

A.
v.
WTO

121st Session

Judgment No. 3602

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. A. against the World Trade Organization (WTO) on 1 March 2013 and corrected on 17 April, the WTO's reply of 12 June, the complainant's rejoinder of 19 July and the WTO's surrejoinder of 23 September 2013;

Considering Article II, paragraph 5, of the Statute of the Tribunal;
Having examined the written submissions;

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

The complainant, a former employee of the WTO, contests the Director-General's decision to summarily dismiss him for serious misconduct.

On 1 December 2011 the complainant, who at that time enjoyed diplomatic status by virtue of his G.10 grade post, was stopped by security agents at Geneva airport as he attempted to board a flight carrying items prohibited under Swiss law, namely a plastic dagger strapped to his leg, a pepper spray with no identification label tucked inside a martial arts tool and a round of rifle ammunition. The prohibited items were confiscated and he was allowed to board a later flight that same day. The WTO was notified of the incident by the Swiss authorities on 2 February 2012. On 3 February representatives of the WTO Administration met with the complainant and notified him of the

Director-General's decision to lift his immunity from jurisdiction and to place him on special leave with full pay.

By a letter of 14 February 2012, the Swiss authorities formally requested that the Director-General of the WTO lift the complainant's immunity from jurisdiction and execution with a view to initiating criminal proceedings. The complainant was later charged with unlawful possession of a prohibited weapon.

On 18 February 2012 the complainant was hospitalised. He subsequently submitted two medical certificates dated 12 and 14 March respectively, certifying that he was unfit to work from 19 February to 31 March 2012. While on sick leave, the complainant was notified by a letter dated 7 March 2012 of the Director-General's decision to summarily dismiss him with immediate effect for serious misconduct. On 16 March and again on 4 April 2012 the complainant's counsel requested the Director-General to review the 7 March 2012 decision and to afford the complainant all the procedural guarantees provided for in Article 11.1 *et seq.* of the Staff Regulations and Article 113.2 of the Staff Rules, in particular that he convene a joint advisory body, and that he also afford him the opportunity to make observations and to be heard on the proposed disciplinary measure pursuant to Staff Regulation 11.4 and Staff Rule 113.2(b) and (c). By a letter of 17 April 2012 the Administration rejected these requests and on 14 May 2012 the complainant filed an appeal with the Joint Appeals Board contesting his summary dismissal and the refusal to convene a joint advisory body. In its report of 2 November 2012, the Joint Appeals Board found that the 7 March 2012 decision was vitiated because the WTO had failed to notify the complainant of the proposed disciplinary measure and to give him an opportunity to comment prior to its imposition. It recommended that the Director-General take a new decision in line with the Staff Regulations and Staff Rules and the requirements of due process.

The Director-General accepted that recommendation and, by a letter of 30 November 2012, the complainant was informed that the 7 March 2012 decision had been withdrawn. However, in that same letter he was also notified that the Director-General proposed to

subject him to the disciplinary measure of summary dismissal and invited him to comment thereon within fifteen days, after which a final decision would be taken. After having received the requested comments from the complainant's counsel, the Director-General decided to apply the proposed measure of summary dismissal, but also to offer the complainant an indemnity equivalent to the salary, emoluments and other benefits that he would have received had he remained in the service of the WTO from 1 April 2012 until the date of that decision. The complainant was relevantly informed by a letter of 21 January 2013. That is the impugned decision.

The complainant asks the Tribunal to order his immediate reinstatement with retroactive effect and the payment of all salary, benefits, step increases, pension contributions and any other emoluments he would have received had he not been summarily dismissed on 7 March 2012. He requests that the letter of 7 March 2012 and the decisions of 30 November 2012 and 21 January 2013 be withdrawn and declared null and void and without legal effect. He also requests that all charges against him be dismissed or, alternatively, that the WTO be ordered to empanel a Joint Advisory Body in accordance with Staff Regulation 11.3 and Staff Rule 113.2(a-c). He claims costs, "actual and moral" damages in an amount not less than 250,000 Swiss francs and exemplary damages in an amount not less than 250,000 francs, with interest on all amounts at the rate of 8 per cent per annum, calculated from 7 March 2012. He also seeks such other relief as the Tribunal deems equitable, just and necessary.

The WTO asks the Tribunal to dismiss the complaint and to reject all of the complainant's claims as unfounded.

CONSIDERATIONS

1. In effect, in seeking the reliefs that are set out in the penultimate paragraph of the statement of the facts, the complainant seeks to set aside the impugned decision of 21 January 2013 and raises fourteen grounds for this.

2. In the first ground, the complainant contends that it was procedurally irregular, and a violation of due process, for the WTO to have lifted his immunity without formal consultations with him. In this regard, the complainant submits that “the administrative decision to lift his immunity without consultation was procedurally improper and in violation of due process”.

3. The complainant’s case is primarily against decisions by the Director-General to terminate his appointment summarily. This is a disciplinary measure under Staff Regulation 11.2, which stipulates that disciplinary measures “may consist of one or more of the following: written censure, loss of one or more salary increments, deferment of a salary increment for a specific period, suspension without pay, fine, demotion, termination of contract with or without notice or compensation in lieu thereof, or summary dismissal for serious misconduct”. Staff Rule 114.3(b) permits a staff member to appeal against a disciplinary measure directly to the Tribunal.

4. Under Staff Rule 114.3(a) a staff member who intends to appeal against a decision other than a decision to apply a disciplinary measure shall first request the Director-General to review the decision and that request must be sent within forty working days from the date on which the staff member received notification of the decision in writing. Since the decision to waive the complainant’s immunity was not a disciplinary measure that fell within Staff Regulation 11.2, the complainant should have first requested a review of that decision, or the failure to have considered it in the impugned decision, and then followed the procedures set out for appeals in relation to such matters, which Staff Rules 114.5 to 114.9 provide. This ground of the complaint is therefore irreceivable, since the complainant did not exhaust the internal remedies as Article VII, paragraph 1, of the Tribunal’s Statute requires. In any event, the Tribunal sees no nexus between the disciplinary matter against the complainant and the waiver of his immunity for the purpose of the proceedings initiated by the Swiss authorities against him. His immunity was lifted in order to allow the Swiss authorities to investigate the charges.

5. In his second ground, the complainant contends that the WTO's "failure to involve [him] in the disciplinary process was procedurally irregular, contrary to Staff Regulations 11.4, 111.3 [*recte* Staff Rule 113.2], and was a violation of due process".

6. Staff Regulation 11.4 requires the Director-General to notify a staff member in writing of the grounds for a disciplinary measure or sanction that is proposed against the staff member for unsatisfactory conduct. Staff Rule 113.2 provides the procedure that is to be followed in the ensuing disciplinary process. The procedure is to commence with a notification of the proposal to apply the disciplinary measure. The Director-General is then required to notify a joint advisory body of the proposal, and the grounds of it, and advise the staff member of that notification. The staff member is then to respond with written observations on the proposal. The joint advisory body is then to hear the staff member and other witnesses and to send a report from these to the Director-General and to the staff member. The staff member may then provide written observations to the Director-General on the report. It is then that the Director-General is to make a decision on the proposed disciplinary measure and to notify the staff member of it.

7. The complainant argues, in ground two of his complaint, that failure to follow this process violated the aforementioned Staff Regulation and Staff Rule and due process, as he was not meaningfully involved in the process. This, according to the complainant, yielded a manifestly defective decision which can only be remedied by reinstatement. He relies on Judgment 888 as authority for this statement.

8. In Judgment 888 the Tribunal ordered the reinstatement of an employee of PAHO against whom the Organization had taken disciplinary action on allegations that he had presented three false medical certificates. At the time when the judgment was delivered, police charges against the complainant for passing fraudulent documents had not been heard. He was notified by PAHO that his employment would be terminated for serious misconduct on a subsequent specific date. However, he was given eight days within which to submit a response

as to whether he considered the accusation proper, failing which “the action of [his] termination [would] be completed”. He responded quickly asking PAHO, among other things, to consider waiting for the Court’s final decision on the Police charges. He stated that he was not aware that the certificates were false because of the circumstances which he listed. He was subsequently notified that his answer had been carefully considered but that termination of his employment was confirmed. The Tribunal found that there was no attempt to find out why he did not know that the certificates were false. Further, the circumstances which he had listed for being unaware of the falsity of the certificates were readily verifiable and PAHO’s failure to verify them meant that the complainant’s answer was not really carefully considered, contrary to what PAHO had stated. It was stated in Judgment 888 that he should have been asked to furnish all relevant information in his reply and not just whether he agreed that the accusation was proper, because that question left the impression that he was only asked whether he was contesting the proposed termination of his employment for serious misconduct. In addition to considering whether the certificates were false, PAHO also had to be satisfied that the complainant had presented them knowing that they were false. It was further found that the decision was defective in that PAHO did not reply to the complainant’s request that it should await the outcome of the trial and did not require him to furnish his full defence. In sum, the decision was vitiated because the complainant was unable to fully exercise his right to be heard in the circumstances.

9. It is noteworthy that the process provided for by Staff Regulation 11.3 and elaborated in Staff Rule 113.2, is not applicable to the present case. The present case is one of summary dismissal for serious misconduct and Staff Regulation 11.3 exempts such summary dismissal cases from the Staff Rule 113.2 disciplinary procedure. However, as in Judgment 888, the complainant still had a right to be heard in his defence against the allegations, particularly given the serious nature of the charge. He correctly complained that that right was violated in the decision of 7 March 2012, which was upheld in the communication of 17 April 2012. The WTO withdrew that decision

and the process commenced anew. The circumstances of the renewed process satisfied the minimum requirements of the right to be heard in that the complainant was informed of the proposal to dismiss him summarily for his behaviour on 1 December 2011, the allegations were made clear to him, he was given an opportunity to present his defence and did so. His right to be heard was satisfied, and, accordingly, ground two of the complaint is unfounded.

10. In ground four of the complaint, the complainant contends that WTO's failure to empanel a joint advisory body before imposing sanctions was procedurally irregular and in violation of Staff Regulation 11.3. However, this ground is unmeritorious because Staff Regulation 11.3 explicitly absolves the Director-General from the obligation to appoint a joint advisory body where, as in the present case, the proposed disciplinary sanction is summary dismissal for serious misconduct. Accordingly, the Director-General was under no obligation to empanel a joint advisory body and thus ground four of the complaint is also unfounded.

11. In ground eight, the complainant contends that the WTO failed to prove misconduct beyond a reasonable doubt. The Tribunal does not agree. The evidence that the WTO provided was sufficient to prove serious misconduct beyond a reasonable doubt. It showed that the complainant had a dagger, which he had strapped to his leg under his trousers. The dagger was a prohibited weapon under Swiss law. The airport security agents had also found in his carry-on luggage a pepper spray from which the label had been removed, in breach of Swiss law. There was also a Swiss military 5.6 cartridge, which was not supposed to have been taken outside of the military shooting stand where it was used. Those cartridges are subject to export prohibition. The complainant's defence is that the steps which the WTO took did not sufficiently evince the necessary urgency for summary dismissal. He states that although the incident occurred on 1 December 2011, it was on 2 February 2012 that the Swiss authorities informed the WTO of the incident and provided some particulars.

12. It is noted that representatives of the Administration met with the complainant on 3 February 2012, shared the information with him, sought his views and informed him of the waiver of his immunity from the jurisdiction of the Swiss Courts to facilitate the criminal investigation. He was also informed that he would be placed on special leave. It was on 15 February 2012 that the WTO received the letter of request for the waiver of immunity from the Swiss authorities that formally provided particulars of the incident and of the items which the complainant had and which were discovered when he was about to board the flight on 1 December 2011. In these circumstances, the Tribunal holds that the complainant's misconduct was proven beyond a reasonable doubt. In the foregoing premises, ground eight of the complaint is unfounded.

13. The complainant's contention, in ground ten, that the incident of 1 December 2011 should not have attracted disciplinary proceedings against him because it occurred in his private capacity and was therefore not relevant to the terms of his employment with the WTO, is also untenable. The Tribunal finds that, notwithstanding that the complainant was travelling in a private capacity, his behaviour was incompatible with the rules of conduct by which an international civil servant must abide. That behaviour involved the breach of airline travel security in a manner that was incompatible with his office and duty to the WTO and that risked WTO's relationship with the Swiss authorities and its esteem and standing as an international organization. That behaviour could properly have attracted liability by way of disciplinary proceedings (see Judgment 2944, under 44-49, for example). Accordingly, ground ten of the complaint is also unfounded.

14. The complainant submits, in ground five, that the disciplinary sanction should not have been imposed on him before any level of responsibility had been determined by the Swiss judicial authorities. He insists that the case was *sub judice* and no conviction had been rendered. The complainant further insists that the WTO acted prematurely when it instituted disciplinary proceedings against him for summary dismissal, which requires proof beyond reasonable

doubt, without awaiting the outcome of his trial, as no such proof existed until he was convicted. He further insists that failing this, the disciplinary action that was taken against him was based on “mistakes of fact and erroneous conclusions”. No authority has been cited in support of these assertions.

15. The imposition of an internal disciplinary sanction falls within the ambit of the Staff Regulations and Staff Rules of the WTO and is independent of any related domestic proceedings against a complainant. The disciplinary process did not have to await the outcome of the domestic judicial process. Ground five of the complaint is therefore also unfounded.

16. Ground seven of the complaint states that the complainant must be compensated for his medical conditions which were aggravated by his employment at the WTO. This ground is however beyond the scope of the complaint and is therefore irreceivable.

17. The complainant contends, in ground six, that his employment was improperly terminated while he was on service-incurred sick leave contrary to Article 5 of Annex 3 to the Staff Rules. This provision relevantly states that in the event of service-incurred illness or injury, a staff member shall be entitled to compensation as prescribed in these rules. This ground of the complaint is unfounded, as the complainant provides no evidence from which the Tribunal may conclude that he suffered from a service-incurred illness at the relevant time.

18. The complainant contends, in ground twelve, that the remedy which the JAB proposed and the Director-General took was illusory. He argues that, following the determination that the dismissal procedure was irregular because it violated his right to a fair hearing and was thus a breach of due process, the only appropriate course of action and legally valid remedy that was then available to the WTO was to set aside the dismissal, reinstate him and commence the full disciplinary process anew. The complainant insists that this would have entailed instituting the proceedings involving the joint advisory body. The Tribunal

has noted that Staff Regulation 11.3 exempts summary dismissal from the joint advisory body process. Ground twelve is therefore also unfounded.

19. The complainant argues, in ground thirteen of the complaint, that the report of the JAB was grossly flawed, denying him his right to an effective internal appeal process as mandated in “international jurisprudence”. His submissions may be summarized as follows: once the JAB found that his right to be heard had been violated, it erred in remitting the case to the Director-General stating that the case was one of “grave concern”. This meant that the JAB did not properly consider the explanation which he gave about the incident in his internal appeal and which would have assisted it to find that the incident was not a serious one given all of the circumstances. The JAB thereby deprived itself of the opportunity of upholding his appeal and recommending suitable remedies. The JAB also erred when it only determined the one procedural issue and failed to consider the other procedural and substantive claims that he raised. That failure rendered its recommendations faulty, and, by extension, “any subsequent decision attempting to re-punish [him] for conduct for which the WTO ha[d] already sanctioned him was equally, fatally flawed”. As a result, the JAB did not provide him with the internal appeals process to which he was entitled. The Tribunal, however, observes that the JAB gave its recommendation on 2 November 2012 and the Director-General accepted it in his letter of 30 November 2012. The complainant should have sought to challenge the latter decision internally but did not do so. He cannot simply raise it in these proceedings. This ground of the complaint is accordingly irreceivable.

20. In ground fourteen the complainant contends that the principle of double jeopardy was violated by the sanction of summary dismissal which was imposed upon him. This principle precludes the imposition of any further disciplinary measure against a person for acts or omissions that have already attracted disciplinary sanction (see, for example, Judgments 3126, under 17, and 3184, under 7). The complainant’s case is that this principle was violated when the Director-

General issued his decision dated 30 November 2012, “addressing the [c]omplainant’s alleged behaviour [of] 1 December 2011 at the Geneva Airport” and then issued a second decision on 21 January 2013 summarily dismissing him “for the exact same behaviour addressed in the 30 November 2012 and 7 March 2012 impugned decision letters”.

21. The Tribunal notes that the Director-General first summarily dismissed the complainant in his letter of 7 March 2012 and that this decision was upheld on review in the letter of 17 April 2012. In the letter of 30 November 2012, the Director-General withdrew the decision of 7 March 2012 to summarily dismiss the complainant and notified him of his “proposal for a disciplinary sanction with respect to the event of 1 December 2011”. The complainant was given 15 days from the date of the notification to reply in writing. The letter of 30 November 2012 also informed the complainant that if the final decision was the termination of his employment, with or without notice or compensation in lieu thereof, he would be awarded an indemnity equal to the total emoluments, allowances and benefits that he would have received had he been in the service until the date on which that decision took effect, but that he would be reinstated if there was no disciplinary sanction against him. The complainant submitted his reply dated 18 December 2012, which was followed by the impugned decision of 21 January 2013 to dismiss him summarily with the payment of the indemnity. In effect, by the letter of 30 November 2012 the Director-General nullified the prior disciplinary sanction, because the process had been flawed, and initiated a new process. The result was that when the impugned decision was given on 21 January 2013 there was no prior disciplinary measure or sanction in place that operated to engage the principle against double jeopardy. Accordingly, this ground of the complaint is also unfounded.

22. However, ground eleven of the complaint, which states that the disciplinary sanction violated the principle of proportionality, has given the Tribunal some pause. Staff Regulation 11.2 requires a disciplinary measure to be proportionate. The Tribunal has stated, in Judgment 210, for example, that even in a case in which serious

misconduct is alleged, staff rules provide a wide range of penalties and it is therefore necessary to apply the principle of proportionality to ensure that the extreme penalty of summary dismissal is applied only in the gravest cases. Thus the following was stated in Judgment 210, under 6:

“[W]hen these mitigating factors are put into the scale together with the lack of any corrupt motive and the complainant’s previous good record, they cause the sentence of summary dismissal to appear out of all proportion to the degree of misbehaviour in this case.”

23. It is observed that the Director-General carried out the exercise to determine proportionality by weighing all of the facts and circumstances of the alleged misconduct against the mitigating factors in favour of the complainant. However, the Tribunal observes that in that exercise the complainant’s health condition, as it may have impacted the complainant’s behaviour on 1 December 2011, was not properly considered and assessed. The Tribunal is particularly concerned with the Director-General’s statement in the impugned decision that the complainant had not established that his illness was responsible for his behaviour on that day.

24. The record shows that on 10 May 2012 the complainant’s physician certified that the complainant had been treated for a serious medical condition since 27 June 2011. This was before the incident of 1 December 2011. The physician confirmed this and certified that the complainant was still in May 2012 undergoing treatment but that his condition had significantly improved. The physician confirmed that diagnosis in another medical certificate of 30 July 2012. This information was provided to the Administration before the Director-General informed the complainant, by the letter of 30 November 2012, that the decision of 7 March 2012 was withdrawn and proposed again to subject him to the disciplinary measure of summary dismissal. That information was also available in the internal appeal proceedings.

25. The Tribunal considers that in the particular circumstances the WTO had a duty of care towards the complainant that went beyond

the mere statement that he had not established that his illness was responsible for his behaviour. That duty required the WTO to seek further medical advice concerning the complainant's medical condition that would have assisted it to have made a more informed assessment of a possible causal connection and consequential decision in the matter. This assessment should also have been weighed in determining proportionality. Having not done so, the impugned decision was unlawful, as the complainant submits in ground three of his complaint, which is accordingly well founded. Since the WTO also did not meet its duty of care to seek further medical advice and to consider it in determining proportionality, ground eleven of the complaint is also well founded.

26. The complainant contends, in ground nine, that this is not a proper case to which summary dismissal proceedings were applicable because his behaviour and the circumstances of the incident of 1 December 2011 were not of a sufficiently serious nature to amount to serious misconduct attracting summary dismissal. He also argues that he lacked the requisite *mens rea*. It has been found that the subject incident was one which constituted a serious breach of the rules of security for travel on a commercial flight in the circumstances in which it occurred. However, in light of the findings in considerations 23, 24 and 25 of this judgment, the Tribunal agrees with the complainant that there was an error of fact and that essential facts were overlooked. Ground nine of the complaint is well founded to this extent, but it is unfounded to the extent that the complainant contends that the impugned decision was in itself tainted with abuse of authority, as there is no proof of this.

27. In the foregoing premises, the impugned decision must be set aside to the extent that it found that summary dismissal was a proportionate sanction. The matter will be remitted to the WTO for reconsideration. The breaches by the WTO, as found in considerations 25 and 26 of this judgment, entitle the complainant to moral damages, for which 12,000 euros is awarded. The complainant shall also be awarded 4,000 euros in costs. All other claims will be dismissed.

DECISION

For the above reasons,

1. The impugned decision of 21 January 2013 is set aside to the extent that it found that summary dismissal was a proportionate sanction.
2. The matter is remitted to the WTO for the Director-General to make a new decision on the complainant's case having regard to the Tribunal's findings in considerations 23 to 27, above.
3. The WTO shall pay the complainant 12,000 euros in moral damages.
4. It shall also pay him 4,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 27 October 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ