

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

**111th Session**

**Judgment No. 3035**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr C.-A. M. against the World Intellectual Property Organization (WIPO) on 5 October 2009 and corrected on 15 October 2009, the Organization's reply of 18 January 2010, the complainant's rejoinder of 26 April and WIPO's surrejoinder of 17 June 2010;

Considering Articles II, paragraph 5, and VII 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. Facts relevant to this dispute are set out in Judgment 2962, delivered on 2 February 2011, concerning the complainant's first complaint.

After some incidents related to the security of WIPO's information technology (IT) systems, a Command Team was set up in February 2008. In April a copy was made of the hard disk of several computers assigned to some staff members who were entitled to have privileged access to certain systems. They included the computer of the

complainant, who was a Senior E-Mail Administrator in the Network Services Section. The Information Security Section, which had been instructed to carry out an initial analysis of the data seized on the complainant's computer, issued its report on 2 September. On 4 September the complainant received a letter from the Director of the Human Resources Management Department in which the latter informed him that "preliminary information" indicated that he had committed serious misconduct; on the one hand, without authorisation, he had installed on the computer assigned to him software, some or all of which could have been used "to compromise the integrity and security of WIPO's IT systems, or which were capable of doing so" and, on the other, without authorisation, he had accessed the mailbox of a WIPO staff member, Mr H., and had apparently copied its entire contents onto the hard disk of his own computer. For that reason, pursuant to Staff Rule 10.1.2\*, the complainant was immediately suspended from duty, with pay, and banned from entering WIPO's premises without prior clearance until the Internal Audit and Oversight Division had completed its investigation of the charges against him. The same measure was adopted with regard to two of his colleagues working in his section, although different charges were levelled at each of them (see Judgments 3036 and 3037, also delivered this day).

On 13 October 2008 the complainant wrote to the Director General to request a review of the decision to suspend him from duty. The Director General replied on 29 October that he confirmed the reasons for the suspension and that he did not intend to interfere in the ongoing investigations. On 1 December 2008, acting through his legal counsel, the complainant asked the Director General to end the investigation forthwith. This request was denied. He then referred the matter to the Appeal Board. In its report of 22 May 2009 the Board

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\* This provision reads as follows: "When a charge of serious misconduct is made against a staff member and if the Director General considers that the charge is well founded and that the staff member's continuance in office pending the results of an investigation might be prejudicial to the service, the Director General may suspend the staff member from duty, with or without pay, until the end of the investigation, without prejudice to his rights."

indicated that, in its opinion, the decision to suspend the complainant from duty was valid. It recommended *inter alia* that the conclusion of the investigation should be given high priority and that consideration should be given to replacing the suspension by an arrangement which would allow the complainant to return to work on the Organization's premises, or to work from home. The complainant was advised by a letter of 6 July 2009, which constitutes the impugned decision, that the Director General had decided to adopt the Board's recommendations, insofar as they had not become moot, but that, for the reasons stated in the Organization's submissions before the Board, a resumption of his duties could not be accepted at that stage "for operational and security reasons".

B. The complainant contends that the decision to suspend him from duty is out of proportion to the charges against him. He submits that this decision had no legal foundation. First, he considers that, before suspending a staff member, it must be established that that person has committed serious misconduct. In the instant case, not only has the Organization failed to prove that the said charges were well founded, but he himself has shown that, although the content of certain mailboxes was transferred onto the hard disk of his own computer, this was done at the express request of the users concerned. He regrets the fact that their testimony has not been taken and, in particular, that Mr H.'s statements exonerating him have been ignored. On this point, he adds that the report commissioned from an external auditor by the Internal Audit and Oversight Division shows that the accusations made in September 2008 are completely unsubstantiated. In his view, the condition that suspension should be resorted to only in situations of urgency has not been respected, because it would have been quite feasible to allow him to continue work during the investigation, whilst blocking part of his privileged access. Lastly, the complainant argues that, since he has been suspended from duty for 13 months, the "principle established" by the above-mentioned Staff Rule, in other words that suspension is essentially temporary, has been breached and that this situation is indicative of prejudice against him. In this connection he draws attention to the fact that in Judgment 2698

the Tribunal found that WIPO had prolonged a temporary measure, without any valid grounds, beyond the reasonable limit accepted by the case law. He believes that the investigation was strung out in order to enable the Organization “to fish for information” in the hope of “finding other more serious [evidence] [...] of the potential danger” which he represented.

The complainant asserts that, although on several occasions he drew the Administration’s attention to what he deemed to be flaws in the procedure leading to the decision to suspend him from duty, the Administration did not react, or even demonstrated bad faith, and he provides several examples to support this view. He says that he was not warned that data were to be seized in April 2008, that he was not present when this exercise took place and that the copies of the files on his computer were not placed under seal. Referring to the fact that Mr W., who was found guilty of harassing him, headed the Command Team, he denounces a misuse of authority and a major conflict of interests. He points out that, according to the applicable procedure, copies should have been made by a technical team, but that in order to seize the data, Mr W. appointed only one staff member from the Information Security Section, whose impartiality seems doubtful.

The complainant considers that the Appeal Board’s deliberations were flawed. He notes that, by the time the Board delivered its report, WIPO already possessed two complete audit reports. He adds that, at that juncture, the Board had not seen his comments on the investigation report drawn up by the Internal Audit and Oversight Division and that its opinion is tainted with bias against him.

He further submits that, by refusing to introduce an arrangement allowing him to return to work on the Organization’s premises, the Director General deliberately departed from the Appeal Board’s recommendations and that, by merely referring to the reasons set out in the Organization’s submissions to the Board, the Director General did not adequately state the grounds for this decision.

Lastly, he alleges that he has been the victim of discrimination and moral harassment. He complains that on 4 September 2008 he experienced humiliating and “brutal expulsion” during which he was

injured. In his opinion, the ban on his entering WIPO premises causes him injury in several respects.

The complainant requests the setting aside of the decisions of 4 September 2008 and 6 July 2009, his immediate reinstatement, an award of damages for the moral and professional injury he has suffered, reimbursement of all his “legal and medical expenses” and “supervision of the Organization’s conduct with regard [to his] work station”. Having pointed out that the periodical reports on his performance have always been highly satisfactory, he enters a claim seeking the cancellation of the “reservations due to the investigation” mentioned in the report which he was given in July 2008.

C. In its reply WIPO states that the terms of Staff Rule 10.1.2 have been respected. It explains that while urgency is not really a prerequisite for ordering the suspension of a staff member, two other conditions must be met. First, the staff member must have been “charged with serious misconduct”. At that stage there is no need to prove the veracity of the charge, because the very purpose of the investigation following the adoption of the suspension measure is to establish whether the charge is well founded. Secondly, the person’s continuance in office must be “prejudicial to the service”. In that respect, WIPO asserts that the complainant was potentially capable of “damaging all or part of WIPO’s IT infrastructure” and that it would have been guilty of “irresponsible management or even gross negligence” if it had not suspended him from duty. While it acknowledges that Mr H. made it known in due course that he had indeed authorised the complainant to copy the contents of his mailbox, it states that in order to assess whether a suspension is justified, the Tribunal must examine only whether, at the time when the measure was adopted, there was sufficient evidence for the Director General to deem the charges well founded. In its opinion, in this case there were strong indications that this was so. Citing Judgment 2698, it recalls that suspension is a discretionary measure which can be reviewed by the Tribunal only on limited grounds. It explains that the length of the suspension and the validity of the measure are two separate questions and that the former cannot therefore constitute grounds for cancelling

the measure. It regrets that it proved necessary to suspend the complainant from duty for so long, but notes that the investigation carried out by the Internal Audit and Oversight Division concerned extremely complex IT issues and “vast quantities of data, whose analysis was particularly lengthy and especially intricate because the misconduct had apparently been committed by an expert”.

In addition, the Organization emphasises that the complainant’s argument concerning the Administration’s alleged failure to react and bad faith is plainly inapposite. Since the hard disks of a number of computers, including that of the complainant, had been copied at a time when it was presumed that hacking was taking place, it considers that it was perfectly legitimate to engage in this exercise without warning the persons concerned, in order to prevent them from deleting any compromising items. It explains that the operation was carried out in the presence of several staff members and that every precaution was taken to safeguard the integrity of the data seized. In WIPO’s opinion the complainant has not proved that his allegations regarding a conflict of interest and misuse of authority are well founded. In this respect, it adds that the Appeal Board found that there was no evidence of a link between the complainant’s difficult working relationship with Mr W. and the decision to suspend him from duty and that Mr W. had withdrawn from the Command Team in April 2008.

WIPO states that it would have been pointless to forward the documents mentioned by the complainant to the Appeal Board, because they could not have called into question the decision to suspend him from duty, since they postdated 4 September 2008.

The Organization draws the Tribunal’s attention to the fact that the Appeal Board did not recommend that the Director General should introduce arrangements allowing the complainant to return to work; it simply recommended that consideration should be given to replacing the suspension measure with such arrangements, a recommendation which was adopted. It maintains that it is clear from the letter of 6 July 2009 that this measure was kept in place in order to contain risks related to the security of its IT systems. It also points out that,

according to the Tribunal's case law, it is permissible for a final decision simply to refer to the reasons provided in the internal appeal proceedings, of which the person concerned is necessarily aware.

WIPO considers that the suspension was "applied in a dignified and professional manner". It confirms that it had proved "necessary physically to restrain the complainant", "directly and exclusively" on account of his own conduct, but it states that since this restraint was extremely moderate and perfectly in proportion with the circumstances, the complainant did not suffer any bodily harm. Lastly, it comments that, in deciding to suspend the complainant from duty with pay, although it could have suspended him without pay, it adopted the least harmful of the possible measures.

D. In his rejoinder the complainant presses his pleas. He says that his working conditions between 2002 and 2008 and the complaint of harassment which he filed against Mr W. in January 2007 explain the "innumerable flaws" in the procedure followed in this case and the decision to suspend him from duty. In his opinion, this decision was not taken by the then Director General, but had been requested by his successor who was to take office in October 2008. He invites the Tribunal to order WIPO to produce the relevant documents to enable him to ascertain whether this is so.

The complainant contends that the report which the Internal Audit and Oversight Division issued on 8 February 2010 shows that the Division concluded that the second charge against him was not well founded, although it upheld the first charge. In his view, the rules which he is accused of flouting do not apply to system administrators. In addition he denounces the "inordinate" length of his suspension – i.e. 19 months – and details the adverse consequences of the decision to ban him from entering WIPO premises.

The complainant also asks for the cancellation of the "investigations and audits", the application of "appropriate measures to his periodic reports [for] 2008 and 2009", an award of exemplary damages "for all the treatment he has suffered", and the "public

announcement” in WIPO of the judgment which will be delivered in the instant case.

E. In its surrejoinder WIPO maintains its position. It annexes to its surrejoinder the memorandum of 4 September 2008 by which the then Director General ordered the complainant’s suspension from duty. It considers that the Internal Audit and Oversight Division carried out its investigations objectively and impartially. It makes it clear that authorisation must be requested for the installation of any new programmes or software, in accordance with a procedure adopted in 2006 which must be followed in all cases without exception, but which the complainant deliberately ignored. It is of the opinion that the decision to ban the complainant from the Organization’s premises was necessary and unavoidable.

### CONSIDERATIONS

1. The complainant joined WIPO in 2002. At the material time he was a Senior E-Mail Administrator.

2. By a letter of 4 September 2008 the Director of the Human Resources Management Department drew his attention to certain actions “which, if proven, [might] lead to disciplinary proceedings being taken against [him]”. It seemed that he was guilty of serious misconduct, namely the unauthorised installation on his computer of software which could have been used to “compromise the integrity and safety of WIPO’s IT systems”, unauthorised accessing of a staff member’s mailbox and, apparently, copying its entire contents onto the hard disk of his own computer.

He was also informed that an investigation would be carried out by the Internal Audit and Oversight Division and that, in view of the gravity of the allegations and the highly sensitive nature of his duties, the Director General had decided to suspend him from his duties, with pay, until the completion of the investigation, pursuant to Staff Rule 10.1.2.

The letter of 4 September 2008 also specified that the complainant's suspension from duty would take effect immediately, that he must return all the equipment which had been allocated to him for work purposes and that, as long as the suspension measure remained in place, he was not authorised to use the Organization's equipment or other resources, or to enter its premises without prior clearance.

His computer was sealed.

Two of his colleagues were also suspended from duty (see Judgments 3036 and 3037).

3. On 13 October 2008 the complainant requested a review of the decision of 4 September. On 29 October the Director General confirmed the reasons for his suspension and advised him that he did not intend to "interfere" in the ongoing investigation.

On 1 December the complainant repeated his request through his legal counsel in order, as he said, to put "an immediate end to the unlawful administrative investigation" concerning him and to his suspension. On 23 December 2008 the Director General replied that his request could not be granted without pre-empting the outcome of the said investigation.

4. On 4 February 2009 the complainant lodged an appeal with the Appeal Board in which he asked it to recommend, *inter alia*, the cancellation of his suspension and his immediate reinstatement within the Organization.

On 22 May the Appeal Board issued its report in which it recommended in particular that "concrete steps should be taken to limit the duration of the suspension in so far as possible", that the conclusion of the investigation should be given high priority and that consideration should be given to replacing the suspension by an arrangement which would allow the complainant to "return to work and to perform duties or to be found appropriate tasks for working at home, considering his qualifications and grade, in a position which could not threaten IT security" at WIPO.

5. The complainant was informed by a letter of 6 July 2009 that the Director General had decided to adopt the Appeal Board's recommendations to the extent that they had not become moot, but that he considered that, for the reasons already stated in the Organization's submissions before the Appeal Board, his resumption of duties could not be accepted at that stage "for operational and security reasons". That is the decision that he impugns before the Tribunal.

6. The complainant seeks the setting aside of the decisions of 6 July 2009 and 4 September 2008, cancellation of the "reservations due to the investigations" contained in the periodical report which he was given in July 2008 and his immediate reinstatement. He also claims damages as compensation for the moral and professional injury which he has suffered, reimbursement of all his "legal and medical expenses" and "supervision of the Organization's conduct with regard [to his] work station".

7. The Organization submits that the complainant's claims are groundless and that the complaint should be dismissed in its entirety.

8. In his rejoinder the complainant asserts that, in breach of Staff Rule 10.1.2, the decision of 4 September 2008 to suspend him from duty seems to have been taken by the newly elected Director General who did not take office until October 2008. But the Tribunal considers that the production by WIPO of a memorandum signed by the Director General in office at the time proves that he ordered the complainant's suspension from duty.

9. The complainant contends that the above-mentioned decision had no legal foundation as it rested "on items of evidence which were not reasonably adequate to provide a basis for legal action".

10. Staff Rule 10.1.2 provides that, "[w]hen a charge of serious misconduct is made against a staff member and if the Director General considers that the charge is well founded and that the staff member's

continuance in office pending the results of an investigation might be prejudicial to the service, the Director General may suspend the staff member from duty, with or without pay, until the end of the investigation, without prejudice to his rights”.

According to the Tribunal’s case law, suspension is an interim measure which need not necessarily be followed by a substantive decision to impose a disciplinary sanction (see Judgments 1927, under 5, and 2365, under 4(a)). Nevertheless, since it imposes a constraint on the staff member, suspension must be legally founded, justified by the requirements of the organisation and in accordance with the principle of proportionality. A measure of suspension will not be ordered except in cases of serious misconduct. Such a decision lies at the discretion of the Director General. It can therefore be reviewed by the Tribunal only on limited grounds and will be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the evidence (see Judgment 2698, under 9, and the case law cited therein).

11. The complainant submits that in the instant case, the condition that he must have engaged in serious misconduct was not met, that his suspension has lasted for more than 13 months, whereas such a measure must be temporary in nature, and that there was no urgent reason to suspend him on the basis of the initial charges which have proved to be unfounded and which “a simple fair analysis at the beginning of the procedure ought to have refuted”.

12. Since the lawfulness of an administrative decision must be appraised as at the date of its adoption, the Tribunal must ascertain whether on 4 September 2008 the conditions laid down in Staff Rule 10.1.2 were met in order that the Director General might take the disputed decision to suspend the complainant, since all subsequent facts are irrelevant (see Judgment 2365, under 4(c)).

13. It is not disputed that the complainant's suspension was ordered in the light of the report drawn up by the Information Security Section. This report brought to light evidence of several wrongful actions which seemed to be ascribable to the complainant and which appeared to be especially serious from the Organization's point of view. In particular, he was accused of using his computer to access the mailbox of another staff member and of having installed several items of non-standard software without authorisation. The question is, therefore, whether there is merit in the various pleas entered by the complainant in his written submissions, having regard to the above-mentioned Staff Rule 10.1.2 and to the Tribunal's case law.

14. The complainant's principal contention is that the impugned decision had no legal foundation.

(a) In substance, the complainant submits that "the requirements that there must be serious misconduct and urgency, if suspension is to be lawful, are not met" in the instant case.

However, the Tribunal finds that the evidence in the file shows that the decision to suspend the complainant rested on preliminary information indicating that he appeared to be guilty of serious misconduct which, on account of the extremely sensitive nature of his duties as a senior e-mail administrator, could have made his continuance in office pending the results of the investigation prejudicial to the Organization's interests.

The Tribunal therefore considers that, since there was no need, at that stage, to prove the complainant's alleged misconduct, the Director General was entitled to order the complainant's suspension in the exercise of his discretion under Staff Rule 10.1.2.

The Tribunal notes, with respect to urgency, that the Rule in question does not expressly state that this is a condition which must be satisfied before the Director General can order a suspension. This provision specifies only that the Director General must consider that the continuance in office, during the investigation, of a staff member who has been charged with serious misconduct might be prejudicial to the service.

As for the remaining submissions, what the complainant describes as “fishing for information” is more related to subsequent facts which, as stated above, could not be taken into account at that time.

(b) The complainant then relies on what he deems to be flaws in the procedure leading to his suspension.

(i) First he complains of the Administration’s failure to react and its bad faith.

But the Tribunal notes that, in support of this plea, the complainant refers to documents which were drawn up after the decision to suspend him from duty and which may not therefore be taken into consideration when appraising its lawfulness.

(ii) The plea that the seizure of data on 21 April 2008 was unlawful in that it occurred without prior warning or a guarantee that the data would be preserved, must be rejected.

As WIPO points out, since several IT incidents had been recorded which suggested that hacking had occurred, ascertaining their source was a matter of urgency. In these circumstances, prior warning of the seizure of the data contained on the computers of the staff members on whom suspicion fell would have enabled them to delete any compromising data.

With regard to the guarantee that data would be preserved, the Organization has supplied reliable information that convinces the Tribunal that every step was taken to preserve the said data’s integrity.

(iii) The complainant alleges a major conflict of interest on the part of members of the Command Team which initiated in February 2008 the investigation leading to his suspension, since the head of the team had been found guilty of harassing him. He adds that the Organization did not respect its duty of impartiality and neutrality and ignored a manifest conflict of interest in appointing as the sole member of the technical team a staff member of the Information Security Section who knew the access codes to the computers and who was in charge of applying the security rules.

The Tribunal notes from the submissions that the head of the Command Team withdrew from the team in April 2008 and hence

could not intervene in any way in the subsequent procedure to look into the complainant's alleged misconduct, which led to his suspension on 4 September 2008. As the Appeal Board found, nothing in the complainant's submissions makes it possible to establish a link between his difficult working relationship with that person and the decision to suspend him from duty.

Similarly, in the absence of other objective evidence, the mere fact that the staff member of the Information Security Section knew the access codes to the computers and was in charge of applying the security rules is not proof of a conflict of interests.

(iv) The complainant submits that the decision to suspend him is tainted with misuse of authority.

However, according to the Tribunal's case law, misuse of authority may not be presumed and the burden of proof is on the party that pleads it (see in particular Judgment 2116, under 4(a)).

In the instant case the complainant merely relies on an alleged conflict of interests which, as stated above, was not proved.

15. It follows from the foregoing that the plea that the decision of 4 September 2008 to suspend him had no legal foundation is devoid of merit and that the Director General was entitled to take the said decision pursuant to Staff Rule 10.1.2.

16. The complainant enters another plea to the effect that the Appeal Board's deliberations were flawed. He submits that by the time the Board issued its report on 22 May 2009, the Organization already possessed complete audit reports which it had received in January and March 2009. He adds that the Board was unaware of the comments he had submitted in August 2009 on the report of the Internal Audit and Oversight Division. He infers from this that the Board's opinion was biased against him.

However, the evidence on file shows that the audit reports mentioned by the complainant postdated the decision to suspend him from duty and could not therefore be taken into consideration in appraising its lawfulness and that, as the complainant's comments were

submitted after the Appeal Board had issued its report, they could not call into question the suspension measure on whose lawfulness the Board had to give an opinion.

17. The complainant objects to the fact that no reasons were stated for the decision of 6 July 2009, since the Director General, in departing from one of the Board's recommendations, merely stated that, for the reasons already given in the Organization's written submissions before the Board, a resumption of the complainant's duties could not be accepted for unspecified "operational and security reasons".

18. The Tribunal finds that, in maintaining the complainant's suspension by his decision of 6 July 2009, the Director General extended the duration of this suspension beyond the reasonable limit accepted by the case law and thus caused the complainant moral and professional injury.

The decision must therefore be set aside and compensation is due in respect of this injury.

19. The Tribunal will not rule on the plea that insufficient reasons were stated for the impugned decision, since in any event this flaw would not result in an increase in the damages awarded.

20. The complainant also complains of having been brutally expelled from his office on 4 September 2008. He states that his "brutal and summary suspension" has caused him "very serious moral and professional injury".

In its reply the Organization states that "at one point, when implementing the suspension measure, it was necessary physically to restrain the complainant". But it explains that this restraint was not only the "direct and exclusive consequence" of the complainant's own conduct, because he had tried to stop the normal process of the operations, but also extremely moderate and perfectly in proportion to the circumstances. It says that this incident was recorded in the report

drawn up by one of the security guards. These statements have not been contradicted.

The Tribunal has no reason to doubt the Organization's good faith. Furthermore, the latter points out that the complainant has never raised the question of the brutal treatment to which he was allegedly subjected directly with the Administration and that he has never requested the opening of an inquiry.

It is true that in the letters of 13 October 2008 and 1 December 2008 in which the complainant asked the Director General to review the decision to suspend him, he mentioned his allegedly brutal treatment, but he never submitted any claim in this respect to the Appeal Board, which did not therefore have to give an opinion on the matter.

21. The complainant takes the Organization to task for banning his entry to its premises.

In this regard, the Tribunal agrees with WIPO that when an IT administrator is suspended from duty on the grounds that he may have undermined the integrity and security of the Organization's IT systems, withdrawing his right of access to its premises is a necessary and unavoidable measure.

22. The complainant requests the cancellation of the reservations contained in the periodical report which he was given in July 2008. The Tribunal cannot grant this request, which does not rest on any real argument.

23. He also requests reimbursement of medical expenses, but the Tribunal cannot grant this request as it is not supported by any evidence.

24. He further requests the "public announcement" of this judgment in the Organization. Apart from the fact that the Tribunal does not consider it appropriate to order such an announcement, a steady line of precedent has it that, in any event, any new claim submitted in a rejoinder must be rejected.

25. On account of the injury mentioned under 18, above, the complainant is entitled to compensation in the amount of 10,000 United States dollars. He is also entitled to costs, which the Tribunal sets at 5,000 dollars.

#### DECISION

For the above reasons,

1. The decision of the Director General of 6 July 2009 is set aside.
2. WIPO shall pay the complainant compensation in the amount of 10,000 United States dollars to redress the injury suffered.
3. It shall also pay him 5,000 dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2011, 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 6 July 2011.

Seydou Ba  
Claude Rouiller  
Patrick Frydman  
Catherine Comtet