Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

108th Session **Judgment No. 2882**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mr S. G. G. against the World Intellectual Property Organization (WIPO) on 21 May 2008 and corrected on 10 July, WIPO's reply of 17 October 2008, the complainant's rejoinder of 13 February 2009 and the Organization's surrejoinder of 20 May 2009;

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 forth under A in Judgment 2598, delivered on 7 February 2007, concerning the complainant's third complaint. It should be recalled that on 17 June 2005 the complainant sent a memorandum to the Director General in which he asked him, inter alia, "to kindly issue the necessary instructions so that the Administration [would] trouble [him] no further [and] that an end [would] be brought to attempts to intimidate [him]". On 8 August, as he had not received a reply and as he wished "to appeal against this lack of a decision", he sent a letter to the Director General in which he

requested him "to review this decision". The complainant was informed by memorandum of 13 September that there were no grounds to accede to the requests which he had made on 17 June and 8 August, since there was no reason to believe that he was "subject to misconduct on the part of [his] colleagues". The request of 8 August also formed the subject of a memorandum dated 15 September, in which the complainant was informed that, since he had made no reference to the administrative decisions he sought to have overturned, as required by Staff Rule 11.1.1(b)(1), he had no grounds for appeal.

On 30 September 2005 the complainant submitted an appeal to the Appeal Board in which he alleged inter alia that he was being harassed. In its report dated 24 October the Board took the view that the appeal had been lodged out of time and was therefore irreceivable. The Director General, however, decided to dismiss it on the grounds that no appealable administrative decision had been taken by 8 August 2005. In consideration 6 of Judgment 2598 the Tribunal stated the following:

> "Having studied the submissions the Tribunal notes that, in the internal appeal he filed on 30 September 2005, the complainant expressly reserved the right to set out his position on the receivability of his appeal in the light of any explanations the Administration might supply in support of its reply; that in that reply the Organization dealt at length with the receivability of the internal appeal; that in his letter of 20 October 2005 the complainant asked to be allowed to submit a rejoinder to the Organization's reply and to have the said reply, which was in English, translated into French to enable him to 'actually find out what it said'; and that the Appeal Board wrote its report four days after this request on which it had not acted."

Since it considered that the principle of due process had not been observed and that the complainant had therefore been deprived of his right to be heard on the essential issue of the receivability of his appeal, the Tribunal referred the case back to the Organization so that a new decision could be taken in compliance with the rules of procedure.

In execution of that judgment the complainant was invited to submit a further appeal to the Appeal Board, which he did on 15 October 2007. In its report of 7 February 2008 the Board stated that, in the absence of an express provision, it seemed reasonable to allow the Administration a period of at least three months in which

to reach a decision on claims submitted to it. The Board therefore considered that the time which had elapsed between the memorandum of 17 June 2005 and the request for review of 8 August 2005 was not sufficient to conclude that the silence of the Administration was equivalent to an implied decision. The Board added that, if the complainant's letter of 8 August were deemed to be a second request for a decision by the Administration, the memorandum of 13 September constituted a negative decision that was subject to appeal, but as the complainant had referred the matter to the Appeal Board without having previously addressed a letter to the Director General to request a review, he had not followed the procedure established in Staff Rule 11.1.1(b). The Board concluded from this that the appeal of 30 September 2005 was not receivable and that the appeal of 15 October 2007 should be dismissed. By a letter of 19 February 2008, which constitutes the impugned decision, the Director of the Human Resources Management Department notified the complainant that the Director General had decided to endorse the Appeal Board's conclusions.

B. The complainant disputes what he regards as the arbitrary reasoning followed by the Appeal Board, and especially the fact that it chose the date of 17 June 2005 as the start of the procedure and identified the memorandum of 13 September as the appealable administrative decision. He holds that, in the absence of any provision in the Staff Regulations and Staff Rules, the Board could not set the time limit after which the Administration's silence would be equivalent to an implied decision dismissing his appeal and that, in view of the "urgency" of the situation, a two-month period was more than enough. According to the complainant, it was the memorandum of 15 September 2005 which constituted the decision which could be challenged before the Appeal Board.

On the merits the complainant reiterates the submissions he made in his third complaint. He asserts that he was the victim of moral harassment by "very senior persons" that culminated in the decisions to suspend him from duty, to transfer him and then to dismiss him.

The complainant asks the Tribunal to quash the impugned decision and to refer the case back to WIPO "in order that it take a decision in accordance with the considerations of the Tribunal". He also claims 200,000 Swiss francs in compensation for moral injury and the defrayal by the Organization of all his costs amounting to 20,000 francs, including his lawyer's fees.

C. In its reply WIPO submits that any appeal to the Appeal Board must be directed against an administrative decision and that, as there is no appealable administrative decision, the appeal of 30 September 2005 was irreceivable. It states that neither the lack of a reply to the letter of 8 August, nor the reply of 13 September, constitutes an administrative decision within the meaning of Staff Rule 11.1.1(b)(1), but that both are covered by the terms of subparagraph (b)(2). However, the provisions of subparagraph (b)(2) apply only where the staff member has previously followed the procedure laid down in subparagraph (b)(1). The Organization also states that the memorandum of 13 September, which contained its reply to the complainant's requests of 17 June and 8 August, was conveyed to him within a reasonable period of time.

WIPO adds that the appeal of 30 September 2005 was lodged out of time. It explains that, in this case, the time limits must be calculated as from the memorandum of 17 June, and not the letter of 8 August, because the latter "was merely a follow-up to the [said] memorandum". Consequently, the memorandum of 15 September, insofar as it constituted a reply to the letter of 8 August, is irrelevant when calculating the time limits and the complainant ought to have referred the matter to the Appeal Board by 9 September 2005 at the latest.

On the merits the Organization states that the complainant's allegation of harassment must be dismissed. It explains that his suspension from duty, his transfer and his dismissal took place after the appeal of 30 September 2005 and therefore cannot be "subsumed" in his claims before the Tribunal; nor do they constitute acts of harassment as defined in the relevant office instructions.

D. In his rejoinder the complainant reiterates his arguments. He considers that the Administration's refusal to "reach a decision regarding the campaign to undermine" him must be treated as an appealable administrative decision under Staff Rule 11.1.1(b). He adds that his letter of 8 August 2005 must be regarded as the starting point of the periods of time referred to in subparagraph (2) of the above-mentioned provision.

E. In its surrejoinder WIPO maintains its position.

CONSIDERATIONS

1. On 17 June 2005 the complainant asked the Director General to take action to secure an end to the harassment of which he alleged he was the victim. On 8 August he wrote to the Director General to complain of the latter's failure to reply; in the complainant's opinion this silence was equivalent to an implied decision of rejection and he requested a review of that decision. In a memorandum of 15 September 2005 the Director of the Human Resources Management Department informed the complainant that, since he had made no reference to the administrative decision he sought to have overturned, as required by Staff Rule 11.1.1(b)(1), he had no grounds for appeal.

On 30 September 2005 the complainant lodged an appeal with the Appeal Board in which he objected to the harassment and pressure to which he was being subjected, as well as the Administration's inaction. On 6 December 2005 he was informed that the Director General had dismissed this appeal on the grounds that it was irreceivable as no appealable decision had been taken. This decision was in line with the conclusion reached by the Appeal Board, although it departed from the stated reason for that conclusion, namely that the internal appeal had been filed out of time.

In Judgment 2598 the Tribunal quashed the Director General's decision and referred the case back to the Organization in order that it might take a fresh decision in compliance with the principle of due

process, the breach of which had deprived the complainant of his right to be heard on the essential issue of the receivability of his internal appeal.

2. On 15 October 2007, in response to the Organization's invitation, the complainant filed another internal appeal with the Appeal Board in which he claimed that his appeal of 30 September 2005 was receivable. In its report of 7 February 2008 the Board concluded that that appeal was not receivable and that the appeal of 15 October 2007 should therefore be dismissed. It considered that the request of 17 June 2005 could not be deemed to have been implicitly rejected by 8 August 2005, since the Administration had been silent for only a little over seven weeks and, in the absence of any express provision, it was reasonable to require that that silence should have lasted for at least three months before speaking of an implied rejection which would permit the filing of an appeal. The Board added that, if the complainant's letter of 8 August 2005 were to be regarded as a second request seeking a decision by the Administration, in that case he had not followed the procedure established in the Staff Rules, since he had lodged an appeal directly with the Appeal Board without first requesting the Director General to review the decision taken in September 2005.

The complainant was informed by letter of 19 February 2008 of the Director General's decision to endorse the Appeal Board's conclusions, and it is that decision that he impugns before the Tribunal.

3. The impugned decision is based on Staff Rule 11.1.1(b), which sets out the procedure to be followed when filing an appeal with the Appeal Board. This paragraph reads as follows:

> "(1) A staff member who, pursuant to Regulation 11.1, wishes to appeal against an administrative decision, shall as a first step address a letter to the Director General requesting that the administrative decision be reviewed. Such a letter must be sent within six weeks of the date on which the staff member received written notification of the decision.
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> (2) If the staff member wishes to appeal against the answer received from the Director General, he shall submit his appeal in writing to the Chairman of the Appeal Board within three months from the date of receipt

of the answer. If within six weeks of sending his letter to the Director General the staff member has not received the latter's answer, he shall, within the following six weeks, submit his appeal in writing to the Chairman of the Appeal Board.

(3) An appeal which is not made within the time limits specified above shall not be receivable; the Board may however waive the time limits in exceptional circumstances."

4. The question of whether the appeal of 30 September 2005 was receivable has been debated satisfactorily between the parties pursuant to Judgment 2598. The sole issue raised in the instant case is therefore whether, following that debate, the Organization is right in maintaining its decision to dismiss that appeal on the grounds of irreceivability.

In reality this decision is based on two reasons. Endorsing the Appeal Board's conclusions, the Director General considered, firstly, that there had been no implied decision rejecting the request of 17 June 2005 and, secondly, that the express decision was not challenged at the internal level in accordance with the applicable procedural requirements.

The Tribunal is of the opinion that the memoranda of September 2005 constituted an appealable administrative decision. In these circumstances it can therefore confine itself to examining whether the complainant's appeal against this decision could be declared irreceivable, as was the case.

5. The complainant directly challenged this decision before the Appeal Board whereas, according to Staff Rule 11.1.1(b), he ought first to have written to the Director General to ask him to review it. He therefore turned to a body which, at that stage, had no authority to examine his claims.

6. Apart from the fact that the complainant had already requested the Director General to review his case given the passive attitude of the Administration to which his allegation of harassment had been referred on 17 June 2005, the following considerations should be borne in mind.

Although rules of procedure must be strictly complied with, they must not be construed too pedantically or set traps for staff members who are defending their rights. If these staff members break such a rule, the penalty must fit the purpose of the rule. Consequently, a staff member who appeals to the wrong body does not on that account forfeit the right of appeal (see Judgments 1734, under 3, and 1832, under 6).

Staff Rule 11.1.1(b) quoted above sets out the successive steps which must be taken by a staff member in order to challenge an administrative decision. This must, on the one hand, enable the Organization to correct any mistakes and, on the other, encourage the amicable settlement of disputes before they are referred to the internal appeal body. The fact that an appeal is mistakenly submitted directly to the Appeal Board, as occurred in this case, cannot entail the irreceivability of the appeal. The Appeal Board has a duty to forward to the Director General any document which is intended for his attention and which has been sent to it in error, in order that it may be treated as a request for review.

7. For this reason the impugned decision must be set aside and in these circumstances the Tribunal need not rule on the complainant's other claims.

The complainant is entitled to costs, which the Tribunal sets at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision is quashed and the case is referred back to WIPO.

2. The Organization shall pay the complainant costs in the amount of 5,000 Swiss francs.

In witness of this judgment, adopted on 6 November 2009, 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 3 February 2010.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet