

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session

Judgment No. 3119

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A.R. R. against the World Intellectual Property Organization (WIPO) on 22 June 2010 and corrected on 6 July, the Organization's reply of 11 October 2010, the complainant's rejoinder of 17 January 2011, WIPO's surrejoinder of 19 April, the complainant's additional submissions of 18 July and WIPO's final observations of 24 August 2011;

Considering Articles II, paragraphs 5 and 6, 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 case are set out in Judgment 3037, delivered on 6 July 2011 on the complainant's first complaint. It may be recalled that on 4 September 2008 the complainant, who was working as a Senior Network Technician in the Network Services Section of WIPO, had been suspended from duty, with pay, pending the completion of an investigation into incidents relating to the security of the Organization's computer systems. He was suspected of having committed serious misconduct, particularly by accessing pornographic

internet sites and storing pornographic images and videos on the hard disk of the computer assigned to him. In its report of 6 April 2009 the Internal Audit and Oversight Division concluded that that charge was substantiated, and it noted that the investigation had shown that the complainant had also infringed a number of provisions, policies and procedures.

By a letter of 9 September 2009 the complainant was informed that the Director General had decided to refer the matter to the Joint Advisory Committee prior to possible disciplinary action. In its report of 9 March 2010 the Committee concluded, on the basis of the report by the above-mentioned Division, that the complainant had in fact committed the acts of which he had been accused. The report also stated that he had infringed the standards of conduct established in WIPO's policies and procedures on information security, which, in view of his position, constituted particularly serious misconduct on account of the extremely high risk of compromise to which the integrity of the Organization's IT system was exposed, pornographic websites being the largest vectors for computer viruses. The Committee therefore recommended the complainant's dismissal, in accordance with Staff Rule 10.1.1. By a letter of 16 March 2010, which constitutes the impugned decision, the Director of the Human Resources Management Department informed the complainant that the Director General had decided to adopt that recommendation and to apply the sanction in question with immediate effect.

B. The complainant explains that on 25 March 2010, when he was notified of the decision to dismiss him, he was no longer a member of the staff and the internal appeal process was therefore no longer available to him, so he was obliged to appeal directly to the Tribunal, in accordance with Judgment 2840.

On the merits, he contends that the composition of the Command Team which, in April 2008, instructed a technical team to make a copy of the hard disk of his computer, was unlawful. He alleges, with reference to the procedure for handling incidents relating to information security, that the Director of the IT Services Division had

invited the future Director General, a close colleague of his, to serve on it instead of approaching the head of the Buildings Division. This, he contends, led to a conflict of interest and an abuse of authority. He adds that, although the Director of the IT Services Division, following his colleague's example, later withdrew from the Command Team, the flagrant personal prejudice which he harboured against the staff of the Network Services Section "affected the entire procedure and consequently, the decisions taken in [his] case".

The complainant objects to the fact that the technical team, contrary to the above-mentioned procedure, comprised only one member, who moreover was "the only member of the Information Security Section at the time" and was therefore both judge and party. He also complains that the Internal Audit and Oversight Division took account only of factors which could be used against him. This biased approach in turn misled the Joint Advisory Committee.

He states that on 18 June 2008 he underwent a "biased cross-examination". Some colleagues in his section who had, like him, been suspended from duty had been able to have a representative of the Staff Association with them during a similar cross-examination, but that option had been denied to him. He also complains that he was not given access to his e-mail inbox, that he was not allowed to be present when evidence about him was being gathered, and that he was not heard by the Joint Advisory Committee.

As for the decision to dismiss him, according to the complainant this constitutes an abuse of authority and is out of proportion to the matters of which he is accused. He submits that the accusations levelled at him are groundless and that the Administration failed to take account of evidence in his favour.

The complainant asks the Tribunal to set aside the impugned decision, to order his immediate reinstatement and to award him damages since, for example, he has received no salary since 15 March 2010 and is not receiving any unemployment benefit. He states that he has been "very damaged psychologically" by his suspension from duty for 19 months, which has seriously harmed his career and his prospects of finding another job, and he seeks compensation for

the moral and professional injury he has suffered. Lastly, he claims reimbursement of “all legal and medical expenses incurred”.

C. In its reply WIPO contends that the complaint is irreceivable for failure to exhaust internal remedies, as the complainant has not followed the procedure laid down in Staff Regulation 11.1.1(b).

Subsidiarily, it submits that it was consistent with the procedure for handling incidents relating to information security that the Director of the IT Services Division should be a member of the Command Team. It recalls that he had, however, withdrawn from the team in April 2008, and so played no part in the procedure which resulted in the complainant’s dismissal. According to WIPO, the complainant has not produced any evidence in support of his allegations of conflict of interest and abuse of authority. It adds that, under the above-mentioned procedure, it was not obligatory for the Director of the Buildings Division to take part, whereas the participation of the person who was later appointed to the post of Director General was justified because, at the time, he was the Chair of WIPO’s Standing Committee on Information Technologies. The Organization also adds that the person concerned likewise subsequently withdrew from the team, to avoid any conflict of interest arising from his possible election as Director General.

The defendant admits that until May 2008 the technical team comprised only one member, but states that the official concerned operated in the presence of several witnesses, to ensure that the procedures were carried out correctly. It also points out that steps were taken to ensure the independence and impartiality of the procedures followed by the Internal Audit and Oversight Division.

WIPO expresses serious doubts as to the veracity of the complainant’s allegations concerning the interview of 18 June 2008, since it cannot trace any document in support of them. It states that the complainant’s access to his e-mail inbox was authorised, but that it was neither necessary nor desirable for him to be present when evidence was taken, given that his presence would have tended to influence the witnesses, and the testimony was in any case made

available to him afterwards. The Joint Advisory Committee did not consider it necessary to hold a hearing, and that being so the complainant's right to be heard was not infringed.

According to the defendant, the sanction of dismissal was imposed in strict compliance with the provisions of Staff Regulation 10.1.1. It was based on incidents of misconduct which no doubt would not have prompted it if taken in isolation but which justify it when taken as a whole, because the complainant committed several acts of serious misconduct which were liable to compromise the integrity of the Organization's IT systems and to undermine its reputation. In dismissing him, the Director General did not draw any mistaken conclusion from the evidence available to him, nor did he abuse his discretion.

D. In his rejoinder the complainant presses his pleas. On the question of receivability, he argues that WIPO's Staff Regulations and Rules do not provide any internal means of redress for a person who no longer has the status of a staff member. On the merits, he states that the Director General, in reaching a decision on the recommendation of a body such as the Joint Advisory Committee, is bound to act objectively and with impartiality. In this case, he cannot have been neutral when he decided on the dismissal, because for three months he had been a member of the Command Team.

The complainant expands on some of his claims and now requests his immediate reinstatement "with all his rights to date and restoration of his reputation", 100,000 Swiss francs in damages for loss of salary and various benefits, and 200,000 francs in compensation for moral and professional injury.

E. In its surrejoinder the defendant maintains its position in its entirety. It submits that the complainant did not take the trouble to ascertain whether the internal means of redress remained open to him after his dismissal. It mentions in this connection several judgments by the Tribunal in cases involving WIPO in which the complainants had exhausted internal remedies even though they were no longer

staff members. On the merits, it draws the Tribunal's attention to Judgment 2555, in which it dismissed a complaint by an official who had been dismissed from his post for compromising the integrity of the Organization's information technology systems.

F. In his additional submissions the complainant states that on 25 May 2010 he sent to the Director General, through the Director of the Human Resources Management Department and with a copy to the Chairman of the Appeal Board, a letter asking whether there were any other remedies open to him, apart from a direct appeal to the Tribunal, to challenge the decision to dismiss him. As he did not receive any reply, he acted in good faith when he filed his complaint with the Tribunal.

G. In its final observations the defendant states that the letter of 25 May 2010 was not sent by the complainant within the eight-week time limit prescribed in Staff Regulation 11.1.1(b) which he should have observed in order to request a review of the decision to dismiss him. It therefore considers it to be a "dead letter" since, at the time in question, the complainant could no longer have initiated the internal appeal process. It adds that he could, however, following the precautionary principle, have filed an internal appeal and a complaint to the Tribunal at the same time.

CONSIDERATIONS

1. This case is a sequel to the events leading to Judgments 2962 and 3037, to which reference is made.

The complainant is now challenging the decision of 16 March 2010, notified to him on 25 March, by which the Director General of WIPO, endorsing the recommendations made by the Joint Advisory Committee on 9 March 2010, imposed on him the disciplinary sanction of dismissal with immediate effect.

2. In substance, he contends that there have been various procedural flaws, that his fundamental rights, including his rights of

defence, have been violated and that the Organization displayed partiality in handling his case.

3. The defendant argues, as its main contention, that the complaint is irreceivable for failure to exhaust internal means of redress. It explains that, before appealing to the Tribunal, a staff member must follow the procedure laid down in Staff Regulation 11.1.1(b), by first sending a letter to the Director General requesting a review of the administrative decision which he or she is contesting, and then submitting an appeal to the Appeal Board if he or she wishes to contest the decision communicated in the Director General's reply. The complainant did not follow this procedure.

4. Article VII, paragraph 1, of the Statute of the Tribunal provides that:

“A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.”

Article 11.1 of WIPO's Staff Regulations provides that the Appeal Board shall give its opinion “whenever a staff member appeals against an administrative decision [...] or against disciplinary action”.

5. According to the Tribunal's case law, the term “staff member” in Article 11.1 has to be construed, in the absence of any indication to the contrary in the applicable rules, as restricted to a serving staff member (see *inter alia* Judgment 2892, under 6 to 8).

Where the staff regulations of an international organisation do not enable former staff members to avail themselves of the internal means of redress, the organisation cannot legally decide to terminate an appointment without giving the person concerned sufficient time to lodge an internal appeal, otherwise he would be deprived of his right to such an appeal.

In the present case, not only did WIPO dismiss the complainant with immediate effect, giving him no prior notice, but in addition, by notifying him only on 25 March 2010 of a decision which took effect on 16 March, it unlawfully conferred retroactive effect on its decision.

6. Moreover, the evidence on file shows that the decision to dismiss the complainant resulted from an irregular procedure. Indeed, as the complainant points out, the composition of the technical team which was tasked with investigating the actions of which he was accused was unlawful. According to paragraph 5 of the “Information security incident handling procedure”, such a team must include “WIPO IT experts, Helpdesk, Buildings security staff and if necessary, external consultants”. Yet, in this case, the team consisted of just one official.

The defendant does not contest this. It states that this situation was “very provisional” and was “counterbalanced” by certain measures. The Tribunal, however, finds that even if the period in which the team comprised only one person was very short, the fact remains that during that period the provisions of paragraph 5 of the above-mentioned procedure were not observed. Although another official subsequently joined the team, the composition of the team remained unlawful in the light of those provisions.

7. It follows from the foregoing that the impugned decision must be set aside.

8. The complainant is requesting immediate reinstatement and the restoration of all his rights. The Tribunal considers this request well founded.

Without prejudice to any future sanction which may be taken against him following renewed disciplinary proceedings, in accordance with the applicable procedure, the complainant must therefore be reinstated and will be entitled to payment of the salary and allowances which he would have received had he not been dismissed, from the date on which his employment ceased until the date of his actual reinstatement. The sums to which he would have been entitled had he remained in his post shall bear interest at a rate of 5 per cent per annum.

9. The complainant claims substantial damages for the moral and professional injury he has suffered. The Tribunal considers it fair to award him an indemnity of 10,000 Swiss francs under all heads of injury.

10. The Tribunal cannot, however, allow the complainant's request for the reimbursement of medical expenses, because he has not furnished any supporting documentation.

11. As the complainant succeeds for the most part, he is entitled to costs in the amount of 8,000 francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The complainant shall be reinstated in his post with all the legal consequences that this entails, as indicated under 8 above.
3. WIPO shall pay him an indemnity of 10,000 Swiss francs in compensation for the injury suffered under all heads.
4. It shall also pay him 8,000 francs for costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2012, Mr Seydou Ba, 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 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet