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

111th Session **Judgment No. 3037**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. R. against the World Intellectual Property Organization (WIPO) on 8 September 2009 and corrected on 6 October 2009, the Organization's reply of 13 January 2010, the complainant's rejoinder filed with the Registry on 15 March and the letter of 30 March 2010 by which WIPO informed the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

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 1963, was recruited by WIPO in May 1994 as a computer technician at grade G6. After some incidents related to the security of WIPO's information technology (IT) systems, a Command Team was set up in February 2008. In April a copy was made of the hard disks of several computers assigned to some staff members who were entitled to have privileged

access to certain systems. They included the computer assigned to the complainant, who was by then a Senior Network Technician, at grade G7, in the Network Services Section. The Information Security Section, which had been instructed to carry out an initial analysis of the data seized on the complainant's computer, issued its report on 2 September. On 4 September the complainant received a letter from the Director of the Human Resources Management Department in which the latter informed him that "preliminary information" indicated that he had committed serious misconduct; on the one hand, he had accessed pornographic internet sites and had stored pornographic images and videos on the hard disk of the computer assigned to him and, on the other, he had held an unauthorised access card to the Organization's premises which had been used between November 2007 and February 2008. Consequently, pursuant to Staff Rule 10.1.2[*], the complainant was immediately suspended from duty, with pay, and banned from entering WIPO's premises without prior clearance, until the 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 working in his section, although different charges were levelled at each of them (see Judgments 3035 and 3036, also delivered this day).

On 9 October 2008 the complainant wrote to the Director General to request the cancellation of the decision to suspend him from duty. The Director General replied on 29 October that he confirmed the reasons for the suspension and that he did not intend to interfere in the ongoing investigation. On 1 December 2008, acting through his legal counsel, the complainant asked the Director General to end the investigation forthwith. This request was denied. He then referred the matter to the Appeal Board. In its report of 22 May 2009 the Board recommended that the Director General review the decision

[*] This provision reads as follows: "When a charge of serious misconduct is made against a staff member and if the Director General considers that the charge is well founded and that the staff member's continuance in office pending the results of an investigation might be prejudicial to the service, the Director General may suspend that staff member from duty, with or without pay, until the end of the investigation, without prejudice to his rights."

of 4 September 2008 "in the light of the requirements of Staff Rule 10.1.2." It also recommended inter alia that the conclusion of the investigation should be given high priority and that consideration should be given to replacing the suspension by an arrangement which would allow the complainant to return to work on the Organization's premises, or to work from home. The complainant was advised by a letter of 6 July 2009, which constitutes the impugned decision, that the Director General had decided to adopt the Board's recommendations, insofar as they had not become moot, but that, for the reasons stated in the Organization's submissions before the Board, a resumption of his duties could not be accepted at that stage "for operational and security reasons".

In the meantime, on 6 April 2009, the Internal Audit and Oversight Division had issued its report, in which it concluded that there was insufficient evidence to substantiate the second charge against the complainant, but that this was not the case for the first charge. It also explained that the investigation had shown that the complainant had also infringed a number of rules, policies and procedures. The complainant, who submitted his comments on 25 May, was informed by a letter of 9 September 2009 that the Director General was going to initiate disciplinary proceedings against him.

B. The complainant contends that the decision to suspend him from duty is out of proportion to the charges against him. He submits that this decision had no legal foundation. First, he considers that, before suspending a staff member, it must be established that that person has committed serious misconduct. In the instant case, not only has the Organization abandoned the charge that he possessed an unauthorised access card, but it has been unable to prove that the charge that he stored pornographic images and videos on his computer is well founded. In his view, the condition that suspension should be resorted to only in situations of urgency has not been respected, because it would have been quite feasible to allow him to continue work during the investigation, whilst blocking part of his privileged access. Lastly the complainant argues that, since he has been

suspended from duty for a year, the "principle established" by the above-mentioned Staff Rule, in other words that suspension is essentially temporary, has been breached and that this situation is indicative of prejudice against him. In this connection he draws attention to the fact that in Judgment 2698 the Tribunal found that WIPO had prolonged a temporary measure, without any valid grounds, beyond the reasonable limit accepted by the case law.

The complainant asserts that, although on several occasions he drew the Administration's attention to what he deemed to be flaws in the procedure leading to the decision to suspend him from duty, the Administration did not react, or even demonstrated bad faith, and he provides several examples to support this view. He says that he was not warned that data were to be seized in April 2008, that he was not present when this exercise took place and that the copies of the images on his computer were not placed under seal. Referring to the fact that Mr W., who headed the Command Team, had been found guilty of harassing one of his colleagues and had roundly condemned the "unacceptable" behaviour of staff in the Network Services Section, he denounces a misuse of authority and a major conflict of interests. He points out that, according to the applicable procedure, copies should have been made by a technical team, but that in order to seize the data, Mr W. appointed only one staff member from the Information Security Section, whose impartiality seems doubtful.

The complainant considers that the Appeal Board's deliberations were flawed.

He further submits that, by refusing to introduce an arrangement allowing him to return to work on the Organization's premises, the Director General deliberately departed from the Appeal Board's recommendations, and that by merely referring to the reasons set out in the Organization's submissions to the Board, the Director General did not adequately state the grounds for this decision.

Lastly, he alleges that he has been the victim of discrimination and moral harassment. He complains that on 4 September 2008 he experienced humiliating and "brutal expulsion" which has caused health problems. In his opinion, the ban on his entering WIPO

premises causes him injury. He points out that the periodical reports on his performance have always been highly satisfactory, but that the report which he was given in July 2008 contains the assessment "satisfactory, with reservations due to the investigation".

The complainant requests the setting aside of the decisions of 4 September 2008 and 6 July 2009, his immediate reinstatement, an award of damages for the moral and professional injuries he has suffered and reimbursement of all his "legal and medical expenses".

C. In its reply WIPO states that the terms of Staff Rule 10.1.2 have been respected. It explains that while urgency is not really a prerequisite for ordering the suspension of a staff member, two other conditions must be met. First, the staff member must have been "charged with serious misconduct". At that stage there is no need to prove the veracity of the charge, because the very purpose of the investigation following the adoption of the said measure is to establish whether the charge is well founded. Secondly, the person's continuance in office must be "prejudicial to the service". In that respect, WIPO asserts that the complainant was potentially capable of "damaging all or part of WIPO's IT infrastructure" and that it would have been illogical not to suspend him from duty. It states that in order to assess whether a suspension is justified, the Tribunal must examine only whether, at the time when the measure was adopted, there was sufficient evidence for the Director General to deem the charges well founded. In its opinion, in this case there were strong indications that this was so. By accessing pornographic internet sites and downloading pornographic images and videos, the complainant had exposed the Organization to "excessive risks", since the sites in question are the largest vectors for computer viruses, which can sometimes infect entire internal networks and seriously damage them. In addition, it was presumed that the complainant had circumvented the rules on filtering access to the internet.

Citing Judgment 2698, WIPO recalls that suspension is a discretionary measure which can be reviewed by the Tribunal only on limited grounds. It explains that the length of the suspension and the validity of the measure are two separate questions and that the former

cannot therefore constitute grounds for cancelling the measure. It regrets that it proved necessary to suspend the complainant for so long, but observes that, in view of the circumstances, the length of his suspension should not be deemed excessive. The investigation carried out by the Internal Audit and Oversight Division concerned extremely complex IT issues and "vast quantities of data, whose analysis was particularly lengthy and especially intricate because the misconduct had apparently been committed by an expert".

In addition, the Organization emphasises that the complainant's argument concerning the Administration's alleged failure to react and bad faith is plainly inapposite. Since the hard disks of a number of computers, including that of the complainant, had been copied at a time when it was presumed that hacking was taking place, it considers that it was perfectly legitimate to engage in this exercise without warning the persons concerned, in order to prevent them from deleting any compromising items. It explains that the operation was carried out in the presence of several staff members and that every precaution was taken to safeguard the integrity of the data seized. In its opinion the complainant has not proved that his allegations regarding a conflict of interest and misuse of authority are well founded. In this respect, it adds that Mr W. withdrew from the Command Team in April 2008.

WIPO states that it would have been pointless to forward the documents mentioned by the complainant to the Appeal Board, because they could not have called into question the decision to suspend him from duty, since they postdated 4 September 2008.

The Organization draws the Tribunal's attention to the fact that the Appeal Board did not recommend that the Director General should introduce arrangements allowing the complainant to return to work; it simply recommended that consideration should be given to replacing the suspension measure with such arrangements, a recommendation which was adopted. It maintains that it is clear from the letter of 6 July 2009 that this measure was kept in place in order to contain risks related to the security of its IT systems. It also points out that, according to the Tribunal's case law, it is permissible for a final

decision simply to refer to the reasons provided in the internal appeal proceedings, of which the person concerned is necessarily aware.

WIPO denies the allegations of brutal and humiliating treatment. It considers on the contrary that the suspension was "applied in a dignified and professional manner", as the complainant "cooperated fully the whole time". With reference to the argument regarding the ban on entering its premises, it states that such access is possible since it is subject to prior clearance. The complainant is simply forbidden to discuss the investigation with his colleagues. Lastly, it comments that, in deciding to suspend the complainant from duty, with pay, although it could have suspended him without pay, it adopted the least harmful of the possible measures.

D. In his rejoinder the complainant presses his pleas. He states that, even though Mr W. withdrew from the Command Team in April 2008, his "blatant prejudice affected the whole process". He denounces the "inordinate" length of his suspension, namely 18 months, and lists the adverse consequences entailed by his "sidelining" at the Organization.

He also requests that "appropriate measures" be taken "with respect to his periodic reports [for] 2008 and 2009", and an award of exemplary damages "for all the treatment he has suffered".

CONSIDERATIONS

1. The complainant joined WIPO in May 1994. At the material time he was a Senior Network Technician at grade G7 in the Organization's Network Services Section.

2. Certain facts relevant to this case are set out in Judgment 2962, and Judgments 3035 and 3036, also delivered this day, relate to similar situations.

Suffice it to recall that the complainant was informed by a letter of 4 September 2008 that he was suspended from duty, with pay, pursuant to Staff Rule 10.1.2 which reads as follows:

> "When a charge of serious misconduct is made against a staff member and if the Director General considers that the charge is well founded and that the staff member's continuance in office pending the results of an investigation might be prejudicial to the service, the Director General may suspend that staff member from duty, with or without pay, until the end of the investigation, without prejudice to his rights."

3. The complainant's suspension was based on two charges of serious misconduct, namely that he had accessed pornographic internet sites and stored pornographic images and videos on the hard disk of the computer which had been assigned to him, and that he had held an unauthorised access card to the Organization's premises which had been used between November 2007 and February 2008.

The letter of 4 September 2008 also explained that these charges would be investigated by the Internal Audit and Oversight Division, that the complainant's suspension would take effect immediately, that he had to return all the equipment allocated to him for work purposes and that as long as the suspension measure remained in place he was not authorised to use the Organization's equipment or other resources, or to enter its premises without prior clearance.

4. On 9 October 2008 the complainant asked the Director General to cancel the decision of 4 September. On 29 October the Director General confirmed the reasons for his suspension and advised him that he did not intend to "interfere" in the ongoing investigation.

On 1 December 2008, in a letter to the Director General, the complainant's legal counsel denounced flaws in the suspension procedure and demanded the immediate termination of the suspension and the "unlawful administrative investigation". As he received a negative reply, on 20 January 2009 the complainant lodged an appeal with the Appeal Board in which he asked it to recommend that the Director General cancel his suspension and order his immediate reinstatement within the Organization.

5. In its report of 22 May 2009 the Appeal Board recommended that the Director General should "review the decision

of 4 September 2008 […] in the light of the requirements of Staff Rule 10.1.2". Without prejudice to the Director General's decision on the matter, the Board also recommended that "concrete steps should be taken to limit the duration of the suspension in so far as possible", that the conclusion of the investigation should be given high priority and that consideration should be given to replacing the suspension by an arrangement which would allow the complainant "to return to work and to perform duties or to be found appropriate tasks for working at home, considering his qualifications and grade, in a position which could not threaten IT security" at WIPO.

6. On 6 July 2009 the Director General notified the complainant that, having reviewed the decision of 4 September 2008 in the light of the requirements of Staff Rule 10.1.2, he confirmed that his suspension was based on a charge of serious misconduct and that his continuance in office might have been prejudicial to the service. He also advised the complainant that a resumption of his duties could not be accepted at that stage "for operational and security reasons". That is the decision that he impugns before the Tribunal.

7. The complainant seeks the setting aside of the decisions of 6 July 2008 and 4 September 2008, his immediate reinstatement, an award of damages as compensation for the moral and professional injury which he has suffered and the reimbursement of all his "legal and medical expenses".

8. The Organization submits that the complainant's claims are groundless and that the complaint should be dismissed in its entirety.

9. According to the Tribunal's case law, suspension is an interim measure which need not necessarily be followed by a substantive decision to impose a disciplinary sanction (see Judgments 1927, under 5, and 2365, under 4(a)). Nevertheless, since it imposes a constraint on the staff member, suspension must be legally founded, justified by the requirements of the organisation and in accordance

with the principle of proportionality. A measure of suspension will not be ordered except in cases of serious misconduct. Such a decision lies at the discretion of the Director General. It can therefore be reviewed by the Tribunal only on limited grounds and will be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the evidence (see Judgment 2698, under 9, and the case law cited therein).

10. The complainant's principal contention is that the decision of 4 September 2008 had no legal foundation and was not justified by any urgency, or by the potential seriousness of the charges against him. He also submits that the decision of 6 July 2009, by which the Director General maintained the decision well beyond the reasonable limit accepted by the case law, is unlawful, particularly because it rests on a biased investigation.

Subsidiarily, he enters pleas related to his brutal expulsion from the Organization's premises and to the subsequent ban on entering them.

11. The complainant first asserts that the suspension ordered on 4 September 2008 was unlawful, because the conditions regarding serious misconduct and urgency which, in his opinion, are prerequisites for adopting such a measure, were not met.

The Tribunal recalls the principle that the lawfulness of a measure must be appraised as at the date of its adoption. In consequence thereof all subsequent facts are irrelevant (see Judgment 2365, under 4(c)).

It is clear from the evidence in the file that on 4 September 2008 the Director General was entitled to suspend the complainant in the exercise of his discretion under Staff Rule 10.1.2, since the preliminary information in his possession brought to light credible evidence that serious misconduct could be ascribed to the complainant. By using his work station to access pornographic internet sites and by saving pornographic images and videos on the hard disk of his

computer, the complainant could obviously have exposed the Organization to risks. As WIPO points out, it is well known that pornographic sites are the largest vectors for computer viruses, some of which can infect entire internal networks and seriously damage them.

The Tribunal notes, with reference to urgency, that the Rule in question does not expressly state that this is a condition which must be satisfied before the Director General can order a suspension. This provision specifies only that the Director General must consider that the continuance in office, during the investigation, of a staff member who has been charged with serious misconduct might be prejudicial to the service.

It follows from the foregoing that the suspension measure ordered on 4 September was adopted in accordance with the requirements of Staff Regulation 10.1.2.

12. The complainant then asserts that, by adopting the decision of 6 July 2009, WIPO, for no valid reason, maintained his suspension beyond the reasonable time limit accepted by the case law and demonstrated prejudice against him, since the Administration was aware of the findings of the various audits conducted in November 2008. He adds that no reasons were stated for the decision, because the Director General departed from the Appeal Board's recommendation that he should be allowed to resume work but did not explain why the Organization would be running a risk if it ended his suspension.

The Tribunal will examine these pleas taken together.

13. The Tribunal finds that, in maintaining the complainant's suspension by his decision of 6 July 2009, the Director General extended the duration of this suspension beyond the reasonable limit accepted by the case law and thus caused the complainant moral and professional injury.

The decision must therefore be set aside and compensation is due in respect of this injury.

14. The Tribunal will not rule on the plea that insufficient reasons were stated for the impugned decision, since in any event this flaw would not result in an increase in the damages awarded.

15. The complainant also sets out an "additional argument" which has two strands.

(a) First, he says that he was brutally expelled from his office by the security guards.

The Organization replies that the Head of Security, who was present throughout the operations, has categorically denied any allegation of brutality and has said that all the operations took place perfectly calmly, since the complainant "cooperated fully the whole time without ever showing the slightest signs of aggressiveness or hostility".

These statements have not been expressly contradicted in the complainant's rejoinder and the Tribunal has no reason to disregard them.

Moreover, the Organization emphasises that the complainant has never raised the question of the brutal treatment to which he was allegedly subjected directly with the Administration and that he has never requested the opening of an inquiry.

The Tribunal will therefore reject the complainant's allegations in this respect.

The complainant adds that the suspension measure was humiliating because it took effect immediately, whereas in his opinion there was no longer any risk that potentially compromising data would be deleted, because the data had already been seized. But the Organization makes the relevant comment that safeguarding data was not the sole purpose of immediately suspending the complainant. There were other reasons for this measure. For example, it was vital to protect the Organization's interests by preventing the complainant from making further use of its IT resources, bearing in mind the extremely sensitive nature of his duties and his privileged access.

(b) The complainant further submits that no longer allowing him to enter the Organization's premises causes him injury.

The Organization replies that this assertion is incorrect, because the complainant is simply forbidden to discuss the investigation with his colleagues, or to enter its premises without prior clearance.

The Tribunal finds, in the light of the complainant's most recent written submissions, to which no reply has been received, that these restrictions on the complainant are such as to undermine his dignity, thereby causing him a moral injury for which compensation must also be provided.

16. The complainant requests reimbursement of medical expenses, but the Tribunal cannot grant this request as it is not supported by any evidence.

17. In addition, he asks that measures be taken with regard to his periodical reports for 2008 and 2009. As this claim, which was entered in his rejoinder, is new, it must be dismissed in any event. The same applies to the other new claim entered in the rejoinder.

18. On account of the injuries mentioned under 13 and 15(b), above, the complainant is entitled to compensation in the amount of 15,000 United States dollars. He is also entitled to costs, which the Tribunal sets at 5,000 dollars.

DECISION

For the above reasons,

1. The decision of the Director General of 6 July 2009 is set aside.
2. WIPO shall pay the complainant compensation in the amount of 15,000 United States dollars to redress the injury suffered.
3. It shall also pay him 5,000 dollars in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2011, 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 6 July 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet