

NINETY-SIXTH SESSION

Judgment No. 2288

The Administrative Tribunal,

Considering the complaint filed by Mr D. A. D. against the World Intellectual Property Organization (WIPO) on 24 January 2003, the Organization's reply of 25 March, the complainant's rejoinder of 30 June and the letter of 18 July 2003 by which WIPO indicated that it did not wish to submit a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant was born in 1960 and has Egyptian nationality. Having worked for WIPO as a consultant in 1996, he was granted a fixed-term contract with the Organization in April 1997. In April 2002 his contract was extended for a period of five years.

In June 2002 a staff member reported to the Human Resources Management Department (HRMD) that she had received unsolicited pornographic e-mail messages in which the complainant's name appeared. The Director General authorised a joint investigation by HRMD and the Information Technology (IT) Services Division, which revealed that the complainant's computer had been "drastically modified from its standard WIPO configuration", and that it was used "primarily for non-WIPO related activity, namely visiting adult (pornographic) Internet sites as well as for downloading software and music from the Internet". In addition, non-standard software products had been installed on the computer. The results of that initial investigation prompted the Director General to establish a Task Force of senior officials to investigate further.

On 15 August 2002 the Task Force recommended to the Director General that, in view of the serious nature of its findings, the complainant should be confronted with the evidence and invited to resign or face summary dismissal, unless he could offer a plausible explanation. Having arranged for the complainant's computer to be impounded, the Director General instructed three senior officials - the Assistant Director General, the Director of HRMD and the Deputy Legal Counsel - to meet with the complainant, inform him of the charges against him and hear his side of the case. During that meeting, which took place on 19 August 2002, the complainant was accused of serious misconduct, including violation of the integrity and security of WIPO information technology systems. He was told that if he had no convincing explanation he could either resign or face summary dismissal. He asked for time to consider his response to the charges and was given until later that day, when he returned to inform the same WIPO officials that, on the advice of his lawyer, he had decided not to resign.

On 19 and 20 August the Director of HRMD, acting on instructions from the Director General, consulted separately the members of the Joint Advisory Committee, who unanimously supported the Task Force's recommendation of dismissal. Also on 20 August, the complainant submitted two sick leave request forms, accompanied by medical certificates, one for the period from 14 to 19 August, the other from 19 August for an indeterminate period. On 21 August the complainant was informed in writing of the Director General's decision to terminate his appointment with immediate effect in accordance with Staff Rule 10.1.1(a)(7).

The complainant challenged the termination decision in a series of letters to the Organization, but the

Director General maintained his position. Consequently, the complainant filed an internal appeal on 1 November 2002. In its report of 18 November 2002 the Appeal Board concluded that the complainant's "clear and obvious violation of the WIPO Information Security Policy did not at all correspond to the minimum standards of professional behavior and decency expected of an international civil servant" and recommended that the decision to dismiss him should stand. Since no decision was taken by the Director General within 60 days of his receipt of the Board's recommendation, the complainant challenges the implicit rejection of his appeal.

B. The complainant contends that the decision to dismiss him breached Staff Rule 10.1.1(c), which requires the Director General to consult the Joint Advisory Committee prior to applying certain sanctions, including dismissal. He submits that there is no evidence that the Committee was convened, or that it considered the evidence and made a recommendation to the Director General. Consequently, the Organization breached its own rules in dismissing him without conducting a fair and impartial investigation. In addition, the Organization wrongly dismissed him while he was on "certified service-related sick leave".

He also considers that his dismissal breached the requirements of due process. In particular, he asserts that he was dismissed on the basis of erroneous conclusions and unsubstantiated allegations and that he was denied his right to present a "reasonable and timely defence". The meeting on 19 August did not constitute a fair opportunity to state his case, because he was simply presented with an ultimatum, knowing that regardless of what he said he would lose his job. Moreover, the Organization was allowed to call "a surprise witness" before the Appeal Board whereas he was denied that possibility.

According to the complainant, the Organization, which had to prove the alleged misconduct beyond reasonable doubt, has not shown precisely how his actions compromised the integrity of WIPO's information technology systems, or that these actions were even capable of doing so. Nor has it proved that his computer, situated in an office to which other staff members had access, was not altered by a third party. The evidence disclosed before the Appeal Board did not warrant summary dismissal, particularly since the pornographic images to which the Organization referred were sent to him in unsolicited e-mail messages. He denies that the materials he allegedly viewed and distributed were pornographic and points out that the websites in question are used daily by many other staff members for business purposes. Neither the Staff Regulations and Rules nor WIPO's Information Security Policy prohibits the use of those sites. The sanction of dismissal was therefore disproportionate to the alleged misconduct and amounts to abuse of power.

He also asserts that the impugned decision was tainted with bias and personal prejudice on the part of the Director General, who, according to the complainant, had personal ties with a staff member previously involved in a relationship with the complainant.

Lastly, he contends that the impugned decision was discriminatory in that another staff member, who had sent him far more offensive material than that which he is accused of having distributed, has not been punished.

The complainant requests oral hearings to enable him to question at least 17 witnesses, and he asks the Tribunal to order the defendant to produce an extensive list of documents. He seeks the following redress: the quashing of the impugned decision and his immediate reinstatement with retroactive effect from 21 August 2002; a disciplinary investigation into his allegations against the Director General and other staff members; an unconditional written apology from the former or, alternatively, promotion to grade P.5 with effect from 21 August 2002; the removal from WIPO records of all documents connected with his summary dismissal; an order that the Director General issue a letter to the Swiss authorities retracting all allegations made by him against the complainant; a declaration that he was released from his duty of confidentiality under Regulation 1.7 as a result of his wrongful dismissal; 25,000 United States dollars in legal costs; at least two million dollars in "compensation for the grave moral injury and heinous mental and physical distress" caused to him and his wife; approximately 30,000 Swiss francs for medical costs; and "such other relief as the Tribunal deems necessary, just, and equitable".

C. The Organization replies that the complainant was dismissed for serious misconduct that was expressly prohibited under the WIPO Information Security Policy. In particular, the installation of non-standard software products, such as Internet messaging software, had enabled free exchange of data across the Organization's secure internal networks by persons unknown and unauthorised. Whilst it acknowledges that some of the offensive material discovered on the complainant's computer may have been received as unsolicited e-mail messages, it points out that he nevertheless deliberately created "bookmarks" enabling him to view and retrieve that material in future.

WIPO asserts that the complainant's dismissal fully complied with the requirements of due process and with the provisions of its Staff Regulations and Rules. All the members of the Joint Advisory Committee were consulted and two investigations into the allegations against him were carried out. He was confronted with the evidence and given ample time and opportunity to explain his actions. Before the Appeal Board he had a further opportunity to defend himself and was even represented by a lawyer. Contrary to his allegations, the Organization did not call "a surprise witness" before the Board; the individual to whom the complainant refers, was the Administration's representative before the Board.

With regard to the allegation that it dismissed the complainant while he was on sick leave, the Organization casts doubt on the validity of his medical certificates and concludes that the complainant "is seeking to hide behind a smoke screen of sick leave to avoid responsibility for serious misconduct".

On the issue of proportionality, the Organization submits that the complainant's actions could have "serious and far-reaching international repercussions", given the Organization's obligations to respect the confidentiality of highly sensitive and valuable technological information deposited with it. Moreover, the computer provided for the discharge of his duties had been reconfigured by him for improper purposes, such as transmitting pornographic material to third parties "against their will". In this connection, WIPO denies any unequal treatment of the complainant, noting that he was dismissed not only because he had viewed and distributed unsolicited pornographic material but also because he had committed other serious acts of misconduct.

Dismissing the complainant's allegations of bias and personal prejudice, the defendant draws attention to several letters from the complainant to the Director General expressing praise and gratitude towards the latter, and to the fact that the Director General had renewed the complainant's contract for a period of five years in April 2002.

The Organization also emphasises that the complainant engaged in further acts of misconduct after his dismissal, which it views as confirming the need to dismiss him in the first instance. It asserts that he made several attempts to break into his office, sent defamatory statements and pornographic images to the Director General and made threats on the latter's life. These incidents were reported to the Swiss authorities.

The defendant considers the complaint to be "a gross distortion and a deliberate misstatement of facts". It describes the complainant's request for the hearing of witnesses as "frivolous", and his claim for damages as "speculative" in the absence of any evidence of moral injury or "heinous mental and physical distress". It asks the Tribunal to award nominal costs against the complainant and his counsel "for bringing the international civil service into disrepute, wasting the time, energy and resources of the Director General and other senior officials of the Organization, and for pursuing a frivolous legal claim against the Organization".

D. In his rejoinder the complainant categorically denies the acts of misconduct allegedly committed both before and after his dismissal and emphasises that the Organization has failed to prove its allegations beyond reasonable doubt.

CONSIDERATIONS

1. In April 1997 the complainant was recruited by WIPO under a fixed-term contract, which was extended in April 2002 for a further five years. On 21 August 2002 he was informed of the Director General's decision to terminate his appointment with immediate effect. After a staff member reported that she had received pornographic e-mail messages in which the complainant's name appeared, an investigation was undertaken to examine the content of the hard disk of his computer as well as his e-mails. The findings of this investigation were communicated to a Task Force, which concluded in a report dated 15 August 2002 that the complainant had altered the configuration of his computer and had used it for non-WIPO related activity, namely visiting pornographic sites and downloading software and music. According to the Task Force, such operations not only contravened the general rules governing the use of computers made available to staff members, but also compromised the integrity and security of the WIPO network infrastructure. In view of the gravity of the violations and the need to protect the integrity of the Organization as well as the rights of third parties, the Task Force proposed that the staff member under investigation should be confronted with the evidence and asked to tender his resignation, failing which appropriate and proportionate disciplinary measures would be taken against him. When he was informed of the Task Force's findings, the Director General gave instructions for all relevant evidence to be photographed and

for the computer concerned to be impounded. The complainant, who was on sick leave from 14 to 19 August, forcibly entered his office on the evening of Friday 16 August and perhaps again, although the point is in dispute, on Saturday 17 August. On Monday 19 August the complainant met with senior officials of the Organization, including the Director of HRMD, who informed him of the charges against him. The complainant denied all the accusations and refused to resign, as had been suggested. Later that afternoon, he explained the reasons why he thought he had been the victim of persecution and maintained his refusal to resign.

2. Following these unproductive meetings, the Director General gave instructions for the members of the Joint Advisory Committee to be consulted and, on 21 August 2002, notified the complainant of his decision to terminate his appointment, with immediate effect, in accordance with Staff Rule 10.1.1(a)(7). After much exchange of correspondence, the complainant lodged an appeal on 1 November. On 18 November 2002 the Appeal Board recommended that the Director General reject the appeal and let the decision of 21 August 2002 stand. The complainant asks the Tribunal to quash the Director General's implicit decision to reject his appeal.

3. In addition to the quashing of the decision to dismiss him summarily, the complainant seeks reinstatement with the payment of all salary, allowances and other emoluments to which he would have been entitled, a written apology from the Director General, a disciplinary investigation into the conduct of the Director General and other officials, the removal from all WIPO records of any document concerning his dismissal, and the despatch of a letter to the Swiss authorities retracting all allegations or denunciations made against him. All claims other than those concerning the decision to dismiss the complainant and his request for reinstatement are obviously irreceivable and must be dismissed by the Tribunal.

4. As grounds for quashing the decision to dismiss him, the complainant submits that the Organization breached the rules of procedure and denied him the right to due process, that it has failed to prove the charges brought against him, that the impugned decision was based on errors of fact and of law and on erroneous conclusions, that the punishment is disproportionate to the alleged conduct, that the impugned decision violated the principle of equal treatment, and that he was the subject of harassment, personal prejudice and abuse of authority.

5. Although the complainant was given the opportunity of a hearing before the Appeal Board to defend himself against the very serious charges that followed the Task Force's detailed report of 15 August 2002, the Tribunal must conclude that the Organization failed to abide by the basic rules that it was required to observe in taking such a serious decision as summary dismissal. Apart from the fact that the complainant had only a few hours on 19 August to defend his case, which in itself constitutes a breach of due process, he was denied the safeguard provided for in Staff Rule 10.1.1(c). That clause stipulates that sanctions such as dismissal may be applied by the Director General only after he has consulted the Joint Advisory Committee, which in such cases shall not include any staff member of a grade below that of the staff member concerned. The defendant considers that the requirement was fully met in view of the fact that the Director of HRMD on 19 and 20 August 2002 consulted the members of the Committee, who unanimously supported the Task Force's recommendations once the Director had explained the background of the investigations. In that connection, the Organization produces a "report" by the Director of HRMD dated 22 January 2003, which the four members of the Committee approved and signed on different occasions between 22 and 26 February 2003, and maintains that the consultation was properly conducted since none of the Committee members held a grade below that of the complainant and since they gave a unanimous opinion. The defendant adds that it even consulted the President of the Staff Council, which is clearly of no avail here.

6. The Tribunal considers that the safeguard available to international civil servants in the form of the mandatory consultation of an advisory body prior to any disciplinary measure cannot legally speaking be said to be complied with unless that body has held an official meeting, the matter has been discussed among the members and minutes of the meeting have been concomitantly drawn up. In the present case, the complainant was denied an essential safeguard owing to the individual consultation of the Joint Advisory Committee members by the Director of HRMD and the disregard for the procedure established in the Staff Rules.

7. The defendant argues that if serious misconduct has been duly established, it cannot be said that there has been any miscarriage of justice on the grounds that some rules of the adversarial proceedings may not have been fully complied with, an argument which it supports by quoting from Judgment 539. The case that led up to that judgment, however, is not at all the same as the present one: the issue then was whether an organisation had complied with a provision that obliged it to provide a staff member "with sufficient information [...] to make it clear to the staff member exactly what he [was] being accused of". In that case, the complainant "could have been

in no doubt as to the accusation he was called upon to answer", since it was based on documents which he had himself supplied and since "the evidence which emerged before the Regional Board was so overwhelming that it [could not] be said that there [had] been any miscarriage of justice". In the present case, although the evidence was weighty, it should have been discussed, as should the degree of punishment which the complainant deserved. And while it is true that, in particularly serious circumstances, some organisations are allowed by their statutes and rules to apply the penalty of summary dismissal without consulting an advisory body, that is not the case under WIPO's Staff Rules, which stipulate in Rule 10.1.1(c) that the Joint Advisory Committee must be consulted before any sanction is applied, except a reprimand.

8. The decision to dismiss the complainant is therefore tainted with procedural flaws and the Tribunal must accordingly set it aside. This does not mean that it will allow the complainant's claim for reinstatement, which, in view of all the circumstances of the case, including events that occurred after the impugned decision, would appear particularly inappropriate. As it did in Judgment 1639, the Tribunal decides to send the case back to the Organization for a new decision to be taken in accordance with the rules of procedure, particularly the rule calling for consultation of the Joint Advisory Committee, since the decision-making process must guarantee for the individual concerned that an impartial solution will be arrived at. The Tribunal grants the complainant compensation equivalent to the total of salary, allowances and other benefits pertaining to his grade and step, which he will have forfeited between the date of his dismissal and the date at which the Director General will take a new decision, less any sums received by him from the Organization or in occupational earnings from other sources since the date of his dismissal.

9. Since the complainant partially succeeds, he may be awarded 2,000 Swiss francs in costs.

DECISION

For the above reasons,

1. The implicit decision by the Director General confirming the decision of 21 August 2002 is set aside.
2. The case is sent back to the Organization for the Director General to take a new decision in accordance with 8 above.
3. WIPO shall pay the complainant compensation as set out under 8, above.
4. It shall pay him 2,000 Swiss francs in costs.
5. All other claims are dismissed.
6. The Organization's counterclaim is dismissed.

In witness of this judgment, adopted on 13 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

