

NINETY-FIFTH SESSION

Judgment No. 2254

The Administrative Tribunal,

Considering the complaint filed by Mr F. S. against the World Trade Organization (WTO) on 30 August 2002 and corrected on 9 October 2002, the Organization's reply of 13 January 2003, the complainant's rejoinder of 20 February and the WTO's surrejoinder of 17 April 2003;

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

Having examined the written submissions;

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

A. The complainant, a British national born in 1940, was recruited by the Organization in 1969. By the time he retired, at the end of July 2002, he had reached grade D.1, having held the position of Chief of the Finance and Accounts Section in the Administration and General Services Division for 17 years.

Ms K., who joined the WTO in June 1998, was transferred the following autumn to the section headed by the complainant. She was given several fixed-term contracts. On 15 November 2001 the complainant requested an extension of her contract until 28 June 2002. The contract was eventually extended only to 28 February 2002. In a memorandum dated 24 January, the complainant informed Ms K. that he had decided not to extend her contract beyond its expiry date, on the grounds that her performance was unsatisfactory. On 22 February Ms K. filed a formal complaint against him, giving details in a memorandum dated 27 February, in which she said that she had been psychologically and sexually harassed by the complainant and accused him of abuse of authority. On 1 March 2002 the Chief of the Human Resources Section wrote to the complainant informing him that a complaint had been filed against him and that a person had been appointed to investigate the matter.

Ms K.-L. worked for the Finance and Accounts Section from 1993 to 1 March 2001. On 3 March 2002 she wrote a memorandum to the Director-General, accusing the complainant of abuse of authority and saying that he had forced her to request a transfer. By a memorandum of 8 March the Chief of the Human Resources Section informed the complainant that the investigator had been instructed to report on those allegations too.

On 3 May the Director-General sent the complainant the two reports drafted by the investigator. The latter had concluded that he had acted in breach of the Standards of Conduct of the WTO, which justified the imposition of disciplinary measures. In accordance with Staff Rule 113.2(a), the Director-General proposed entering a formal written censure in the complainant's official record of service and suspending him without pay for one month, from 27 June to 27 July 2002, the date of his retirement. He also enquired whether the complainant wanted him to seek the advice of a joint advisory body as provided for in Staff Regulation 11.3, an offer which the complainant turned down on 7 May. On 28 May the complainant sent comments to the Director-General in a memorandum, in which he said that he considered that the two reports had been drafted in violation of the basic rules of due process. By a letter of 7 June 2002, which constitutes the impugned decision, the Director-General informed him that he noted his comments but confirmed his intention to impose the proposed disciplinary measures.

B. Citing the Tribunal's case law, the complainant contends that his right to due process was breached, since he was not allowed either adversarial proceedings or a hearing. In support of his allegations, he says that the investigator, who was "chosen" by Ms K. without his being consulted, had questioned him when he was still unaware of the

accusations against him, and that he was not invited either to submit evidence or to attend the hearing of witnesses. The complainant furthermore considers that the investigator lacked the necessary legal qualifications to conduct an impartial inquiry and arrived at mistaken conclusions.

He considers that the impugned decision is not reasoned, since it refers only to the investigation reports, which are themselves not sufficiently reasoned. In his view, the complaints were "devoid of substance in fact". Yet the investigator concluded that he had been guilty of sexual harassment against Ms K. and that, as she had rejected him, he had abused his authority in deciding to terminate her appointment. He flatly denies Ms K.'s allegations and points out that it was only in February 2002 that she complained for the first time of the advances he had supposedly been making since the end of 1998. In fact, it was the director of his division and the Chief of the Human Resources Section who decided not to extend her contract because her performance was unsatisfactory. The complainant submits that, since Ms K. had withheld from the investigator the voluntary nature of the relationship she had maintained with him from the end of 1998 until the autumn of 2000, the Director-General's decision overlooked an essential fact.

The complainant explains that Ms K.-L. for her part accused him of having gradually withdrawn her responsibilities from 1999 onwards owing to the fact that she had complained of the lack of qualifications of certain colleagues. He denies having driven her to request a transfer. Ms K.-L. had an "awkward character" and did not get on well with her subordinates. He considered that it was his duty as head of section to intervene.

The complainant requests the quashing of the impugned decision. He asserts that his reputation was sullied and that he had to depart from the Organization "almost clandestinely". His health and his private life suffered as a result. He therefore claims 150,000 Swiss francs in compensation for moral injury. According to him, he had been assured by the director of his division that he would continue to be employed until July 2003, one year after the age of retirement. As that promise was not kept, he claims the payment of 12 months' lost salary, as well as payment of the month's salary withheld as a disciplinary measure and compensation for lost leave, an amount totalling 203,277.70 francs according to his calculations. Lastly, he claims 20,000 francs in costs.

C. In its reply the WTO begins by arguing that the complainant had no acquired right to an extension of his contract beyond 26 July 2002, any such extension lying within the discretionary authority of the Director-General.

The Organization points out that the purpose of giving reasons for a disciplinary measure is to allow the staff member concerned and the Tribunal to verify the facts on the basis of which the decision was taken and to assess the proportionality of the sanction. It considers that this purpose was in the event fulfilled. The conclusions reached by the investigator are supported by the facts. Contrary to the complainant's allegations, the investigator did take account of the evidence given of the voluntary nature of the relationship maintained by Ms K. with the complainant. The report on her accusations shows that it is the attitude of the complainant over a particular period which constitutes the sexual harassment and abuse of authority for which he was sanctioned. The WTO accepts that the complainant was not pressing for the non-extension of Ms K.'s contract, but emphasises that she was "completely dependent" on him for the renewal of her contract.

According to the Organization, the fact that Ms. K.-L. herself asked to be transferred did not *per se* invalidate her accusations of abuse of authority. On the basis of the information that she had gathered and which the complainant does not deny, the investigator found that he had shown favouritism and an unprofessional attitude to assessing staff in his section and had been guilty of psychological harassment by removing Ms K.-L. from some of her responsibilities and blaming her entirely for the section's problems.

The WTO contends that the relevant provisions of the Staff Regulations and Rules and the complainant's rights were fully complied with. It recognises that he was not consulted regarding the choice of an investigator but, as he had been rapidly informed of her appointment, he could immediately have objected. The person concerned was "the most qualified and the most experienced" and she had demonstrated her objectivity in previous investigations. The experience she had acquired more than offset the fact that she was not a trained lawyer. The investigation had been conducted objectively according to a procedure recognised and applied by other international organisations.

Lastly, the WTO considers that the complaint is abusive. In its opinion, the issue to be resolved is that of whether, by waiving his right to the inquiry procedure provided for under Rule 113.2, the complainant abused his right under Rule 114.3(b) to appeal directly to the Tribunal against the disciplinary measure.

D. In his rejoinder the complainant submits that the "attacks on his personality" voiced by the WTO in its reply caused him further injury. He increases his claims accordingly to 300,000 francs for moral injury and 40,000 francs for costs.

He reiterates that he had received assurances that his contract would be extended. He points out, furthermore, that it is not up to him to prove his innocence. On the contrary, it was for the Organization to prove his guilt, which it had been unable to do. He accuses the WTO of partiality and bad faith, because it never warned him that waiving his right to bring his case before a joint advisory body could affect the receivability of a subsequent complaint before the Tribunal. By acknowledging that he was not responsible for the non-renewal of Ms K.'s contract, the WTO admitted that the main accusation against him was in fact unfounded. It is to justify the disciplinary measures retroactively that it has brought further charges. If the disputed sanctions were decided on the ground that he failed in his duty to the Organization by continuing to employ persons whose performance was unsatisfactory, the Director-General should have said so when proposing the sanctions.

E. In its surrejoinder WTO argues that the content of its reply is in no way offensive to the complainant. It considers merely that it has succeeded in demonstrating that he behaved irresponsibly. It is clear from his rejoinder that he has not understood the concepts of harassment and abuse of authority.

CONSIDERATIONS

1. In March 2002 the complainant was informed that two of his colleagues, Ms K.-L. and Ms K., had filed formal complaints against him for abuse of authority. The latter also accused him of sexual harassment. An investigator was appointed.

In a memorandum of 3 May 2002, the Director-General of the WTO sent the complainant the two reports produced by the investigator, which indicated that he had violated the Standards of Conduct of the WTO, and proposed suspending him without pay for one month and entering a written censure in his personal file. Pursuant to Staff Rule 113.2(b) the complainant was invited to state whether he wished a joint advisory body to give an opinion on the proposed disciplinary measures.

Having requested clarification of the applicable procedure, the complainant was informed, in a memorandum of 6 May, that in the event that he waived referral to the joint advisory body, he would have the opportunity to submit written comments concerning those measures, and that he retained the right to appeal against the decision finally taken by the Director-General directly to the Tribunal.

Having waived his right of referral to the joint advisory body, on 28 May 2002 the complainant sent in written comments in response to the sanctions and opposed the confirmation of the proposed disciplinary measures.

By a letter of 7 June 2002, which constitutes the impugned decision, the Director-General confirmed the measures in full, solely on the basis of the conclusions contained in the investigator's reports.

2. The complainant asks the Tribunal to set aside that decision. He also claims payment of the sum of 203,277.70 Swiss francs, representing 13 months' salary and lost leave, 150,000 francs for moral injury, increased to 300,000 francs in his rejoinder, and costs.

3. He alleges violation of "the basic legal principles of due process". In this respect, the complainant contends that the investigator who drafted the reports on which the Director-General, disregarding the complainant's objections, based the disputed sanctions, was "chosen" by Ms K., and that he had no say in her appointment.

The complainant adds that when he was interviewed by the investigator he was unaware of the accusations made against him and was therefore unable to reply to them in full knowledge of the facts. Moreover, he was denied the right to attend the hearing of witnesses and was not asked by the investigator to produce evidence, which in his view constitutes a violation of the right to adversarial proceedings.

4. In its reply the defendant acknowledges that Ms K. was consulted over the choice of investigator and that the complainant was merely informed of the latter's appointment.

It justifies the fact that the complainant was not invited to attend the hearing of witnesses on grounds of confidentiality, its objective being to preserve the reputations of all the parties involved, including that of the complainant, in case the complaints turned out to be unfounded. It considers that this approach is appropriate where the person under investigation is in a position, as the complainant was in this case, to exert pressure or take reprisals, especially against witnesses.

The WTO asserts that the parties were placed on an equal footing, that the names of witnesses did not appear on the version of the report they were given and that no one prevented the complainant from producing evidence; on the contrary, the investigator offered to meet him again if he had further information to submit.

5. It is established from the file that before appointing the person responsible for the investigation, the Organization asked Ms K. to put forward a name and that it agreed to the choice she made without informing or even consulting the complainant. It is also established that the witnesses gave evidence without the complainant being present and that the latter was heard without having full knowledge of the accusations made against him.

6. (a) According to firm precedent, before deciding a disciplinary sanction, an organisation should inform the person concerned that disciplinary proceedings have been initiated and should allow him ample opportunity to take part in adversarial proceedings, in the course of which he is given the opportunity to express his point of view, put forward evidence and participate in the processing of the evidence submitted in support of the charges against him.

(b) The Organization argues, in this case, that it complied with all the relevant general principles of law. Moreover it considers that the rights of the complainant in that respect were safeguarded and that it was his decision to waive them.

According to Rule 113.2(a) and Regulation 11.4, the Director-General notifies the staff member in writing of the proposal to apply a disciplinary measure and of the grounds for such action. Under Regulation 11.3, he shall seek advice of a joint advisory body. According to Rule 113.2(b), however, the staff member may waive referral to that body.

In the Organization's view, this is what the complainant decided to do and he must accept the consequences. That is why the Director-General based his decision on the report drawn up by the investigator in the course of the preliminary procedure, which he could assume to be reliable.

(c) The complainant objects to the way in which the procedure was conducted and the conclusions drawn from it by the Organization. He points out, in substance, that his attention was never drawn to the potential effects of waiving referral to a joint advisory body; on the contrary, he was expressly told, in the memorandum of 6 May 2002, that he could waive his right to referral and appeal directly to the Tribunal against a disciplinary sanction.

The Tribunal notes that the complainant was not in fact given sufficient information regarding an important procedural matter.

Moreover, the Director-General, by virtue of his duty to assist a staff member faced with a procedural problem (see Judgment 2017 and the cases cited therein), should have realised that the staff member was on the wrong track and, in the light of the latter's objections, should have taken the initiative of pointing out that an adversarial hearing before the joint advisory body was appropriate in the circumstances.

(d) Considering the comments the complainant made in his memorandum of 28 May 2002, the Director-General could not reasonably infer that the complainant's response was based on informed consent, implying a valid waiver of adversarial proceedings. That being so, he could not, without replying in detail to the complainant's comments, merely refer to the preliminary investigation report, which, as such, manifestly did not meet the requirements of adversarial proceedings.

Failing a valid waiver on the part of the complainant of the adversarial proceedings provided for in the Staff Rules, the Director-General incorrectly based his decision on information that was not gathered in the context of adversarial proceedings guaranteeing the complainant's right to be heard.

Since the complainant was not given the opportunity to put forward a proper defence, this fundamental flaw must cause the impugned decision to be set aside.

This being so, there is no need to consider further whether the Organization's disciplinary procedure (if properly applied) meets the requirements of the case law concerning disciplinary sanctions, particularly with regard to a preliminary investigation report and whether, or even to what extent, such a report may be taken into account when a disciplinary decision is taken.

The impugned decision must therefore be set aside, so that there is no need to rule on the substantive pleas of the complainant.

7. The complainant claims *inter alia* payment of one month's salary, of which he was deprived as a disciplinary measure, amounting to 13,988 francs.

The Tribunal considers that this claim is justified in the circumstances, in view of the setting aside of the decision.

8. The complainant explains that the director of his division had assured him that he would continue to be employed after his 62nd birthday until July 2003, in other words, one year after his retirement age. As this promise was not kept, in his view because of the complaints filed against him, he claims the payment of the corresponding 12 months' salary.

As the Organization stated in its reply that it had never seriously considered the possibility of employing the complainant beyond the retirement age, the Tribunal cannot accept the complainant's claim, noting that he has not submitted any semblance of written evidence to support his allegations. It considers that there is no reason in the circumstances to hear the proposed witnesses.

9. The Tribunal considers that the sanctions imposed on the complainant in the above-mentioned circumstances caused him moral injury, which shall be remedied by an award of 15,000 francs.

The complainant is also entitled to 5,000 francs for costs.

DECISION

For the above reasons,

1. The decision of the Director-General of the WTO of 7 June 2002 is set aside.
2. The Organization shall pay the complainant 13,988 Swiss francs for the month's salary of which he was deprived.
3. It shall also pay the complainant 15,000 francs in compensation for moral injury.
4. It shall pay him 5,000 francs in costs.
5. All the complainant's other claims are dismissed.

In witness of this judgment, adopted on 21 May 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

