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

101st Session **Judgment No. 2555**

The Administrative Tribunal,

Considering the second complaint filed by Mr D.A.D. against the World Intellectual Property Organization (WIPO) on 3 January 2005 and corrected on 2 May, the Organization's reply of 3 August, the complainant's rejoinder of 8 November 2005 and WIPO's surrejoinder of 6 February 2006;

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

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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 2288, delivered on 4 February 2004, concerning the complainant's first complaint. It may be recalled that by a decision of 21 August 2002 the complainant was dismissed for serious misconduct. He was accused, in particular, of having altered the configuration of his computer for purposes unrelated to WIPO's activities, thereby compromising the integrity and security of the Organization's information technology systems, and of having circulated pornographic materials to other staff members against their will. In Judgment 2288 the Tribunal set aside the decision of 21 August on the grounds that it was procedurally flawed. It sent the case back to the Organization for a new decision and awarded the complainant compensation equivalent to the total of salary, allowances and other benefits forfeited between the date of his dismissal and the date of the new decision, subject to the deduction of any sums received by him from the Organization or in occupational earnings from other sources during that period. The Tribunal also awarded him 2,000 Swiss francs in costs, but it dismissed his other claims – in particular his claim for reinstatement – and likewise the Organization's counterclaim for a nominal award of costs. It is not disputed that the sums awarded to the complainant under Judgment 2288 have been paid to him.

Following the delivery of that judgment, the Organization immediately resumed the disciplinary proceedings against the complainant on the basis of the same charges and evidence. By a letter of 12 February 2004 the Director of the Human Resources Management Department (HRMD) warned him that he might face disciplinary action – including dismissal – for serious misconduct, informed him that the Director General intended to consult the Joint Advisory Committee and invited him to respond in writing to the charges against him by 23 February.

The complainant's counsel replied, by a letter of 23 February, that his client denied the charges and called upon WIPO to prove them beyond a reasonable doubt. He renewed the requests made during the procedure which culminated in Judgment 2288 for disclosure of a large number of "fundamental documents" and for access to the complainant's computer, and he demanded that his client be given the opportunity to present his case in person before the Joint Advisory Committee, with the assistance of his counsel.

At an initial meeting held on 24 February 2004, the Joint Advisory Committee decided to allow the complainant until 8 March to submit additional information in writing. The complainant was informed of this decision by the Director of HRMD in a letter of 25 February, to which his counsel replied, on 8 March, that since the Organization had not granted the requests made in his previous letter, which he reiterated, he had nothing to add to his earlier comments.

The Joint Advisory Committee met again on 11 March. It decided not to hear the complainant in person, because it considered that he had been given a full opportunity to present his defence and that it had sufficient information to proceed. Its members also felt that, the Joint Advisory Committee being an internal consultative body with neither the functions nor the competence of the Appeal Board or the Tribunal, it would be inappropriate for the complainant's counsel to appear before it. In its report dated 16 March 2004, the Committee unanimously concluded that the complainant had committed acts of serious misconduct contravening Staff Regulation 1.5, which

provides that “[s]taff members shall conduct themselves at all times in a manner befitting their status as international civil servants”, and that those acts had posed a serious threat to the integrity of WIPO’s information systems. Its recommendation to the Director General was that the complainant should be dismissed.

By a letter of 16 March 2004 the Director of HRMD informed the complainant that, “[o]n the basis of the evidence and the recommendations of the Task Force established to investigate serious misconduct on [his] part and having consulted again with the Joint Advisory Committee”, the Director General had decided to dismiss him in accordance with Staff Rule 10.1.1(a)(7) with immediate effect. On 26 April 2004 the complainant’s counsel submitted a request for review of that decision, demanding the complainant’s reinstatement and repeating his requests for the disclosure of documents and for access to the complainant’s computer. He also demanded that an investigation be conducted into the complainant’s allegations of misconduct against the Director General and others, whilst insisting that the Director General “recuse [him]self from [his] role in the disciplinary process”. He then lodged an appeal with the Appeal Board, received on 27 July, contending that WIPO had failed to execute Judgment 2288 because it had not taken a new decision in accordance with the rules of due process. In a report dated 3 September 2004 the Board unanimously recommended that the appeal be dismissed in its entirety. It agreed with the Tribunal’s finding, in Judgment 2288, that the evidence against the complainant was “weighty”, and considered that in dismissing him the Director General had exercised his prerogative in accordance with the Staff Regulations and Rules. The Board rejected the complainant’s request for an oral hearing, noting that although he and his counsel had been given the opportunity to appear before the Board in the context of the proceedings leading to Judgment 2288, they had not used that opportunity to clarify any new points.

On 22 October 2004 the Director of HRMD wrote to inform the complainant that the Director General had decided to accept the recommendation of the Appeal Board. That is the impugned decision.

B. The complainant, who indicates by way of an introduction to his second complaint, that it “arises from and raises most of the very same issues” as his first complaint, puts forward ten pleas. The first is that the Director General failed to execute Judgment 2288 because he merely endorsed the earlier decision to dismiss him “without consulting with the Joint Advisory Committee in accordance with the rules of procedure”. He refers, in particular, to the fact that the letter of 16 March 2004 by which the Director of HRMD informed him that the Director General had again decided to dismiss him contained no evidence – in the form of minutes of the Joint Advisory Committee’s meeting or a copy of its report – of consultation of the Committee in accordance with Staff Rule 10.1.1(c). Nor was he provided with a copy of the “evidence and recommendations” of the Task Force to which the letter referred. Moreover, “because the Director General repeatedly failed to supply him with so much as a shred of evidence against him”, he was denied a reasonable opportunity to rebut the charges, in violation of his due process rights.

His second plea is that the second decision to dismiss him is tainted with the same flaws as the first. It appears once again to be based solely on the findings of the Task Force. Moreover, he was not allowed to appear before the Joint Advisory Committee.

Thirdly, the complainant contends that his defence rights were breached as a result of the Organization’s refusal to allow him access to his computer and to official files, its failure to allow him adequate time to respond to the charges against him, and the decision of the Appeal Board to allow the Organization to call a witness, despite his counsel’s objections, during the first proceedings before the Board.

Fourthly, he submits that the punishment imposed on him was disproportionate to the alleged misconduct, particularly because it was based on unsubstantiated allegations. He produces an opinion written by “an expert in computer systems and security”, who concluded that the evidence relied on by WIPO was unreliable and insufficient. He also produces a series of performance evaluation reports which, according to him, establish the extenuating circumstance that he had a “proven positive track record”.

His fifth plea is that WIPO has failed to prove his culpability beyond a reasonable doubt. He contends that his denial of the alleged misconduct “shifts the burden of proof to the Organization”, and that the latter has not shown exactly how his actions compromised the integrity of its information systems. He points out that there were numerous opportunities for third parties to tamper with his computer.

His sixth plea is that the impugned decision is based on mistakes of fact and erroneous conclusions. He refers again to the expert’s report and reiterates that the Organization has not shown how the modifications made to his

computer were capable of causing such harm as to warrant his dismissal. He asserts that the supposedly offensive images found on his computer were received as unsolicited e-mail or "spam", and that WIPO would find similar images on the computers of most, if not all staff members, if it cared to look.

As a seventh plea, the complainant contends that the decision to dismiss him was "tainted by harassment, personal prejudice, malice, ill-will, bias, and discrimination" by the Director General, stemming from his involvement in a relationship with a staff member who apparently also had personal ties with the Director General. He points out that the Organization has been unable to refute his allegations in this regard.

His eighth plea is that the said decision violates the principle of equal treatment, insofar as another staff member, who sent him e-mails containing "far more offensive" materials than those he is accused of having viewed and distributed, was not punished for his actions.

His ninth plea is that since his conduct was neither expressly nor impliedly prohibited by WIPO, the decision to dismiss him cannot stand. He asserts that there is no provision in either the Staff Regulations and Rules or the WIPO Information Security Policy barring the use of the websites which the Organization describes as pornographic.

His tenth plea is that the Director General committed an abuse of power and a "*détournement de procédure*" by refusing to initiate a disciplinary investigation into his own alleged misconduct and that of other WIPO officials. He accuses the Director General of acting for improper purposes, based on the "feelings of hostility and jealousy" that the latter harboured against him.

The complainant requests oral hearings to enable him to question numerous witnesses, and he asks the Tribunal to order WIPO to produce a large number of documents. He seeks the following relief: the quashing of the decision to dismiss him and his immediate reinstatement with retroactive effect from 16 March 2004; a disciplinary investigation into his allegations against the Director General and other staff members, the Director General being instructed to "recuse himself from participation" therein; an unconditional written apology from the Director General or, alternatively, promotion to grade P.5 with retroactive effect from 21 August 2002; the removal from all WIPO records of all documents connected with the two successive decisions to dismiss him; an order that the Director General issue a letter to the Swiss authorities retracting all allegations made against him; a declaration that he was released from his duty of confidentiality under Regulation 1.7 as a result of his wrongful dismissal; 50,000 United States dollars in legal costs; at least 2 million dollars in "compensation for the grave moral injury and heinous mental and physical distress" caused to him and his wife; and "such other relief as the Tribunal deems necessary, just, and equitable".

C. In its reply WIPO submits, with regard to the receivability of the complaint, that most of the issues raised by the complainant are *res judicata*, having already been disposed of by the Tribunal in Judgment 2288 in the following terms:

"All claims other than those concerning the decision to dismiss the complainant and his request for reinstatement are obviously irreceivable and must be dismissed [...]"

In view of that finding, it confines its submissions to claims concerning the decision to dismiss the complainant. Referring again to Judgment 2288, it adds that the complainant cannot obtain reinstatement, because that remedy has already been excluded by the Tribunal as being "particularly inappropriate".

WIPO considers that the new decision to dismiss the complainant strictly complies with the requirements of due process and with the ruling in Judgment 2288. It points out that the letter of 12 February 2004, by which it informed him that the disciplinary proceedings were being resumed, carefully and fully outlined the nature of the charges against him, even though as a result of the previous proceedings he had already been aware of the charges for almost 18 months. He then had more than three weeks to respond to the charges. Copies of the Task Force's report of 15 August 2002 and of the statements of the Head of the Information Technology (IT) Services Division had been in his possession for at least 11 months, having been produced during the proceedings leading to Judgment 2288, and both he and his counsel had been present when the Head of the IT Services Division had given his presentation before the Appeal Board in November 2002. The composition and proceedings of the Joint Advisory Committee likewise complied with the applicable rules. In particular, the procedural irregularity identified in Judgment 2288 regarding the consultation of the Committee was corrected. The Director General's

decision to confirm his earlier decision to dismiss the complainant was based on the Committee's unanimous recommendation. WIPO emphasises that the complainant's breach of his obligations towards the Organization lay in the fact that he created a significant and unacceptable risk for its information technology security systems, and that the issue of whether or not that risk materialised is irrelevant.

With regard to the denial of the complainant's requests to be heard by the Joint Advisory Committee and the Appeal Board, the Organization argues that to allow complainants in every case the opportunity to call witnesses and cross-examine them in person, and physically to examine evidence at the investigation stage, would render its internal appeal system unnecessarily convoluted, lengthy and costly. Indeed, there is no provision for such measures in the rules governing the Joint Advisory Committee and the Appeal Board, respectively. Referring to Judgment 2397, it submits that the Organization's obligation to ensure that a staff member facing disciplinary action is made aware of the charges and given a reasonable opportunity to respond is met by giving the staff member the opportunity to make written submissions to the Joint Advisory Committee, the Appeal Board and ultimately the Tribunal, *a fortiori* in a case such as this, where the complainant, by his own admission, is raising the same issues before the Tribunal a second time.

The Organization draws attention to its obligation, notably under Articles 30 and 38 of the Patent Cooperation Treaty (PCT), to safeguard the confidentiality of the information it receives from "users of the PCT". It acknowledges that the presence of offensive materials on a computer can be due to unsolicited e-mail or to accidental visiting of a website resulting from a mistyped internet address, but points out that the creation of "bookmarks" such as were found on the complainant's computer, enabling the user to store and retrieve such materials, necessarily implies deliberate action by the user. It maintains that analysis of the hard disk of the complainant's computer showed that the computer was used primarily for purposes unrelated to WIPO's activities. Referring in particular to Staff Regulation 1.5 and Staff Rule 1.7.1, and to Paragraph 4.4 of the WIPO Information Security Policy, it states that its statutory provisions could not be clearer with respect to such conduct. All staff members were informed that any breach of the said Policy would be met with disciplinary sanctions.

In response to the complainant's allegation of breach of the principle of equal treatment, WIPO refers to the case law and observes that this principle "cannot be invoked to protect otherwise illegal behavior". Regarding the proportionality of the sanction imposed on him, it emphasises that the complainant's conduct "jeopardized or [was] likely to jeopardize the reputation of the Organization and its staff, breached the integrity and security of the WIPO information technology systems and threatened the Organization's obligations to respect the confidentiality of highly sensitive and valuable information deposited with WIPO under various treaties". Consequently, in imposing the sanction of dismissal, the Director General neither drew any mistaken conclusions from the evidence nor went beyond the bounds of his discretion.

The Organization asserts that the facts of the case belie the complainant's allegations of prejudice and abuse of power. It draws attention to several letters from the complainant to the Director General expressing praise and gratitude towards the latter, and to the fact that the Director General had renewed the complainant's contract for a period of five years in April 2002. It also recalls that, following the initial decision to dismiss him, the complainant engaged in further acts of misconduct, some of which were reported to the Swiss authorities. It argues that these incidents confirm the need to dismiss him in the first instance.

D. In his rejoinder the complainant states that, as a result of the fact that the Director General "completely disregarded the Tribunal's ruling", he has once again suffered injury. Consequently, the claims which the Organization describes as *res judicata*, though not new, are "worthy of review", being "directly related to his improper dismissal" and commensurate with the injury suffered. Likewise, his claim for reinstatement, though rejected by the Tribunal in Judgment 2288, remains valid insofar as it is brought in respect of a further denial of his due process rights which occurred after the delivery of that judgment.

Repeating his allegation of a denial of due process, he asserts that the Joint Advisory Committee merely reviewed the same "faulty, unsubstantiated evidence" whilst denying him the opportunity to be heard, and that the evidence against him is insufficient to warrant dismissal. He cites Judgment 2475 as authority for the view that he ought to have been permitted to examine all of the evidence on which the charges against him were based.

E. In its surrejoinder WIPO maintains its position. It submits that the complainant commits an abuse of process by raising issues on which the Tribunal has already ruled. Regarding the alleged insufficiency of the evidence against him, it draws attention to the fact that in Judgment 2288 the Tribunal found that the Task Force's report was

“detailed” and the evidence as a whole “weighty”.

CONSIDERATIONS

1. In Judgment 2288, delivered on 4 February 2004, the Tribunal set aside a decision by the Director General of WIPO dismissing the complainant for serious misconduct on the grounds that it was tainted with procedural flaws. Having rejected as irreceivable the complainant’s claims to receive a written apology from the Director General, for a disciplinary investigation to be undertaken into the conduct of the Director General and other officials, for the removal from all WIPO records of any document concerning his dismissal and for the despatch of a letter to the Swiss authorities retracting all allegations or denunciations made against him, the Tribunal examined on the merits the claims for the quashing of the decision to dismiss him and for his reinstatement as a staff member of WIPO. Although it allowed the complainant’s claim to set aside the decision to dismiss him, on the grounds that the consultation of the Joint Advisory Committee, which was mandatory under Staff Rule 10.1.1(c), had not been properly conducted, it rejected his claim for reinstatement, in view of all the circumstances of the case. It ordered the defendant Organization to pay the complainant compensation equivalent to the total of salary, allowances and other benefits forfeited between the date of his dismissal and the date at which the Director General would take a new decision, less any sums received by him from the Organization or in occupational earnings from other sources during that period.

2. WIPO dealt with the financial consequences of that judgment by paying the complainant the sum of a little over 225,000 Swiss francs. As for the consequences of the quashing of the dismissal, it resumed the disciplinary procedure by sending the complainant on 12 February 2004 a document setting out the charges against him, together with a series of attachments concerning those charges. The Organization asked the complainant to submit his comments in writing by 23 February.

3. On 23 February 2004 the complainant’s counsel wrote to the Director of the Human Resources Management Department of WIPO asking for copies of numerous documents, which he identified only in general terms, and requesting that his client be allowed to present his case in person, assisted by himself, before the Joint Advisory Committee. The Committee met on 24 February and informed the complainant’s counsel that if his client needed to submit additional information, he had until 8 March 2004 to do so. In reply to that invitation the complainant’s counsel stated that the allegations of misconduct had no basis in fact, and that the complainant reiterated his request to receive documentation as well as his request for a hearing and for the cross-examination of his accusers.

4. The Joint Advisory Committee met again on 11 March 2004. It considered that it had sufficient information on the case and, recalling that the complainant and his counsel had had an opportunity to appear in person before the Appeal Board in November 2002, decided that there was no need for them to appear before the Committee. It concluded unanimously that the complainant had committed acts of serious misconduct by sending unsolicited e-mail containing pornographic material to a staff member and by changing the configuration of his computer, thereby posing a serious threat to the integrity of WIPO’s information technology systems. On 16 March 2004 it recommended that the Director General dismiss the complainant, a recommendation which was implemented that same day.

5. The complainant then submitted a request for review of that decision to the Director General – whom he also asked to recuse himself – indicating that he intended to pursue the matter before the Tribunal, as well as the European Court of Human Rights or a competent court in the United States. The Appeal Board, to which the case was referred, considered that the Organization had complied with the Tribunal’s judgment by resuming the procedure before the Joint Advisory Committee and that there was no need for an oral hearing of the complainant and his counsel since they had put forward no new evidence in the course of the hearing held during the first appeal before the Board. It unanimously recommended that the Director General reject the appeal before it. By letter of 22 October 2004 the Director of the Human Resources Management Department informed the complainant’s counsel that the Director General had decided to accept that recommendation.

6. The complainant asks the Tribunal to set aside the decision dismissing him, to order his reinstatement and to award him compensation of at least 2 million United States dollars. He also submits many other claims, which are listed under B above.

7. The defendant considers that it has met its obligations under Judgment 2288 and that all claims other than those concerned with setting aside the complainant's dismissal are now *res judicata*. This is correct with regard to the claims for the Director General to submit a written apology or, failing that, to grant him a promotion, for a disciplinary investigation to be undertaken, for all documents concerning his dismissal to be removed from WIPO's records, for the Swiss authorities to be issued a letter retracting all the allegations and denunciations made against him and for the Tribunal to recognise that he was no longer bound by a duty of confidentiality. On the other hand, the plea of *res judicata* cannot succeed against the claim for reinstatement, because if his dismissal were to be set aside on the merits, there might be a new legal basis for his claim, in which case it could be examined by the Tribunal notwithstanding the ruling in Judgment 2288. The claims for the Director General to be obliged to recuse himself and for WIPO's Coordinating Committee – or any other "impartial and neutral" authority – to be called upon to fulfil the role of the Director General in the disciplinary investigation are, however, obviously irreceivable.

8. The complainant bases his claim to set aside the decision dismissing him for serious misconduct on ten pleas, which the Tribunal shall consider in the order in which they are put forward in his complaint.

9. The first plea is that the Director General failed to execute Judgment 2288 correctly because he merely endorsed his earlier decision, which was taken following improper consultation of the Joint Advisory Committee. The complainant expresses doubts as to whether the Committee was actually consulted, but the Organization produces the report drawn up by the Committee after its two meetings. The complainant also submits that the Director General was wrong to rely on the same documents he had used during the procedure preceding the first decision to dismiss him, especially the report of the Task Force which had conducted the investigations and had recommended to the Director General that the complainant be confronted with the evidence. The Task Force's report was appended to the document of 12 February 2004 setting out the charges against the complainant, who had an opportunity to contest its conclusions, even though he was not invited to do so by appearing in person.

10. The second plea, very similar to the previous one, is that the Director General made the same mistakes as during the procedure preceding the first dismissal decision: the complainant queries the impartiality of the Task Force, whose members he suggests were cronies of the Director General prepared to do his bidding, as well as a testimony against which he was unable to defend himself effectively because he was notified too late. These accusations, however, are not backed up by any evidence, except perhaps for the transcription of a call curiously recorded on the complainant's answerphone, in which the Director General expressed a wish to obtain his departure. There is nothing, at any rate, to cast doubt on the objectivity of the investigations conducted.

11. For his third plea the complainant contends that the Organization breached his defence rights by informing him insufficiently and belatedly of the charges against him, by refusing him access to his computer and by allowing a witness to testify against him during the first proceedings before the Appeal Board without giving him prior warning. The Organization considers, on the other hand, that his defence rights were fully respected, considering that the complainant, in any event after the quashing of the decision by the Tribunal, had several weeks to rebut the charges against him, both during the period leading up to the meeting of the Joint Advisory Committee, and before the Appeal Board. The Tribunal shares that view, since the requirements of due process – as recalled in particular by Judgment 2475 – were not disregarded in this case, given that the complainant was informed of the charges against him and was given the opportunity to contest them before the Joint Advisory Committee and before the Appeal Board, once orally and the second time in writing.

12. For his fourth plea the complainant contends that the punishment imposed on him was disproportionate: the penalty was the most severe he could receive and it was meted out on the basis of questionable evidence. Moreover, it was directed against a staff member who had always given satisfaction in his work. According to the complainant, even if the charges held against him were true, they could in no way present a risk for the Organization. On this point, the answer to this plea depends on whether the charges were well founded, an issue to be considered under the heading of the fifth plea. If it is true that the complainant altered the configuration of his computer in order to use it for purposes unrelated to his duties, and in particular to visit pornographic sites and download software and music, then the sanction cannot be regarded as disproportionate.

13. The fifth and sixth pleas are precisely based on the fact that the charges against the complainant have not been proved by the defendant "beyond a reasonable doubt". The complainant contends that by denying him access to his computer, the Administration prevented him from challenging the evidence against him: according to him, there is no proof either that his actions jeopardised the integrity of the Organization's information systems, or that it was he and not another person who downloaded certain images, or that the messages allegedly found on his

computer were not unsolicited e-mail. The complainant refers to the conclusions of a computer expert, who explains that there are many ways of placing pornographic images or messages on a computer without the user's consent.

On all these points the Organization relies on the findings of the investigations conducted in July and August 2002 on the complainant's computer. The statements made by the Head of WIPO's Information Technology Services Division during the first proceedings before the Appeal Board leave no doubt that the complainant had indeed altered the configuration of his computer in such a way as to jeopardise the security and integrity of the Organization's computer systems. It is certain, moreover, that the complainant added "bookmarks" enabling the viewing of sites totally unrelated to his duties, from which he downloaded files.

In the circumstances, the Tribunal finds that, despite the uncertainty that remains as to whether unsolicited messages appeared on the hard disk of the complainant's computer, the defendant, which bears the burden of proof in this regard, has proved the facts on which the charges against the complainant are based, and has established that they were indeed such as to justify his dismissal.

14. The seventh and tenth pleas are based on the contention that the challenged decision was not taken objectively but was the result of prejudice, harassment and discrimination on the part of the Director General. Even though a dispute of a private nature appears to have opposed the two men, the Tribunal does not find sufficient evidence in the file to conclude that there was abuse of authority.

15. The eighth plea is that the principle of equal treatment was breached, because a person who sent the complainant messages far more offensive than those he is supposed to have sent was not punished. In the absence of further details, this plea clearly cannot succeed. The fact that other officials may have sent pornographic messages without being penalised does not imply that the sanction imposed on the complainant was unlawful (see Judgment 207 in this respect).

16. For his ninth plea, the complainant contends that there is no rule forbidding access to sites wrongly considered as pornographic, which are in fact visited by many other staff members of the Organization. Even if this circumstance were true, it would in no way alleviate the charges against the complainant, especially since he is chiefly blamed with having installed messaging software enabling unknown persons to exchange data through the Organization's secure networks.

17. It may be concluded from the above that the claim for the sanction imposed on the complainant to be set aside does not succeed and that consequently the claims for reinstatement, compensation and costs must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.