

SEVENTY-FIRST SESSION

In re OMOKOLO (Nos. 1 and 2)

Judgment 1115

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hilaire Omokolo against the World Intellectual Property Organization (WIPO) on 20 June 1990 and corrected on 24 August and the letter his counsel sent the Registrar of the Tribunal on 24 August 1990;

Considering the second complaint filed by Mr. Omokolo against WIPO, also on 24 August 1990;

Considering WIPO's single reply of 26 November 1990 to the two complaints, the complainant's single rejoinder of 4 January 1991 and WIPO's letter of 5 February 1991 stating that it did not want to file a surrejoinder in either case;

Considering the letter which the Registrar wrote to the Organization on 11 March 1991 asking it to disclose certain texts and the Organization's reply of 21 March 1991;

Considering Articles II, paragraph 5, and VII, paragraphs 2 and 3, of the Statute of the Tribunal, Article 6(3) of the Rules of Court, Regulations 1.4, 1.7, 1.11(b), 4.18 and 11.1 and Rules 10.1.1(a)(3) and 11.1.1(b)(1) of the Staff Regulations and Staff Rules of the International Bureau of WIPO;

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

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

A. The complainant is a citizen of Cameroon. He was born in 1946, is married and has six children. Coming from the national civil service of his country, he joined the staff of WIPO in Geneva in January 1983 as assistant librarian at grade P.2 under a fixed-term appointment for two years. On 1 September 1985 he was appointed head of the Library after a competition. His appointment was extended to 28 January 1988.

In a "periodical report" made on 18 July 1986 in accordance with Regulation 4.18 of WIPO Staff Regulations his supervisor, the Director of the Classifications and Patent Information Division, described as satisfactory the quality and quantity of his work and his conduct. But reports dated 15 April and 8 September 1987 were bad and in September 1987 he was made library research officer instead and warned that his appointment would not be extended. He appealed to the Appeal Board, and the upshot was that he had his appointment extended after all, to 28 January 1989, but still as library research officer.

His next periodical reports, dated 3 August and 15 December 1988, were better and he got another year, to 28 January 1990.

In mid-December 1988 he was moved, still at grade P.2, to the Development Co-operation and External Relations Bureau for Africa as programme officer.

Senior officers of WIPO write reports, called "days", on how they have spent each working day. In March 1987 the African Intellectual Property Organization had been discussing the subject of its future leadership. The complainant's new supervisor, the Director of the Bureau, did not learn that until 13 January 1989, from talking to an African government minister, and he recorded the fact in his report on that day. The complainant spoke of the matter to the Permanent Representative of Cameroon for international organisations in Geneva, who asked him for some written record, and he made over a copy of the Director's "day" for 13 January 1989.

The Permanent Representative saw the Director General on 6 July 1989.

The complainant's periodical report, signed on 28 July 1989 by the Director of the Bureau, was bad. About the quality of his work it said:

"Although he lacks experience in the field of intellectual property, he has not manifested the capacity to develop the necessary skill. Letters he prepares have to be subjected to constant reviews; memoranda do not adequately describe and explore ramifications of their subject matter";

about his output:

"Quantity not sufficient as work performance is slow";

and about his conduct:

"While his relations with colleagues are satisfactory, he has, as concerns his external contacts, exceeded the limits of discretion and has committed a breach of his oath of loyalty to the Organization in disclosing to a highly placed representative of a member State the contents of an internal note prepared by his superior which was of some importance and of a confidential character."

On 31 July he put in comments on that report, pleading that he had seen nothing wrong in sending the "day" to the Permanent Representative.

By a letter of 22 September 1989 the Director General informed him of the intention, after consulting the Joint Advisory Committee, of imposing the sanction of "delayed advancement to the next salary step" under Rule 10.1.1(a)(3) on the grounds of unsatisfactory performance.

By a letter of 25 September the Personnel Division told him that his appointment would expire at 28 January 1990. In a letter of 19 October 1989 to the Director General he made a request under Regulation 11.1 for review of the non-renewal and of his report of 28 July 1989. Having got no answer, he lodged an appeal with the Appeal Board on 15 December 1989, asking for a new report and a permanent appointment.

By a letter of 5 January 1990 the Director General offered him an extension to 30 June 1990 and he accepted it.

The Board reported on 16 March 1990. It recommended no action on the complainant's report, took note of the extension and held that he did not qualify for a permanent appointment.

By a memorandum of 23 March the Director General upheld the report of 28 July 1989 and refused him a permanent appointment. That is the decision he is impugning in his first complaint, filed on 20 June 1990.

The Joint Advisory Committee, after giving him a hearing, reported on 27 March. It took the view that there were grounds for the sanction the Director General had warned him of in the letter of 22 September 1989. By a memorandum of 23 April 1990 the Director General therefore informed him that his next salary step increase was withheld as from 1 April 1990.

Meanwhile, on 26 March, another staff member had written him a letter alleging that the Director General had demanded bad reports on him as a pretext for non-renewal. The Appeal Board was shown that letter and took oral evidence from the author as well as from a Deputy Director General and others. It regarded the letter as a new fact warranting resumption of the proceedings on his appeal. In a supplementary report of 11 May 1990 it said that since the evidence was conflicting it could make no recommendation. The Director General having taken no further decision, the complainant is impugning in his second complaint, filed on 24 August 1990, the rejection of his appeal that he infers under Article VII(3) of the Tribunal's Statute.

On 28 May 1990 his supervisors signed another report. It described the quality and quantity of his work as unsatisfactory and his conduct as satisfactory, though he was "often unavailable". On 1 June he stated his objections in writing.

A memorandum of 5 June from the Director General told him that he would get no extension after 30 June.

On 6 June he made a request under Rule 11.1.1(b)(1) for review of the Director General's decision of 23 April to suspend his step increase and of the decision of 5 June to give him no further extension.

The Director General replied on 22 June confirming both decisions. By a letter of 25 June, supplemented by one of 4 July, he filed an appeal with the Appeal Board objecting to the sanction, to the report of 28 May and to the non-

renewal.

The Board reported on 6 July 1990. It found no grounds for recommending reversal of the sanction or of the decision on non-renewal, and in a memorandum of 13 July the Director General accepted the Board's conclusions and confirmed the decisions of 23 April and 5 June 1990. That is the final express decision the complainant is impugning in his second complaint, besides the implied rejection mentioned above.

B. The complainant alleges that the Permanent Representative had got rid of a butler, a Cameroonian who came from the same village as the complainant, and the Swiss press had made much of the matter. The Permanent Representative wanted revenge and, after inducing the complainant to disclose his supervisor's "day", asked that supervisor to dismiss him for breach of confidence. His supervisor having failed to do so, the Representative saw the Director General and the next day the Director General told his supervisor and a Deputy Director General to issue bad reports about him so that he could be got rid of. His supervisor did not even write the report, since it was in English, a language he does not draft in. The complainant told someone in the Government of Cameroon what was going on and on 10 November 1989 the Permanent Mission wrote to WIPO, apparently to countermand what the Representative had said in July. WIPO tried to dissuade him from appeal by an offer of 50,000, later upped to 60,000, Swiss francs, for an "agreed termination", but he refused because he could not go back to his old job at home. A colleague gave written and oral evidence in his favour to the Appeal Board in mid-March 1990, bearing out his allegations and saying that it was notorious that his supervisor had signed a false report. And on 26 March the other official wrote confirming that the Director General had ordered bad reports about him. That official later gave the Board oral evidence to the same effect. On 11 June 1990, shortly after he got the second bad report, the one of 28 May 1990, his supervisor saw him in private and made a long statement which, to save his livelihood, he secretly recorded and which again confirmed that at the Director General's own bidding his supervisor and the Deputy Director General had endorsed bad reports trumped up for their signature.

The complainant explains how important reports are in an official's career: someone on fixed-term appointments who gets good ones for seven years running becomes entitled to a permanent appointment. Though the Appeal Board took a cautious view, at least it found a conflict of evidence: in other words, some witnesses had been lying. That alone suffices to make the report of 28 July 1989 unlawful: when the facts are not proven the proper inference is that essential facts have been disregarded or the wrong conclusions drawn. It is also plain, on the evidence given by the other two staff members to the Board, that the report was wilfully false and should be set aside for abuse of authority.

Being based on that report, the suspension of the complainant's step increase constituted a gross abuse of authority; besides, his supervisor's "day" was not a confidential text and disclosing it did not warrant the sanction.

The purpose of the extension to 30 June 1990 was to allow just enough time for another bad report and, sure enough, out came the report of 28 May. His supervisor referred in the recorded statement of 11 June 1990 to "the thing in draft" - an obvious allusion to the text put to him for signature.

In taking instructions from a government representative the Director General acted in breach of Regulation 1.4 of the WIPO Staff Regulations ("In the performance of their duties ... staff members shall neither seek nor accept instructions from any government ...") and of the oath of loyalty which he took under Regulation 1.11(b) and which is to the same effect. False reports were made, and officials were incited to bear false witness, so as to back up a decision the Director General had taken for covert political reasons.

The complainant seeks disclosure of notes taken on conversations between the Director General and the Permanent Representative on 6 July, 29 November and 19 December 1989 and of all relevant correspondence between WIPO and the Permanent Mission.

The complainant has lost his job and his residence permit for Switzerland and in the light of the two bad reports is unlikely to find other work. He and his family have suffered, too, from a deep sense of injustice.

In his first complaint, which he filed on 20 June 1990, he asks the Tribunal to set aside the report of 28 July 1989, to grant him three years' salary in moral damages and to award him 20,000 Swiss francs in costs.

In his second complaint, filed on 24 August 1990, he asks the Tribunal to set aside the reports of 28 July 1989 and 28 May 1990 and the Director General's decisions to suspend his salary step increase and not to extend his

appointment, to grant him in damages for material and moral injury the equivalent of five years' salary and allowances as at the date of termination and to award him 20,000 francs in costs.

C. WIPO replies that the first complaint is irreceivable because it was filed outside the time limit of ninety days in Article VII(2) of the Tribunal's Statute.

The second complaint is irreceivable insofar as it challenges the report of 28 July 1989 because the decision of 23 March 1990 confirming it was final and the complaint was not filed until 24 August, again after the ninety days. It would be receivable only if it challenged the other decisions as *ultra vires*, but it does not. It is receivable only insofar as it challenges the report of 28 May 1990 and the decision not to renew the complainant's appointment after 30 June 1990.

WIPO submits that the complainant's record of service was poor. Only four of his reports in over seven years were good whereas the other seven were bad or qualified. His secret recording of what his supervisor said to him on 11 June 1990 was misconduct that would have warranted a sanction had he not been leaving anyway.

As to the report of 28 July 1989, he admits that he disclosed his supervisor's "day" to an outsider. "Days" are given restricted distribution. The text he disclosed recorded a confidential conversation between his supervisor and an African government minister about a delicate political topic. In making it over to the Permanent Representative he acted in breach of Regulation 1.4, and of 1.7, too, which forbids staff to disclose "any information known to them by reason of their official position which has not been made public".

His allegation that the reports of 28 July 1989 and 28 May 1990 were false is an attack on his supervisors' good faith and is unsubstantiated. As his supervisors said to the Appeal Board, they exercised their own judgment. They were not told to write bad reports and he cannot show that his reports would otherwise have been good. There was nothing unusual about writing the report of 28 July 1989 in English and the one of 28 May 1990 in French: French is the complainant's mother tongue and English the Deputy Director General's.

All that the recording shows is that his supervisor believed that the Permanent Representative of Cameroon had prompted the decision not to renew his appointment. But that belief was mistaken, the evidence given by the two officials being mere hearsay. The Director General did not act on instructions from the Permanent Representative. On learning of the disclosure of the memorandum he at once made an inquiry and duly imposed the sanction. The Representative did not want the complainant to go but asked the Director General several times to give him another chance. In view of the complainant's performance it would have been wrong to keep him on. Assessing performance is a matter of discretion, the Tribunal will not ordinarily interfere, and there are no grounds for setting aside the fair assessments the complainant's supervisors made of him.

The Organization submits that the Appeal Board proceedings gave the complainant his full say and the Board's findings were fair and reasonable.

Lastly, WIPO observes that records of conversations with the representative of a member State are confidential and that the Tribunal does not ordinarily order disclosure of such records. The Organization sees no need to produce them or the text of correspondence with the Mission of Cameroon.

It invites the Tribunal to dismiss the claims in both complaints.

D. In his rejoinder the complainant submits that his first complaint is not time-barred and that both complaints are fully receivable *ratione materiae*. He develops his account of the facts, which he submits that WIPO misrepresents in several important respects and contends that its own version is inconsistent. He enlarges on his pleas on the merits with particular reference to the quality of his performance and the reports of 28 July 1989 and 28 May 1990, observing that WIPO has offered no evidence whatever of any shortcoming in the period preceding the earlier of those reports. In fact his work was good and he was even commended for it; at any rate he was given neither written nor oral warning of dissatisfaction with him. WIPO fails to show that his supervisor's "day" contained any information that was not already a matter of public knowledge. He presses his application for the production of written evidence, or at least for their disclosure to the Tribunal, and the claims in both complaints.

E. By a letter of 11 March 1991 the Registrar conveyed to the Organization the Tribunal's instruction that it disclose the notes and the correspondence to which the complainant's counsel had alluded both in a letter of 24 August 1990 to the Registrar and in the rejoinder on the understanding that in the meantime the Tribunal would

treat those texts as confidential and would not pass them on to the complainant or to his counsel. The Organization replied on 21 March 1991 supplying several texts.

CONSIDERATIONS:

Joinder

1. In his first complaint the complainant is impugning a decision which, having considered a report of 16 March 1990 from the Appeal Board, the Director General of WIPO took on 23 March to uphold a bad report dated 28 July 1989 on his performance and to refuse him a permanent appointment.

In his second complaint he is challenging two decisions. One is an implied refusal by the Director General to reconsider his decision of 23 March 1990 on the strength of a supplementary report of 11 May 1990 from the Appeal Board. The Board had met again to hear additional evidence and in that report stated that the evidence was conflicting and that it was making no further recommendations. The other decision impugned is a final one of 13 July 1990 confirming a decision of 23 April 1990 to suspend the complainant's advancement to the next salary step and a decision of 5 June 1990 to grant him no further extension of appointment.

Since both complaints are based on similar issues of fact and raise similar issues of law they may be joined to form the subject of a single judgment.

Receivability of the first complaint

2. The time limit of ninety days, set in Article VII(2) of the Tribunal's Statute, for filing a complaint starts to run from the date of notification of the impugned decision. The decision the first complaint impugns is dated 23 March 1990 and was notified to the complainant the same day.

Article 6(3) of the Rules of Court says that "the date of despatch of the complaint shall alone be taken into account" in applying Article VII(2) of the Statute. According to the date of the postmark on the envelope in which the first complaint was delivered to the Registry of the Tribunal it was posted on 20 June 1990.

Having been filed on the ninetieth day the complaint is receivable under VII(2).

Receivability of the second complaint

3. The Organization does not challenge the receivability of the second complaint insofar as it impugns the express decision of 13 July 1990. It does challenge receivability insofar as the complaint impugns the implied decision of rejection, but its objections are mistaken. Having heard the additional evidence at its further meeting the Appeal Board would have been free to change the recommendation in its report of 16 March 1990 and the Director General would then have had to reconsider his decision of 23 March 1990. But the fact that the Board made no further recommendation and that the Director General took no further express decision does not preclude the complainant from impugning the implied decision that followed the resumption of hearings by the Board on the strength of new evidence. The outcome of the resumed hearings must be subject to review by the Tribunal even though the implied decision is the same in purport as the original decision.

Disclosure of evidence

4. The complainant alleges, among other things, that the Permanent Representative of Cameroon wanted revenge; that, having induced the complainant to disclose his supervisor's daily memorandum, or "day", the Permanent Representative saw his supervisor and asked for his dismissal for breach of confidence; that, not getting what he asked for, the Permanent Representative asked the Director General to have him dismissed; and that the next day the Director General told his supervisor and a Deputy Director General to issue bad reports on his performance in order to get rid of him.

The Organization denies his allegations and says that in fact the Permanent Representative wanted to have him kept on. He seeks production of notes made of talks between the Director General and the Permanent Representative and of any relevant correspondence between them. The Organization objects to such production on the grounds of privilege but not to the Tribunal's seeing the documents and ruling on the plea of privilege. The complainant being in agreement with that course of action, the Tribunal has ordered the Organization to disclose to it the notes and

correspondence.

Having read the documents disclosed the Tribunal upholds the plea of privilege. The correspondence consists of formal letters addressed by the Permanent Representative on behalf of the Government of Cameroon to the Director General and as such should be protected by privilege.

The Organization has disclosed no notes on the meetings. It appears that none were made on the meetings of 6 July and 19 December 1989 and the Organization's legal counsel says he has found no trace of any notes on the meeting of 29 November 1989. So the question of privilege does not arise.

The merits

5. The relief the complainant seeks in his first complaint is the quashing of the unfavourable report dated 28 July 1989 and awards of damages and costs.

The relief he seeks in his second complaint is:

- (a) the quashing of the same report of 28 July 1989 and of another unfavourable one dated 28 May 1990;
- (b) the quashing of the Director General's decision of 13 July 1990 to suspend his advancement in step and grant him no extension of appointment after 30 June 1990;
- (c) awards of damages and costs.

The alleged bad faith and abuse of authority

6. In support of his claims he makes the serious allegations set out in the first paragraph of 4 above and, if true, they would amount to abuse of authority. The Director General denies them. To bear them out the complainant asked the Appeals Board to hear further witnesses at the resumed hearings. The Board heard evidence from former colleagues of the complainant's and from his supervisors but found it conflicting: it merely stated that there was a conflict and did not resolve it. The Board made no further recommendations.

7. A complainant must discharge the burden of proof and satisfy an internal appeal body or the Tribunal that the balance of probability is that his allegations of fact are true. He will fail to discharge that burden if, after weighing all the evidence, the internal body or the Tribunal is unable to come down on his side.

When the Board failed to resolve the conflict in evidence in this case and said it was therefore noting no further recommendations what it meant was that the complainant had failed to prove his case.

The Tribunal has likewise considered all the evidence, including a transcript of a recording the complainant secretly made of a conversation with his supervisor. It finds that he has not discharged the burden of proving his allegations against his supervisors, the Director General and the Permanent Representative and, more particularly, his accusations of bad faith and abuse of authority.

The conclusion is that there is no reason to set aside the Director General's decision of 23 March 1990, or his implied refusal to reconsider it, on those grounds.

The performance reports and suspension of advancement

8. The report dated 28 July 1989 described as unsatisfactory the quality and quantity of the complainant's work and his conduct.

The Tribunal has only a limited power of review in the matter of performance reports. It will not interfere unless the decision impugned has been based on a mistake of fact or of law, or on breach of a rule of form or of procedure, or there has been failure to take account of some essential fact, or it draws obviously incorrect conclusions from the facts or amounts to abuse of authority.

The reason why the complainant was given an unsatisfactory rating for conduct was that, as he does not deny, he had disclosed his superior's "day". That was a clear breach of Regulation 1.7, which reads:

"Staff members shall exercise the utmost discretion in all matters relating to official business. Except in the course of their official duties or with the permission of the Director General, they shall not communicate to any person any information known to them by reason of their official position which has not been made public. ..."

The complainant's excuse that he did not consider the "day" to be confidential is unacceptable.

The unsatisfactory rating of his performance was given by his supervisor. That supervisor was the right person to give it; he told the Appeal Board that he stood by his comments; and the Board accepted that the comments reflected his considered assessment. The complainant has failed to prove that his supervisor acted from any wrong motives or was instructed to issue a false report. The report made a genuine assessment and there are no grounds for setting it aside.

9. The second unfavourable report, the one dated 28 May 1990, also rated the quality and quantity of the complainant's work unsatisfactory.

Again the Tribunal is not satisfied that it was a false report made out on the Director General's instructions. It was made by his supervisor and he puts forward no valid reason for setting it aside.

10. The decision of 13 July 1990 to suspend his advancement in step was based on the unsatisfactory performance reports. It was a sanction which the Director General was entitled to impose, after consulting the Joint Advisory Committee, in the light of those reports and in accordance with Rule 10.1.1(a)(3).

The non-renewal

11. Lastly, the complainant cannot succeed in his claim to the quashing of the decision of 13 July 1990 not to extend his appointment beyond 30 June 1990. The Director General decided on 23 March 1990 not to allow his request for a permanent appointment on the grounds that he failed to meet the condition of seven years' satisfactory service. The complainant therefore has no right to any further extension after 30 June 1990: the Director General had a solid basis for his decision and it must stand.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Tun Mohamed Suffian, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

Mohamed Suffian
Mella Carroll
E. Razafindralambo
A.B. Gardner