

S. (No. 2)

v.

WIPO

126th Session

Judgment No. 4002

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. S. against the World Intellectual Property Organization (WIPO) on 25 September 2014 and corrected on 8 December 2014, WIPO's reply of 20 March 2015, the complainant's rejoinder of 4 April 2016 and WIPO's surrejoinder of 27 July, corrected on 2 August 2016;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

At the material time, the complainant, who held a grade P-5 post, was a member of the Staff Council, one of the constituent bodies of the Staff Association. During a Staff Council meeting held on 28 February 2012, it was recalled that on 22 February the Staff Council's Executive Committee met with the Director General who stated that the complainant had tried to discuss with him matters pertaining to the Staff Council during a meeting held on 9 February. The complainant denied having discussed any Staff Council-related activities with the Director General. On 6 March the Staff Council adopted by a majority the proposal of its President to exclude the complainant from the Council pending a decision of the General Assembly of the Staff Association.

That same day, the complainant resigned from the Staff Council with immediate effect.

The Staff Council convened the General Assembly and submitted to its members document OGA/12/06. Based on this document, the Ordinary General Assembly (OGA) adopted on 14 May two motions relating to the governance of the Staff Council.

On 11 June 2012 the complainant requested the Internal Audit and Oversight Division (IAOD) to open an investigation regarding the “false and inaccurate allegations” made against him. On 1 February 2013 the Director of IAOD informed him that, pursuant to a preliminary evaluation, he had decided to take no further action. He explained that an investigation into Staff Council matters fell outside the remit of IAOD.

Meanwhile, in September 2012 the Director of the Human Resources Management Department (HRMD) offered her mediation but the parties did not resolve the matter. Nevertheless, in a letter dated 1 November 2013 and published on the Intranet of the Organization, the Director of HRMD explained to the complainant that the “incidents” were the result of a “series of misunderstanding” – which she sincerely regretted.

On 27 January 2013 the complainant asked the Staff Council to distribute to the staff members of WIPO a document entitled “rebuttal [...] of unfounded and malicious allegations contained in document OGA/12/06”. On 18 April 2013 he filed a grievance complaint before the Joint Grievance Panel (JGP) against several Staff Council members. The complainant subsequently clarified that his complaint was lodged against the respondents for alleged “acts of defamation and retaliation”. In its report of 25 June 2014, the JGP decided to dismiss the complaint as clearly irreceivable. It considered that entering into the merits of the case would fall outside its mandate and would also generate a high risk of inappropriate interference into the Staff Council’s internal business.

On 25 September 2014 the complainant filed his complaint with the Tribunal. In his complaint form, he identified the impugned decision as the JGP’s 25 June 2014 decision. Also on 25 September, the complainant purported to lodge an internal appeal with the Appeal Board against that same decision of 25 June. However, he was informed on 29 September that his appeal had been forwarded to the Director of HRMD to be

treated as a request for review. Having been advised on 15 January 2015 that the decision of the JGP was maintained, the complainant lodged an appeal with the Appeal Board on 14 April. In its conclusions dated 16 November 2015, the Appeal Board found no reason to depart from the JGP's conclusion and recommended dismissing the appeal. On 27 November 2015 the complainant was informed that the Assistant Director General had decided to follow that recommendation.

The complainant requests the Tribunal to order WIPO to conduct a fair and independent investigation by external investigators, to declare that the decision of the Staff Council of 6 March 2012 and the decision of the Staff Association of 14 May 2012 are illegal, to recommend appropriate sanctions against the WIPO officials found guilty, to grant him material, moral and aggravated exemplary damages in the amount of 500 000 Swiss francs to be paid by WIPO and the Staff Association and/or by the concerned officials, to order the removal of all documents related to this matter from the records of the Staff Association and to order appropriate public apologies from the concerned staff councillors, the Staff Council and the Staff Association. He also seeks costs.

In its reply WIPO contends that the complaint and all the claims made against the Director General are irreceivable for failure to exhaust the internal means of redress. It adds that the challenge to the decision of 1 February 2013 is time-barred. Alternatively, it requests that the Tribunal dismiss the complaint as unfounded in its entirety.

In his rejoinder the complainant states that, as he has now received the final decision of 27 November 2015 on his appeal, the internal means of redress have been exhausted and his complaint is receivable. He maintains his claims for relief.

In its surrejoinder WIPO no longer contends that the complaint is irreceivable for non-exhaustion of the internal means of redress, but otherwise maintains its position.

CONSIDERATIONS

1. The complainant impugns the JGP's 25 June 2014 decision dismissing as clearly irreceivable his grievance complaint against several members of the Staff Council. Initially, the allegations brought by the complainant against these respondents consisted of "acts of defamation, harassment, mobbing, retaliation and various other misconduct". Subsequently, the complainant clarified that the complaint brought against these respondents was for "alleged acts of defamation and retaliation". In the same complaint, the complainant also advanced allegations against the Director General, however, these were subsequently withdrawn.

2. As explained above in the recitation of the facts, ultimately the complainant lodged an appeal with the Appeal Board against the JGP's decision. In its 16 November 2015 conclusions the Appeal Board found no reason to depart from the JGP's conclusion and recommended that the appeal be dismissed. In his 27 November 2015 decision, the Assistant Director General endorsed the Appeal Board's recommendation and dismissed the appeal.

3. This complaint was filed in the Tribunal before, as a matter of fact, the complainant initiated his internal appeal culminating in the report of the Appeal Board of 16 November 2015. It may well be that, at the time the complaint was filed, the complainant had not exhausted his internal means of redress, but a firm conclusion to that effect would require a detailed analysis of the applicable rules then operating. Specifically, those rules may address the consequences of the abolition of the JGP effective 1 January 2014, save to enable it to consider grievances filed before that date. But WIPO expressly abandoned, in its pleas, an argument that the complainant had not exhausted the internal means of redress. In these unusual circumstances, the Tribunal will consider the parties' arguments focusing on the JGP's decision.

4. It is convenient to deal firstly with two issues of receivability raised by WIPO. In his rejoinder, the complainant directs a number of his arguments at the Director General's alleged misrepresentation of the

meeting that took place on 9 February 2012. However, as noted above, the complainant withdrew his allegations against the Director General. Consequently, no decision under the internal appeal processes concerning the Director General was ever rendered. It is also observed that the complainant reiterated before the Appeal Board and the Tribunal that the appeal and the complaint were not directed against the Director General, and accordingly the arguments advanced against him are beyond the scope of the present complaint and are irreceivable. The complainant's attempt to challenge the Director of IAOD's decision of 1 February 2013 in this complaint is also irreceivable for failure to exhaust the internal means of redress.

5. As the Appeal Board and, ultimately, the Assistant Director General concluded that there was no reason to depart from the JGP's conclusion and recommendation, at this point, a summary of the JGP's decision is useful. In its decision, the JGP observed:

“Irrespective of the reliability of the allegations related to the content of the Complainant's discussion with the Director General, the [JGP] concluded that both the decision taken by Staff Council to terminate the Complainant's mandate and to submit such decision to the final approval of the OGA, and the 'Motion' subsequently voted by the OGA to endors[e] it, fall squarely within the Staff Council/Association respective internal activities and were taken in the exercise of their prerogatives.”

The JGP added that “the Respondents are staff members who directly or indirectly participated to and took decisions in the exercise of their respective individual and collective capacity either as staff representatives or members of the Staff Council or members of the Executive Committee”. The JGP noted that in this regard, the complainant himself confirmed that this was the case. Additionally, the alleged actions taken by the Staff Council and the Staff Association were in line with their respective statutory internal rules and procedures and were within the context of their internal activities. As to document OGA/12/06 the complainant claimed that it was a defamatory statement against him. The JGP found that it was an official document that was discussed, voted on and approved by the Ordinary General Assembly of the Staff Association and that this applied equally to the Staff Council's 6 March 2012 decision to terminate the complainant's mandate as a

member of the Staff Council. Lastly, the JGP observed that even a *prima facie* assessment of the legitimacy of the respondents' actions and of the defamatory nature of the relevant documents would inevitably lead to interference in the substantial work and the mandate of the Staff Association and its internal bodies and would involve a violation of the principle of freedom of association and exceed the scope of its competence.

6. In his complaint, the complainant maintains that he was subjected to harassment, retaliation, intimidation, discrimination and unequal treatment, abuse of power, defamation, and a violation of human rights. He submits that the Staff Council's members unfounded allegations against him; barring him from performing his duty as a member of the Staff Council; and publishing of a defamatory document about him constitute improper conduct and created a hostile working environment. It must be observed that, as noted above, the only grievances that have been subject to internal review are those of retaliation and defamation. It follows that the allegations of harassment, intimidation, discrimination and unequal treatment, abuse of power and violation of human rights are beyond the scope of this complaint and will not be considered. As to the allegations of retaliation and defamation, as stated above, the complainant does not dispute that the acts allegedly constituting retaliation and defamation were taken in the context of Staff Council activities.

7. However, the complainant submits that the JGP's decision is flawed because of the failure to consider the merits of his internal complaint and is therefore unlawful. He contends that the principle of freedom of association "cannot be used as a sanctuary for gross misconduct".

In Judgment 3106, under 7 and 8, the Tribunal discussed the principle of freedom of association and the implications of that principle in terms of the relationship between an organization and the staff union. The Tribunal observed:

"[T]hat principle has two important aspects. The first is that it precludes interference by an organisation in the affairs of its staff union or the organs of its staff union (see Judgment 2100, under 15). A staff union must be free

to conduct its own affairs, to regulate its own activities and, also, to regulate the conduct of its members in relation to those affairs and activities. [...] Further, an organisation must remain neutral when differences of opinion emerge within a staff union: it must not favour one group or one point of view over another. To do so would be to diminish the right of a staff union to conduct its own affairs and to regulate its own activities. Nor does an organisation have any legitimate interest in the actions of staff members in their dealings with their staff union and/or other staff union members with respect to the affairs and activities of the union. Thus, it was said in Judgment 274, under 22, that '[a] staff member's conduct of [his] private life is not the concern of the Director-General [unless it] brings the Organization into disrepute', and that trade union activities 'likewise constitute an area that is "prima facie" outside the Director-General's jurisdiction', although 'there may be exceptional cases'.

8. The second aspect of freedom of association [...] is that it necessarily involves freedom of discussion and debate. [...] This notwithstanding, the Tribunal has acknowledged that the freedom of discussion and debate is not absolute and that there may be cases in which an organisation can intervene if, for example, there is 'gross abuse of the right to freedom of expression or lack of protection of the individual interests of persons affected by remarks that are ill-intentioned, defamatory or which concern their private lives' (see Judgment 2227, under 7). [...]"

8. In the present case, given that the actions at issue were all taken by the Staff Council in the context of the regulation of its own activities and the regulation of the conduct of one of its members, a consideration of the merits of the grievance complaint was clearly beyond the mandate of the JGP. Moreover, a consideration of the merits by the JGP would have violated the principle of freedom of association.

9. It is also observed that the contents of document OGA/12/06 cannot by any standard be regarded as a "gross abuse of the right to freedom of expression". As stated in the document, its purpose was "to report to the General Assembly [...] facts that led the Staff Council to request the Ordinary General Assembly of the WIPO Staff Association to debate and to take a decision by vote, on an item related to the Governance of the Staff Council". The document details the facts reported to the Staff Council, the confirmation with the Director General; the decision taken by the Staff Council; new developments following the complainant's resignation; and the competence of the

General Assembly to confirm a measure taken by the Staff Council against an elected Staff Councillor who allegedly did not undertake his mandate in compliance with the related ethics. Relevantly, the document also notes that the complainant disputed the account of his meeting with the Director General.

10. As there is no evidence of an exceptional circumstance that would warrant the Administration's intervention in the Staff Council activities, the complainant's submission that the JGP's decision was flawed due to its failure to consider the merits of the case is rejected. Accordingly, the complaint will be dismissed.

11. In these circumstances, the request for oral proceedings is rejected.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 16 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ