F. A.

v.

WIPO

129th Session **Judgment No. 4247**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A. F. A. against the World Intellectual Property Organization (WIPO) on 8 December 2017 and corrected on 25 January 2018, WIPO's reply of 2 May, the complainant's rejoinder of 22 August and WIPO's surrejoinder of 28 November 2018;

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

Having examined the written submissions;

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

The complainant challenges her dismissal from service for serious misconduct.

At the material time, the complainant was employed under a permanent contract and had been authorized to follow the flexible working time system provided for in Office Instruction No. 71/2012 (Corr.). Pursuant to Paragraph 11 of this Office Instruction, she was required to register on the clocking device provided for that purpose her time of arrival at the workplace as well as her time of departure.

On 16 February 2015 the Internal Oversight Division (IOD) received a report that the complainant had possibly engaged in unauthorized absences. A preliminary evaluation revealed discrepancies between the complainant's clockings on the flexible working time system and her

physical access badging records. The Director, IOD, decided to open a full investigation into the allegation that the complainant had breached working time requirements and, by a memorandum of 16 April, the complainant was notified of the investigation. On 20 May 2015 the complainant was interviewed by IOD.

Ordinarily, staff members record, electronically, when they arrive at and leave work by individually activating a device for that purpose. However, there are other electronic means of ascertaining a staff member's movements in and out of the workplace. They were in this case reviewed and analysed by IOD. In its report dated 9 May 2016, IOD found that there was clear and convincing evidence that the complainant was absent from work without a proper authorization 80 times between 1 October 2014 and 31 March 2015 and that, in each of these instances, she had misrepresented her presence at work through "omission to clock" submissions. The "omission to clock" procedure requires that in cases where the staff member has misplaced or forgotten her or his clocking card, she or he must declare through the appropriate electronic form the arrival and departure times and send it to her or his supervisor for approval and processing. The effect of the complainant's misrepresentations was to inflate her working hours by 101 hours and 16 minutes. IOD concluded that the complainant had possibly engaged in misconduct and recommended that disciplinary action be initiated.

On 30 May 2016 the Director of the Human Resources Management Department sent to the complainant a charge letter informing her that disciplinary action was being initiated against her. She was accused of having repeatedly and systematically abused the procedures governing the flexible working time system during the period from 1 October 2014 to 31 March 2015, and of having made 80 separate misrepresentations through the electronic form of the omission to clock procedure, to conceal the actual duration of her work interruptions or absences, in breach of the relevant provisions. Annexed to the charge letter was the IOD report and other documents detailing the dates and times when she was alleged to have engaged in unauthorized absences. The complainant was invited to comment, which she did on 1 July 2016. She admitted that she had

taken some "liberties with the rules on working time" but stated that her unauthorized absences were related to difficult personal circumstances.

By a letter dated 1 August 2016 the Director General informed her that, although her behaviour amounted to serious misconduct, he had decided not to summarily dismiss her but, taking into account certain circumstances pointing in her favour, to dismiss her with effect from the day when this decision would be notified to her and to grant her a termination indemnity equivalent to five months' salary and a sum equivalent to three months' salary in lieu of notice.

On 28 November 2016 the complainant lodged an appeal with the Appeal Board. In its conclusions dated 12 July 2017, the Board recommended by a majority that the appeal be dismissed. On 11 September 2017 the complainant was informed that the Director General had decided to adopt this recommendation. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order her reinstatement. Alternatively, she claims material damages for all salary, benefits and entitlements she would have received from the date of her termination to the date of her retirement. She seeks moral and exemplary damages for the wrongful termination of her permanent appointment and the damage caused to her personal and professional reputation and to her career, as well as costs, with interest on all sums awarded. She also asks that WIPO provide her with a work certificate. In her submissions, the complainant requests that WIPO be ordered to produce any and all documents related to the investigation of the alleged misconduct, as well as any and all documents relating to the decision to terminate her appointment. She specifically asks for a copy of the report IOD received on 16 February 2015, arguing that not disclosing the identity of the person or persons who made the allegations against her constitutes a denial of due process.

WIPO submits that the complaint is entirely devoid of merit, and notes that it has supplied the complainant with a work certificate by an e-mail of 18 October 2016. With respect to her request for the production of documents, WIPO argues that it constitutes an impermissible fishing expedition and affirms that all the evidence on which the charge of

misconduct and subsequent decision were based was provided to her with the charge letter of 30 May 2016. It further submits that there is no general requirement to disclose an informant's identity in a case like this, that the identity of this person is irrelevant to the present case and that this report is privileged and confidential pursuant to Paragraph 15 of the Internal Oversight Charter.

CONSIDERATIONS

1. This complaint arises from a finding that the complainant's absence from work without proper authorization 80 times between 1 October 2014 and 31 March 2015 and her misrepresentation of her presence at work through "omission to clock" submissions amounted to serious misconduct. In other words, on numerous occasions during that period, the complainant had failed to use the regular clocking device provided for the purpose of her flexible working time arrangement with the Organization and had submitted "omission to clock" declarations through an electronic system effectively claiming she was at work when she was not. In her complaint, the complainant impugns the Director General's 11 September 2017 decision in which he adopted the recommendation of the Appeal Board and dismissed her appeal. Thus, the Director General maintained his earlier decision to dismiss the complainant for serious misconduct effective from the date of the notification of the decision to the complainant and to grant the complainant a termination indemnity equivalent to five months' salary and an amount equivalent to three months' salary in lieu of notice.

2. In her complaint form, the complainant requested an oral hearing, identifying herself as a witness to be called regarding all claims raised in the complaint and, in particular, in relation to the material issues of fact contested by WIPO. The parties have presented ample submissions and documents to permit the Tribunal to reach an informed and just decision on the case. The request for an oral hearing is, therefore, rejected.

3. It is convenient to deal firstly with the procedural matters raised by the complainant. The complainant submits that the Administration failed to produce documents that she had requested during the course of the internal appeal and reiterates the request in the complaint. The complainant asks the Administration to provide her with a vast array of documents including "reports, correspondence, e-mails, notes, records, memoranda, letters, notices, file contents, minutes, or any other documents or items in the possession of the Administration that may in any way describe, comment on, relate or refer to, control, record, and/or evidence, in general or specifically, the investigation of the alleged conduct" and "the decision to terminate her." Particularly given the breadth of this request, it can only be characterised as an impermissible "fishing expedition" and is rejected (see Judgment 4086, consideration 9). It must also be added that when the complainant was given the charge letter, she was also provided with the investigation report and copies of all the evidence collected during the course of the investigation and on which the Director General's decision was based.

4. The complainant also requested a copy of the 16 February 2015 report of alleged misconduct and the identity of the person who made this report. Before the Tribunal, the complainant focuses on the Administration's refusal to disclose the identity of the reporter of the suspected misconduct and contends that this raises a presumption of prejudice and bias as does the refusal to disclose the requested documents. In the absence of compelling reasons justifying the disclosure of the identity of the reporter of suspected misconduct, this request is also rejected. As stated in the Internal Oversight Charter at Paragraph 15, reports of possible misconduct to the Director, IOD, shall be received on a confidential basis and may also be made anonymously. As well, the IOD's Intranet site specifically provides that the reporting of suspected misconduct may be made confidentially or anonymously. Additionally, contrary to the complainant's assertion, the identity of the reporter is entirely irrelevant in relation to the nature of the allegations of misconduct by the complainant. It is also noted that the judgments the complainant cited in support of her assertion are all distinguishable on their facts and do not assist the complainant.

5. Turning to the impugned decision, the complainant submits that the decision to dismiss her is disproportionate to the alleged misconduct. The complainant points out that her service as a staff member for fifteen years was unblemished, her performance evaluations were consistently satisfactory or better and she never had any issues with misconduct of any nature. She stresses that the misconduct of which she was accused was not intentional and adds that she had no intention to defraud WIPO or to harm its interests. The complainant submits that without any demonstrative proof of intent, the sanction of dismissal far outweighs the negligent actions that precipitated it. She maintains that the instances of improper recording of working hours only occurred because of her severe personal situation during the period under investigation and acknowledges that she acted negligently during that time.

6. The complainant submits that the imposition of the severe disciplinary sanction did not take into account the mitigating circumstances during the period under investigation. First, the complainant states that some of the absences identified in the investigation report can be attributed to the physiotherapy sessions she had to attend as a result of the service-incurred injury she suffered in May 2014 that were medically authorized and necessary to ensure her physical recovery. The complainant contends that the eleven absences to attend the therapy sessions should be deducted from the unauthorized list of absences. Second, during the period under investigation, due to urgent, unforeseen personal circumstances the complainant had to leave the office on several occasions. Third, the complainant submits that the Administration did not take into account her behaviour after the period under investigation and points to the congratulations she received regarding the skill testing she took at the request of her hierarchy in early 2016; the initiative she took in the spring of 2016 to reduce a three-month backlog in her division in a little over three weeks; and in the summer of that year the voluntary assistance she provided to the Trademarks Department at a time when it had a heavy workload and was experiencing functional problems due to a new IT system. The complainant argues that the foregoing mitigating circumstances and the performance of her work before and after the investigation should have led to a lesser sanction

that could have punished the complainant without jeopardizing WIPO's interests. Lastly, the complainant submits that the imposed disciplinary sanction is even more disproportionate considering that she (or the staff in general) was never warned that improper recording of working could result in a disciplinary investigation and, eventually the termination of her contract. It is observed that the Administration was only alerted to the alleged misconduct on 16 February 2015, that had been ongoing since 1 October 2014. Thus the occasion to give the complainant a timely warning had passed. The question whether the complainant had engaged in misconduct arose after the event. Moreover, Paragraph 21 of Office Instruction No. 71/2012 (Corr.) entitled "Working Hours" clearly states that repeated unjustified omissions to register an arrival or departure may be subject to disciplinary measures under WIPO's Staff Regulations and Rules. Consistent case law has it that a staff member is presumed to be aware of the organization's rules and regulations to which she or he is subject (see, for example, Judgment 2962, consideration 13).

7. As to the complainant's submissions concerning the proportionality of the decision to dismiss her, it must first be recalled, as stated in Judgment 3953, consideration 14, that:

> "[A]ccording to a long line of precedent the decision-making authority has discretion in determining the severity of a sanction to be applied to a staff member whose misconduct has been established. However, as stated in Judgment 3640, under 29 and 31, that discretion must be exercised in observance of the rule of law, particularly the principle of proportionality."

8. In his decision, the Director General considered the proportionality of the disciplinary measure in relation to the seriousness of the misconduct. In this regard, the Director General recalled that the complainant's misconduct was not occasional and the complainant's misrepresentations whether intentional or negligent concealed her frequent unauthorized absences. He also noted that the complainant was given multiple opportunities to explain these misrepresentations and observed that the misconduct was clearly shown despite the complainant's explanations that he considered were unsubstantiated. The Director General observed that having regard to the seriousness of the misconduct, for which the complainant alone was responsible, he could have imposed

the disciplinary measure of summary dismissal. Relevantly, the Director General added that after considering the complainant's performance records, personal situation and family circumstances, he decided to apply the lesser sanction of dismissal and to grant the complainant a termination indemnity equivalent to five months' salary and an amount equivalent to three months' salary in lieu of notice. Having regard to the Director General's reasons for the application of the disciplinary measure of dismissal, the Tribunal concludes that the sanction was not disproportionate.

9. The complainant argues that the Director General failed to take into consideration the fact that part of the improper recording of working hours was due to her service-incurred injury. In this regard, she reiterates that a number of improper recording of working hours instances were due to her physiotherapy sessions. The complainant contends that the Administration's treatment of these visits as unjustified and unacceptable absences as they were not of a medical nature is patently unfair, irregular and goes against WIPO's principles and practices. This is, in effect, a reframing of the submission concerning the proportionality of the decision to dismiss the complainant and is unfounded.

10. The complainant also advances arguments regarding the lawfulness of the decision to dismiss her. First, she submits that the decision was tainted by mistakes of fact and erroneous conclusions. In particular, she notes that IOD and, in turn, the Director General failed to take into account her exculpatory explanations. This submission is rejected. It is abundantly clear in the investigation report that IOD reviewed and considered each of the complainant's explanations. As well, it is equally clear in the Director General's decision that he considered all the complainant's explanations.

11. Second, the complainant submits that the decision to dismiss her was tainted by errors of law. The complainant takes the position that there is no evidence whatsoever to show that her improper recording of working hours was anything other than an oversight on her part or simple negligence. This position is unfounded. As IOD concluded in its

investigation report, the complainant made 80 misrepresentations of her working hours in the 93 days she was present over a period of six months. This evidence undermines the complainant's position that her improper recording of working hours was the result of oversight or simple negligence. The complainant is also of the view that the decision is flawed because she was not accorded the presumption of innocence and WIPO failed to prove her misconduct beyond a reasonable doubt. The complainant's assertion concerning the presumption of innocence is unsubstantiated. In fact, a review of the IOD investigation report and the evidence shows that the complainant was presumed to be innocent throughout the investigation process. In relation to the latter point the complainant made, as stated in Judgment 3882, in consideration 14:

> "It is settled principle that the organization must prove its case against a complainant in a disciplinary matter such as this beyond a reasonable doubt. The complainant argues that the [organization] did not meet that standard of proof in the present case. The Tribunal's approach when this issue is raised was stated, for example, in consideration 14 of Judgment 3649, as follows:
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> > 'At this juncture, it is useful to reiterate the well settled case law that the burden of proof rests on an organization to prove the allegations of misconduct beyond a reasonable doubt before a disciplinary sanction is imposed. It is equally well settled that the "'Tribunal will not engage in a determination as to whether the burden of proof has been met, instead, the Tribunal will review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made' (see Judgment 2699, consideration 9)."'"

However, at this juncture, it must also be noted that WIPO's Staff Rule 10.1.2(d)* expressly provides that the applicable standard of proof in disciplinary proceedings is "clear and convincing evidence".

12. In the present case, based on a comprehensive investigation, IOD found that there was "clear and convincing evidence that [the complainant] was absent from work without a proper authorization 80 times between 1 October 2014 and 31 March 2015" and that, "[i]n each of [these] instances, [she] had misrepresented her presence at work through e-Work 'omission to clock' submissions". The Tribunal has

* Previously in subparagraph (f).

reviewed the IOD's investigation report and the extensive evidence referenced in that report. The Tribunal agrees with IOD's characterization of the evidence as being, at a minimum, "clear and convincing evidence" regarding the complainant's conduct. It is clear that the facts underlying the charge of misconduct are uncontroverted. The reference by the Director General to the "clear and convincing evidence standard" does not detract from the fact that, in substance, the standard of beyond a reasonable doubt was met. As the assertion that WIPO failed to prove the complainant's misconduct beyond a reasonable doubt is unfounded, it is rejected.

13. Lastly, the complainant submits that the decision to dismiss her amounts to unequal treatment, alleging that other officials who have committed fraud and other forms of misconduct were never sanctioned. This submission is rejected. Leaving aside the fact that she has not substantiated that those officials were similarly situated in fact and law, the Tribunal's case law consistently holds that the principle of equal treatment cannot ordinarily be invoked to challenge a finding of misconduct (see, for example, Judgment 3575, consideration 5, and the case law cited therein).

14. As the complainant has not established that the decision to dismiss her is disproportionate to the alleged misconduct or that the decision was tainted by errors of fact or law, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ