

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

111th Session

Judgment No. 3036

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. B. against the World Intellectual Property Organization (WIPO) on 24 September 2009, the Organization's reply of 18 December 2009, the complainant's rejoinder of 22 February 2010 and the letter of 30 March 2010 by which WIPO informed the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

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. The complainant, a French national born in 1969, was recruited by WIPO in 1999 as a consultant in the Network Services Section. After some incidents related to the security of the Organization's information technology (IT) systems, a Command Team was set up in February 2008. In April a copy was made of the hard disks of several computers assigned to some staff members who were entitled to have privileged access to certain systems. They included the

complainant's computer. The Information Security Section, which had been instructed to carry out an initial analysis of the data seized on the complainant's computer, issued its report on 2 September. On 4 September the complainant received a letter from the Director of the Human Resources Management Department in which the latter informed him that "preliminary information" indicated that he had committed serious misconduct consisting, first, in unauthorised connection to the Flexitime database directly through the server and, secondly, unauthorised access to the Interflex access control system. Consequently, pursuant to Staff Rule 10.1.2*, the complainant was immediately suspended from duty, with pay, and banned from entering WIPO's premises without prior clearance, until the Internal Audit and Oversight Division had completed its investigation of the charges against him. The same measure was adopted with regard to two of his colleagues working in his section, although different charges were levelled at each of them (see Judgments 3035 and 3037, also delivered this day).

On 8 October 2008 the complainant wrote to the Director General to request a review of the decision to suspend him from duty. The Director General replied on 29 October that he confirmed the reasons for the suspension and that he did not intend to interfere in the ongoing investigation. On 1 December 2008, acting through his legal counsel, the complainant asked the Director General to end the investigation forthwith. This request was denied. He then referred the matter to the Appeal Board. In its report of 22 May 2009 the Board indicated that, in its opinion, the decision to suspend the complainant from duty was valid. It recommended *inter alia* that the conclusion of the investigation should be given high priority and that consideration should be given to replacing the suspension by an arrangement which would allow the complainant to return to work on the Organization's premises, or to

* This provision reads as follows: "When a charge of serious misconduct is made against a staff member and if the Director General considers that the charge is well founded and that the staff member's continuance in office pending the results of an investigation might be prejudicial to the service, the Director General may suspend that staff member from duty, with or without pay, until the end of the investigation, without prejudice to his rights."

work from home. The complainant was advised by a letter of 6 July 2009, which constitutes the impugned decision, that the Director General had decided to adopt the Board's recommendations, insofar as they had not become moot, but that, for the reasons stated in the Organization's submissions before the Board, a resumption of his duties could not be accepted at that stage "for operational and security reasons".

In the meantime, on 27 April 2009, the Internal Audit and Oversight Division had issued its report in which it concluded that, although there was not enough evidence to substantiate the initial charges of misconduct, the investigation had shown that the complainant had engaged in a number of other forms of misconduct. The complainant, who submitted his comments on this report on 27 July, was informed by a letter of 9 November 2009 that the Director General was going to initiate disciplinary proceedings against him.

B. The complainant contends that the decision to suspend him from duty is out of proportion to the charges against him. He submits that this decision had no legal foundation. First, he considers that, before suspending a staff member, it must be established that that person has committed serious misconduct. In the instant case, the Organization has abandoned the initial charges. In his view, the condition that suspension should be resorted to only in situations of urgency has not been respected, because it would have been quite feasible to allow him to continue work during the investigation, whilst blocking part of his privileged access. Lastly, the complainant argues that, since he has been suspended from duty for a year, the "principle established" by the above-mentioned Staff Rule, that a suspension measure is essentially temporary, has been breached and that this situation is indicative of prejudice against him. In this connection he draws attention to the fact that in Judgment 2698 the Tribunal found that WIPO had prolonged a temporary measure, without any valid grounds, beyond the reasonable limit accepted by the case law. He believes that the investigation was strung out in order to enable the Organization "to fish for information" in the hope of "finding other more serious [evidence] [...] of the potential danger" which he represented.

The complainant asserts that, although on several occasions he drew the Administration's attention to what he deemed to be flaws in the procedure leading to the decision to suspend him from duty, the Administration did not react, or even demonstrated bad faith, and he provides several examples to support this view. He says that he was not warned that data were to be seized in April 2008, that he was not present when this exercise took place and that the copies of the images on his computer were not placed under seal. Referring to the fact that Mr W., who headed the Command Team, had been found guilty of harassing one of his colleagues and had roundly condemned the "unacceptable" behaviour of staff in the Network Services Section, he denounces a misuse of authority and a major conflict of interests. He points out that, according to the applicable procedure, copies should have been made by a technical team, but that in order to seize the data, Mr W. appointed only one staff member from the Information Security Section, whose impartiality seems doubtful.

The complainant considers that the Appeal Board's deliberations were flawed. He notes that, by the time the Board delivered its report, WIPO already possessed two complete audit reports as well as his comments thereon.

He further submits that, by refusing to introduce an arrangement allowing him to return to work on the Organization's premises, the Director General deliberately departed from the Appeal Board's recommendations, and that by merely referring to the reasons set out in the Organization's submissions to the Board, the Director General did not adequately state the grounds for this decision.

Lastly, he alleges that he has been the victim of discrimination and moral harassment. He complains that on 4 September 2008 he experienced "brutal expulsion", which was especially humiliating because the periodical reports on his performance had always been highly satisfactory. In his opinion, the ban on his entering WIPO premises causes him injury, particularly because it prevents him from maintaining contacts with his colleagues.

The complainant requests the setting aside of the decisions of 4 September 2008 and 6 July 2009, his immediate reinstatement, an

award of damages for the moral and professional injury which he has suffered and reimbursement of all his “technical and administrative expenses” as well as his “legal and medical expenses”.

C. In its reply WIPO states that the terms of Staff Rule 10.1.2 have been respected. It explains that while urgency is not really a prerequisite for ordering the suspension of a staff member, two other conditions must be met. First, the staff member must have been “charged with serious misconduct”. At that stage there is no need to prove the veracity of the charge, because the very purpose of the investigation following the adoption of the suspension measure is to establish whether the charge is well founded. Secondly, the person’s continuance in office must be “prejudicial to the service”. In that respect, WIPO asserts that the complainant was potentially capable of “damaging all or part of WIPO’s IT infrastructure” and that it would have been guilty of “irresponsible management or even gross negligence” if it had not suspended him from duty. It states that in order to assess whether a suspension is justified, the Tribunal must examine only whether, at the time when the measure was adopted, there was sufficient evidence for the Director General to deem the charges well founded. In its opinion, in this case there were strong indications that this was so. Citing Judgment 2698, WIPO recalls that suspension is a discretionary measure which can be reviewed by the Tribunal only on limited grounds. It explains that the length of the suspension and the validity of the measure are two separate questions and that the former cannot therefore constitute grounds for cancelling the measure. It regrets that it proved necessary to suspend the complainant from duty for so long, but considers that, in view of the circumstances, the length of his suspension should not be deemed excessive. The investigation carried out by the Internal Audit and Oversight Division concerned extremely complex IT issues and “vast quantities of data, whose analysis was particularly lengthy and especially intricate because the misconduct had apparently been committed by an expert”.

In addition, the Organization emphasises that the complainant’s argument concerning the Administration’s alleged failure to react and

bad faith is plainly inapposite. Since the hard disks of a number of computers, including that of the complainant, had been copied at a time when it was presumed that hacking was taking place, it considers that it was perfectly legitimate to engage in this exercise without warning the persons concerned, in order to prevent them from deleting any compromising items. It explains that the operation was carried out in the presence of several staff members and that every precaution was taken to safeguard the integrity of the data seized. In WIPO's opinion the complainant has not proved that his allegations regarding a conflict of interest and misuse of authority are well founded. In this respect it adds that Mr W. withdrew from the Command Team in April 2008.

WIPO states that it would have been pointless to forward the documents mentioned by the complainant to the Appeal Board, because they could not have called into question the decision to suspend him from duty, since they postdated 4 September 2008.

The Organization draws the Tribunal's attention to the fact that the Appeal Board did not recommend that the Director General should introduce arrangements allowing the complainant to return to work; it simply recommended that consideration should be given to replacing the suspension measure with such arrangements, a recommendation which was adopted. In its opinion, the grounds for the decision of 6 July 2009 were stated "clearly and precisely". It also points out that, according to the Tribunal's case law, it is permissible for a final decision simply to refer to the grounds provided in the internal appeal proceedings, of which the person concerned is necessarily aware.

WIPO denies the allegations of brutal and humiliating treatment. It considers on the contrary that the suspension was "applied in a dignified and professional manner", despite the complainant's "hostile and aggressive" attitude. With reference to the argument regarding the ban on entering its premises, it states that such access is possible since it is subject to prior clearance. The complainant is simply forbidden to

discuss the investigations with his colleagues. Lastly, it comments that, in deciding to suspend the complainant from his duties with pay, although it could have suspended him without pay, it adopted the least harmful of the possible measures.

D. In his rejoinder the complainant presses his pleas. He denounces the “inordinate” length of his suspension, namely 18 months, and lists the adverse consequences entailed by his “sidelining” at the Organization.

He also requests that “appropriate measures” be taken “with respect to his periodic reports [for] 2008 and 2009”, an award of exemplary damages “for all the treatment he has suffered”, and the “public announcement” of the cancellation of his suspension. He withdraws his claim to reimbursement of all his “technical and administrative expenses”.

CONSIDERATIONS

1. The complainant joined WIPO on 12 July 1999 as a consultant in the Network Services Section.

2. Certain facts relevant to this case are set out in Judgment 2962, and Judgments 3035 and 3037, also delivered this day, relate to similar situations.

Suffice it to recall that the complainant was informed by a letter of 4 September 2008 that he was charged with serious misconduct – unauthorised connection to the Flexitime database directly through the server and unauthorised access to the Interflex access control system – and that pursuant to Staff Rule 10.1.2 he was therefore suspended from duty, with pay, until the investigation of the charges against him had been completed.

3. The decision took effect immediately. The complainant had to return all the equipment allocated to him for work purposes, and

as long as the suspension measure remained in place he was not authorised to use the Organization's equipment or other resources or to enter its premises without prior clearance.

4. On 8 October 2008 the complainant asked the Director General to review the decision of 4 September. On 29 October the Director General confirmed the reasons for his suspension and advised him that he did not intend to "interfere" in the ongoing investigation.

On 1 December the complainant repeated his request through his legal counsel in order, as he said, to put "an immediate end to the unlawful administrative investigation" concerning him and to his suspension. On 23 December 2008 the Director General replied that his request could not be granted without pre-empting the outcome of the said investigation.

5. On 26 January 2009 the complainant lodged an appeal with the Appeal Board in which he asked it to recommend, *inter alia*, the cancellation of his suspension and his immediate reinstatement within the Organization.

On 22 May the Appeal Board issued its report in which it recommended in particular that "concrete steps should be taken to limit the duration of the suspension in so far as possible", that the conclusion of the investigation should be given high priority and that consideration should be given to replacing the suspension by an arrangement which would allow the complainant "to return to work and to perform duties or to be found appropriate tasks for working at home, considering his qualifications and grade, in a position which could not threaten IT security" at WIPO.

6. The complainant was informed by a letter of 6 July 2009 that the Director General had decided to adopt the Appeal Board's recommendations to the extent that they had not become moot, but that he considered that, for the reasons already stated in the Organization's submissions before the Appeal Board, his resumption

of duties could not be accepted at that stage “for operational and security reasons”. That is the decision that he impugns before the Tribunal.

7. The complainant seeks the setting aside of the decisions of 6 July 2009 and 4 September 2008, his immediate reinstatement, an award of damages as compensation for the moral and professional injury which he has suffered and reimbursement of all his “legal and medical expenses”.

He contends in support of his complaint that, in taking the decision of 4 September 2008, and in maintaining his suspension by the decision of 6 July 2009, the Organization breached the rules governing suspension from duty and those relating to his status as an international civil servant.

8. The Organization submits that the complainant’s claims are groundless and that the complaint should be dismissed in its entirety.

9. The complainant makes it clear that his main contention is that the decision to suspend him of 4 September 2008 had no legal foundation in that:

- (i) the conditions that there must have been serious misconduct and urgency, which in his opinion are prerequisites for the adoption of a suspension measure, were not met, and
- (ii) the procedure leading to his suspension was flawed.

He also raises various matters related to his brutal expulsion from the Organization’s premises and the subsequent ban on entering them, which he describes as an “additional argument”.

10. The Tribunal will examine the decisions in chronological order and will first rule on the lawfulness of the decision to suspend the complainant of 4 September 2008, in the light of Staff Rule 10.1.2 and the principles established by the case law, before considering

whether the deliberations of the Appeal Board were flawed and whether the Director General was entitled to maintain the suspension measure through his decision of 6 July 2009. Lastly, it will take up what the complainant terms an “additional argument”, i.e. his brutal expulsion from the Organization’s premises followed by the ban on entering them.

11. Staff Rule 10.1.2 reads as follows:

“When a charge of serious misconduct is made against a staff member and if the Director General considers that the charge is well founded and that the staff member’s continuance in office pending the results of an investigation might be prejudicial to the service, the Director General may suspend that staff member from duty, with or without pay, until the end of the investigation, without prejudice to his rights.”

12. According to the Tribunal’s case law, suspension is an interim measure which need not necessarily be followed by a substantive decision to impose a disciplinary sanction (see Judgments 1927, under 5, and 2365, under 4(a)). Nevertheless, since it imposes a constraint on the staff member, suspension must be legally founded, justified by the requirements of the organisation and in accordance with the principle of proportionality. A measure of suspension will not be ordered except in cases of serious misconduct. Such a decision lies at the discretion of the Director General. It can therefore be reviewed by the Tribunal only on limited grounds and will be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the evidence (see Judgment 2698, under 9, and the case law cited therein).

13. The complainant submits that the conditions regarding serious misconduct and urgency, which in his opinion are prerequisites for the suspension of a staff member, were not met in the instant case.

(a) He states that suspension must be based on serious misconduct and that the Director General “must be convinced that the charges have been substantiated”.

However, as stated earlier, the Director General may adopt a suspension measure at his own discretion if he considers, on the basis of the evidence before him, that the charge of serious misconduct against a staff member is well founded. As the Tribunal already held in Judgment 2698, under 11, “[t]here is no need at this stage to prove that the accusations are well founded”.

The complainant states that the charges against him were not proved. In doing so he relies on documents drawn up after the decision to suspend him had been taken. However, when it is called upon to appraise the lawfulness of a suspension, the Tribunal must determine whether the requisite conditions for adopting such a measure were met when the Director General ordered it; subsequent facts are irrelevant (see Judgment 2365, under 4(c)).

In the instant case, facts postdating 4 September 2008 therefore cannot be taken into account.

(b) The complainant submits that there was no urgent need to order his suspension.

The Tribunal notes that Staff Rule 10.1.2 does not expressly state that urgency is a condition which must be satisfied before the Director General can order a suspension. This provision specifies only that the Director General must consider that the continuance in office, during the investigation, of a staff member who has been charged with serious misconduct might be prejudicial to the service.

14. The Tribunal finds that the other arguments put forward by the complainant to challenge the lawfulness of the decision to suspend him of 4 September 2008 are irrelevant, since they refer to facts postdating 4 September 2008, or to considerations the examination of which would oblige it to go beyond the bounds of a limited review.

As for the remaining submissions, what the complainant describes as “fishing for information” is more related to subsequent facts which, as explained above, could not be taken into account at that time.

The complainant further submits that the decision to suspend him is tainted with misuse of authority.

However, according to the Tribunal's case law, misuse of authority may not be presumed and the burden of proof is on the party that pleads it (see, in particular, Judgment 2116, under 4(a)).

In the instant case, the complainant merely relies on an alleged conflict of interests which, as stated above, was not proved.

15. It follows from the foregoing that the suspension decision of 4 September 2008 was taken in compliance with the requirements of the relevant Staff Rule and with the principles established by the case law and it will not therefore be set aside.

16. The Tribunal emphasises, with reference to the plea that the deliberations of the Appeal Board were flawed, that the audit reports and the complainant's comments thereon postdated the decision to suspend him from duty and could not therefore be taken into account in appraising its lawfulness.

17. The complainant further contends that the reasons for the impugned decision were not stated. He submits that the Director General departed from the Appeal Board's recommendation regarding his return to work and did not explain why the Organization would be running a risk if it ended his suspension. He submits that this suspension extended well beyond the reasonable limits accepted by the case law, that it "seriously [affected] his morale, his career [and] his reputation as a consultant" in and outside the Organization and that it must therefore be terminated in order that he can resume work on decent conditions.

18. The Tribunal finds that, in maintaining the complainant's suspension by his decision of 6 July 2009, the Director General extended the duration of this suspension beyond the reasonable limit accepted by the case law and thus caused the complainant moral and professional injury.

The decision must therefore be set aside and compensation is due in respect of this injury.

19. The Tribunal will not rule on the plea that insufficient reasons were stated for the impugned decision, since in any event this flaw would not result in an increase in the damages awarded.

20. The complainant also complains that he was brutally expelled from his workplace while he was in the process of carrying out his duties. He received the order to return to his office immediately and to stop what he was doing, without any prior explanation. He then received the letter notifying him of his suspension and he was expelled *manu militari* from the Organization's premises. He considers that the Administration's conduct towards him was likely to "shed discredit" on him.

The Organization denies these allegations and relies on the testimony of a security guard of the Organization and the Head of the Information Security Section, both of whom were present when the complainant was notified of his suspension and when he left. It also observes that the complainant has never raised the question of the brutal treatment to which he was allegedly subjected directly with the Administration and that he has never requested the opening of an inquiry.

It is to be noted that in his rejoinder the complainant does not formally challenge the Organization's submissions and that he maintains only that the conditions in which he was expelled "were neither friendly nor professional" and "that there was no neutral person on hand to stop things going too far".

The Tribunal cannot allow this plea solely on the basis of the complainant's mere assertions which, moreover, were not submitted beforehand for consideration by the Organization's appeals bodies.

21. The complainant submits that no longer allowing him to enter the Organization's premises causes him injury, because he is not even permitted to remain in contact with his colleagues. He therefore considers that he has been banished from the Organization.

WIPO replies that these assertions are incorrect, because the complainant is only forbidden to discuss the investigation with his colleagues and to enter its premises without prior clearance.

The Tribunal finds, in the light of the complainant's most recent written submissions, to which no reply has been received, that these restrictions on the complainant are such as to undermine his dignity, thereby causing him a moral injury for which compensation must also be provided.

22. The complainant requests reimbursement of medical expenses, but the Tribunal cannot grant this request as it is not supported by any evidence.

23. In addition, he requests that the cancellation of his suspension be "publicly announced" in the Organization. Apart from the fact that the Tribunal does not consider it appropriate to order such an announcement, consistent precedent has it that in any event any new claim submitted in a rejoinder must be rejected.

24. On account of the injuries mentioned under 18 and 21, above, the complainant is entitled to compensation in the amount of 15,000 United States dollars. He is also entitled to costs, which the Tribunal sets at 5,000 dollars.

DECISION

For the above reasons,

1. The decision of the Director General of 6 July 2009 is set aside.
2. WIPO shall pay the complainant compensation in the amount of 15,000 United States dollars to redress the injury suffered.
3. It shall also pay him 5,000 dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2011, 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 6 July 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet