

**M. (Nos. 1 and 2)**

*v.*

**WIPO**

**120th Session**

**Judgment No. 3502**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. M. against the World Intellectual Property Organization (WIPO) on 21 August 2012 and corrected on 20 September, WIPO's reply of 21 December 2012, the complainant's rejoinder of 8 April 2013 and WIPO's surrejoinder of 10 July 2013;

Considering the second complaint filed by Mr M. against WIPO on 21 March 2014, WIPO's reply of 30 June, the complainant's rejoinder of 2 October 2014 and WIPO's surrejoinder of 7 January 2015;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant joined WIPO in January 1998. At the material time he was employed as the Head of the Administrative Support Section for the Innovation and Technology Sector. In that capacity he performed a managerial procurement function.

By a letter of 24 May 2011 the complainant was notified that the Director General had decided to temporarily suspend him from duty (with immediate effect), with pay, pending the outcome of an

investigation by the Internal Audit and Oversight Division (IAOD). It was alleged that the complainant had engaged in activities contrary to the conduct expected of an international civil servant, and in violation of several provisions of WIPO's Financial Regulations and Rules. That same day he was served with an internal memorandum with the subject heading "Notice of Investigation" (hereinafter the "notice of investigation") from the Director of the IAOD, dated 23 May 2011.

In a letter of 3 June to the Administration the complainant's lawyer protested against the complainant's suspension and against the circumstances in which it had been carried out. He indicated that he had been instructed to file an appeal and he requested disclosure of all evidence related to the matter. On 8 July the Deputy Director of the Human Resources Management Department replied, *inter alia*, that at that point in time it was premature for the complainant to demand full details of the allegations against him or to obtain disclosure of evidence.

In the meantime, on 7 June the complainant requested the Director General to review the decision of 24 May and he claimed various forms of relief. By a letter of 28 July 2011 the complainant was informed that the Director General had decided to reject his request for review in its entirety.

The complainant submitted an internal appeal (the "first appeal") to the WIPO Appeal Board (hereinafter "the Appeal Board") on 30 August 2011 in which he challenged the decision of 28 July. He sought immediate reinstatement, an unconditional apology, disclosure of the IAOD's investigation file including all evidence against him, and 15,000 Swiss francs in moral damages for injury to his dignity and for breach of due process and fair treatment. He claimed a further 10,000 francs in moral damages for delay in the investigation of the matter, 100,000 francs as compensation for psychological trauma, and reimbursement of legal fees and expenses.

Following its investigation into the matter, on 2 March 2012 the IAOD issued a report in which it concluded that it appeared that the complainant's conduct was contrary to the conduct expected of an international civil servant as set forth in Staff Regulation 1.5 and that he had violated WIPO Financial Regulations and Rules 105.26 to 105.28

and Office Instruction No.18/2004, as amended by Office Instruction No. 21/2009, on Honors and Gifts. It was recommended that the Director General initiate the appropriate disciplinary procedures.

The Appeal Board issued its report on the complainant's first appeal on 19 March 2012. It concluded inter alia that the discretionary decision of 24 May 2011 to suspend the complainant with pay was flawed by error of law or procedure and the disregard of essential facts in that no charge of serious misconduct had been made against the complainant as required by Staff Rule 10.1.2. The decision appeared to have been taken only on operational and security grounds without any consideration of the quality of the evidence and the rights of the complainant. The Appeal Board recommended that the Director General should lift the complainant's suspension with immediate effect, award him 15,000 Swiss francs for moral injury caused by the implementation of the flawed decision to suspend him, and award him the fees he had paid for eight hours of legal services.

By a letter 13 April 2012 the complainant was formally charged with serious misconduct; details of four specific charges were set out in the letter. It was explained that the Director General would consult the Joint Advisory Committee (JAC) for a recommendation as to whether any disciplinary measures should be taken against the complainant.

The following month, in a letter of 23 May 2012, the complainant was informed that the Director General had decided to partially adopt the Appeal Board's recommendations on the first appeal. In particular, he had decided not to lift the complainant's suspension from duty and not to award him the fees he had paid for eight hours of legal services. Nevertheless, he had decided to award the complainant 2,000 Swiss francs for moral injury caused by the manner in which the flawed suspension decision had been implemented. The Director General accepted the Board's finding that the decision to suspend the complainant was initially flawed to the extent that the letter of suspension and the notice of investigation did not contain sufficient information regarding the allegations of misconduct. However, he would not lift the complainant's suspension given that charges of serious misconduct had since been brought against him. The complainant would

remain suspended from duty with full pay, pending the outcome of the disciplinary proceedings. That is the decision the complainant impugns in his first complaint.

Following deliberations held in June and July 2012 the JAC issued a report in which it concluded that the IAOD investigation had not proven beyond a reasonable doubt that the complainant had committed the acts which had led to the four charges brought against him. Nevertheless, the investigation had proven beyond a reasonable doubt that the complainant had violated Staff Regulation 1.5 regarding conduct and Rule 105.27 of the Financial Rules and Regulations regarding conflicts of interest. It recommended that the complainant be reinstated immediately to a post which did not carry any procurement related responsibilities. In addition, in accordance with Staff Rule 10.1.1(a)(3), the complainant's advancement to the next salary step should be delayed by six months.

In a letter of 5 September 2012 the complainant was informed that, after taking into account the JAC's findings and recommendations, the Director General had decided, with effect from 10 September 2012, to lift the complainant's suspension from duty with full pay (allowing his return to work once he was medically fit to do so), transfer him to the P-4 post of Translator-Reviser in the English Translation Section, Language Division, Conference and Language Department, without supervisory or procurement related responsibilities (he would retain his P-5 grade and salary step), and delay his advancement to the next salary step by 12 months.

On 16 October 2012 the complainant requested the Director General to review the decision of 5 September and he claimed several forms of relief. In a letter of 11 December 2012 the complainant was notified that the Director General maintained his decision and rejected the complainant's claims (with the exception that his access badge and intranet account had been reactivated).

The complainant submitted an internal appeal to the Appeal Board on 4 March 2013 in which he challenged the decision of 11 December 2012 (the "second appeal"). He contested inter alia various aspects of the JAC's report and the reasons which the Director General had

provided for not following the JAC's recommendations. He claimed reinstatement to his former post and requested that all administrative sanctions against him be lifted, including the decision to delay his advancement. He sought a written apology, moral damages, compensation for on-going work-induced psychiatric injury, legal costs, and any other relief the Appeal Board considered appropriate.

In September 2013 the complainant learned that his diplomatic immunity from criminal jurisdiction and prosecution had been lifted by the Director General following a request from the *Procureur général de la République et canton de Genève* to hear him in relation to specific allegations which had been made against him.

On 30 October 2013 the Appeal Board issued its report on the complainant's second appeal. It recommended that the Director General withdraw the contested decision and endorse the JAC's recommendations insofar as they concerned the complainant's reinstatement as well as its conclusion that the IAOD investigation had not proved beyond a reasonable doubt that the complainant had committed the acts with which he had been charged. Furthermore, the Director General should, after consultation with the complainant, transfer the latter to a post which would be, as far as possible, consonant with his present grade and qualifications. Lastly, the Appeal Board recommended that the complainant be reimbursed a reasonable fee for eight hours of legal services.

By a letter of 23 December 2013 the complainant was informed *inter alia* that the Director General had decided to adopt the Appeal Board's recommendations, with one exception. He was not prepared to reimburse the complainant for eight hours of legal services. As to the decision regarding the complainant's transfer to another post, the Human Resources Management Department had been instructed to consult with the complainant as soon as he returned to work from sick leave. That is the decision the complainant impugns in his second complaint.

In his first complaint the complainant asks the Tribunal to set aside the decisions of 24 May 2011 and 23 May 2012. He seeks immediate reinstatement to the post from which he was suspended (his

return to work dependent upon his medical condition). In the event the Tribunal does not order his reinstatement, he claims material damages in the amount of 1,508,526 Swiss francs. He claims 100,000 Swiss francs as damages for psychiatric injury, 50,000 francs in moral damages and 95,000 francs for legal costs. He also claims interest on these amounts.

In his second complaint, as a preliminary matter, the complainant requests the joinder of his first and second complaints. He asks the Tribunal to order WIPO to uphold the promise made to him and to find him a suitable position, appropriate to his grade and experience. He claims moral damages for wrongful treatment, humiliation and the failure to follow the opinion of the Appeal Board, moral damages for the circumstances in which his diplomatic immunity was lifted, legal costs in the global amount of 173,169 Swiss francs for both of his complaints and for the costs of his legal representation in the subsequent criminal investigation by the Swiss authorities, and compensation for his own lost time. He seeks simple interest at 5 per cent per annum on all awards of moral damages, legal fees, and costs.

WIPO denies that the complainant is entitled to any of the relief he seeks and it requests the Tribunal to dismiss each complaint in its entirety.

## CONSIDERATIONS

1. In his first complaint, the complainant impugns the Director General's decision (communicated by letter dated 23 May 2012) to partially adopt the Appeal Board's recommendations on the complainant's first appeal to the extent that they had not become moot due to subsequent events. Specifically, he decided not to lift the complainant's suspension with pay, to award him 2,000 Swiss francs for the moral injury caused by the implementation of the flawed decision to suspend him with pay, and not to award him costs.

2. The decision not to lift the complainant's suspension was based on the fact that the IAOD had completed its Investigation

Report and Addendum (dated 2 and 16 March 2012, respectively) and had recommended that the complainant be charged with serious misconduct and that disciplinary proceedings be commenced.

Prior to his receipt of the decision of 23 May, the complainant was notified by a letter dated 13 April 2012 of the decision to initiate disciplinary proceedings. That letter informed him of the procedure to be followed and the specific charges which had been brought against him. In his final decision of 23 May 2012 the Director General held that the complainant's return to work could pose a potential security risk as the complainant worked in the most protected part of WIPO, an area dealing with confidential patent applications. Furthermore, WIPO simply could not afford to expose itself and its staff to the risk of retaliation and thus he had decided to continue the complainant's suspension with pay, pending the outcome of the disciplinary proceedings. Bearing in mind the length of the suspension, the Director General had asked the Chairman of the JAC to expedite the disciplinary proceedings in order to bring closure to the matter as soon as possible. The decision not to award costs was taken on the basis that WIPO did not normally compensate staff for the legal costs of internal appeals as they were "perfectly navigable by staff members without any legal training", and in this case particularly, the complainant was a high level professional staff member at grade P-5.

3. The Director General accepted the Appeal Board's finding that the decision to suspend the complainant from duty with pay was flawed when initially taken to the extent that neither the letter of suspension nor the notice of investigation (dated 24 and 23 May 2011, respectively) contained sufficient information on the alleged serious misconduct. The Director General considered that as that information was then provided in the letter of 8 July 2011, the time frame of six weeks mitigated the injury to the complainant. The Director General justified reducing the recommended award of moral damages from 15,000 Swiss francs to 2,000 Swiss francs on those grounds, as well as on the grounds that the complainant had not proven that he had suffered any humiliating or undignified treatment in the circumstances surrounding his suspension with pay and that the Appeal Board had

considered other reasons for the unlawfulness of the decision with which the Director General did not agree.

4. The complainant bases his first complaint on several grounds. First, the Director General's decision not to fully endorse the Appeal Board's recommendations was not properly motivated. Second, no proper reasons were given for the complainant's suspension. Third, the decisions were tainted by personal prejudice and abuse of power. Fourth, the proper procedure for suspension was not followed. Fifth, the suspension lasted beyond a reasonable time. Sixth, WIPO's breach of good faith caused psychological and hence financial injury to the complainant. Seventh, there is no redress mechanism for work-related illness and, lastly, the IAOD and the Director General took irrelevant considerations into account.

5. As noted in the JAC report (signed 26 July 2012), the complainant was charged with having infringed WIPO Staff Regulations 1.5 and 1.8 and WIPO Financial Rules 105.26, 105.27, and 105.28. The charges brought were listed as follows:

- Charge No. 1** Having accepted hospitality from [Company X] contrary to Staff Regulation 1.8 and Office Instruction No. 18/2004, without receiving the prior (or subsequent) approval of the Director General.
- Charge No. 2** Having breached WIPO Financial Regulations and Rules, in particular Rules 105.26, 105.27, and 105.28, by having conveyed either intentionally or negligently, confidential information about the procurement process to his partner, [...], who then contacted [Ms.J.], advising [Company X] to modify the prices in its proposal to WIPO.
- Charge No. 3** Having accepted hospitality in 2009, 2010, and possibly 2011 from [Company Y] contrary to Staff Regulation 1.8 and Office Instruction No. 18/2004, without receiving the prior (or subsequent) approval of the Director General.
- Charge No. 4** Having submitted a false claim of nearly 78 pounds sterling for Russian books in 2007 in relation to the education grant of his daughter [...]."

6. With regard to the first charge, the JAC “considered it quite possible and likely that the [complainant] did know that [Ms J.] had paid for the weekend stay in the hotel and the likelihood of this [was] much higher after the ‘surprise trip’ was over”. However, the JAC also considered that, in view of the seriousness of the charge and the resulting possible penalty (including dismissal), the charge had to be proved beyond reasonable doubt, and that the standard of reasonable doubt required more than that the complainant was “probably guilty” or “likely guilty”. It concluded that the complainant’s relationship with Ms J. had “created doubts regarding the [complainant’s] independence and impartiality which is essential for a senior staff member of WIPO [...] [which] has led to the perception that he ha[d] a conflict of interest in relation to his duties in the context of the procurement process which he should have formally disclosed to WIPO (Rule 105.27 of the WIPO Financial Rules and Regulations)” and therefore found that while the charge was not sustained, the complainant’s conduct violated Staff Regulation 1.5 and Rule 105.27 of the WIPO Financial Rules and Regulations.

With regard to the second charge, the JAC concluded that the Investigation Report did not contain sufficient evidence to prove the charge beyond a reasonable doubt, thus the charge was not sustained.

Considering the third charge, the JAC found that while it could not be proven beyond reasonable doubt that the complainant had accepted hospitality from [Company Y], and while the complainant may have acted in good faith, “in view of the fact that this relationship was with a supplier and a bidder in an ongoing procurement process in which the [complainant] was involved himself in a responsible and senior position, this social relationship went beyond appropriate limits since it could (and did) create at least a perception that the [complainant] was lacking the necessary integrity, impartiality and independence with regard to this company. Given his seniority and experience in WIPO, the [complainant] must have realized that his behavior could give rise to such a perception.” Thus, the third charge was not sustained but the complainant’s conduct was found to be in violation of Staff Rule 1.5.

The fourth charge was not sustained. In its conclusions, the JAC stated inter alia that the IAOD investigation had not presented enough evidence to prove beyond reasonable doubt that the complainant had committed the acts listed in Charges Nos. 1 to 4, but that the investigation had proved beyond reasonable doubt that the complainant's conduct violated Staff Rule 1.5 on conduct and Rule 105.27 of the WIPO Financial Rules and Regulations on conflicts of interest. Considering the length of the complainant's suspension, the JAC unanimously recommended that the complainant "be reinstated immediately but moved to a post which does not carry any responsibilities with regard to any procurement related activities" and, in accordance with Staff Rule 10.1.1(a)(3), his advancement to the next salary step should be delayed by six months beyond the due date of the next regular advancement.

7. In a letter dated 5 September 2012 the complainant was informed of the Director General's decision (effective 10 September 2012) to lift his suspension, transfer him to the P-4 post of Translator-Reviser in the English Translation Section, Language Division, Conference and Language Department, without supervisory and procurement related responsibilities, maintain his current P-5 grade and salary step, and to delay his advancement to the next salary step by 12 months.

8. Following the complainant's request for a review of the aforementioned decision, on 11 December 2012 the Director General maintained it. The complainant contested the decision of 11 December in his second internal appeal, stating inter alia that he had been sanctioned for violating Rules and Regulations for which he had not been explicitly charged. In its report dated 30 October 2013, the Appeal Board noted that while the Director General could instead file more specific charges in a new disciplinary hearing, he "might find that overall it was not in [WIPO's] interest to maintain the sanction" of delaying the complainant's salary step advancement by 12 months. In its conclusions, the Appeal Board noted that the complainant had already been reinstated though "the question of the post to which he

should be reinstated should be determined in accordance with the principles and procedures relating to transfers”. It stated that with regard to moral damages, no moral injury could be claimed if the Director General decided to follow the Board’s recommendations and if the Director General chose otherwise, it would be for the Tribunal to eventually determine the amounts, if any, to be awarded. It considered the complainant’s claim relating to his medical issues needed to be made in the context of the procedures under Staff Regulation 6.2 with respect to compensation in the event of illness, accident or death attributable to the performance of official duties. It considered that the complainant should be reimbursed for eight hours of legal costs though it noted particularly that “[c]oncerning the preparation of the [complainant’s] submissions, the Board recognized the usefulness of many points made by the [complainant] and understood that he might have strong feelings concerning his actual or perceived treatment in this case as well as claimed health problems. Nevertheless, it felt that his resort to the services of a professional lawyer should have avoided the misuse of the present procedure, protected by privilege, for admonishing the Director General for alleged shortcomings in general, unrelated to the decision which the [complainant] was lawfully contesting.” Finally, it recommended that the appeal be allowed in part, that the Director General withdraw the contested decision and replace it with two separate decisions, and that the complainant be reimbursed a reasonable fee for eight hours of legal services. In respect of the two separate decisions, it was recommended that the Director General endorse the recommendations of the JAC insofar as they concerned the complainant’s reinstatement as well as its conclusion that the investigation conducted by the IAOD had not found and documented sufficient evidence to prove beyond reasonable doubt that the complainant had committed the acts with which he had been charged and, pursuant to Staff Regulation 4.3(a) and after consulting with the complainant, transfer the complainant to a post which would be as far as possible consonant with his present grade and qualifications.

9. In his second complaint, the complainant impugns the Director General's decision dated 23 December 2013 which, "in the interest of turning the page", endorsed all but one of the Appeal Board's recommendations, rejecting the recommendation to reimburse the complainant a reasonable fee for eight hours of legal services. As in the decision of 23 May 2012, the decision not to award costs was taken on the basis that WIPO did not normally compensate staff for the legal costs of internal appeals as they are designed to be navigable by staff who have no legal training and it should have been particularly simple for the complainant, who was a high level professional staff member at grade P-5, to do so. The Appeal Board's comment regarding the complainant's submissions with respect to the Director General was also noted.

10. The complainant bases his second complaint on several grounds. First, the Director General, by failing to transfer him to another P-5 post, breached the promise made to him in the decision of 23 December 2013. Second, the Director General wrongfully lifted the complainant's diplomatic immunity, doing so without first consulting with the complainant. Third, he did not properly motivate his decision not to award the complainant compensation for legal costs, contrary to the recommendations of the Appeal Board.

11. The Tribunal finds it convenient to join the two complaints as they are largely interrelated, and are based on similar issues of fact and law.

12. The Tribunal holds that the complainant's claim related to the lifting of his diplomatic immunity and his claim for damages in respect of injury to his health are both irreceivable for failure to exhaust all internal means of redress. With regard to the claim in relation to the lifting of his diplomatic immunity, the Tribunal notes that while it is not competent to quash the decision itself, case law holds that it does have the power to review the circumstances in which the decision was taken (see Judgment 2302, under 7, and the case law cited therein). However, the complainant should have followed the

normal procedure for contesting the circumstances surrounding the administrative decision to lift his immunity, first by requesting a review of that decision and then by filing an internal appeal if needed. Without having completed those steps, there is no final decision for the Tribunal to review. With regard to his claims for damages for injury to his health, WIPO has convincingly demonstrated that there is a system in place to review medical claims. As the complainant refuses to participate in that system, he cannot expect to come directly to the Tribunal with his claim. The complainant's claim for costs related to his defence in the criminal proceedings is irreceivable as those proceedings are not within the Tribunal's jurisdiction. These three claims must be dismissed as irreceivable.

13. The Tribunal notes that the 24 May 2011 decision, to temporarily suspend the complainant with full pay pending the outcome of the preliminary fact-finding investigation into the potential charges of serious misconduct, was taken in accordance with the version of Staff Rule 10.1.2 then in force (governing temporary suspensions from duty) which reads: "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." The word "charge" does not concern a formal charge, but rather an allegation of serious misconduct which warrants an investigation of the type referred to in the Rule.

14. In the Appeal Board's report on the first appeal, it was noted that although the appeal was directed against WIPO and two of its staff members, it was assumed that the appeal was essentially challenging the 28 July 2011 decision to reject the complainant's request for review of the decision to suspend him. The Appeal Board found that the Staff Rule 10.1.2 required that a charge be made, "even if the charge was worded in general terms in order not to prejudice the investigation or restrict its scope".

15. In the suspension letter of 24 May 2011 the complainant was informed of his temporary suspension with pay pending an investigation by the IAOD with regard to allegations that he had engaged in activities contrary to the conduct expected of an international civil servant, as set forth in WIPO Staff Regulation 1.5, and in violation of the WIPO Financial Regulations and Rules, in particular Rule 105.26 regarding confidentiality and Rules 105.27 and 105.28 regarding standards of conduct. Rule 105.26 reads: “Throughout the tender process and until the results of that process are announced, no information about offers or the evaluation process may be divulged to any individual other than those directly involved in the evaluation process, such as responsible members of the Organization’s staff and employees or authorized external consultants.” Rule 105.27 reads: “Officers of the Organization involved in a procurement action shall disclose, in advance, any possible conflict of interest that may arise in the course of carrying out their duties. Failure to do so may result in appropriate disciplinary action or other appropriate civil and/or criminal action.” Rule 105.28 reads: “All officers of the Organization who are involved in a procurement action must observe the terms of the Staff Regulations and Staff Rules and the Standards of Conduct applicable to International Civil Servants, in particular the WIPO Staff Regulations and Rules on confidentiality, without prejudice to employees’ obligation to report waste, fraud or abuse.” It was further noted in the letter that the IAOD would contact the complainant with respect to the investigation to be carried out and to provide further details into the allegations. It was explained that the Director General had decided to temporarily suspend him due to the gravity of the allegations and the potential risk to WIPO that was posed by the complainant’s working in a higher level security area and the possibility of his tampering with the evidence.

The notice of investigation dated 23 May 2011 from the Director of the IAOD stated *inter alia* that it was alleged that the complainant had engaged in activity which is conduct contrary to that expected of an international civil servant, Regulation 1.5 of the WIPO Staff Regulations and Staff Rules and additionally, the WIPO Financial Regulations and Rules. In response to his request for information regarding the precise allegations, the complainant received a letter

dated 8 July 2011 from the Deputy Director of the Human Resources Management Department, which specified that the suspension letter clearly set out the relevant provisions which he had allegedly violated. She went on to specify that preliminary information indicated that he had improper contacts with one or more companies engaged in a tender process which could lead to potential charges of corruption and which, if proven, would result in a violation of Rules 105.26, 105.27 and 105.28 of the WIPO Financial Regulations and Rules. She highlighted that as no formal charges had been brought against the complainant at that time (and that there might never be any charges filed if the investigation concluded that the allegations were groundless), the complainant's request for full disclosure of the allegations and evidence was considered premature at that stage but that specific allegations would be put to him when he was interviewed during the investigation process and that he would be given full opportunity to respond.

16. The Tribunal holds that, as the decision to temporarily suspend the complainant with full pay in accordance with Staff Rule 10.1.2 was part of a preliminary, fact-finding investigation into allegations of serious misconduct, in order not to prejudice the investigation, it was not unlawful for WIPO to only give the complainant information regarding the specific Rules that he was alleged to have infringed, without specifying at that time the exact details of the allegations (names, dates, etc.). It should be noted that the Staff Rules listed in the letter of 24 May and the notice of investigation of 23 May are quite specific and could be considered sufficient. As the Director General accepted the Appeal Board's recommendation on the first appeal that the information provided was not sufficiently detailed, and as the letter of 8 July 2011 did provide sufficient detail, the Tribunal finds that the decision to award the complainant 2,000 Swiss francs in moral damages is appropriate.

17. With regard to the Appeal Board's conclusion regarding whether or not the second clause of Staff Rule 10.1.2 (that the charge must be considered well founded by the Director General) was

satisfied, the Board cited Judgment 2365, under 4(b), wherein the Tribunal found, with respect to a similar requirement under the rules of another organisation, that “the specific accusations made [should allow the Director General] to presume that the charge is well-founded”. The Board found that “the basis on which the Director General had taken the decision to suspend the [complainant] was inadequate in strength and reliability”. The Tribunal notes that Judgment 2365 regarded a suspension pending disciplinary proceedings for charges which had already been brought, whereas the present complaint involves a suspension pending a fact-finding investigation to determine whether or not charges should be filed. The quality of the evidence must necessarily be more stringent in a disciplinary proceeding than in a preliminary investigation. Moreover, the Tribunal notes that “[t]he Board found a number of points in the [...] allegations to be insufficiently conclusive in the sense that they left open a number of questions which could have explained the [complainant’s] alleged actions (in a way which could have decreased or possibly increased the likelihood of serious misconduct) but which the investigator did not take into consideration”. The Appeal Board went on to say that, with regard to several of the allegations, clarification should have been sought. The Tribunal holds that while the Board said that more information was required to decide whether or not the allegations were true, it somehow contradictorily reached the conclusion that the Director General did not have enough of a basis to suspend the complainant and to initiate the preliminary, fact-finding investigation whose express purpose was to collect more information and verify whether or not the allegations were valid and if so, to what degree of seriousness. It appears that the Appeal Board had in mind the probative value of evidence necessary for disciplinary proceedings. The Board’s finding that the complainant should have been invited to express his views on the detailed allegations before the suspension was decided is not grounded on any Staff Rule or Regulation and thus, it was not sound. The Tribunal notes that the suspension was not a sanction; it was an urgent cautionary interim measure (see, for example, Judgment 3037, under 9).

18. The Appeal Board also expressed concern at the fact that the Director General had relied on an oral briefing by an IAOD officer, regarding the content of the interviews, when taking the interim decision to temporarily suspend the complainant based on the suspicion of misconduct. Bearing in mind that the complainant was not being formally charged with serious misconduct at that time, the Tribunal recognises that it was not unreasonable for the Director General to rely on the preliminary information provided to him by the IAOD officer when taking the interim decision to suspend the complainant. That the information was presented orally does not vitiate the Director General's discretionary decision.

19. Considering that the investigation related to potential charges of serious misconduct, that the two whistleblowers were subordinates of the complainant, and that the complainant worked in a highly sensitive security area, the Tribunal finds that the Director General's decision to temporarily suspend the complainant was taken in WIPO's interests, with a view to protecting it from potential risk of damage or embarrassment. This was an administrative decision taken at the discretion of the Director General in accordance with the version of Staff Rule 10.1.2 then in force. The Tribunal does not consider that it was taken without authority, or in breach of a rule of form or procedure, or was based on an error of fact or law, or overlooked some essential fact, or was tainted with abuse of authority, or that a clearly mistaken conclusion was drawn from the evidence (see, for example, Judgments 3035, under 10, and 3037, under 9).

20. The Appeal Board and the Director General agreed that the execution of the suspension order followed the proper protocol and was not done in a way that deliberately humiliated the complainant. As the Tribunal finds the suspension decision was lawful, any humiliation stemming from the suspension is not, in this case, compensable by way of an award of moral damages, given that the humiliation he suffered was a necessary and direct consequence of the suspension itself. Consequently, the Director General's decision to limit the payment of moral damages to 2,000 Swiss francs, as detailed above, was founded.

21. The duration of the preliminary fact-finding investigation lasted approximately ten months, which may be too long. However, in the present case, there are other factors which explain the delay. First, the complainant and his counsel were responsible for a three and a half month delay in the investigation. Second, the investigation was complex as several of the pertinent witnesses to be questioned were not WIPO employees and thus could not be required to cooperate with the investigation. As part of the investigation also required the cooperation of the local authorities, there was the added factor of requesting and being granted permission to work with the Swiss police, and the time needed by the Swiss police to conduct their investigations and present their findings to the IAOD. In light of the specific exigencies of the circumstances, the Tribunal finds that the duration of the temporary suspension with pay, was not excessive. The further period of temporary suspension with pay which lasted five months from 13 April 2012 to the conclusion of the disciplinary proceedings (with reinstatement effective 10 September 2012) which faced similar constraints and carried a heavier burden of proof, is not unreasonable.

22. The complainant contests the Director General's decision not to award costs as recommended by the Appeal Board. The Tribunal finds that even if the reasons provided by the Board (in both appeals) for the exceptional awarding of costs – that is, when the legal assistance provided was necessary in order to avoid an irretrievable loss of rights in possible subsequent proceedings – were correct, it does not necessarily follow that a person in the position of the complainant is entitled to an award of costs as against the defendant organisation. It is his actions that have led him to the position where legal representation is required or desirable. Moreover, the Tribunal observes that the complainant's submissions in his internal appeals and in his first complaint were unnecessarily offensive towards WIPO and were unnecessarily lengthy, with large portions devoted to irrelevant attacks on WIPO and its staff members. It should be noted that the complainant owes a duty of respect to WIPO and to its staff which, by the intemperate language of his submissions, has not been fulfilled (see Judgment 1531, under 15).

The Tribunal finds that the decision not to award the complainant costs for the internal proceedings is founded.

23. With regard to the claim of alleged breach of promise, the Tribunal finds that as the claim fails on the merits, there is no need to address its receivability. The Tribunal holds that the recommendation and the decision to adopt that recommendation specify that the transfer to a post consonant with the complainant's present grade and qualifications is to be done "as far as possible". In his final decision of 23 December 2013, the Director General adopted the Board's recommendation to endorse the JAC's recommendations insofar as they concerned the complainant's reinstatement. In the relevant part, the JAC recommended that the complainant "be reinstated immediately but moved to a post which does not carry any responsibilities with regard to any procurement related activities". The Tribunal recognises that there may be difficulties in finding a P-5 post which does not include procurement responsibilities and, given the circumstances, WIPO was correct to assign the complainant, who retained his P-5 grade, to a P-4 post while continuing to search for a more appropriate post for him. The complainant has not shown any convincing evidence of the existence of suitable P-5 posts to which the Director General could have transferred him.

24. The complainant's allegation that the Director General had started criminal proceedings against him is unfounded. It is clear from the evidence presented that the Swiss authorities filed the charges based on the information and evidence that they gathered with regard to the complainant's hotel stay which was proven to have been paid for by [Company X]. While the Swiss authorities found that evidence following a request made by WIPO in the context of the IAOD investigation, it cannot be considered a request on the part of WIPO to initiate criminal proceedings against the complainant.

25. The Tribunal finds that the complainant has not presented convincing evidence that the Director General has taken the decisions of 23 May 2011 and 23 December 2013 in breach of good faith, or

with an abuse of power, or with any other flaw that would otherwise vitiate the decisions. There has been no breach of promise as claimed in the second complaint. In light of the above, the two complaints must be dismissed in their entirety and the complainant shall bear his costs.

DECISION

For the above reasons,  
The complaints are dismissed.

In witness of this judgment, adopted on 21 May 2015, 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 30 June 2015.

GIUSEPPE BARBAGALLO  
DOLORES M. HANSEN  
MICHAEL F. MOORE

DRAŽEN PETROVIĆ