

109th Session

Judgment No. 2934

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 2636 filed by Mr B.W. F. against the World Intellectual Property Organization (WIPO) on 11 September 2008 and corrected on 22 December 2008, the Organization's reply of 7 April 2009, corrected on 16 April, the complainant's rejoinder of 15 July, and WIPO's surrejoinder of 20 October, corrected on 26 October 2009;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Facts relevant to this case are set out in Judgment 2636, delivered on 11 July 2007, concerning the complainant's first complaint. Suffice it to recall that the complainant alleged that he had been aggressed and insulted by four staff members in his office on 28 June 2005. The Tribunal remitted to the Director General the complainant's claims with respect to these events for fresh consideration, including, if necessary, by the WIPO Appeal Board.

By a letter of 26 July 2007 the Director of the Human Resources Management Department (HRMD) informed the complainant that, if he was willing to pursue a fresh consideration of the events of 28 June 2005, he should arrange to submit his case to the Appeal Board. If so, the Director General would correspond separately with the Appeal Board to request that it forward a copy of his claims against the staff members who have allegedly harassed him with a view to seeking their comments. He added that his submissions would be treated as an appeal before the Appeal Board and that the usual process set out in Staff Regulation 11.1 would be followed.

The complainant filed an appeal with the Appeal Board on 12 December 2007 asking that it review its report of 25 November 2005 in light of Judgment 2636. He indicated that his appeal was limited to the events of 28 June 2005 and that he would not submit any additional material or legal argument other than those already put forward before the Board in his first appeal.

In December 2007 the Administration requested the Internal Audit and Oversight Division (IAOD) to undertake an investigation into the events of 28 June. In its report of 17 March 2008 the IAOD noted that one of the staff members who had allegedly harassed the complainant was not in Geneva on that date. It found evidence that the complainant presided over the Staff Council during a lengthy and particularly contentious period, and that he suffered severe anxiety and depression; however, his medical condition was not attributed solely to the events that occurred in his office on 28 June. It also held that, although the complainant may have felt aggressed and insulted, subjective feelings alone were insufficient to establish that the single exchange in his office objectively interfered with work. It further considered that the complainant contributed to the tension surrounding the events in question, and, hence it could not be said that the staff members accused of harassment created an intimidating, offensive or hostile work environment. The IAOD concluded that the complainant's allegation of harassment on the part of four staff members was not substantiated.

The Organization, in its reply to the Appeal Board, relied on the IAOD's report to support its contention that the complainant's allegations should be dismissed. In his rejoinder to the Board the complainant contended that the IAOD's investigation was conducted in a neglectful way, was not comprehensive and was biased. Consequently, he asked the Board to recommend that a thorough investigation be conducted in an impartial way.

In its report of 15 May 2008 the Appeal Board recommended dismissing the appeal. It held that there was no evidence to support the complainant's claim that the IAOD's investigation was carried out in a neglectful way or that the report was biased or not comprehensive. It noted that the IAOD had found no evidence that the complainant had been aggressed on 28 June 2005 and that the complainant himself had produced no evidence supporting his allegations.

By letter of 17 June 2008 the Director of HRMD informed the complainant that the Director General, having considered the opinions and recommendation of the Appeal Board, had decided to dismiss his appeal. That is the impugned decision.

B. The complainant contends that WIPO has failed to execute properly Judgment 2636. In his view, the impugned decision is illegal as it is based on the Appeal Board's recommendation, which was adopted in breach of due process of law, and which showed bias against him.

He alleges that the internal appeal process was procedurally flawed because the Chairman of the Appeal Board stated in a letter of 31 January 2008, which was addressed to the Director General, that, having already granted two extensions to the Administration to submit its reply to the Board, he would not consider favourably any further request of extension by either party. According to the complainant, such decision is a clear violation of Staff Rule 11.1.1(e)(6), which provides that "[t]he Appeal Board shall have the discretion to extend the foregoing deadlines in exceptional circumstances".

The complainant contends that the IAOD's report, on which the Appeal Board based its recommendation, was not comprehensive and

that the IAOD showed negligence and bias in conducting its investigation. Indeed, many of the appended documents were irrelevant. The IAOD relied on a report, which, according to the Tribunal's findings in Judgment 2636, was not prepared pursuant to a thorough investigation; consequently, the IAOD was not able to consider the context in which the events of 28 June had occurred. It also failed to take steps to compel a witness to respond to its requests. In addition, the complainant points to contradictions in the report and criticises the finding that his medical condition was not attributed solely to the events that took place on 28 June. He contends that, according to the Tribunal's case law, no conclusive evidence is required in medical cases. He nevertheless indicates that he was put on sick leave for the first time on 14 July 2005 and that three medical certificates attest that he had suffered from mobbing at work. Thus, the causal link between the events of 28 June and his medical condition is established. He further contests the IAOD's finding that it could not objectively be said that the exchange in the complainant's office unreasonably interfered with work.

In addition, he argues that the Appeal Board's recommendation was a mere endorsement of the Administration's position and no regard was given to the arguments put forward by the Director General or by himself. It shows that his case was not properly discussed by the members of the Appeal Board.

The complainant asks the Tribunal to set aside the impugned decision, to refer the case back to the Organization for a "proper procedure to be followed", and to award him moral damages. He also claims costs in the amount of 6,300 euros.

C. In its reply WIPO submits that, according to the Appeal Board's findings, neither the complainant's allegations concerning the investigation nor those concerning harassment were substantiated. In its view, the Director General was therefore fully justified in deciding to dismiss his appeal. The Organization indicates that, although the Appeal Board stated that it would not consider any further request for extension, it did not actually refuse any specific request in that respect and, consequently, did not breach Staff Rule 11.1.1(e)(6). The Board

explained that it did not want to delay unduly the procedure but that it would have examined any specific request for extension.

The Organization argues that the IAOD conducted a thorough and professional investigation and denies any bias or negligence on its part. Consequently, it sees no reason to conduct a new investigation. With regard to the hearing of witnesses, it points out that the complainant has failed to indicate which authority was competent to compel witnesses to give evidence. It adds that if the complainant felt that relevant evidence supporting his case were available, nothing prevented him from attempting to secure this evidence himself.

The defendant indicates that the complainant has not produced contemporaneous medical certificates linking his medical condition to the events of 28 June. The medical certificates submitted by the complainant were issued more than a year after the events in question and the practitioners did not make an assessment of the alleged facts of harassment but simply stated that the condition of the complainant was based on harassment at work as “described” or “reported” by him.

D. In his rejoinder the complainant contends that the IAOD is highly dysfunctional despite an increase in its resources. He refers to a report from the Joint Inspection Unit of the United Nations and to another one from the Audit Committee, according to which the staffing situation in the IAOD and its lack of professionalism was worrying. He is also surprised that the Organization provides, at the present stage, supplementary testimonies of those accused of having aggressed him on 28 June. In his view, if the IAOD’s investigation had been professionally conducted, WIPO would not have had to produce such documents. In addition, he states that his practitioner issued a medical certificate as from his first day of sick leave, i.e. 14 July 2005, and that it was forwarded to the defendant straightaway.

E. In its surrejoinder the Organization indicates that, following the reports to which the complainant refers, additional qualified staff were recruited to work in the IAOD; these persons participated in the investigation concerning the complainant’s claims. It denies that the

IAOD's investigation was unprofessional, explaining that it submitted additional testimonies in the present proceedings because it considered that those accused of harassment should be given the opportunity to defend themselves. It also draws attention to the fact that the IAOD identified potential new witnesses but that these witnesses, who were working in the vicinity of the complainant's office on 28 June 2005, did not notice or remember anything.

CONSIDERATIONS

1. In Judgment 2636 the Tribunal set aside a decision of the Director General to the extent that it referred the complainant's claims with respect to events in his office on 28 June 2005 to the IAOD and remitted the claims for fresh consideration, including, if necessary, by the WIPO Appeal Board. Thereafter, the Director General again referred the claims to the IAOD and, at the Administration's request, the complainant again submitted his claims to the Appeal Board. The Board recommended that the appeal be dismissed in its entirety. The Director General adopted that recommendation and the complainant was so informed by a letter dated 17 June 2008. That is the impugned decision.

2. The complainant contends that Judgment 2636 was not properly executed and seeks to have the case referred back to WIPO for a "proper procedure to be followed", moral damages for "the incorrect execution" of the judgment and costs, including his costs before the Appeal Board. It is not suggested that the Director General was wrong in requesting an investigation by the IAOD, only that it "was conducted in an incomplete and neglectful way". That particular argument must be rejected. The IAOD contacted the complainant and the four persons who, admittedly, went to his office on 28 June 2005 to ask him, in his capacity as President of the Staff Council, when the Council would call an extraordinary general assembly as had been requested by 80 of the Staff Association's members. Not surprisingly, the complainant maintained his earlier claim that three of those four persons had been verbally aggressive and

that one of them had blocked the door to his office and pushed him back when he attempted to leave. Equally unsurprisingly, the four persons concerned maintained that they had not raised their voices and that no one had blocked the doorway of the office or pushed the complainant aside. The IAOD contacted other persons who were working in the vicinity of the complainant's office at the time and, although the other four persons had indicated that there were witnesses to what happened in the corridor after they and the complainant left his office, those other persons were not able to shed any light on the incident. The complainant argues that the IAOD should have compelled evidence from one staff member whom it described as "unwilling to provide evidence" and should have reported his comments with respect to one of the four persons concerned in the incident. However, it has since emerged that it was not strictly accurate to say that that staff member was unwilling to provide evidence and, in any event, he had no recollection of the incident. So far as his other comments are concerned, there is no reason to suppose that they have any relevance to the events in question. Given this, and given also the time that had elapsed, it is impossible to conclude that the investigation was inadequate or negligently conducted. The complainant's argument in that regard is not advanced by his claim that the IAOD is dysfunctional.

3. The IAOD made a number of factual findings, one of which was adverse to the complainant. That finding was that there had been no physical aggression and was based on the complainant's failure to mention any physical aggression in his e-mail to the Director General of 28 June 2005, or to Mr P., who later conducted interviews with the complainant and the four persons who went to his office. However, the IAOD did find that the complainant "*subjectively* considered unwelcome [...] [the] verbal behaviour" of the three persons of whom he complained. It also found that one of those persons stood in or

blocked the door to his office and that that “was, *subjectively*, unwelcome physical behavior”. It also found that the complainant’s office was small and “would have seemed crowded if four people had entered or been near the entrance to the room at once”.

4. It seems that the referral to the IAOD was to investigate the complainant’s claim of harassment by four named staff members, one of whom was not at any stage the subject of his claims with respect to the incident on 28 June 2005. The IAOD concluded, by reference to the relevant definition of “harassment” requiring either that the conduct in question unreasonably interfered with work or created an intimidating, hostile or offensive environment, that the events in his office, although unwelcome, did not constitute harassment. The complainant challenges that conclusion. In relation to the first requirement, the IAOD found that, although the complainant “suffered severe anxiety and depression, his medical condition ha[d] not been attributed solely to the exchange in his office”. Accordingly, it concluded, “[o]n balance” that the exchange did not unreasonably interfere with work. As to the second requirement, it found that the complainant “was quick to respond to [the] appearance [of the four persons]: telling the four not to enter his office, and claiming another engagement to get out of his office and away from them”. Additionally, the IAOD reported that while in the corridor outside his office, the complainant “revealed personal and confidential information about [one of the four persons]” and promptly signalled to the Director General “his feeling of being aggressed, which in turn resulted in his offending [two of the persons concerned]”. It concluded:

“Taken together, this evidence suggests that [the complainant] contributed to the tension surrounding the event in his office. It cannot reasonably be said, then, that the [persons of whose behaviour he complained] created an intimidating, offensive or hostile work environment.”

5. Neither the conclusion that the events in the complainant’s office did not unreasonably interfere with work nor that they did not

create an intimidating, offensive or hostile work environment can stand. The first conclusion is based on the proposition that the complainant's subsequent medical condition had not been attributed solely to the exchange in his office. That is the wrong test. If the events in his office were causally connected to his health problems and they resulted in his absence from work or adversely impacted on his work, then those events interfered with work. As explained in Judgment 1373, all that is necessary is that there is "some fairly definite connection" between the events in question and his health problems.

6. So far as concerns the finding that the events in the complainant's office did not create an intimidating, offensive or hostile work environment, it is sufficient to note that that finding is not justified on the basis of the complainant's quick response. Indeed, he may have reacted as he did simply because the situation was intimidating, particularly if, as seems to be the case, the four persons arrived without an appointment or any announcement and entered or were in the doorway of his small office without invitation. Further, what happened after the complainant left his office is irrelevant to whether the sudden appearance of four persons, who were known to be opposed to the stance taken by him as President of the Staff Council and who, at the very least, were asking to be told the date of the extraordinary general assembly even though they had been informed only a little earlier by a member of the Council that they would be notified of that in writing, created an intimidating, offensive or hostile work environment. And it is completely beside the point that two of the four persons were offended by the complainant's subsequent e-mail to the Director General. The fact that they were offended by that later communication could not possibly have contributed to tension when the four persons earlier went to the complainant's office.

7. It is also argued that the Appeal Board simply endorsed the Administration's position without any regard to the arguments.

Whether or not that is so, there was a fundamental flaw in its approach. So far as concerns the substance of the complainant's claim, the Board made three findings:

- “The Board could not find any evidence produced by the [complainant] in support of his claim of verbal and physical aggression on June 28, 2005.”
- “The Board noted that the Report of IAOD had found no evidence supporting the [complainant's] allegations.”
- “The [complainant] did not produce any evidence supporting his allegations concerning the events of June 28, 2005.”

It is simply incorrect to say that the complainant did not produce any evidence of the events in question. He provided his version of those events; it was not disputed that the four persons, who held views opposed to the complainant's, went to his office and, at the very least, asked when the extraordinary general assembly would be held even though, only a little earlier, they had been informed by a member of the Staff Council that they would be notified of that in writing. Further, there was evidence of early complaint to the Director General. It is equally incorrect to say that the IAOD found no evidence supporting the complainant's allegations. It found that the verbal behaviour of three of the four persons who went to his office was unwelcome, that one of them stood in or had blocked the door and that that was unwelcome behaviour. It also found that his office was small and “would have seemed crowded” with four people in it or near its entrance.

8. Additionally, the Appeal Board made no analysis of the basis on which the IAOD found that there was no harassment. In the light of the appeal before it, the Board had a duty to do so. Moreover, it failed to consider the question specifically adverted to in Judgment 2636, namely, whether, in the light of its knowledge as to the strong feelings that existed between the protagonists with respect to the affairs of the Staff Council, WIPO failed to ensure that the complainant was not subjected to intimidation, offensive behaviour or

aggression. That, it may be added, is not the same question as whether the three persons in respect of whose conduct complaint was made were guilty of harassment.

9. The complainant raises other matters with a view to establishing bias on the part of the IAOD and the Appeal Board and/or want of due process. It is sufficient to state that those matters neither establish bias nor add to the relief that might be granted. As the Director General's decision was based on the IAOD's report, which was flawed in the respects already indicated, and on the recommendation of the Appeal Board, which failed to analyse that report or to address the question identified in Judgment 2636, that decision must be set aside. The complainant's claims will be remitted to the Director General for a new decision, if necessary, after proper proceedings before a differently constituted Appeal Board. The complainant is entitled to moral damages in the amount of 10,000 Swiss francs in respect of the failure to ensure that his claim was properly considered. He is also entitled to costs in the amount of 7,500 francs for these and the proceedings before the Appeal Board.

DECISION

For the above reasons,

1. The Director General's decision of 17 June 2008 is set aside.
2. The matter is remitted to the Director General for a new decision, if necessary, after proper proceedings before a differently constituted Appeal Board.
3. WIPO shall pay the complainant moral damages in the amount of 10,000 Swiss francs.
4. It shall also pay him costs in the amount of 7,500 francs.

In witness of this judgment, adopted on 14 May 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet