

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

B.
v.
WIPO

125th Session

Judgment No. 3944

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. B. against the World Intellectual Property Organization (WIPO) on 27 July 2015, containing an application for the fast-track procedure, and WIPO's letter of 8 September 2015 informing the Registrar of the Tribunal that it was opposed to that application;

Considering the complaint corrected on 5 November 2015, WIPO's reply of 7 March 2016, the complainant's rejoinder of 15 June and WIPO's surrejoinder of 13 September 2016;

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

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

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

The complainant challenges the decision to dismiss him following disciplinary proceedings.

The complainant, who held a post at grade G5 and a permanent appointment, was informed by a memorandum of 13 December 2013 that the Internal Audit and Oversight Division (IAOD) had launched an investigation in response to allegations of fraud committed by him which had been brought to its attention. He was advised that IAOD was conducting investigations in accordance with the 2010 version of the Investigation Procedure Manual.

In its report of 23 January 2014, IAOD, which had heard the complainant, found that in 2012 and 2013 he had submitted to the insurance broker responsible for the management of WIPO's health insurance scheme some forged invoices in support of 29 claims for the reimbursement of medical expenses. As a result of this "fraudulent practice" the insurance broker had wrongly reimbursed him the sum of 28,487.50 Swiss francs. In addition, IAOD had established that the complainant had engaged in a "collusive practice" by arranging for healthcare providers to issue false invoices and a false treatment plan, which had enabled him to "defraud" the insurance broker. IAOD noted that he had repaid the above-mentioned sum in full, but emphasised that he had ended these practices only when he had been "caught" and that he had admitted his wrongdoing only when he had been "confronted with the proof". It concluded that, by acting in a manner that was "incompatible with the integrity" required by his status as an international civil servant, the complainant had breached Staff Regulation 1.5 concerning conduct and had engaged in "prohibited practices" within the meaning of Office Instruction No. 13/2013. It consequently recommended the initiation of disciplinary proceedings against him.

On 28 February 2014, the Director of the Human Resources Management Department (HRMD) sent the complainant a charge letter informing him that disciplinary action was being initiated against him under Chapter X of the Staff Regulations and Rules which had entered into force on 1 January 2014 and Office Instruction No. 9/2014 of 4 February 2014 on the procedure governing the application of disciplinary measures. She informed him of the charges against him, which were based on the IAOD report, and invited him to comment, which he did on 28 March. He expressed his "deep regret" and presented his apologies, asking the Director of HRMD to show clemency and leniency towards him.

On 28 April the Director General advised the complainant that as the proof that he had committed fraud was "clear and convincing", the charges against him were well-founded. He informed the complainant that although under Staff Rule 10.1.4 fraud was considered to be serious misconduct warranting summary dismissal, having regard to his personal

situation he had instead decided to dismiss him with effect on 30 April 2014 but to grant him a termination indemnity equivalent to six months' salary and a sum equivalent to three months' salary in lieu of notice.

On 18 June 2014 the complainant's representative filed an appeal with the Appeal Board. He argued that since the acts with which the complainant was charged had taken place in 2012 and 2013, the applicable provisions were those which had been in force at the time and not those which had entered into force on 1 January 2014. He therefore submitted that, under Staff Rule 10.1.1 applicable until 31 December 2013, the case should have been referred to the Joint Advisory Committee, and he noted that on 24 December 2013 HRMD had sent the Committee a memorandum in which, according to the representative, it had "given [the Committee] authority" to examine the complainant's case before "relieving it of jurisdiction" in March 2014, thus committing an error of law. He sought the setting aside of the decision of 28 April and the complainant's reinstatement. In its reply, WIPO principally asked the Appeal Board to recommend the dismissal of the appeal on the grounds that it was tainted with "serious procedural flaws" in that it rested on two documents to which the complainant's representative had had access as a member of the Joint Advisory Committee and of which the complainant had been apprised only because his representative had breached his duty of confidentiality and disregarded the principle that conflicts of interest must be prevented. At the rejoinder stage, the complainant changed his representative and stated that that measure was sufficient to regularise his appeal, if that were necessary. In its surrejoinder, WIPO argued that this change of representative did not alter the fact that the appeal was unlawful.

In its conclusions dated 18 May 2015 the Appeal Board stated that the information contained in the two documents in question was of no relevance to the redress sought and that it had consequently decided not to examine whether the complainant's first representative had breached his duty of confidentiality. Moreover, it took the view that the possibility that the latter might have had a potential conflict of interest did not prevent it from ruling on the merits of the appeal. The Appeal Board found that the procedure followed by IAOD complied with the

applicable rules and that the sanction imposed on the complainant was not disproportionate. The majority of its members recommended the dismissal of the appeal. The complainant was informed by a letter of 17 July 2015 that the Director General had decided to follow this recommendation. That is the impugned decision.

The complainant seeks the setting aside of the impugned decision, reinstatement, redress for material and moral injury, and costs in the amount of 6,000 euros.

WIPO submits that the complaint must be dismissed because the internal appeal procedure was tainted with a serious procedural flaw in that the complainant's first representative had a conflict of interest and breached his duty of confidentiality. It asks that the Tribunal find at least that that person's mandate as representative was unlawful. It submits that at all events the complaint must be dismissed as unfounded.

CONSIDERATIONS

1. The complainant impugns the decision of 17 July 2015 by which the Director General dismissed his internal appeal against the decision to dismiss him following disciplinary proceedings.

2. The complainant submits that under the version of Staff Rule 10.1.1 which was in force prior to 1 January 2014, his case should have been referred to the Joint Advisory Committee. Although the Committee was abolished on that date, he asserts that the disciplinary proceedings against him predated its abolition since it began on 24 December 2013.

3. The Organization states that the Committee did not have to be consulted because the disciplinary proceedings was initiated on 28 February 2014.

4. As disciplinary proceedings are in essence adversarial, they begin only once the staff member in question has been notified of them. The Tribunal considers that the sole purpose of the preliminary

investigation is to determine whether there are grounds for initiating disciplinary action.

In the instant case, disciplinary action against the complainant was initiated on 28 February 2014 by the letter from the Director of HRMD informing him of the opening of a disciplinary procedure against him in accordance with paragraph 27 of Office Instruction No. 9/2014 of 4 February 2014 on procedure governing the application of disciplinary measures. Consequently, WIPO was not bound to consult the Joint Advisory Committee which had ceased to exist on 1 January 2014.

5. The complainant submits that the abolition of the Joint Advisory Committee on 1 January 2014 breached his acquired rights.

6. According to the case law established for example in Judgment 61, clarified in Judgment 832 and confirmed in Judgment 986, the amendment of a provision governing an official's situation to her or his detriment without his or her consent constitutes a breach of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on. In order to decide whether there may have been a breach of an acquired right, it is therefore necessary to determine whether the altered terms of employment are fundamental and essential within the meaning of Judgment 832 (see, for example, Judgment 3571, under 7). In this case, the Tribunal considers that the abolition of the Joint Advisory Committee does not affect a fundamental and essential term of employment. Moreover, it cannot generally be accepted that the rules on disciplinary action are an integral part of the fundamental and essential terms of employment which induce a person to apply for a post or to remain in the international civil service. Consequently, the plea concerning a breach of acquired rights must be dismissed.

7. The complainant contends that the IAOD investigation was unlawful because it was conducted in accordance with the 2010 version of WIPO's Investigation Procedure Manual, whereas a new version of the

Manual was published on 27 January 2014 and applied immediately. He therefore maintains that he was denied the benefit of several updated rules.

He also submits that the investigation flouted the principles of fairness and good faith and breached the presumption of innocence and the right to be heard. If the Tribunal were to find that the 2010 Investigation Procedure Manual applied, he contends that under paragraph 97 of its French version, “where possible witnesses will be interviewed in the presence of the person who is the subject of the investigation”*. In his opinion, this paragraph was ignored because he was not “informed of or a fortiori invited to attend the interviewing of witnesses”.

8. WIPO submits that since the IAOD investigation was opened on 13 December 2013, it was conducted in accordance with 2010 version of the Investigation Procedure Manual. In addition, the investigation ended on 23 January 2014, in other words several days before the new version of the Manual was published. It did not therefore have to be applied to the complainant’s case.

Moreover, as far as the complainant’s rights of defence are concerned, the Organization endeavours to show that it respected these “guiding principles”. With regard to the alleged violation of paragraph 97 of the French version of the 2010 Investigation Procedure Manual, WIPO, relying on the English version of the text which, it says, is the only authentic version, contends that there was no obligation to interview witnesses in the complainant’s presence and observes that he was informed of the contents of the witnesses’ statements and given an opportunity to comment on them, but he chose not to do so.

9. It is clear from the submissions in the file that the IAOD investigation ended on 23 January 2014, in other words before the publication of the new version of the Investigation Procedure Manual on 27 January 2014. At all events, it was therefore right to apply the 2010 version of the Manual.

* Registry’s translation.

10. With respect to the breach of the principles of fairness, good faith and the presumption of innocence on which the complainant relies, there is nothing in the file which suggests that these principles were not respected. The complainant was invited to put his case during his interview, at which juncture he had an opportunity to respond to the allegations against him. The provisions of the Investigation Procedure Manual, the French and English versions of which are not entirely consistent with one another, are not absolutely clear about the obligation to interview witnesses in the presence of the person who is the subject of the investigation. However, the Tribunal considers that in any case, even if the complainant did not attend the witnesses' interviews, his right to be heard was not breached, since he was informed of the content of their testimony and given an opportunity to comment on it when he received the charge letter of 28 February 2014 (see, for a similar case, Judgment 3640, under 20).

11. Lastly, the complainant submits that WIPO breached the principle of proportionality, because he regards the sanction imposed on him as disproportionate having regard to his 19 years of service, his good performance, his family situation and the fact that he immediately repaid the sum demanded. The Organization recalls that the Director General has a discretion to determine sanctions and asserts that the complainant's dismissal was not a disproportionate measure.

12. The disciplinary authority within an international organisation has a discretion to choose the disciplinary measure imposed on an official for misconduct. However, its decision must always respect the principle of proportionality which applies in this area (see Judgment 3640, under 29). In this case, the Tribunal finds that the complainant engaged in repeated fraudulent practices over several months. In view of the serious nature of the acts committed by the complainant, his dismissal cannot be deemed disproportionate, notwithstanding the various factors which he puts forward for consideration. This plea will therefore be dismissed.

13. It follows from the foregoing that the complaint must be dismissed in its entirety, without there being any need to rule on the objections to receivability raised by the Organization.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2017, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ