

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

111th Session

Judgment No. 3015

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mr S.G. G. against the World Intellectual Property Organization (WIPO) on 23 April 2009 and corrected on 5 June and 9 July, the Organization's reply of 16 September, the complainant's rejoinder of 27 November 2009 and WIPO's surrejoinder of 16 February 2010;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Facts relevant to this case are to be found in Judgment 2697, delivered on 6 February 2008, concerning the complainant's sixth complaint. Suffice it to recall that he received a periodical report on 12 December 2005 in which he obtained an unsatisfactory rating for the quality and quantity of his work and for his conduct. In January 2006 he asked the Director General to set aside the report in question, to remove it from his file and to issue a new report "expressing satisfaction in all areas". By a letter of 26 June 2006 the complainant was notified of the Director General's decision to dismiss the appeal he had filed with the Appeal Board. In Judgment 2697 the Tribunal set

aside the aforementioned decision on the ground that it was tainted with a procedural flaw and sent the case back to the Organization for a decision to be taken in a manner that complied with the applicable rules.

Following the delivery of that judgment, on 14 May 2008 the Organization invited the complainant to file a new appeal with the Appeal Board against the report of 12 December 2005. After considering that second appeal, filed on 16 July 2008, the Board concluded in its report of 21 November 2008 that the complainant had not produced any evidence of the existence of a factual error or an abuse of authority, nor had he shown that the way in which the impugned report had been communicated to him was tainted with procedural flaws, and it recommended that the appeal be dismissed. By a letter of 19 January 2009 the Director of the Human Resources Management Department informed the complainant that the Director General had accepted the Board's recommendation. That is the impugned decision.

B. The complainant contends that the periodical report of December 2005 is unfounded and arbitrary. In his opinion, Staff Regulation 4.18 and Office Instruction 7/1982 have been flouted, because they stipulate that a periodical report must be signed by the staff member's superiors, whereas his report had been signed by only one superior. He maintains that, contrary to the Organization's practice, the report was drawn up without any prior discussion or correspondence and that he did not receive any explanation from the Organization for the negative assessment of his performance. He further asserts that in December 2005 he was unable to submit his comments on the report, as required by the above-mentioned Office Instruction, particularly because he was returning from sick leave. Moreover, the fact that a staff member who was engaged in a dispute with the Organization signed the Appeal Board report that gave rise to the impugned decision implies, in his view, that it is tainted with a procedural flaw.

He stresses that in his previous periodical reports his work had invariably been rated satisfactory without reservation, and submits that

the report of December 2005 demonstrates the obvious determination of certain senior officials to get rid of him. He asserts that he has suffered harassment since May 2005, when a private security firm complained about him. This harassment, which he describes in detail, allegedly continued without the Administration doing anything to stop it and led to the drawing up of an unfavourable periodical report. The complainant also outlines what he sees as the wider background to the dispute and alleges that his supervisor upset the efficient running of the section for which he was responsible with her “pettifoggery” and constant interference. He maintains that the continuous harassment that he suffered had a devastating impact on his health.

The complainant asks the Tribunal to set aside the Director General’s decision of 19 January 2009 and to send the case back to the latter so that he may order the cancellation of the periodical report of 12 December 2005, its removal from his file and its replacement with a “satisfactory” report. He also claims 150,000 Swiss francs as compensation for moral injury and 40,000 francs for costs.

C. In its reply the Organization states that the periodical report of 12 December 2005 is not tainted with any formal flaw, since it was signed in accordance with Office Instruction 7/1982 by the complainant’s supervisor whose superior, being the Director General, was not required to append his signature. It emphasises that the Tribunal’s case law clearly establishes that periodical reports are drawn up at the discretion of an organisation, and contends that the complainant has failed to prove that his report was tainted with a flaw warranting its cancellation. It further notes that the Tribunal, in Judgment 2830 concerning the complainant’s tenth complaint, corroborated the assessments contained in the report in question.

According to WIPO, the complainant’s argument that he was not warned of the forthcoming negative assessment of his performance is incorrect. It points out that the complainant ignored the warnings issued to him by memorandum and e-mail in 2005, whereby he was requested to comply, on the one hand, with the instructions of his supervisor and, on the other, with the procedures in force in the Organization. The defendant alleges that the complainant’s conduct,

which never improved despite repeated warnings, breached the Standards of Conduct for the International Civil Service. Furthermore, it disputes the complainant's assertion that he had never received a negative assessment prior to the report of December 2005. In the final periodical report for 2003, his then direct supervisor criticised the quality of his work in the same terms as the report of December 2005. The Organization points out that the receipt of a series of positive periodical reports does not imply that a staff member is entitled to receive such reports indefinitely.

The defendant asserts that, contrary to the complainant's submissions, his supervisor did try to have an exchange of views with him, as is evidenced by a number of e-mails and a memorandum, all dated 14 December 2005. It notes that the complainant made no effort subsequently to seize the opportunity to discuss the report with his supervisor.

The Organization states that it will only comment briefly on the allegations of harassment, since they are the subject of another complaint before the Tribunal. It maintains that their sole aim is to divert the Tribunal's attention from the fact that the complainant's working relations with most of his colleagues were acrimonious.

D. In his rejoinder the complainant maintains that the procedure was flawed by a conflict of interests because a staff member engaged in a dispute with the Organization signed the Appeal Board's report. He alleges that the defendant tried to mislead the Tribunal by introducing a deliberately truncated reference to Judgment 2830. He takes the Organization to task for seeking to reverse the burden of proof with respect to allegations of harassment by holding him responsible for the difficult relations he had with his colleagues.

E. In its surrejoinder the Organization affirms that there is no link between the action brought against it by a member of the Appeal Board and the present case. It disputes the existence of any conflict of interests. Furthermore, the Organization points out that the burden of proving harassment lies with the person alleging it.

CONSIDERATIONS

1. By Judgment 2697 the Tribunal set aside a decision dismissing an internal appeal filed by the complainant against the periodical report that his supervisor had drawn up concerning him on 12 December 2005 and in which she rated his conduct and the quality and quantity of his work as unsatisfactory. The case was sent back to WIPO for it to take a new decision meeting the requirements of due process, as he had been unable to give his version of events or to produce supporting evidence.

On the basis of that judgment, the Organization authorised the complainant to file a new appeal against the disputed periodical report, which he did, criticising the report on procedural and substantive grounds. On 21 November 2008 the Appeal Board concluded that the complainant had not proved that a factual error or abuse of authority had occurred or that the communication of the periodical report to him had been tainted with procedural flaws. It recommended that the new internal appeal be dismissed. The Director General accepted this recommendation and dismissed the appeal by a decision of 19 January 2009, which is the subject of the complaint before the Tribunal.

2. As far as procedure is concerned, the complainant first draws attention to an irregularity in the composition of the Appeal Board, one of whose members was a staff member who, being engaged in a dispute with the Organization, allegedly had a conflict of interests which deprived him of the independence required to adopt a position on the appeal. He then criticises the Board for not having ruled “at all” on his two main pleas, namely that the impugned report failed to comply with the rules of procedure laid down in Office Instruction 7/1982, since it had not been the subject of a prior exchange of views with his supervisor and had been signed only by the latter.

(a) The question as to whether the plea concerning the conflict of interests was actually raised or could or should have been raised before the Appeal Board may remain undecided, as it is in fact devoid of merit. The dispute between the Board member

concerned and the defendant was pending before this Tribunal when the Board considered the complainant's appeal and was the subject of Judgment 2803 delivered on 4 February 2009; there was no discernible relationship between that dispute and the issue on which the Appeal Board was required to make a recommendation in the present case. Moreover, the complainant presents no argument establishing at least a plausible ground for disqualification based on the existence of the dispute.

(b) Contrary to the complainant's claim, the Appeal Board, in paragraphs 30 to 34 of its report of 21 November 2008, dealt clearly with the two main pleas that he raised. The grounds stated therein, albeit summarily, are sufficient to explain why the advisory body and subsequently the Director General did not accept the complainant's criticism, which he was given every opportunity to develop during the second appeal proceedings conducted pursuant to Judgment 2697.

3. Before considering the other pleas raised against the periodical report of 12 December 2005, it should be determined whether there is any merit in the complainant's other procedural criticisms concerning the manner in which the report was drawn up and communicated to him.

(a) The first of these criticisms is based on subparagraph 2(ii) of Office Instruction 7/1982 applicable to periodical reports, which reads as follows:

“the report should create an occasion for an exchange of views between the staff member and his or her superiors for improving – where improvement is necessary to make it fully satisfactory – his or her performance and/or conduct in the future.”

Although this exchange of views did not take place, the defendant explains convincingly and with supporting evidence the circumstances that precluded compliance with this procedure due to the complainant's conduct. In his rejoinder the latter presents no concrete evidence capable of demonstrating the inaccuracy of these explanations.

This plea must therefore be rejected.

(b) The second of these criticisms is based on paragraph 7 of the aforementioned Office Instruction, which reads as follows:

“The report shall be signed by each of the hierarchical supervisors of the staff member, except the Director General, provided that the Director General shall establish and sign the reports of staff members – other than the Deputy Directors General – who are under his direct supervision.”

It has been ascertained that the impugned report was signed only by the complainant’s direct supervisor, who was his only supervisor apart from the Director General, to whom she was an immediate subordinate. This situation is certainly regrettable, since it precludes an exchange of views on the performance of a staff member undergoing assessment in a periodical report. However, it is a rule clearly laid down in the provision cited above, since it is applicable to staff members of the rank held at the time by the complainant, and the Director General is required, if necessary, to review the assessment of such officials only in the context of the internal appeal that they are entitled to file against periodical reports concerning them.

It follows that this procedural plea must also be rejected.

4. It is now necessary to consider the substantive pleas against the periodical report of 12 December 2005.

5. According to the report, the quality and quantity of the complainant’s work were unsatisfactory, and his knowledge and experience in security issues did not meet the requirements for the head of a service in the current environment. Under the heading “Conduct” it was stated, on the one hand, that the complainant responded poorly to advice and did not follow instructions and, on the other, that his working relations with colleagues and external parties could be strained or even difficult.

According to its case law, the Tribunal will not replace an organisation’s assessment of a staff member’s merits with its own, unless the disputed assessment is tainted with a manifest error. International organisations must, however, have conducted the assessments in full knowledge of the facts, and the factual considerations on which they are based must be accurate and properly

established. The Tribunal must be even more vigilant when the contested assessment may lead to the termination of the appointment of a staff member holding a contract of indeterminate duration, which should secure him, in principle, against any risk of job loss or insecurity. This also applies when the staff member's services were regularly assessed in the past as satisfactory (see Judgment 2468, under 16).

6. The disputed periodical report was drawn up at the end of the year in which the complainant was promoted from grade G7 to grade P-3 as a result of his appointment to the post of Head of the Security Coordination Section in 2002. The report was doubtless one of the factors that led to the decision to transfer him to another division and then to terminate his appointment in the absence of available posts corresponding to his former duties. Furthermore, it has been established that the previous assessments of the complainant's performance were, on the whole, satisfactory. While these circumstances warrant greater vigilance on the part of the Tribunal, it has to be acknowledged that the disputed assessment is not tainted with any manifest error and is not based on inaccurate facts.

As stated by the Tribunal in its Judgment 2830 concerning the complainant's tenth complaint, the complainant lacked appropriate training for the continued exercise of his supervisory duties in the Organization's new security system and his transfer to another service was justified. The facts set forth in the periodical report are closely related to this finding that the complainant was ill-equipped to assume new responsibilities in a context of modernisation. These facts were duly established by the Organization on the basis of the information gathered, and the complainant was eventually given the opportunity to comment thereon at length during the internal appeal proceedings. In

particular, it has not been shown that a causal link existed between the harassment that the complainant claims to have suffered – and in the context of which Judgment 2882 was rendered – and the inadequacy of his performance in 2005, or that the alleged harassment prompted his supervisor to adopt a biased position in the disputed report.

In these circumstances, the substantive pleas against the periodical report of 12 December 2005 must be rejected.

7. The complaint must therefore be dismissed.

DECISION

For the above reasons,
The complaint is 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