudulent acts referred to in consideration 15 above, although involving relatively modest amounts, constitute serious breaches of the duty of honesty incumbent on any member of the staff of an international organisation. In addition, the repeated failures by the complainant to honour private obligations were, as stated in consideration 13, liable to undermine the dignity of the status of international civil servant and tarnish the reputation of ITU. As correctly pointed out in the decision of 30 July 2021, the fact that the complainant worked in the Human Resources Management Department is an aggravating factor since it can normally be assumed that staff within that department will be particularly careful to observe the ethical standards expected of the organisation's staff members. Lastly, although the personal difficulties referred to above might certainly be considered as a mitigating factor, the facts at issue would in any case be no less serious on that account.

The Tribunal therefore considers, as did the Appeal Board, that, in deciding the contested dismissal, the Secretary-General did not impose on the complainant a sanction disproportionate to her misconduct, especially in view of the fact that, in this case, the decision was accompanied by a termination indemnity equivalent to five months' salary.

17. As a result of the foregoing, none of the numerous pleas put forward by the complainant against the impugned decision is well founded and, consequently, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 November 2023, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

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

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER