

## NINETY-FIFTH SESSION

Judgment No. 2226

The Administrative Tribunal,

Considering the complaint filed by Mr J.-M. L. against the World Trade Organization (WTO) on 21 June 2002, the WTO's reply of 30 September, the complainant's rejoinder of 19 November 2002, and the Organization's surrejoinder of 28 March 2003;

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

Having examined the 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. The complainant, a Canadian national born in 1944, joined the Organization as Director of the Statistics and Information Systems Division on 3 September 1989. At the material time he was Director of the Technical Cooperation Division at grade 11; he had been assigned to this post on 5 October 1998.

Staff Rule 107.5(b), relative to reassignment of staff members, reads as follows:

"The Director-General may, after seeking the staff member's consent and in the interests of the WTO, reassign a staff member to a vacant position at the staff member's grade or to a position at a lower grade which corresponds to the professional qualifications of the staff member. Such an assignment shall have no effect on the staff member's administrative status."

The complainant was summoned to meet the Director-General on 31 May 2001, when the latter informed him of the establishment of a Members' Information Unit within the Information and Media Relations Division. He was to be reassigned, effective the next day, as Head of this Unit. The complainant objected, stating that he had been a Director in the Organization for 12 years and had also been a director for many years before joining the WTO. He asked that the Unit be renamed the Trade Information Centre, reporting directly to the Director-General, so that he could keep his status as Director. The Director-General agreed to these changes the same day. The details of the functions and objectives of the Centre were reserved for "future materialisation". By a notice of 1 June 2001 all staff were informed of the complainant's reassignment to the post in question as well as the reassignment of his successor as Director of the Technical Cooperation Division.

On 23 July the complainant submitted a "[r]equest for review pursuant to Rule 114.3 of the decision of 1 June 2001 by the Director-General". In particular, he pointed out that his new position bore no relationship to his experience and abilities in his previous positions with the Organization, that the announcement of his reassignment appeared more like a disguised disciplinary measure, and that he had been the subject of moral harassment. The Director-General replied to the complainant on 1 August that there was no reason to believe that his reassignment was a disguised disciplinary measure, particularly since his own suggestions were largely being followed; therefore, he said, he was not prepared to review the decision. The complainant appealed against this decision on 24 August 2001.

In its report dated 28 March 2002 the Joint Appeals Board recommended rejecting the complainant's appeal. Among other things, the Board stated that it had taken into account the complainant's grade in its deliberations and had determined that what "could seriously affect the dignity of a staff member of lower rank" was "merely discourteous" in the case of a director. In a memorandum of 4 April 2002 the Chief of the Human Resources Section informed the complainant, on the Director-General's behalf, that the latter had decided to accept the Board's recommendation. That is the impugned decision.

B. The complainant contends that the decision to reassign him violated Staff Rule 107.5(b), which grants the Director-General the authority to reassign a staff member only after seeking the latter's consent. He asserts that the Director-General, while informing him of his reassignment to the Members' Information Unit, told him that he was "not in the mood to negotiate"; it was because of his own "contemporaneous objection" to the reassignment that he was able to negotiate the retention of his title as Director. Additionally, Rule 107.5(b) requires that a reassignment correspond to the professional qualifications of the staff member. But that was not the case here: he was reassigned to a non-existing Centre with no staff. He submits that, even though he was allowed to keep the title of Director, he had been constructively demoted. He contends that his reassignment was a disguised disciplinary measure. He points out that although his reassignment to the Centre could be considered, in retrospect, to be in the interests of the WTO, it would be unfair to accept any argument to that effect made by the Organization, since he was the one who suggested the Centre. In any event, this does not mean that the reassignment was "proper" and it should not have resulted in unfair treatment.

He argues that the decision was procedurally irregular and flawed. He should have been given the opportunity to discuss the decision, and he also should have been given the real reasons behind it, as the Tribunal's case law requires. Not only was he denied proper notice and the opportunity for consultation or discussion about the reassignment, but he was not provided with the reasons for it. The only explanation given to him was that the Director-General was dissatisfied with the alleged mishandling of a particular programme. However, he says, at the time in question he was not responsible for the programme; in fact, it came under the responsibility of the staff member who was eventually named as his successor.

The decision also constituted an abuse of power. He alleges that he was reassigned as a pretext for rewarding another staff member with his post. The circumstances surrounding the decision create the "presumption and appearance" of impropriety. In addition, the decision was flawed because it was based on the Board's report which itself was flawed. He considers the most "stunning" aspect of the Board's report to be the application of a different standard of treatment of directors over any other staff.

The method and manner used by the Administration to reassign him had been designed to offend his professional and personal dignity. He was not given any funding, staff, space or other resources necessary to establish and administer the Centre. He alleges that the decision is discriminatory and based on bad faith on the part of the Administration. He is the only Director to lose his post and responsibilities "in such a hostile and insulting manner". The conditions he has been subjected to amount to a constructive termination of his appointment. He believes that the actions of the Director-General towards him amount to a *prima facie* case of psychological harassment.

He asks the Tribunal to quash the decision to reassign him and to be reinstated as Director of the Technical Cooperation Division, with retroactive effect from 31 May 2001. In the event that he cannot be reinstated in that post, and in the event that the Tribunal concludes that his reassignment constitutes a constructive termination of his appointment, he claims a lump sum equivalent to his salary, entitlements, benefits, adjustments and such other emoluments that he would have received between 31 May 2001 and his expected mandatory retirement date of 30 April 2006. He claims moral and punitive damages under several heads, totalling 2,000,000 United States dollars, plus legal fees and costs of 25,000 dollars. He also claims interest at 8 per cent per annum as from 31 May 2001 on all amounts to be awarded. He makes a request for numerous documents and for oral hearings.

C. In its reply the Organization argues that the complainant has raised new claims, in particular relating to the choice of his successor, and therefore these are irreceivable.

The Organization notes that the complainant did not complain when he was reassigned to the Technical Cooperation Division; he was not consulted "well in advance" on that reassignment, just like he was not given advance notice for the reassignment in question. In any event, the Tribunal's case law has consistently held that the decision to reassign a staff member is a discretionary one, and therefore open to only limited review. Nevertheless, this decision satisfies the requirements set out in the Tribunal's case law. It submits that all the requirements laid out in Staff Rule 107.5(b) have also been met: his consent was sought, the post was vacant and corresponded to his professional qualifications, and the reassignment was in the interests of the Organization. Furthermore, Rule 107.5(b) only requires the staff member's consent be sought, not obtained. It concedes, however, that he was not given prior notice of the reassignment. But such notice, while serving a clear purpose when a reassignment involves a change of duty station, is less clear when the reassignment involves a "mere" change of the hierarchical line and a modification of activities. It is not clear that in this case notice would have served any purpose so the

lack thereof should not be seen as a flaw.

It refutes that the reassignment was tantamount to a demotion. The complainant retained his grade and status as a Director. In his previous post, although he was in charge of a larger staff, he reported to a Deputy Director-General, but in his new post he reports directly to the Director-General. It notes that to accept the argument that reassigning a Director to a position with less staff is tantamount to a demotion would mean that no qualified Director could ever be put in charge of "a promising new set-up". It denies as well that the reassignment was a disguised disciplinary measure. His dignity and good name were not disregarded by the reassignment and he has suffered no moral injury.

Lastly, it says that the plea of harassment is not based on any valid grounds and it refutes the facts that he has put forth in this regard.

The WTO objects to the complainant's request for numerous documents, stating that the documents requested are not relevant for the dispute at hand.

D. In his rejoinder the complainant states that he did not raise new claims in his complaint; he simply invited the Tribunal to make a number of "findings of fact and conclusions of law". His claims are therefore receivable.

The complainant argues that the WTO cannot justify his reassignment to the Centre without his consent simply by virtue of the fact that he did not complain when he was reassigned to the post of Director of the Technical Cooperation Division. In any event, the two reassignments are not comparable.

He denies that the Organization complied with the requirements set out in Rule 107.5(b). He says that his skills were not commensurate with those necessary for the post in question, and the WTO cannot claim to have sought his consent, particularly given the manner in which he was informed of his reassignment. It was made clear to him that the issue was closed to any discussion. The complainant notes that the Administration now admits that it failed to give him notice of the reassignment. He questions, however, on what staff rule or case law the Administration has relied when it asserted that notice of a reassignment need only be given when it involves a change of duty station; in any event, any such rule would be a breach of the principle of equal treatment. He asserts that, contrary to the Organization's point of view, there was no reason not to give him notice. He objects to the Organization's argument that the reassignment was in the interests of the WTO, as it was he who suggested the establishment of the Centre in order to retain his title of Director; the Director-General had planned to reassign him as the head of a Members' Information Unit.

The complainant states that he does not contest the Organization's right to reassign a Director to a post with a smaller staff; he objects to the fact that he was reassigned to a post with no staff at all. He maintains that his reassignment was a disguised disciplinary measure. As such, he has never been given the opportunity to defend himself properly.

He provides examples of actions he contends were taken to diminish his reputation, dignity and good name. He submits that, even if he has retained his title as Director, his "effective status" is below that of a unit head at the WTO.

E. In its surrejoinder the WTO submits that the complainant has not sustained any material damage as a result of the reassignment and it denies that the reassignment was flawed in any way. It also denies that the complainant was reassigned in order to reward another staff member with the post of Director of the Technical Cooperation Division. There is no proof that the complainant was told that he was being reassigned because he had mishandled a particular programme. It reiterates that the reassignment was not a demotion, nor was it a hidden disciplinary sanction, nor was the complainant subjected to any ill-treatment offending against his dignity.

The Organization considers that the complainant did indeed possess the skills necessary for the post in question. It adds that the post is one of "confidence" as the complainant is meant to implement a priority set out by the Director-General. On the issue of staff, it points out that although the Centre does not need a great number of staff members, its Director shall be responsible for "surveying and following the work" of a relatively large number of staff without being their hierarchical chief.

## CONSIDERATIONS

1. On 31 May 2001 the complainant had a meeting with the Director-General who informed him that he would be reassigned as Head of a Members' Information Unit within the Information and Media Relations Division. Later in the day, upon the suggestion of the complainant, the Unit was renamed the Trade Information Centre with him as its Director reporting directly to the Director-General.
2. The purpose of the Centre was "to facilitate fuller participation of all Members, Observers and others wishing to join the WTO, by enhancing access to information through the use of information technologies". The complainant would also "be responsible for reviewing the functioning of the library and the services it provides with a view to recommending possible improvements in these services" to the Director-General within six months.
3. The complainant submitted a report to the Director-General on 21 June outlining a strategy for the new Centre. He did not receive any comments thereon despite reminding the Director-General's office on 4 July that a reply was essential in order that he might initiate action.
4. On 23 July he requested a review of the Director-General's decision circulated to staff on 1 June. He stated that his new position bore no relationship to his extensive responsibilities in the Organization, nor to his experience and abilities as demonstrated in his previous positions and functions. He asked for reinstatement in his previous position and compensation for injuries suffered.
5. The Director-General replied to the complainant on 1 August assuring him that he was seriously considering the proposals regarding the Centre and that a smaller staff would be needed there. He added that the new assignment was not a "disguised disciplinary measure" but rather "a reassignment in the interest of the WTO, which [he was] not prepared to review".
6. On 24 August 2001 the complainant filed an appeal with the Joint Appeals Board challenging that decision.
7. The complainant was informed on 4 April 2002 that the Director-General accepted the recommendation made by the Board on 28 March to reject his appeal.
8. In the complaint before the Tribunal the complainant seeks the following relief: that the decision of 31 May 2001 be quashed and that he be reinstated in his former position as Director of the Technical Cooperation Division with full retroactive effect from 31 May 2001; in the event that this is not possible, that he be awarded a lump sum equivalent to the salary, entitlements, benefits, adjustments and other such emoluments that he would have received between 31 May 2001 and his expected mandatory retirement date of 30 April 2006. He also claims moral and punitive damages on account of the transgressions of the WTO and its officials, as well as legal fees and costs, with interest on all sums awarded.
9. In its reply the WTO alleges that the decision to reassign the complainant did not violate the Staff Rules; the Joint Appeals Board had also so found. He was reassigned in order to materialise a priority in the announced programme of the Director-General and therefore, within the latter's discretion.
10. The WTO admits that he was not given previous notice of his reassignment; however, he was given an opportunity to comment on the terms of reference for the new set-up, within the general framework laid down by the Director-General.
11. It asserts that the new assignment corresponds to his qualifications. It did not modify his status much less demote him. He was and still is a Director at grade 11 in Geneva. Likewise, the reassignment cannot be described as a "disguised disciplinary measure", "a constructive termination of the complainant's appointment", or a move to favour another staff member or one to harass him. It did not disregard his dignity and good name, nor did it defame his personal and professional reputation.
12. The WTO contests the admissibility of the complainant's claim concerning the fact that his reassignment was motivated by an intention of the Director-General to favour the complainant's successor and since this matter was not raised before the Joint Appeals Board, the Tribunal should not entertain it.
13. The reassignment of the complainant from the position of Director of the Technical Cooperation Division to Director of the Trade Information Centre was, on the face of it, a lawful exercise of the Director-General's

discretionary power of appointment pursuant to Staff Regulation 3.2 which provides that:

"Pursuant to Article VI:3 of the WTO Agreement, the Director-General shall appoint the staff members of the WTO and shall determine their duties and conditions of service in accordance with the *Staff Regulations* and *Staff Rules*. The Director-General may assign staff members to any of the activities of the WTO which are compatible with their qualifications."

14. Time and again, the Tribunal has upheld administrative decisions, especially those affecting the personnel, on the broad ground of promoting the interests of the Organization. In this case, the reason given by the Director-General for the complainant's reassignment was "in order to improve efficiency and administrative structures relating to the Secretariat's technical assistance activities". On the assumption that the head of an Organization is the best judge of how to promote its interests, the Tribunal has accorded him/her a wide latitude of executive discretion and has allowed itself only very limited review.

15. While the authority of the Director-General to make appointments and effect changes in assignments is extensive, it is nevertheless limited by certain procedural constraints. These are specified in Staff Rule 107.5(b) which provides as follows:

"The Director-General may, after seeking the staff member's consent and in the interests of the WTO, reassign a staff member to a vacant position at the staff member's grade or to a position at a lower grade which corresponds to the professional qualifications of the staff member. Such an assignment shall have no effect on the staff member's administrative status."

16. The crux of the complaint is the alleged violation by the Organization of the procedural safeguards laid down in Staff Rule 107.5(b). As the complainant stated in his appeal to the Joint Appeals Board: "[he is] not challenging the Director-General's discretion on transfers as such. Rather, [he is] challenging - indeed, strenuously objecting to - the 'process' that was used."

17. Under the relevant staff rule, the Director-General must first seek the *consent* of the staff member concerned. Unlike other rules, it is not sufficient merely to inform or give notice to the person concerned. His consent must be sought. In effect, it is tantamount to informing him of the reassignment to be made, the reason therefor, and to giving him an opportunity to be heard.

18. In its reply the Organization admits that: the complainant was not given previous notice of his reassignment; he was not consulted either on the principle of that decision or on the broad lines of the new set-up; and he was not given a job description. In addition, the opportunity to comment on his new assignment was inadequate.

19. In the present case the tenets of due process were not observed, nor were the explicit requirements of the relevant staff rule. The Tribunal has previously stated that "whether or not there is a specific provision in the Staff Rules, as a matter of contractual obligation the Administration ought not to take a decision injuriously affecting a staff member's career without first, as a matter of natural justice, giving him the reasons for the decision and getting his response" (see Judgment 631, under 28).

20. In one case, the Tribunal conceded that the Organization's own interests are paramount, "but it must still, for the sake of proper management and mutual confidence, treat its staff fairly [...]. It must give him a statement of the reasons for the transfer and the opportunity of responding" (see Judgment 1234, under 19).

21. Considering the complainant's length of service (12 years with the Organization), the absence of any report of misconduct or unsatisfactory performance on his part, or any indication of urgency that might have justified a sudden, unheralded management decision to reassign him, the action of the Director-General was flawed by procedural irregularity. The affront to the dignity and personal feelings of the complainant warrant redress in the form of damages which the Tribunal sets at 10,000 Swiss francs. There is, however, no evidence that the reassignment of the complainant was a disguised disciplinary measure of any kind.

22. There is no merit to his other pleas about substantive flaws in the exercise of the discretionary power and authority of the Director-General to reassign a staff member or to his claim to be reinstated to his former position.

23. The impugned decision shall be quashed. Having partially succeeded, the complainant is entitled to costs in the amount of 3,000 francs.

## DECISION

For the above reasons,

1. The impugned decision is quashed.
2. The Organization shall pay the complainant 10,000 Swiss francs in damages for moral injury.
3. It shall pay him 3,000 francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet