Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

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

**110th Session** **Judgment No. 2962**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C.-A. M. against the World Intellectual Property Organization (WIPO) on 12 December 2008 and corrected on 26 January 2009, the Organization's reply of 16 July, the complainant's rejoinder of 19 October 2009 and WIPO's surrejoinder of 19 January 2010;

Considering Articles II, paragraph 5, and VII 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. The complainant, a French national born in 1965, was recruited in 2002 as Senior E-Mail Administrator in the IT Infrastructure Section of the IT Services Division of WIPO.

On 4 January 2007 he lodged a complaint of harassment with the WIPO Joint Grievance Panel against Mr W., his supervisor, and two other staff members in his division. The Internal Audit and Oversight Division of WIPO, which had been instructed by the Panel to

investigate this complaint, issued its report on 25 September 2007. After the investigation, the parties to the proceedings spontaneously submitted some observations to the Panel. In its report to the Director General of 11 February 2008 the Panel stated that, in its opinion, the report of 25 September 2007 presented a fair and balanced view of the matters relating to the grievance. It found that Mr W. had demonstrated personal bias against the complainant which amounted to harassment, that Mr W. had failed to establish a proper working relationship between the unit to which the two above-mentioned staff members belonged and that in which the complainant worked, to the latter's detriment, that Mr W. had made no attempt to resolve the workplace difficulties affecting the complainant and that a general atmosphere of conflict prevailed in the parties' workplace. On the other hand, the Panel rejected as unfounded the complainant's allegations against the two other staff members in question. It recommended that Mr W. should receive a verbal reprimand and coaching to improve his ability to resolve workplace difficulties, that all the parties should be provided with separate and common coaching sessions and that all written submissions and recordings of interviews conducted during the investigation carried out by the Internal Audit and Oversight Division should be made available on request to each of the parties.

In March 2008 the Director General asked the Panel to obtain each party's comments on the observations that had been submitted before it issued its report and to provide him with a supplementary report saying whether such comments led it to reconsider any of its conclusions and recommendations, or whether it maintained them. In its supplementary report of 31 July 2008 the Panel maintained its initial conclusions and recommendations.

In the meantime, by a memorandum of 21 April 2008 the complainant had asked the Director General to impose an "exemplary sanction" on Mr W. and not merely a verbal reprimand. He also criticised the length of time taken to process his complaint and the fact that he had not been afforded sufficient protection. Noting that no decision had been adopted in response to this memorandum, on 21 July the complainant asked the Director General to review

the "implied rejection" of his request concerning the Panel's recommendations. The complainant was advised on 28 August that his requests of 21 April and 21 July 2008 were premature, since they predated the Panel's supplementary report, and that he would be duly informed of the Director General's decision.

A new Director General took office on 1 October 2008. By a memorandum of 30 October the complainant asked him to reconsider what he deemed to be the former Director General's implied rejection of his complaint of harassment. He also notified him that he intended to file a complaint with the Tribunal so as not to forfeit his right of appeal. The complainant was told by a letter of 9 December that the Panel's recommendations were under consideration and that he would be advised in due course of the decision taken. On 12 December 2008 he filed his complaint with the Tribunal, impugning the implied rejection of his request for review of 21 July 2008.

Having been told by a letter of 13 March 2009 that the Director General had decided to approve some of the Panel's recommendations, the complainant informed WIPO that he was prepared to withdraw his complaint, provided that he received satisfactory compensation for the moral and professional injury he had suffered. He was advised by letter of 1 May 2009 that, since the Organization considered his complaint to be premature, there was no reason to contemplate any conditions for its withdrawal.

While the complaint of harassment was being examined, a "Command Team", including Mr W., was instructed in February 2008 to look into some incidents related to WIPO's IT security. After this inquiry the complainant learned from a letter of 4 September 2008 that preliminary information indicated that he had committed serious misconduct and that he would be immediately suspended from duty, with pay, until WIPO's Internal Audit and Oversight Division had completed its investigation of the charges against him. The same measure was adopted with regard to two of his colleagues. On 4 February 2009 the complainant lodged an appeal with the Appeal Board against the decision to suspend him from duty. In a report of 22 May the Board found that the suspension decision had been taken in

accordance with the applicable rules. The complainant was informed by letter of 6 July 2009 that the Director General had decided to adopt the recommendations of the Appeal Board and that his appeal was rejected. On 5 October 2009 the complainant filed a second complaint with the Tribunal in which he challenges his suspension.

B. The complainant submits that, since the Administration has failed to take a decision on his request for review of 21 July 2008, he considers that this request has been rejected by an implied decision against which he may file a complaint under Article VII, paragraph 3, of the Statute of the Tribunal. In support of this view, he contends that the Organization described this request as premature but did not question its validity, that by the date of filing the complaint the Director General had not taken action on the Panel's initial or supplementary reports and, lastly, that the Administration's letter of 9 December 2008 provided no new information and cannot therefore be deemed to be a new decision. In his opinion, since the Appeal Board is not competent to deal with allegations of harassment, he has exhausted all the internal means of redress available to him, because the Director General is the final authority competent to take a decision on the Panel's recommendations.

On the merits, the complainant states that WIPO has breached its duty of care in the way his complaint of harassment was handled, as well as its duty to protect a staff member who is a victim of harassment.

He submits that the Command Team's inquiry ordered by Mr W. constituted a retaliatory measure against him and that his suspension from duty is a disguised disciplinary measure. In addition, he holds that WIPO's decision of July 2008 to outsource its e-mail system constitutes further retaliation against him.

The complainant seeks the "immediate implementation of the [Panel's] conclusions"; suitable protective measures in order that he may continue his work in optimum security conditions; the quashing of the decision to suspend him from duty; the setting aside of the

"investigation by the Audit Division" because it is procedurally flawed, a misuse of authority and retaliatory; financial compensation for moral and professional injury; and the reimbursement of medical expenses incurred since the beginning of the harassment which have not been defrayed by WIPO's medical insurance and of the costs of legal representation.

C. In its reply the Organization states that the complainant's claims are irreceivable because he has not exhausted internal means of redress. It explains that when the complaint was filed, none of these claims had formed the subject of an appeal to the Appeal Board and none of them had therefore given rise to a recommendation from the Board, or a decision by the Director General, as required by Chapter XI of the Staff Regulations and Staff Rules of WIPO and Article VII, paragraph 1, of the Statute of the Tribunal. The Organization denies the complainant's contention that there has been an implied rejection of the Panel's recommendations and it underlines that, on the contrary, the Director General adopted most of these recommendations, but the complainant did not appeal against the decision of 13 March 2009, either by submitting a request for review to the Director General, or by lodging an appeal with the Appeal Board. If the Tribunal were to find that there was indeed an implied rejection, the defendant holds that the complainant did not initiate any proceedings before the Appeal Board after the exchange of memoranda of 21 July and 28 August 2008 and that he has not therefore exhausted the internal means of redress available to him.

The Organization asks the Tribunal to "delete" from the complaint inter alia all mention of the decision to outsource its e-mail system since, in its opinion, this matter is not relevant to the case and has no bearing on the claim seeking the implementation of the Panel's recommendations, or on the decision to suspend the complainant from his duties. It makes the same request with reference to matters related to the complainant's suspension and the subsequent investigation carried out by the Internal Audit and Oversight Division, since they have been examined by the Appeal Board and have formed the subject of an administrative decision of 6 July 2009.

On the merits, WIPO argues that most of the Panel's recommendations have been approved and implemented and that, as far as the others are concerned, the complainant cannot require the Organization to give effect to a Panel recommendation which the Director General has not approved.

It further submits that there is no connection between the lodging of the complaint of harassment and the complainant's suspension from duty, and it emphasises that the decision to outsource its e-mail system was purely administrative and was taken for practical reasons in the Organization's interests. With regard to the inquiry conducted by the Command Team, it explains that Mr W. withdrew from the team of investigators at the very beginning of the inquiry on account of proceedings against him before the Joint Grievance Panel.

D. In his rejoinder the complainant reiterates his submissions as to the receivability and merits of his complaint.

He adds that he still has a cause of action, first, because not all of the Panel's recommendations have been adopted by the Director General and, second, because the sanction imposed on Mr W. was not in proportion with the real extent of the harassment and its consequences. He asks the Tribunal to assess the proportionality of this sanction.

E. In its surrejoinder WIPO maintains its position. It states that, in accordance with a well-established principle, a staff member may not challenge the proportionality of a sanction applied to another staff member. It contends, however, that the sanction imposed on Mr W. took account of the complexity of the case and the fact that all the parties had contributed to the worsening atmosphere at the workplace.

It further states that there is no connection between the Command Team's inquiry and the publication of the Joint Grievance Panel's report in February 2008.

## CONSIDERATIONS

1. On 4 January 2007 the complainant, who was working as Senior E-Mail Administrator at WIPO, lodged a complaint of harassment against his supervisor and two other staff members of the division to which he was assigned.

2. In September 2007 WIPO's Internal Audit and Oversight Division investigated the complainant's allegations of harassment.

The Joint Grievance Panel concluded on 11 February 2008 that the complainant had been harassed by his supervisor and recommended, inter alia, that the latter should receive a verbal reprimand.

In March the Director General of the Organization asked the Panel to give the complainant and the staff members targeted by his allegations an opportunity to comment on the observations they had submitted before it had issued its report and to produce a supplementary report.

3. On 21 April 2008 the complainant requested that a harsher sanction be imposed on his supervisor than that recommended by the Panel. He contended that the harassment was continuing in different ways, including through the outsourcing of the e-mail system of which he was in charge.

As he received no reply, on 21 July 2008 he asked the Director General to review the "implied rejection" of his request concerning the Panel's recommendations, not only on the grounds set out in his initial grievance, but also because the harassment had continued since May in the form of an "IT security" procedure to which he and six of his colleagues were being subjected.

4. In its supplementary report of 31 July 2008 the Panel maintained the conclusions and recommendations contained in its report of 11 February 2008. On 28 August the Director of the Human

Resources Management Department informed the complainant that his requests of 21 April and 21 July were premature, since they predated the Panel's supplementary report. He added that the Panel's conclusions would be studied by the Director General and that the complainant would then be informed of the final decision on his harassment complaint.

5. On 4 September 2008 the complainant and two other colleagues from his section were suspended in connection with different proceedings.

6. On 30 October 2008 he sent the new Director General of the Organization a memorandum seeking a review of the implied rejection of his complaint of harassment. He wrote the following:

> "On 31 July 2008 the [Panel] maintained its conclusions and submitted them to the Director General.
>
> By 15 September 2008 the Director General had not formulated any decision. This must be interpreted as an implied rejection.
>
> As despite numerous calls for prompt processing from me and even the [Panel], […] no final decision was taken by your predecessor, I am obliged to adopt two parallel lines of action:
>
> - I ask you kindly to review your predecessor's implied rejection.
> - I am going to forward the file internally and to the Administrative Tribunal [of the International Labour Organization] so as not to forfeit my rights of defence.
>
> Obviously, if you were to accept the [Panel's] findings in my favour, I would reconsider my position regarding my complaint to the [Tribunal]."

The Director of the Human Resources Management Department replied to the complainant by a letter of 9 December 2008 that the recommendations of the Joint Grievance Panel concerning his grievance were "under consideration", that a decision would be made and that he would be "advised accordingly in due course".

7. In the circumstances, the complainant filed a complaint with the Registry of the Tribunal on 12 December 2008 in order, as he says, to impugn the implied rejection of his request for review of 21 July 2008.

8. He submitted an appeal against his suspension to the Organization's Appeal Board on 4 February 2009. The Board's conclusions and recommendations contained in a report of 22 May were forwarded to the Director General on 5 June. The complainant was informed of the final decision on that appeal by letter of 6 July 2009.

9. On 13 March 2009 the acting Director of the Human Resources Management Department notified the complainant of the Director General's final decision concerning the complaint of harassment which he had filed on 4 January 2007.

10. The Organization asks the Tribunal to "delete" certain passages from the complaint, as in its view they have no bearing on this dispute. The Tribunal will not grant this request, because complainants are free to present any argument that they consider relevant to their case, provided that they do not use terms or a tone overstepping the bounds of what is permissible in judicial proceedings.

11. The defendant disputes the receivability of the complaint on the grounds that the complainant did not exhaust internal means of redress before filing his complaint with the Tribunal as required by the provisions of Article VII, paragraph 1, of its Statute. It emphasises that on 21 July 2008 the complainant first submitted a request for review of what he deemed to be an implied rejection of his request concerning the Panel's recommendations and that, in doing so, he relied in particular on Staff Rule 11.1.1(b)(1), but that he did not submit an appeal to the Appeal Board. Then, having received a written reply on 28 August 2008 from the Director of the Human Resources Management Department, which referred specifically to his request for review, the complainant again failed to submit an appeal to the Appeal Board against this reply as required by the provisions of Chapter XI of the Staff Regulations and Staff Rules.

The Organization argues that, if the Tribunal were to find that there was an implied rejection of the Panel's recommendations, as the complainant alleges, he did not initiate any proceedings before the

Appeal Board, as he should have done after the exchange of memoranda of 21 July and 28 August 2008.

At all events it denies that there was any implied rejection, because the Director General ultimately adopted most of the Panel's recommendations in his decision of 13 March 2009.

It adds that, as far the complainant's suspension is concerned, the complaint is also irreceivable because it was filed in December 2008, whereas he did not refer the matter to the Appeal Board until February 2009. He had not therefore exhausted internal means of redress.

12. The complainant endeavours to counter the defendant's objection to receivability by arguing in substance that he is impugning before the Tribunal the implied rejection of his request for review of 21 July 2008, after having made reasonable efforts to exhaust all internal means of redress. He explains that he first turned to the Joint Grievance Panel which, in his opinion, has sole competence to make recommendations concerning complaints of harassment since, according to the provisions of Chapter XI of the Staff Regulations and Staff Rules, the Appeal Board is competent to deal only with appeals against administrative decisions. He therefore considers that a decision taken in a case concerning harassment may be challenged directly before the Tribunal without first lodging an appeal with the internal appeal body, as occurred in the case giving rise to Judgment 2642. He consequently submits that he was right to appeal directly to the Tribunal against the implied rejection of his complaint of harassment, under Article VII, paragraph 3, of the Statute of the Tribunal, because the Director General, to whom a request for review had been submitted, had not taken any decision within sixty days.

13. The Tribunal does not share the complainant's opinion that the Panel has sole competence to deal with allegations of harassment and that a decision in a case concerning harassment is not an administrative decision within the meaning of Chapter XI of the Staff Regulations and Staff Rules.

Like a disciplinary board, the WIPO Joint Grievance Panel may do no more than make recommendations for consideration by the appointing authority, which may decide to follow or depart from them. It is this decision which in all cases constitutes the administrative decision that may be challenged in accordance with the procedure laid down by each organisation.

At the material time, the relevant provisions of the Staff Regulations and Staff Rules read as follows:

"**Regulation 11.1**

Internal Appeal

The Director General shall establish an administrative body with staff participation to advise him whenever a staff member appeals against an administrative decision alleging the non-observance of his terms of appointment, in particular any pertinent provisions of the Staff Regulations and Staff Rules, or against disciplinary action.

Rule 11.1.1 – Appeal Board

(a) The administrative body provided for in Regulation 11.1 shall be an Appeal Board.

(b) (1) A staff member who, pursuant to Regulation 11.1, wishes to appeal against an administrative decision, shall as a first step address a letter to the Director General requesting that the administrative decision be reviewed. Such a letter must be sent within six weeks of the date on which the staff member received written notification of the decision.

(2) If the staff member wishes to appeal against the answer received from the Director General, he shall submit his appeal in writing to the Chairman of the Appeal Board within three months from the date of receipt of the answer. If within six weeks of sending his letter to the Director General the staff member has not received the latter's answer, he shall, within the following six weeks, submit his appeal in writing to the Chairman of the Appeal Board.

(3) An appeal which is not made within the time limits specified above shall not be receivable; the Board may however waive the time limits in exceptional circumstances.

(c) The opinions and recommendations of the Appeal Board shall be advisory in character. The Director General shall give them his full consideration when taking his decision on cases where an appeal has been made."

According to firm precedent, every international civil servant may be expected to know the rules and regulations to which he is subject. It is clear from the submissions that in the instant case the complainant was not in the least unfamiliar with these texts and that he knew which procedure to follow in order to challenge an express or implicit administrative decision.

Indeed, in his request for review of 21 July 2008 he cited Staff Rule 11.1.1(b)(1) and in his memorandum of 30 October 2008 he was at pains to inform the new Director General that he was going to "forward the file internally" and to the Tribunal "so as not to forfeit [his] rights of defence".

14. The Tribunal concludes from the foregoing that the complainant should have lodged an appeal with the Appeal Board within the prescribed time limit.

The case law established in Judgment 2642 is not relevant here, because in that case the Tribunal does not have to rule on the issue of whether the complaint, which was directed against a decision of the Director General of the organisation in question to approve the conclusions of the Grievance Panel and to close the case, was receivable.

15. Article VII, paragraph 1, of the Statute of the Tribunal states that "[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". The only exceptions allowed under the Tribunal's case law to this requirement that internal means of redress must have been exhausted are cases where staff regulations provide that decisions taken by the executive head of an organisation are not subject to the internal appeal procedure, where there is an inordinate and inexcusable delay in the internal appeal procedure, where for specific reasons connected with the personal status of the complainant he or she does not have access to the internal appeal body or, lastly, where the parties have mutually agreed to forgo this requirement that internal means of

redress must have been exhausted (see, for example, Judgment 2912, under 6, and the case law cited therein).

16. In the instant case, the complainant filed a complaint directly with the Tribunal without any of these conditions being met, since the argument that the Panel has sole competence is incorrect, as was demonstrated above.

17. The complainant may not rely on Article VII, paragraph 3, of the Statute of the Tribunal because, as he did not refer the matter to the Appeal Board, there was no implied decision to dismiss an internal appeal.

18. It follows from the foregoing that the complaint is irreceivable for failure to exhaust internal means of redress and must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 2010, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet