Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S. (No. 6)

v.

WIPO

133rd Session **Judgment No. 4478**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr A. S. against the World Intellectual Property Organization (WIPO) on 20 November 2018 and corrected on 8 January 2019, WIPO's reply of 23 April, the complainant's rejoinder of 6 August and WIPO's surrejoinder of 11 November 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant contests the decision to impose on him the disciplinary measure of delayed advancement to the next salary step for a period of 20 months, pursuant to Staff Rule 10.1.1(a)(2).

The complainant joined WIPO in 1989. At the time of the events giving rise to the present complaint, he was the Head of the Small and Medium-Sized Enterprises (SMEs) Section in the SMEs and Entrepreneurship Support Division (SESD).

On 29 February 2016 the Administration promulgated Office Instruction No. 10/2016 by which, among other things, it announced the discontinuation of the SMEs Section. On 24 May 2016 the complainant sent an email to the Director General, entitled "Office Instruction No. 10/2016", in which he wrote, inter alia:

> "I am in the process of preparing a request for review of Office Instruction No. 10/2016 issued on February 29, 2016, which among other things, has discontinued SMEs Section which I was heading.
>
> [...]
>
> I consider this administrative decision as yet another event in a chain of harassment, discrimination, retaliation, abuse of authority and attack on my honor and dignity which began in the second half of 2008 with your decision to discontinue the Executive Program of WIPO Academy which I was heading [...]
>
> [...]
>
> I will also argue about the unethical role of Mr [P.] in creating impediments and obstructions in regard to the implementation of SMEs related activities in India and the lack of support from Mr [S.] on this matter. [...]"

This email was copied to seven WIPO staff members, namely the Assistant Director General and Chief of Staff (Mr P.), the complainant's second-level supervisor (Mr S.), the Chief Ethics Officer, the Director of HRMD, the Acting Director of IOD, the Acting Director of the SESD, and the former Director of the SESD.

On 25 May 2016, the complainant wrote an email to Mr S., entitled "Seeking an appointment with you", which was copied to the Director General. In his email, the complainant wrote:

> "Dear Mr. [S.],
>
> I refuse to accept any further humiliation from you or the Director General. My self respect and pride has been badly hurt. I am about to reach a point of no return. Before I cross that threshold, which will not be in the interest of WIPO, its Director General, yourself or myself, I would like to meet you today to have one final chat about what your proposals are to redress the current situation of inequity which flows out of Office Instruction No. 10/2016.
>
> I thank you for your understanding and look forward to hearing from you.
>
> Best regards."

Also on 25 May 2016, the Director, HRMD, decided to suspend the complainant from duty with full pay for an initial period of one month, on the grounds that his continuance in office would be detrimental to the interests of WIPO and presented a risk of serious disturbance at the workplace. The Director, HRMD, eventually lifted the complainant's suspension on 15 June 2016, after having been informed by IOD that it appeared that the complainant did not have any intention of behaving in a violent or otherwise inappropriate manner.

By a letter of 9 September 2016 ("the charge letter"), the Director, HRMD, informed the complainant that he was being formally charged with misconduct in connection with the statements he had made in his emails of 24 and 25 May 2016.

In respect of the email of 24 May 2016, the complainant was charged with the following:

> "a) Having made defamatory statements about Mr [P.], in breach of the obligations contained in Staff Regulation 1.5(a) to conduct [himself] in a manner befitting [his] status as an international civil servant, and to avoid any action which may adversely reflect on the international civil service, or which is incompatible with the integrity required by that status.
>
> b) Having breached Staff Regulation 11.1, in that in making the defamatory statements identified in paragraph 8 above, [he] failed in [his] duty, which is incumbent upon all staff members, 'to contribute to a respectful and harmonious workplace'.
>
> c) Having made statements which [he] knew to be false or misleading, or with reckless disregard for their accuracy (see Staff Regulation 1.7(e))."

In respect of the email of 25 May 2016, the complainant was charged with the following:

> "a) Having breached Staff Regulation 11.1, in that in making the threatening statements [in his email of 25 May 2016], [the complainant] failed in [his] duty, which is incumbent upon all staff members, 'to contribute to a respectful and harmonious workplace'.
>
> b) Having breached Staff Regulation 1.5(a), in that in making the threatening statements identified in paragraph 5 above, (i) [he] failed to conduct [him]self in a manner befitting [his] status as an international civil servant, (ii) [he] failed to 'avoid any action [...] which may adversely reflect on the international civil service', and (iii) [he] conducted [him]self in a manner which was incompatible with the integrity required by that status."

The complainant was invited to submit his response, which he did on 10 October 2016. In his response the complainant denied the charges, expanded on his allegations against Mr P. and requested that the Director General and the Director, HRMD, recuse themselves, and that his case be reviewed by an independent authority.

On 7 November 2016, the Deputy Director General informed the complainant that the Director General and the Director, HRMD, had decided to recuse themselves and to designate herself (i.e. the Deputy Director General) as the competent authority to take a decision on his alleged misconduct. The Deputy Director General also informed the

complainant of her decision to stay the disciplinary proceedings against him pending the outcome of a harassment complaint the complainant had filed in August 2016 against the Director General, the Director, HRMD, his supervisor, Mr P., Mr S. and other WIPO officials, and also pending the conclusion of any investigation into the allegations of misconduct the complainant had made against the Director, HRMD, and Mr P. in his response to the charge letter. On 21 February 2017 the Deputy Director General notified the complainant of her decision to dismiss his August 2016 harassment complaint as unfounded in its entirety.

On 23 June 2017 IOD informed the complainant that his allegations against Mr P. did not warrant a full investigation and, on 20 July 2017, it advised the Deputy Director General that it had found no credible evidence to support the charge that the complainant had made allegations against Mr P. which he knew to be false or misleading, or with reckless disregard for their accuracy.

By a letter of 21 August 2017, the Deputy Director General informed the complainant of her conclusion that the alleged misconduct had occurred and her decision to impose on him the disciplinary measure of delayed advancement to the next salary step for a period of 20 months, pursuant to Staff Rule 10.1.1(a)(2).

On 21 November 2017 the complainant filed an appeal with the Appeal Board against this decision asking, inter alia, that the Board set it aside and that it also set aside the 25 May 2016 decision to suspend him from duty as well as the 9 September 2016 decision. The Appeal Board submitted its conclusions to the Director General on 26 June 2018. Considering that the decision to suspend the complainant was outside the scope of the appeal, the Board upheld the decision to impose on the complainant the disciplinary measure of delayed advancement to the next salary step for a period of 20 months and recommended the dismissal of the appeal.

By a letter of 24 August 2018, the complainant was informed of the Director General's decision to dismiss his appeal in its entirety pursuant to the Board's recommendation. This is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision of 24 August 2018, as well as the decision to suspend him from duty of 25 May 2016 and the letter of charges of 9 September 2016, and to order the Director General to issue a public apology to all WIPO staff

for his illegal suspension, disciplinary proceedings and disciplinary measure. He claims 500,000 Swiss francs in moral damages, 250,000 francs in exemplary damages, and at least 16,000 francs in damages for his service-incurred illness resulting from the disciplinary accusations and improper suspension. He also claims reimbursement of all legal costs he incurred in bringing this appeal. He requests that WIPO be ordered to re-credit him with all statutory sick leave taken due to his service-incurred illness and to pay him any step increase it withheld as a result of the disciplinary measure imposed upon him on 21 August 2017. He seeks interest at the rate of 5 per cent per annum on all amounts awarded and such other relief as the Tribunal may deem necessary, just and appropriate.

WIPO asks the Tribunal to dismiss the complaint.

CONSIDERATIONS

1. The complainant impugns the Director General's decision of 24 August 2018 accepting the Appeal Board's findings and recommendation, contained in its report of 26 June 2018, to dismiss his appeal against the disciplinary measure of delayed advancement to the next salary step for a period of 20 months, applied by the Deputy Director General in her 21 August 2017 decision pursuant to Staff Rule 10.1.1(a)(2).

2. The complainant essentially puts forward in his complaint the following pleas:

(a) As the exercise of the right to appeal by staff is not actionable as misconduct, the impugned decision is based on a mistake of fact;

(b) The complainant's statements regarding Mr P. were erroneously held to be defamatory;

(c) WIPO's decision to impose upon the complainant a disciplinary sanction was disproportionate to his conduct;

(d) WIPO's failure to consider all relevant facts, including exculpatory evidence, to respect the complainant's presumption of innocence and to afford him the benefit of the doubt violated the principle of equal treatment and protection against retaliation, including through the imposition of a disciplinary measure for unproven misconduct;

(e) By applying the incorrect standard of proof, WIPO committed errors of law and violated the complainant's rights to due process and equal treatment;

(f) By failing to "separate out" administrative decisions, including charges, investigation, and disciplinary proceedings, WIPO acted out of bias and prejudice and prevented the complainant from exercising his right to informal conflict resolution and appellate review.

3. WIPO raises receivability as a threshold issue. It contends that the complaint suffers from procedural defects pertaining to its scope, as a large part of the complainant's allegations, including those relating to his temporary suspension, are unrelated to the impugned decision. The complainant argues that the events leading to his suspension and the disciplinary decision form part of a broader pattern in which he was unfairly targeted and subjected to abuse of authority.

4. According to the Tribunal's case law, ordering an organisation to apologize is clearly beyond the competence of the Tribunal (see, for example, Judgment 3011, consideration 6). As to the complainant's claims concerning his temporary suspension, the Tribunal notes that they are irreceivable for failure to exhaust internal remedies within the meaning of Article VII, paragraph 1, of the Tribunal's Statute. Indeed, the complainant did not file a request for review of the 25 May 2016 decision to temporarily suspend him from duty within 90 days from the date he received written notification of said decision, as required by Staff Rule 11.4.3. It is to be recalled that, according to the case law, a suspension decision has, by itself, an immediate, material, legal and adverse effect and can be challenged by itself (see, for example, Judgment 4237, consideration 8, and the case law cited therein). Accordingly, the complainant's request for the production of all documentation associated with WIPO's decision to suspend him is denied.

5. Turning to the merits of this case, the complainant's first plea, that the impugned decision was based upon a mistake of fact, is unfounded. His main argument is that the Administration erred in characterizing the 25 May 2016 email as containing "threatening" statements. He alleges that he was merely asserting his right to appeal and to engage in informal dialogue in order to avoid resorting to the formal appeal process.

Specifically, he argues that in stating "I am about to reach a point of no return" he was indicating emphatically that he had been left with no choice but to submit an appeal and that he had no intention of behaving in a violent or otherwise inappropriate manner, which was confirmed by IOD. The Tribunal is unable to accept this argument. The contents of the 25 May 2016 email have been reproduced in full in the presentation of facts above. The email did not indicate that the complainant was about to exercise his right to appeal, which he could have expressed explicitly had he wished to communicate such an intent. The language of "I refuse to accept any further humiliation from you or the Director General", "I am about to reach a point of no return" and "Before I cross that threshold, which will not be in the interest of WIPO, its Director General, yourself or myself" was not merely emotionally charged rhetoric but presented in a threatening tone that the complainant could take irreversible actions to the detriment of the Organization, the Director General and/or the complainant's second-level supervisor. The Deputy Director General, in reaching her conclusion, also considered the statements in question in the context of exchanges the complainant had with other staff members between 23 and 25 May 2016, and correctly concluded that statements in the 25 May 2016 email constituted "a threat of such a nature as to unsettle, intimidate and exert pressure on its addressees". The IOD preliminary evaluation from the interview that the complainant did not actually intend to behave in an inappropriate manner, which led the Administration to lift the temporary suspension, is not relevant.

6. The complainant's second plea, that the Administration erroneously held his statements regarding Mr P. to be defamatory, is also unfounded. The complainant asserts that his statement in the 24 May 2016 email did not appear to cause serious harm to Mr P.'s reputation, that he intended to request an internal review, that the use of the word "unethical" was criticism of specific decisions and actions that he observed and experienced, that the email was sent to only a limited number of recipients, that the statement should also be seen as a response to Mr P.'s criticism and attack, and that he had a legitimate interest regarding an ongoing issue of professional relevance at WIPO to all staff. He further claims that according to IOD's findings, there was no credible information or evidence that his allegations were

"intentionally and knowingly false or misleading, or made with reckless disregard for the accuracy of the information".

7. In Judgment 3106, consideration 9, the Tribunal identified two crucial aspects of the law of defamation:

> "The law of defamation is not concerned solely with the question whether a statement is defamatory in the sense that it injures a person's reputation or tarnishes his or her good name. It is also concerned with the question whether the statement was made in circumstances that afford a defence. Broadly speaking, the defences to a claim in defamation mark out the boundaries of permissible debate and discussion. As a general rule, a statement, even if defamatory in the sense indicated, will not result in liability in defamation if it was made in response to criticism by the person claiming to have been defamed or if it was made in the course of the discussion of a matter of legitimate interest to those to whom the statement was published and, in either case, the extent of the publication was reasonable in the circumstances."

8. For the first aspect, it is for the organisation to prove the statement was defamatory. The standard is whether the publication of an untrue statement injures a person's reputation or tarnishes her or his good name. Neither the complainant's intention nor malice are essential elements of defamation. Firstly, the complainant's 24 May 2016 email contained his allegation regarding "the unethical role of Mr [P.] in creating impediments and obstructions [...]", which criticised Mr P. morally and professionally. The allegation was indeed injurious to Mr P.'s reputation. Secondly, the allegation was untrue, as the IOD did not find cogent evidence to substantiate Mr P.'s "unethical role". Thirdly, the 24 May 2016 email was communicated not only to Mr P. but also to seven senior-level staff members. As stated in Judgment 2861, consideration 101, "[t]he essence of defamation is the publication of material to third parties, not to the person claiming to be defamed"; the publication requirement was therefore also satisfied. The Tribunal agrees with the Appeal Board that whether the author knows that his allegation is false or misleading is not an essential element of defamation. The Tribunal sees no error in the Appeal Board's consideration that the constitutive elements of defamation were "well indeed present" in the 24 May 2016 email.

9. For the second aspect, it is for the complainant to prove that he has a valid defence. In Judgment 3106, consideration 9, the Tribunal listed two defences: a discussion of legitimate interest and a response to criticism or attack. However, the complainant did not produce any evidence to prove that Mr P. had criticized or attacked him. As the 24 May 2016 email was centred on the complainant's own interest concerning the discontinuation of the SMEs Section which he headed, the Tribunal does not accept his assertion that the statement was made in the course of a discussion of a matter of legitimate interest to Mr P. In Judgment 2751, consideration 5, the Tribunal recognised another defence, namely that statements are privileged if made in legal proceedings, and the same applies to those of internal appeal bodies, because it is necessary for the proper determination of proceedings and the issues that arise in their course:

> "A litigant whose submissions contain language that is unacceptable, or ill-chosen, or damaging, or unseemly, does not thereby lose the immunity that attaches to statements made in judicial proceedings, however much the breach of good taste may be deplored."

The 24 May 2016 email obviously did not fall into a privileged category. The complainant submitted a request for review to challenge the contents of Office Instruction No. 10/2016 on 1 August 2016, more than two months after sending his email.

10. As to the issue of the standard of proof, the complainant submits, in his fifth plea, that WIPO erred in applying the "clear and convincing" standard of proof. He adds that due to its failure to meet its *prima facie* obligation to prove the complainant's misconduct beyond reasonable doubt, WIPO violated the complainant's rights to due process and equal treatment. It is true that the Tribunal clearly stated that the applicable standard of proof is beyond reasonable doubt (see, for example, Judgment 3649, under 14, and Judgment 4247, under 11-12). But the standard of beyond reasonable doubt derived from the Tribunal's case law as it has evolved over the decades, serves a purpose peculiar to the law of the international civil service, as stated in Judgment 4360, consideration 10, and Judgment 4362, considerations 7, 8 and 10:

> "Rather the standard involves the recognition that often disciplinary proceedings can have severe consequences for the affected staff member, including dismissal and potentially serious adverse consequences on the reputation of the staff member and her or his career as an international civil servant, and in these circumstances it is appropriate to require a high level

> of satisfaction on the part of the organisation that the disciplinary measure is justified because the misconduct has been proved. The likelihood of misconduct having occurred is insufficient and does not afford appropriate protection to international civil servants. It is fundamentally unproductive to say, critically, this standard is the 'criminal' standard in some domestic legal systems and a more appropriate standard is the 'civil' standard in the same systems involving the assessment of evidence and proof on the balance of probabilities."

The Tribunal notes that Staff Rule 10.1.2(d) of WIPO provides that the applicable standard of proof in disciplinary proceedings is "clear and convincing evidence". In the present case, it is clear that the facts underlying charge of misconduct are uncontroverted. The reference by the Director General to the "clear and convincing evidence" standard does not detract from the fact that, in substance, the standard of beyond reasonable doubt was met.

11. With regard to the complainant's third plea that the disciplinary sanction was disproportionate to his conduct, the complainant contends that the Administration failed to take into account "all extenuating circumstances", for instance, the actual harm caused, a limited number of recipients, the unjustified suspension already endured by him, his legitimate interest in seeking protection from retaliation, his long unblemished career, and chilling effect. The case law confirms that the decision on the type of disciplinary action taken remains in the discretion of the disciplinary authority, as long as the measure is not disproportionate.

> "[T]he Tribunal cannot substitute its evaluation for that of the disciplinary authority, the Tribunal limits itself to assessing whether the decision falls within the range of acceptability."

(See Judgment 3971, consideration 17.)

> "[I]t may be noted that lack of proportionality is to be treated as an error of law warranting the setting aside of a disciplinary measure even though a decision in that regard is discretionary in nature (see Judgments 203 and 1445). In determining whether disciplinary action is disproportionate to the offence, both objective and subjective features are to be taken into account and, in the case of dismissal, the closest scrutiny is necessary (see Judgment 937)."

(See Judgment 2656, consideration 5.)

12. In her decision, the Deputy Director General considered the proportionality of the sanction in relation to various circumstances, both objectively and subjectively, namely, the nature and gravity of the misconduct involved, the circumstances in which the complainant had

made the statements, the limited recipients, the complainant's long service with a good performance record, and the expression of regrets in his response. The Tribunal notes that the Staff Rule 10.1.1 lists six possible disciplinary measures, and "delayed advancement, for a specific period of time, to the next salary step" is the second lightest disciplinary measure. The complainant's statements constituted a breach of both Staff Regulations 1.5(a) and 11.1, namely, the obligation on staff members "to conduct themselves at all times in a manner befitting their status as international civil servants" and the duty to avoid any action which "may adversely reflect on the international civil service or which is incompatible with the integrity [...] required by their status". Having regard to the Deputy Director General's reasons for the application of the disciplinary measure, the Tribunal concludes that the sanction was not disproportionate.

13. In his fourth and sixth pleas, the complainant challenges the impugned decision on the grounds that WIPO failed to respect the presumption of innocence and to afford him the benefit of the doubt, violated the principle of equal treatment and protection against retaliation, acted out of bias and prejudice, and prevented him from exercising his right to informal conflict resolution and appellate review. The Tribunal finds no merit in these allegations. The complainant was presumed innocent throughout the disciplinary proceedings, and where reasonable doubt did not exist, the issue of the benefit of the doubt did not arise. The burden of proof is on the party who alleges that the organisation acted out of bias and prejudice or that she or he was victimized by retaliatory action. The complainant has not provided any convincing evidence to prove that he suffered discrimination, bias, prejudice and retaliation or unequal treatment in the process. The complainant was at no point in time prevented from exercising his right of appeal. On the contrary, he was able to present his defence against the charges of misconduct, submit a detailed response in adversarial proceedings, exercise his right of internal appeal and seize the Tribunal. Hence, the complainant's pleas are all rejected.

14. In the foregoing premises, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ