

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

109th Session

Judgment No. 2913

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. M.-S. against the World Health Organization (WHO) on 19 November 2008 and corrected on 8 January 2009, the Organization's reply of 11 May, the complainant's rejoinder dated 14 July and WHO's surrejoinder dated 9 October 2009;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Congolese national born in 1963, is a former staff member of the Organization. He joined the WHO Regional Office for Africa in Brazzaville (Congo) in 1984. At the material time he was performing duties at grade G.5, step 13 (BZ.05.13).

On 29 September 2005 vacancy notices were issued with a view to holding a competition to fill three G.7 posts for human resources assistants. The complainant applied. On 22 November 2005 the

candidates for these posts took part in a written selection test which was held on the premises of the Regional Office. The complainant and another candidate, Mr M.-N., were seated next to each other in the group installed in the library. When the test papers were marked, those of the complainant and Mr M.-N. were found to display great similarities. The answers to the questions were the same and their wording was almost identical.

The complainant was warned by a memorandum of 24 January 2006 that he was presumed to have cheated in the written test taken on 22 November 2005, which would constitute misconduct possibly entailing disciplinary action, and he was invited to comment. The next day he replied by a memorandum in which, inter alia, he asked to see a copy of the record of proceedings drawn up at the end of the test. Since his supervisor did not deem this answer to be a “satisfactory explanation”, he informed the complainant on 18 April that he – the complainant – had engaged in misconduct as defined in Staff Rule 110.8 and that the Regional Director was considering the possibility of reassigning him with a reduction in grade to G.4, step 1, as from 24 July 2006. This decision was confirmed by a memorandum of 9 May.

On 31 May the complainant lodged an appeal with the Regional Board of Appeal which, in its report submitted to the Regional Director on 5 December 2006, concluded that there was a lack of evidence of wrongdoing and that a mere assumption of wrongdoing was not a sufficient reason for downgrading and reassigning a staff member. It recommended to the Regional Director that the complainant be barred from taking part in any tests held by the Organization for a period of time, that he be reinstated in the grade which he had held before being subjected to a disciplinary measure and that, having regard to the apparent deterioration in his working relationship with his supervisor, he be reassigned to a new post. On 12 January 2007 the Regional Director rejected these recommendations which seemed to him to be contradictory; however, in view of the complainant’s family situation, he decided to place him at step 10 of grade G.4.

On 22 January 2007 the complainant referred the matter to the Headquarters Board of Appeal. In its report of 26 November 2007 the Board found that the test had not been organised in a satisfactory manner, that there was still some doubt as to whether cheating had occurred, that a mere presumption did not constitute sufficient grounds for a disciplinary measure, and that there was a conflict of interests within the regional Administration which was “liable to undermine compliance with internal justice”. It recommended that the Director-General reinstate the complainant in his previous grade with retroactive effect from 1 August 2006, reassign him to a post matching his grade in a different unit, adjust his salary with retroactive effect from 1 August 2006 and, lastly, pay him damages for moral injury in the amount of 1,000 United States dollars. On receiving this report, the Director-General noted some divergences between the position of the Headquarters Board of Appeal and the Administration’s analysis of the situation. She therefore asked the Board to comment on these divergences, and, on 9 June 2008, the Board sent her an additional report in which it confirmed its initial position and maintained its recommendations. After examining both reports, the Director-General notified the complainant, by a letter of 9 September 2008, of the reasons why she could not follow the Board’s recommendations. She stated in particular that the evidence supplied by the Administration gave rise to “a set of strong, precise and concordant presumptions of cheating”, which amounted to misconduct, and she rejected the complainant’s appeal in its entirety. That is the impugned decision.

B. The complainant enters six main pleas. He considers first that in the instant case the presumption of cheating “is not irrebuttable” since, in his opinion, the similarity of the test papers does not constitute “sufficient and concordant evidence” of cheating. He contends that when a presumption is “reversed by evidence to the contrary”, such as the lack of a record of proceedings drawn up at the end of the test, it does not establish that a person engaged in misconduct.

Secondly, he emphasises that, since the Organization has no rules governing the procedure for holding written tests which would offer “a

reliable and lawful legal framework”, no guidance can be given to the parties as to what disciplinary measure should be adopted.

Thirdly, the complainant objects to the imposition of concurrent disciplinary measures which he regards as disproportionate, unjustified and unwarranted. In that connection he refers in particular to the setting aside of his test paper and to his reassignment with a reduction in grade which, in his view, amount to “prejudice and misuse of authority” on the part of the Administration.

Fourthly, he takes issue with the fact that his supervisors carried out jointly the functions of organising and assessing the written test and deciding on the disciplinary measures to be taken, and he accuses them of prejudice. In his opinion, their conduct shows that there was a conflict of interests in his department.

The complainant’s fifth plea is that he suffered moral injury because the disciplinary measure of reassignment with a reduction in grade was an affront to his reputation, honour and dignity, since it made him look like “a cheat” in the eyes of the staff. He adds that the undue length – three years – of the internal appeal proceedings also caused him moral injury. Furthermore, he claims that he suffered material injury owing to the decrease in his salary consequent upon his reduction in grade. In addition, he asserts that he has lost any chance of obtaining any appointment or promotion within the Organization.

Lastly, the complainant stresses that, in his opinion, the Administration’s improper action is related to the injury which he has suffered, especially the “financial, [...] social and professional instability” which he has been experiencing for more than three years.

He asks the Tribunal to set aside the Director-General’s decision of 9 September 2008 and the Regional Director’s decision of 12 January 2007 and to order his reinstatement in his previous grade and adjustment of his salary, with retroactive effect from 1 August 2006. He also asks for his reassignment to a post matching his grade in a different unit because of the deterioration in his working relationship with his supervisors, or a “transfer to another regional or

country office of the Organization”, as well as the reconstitution of his career since 1 August 2006. In addition, he claims 200,000 United States dollars in damages for moral injury, 200,000 dollars in compensation for material injury, 200,000 dollars in compensation for professional injury, and 100,000 dollars in costs. The complainant subsidiarily asks the Tribunal to order the payment of 8 per cent interest per annum on all the sums due with retroactive effect from 1 August 2006, and very subsidiarily he requests the cancellation of all the results of the test held on 22 November 2005 on the grounds of “administrative amateurism” and the “restoration of the candidates’ administrative careers”.

C. In its reply WHO asks the Tribunal to join the instant complaint with that filed by Mr M.-N., since they are similar in fact and in law and seek the same redress “through the submission of identical claims”.

On the merits, the Organization states that the alleged absence of proof of cheating on which the complainant relies does not stand up to an examination of the factual evidence. It points out firstly that in the memorandum of 25 January 2006 the complainant admitted that he had cheated “during the examination, but not during the performance of his duties or exercise of his rights”. Secondly, it comments that the similarity of the answers supplied by the two candidates concerned to questions asking them to describe their own personal response “obviously cannot be ascribed to mere coincidence”. It adds that the complainant has never made any attempt to explain how such a similarity could have come about, but instead has tried to shed blame by referring to the fact that no record of proceedings was drawn up at the end of the written test.

The Organization further explains that it fails to perceive the relevance of the complainant’s second plea. It admits that there are no rules of procedure for written tests but it stresses that they are governed by “best practices”, which were followed in this case, and that the complainant had the duties and obligations specified in the Staff Rules and Staff Regulations and the Standards of Conduct for the International Civil Service, which forbid any unethical, corrupt

or dishonest behaviour. The Organization notes in this connection that the Tribunal has found that staff members “have a duty [...] to regulate their conduct with the interests of the [Organization] only in view [...] and may not so behave as to harm its good name. There is no need for any express rule against cheating.”

As for the disciplinary measure of reassignment with a reduction in grade to which the complainant was subjected, WHO states that he was duly informed of the legal bases for applying this measure to him. In view of his misconduct the decision to take disciplinary action against the complainant was also justified under the Tribunal’s case law.

With respect to the conflict of interests which allegedly arose because the complainant’s supervisors carried out several functions, the Organization explains that the same person did not participate in all stages of the selection process. For example, the test papers were marked “anonymously by a group of five officials” from Human Resources and the disciplinary measure was decided by the Regional Director. It adds that it is difficult to see what connection there might be between the professional duties of the complainant’s supervisors and the finding that he had cheated. Furthermore, the accusations of prejudice made by the complainant are no more than completely unsubstantiated allegations.

Lastly, with regard to the moral injury which the complainant claims to have suffered owing to the slowness of the internal appeal procedure, WHO states that the complainant’s appeals were processed with all due diligence and that he was twice informed of the periods of time that would be needed before he could be notified of the Director-General’s final decision.

The Organization likewise considers that it need not “discuss the complainant’s standard of living and the effect of his reduced salary on his financial situation”. It draws attention to the fact that, in order to take account of his family situation, the Regional Director did, however, decide to mitigate the financial impact of the initial disciplinary measure by giving the complainant a higher step in his

grade, thus ensuring that his income was higher. His claim for compensation for material injury is therefore singularly inappropriate.

As far as any professional injury is concerned, the Organization takes the view that the complainant alone is responsible for bearing the adverse consequences of his cheating on his professional reputation.

D. In his rejoinder the complainant presses his pleas and also calls into question “all the examination papers”. In his opinion there is some doubt as to the authenticity of the test papers produced by the Organization with its reply. He submits that “the marks were wrongly recorded through the Organization’s machinations” and that the examination papers were thus forged. He asks the Tribunal to reject “wholesale” the validity of these papers, which have not been authenticated.

Moreover, the complainant modifies his claims and asks for the adjustment of his salary with retroactive effect from 1 August 2006, the payment of 400,000 dollars in compensation for moral injury caused in particular by the undue length – three years according to his calculations – of the internal appeal procedure, 400,000 dollars for professional injury and 600,000 dollars for material injury plus costs in the amount of 200,000 dollars.

Lastly, the complainant states that he does not object to a joinder of his case with that of Mr M.-N. but he asks the Tribunal to decide “in each case” on compensation for the injury suffered and career reconstitution.

E. In its surrejoinder the Organization reiterates its request for joinder and notes that it has been expressly accepted by the complainant in his rejoinder.

On the merits, it fully maintains its position. It states that the internal appeal proceedings certainly did not last for three years, as the complainant claims. It holds that the complainant has still not furnished anything resembling a plausible explanation for the similarity of his examination paper to that of Mr M.-N. Furthermore, it objects to what it terms the complainant’s “purely gratuitous”

allegation that it forged the copies of the examination papers it supplied with its reply. These documents are authentic and the originals can be forwarded to the Tribunal if it deems this necessary.

CONSIDERATIONS

1. The complainant joined WHO in 1984 at the Organization's Regional Office for Africa in Brazzaville. At the material time he held the post of clerk at grade G.5, step 13 (BZ.05.13). He was dismissed for misconduct by a decision of 26 September 2008.

2. On 22 November 2005 the Organization held a written test to fill several grade G.7 posts for human resources assistants. The complainant and 19 other staff members took part in this test. When the papers were marked, those of the complainant and of another candidate who had sat at the table next to his were found to resemble each other greatly.

By a memorandum of 24 January 2006 the complainant was informed that he was presumed to have cheated during the test and that this could lead the Administration to take disciplinary action against him. He was given a copy of the test papers as evidence of this cheating and was asked to provide an explanation. In substance, in his reply of 25 January he asked the Administration to produce the record of proceedings drawn up at the end of the test which, in his opinion, could enlighten the parties as to whether the alleged facts occurred.

As the Administration took the view that the complainant had not provided a satisfactory explanation or furnished any evidence which might refute the accusation levelled at him, it informed him by a memorandum of 18 April 2006 that the Regional Director was considering the possibility of reassigning him with a reduction in grade to a post at grade G.4, step 1, with effect from 24 July 2006. The memorandum invited him to submit his comments in writing.

Having received the complainant's reply of 2 May 2006, the Regional Director confirmed his decision on 9 May.

3. The complainant filed an appeal against this decision with the Regional Board of Appeal. In its report submitted to the Regional Director on 5 December 2006, the Board recommended *inter alia* that the complainant be reinstated in the grade which he had held before being subjected to a disciplinary measure and, in view of the deterioration in his working relationship with his supervisor, that he be reassigned to a new post.

The Regional Director informed the complainant by memorandum of 12 January 2007 that he did not accept the recommendations of the Regional Board of Appeal because they appeared to be contradictory, but that, in order to take account of the financial consequences of the disciplinary measure on his family situation, he was reinstating him at step 10 in grade G.4.

4. On 22 January 2007 the complainant challenged this decision before the Headquarters Board of Appeal.

In its first report the Board recommended that the complainant be reinstated in his previous grade with retroactive effect from 1 August 2006, that he be reassigned to a post matching his grade in a different unit, that his salary be adjusted with retroactive effect from 1 August 2006, and that he be paid damages for moral injury in the amount of 1,000 dollars.

The Board explained that its recommendations to the Director-General were based on the grounds that the test had not been organised in a satisfactory manner, that the Administration should have done everything possible to ensure that the test was conducted properly, that an invigilator had to be present in each examination room in order “to avoid any untoward occurrences”, that in the absence of a record of proceedings it had concluded that there was still some doubt as to whether cheating had occurred, that the test papers were insufficient evidence of cheating, that the disciplining of the complainant was not clearly justified, and that he could not be disciplined on the basis of a mere presumption that he had cheated.

After studying this report, the Director-General considered that it was necessary to look in greater depth at the Board’s reasoning and

findings and she therefore asked the Regional Office to clarify certain facts and to re-examine all the test papers. As this exercise revealed some substantial divergences, she asked the Board to comment on each of them. To this end, by a memorandum of 5 May 2008 she requested the Board to draw up an additional report containing amended recommendations where appropriate.

In its additional report the Headquarters Board of Appeal commented on each of the points raised by the Director-General and maintained most of the findings and all of the recommendations contained in its first report.

By a letter of 9 September 2008 the Director-General informed the complainant that she was “unable to follow” the recommendations of the Headquarters Board of Appeal and that she upheld the Regional Director’s decision of 12 January 2007, which she regarded as fully justified.

5. The complainant’s claims are set out under B and D above. He puts forward six principal pleas in support of these claims.

6. The Organization submits that the complaint should be dismissed as unfounded.

It requests the joinder of this complaint with that filed by the other staff member who is presumed to have cheated on the same occasion.

7. The Tribunal finds that the two complaints were filed by two different staff members against two decisions which, although they bear the same date and are couched in almost identical terms, concern these staff members individually.

Having regard in particular to the fact that the complaints are directed against disciplinary measures, the Tribunal considers that it must refuse the request for joinder (see Judgment 2343, under 5).

8. On the merits, the complainant first criticises the impugned decision in that it rests solely on a presumption of cheating in the written test held on 22 November 2005, which would constitute

misconduct justifying a disciplinary measure, although in the internal appeal proceedings the Administration was unable to supply the Regional Board of Appeal and the Headquarters Board of Appeal with “sufficient and concordant evidence to support a presumption of cheating”.

9. The Tribunal points out that, in the event of disciplinary measures, the staff member concerned enjoys a presumption of innocence and that, in accordance with the principle *in dubio pro reo*, he or she must be given the benefit of the doubt (see in particular Judgment 2351, under 7(b)). The burden of proof lies with the Organization which intends to take disciplinary action against a staff member.

10. In the instant case, having noticed a similarity between the complainant’s test paper and that of another candidate, the Administration asked the complainant to provide written explanations regarding the presumption that he had cheated. In his reply the complainant asked for the production of the record of proceedings drawn up at the end of the test which, in his words, would make it possible to present a “more meaningful” analysis.

Since the Regional Director did not deem this reply to be a satisfactory explanation, he informed the complainant that he intended to impose the disputed disciplinary measure on him on the grounds that he had “supplied no proof that [he] ha[d] not copied from another candidate or ha[d] not permitted another candidate to copy [his] test paper”.

The Tribunal finds that, by basing its decision on these grounds, the Administration in fact reversed the burden of proof and therefore committed an error of law.

11. However, the only fundamental issue raised by this case is that of whether the complainant actually cheated during the test on 22 November 2005.

12. A comparison of the complainant's test paper with that of the other candidate concerned reveals that the answers to the first and third questions are almost identical and that the answer to the second question is absolutely identical but for one word.

In addition, in the answer to the fourth question, which involved drawing up a numerical table, both candidates made the same mistake when transcribing one of the figures to be included in this table.

Since it is plain from the test papers in question that these strong similarities cannot possibly be the product of mere coincidence, the Tribunal is of the view that these facts are in themselves sufficient evidence of the existence of cheating which could have come about only through the collusion of the two persons concerned. Such cheating obviously constitutes a breach of a general rule of conduct which must be observed by any candidate in an examination. Consequently, the complainant's argument that there were no rules governing the procedure for holding written tests is in any case of no avail. The offence with which the complainant was charged therefore justified a disciplinary measure.

13. The complainant contends that the Organization unlawfully imposed several disciplinary measures on him for the same misconduct, in that his test paper was set aside and he was reassigned with a reduction in grade.

However, the setting aside of his test paper was not a disciplinary measure and Staff Rule 1110.1.3 makes express provision for the disciplinary measure of reassignment with a reduction in grade.

14. Lastly, the Tribunal considers that the disciplinary measure chosen was not manifestly disproportionate given the serious nature of the misconduct.

15. Since the disciplinary measure was justified and in proportion with this misconduct, the other pleas entered by the complainant are of no relevance and must be dismissed.

16. It may be concluded from the above that the complainant's claims must be rejected in their entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 7 May 2010, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet