

P.
v.
CCC

127th Session

Judgment No. 4058

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. G. P. against the Customs Co-operation Council (CCC), also known as the World Customs Organization (WCO), on 24 April 2017 and corrected on 16 May and the WCO's reply of 4 September 2017, the complainant having failed to file a rejoinder within the allocated time;

Considering Articles II, paragraph 5, and VII 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 terminate his fixed-term appointment for serious misconduct.

At the material time the complainant was employed by the WCO as a Senior Technical Officer. As part of his duties, he was responsible for organizing WCO events. In September 2014 he established a private company called Event Planners International (EPI).

Following an investigation which established that the complainant's activities with EPI conflicted with his obligations as a WCO official, the Secretary General transmitted to the Disciplinary Committee a report containing all the accusations levelled at the complainant. It was mentioned, inter alia, that he had established EPI without informing or

seeking permission from the WCO. According to the Secretary General, the facts complained of constituted a violation of the exclusivity of service required of WCO officials and showed that the complainant had failed to regulate his conduct with the interests of the WCO only in view.

By a letter of 13 November 2015, the complainant was informed of the decision to initiate disciplinary proceedings against him. After having heard the complainant, the Disciplinary Committee issued its opinion on 21 December 2015. It unanimously recommended that no sanction be imposed on the complainant on the ground that, while there was an appearance of conflict of interest in relation to the use of the WCO's resources and references to WCO events on the EPI website, there was no conflict of interest *per se*, and that the most appropriate measure would be a discussion between the complainant and his line manager.

By a letter of 21 January 2016, the Secretary General informed the complainant that, in his view, the Disciplinary Committee's conclusion was flawed and that he had decided to terminate his appointment – which was due to expire on 31 May 2017 – with four months' salary in lieu of notice. He stressed that before the decision was taken, the complainant had been heard by the Head of Administration and Personnel, acting in his capacity as representative of the Secretary General, and that inconsistencies in the complainant's argumentation had been pointed out to him during that meeting. Considering the facts, which were not denied, and the outcome of that meeting, the Secretary General had come to the conclusion that the complainant's behaviour constituted serious misconduct.

As the complainant's request for review of this decision was rejected on 4 March 2016, he lodged an appeal on 25 March 2016. The Appeals Board held several hearings, including one with the complainant. In its report of 5 December 2016, the Appeals Board found that the complainant had not sought formal review and approval of the business steps which he had taken. This had created an appearance of conflict of interest and embarrassment for the WCO. It recommended dismissing the appeal.

By a letter of 24 January 2017, the Secretary General informed the complainant that, in view of the opinion of the Appeals Board, he had decided to maintain his decision to terminate his appointment. That is the impugned decision.

The complainant asks the Tribunal to quash the decisions of 21 January 2016, 4 March 2016 and 24 January 2017 and to order the payment of all salaries and allowances he would have received until the expiry of his contract on 31 May 2017, with interest. He claims 10,000 euros in moral damages, as well as costs.

The WCO requests the Tribunal to dismiss the complaint as entirely unfounded.

CONSIDERATIONS

1. By the impugned decision dated 24 January 2017, the Secretary General, “[i]n view of the opinion” of the Appeals Board contained in its report of 5 December 2016, decided to “maintain [his 21 January 2016] decision to terminate [the complainant’s] contract” which was due to expire on 31 May 2017.

2. The Secretary General’s 21 January 2016 decision was preceded by disciplinary proceedings which were initiated by the Secretary General via a report sent to the complainant and the members of the Disciplinary Committee on 26 November 2015. In that report the Secretary General submitted that the complainant had violated Article 2(a) and (e) and Article 4(a), (b), (c) and (d) of the Staff Manual, as well as paragraphs 3, 4 and 41 of the WCO Standards of Conduct, by establishing a private company without informing the Organization or seeking prior approval from the Secretary General. According to the Secretary General, the facts complained of constituted a violation of the exclusivity of service and allegedly showed that the complainant had failed to regulate his conduct with the interests of the WCO only in view. In its opinion of 21 December 2015, the Disciplinary Committee summarized the charges against the complainant into two categories; “Exclusivity of service and devotion to international civil service” and “Obligation to act with

integrity and loyalty towards the WCO”. The Disciplinary Committee unanimously recommended that no sanction be imposed on the complainant on the ground that there was an appearance of conflict of interest in relation to the use of the WCO’s resources, but no conflict of interest *per se*. The Disciplinary Committee unanimously recommended “that the most appropriate measure would be a discussion between [the complainant] and his line manager: to address the need to refrain from engaging in external activities to avoid conflict of interests; and request [the complainant] to indicate the steps he ha[d] taken or plan[ne]d to take to avoid any conflict of interests and/or appearance thereof”.

3. In his decision dated 21 January 2016, the Secretary General stated *inter alia* that he disagreed with the Disciplinary Committee’s opinion. He stated, in particular, that he did not share the Disciplinary Committee’s conclusions regarding the use of WCO’s resources, and he noted that the Disciplinary Committee had not commented on some of the breaches raised in his report, namely:

- “- The mandatory exclusivity of service ([A]rticle 2 (e) of the Staff Manual and paragraph 41 of the Standards of Conduct);
- The obligation to seek the interests of the Organization exclusively (Article 2 (a) of the Staff Manual);
- The observance of the basic qualities of international civil servants (Article 4 (a) of the Staff Manual);
- The obligation to use one’s status as an official with the greatest circumspection (Article 4 (d) of the Staff Manual); and
- The obligation for officials to place the interests of the Organization above their own (paragraph 3 of the Standards of Conduct).”

The Secretary General noted that the complainant had met with the Head of Administration and Personnel (in his capacity as representative of the Secretary General) on 11 January 2016 and that in that meeting the complainant was given the opportunity to share his observations and “some inconsistencies were pointed out in [the complainant’s] argumentation”. He went on to state that, “[c]onsidering (i) the facts, which were not denied, and (ii) the outcome of [the 11 January] meeting, I come to the conclusion that your behaviour led to a breach of your obligations as a WCO official which constitutes a case of serious

misconduct. As a consequence, despite the opinion of the Disciplinary Committee, I hereby inform you that, in compliance with Article 53 (a) (iv) of the Staff Manual, I have decided to terminate your appointment as Senior Technical Officer. Article 18.1 (a) of the Staff Manual provides for a four months period of notice in case of termination of a Category A appointment. I have decided to dispense with this requirement but will pay you the salary and allowances due for this period.”

4. The complainant requested a formal review of that decision in a letter dated 4 February 2016 and, by a letter dated 4 March 2016, the Secretary General notified the complainant of his decision to reject the complainant’s request and to maintain the 21 January 2016 decision. The complainant lodged an internal appeal on 25 March 2016. In its report, dated 5 December 2016, the Appeals Board noted that the complainant’s grounds for appeal were: “a) Violation of the obligation to state reasons – Reversal of the burden of proof – Violation of the duty of care; b) Undue reversal of the burden of proof – Violation of the obligation to prove the alleged misconduct beyond reasonable doubt – Violation of the reinforced duty to state reason in case the recommendation of the Disciplinary Committee is not followed; c) Irregular disciplinary proceedings – Violation of fundamental rights; d) Manifest error of assessment; [and] e) Violation of the principle of proportionality”. In its “Summary of the Matter”, the Appeals Board “consider[ed] that it [was] not necessary to pass an opinion on each ground of appeal and ha[d] therefore come to a conclusion that under the given facts a critical issue [was] whether the decision of the Secretary General amounted to a violation of the principle of proportionality in so far as it relates to the [complainant]”. Under the heading “Recommendation”, the Appeals Board wrote as follows:

“The Appeals Board concludes that the [complainant] made errors in judgement based on his eagerness and determination to take over outsourced WCO’s event management and training services. Moreover, the Appeals Board concludes that although WCO management had some hint that he had established private companies, the [complainant] did not fully inform the WCO Secretary General or the WCO Head of Administration of all his actions in establishing a private sector enterprise in anticipation of taking over outsourced WCO event management and training services.

The Appeals Board concludes that it was ill-advised for the [complainant] to lobby members of the Financial Committee when the Head of Administration had made his decision about holding a Call for Tender, and to do so without informing the Head of Administration.

The Appeals Board also concludes it was an error of judgement for the [complainant] to have included his daughter and other persons as representatives in his business particularly as there are several indications that they had begun to seek out, albeit modestly, non-WCO business partners before the [complainant] departed the WCO.

In the view of the Appeals Board, our role is to make a recommendation based on whether it was reasonable for the Secretary General to conclude that the [complainant] was in breach of several provisions of the Staff Manual and Standards of Conduct.

Although it is likely that, as the [complainant] contends, the steps he took to operationalize EPI were in anticipation of running the outsourced services as a private business, and that he had at least communicated his intention that a business run by him would either bid for the contract or take over the contract without a competitive bidding process, the specific steps were not fully communicated to WCO management and he did not seek formal review and approval. The business steps taken by the [complainant] and his failure to fully notify and seek the review and approval of WCO management created the appearance of a conflict of interest and embarrassment for the WCO. This indicates non-exclusivity of service and not placing the interests of the Organization above their own. Accordingly, in our view, the WCO Secretary General was justified in his decision to terminate the [complainant]'s employment based on the points listed in his letter of 21 January 2016 [...].”

5. The complainant's grounds for complaint are as follows: violations of Articles 54 and 58 of the Staff Manual; violation of the requirement to state reasons; violation of the principle of equality of arms; violation of the right to be heard and the right of defence; violation of the Organization's duty of care; violation of the principle of proportionality; unlawful reversal of the burden of proof; manifest error of assessment; failure to prove the allegations of misconduct beyond a reasonable doubt; procedural flaws in the disciplinary proceedings; and conflict of interest on the part of the Head of the WCO's Legal Service and the Head of Administration and Personnel.

6. The complaint is well founded. The Secretary General's 24 January 2017 decision, maintaining the 21 January 2016 decision to terminate the complainant's contract, is unlawful as it is based on a report of the Appeals Board that is flawed. The primary flaw in the Appeals Board's report is that it did not recognize the conflict of interest of the Head of the Legal Service and the Head of Administration and Personnel being involved as anything other than witnesses in the investigation, the disciplinary proceedings and, in the case of the Head of Administration and Personnel, the final meeting prior to the Secretary General taking the 21 January 2016 decision.

7. The Tribunal notes that it is uncontested that the Head of the Legal Service, in November of 2013, on behalf of the Head of Administration and Personnel discussed with the complainant the termination of the contract with the private company in charge of delivering private sector training. As there had been two private companies contracted and neither had been able to meet the needs of the WCO and the private sector, the complainant was asked to help find a solution. He suggested that, as his contract was then supposed to end on 31 May 2015 (it was subsequently renewed for two years), he could take over the events and private sector training through a private company which he would establish. Over the following two years the complainant worked with the Head of the Legal Service and the Head of Administration and Personnel on this project of outsourcing events planning and training through a private company. There were many meetings, discussions and email exchanges over that period which led the complainant to believe that there would be a Call for Tender and that he could compete in it. Taking that at face value, he created a private company as had been discussed and planned, though without explicitly notifying the Organization of the company's exact start date. In an email, dated 6 August 2015, the complainant was informed that the Head of Administration and Personnel had engaged a company to conduct a Feasibility Study on the Private Sector Training Offer. In a meeting on 2 October 2015 in the office of the Head of Administration and Personnel, the complainant was informed that the recommendation from the Feasibility Study was for the WCO to create an internal service to deliver Private Sector

Training. It was then that the complainant realized that there would be no Call for Tender. As evidenced by this two-year period of involvement with the Head of the Legal Service and the Head of Administration and Personnel, it is clear that neither should have been involved in the investigation regarding the complainant's creation of a private company which was linked directly to their continuous interactions. The Organization defends their involvement by stating that they were merely acting in their official capacities, but if an investigation were to be properly conducted, it would also need to investigate their involvement in the planning stages in order to establish their level of responsibility, if any. Though the complainant raised the issue of conflict of interest of the Head of the Legal Service and the Head of Administration and Personnel, neither the Appeals Board nor the Secretary General in his final decision addressed this fundamental issue.

8. The existence of the above-mentioned conflict of interest is enough of a vitiating procedural flaw to require the setting aside of the 21 January 2016 and 24 January 2017 decisions. Moreover, the Disciplinary Committee found no misconduct and recommended no sanction. In the decision of 21 January 2016, the Secretary General failed to explain why the Disciplinary Committee's analysis and conclusions on both the question of guilt and the question of sanction were wrong (see Judgment 3969, consideration 10).

9. The complainant is no longer working for the Organization. No order was sought by the complainant to remit the matter to the Organization to consider again whether the complainant was guilty of misconduct and, if found guilty, what sanction should be imposed in light of a finding of misconduct. Accordingly, no order remitting the matter will be made. However, this also has the effect that it is not possible to award material damages as a finding whether the complainant was guilty or not will never be made. The complainant is entitled to moral damages in the amount of 10,000 euros for the personal pain and suffering arising from the Secretary General's finding of guilt and the decision to terminate his contract, and an award of costs which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The 21 January 2016 and 24 January 2017 decisions are set aside.
2. The WCO shall pay the complainant 10,000 euros in moral damages.
3. It shall also pay him 5,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 30 October 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ