Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

F.

v.

CERN

124th Session **Judgment No. 3875**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. F. against the European Organization for Nuclear Research (CERN) on 27 August 2015 and corrected on 20 October 2015, CERN's reply of 17 February 2016, the complainant's rejoinder of 20 June, corrected on 19 July, CERN's surrejoinder of 20 October, the complainant's further submissions of 21 December 2016 and CERN's final comments of 25 January 2017;

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

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

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

The complainant challenges the decision to dismiss him on disciplinary grounds.

The complainant entered CERN's service on 1 December 2013 on a two-year contract. After it was discovered that the office computer of one of his colleagues, Ms S., had been hacked, an investigation was launched. In the morning of 5 December 2014, in the context of that investigation, a CERN Computer Security Team met with the complainant for the purpose of examining his office computer. During the afternoon, this team sent him an email informing him that any modification, destruction or deletion of files on his personal laptop computer, which had been seen on his desk, would be treated as suspicious. On the evening

of the same day, the complainant replied that, before receiving that email, on the advice of his supervisor, he had "thrown away" that computer after having made a copy of the "small amount of data" that it contained.

The complainant was sent the findings of the Computer Security Team's initial investigation under cover of a letter of 12 December 2014. At that juncture he was informed that there was a strong presumption that he had been directly involved in the malicious hacking of Ms S.'s computer and that the alleged acts were likely to give rise to more serious disciplinary action than a reprimand. He was accused in particular of having breached the provisions of Operational Circular No. 5, concerning the use of CERN computing facilities, and several Staff Rules. He was advised that pursuant to Article R VI 2.06 of the Staff Regulations he had the right to reply to the allegations against him, that he was placed on compulsory special leave with pay with immediate effect, that his right of access to CERN computing facilities was suspended until further notice but that, if he needed access in order to prepare his defence, this could be granted under certain conditions. The complainant responded on 9 January 2015, refuting the allegations, and he requested that the decision to place him on special leave be suspended. He was informed by a letter of 16 January that the matter had been referred to the Joint Advisory Disciplinary Board (JADB) and that he must remain on special leave.

On 13 February the complainant received the detailed findings of the Computer Security Team, which had concluded that he was responsible for the hacking activity. On 10 April the complainant filed detailed submissions with the JADB. A hearing before the JADB took place on 28 April. In its report of 20 May the JADB stated that, in the absence of absolute proof, but given the precise and concurrent set of presumptions, it was satisfied beyond reasonable doubt that the complainant was the perpetrator of the attack on Ms S.'s computer. It unanimously recommended his dismissal in accordance with Article S VI 2.02 of the Staff Rules. The complainant was informed by a letter of 1 June 2015, which constitutes the impugned decision, that the Director-General had decided to follow that recommendation, that he was dismissed with

effect on 15 June 2015 and that, in the meantime, he was placed on special leave with pay.

The complainant asks the Tribunal to set aside that decision and in consequence to order CERN to restore "his right of access to the CERN domain" and to pay him, with interest, all the salary, emoluments and allowances which he would have received had his contract run its full course. He also claims compensation for moral injury in the amount of 20,000 euros and costs.

CERN asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant requests the setting aside of the decision of 1 June 2015 by which the Director-General, endorsing the unanimous recommendation of the JADB, terminated, with effect on 15 June 2015, his two-year contract of employment with CERN, which was due to expire on 30 November 2015. The Director-General considered, as did the JADB, that the facts established during an investigation conducted by the Organization's Computer Security Team were sufficient evidence that the complainant was the perpetrator of an attack on the computer of a member of his group.

2. The complainant does not dispute either the actual existence of the hacking that prompted the opening of the investigation, or the fact that the hacking was extremely serious in view of the particularly confidential nature of CERN's activities. Nor does he question the proportionality of the contested measure. However, he endeavours to prove his innocence. He mainly submits that the way in which the disciplinary investigation was conducted flouted his right of defence and that the decision to dismiss him was based on errors of fact and of law.

3. Established precedent has it that before adopting a disciplinary measure, an organization must first inform the staff member concerned that disciplinary proceedings have been initiated and she or he must be given the opportunity to defend herself or himself in adversarial

proceedings. The staff member must be able to express her or his point of view and participate in the processing of any evidence which might be considered relevant to discovering the truth.

The case law has also made clear that a disciplinary investigation must be conducted in such a way as to clarify all the relevant facts without compromising the good name of the employee, and that the employee must be given an opportunity to test the evidence against her or him and to answer the charges made (see, in particular, Judgments 2254, under 6(a), 2475, under 7, 2771, under 14 and 15, 3315, under 6, and 3682, under 13).

4. The complainant takes CERN to task for failing to respect these basic rules since, according to him, he was presumed guilty from the outset. He also alleges that it effectively deprived him of all means of defence by placing him on special leave and thus denying him any further access to CERN's computing facilities.

In addition, the complainant contends that CERN "wilfully deprived [him] of access to documents that were useful for [his] defence", and that witnesses who could have proved his innocence were influenced or intimidated by the publication of an anonymous internal news bulletin which enabled his colleagues to "establish a link" between his absence and the accusations contained in the bulletin.

Moreover, he submits that the investigators tried to obtain information covertly, particularly by accessing, without his permission, his personal laptop computer which was on his desk.

5. These criticisms are groundless. An investigation aimed at identifying the perpetrator of an undisputed incident of computer hacking has no chance of success unless rigorous protective measures are taken immediately, as a first step, in order to put an end to the damage caused by this unlawful action. The evidence in the file shows, firstly, that the conduct of the investigators towards an employee whom they could objectively regard as the prime suspect did not go beyond what was necessary in the circumstances. Had they not seized all the data in his possession, and had he not been removed temporarily from his workplace,

it would have been easy for him, if he was the guilty party, to erase any data which might have proved that he was implicated in the hacking which formed the subject of the investigation. Moreover, the complainant was able to comment fully on all the facts concerning him and to participate in the examination of the evidence without any restrictions other than those that were essential to the conduct of the investigation. In particular, it is difficult to see how, in the circumstances of the case, the information provided in the above-mentioned bulletin, which was in fact deleted as soon as the complainant complained about it, could have prevented him from refuting the evidence against him.

6. The complainant also takes the JADB to task for denying him access to certain items of evidence related to the charges against him and for not taking the necessary steps to call one of the two witnesses whose hearing he had requested. He also contends that a conflict of interest arose on account of the hearing of the Computer Security Officer.

CERN maintains that it gave the complainant satisfactory access to the evidence forming the basis of the charges against him. The complainant comments very briefly on this statement without specifically disputing it. This criticism must therefore be rejected.

With regard to the alleged failure of the JADB to hear a witness, it must be noted that the JADB agreed to hear both of the witnesses named by the complainant, even though his request was submitted out of time. It is clear from the submissions in the file that the JADB did not deliberately refuse to hear one of them but, when the time came, it actually proved impossible to hear him and that in this situation the complainant did nothing to ensure that the hearing could take place. Furthermore, in light of the circumstantial evidence already gathered, the relevance of that person's testimony, which would have concerned a very specific isolated fact of secondary importance (the complainant's presence at a given place at a given time), might not have seemed obvious to the JADB, to say the least.

The circumstances in which the Computer Security Officer was heard, as disclosed by the transcript in the file, after a discussion between the Chairman of the Board and the complainant, give the Tribunal no grounds to consider that the complainant's right of defence was breached.

7. The complainant also holds that the JADB applied a "presumption of guilt" in his case and did not "monitor or verify" the investigation.

8. In disciplinary matters, the burden of proof lies with the employer, which must demonstrate that the employee did indeed engage in the conduct of which she or he is accused. If the facts are disputed and there is no persuasive material evidence, the facts of the dispute must be appraised on the basis of conclusive circumstantial evidence. Thus, the facts may be held to be established when a set of precise presumptions and concurring circumstantial evidence enable the decision-making authority to conclude beyond reasonable doubt that the person concerned is guilty (see, in particular, Judgments 2786, under 9, 2849, under 16, and 3297, under 8).

When a complaint is filed seeking the setting aside of a disciplinary measure or a dismissal ordered at the end of disciplinary proceedings, it is not the Tribunal's role to reweigh the evidence collected by an investigative body, the members of which have already appraised this evidence, or in particular the reliability of the testimony of persons whom they have directly heard (see, in particular, Judgment 3757, under 6). This is all the more true when the evidence to be appraised comprises extremely complex technical elements such as those inherent to a process of computer hacking of the kind observed in this case. What is essential is that any person under investigation has ample opportunity to adduce and refute evidence, which has manifestly been the case here.

9. In the instant case, the submissions in the file show that the advisory body's recommendations which formed the basis of the impugned decision were formulated after CERN had carried out a thorough, detailed investigation of the complainant's alleged improper actions.

The general context in which the investigation was launched, as described in detail in CERN's reply, which is not convincingly refuted by the complainant, could reasonably lead the Organization to suspect him. CERN was right to regard these suspicions as being objectively confirmed by the information gleaned from the technical examination of the computers concerned. Moreover, in view of all the circumstances of the case, that information could appear to be corroborated by the manifestly confused, often contradictory, scarcely credible explanations provided by the complainant throughout the investigation, combined with some of his actions, the most striking of which was indisputably the untimely, bizarre destruction of the laptop computer which he had set up on his desk where there was already a desktop computer.

10. In the final analysis, none of the complainant's pleas convinces the Tribunal that the impugned decision is tainted with an error of fact or of law, as he submits. CERN cannot be said to have unduly discounted a reasonable doubt which might have led it to exonerate the complainant.

In these circumstances the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 26 April 2017, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ