

The Administrative Tribunal,

Considering the second complaint filed by Mr I. L. against the World Health Organization (WHO) on 3 January 2007 and corrected on 6 February, the Organization's reply of 8 May, the complainant's rejoinder of 26 June and WHO's surrejoinder of 2 October 2007;

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

Having examined 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. Facts concerning the present case can be found in Judgment 2525, delivered on 1 February 2006, in which the Tribunal ruled on the complainant's first complaint, finding it irreceivable for failure to exhaust internal remedies. Suffice it to recall that on 15 April 2004 the complainant was notified of his dismissal for misconduct, effective 17 May 2004, as a consequence of submitting a falsified invoice in support of a travel claim. On 10 May he submitted a statement of intention to appeal the dismissal decision to the Executive Secretary of the Headquarters Board of Appeal. By letter dated 25 October 2004 the Director-General set aside the dismissal decision on the basis of procedural errors. Pending a new decision, the complainant was placed on special leave with full pay. By a letter of 18 November he was again notified of his dismissal, effective 18 December 2004, for the same misconduct. On 22 December 2004 he filed a second statement of intention to appeal with the Board of Appeal against the new dismissal decision. On the same day he filed a complaint with the Tribunal against the same decision. At the complainant's request the Board of Appeal suspended his second appeal *sine die* until such time as the Tribunal had ruled on the receivability of his complaint. After the Tribunal's ruling in Judgment 2525 he asked the Board to proceed with his suspended appeal.

In its report dated 24 July 2006 the Board of Appeal concluded that there had been flaws in the procedure leading to the complainant's first dismissal, but that these had been rectified by the Director-General's letter of 25 October 2004. There were no serious irregularities in the "second procedure" and therefore in the "overall procedure" that would nullify the contested decision. The complainant had attempted fraud by submitting a false invoice in support of a travel claim. However, although this behaviour called for a "severe and clear sanction", dismissal was harsh and other possible sanctions existed. It recommended that the level of sanction be reviewed.

By a letter dated 5 October 2006, which constitutes the impugned decision, the Acting Director-General dismissed the complainant's appeal. He accepted the Board's conclusions with respect to the procedural issues and said that he concluded that the complainant had committed misconduct. After recalling the surrounding circumstances and WHO's position with respect to the provision of falsified documents in support of claims, he found that the sanction of dismissal was proportionate.

B. The complainant argues that the impugned decision is based upon a mistake of fact because the Administration concluded that he had wilfully provided WHO with a forged document. He asserts that his frequent flyer card was used without his knowledge by a family acquaintance, Mr L., who then kept the money that had been provided to pay for the airline tickets and falsified the invoice that was attached to his travel claim. He himself was defrauded by Mr L. but the Administration "inexplicably" ignored the affidavit of that person.

The complainant asserts that prior to both of his terminations he was not given the benefit of the doubt. In his opinion, WHO has not offered any reasons why his explanation was not credible. It has failed to satisfy the burden of proof, beyond a reasonable doubt, of his culpability. He also considers that the sanction imposed was inappropriate and disproportionate. The Administration has committed a "*détournement de pouvoir*" by failing to apply correctly the relevant rules and case law to the facts of his case. Citing Article 26 of the International Covenant on Civil and Political Rights, he submits that WHO has violated the principle of equal treatment. In his view, other staff members who have committed similar acts have not been subjected to the same level of severe disciplinary sanction and he provides specific examples of their behaviour.

He also alleges a “*détournement de procédure*”. The process of his dismissal was tainted with prejudice, bias and uncertainty. The lack of a formal disciplinary procedure at WHO led to a denial of his right to be heard and to present his defence, which resulted in a “gross denial” of his fundamental due process rights as an international civil servant. He relies on Judgment 2475 as authority for the proposition that the decision of 18 November 2004 confirming his dismissal was fatally flawed and tainted by bias and by the failure of the Acting Director-General to recuse himself from the matter.

The complainant alleges that the Tribunal’s finding that his first complaint was irreceivable resulted in a delay that has irretrievably damaged his ability to have his appeal heard with the due process guarantees to which he is entitled. He insists upon full document discovery, demands a public hearing and requests that the Tribunal call witnesses.

The complainant requests that the decisions of 15 April and 18 November 2004 be quashed and that he be reinstated in his previous post with full retroactive effect. Upon reinstatement, he asks to be granted either a five-year extension of his contract or alternatively a “service appointment” which would take him to the age of retirement. He claims exemplary damages and one million Swiss francs in moral damages. He asks for those responsible for his dismissal to be subjected to “appropriate disciplinary sanctions”. He also claims costs in an amount equal to at least 50,000 United States dollars, interest at the rate of 8 per cent per annum from 17 December 2004 through the date all amounts that he may be awarded are actually paid in full, and such other relief as the Tribunal deems just, necessary and equitable.

C. In its reply WHO denies that the impugned decision was based on a mistake of fact. It asserts that, in a letter dated 6 July 2004, the Director of Human Resources Services provided the complainant with an “exhaustive and detailed” explanation as to why Mr L.’s written confession was not credible. In the dismissal letter of 18 November the Assistant Director-General for Family and Community Health agreed with the analysis contained in the letter of 6 July. In WHO’s view the confession does not diminish the complainant’s responsibility for submitting a falsified invoice in support of his travel claim. It further argues that upon finding that the complainant’s explanations were not credible, the question of giving him the benefit of the doubt was no longer relevant. It accepts that it bears the burden of proving the complainant’s misconduct and maintains that it has satisfied this burden beyond a reasonable doubt.

The Organization states that in determining an appropriate sanction for the complainant it took into account both objective and subjective considerations and any mitigating factors. Its deliberations were guided by the Tribunal’s case law dealing with the proportionality of disciplinary sanctions. It maintains that the intent to defraud is a serious offence and that WHO is entitled to expect the highest standards of integrity from its staff. It argues that there was no inequality of treatment. Other staff members who have submitted fraudulent claims or falsified documents in support of claims have also been dismissed. The Organization rejects the complainant’s claims that there was a “*détournement de procédure*”. It denies his allegations of bias or prejudice on the part of WHO staff members involved in the matter. The complainant’s case was considered a second time in an objective manner, based on a careful review of all the relevant material. The Organization states that it observed the requirements of due process and that the complainant benefited from all of the formal and procedural safeguards stipulated by the Staff Rules and the case law. He had ample opportunity to respond to the material facts and allegations that were clearly put to him during the investigation. WHO asserts that it handled the matter in compliance with the Tribunal’s ruling in Judgment 2475 and it rejects the complainant’s requests for relief.

D. In his rejoinder the complainant reiterates his arguments and presses his pleas. He points out that one of his main contentions is that the Organization did not fully consider the evidence he provided. It also failed to conduct a proper investigation. He contends that WHO should have heard oral testimony and that it is an elementary condition of due process that an accused be able to call witnesses. In his view, the Organization’s failure to interview Mr L. strongly supports a finding of bias and prejudice. He reasserts his request for full document discovery and states that if the Tribunal does not compel the production of specific items he will “seek due process elsewhere”.

E. In its surrejoinder WHO maintains that the probative value of Mr L.’s written evidence was carefully and thoughtfully considered and that it correctly concluded that the latter’s statements were not credible. Having reached that conclusion it did not have an obligation to verify the information directly with that person. It asserts that the onus it placed on the complainant to provide a credible explanation of the documents he provided to support his travel claim is not a reversal of the burden of proof. It also contends that the complainant is wrong in

asserting that a second consideration of the matter required WHO to start its investigation from the beginning.

## CONSIDERATIONS

1. The facts giving rise to the complaint are set out in Judgment 2525. The complainant's internal appeal against the decision to dismiss him for misconduct was suspended pending the Tribunal's decision regarding his first complaint that had been filed prematurely, at the same time as the appeal. After the Tribunal had dismissed the first complaint as irreceivable, the proceedings before the Board of Appeal resumed.

2. On 2 June 2006 the Board of Appeal met *in camera* to examine the appeal, supplemented by a hearing at the complainant's request. The complainant identified the following individuals as witnesses: the Director of Human Resources Services, the Assistant Director-General for Family and Community Health, the Acting Director-General, the Director of the Office of Internal Oversight Services (IOS), and two other staff members that the complainant claimed had committed financial fraud upon the Organization but who were not dismissed. The Director of IOS declined to appear on the grounds of confidentiality but did offer to respond in writing to questions forwarded by the Board, reserving his right to decline to answer any questions that were, in his opinion, contrary to the duty of confidentiality placed on the IOS. The Acting Director-General also did not appear. Finally, the Chairman of the Board took the decision to exclude the two other employees on the basis that they were not party to the case at issue.

3. By a letter dated 5 October 2006, the Acting Director-General informed the complainant that his appeal and related requests for redress were being dismissed. He stated that he accepted the Board's conclusion that the procedural flaws in the first dismissal procedure were rectified by the Director-General's letter of 25 October 2004. He also stated that he found the investigation and second decision to dismiss the complainant procedurally correct, and accepted the conclusion that the complainant had committed misconduct by submitting a falsified invoice in support of his travel claim. Concerning the Board's recommendation that the level of sanction be reviewed, he stated that upon having conducted the review, and having regard to the fact that WHO is gravely concerned with falsified documents in support of claims and taking account of all the surrounding circumstances of the case, he concluded that the sanction of dismissal was proportionate. This is the decision the complainant challenges before the Tribunal.

### *Mistake of fact*

4. The complainant submits first that the decision is based on the finding that he wilfully provided a falsified invoice. He argues that this constitutes a mistake of fact.

5. In reviewing a decision, it must be recalled that it is not the role of the Tribunal to reweigh the evidence before the internal appeal board which is entitled to considerable deference as the primary trier of fact. Where a body such as the Board of Appeal has heard evidence and made findings of fact based on its appreciation of that evidence, the Tribunal will only interfere in case of manifest error (see Judgment 2295, under 10).

6. In the present case, the Board of Appeal conducted a hearing at which the complainant and others testified. However, it should be noted that Mr L. was not called as a witness by the Organization or the complainant.

7. The complainant grounds his allegation of mistake of fact on the basis that Mr L. in his affidavit deposes to facts that differ from those upon which the decision of dismissal was made. The credibility concerns surrounding this affidavit, including the timing of its delivery, the questions concerning the timeline of events and other inconsistencies, were all identified in the Director of Human Resources Services' letter of 6 July 2004 to the complainant.

8. Despite having been presented with these inconsistencies and other problems surrounding the credibility of the affidavit, the complainant did not offer any reasonable response to the concerns. In light of the problems in relation to the affidavit, the complainant's assertion of mistake of fact is unfounded.

### *Benefit of the doubt/burden of proof*

9. The complainant submits that the burden of proof in cases such as his case, is proof beyond a reasonable doubt. He claims that not only was that burden not discharged but that the burden of proof was shifted to him. He

contends that he was not given the benefit of the doubt. In maintaining that the misconduct was not proved beyond a reasonable doubt, the complainant again relies on the affidavit referred to above.

The Tribunal will not engage in a determination as to whether the burden of proof has been met; instead, the Tribunal will review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made by the primary trier of fact (see Judgment 969, under 21). As the complainant relies on the contents of Mr L.'s affidavit to advance this argument and in light of the above comments regarding the credibility concerns in relation to the affidavit, this argument is rejected.

10. The complainant also argues that by not accepting Mr L.'s affidavit as establishing his innocence, the burden of proof was reversed and he has to prove his innocence rather than refute evidence levelled against him. This is not correct. It does not follow from the fact that evidence tendered to rebut evidence of guilt is rejected on the basis of lack of credibility that the burden has shifted to an accused person.

11. As to the complainant's contention that he was not given the benefit of the doubt, he rests this argument on the basis that his version of events was not believed. In Judgment 2009, under 4, the Tribunal noted that the internal appeal body in that case was entitled, having weighed the evidence, to reach the conclusion that the complainant's explanations were not credible and should be rejected. Since no doubt existed, benefit of the doubt could not arise and the complainant could not succeed on the plea that the employer was bound to accept that he had made a mistake. The same reasoning applies in the present case. Here the Board of Appeal was justified in reaching its conclusions, about which it had no reservations and therefore the question of the benefit of the doubt does not arise.

#### *Proportionality of the sanction*

12. The complainant's plea that the sanction was disproportionate is grounded primarily on his assertion that he did not wilfully intend to defraud the Organization. He states that he was in mourning at the time because of the loss of a close family member. In addition, he points out that he had a long record of satisfactory employment with WHO.

13. The fact remains, however, that the finding was one of wilfully having defrauded the Organization. In addition to other factors, the nature of the offence itself is one of the factors to be taken into account in arriving at a just sanction.

14. It is clear from the Staff Regulations and Staff Rules that dismissal is contemplated as a response to fraudulent acts such as that of the complainant. Staff Rule 110.8.1 defines "misconduct" as "any improper action by a staff member in his official capacity" and Staff Rule 110.8.3 provides that "misconduct" encompasses "any improper use or attempt [by a staff member] to make use of his position as an official for his personal advantage". Under Staff Rule 1075.1, it is provided that "[a] staff member may be dismissed for misconduct as defined in Rule 110.8".

15. Consistent precedent has it that a high degree of deference will be accorded to decisions concerning sanctions where the misconduct relates to issues of dishonesty, misrepresentation and a lack of integrity. In these circumstances, the Tribunal is unable to conclude that the sanction was disproportionate.

#### *Equality of treatment*

16. The complainant also argues that other staff members who have committed similar acts to those in his case have not been subjected to the same level of disciplinary sanction. He bases this argument on an anonymous note he received by post regarding financial misconduct on the part of two other employees. Given the unreliable nature of the evidence on which the claim of unequal treatment is based, this argument will not be addressed.

#### *Right to be heard*

17. The complainant's submissions in this regard include an allegation that his due process rights were violated during the course of the investigation and that he was not allowed to adduce evidence or establish Mr L.'s credibility. There is no need to reiterate the complainant's many assertions in this regard. Suffice it to say that the complainant was at all times fully informed of the charges against him and was given numerous opportunities to respond to the accusations.

18. With regard to the investigation itself, the complainant claims that he should have been invited to put questions to the representatives of the airline or the travel company. The case law on which the complainant relies does not support this position. Moreover, this evidence was ultimately of no significance as the only matter at issue was the complainant's knowledge with respect to the falsity of the invoice. The complainant was informed early on of what the allegations were and on what basis they were made. There is simply no basis for arguing that the complainant did not have knowledge of the evidence against him.

19. As to the contention that his attempts to see the Assistant Director-General for Family and Community Health were rebuffed after the decision of 25 October 2004, given the self-serving nature of the evidence to support this claim, it will not be considered further. Moreover, in terms of his attempts to establish Mr L.'s credibility, the Tribunal notes that the complainant opted not to call him as a witness at the hearing before the Board of Appeal.

### *Bias*

20. The complainant alleges bias on the part of the Acting Director-General; since the Acting Director-General made the earlier decision – and he was, in effect, reviewing his own decision – he ought to have recused himself from the matter. It is not uncommon in international organisations for the head of an organisation to review his or her earlier decision based on the recommendations of an internal appeals body. This alone does not establish bias.

### *Reasons*

21. The complainant argues that the Acting Director-General decided not to follow the Board of Appeal's conclusion that dismissal was disproportionate and did not provide sufficient reasons for not following its recommendation.

22. While the Board of Appeal did conclude that fraud by a senior staff member called for a severe and clear sanction, it found that the sanction of summary dismissal was harsh. The Board noted that in addition to summary dismissal various other degrees of sanction were possible and should be considered in light of the aggravating and extenuating circumstances surrounding this case. It did not state what those circumstances were nor did it make a specific recommendation.

23. In his decision the Acting Director- General stated the following:

“The Board concluded that fraud by a senior staff member called for a severe and clear sanction. It nevertheless recommended that the decision to dismiss you be reviewed. I have done so. This review confirmed that WHO views with the gravest concern the provision of falsified documents in support of claims. Taking this into consideration, along with all of the surrounding circumstances as recommended by the Board, I find the sanction of dismissal to be proportionate.”

24. The case law makes it clear that when rejecting a recommendation of an internal appeals body that favours a complainant, the final decision-maker must give clear and cogent reasons for such a decision (see Judgments 2092, 2261, 2347 and 2355).

25. In the present case, the Board of Appeal appears to have based its recommendation on the mistaken impression that the complainant was summarily dismissed. Further, it did not recommend a specific sanction, it simply recommended a reconsideration of the measure imposed. The Acting Director-General did reconsider the sanction and, although brief, provided clear and cogent reasons for the sanction he decided to impose.

26. The complainant insists on the production of numerous specific documents, in particular documents relating to disciplinary sanctions brought against staff members in a similar situation. He also requests a public hearing. Given that the case ultimately depends on the weight to be given to the evidence of Mr L. whom the complainant elected not to call as a witness before the Board of Appeal, this is not a case for further evidence or oral hearings. For the same reason, the complainant's request for the production of additional documents is also rejected.

### *Relief*

27. As part of his claims for relief the complainant requests exemplary damages for alleged retaliatory actions taken against him. As evidence of this he submits, inter alia, that WHO published an article he had co-authored

without a citation featuring his credentials. However, the complainant submitted a preliminary version of the article and not the published article that did have his credentials. The Tribunal finds that the allegation of retaliation is completely unsupported by the evidence. Therefore the claim for exemplary damages is without merit.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2007, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet