

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

## **109th Session**

## **Judgment No. 2914**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. M.-N. against the World Health Organization (WHO) on 11 December 2008 and corrected on 21 April 2009, the Organization's reply of 4 June, the complainant's rejoinder dated 17 July and WHO's surrejoinder dated 9 October 2009;

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 Congolese national born in 1963, is a former staff member of the Organization. He joined the WHO Regional Office for Africa in Brazzaville (Congo) in 1996. At the material time he was performing duties at grade G.5, step 10 (BZ.05.10).

On 29 September 2005 vacancy notices were issued with a view to holding a competition to fill three G.7 posts for human

resources assistants. The complainant applied. On 22 November 2005 the candidates for these posts took part in a written selection test on the premises of the Regional Office. The complainant and another candidate, Mr M.-S., were seated next to each other in the group installed in the library. When the test papers were marked, those of the complainant and of Mr M.-S. were found to display great similarities. The answers to the questions were the same and their wording was almost identical.

The complainant was warned by a memorandum of 24 January 2006 that he was presumed to have cheated in the written test taken on 22 November 2005, which would constitute misconduct possibly entailing disciplinary action, and he was invited to comment. The complainant replied by a memorandum of 30 January 2006 in which he acknowledged “the similarity of the papers” which, he said, was caused by a printout problem at the end of the test, but he denied cheating. Since his supervisor did not deem this reply to be a “satisfactory explanation”, he informed the complainant on 20 April that he – the complainant – had engaged in misconduct as defined in Staff Rule 110.8 and that the Regional Director was considering the possibility of reassigning him with a reduction in grade to G.4, step 1, as from 24 July 2006. This decision was confirmed by a memorandum of 9 May.

On 3 July the complainant lodged an appeal with the Regional Board of Appeal which, in its report submitted to the Regional Director on 5 December 2006, concluded that there was a lack of evidence of wrongdoing and that an assumption of wrongdoing was not a sufficient reason for downgrading and reassigning a staff member. It recommended to the Regional Director that the complainant be barred from taking part in any tests held by the Organization for a period of time, that he be reinstated in the grade which he had held before being subjected to a disciplinary measure and that, having regard to the apparent deterioration in his working relationship with his supervisor, he be reassigned to a new post. On 12 January 2007 the Regional Director rejected these recommendations which seemed to him to be contradictory; however,

in view of the complainant's family situation, he decided to place him at step 7 of grade G.4.

On 24 January 2007 the complainant referred the matter to the Headquarters Board of Appeal. In its report of 26 November 2007 the Board found that the test had not been organised in a satisfactory manner, that there was still some doubt as to whether cheating had occurred, that a mere presumption did not constitute sufficient grounds for a disciplinary measure, and that there was a conflict of interests within the regional Administration which was "liable to undermine compliance with internal justice". It recommended that the Director-General reinstate the complainant in his previous grade with retroactive effect from 1 August 2006, reassign him to a post matching his grade in a different unit, adjust his salary with retroactive effect from 1 August 2006 and, lastly, pay him damages for moral injury in the amount of 1,000 United States dollars. On receiving this report, the Director-General noted some divergences between the position of the Headquarters Board of Appeal and the Administration's analysis of the situation. She therefore asked the Board to comment on these divergences and on 9 June 2008 the Board sent her an additional report in which it confirmed its initial position and maintained its recommendations. After examining both reports, the Director-General notified the complainant, by a letter of 9 September 2008, of the reasons why she could not follow the Board's recommendations. She stated in particular that the evidence supplied by the Administration gave rise to "a set of strong, precise and concordant presumptions of cheating", which amounted to misconduct, and she rejected the complainant's appeal in its entirety. That is the impugned decision.

B. The complainant enters six main pleas. He points out first that no record of proceedings was drawn up at the end of the test and that there are no rules governing the procedure for holding written tests. He considers this to be "a very serious breach".

Secondly, he considers that there is no "sufficient and concordant evidence" to support the Administration's presumption that cheating took place. He is of the opinion that, as the Headquarters Board of

Appeal found, the similarity of the papers does not constitute proof of cheating.

Thirdly, the complainant contends that he was subjected to a disciplinary measure because his supervisors were prejudiced against him. He also asserts that there was a conflict of interests.

Fourthly, he objects to the fact that three concurrent “inhuman, unjustified and devoid of merit” disciplinary measures were imposed on him, namely, the setting aside of his test paper, his reassignment and the reduction of his grade. He explains that, under WHO Staff Rule 570.1.2, reassignment with a reduction in grade is applicable when a staff member’s performance is deemed unsatisfactory, which was not true in his case.

The complainant’s fifth plea concerns the fact that his supervisors devised and marked the tests and recommended to the Regional Director the disciplinary measure to be imposed on him. They have therefore carried out jointly several functions which amounted to acting as both “judge and jury”. He also disputes their neutrality.

Lastly, the complainant points out that this case has caused him moral and material injury because the disciplinary measure of reassignment with a reduction in grade was “disproportionate, inhuman and unjustified” and that it forced him into debt because of his loss of purchasing power. It also caused him professional injury since he had to resign from the Organization because he was being harassed.

The complainant asks the Tribunal to set aside the impugned decision, to order his reinstatement in his previous grade and adjustment of his salary, with retroactive effect from 1 August 2006. He claims 200,000 dollars in damages for moral injury, 200,000 dollars in compensation for material injury, 200,000 dollars in compensation for professional injury, and 100,000 dollars in costs.

C. In its reply WHO asks the Tribunal to join the instant complaint with that filed by Mr M.-S., since they are similar in fact and in law and seek the same redress “through the submission of identical claims”.

On the merits, the Organization explains that it fails to perceive the relevance of the complainant's first plea. It admits that there are no rules of procedure for written tests and no obligation to draw up a record of proceedings at the end of a test, but it stresses that written tests are governed by "best practices", which were followed in this case, and that the complainant had the duties and obligations specified in the Staff Rules and Staff Regulations and the Standards of Conduct for the International Civil Service, which forbid any unethical, corrupt or dishonest behaviour. The Organization notes in this connection that the Tribunal has found that staff members "have a duty [...] to regulate their conduct with the interests of the [Organization] only in view [...] and may not so behave as to harm its good name. There is no need for any express rule against cheating".

With regard to the alleged absence of any proof of cheating, the Organization points out that the virtually identical test papers of the complainant and Mr M.-S. constitute sufficient evidence of cheating during the test and therefore an offence warranting a disciplinary measure. It adds that the complainant has never made any attempt to explain how such a similarity could have come about, but instead has tried to shed blame by referring to the fact that no record of proceedings was drawn up at the end of the written test.

As for the complainant's accusations of prejudice on the part of one of his supervisors, the Organization contends that these are completely unsubstantiated allegations which should simply be dismissed.

WHO considers that the disciplinary measure of reassignment with a reduction in grade to which the complainant was subjected was fully justified in light of the Tribunal's case law.

With respect to the conflict of interests which allegedly arose because the complainant's supervisors carried out several functions, the Organization explains that the same person did not participate in all stages of the selection process. For example, the test papers were marked "anonymously by a group of five officials" from Human Resources and the disciplinary measure was decided by the Regional Director. It adds that it is difficult to see what connection there might

be between the professional duties of the complainant's supervisors and the finding that he had cheated.

The Organization is of the view that the complainant's claim for compensation for material injury is singularly inappropriate. It was he who put himself in the situation in which he now finds himself by not complying with his obligation to act with integrity and honesty. It is now up to him to bear the adverse consequences which his cheating has had on his career.

Lastly, the Organization considers it need not "discuss the complainant's purchasing power and the effect of his reduced salary on his financial situation". It draws attention to the fact that, in order to take account of his family situation, the Regional Director did, however, decide to mitigate the financial impact of the initial disciplinary measure by giving the complainant a higher step in his grade, thus ensuring that his income was higher.

D. In his rejoinder the complainant reiterates some of the pleas put forward in his complaint and adds some new ones. He denounces one of his former supervisors as being "the real cheat in the Organization" because, according to the complainant, the information on his legal studies which this person supplied in his personal history form is untruthful. He asks to be reinstated in the Organization, which he would not have had to leave had he not been the victim of harassment.

In addition to the claims set out in his complaint, the complainant claims 200,000 dollars in compensation for the moral injury caused by the undue length – three years according to his calculations – of the internal appeal procedure.

Lastly, the complainant states that the Tribunal could join his case with that of Mr M.-S. but decide "in each case" on compensation for the injury suffered.

E. In its surrejoinder the Organization repeats its request for joinder and notes that it has been expressly accepted by the complainant in his rejoinder.

On the merits, it fully maintains its position and holds that the complainant has still not furnished anything resembling a plausible explanation for the similarity of his examination paper to that of Mr M.-S. It rejects the complainant's "outrageous and unfounded accusations", which are not supported by one shred of evidence and which should therefore be dismissed. It adds that he resigned of his own volition. It submits that the complainant's allegations that his resignation was linked to the harassment to which he had been subjected by his supervisors are unfounded; moreover, they are new because they were never presented to the internal appeal bodies and, as such, they are irreceivable.

The Organization states that the internal appeal proceedings certainly did not last for three years, as the complainant claims.

## CONSIDERATIONS

1. The complainant, who joined the Organization in 1996 at the WHO Regional Office for Africa in Brazzaville, was performing duties at grade G.5, step 10 (BZ.05.10) at the material time. He resigned with effect from 1 February 2007. Most of the facts relevant to this case are set out in Judgment 2913, also delivered this day.

2. Suffice it to say that, like the staff member who initiated the proceedings leading to the above-mentioned Judgment 2913, the complainant was accused of having cheated during the written test held on 22 November 2005 with a view to filling several G.7 posts for human resources assistants.

When the complainant was invited to explain why his answers were similar to those of the other staff member involved, he admitted that his test paper "resembled" that of the other staff member, but he denied any cheating.

As the Administration took the view that the complainant had not provided a satisfactory explanation or furnished any evidence which might refute the accusation levelled at him, it informed him by

a memorandum of 20 April 2006 that the Regional Director was considering the possibility of reassigning him with a reduction in grade to a post at grade G.4, step 1, with effect from 24 July 2006. The memorandum invited him to submit his comments in writing.

In his reply of 3 May 2006 the complainant continued to deny any wrongdoing. On 9 May he was notified that the disciplinary measure consisting of reassignment with a reduction in grade had been confirmed.

3. On 5 December 2006 the Regional Board of Appeal, to which the matter had been referred by the complainant on 3 July 2006, submitted its report to the Regional Director. It concluded that there was a lack of evidence and that a mere presumption of cheating was insufficient reason for reassigning and reducing the grade of a staff member. Its recommendations to the Regional Director included reinstating the complainant in the grade which he had held before being subjected to a disciplinary measure and, in view of the deterioration in his working relationship with his supervisor, reassigning him to a new post.

The Regional Director informed the complainant by a memorandum of 12 January 2007 that he did not accept the recommendations of the Regional Board of Appeal because they appeared to be contradictory, but that, in order to take account of the financial consequences of the disciplinary measure on his family situation, he was reinstating him at step 7 in grade G.4.

4. On 24 January 2007 the complainant challenged this decision before the Headquarters Board of Appeal.

In its first report the Board recommended that the complainant be reinstated in his previous grade with retroactive effect from 1 August 2006, that he be reassigned to a post matching his grade in a different unit, that his salary be adjusted with retroactive effect from 1 August 2006, and that he be paid damages for moral injury in the amount of 1,000 dollars.

The Board explained that its recommendations to the Director-General were based on the grounds that the test had not been organised in a satisfactory manner, that the Administration should have done everything possible to ensure that the test was conducted properly, that an invigilator had to be present in each examination room in order “to avoid any untoward occurrences”, that in the absence of a record of proceedings it had concluded that there was still some doubt as to whether cheating had occurred, that the test papers were insufficient evidence of cheating, that the disciplining of the complainant was not clearly justified and that he could not be disciplined on the basis of a mere presumption that he had cheated.

After studying this report, the Director-General considered that it was necessary to look in greater depth at the Board’s reasoning and findings and she therefore asked the Regional Office to clarify certain facts and to re-examine all the test papers. As this exercise revealed some substantial divergences, she asked the Board to comment on each of them. To this end, by a memorandum of 5 May 2008 she requested the Board to draw up an additional report containing amended recommendations where appropriate.

In its additional report the Headquarters Board of Appeal commented on each of the points raised by the Director-General and maintained most of the findings and all of the recommendations contained in its first report.

By a letter of 9 September 2008 the Director-General informed the complainant that she was “unable to follow” the recommendations of the Headquarters Board of Appeal and that she upheld the Regional Director’s decision of 12 January 2007, which she regarded as fully justified.

5. The complainant’s claims are set out under B and D above. He puts forward six principal pleas in support of these claims.

6. The Organization submits that the complaint should be dismissed as unfounded.

It asks the Tribunal to join this complaint with that filed by the other staff member accused of having cheated during the test on 22 November 2005. For the same reasons as those set forth in Judgment 2913, the Tribunal does not consider that the complaints should be joined.

7. On the merits, the complainant first criticises the impugned decision in that it rests solely on a presumption of cheating, which is based on the similarity of his test paper and that of another candidate who took the written test on 22 November 2005, whereas, in his opinion, since the test was “non-specific”, the mere fact that the test papers were similar should not be deemed proof of cheating that justifies a disciplinary measure.

8. The Tribunal points out that, in the event of disciplinary measures, the staff member concerned enjoys a presumption of innocence and that, in accordance with the principle *in dubio pro reo*, he or she must be given the benefit of the doubt (see in particular Judgment 2351, under 7(b)). The burden of proof lies with the Organization which intends to take disciplinary action against a staff member.

9. In the instant case, having noticed a similarity between the complainant’s test paper and that of another candidate, the Administration asked the complainant to provide written explanations regarding the presumption that he had cheated. In his reply the complainant denied cheating and attempted to explain this similarity by stressing inter alia that “the equipment played up” when printing out the test papers.

Since the Regional Director did not deem this reply to be a satisfactory explanation, he informed the complainant that he intended to impose the disputed disciplinary measure on him on the grounds that he had “supplied no proof that [he] ha[d] not copied from another candidate or ha[d] not permitted another candidate to copy [his] test paper”.

The Tribunal finds that, by basing its decision on these grounds, the Administration in fact reversed the burden of proof and therefore committed an error of law.

10. However, the only fundamental issue raised by this case is that of whether the complainant actually cheated during the test on 22 November 2005.

11. A comparison of the complainant's test paper with that of the other candidate concerned reveals that the answers to the first and third questions are almost identical and that the answer to the second question is absolutely identical but for one word.

In addition, in the answer to the fourth question, which involved drawing up a numerical table, both candidates made the same mistake when transcribing one of the figures to be included in this table.

Since it is plain from the test papers in question that these strong similarities cannot possibly be the product of mere coincidence, the Tribunal is of the view that these facts are in themselves sufficient evidence of the existence of cheating which could have come about only through the collusion of the two persons concerned. Such cheating obviously constitutes a breach of a general rule of conduct which must be observed by any candidate in an examination. Consequently, the complainant's argument that there were no rules governing the procedure for holding written tests is in any case of no avail. The offence with which the complainant was charged therefore justified a disciplinary measure.

12. The complainant contends that the Organization unlawfully imposed several disciplinary measures on him for the same misconduct, in that his test paper was set aside and he was reassigned with a reduction in grade.

However, the setting aside of his test paper was not a disciplinary measure and Staff Rule 1110.1.3 makes express provision for the disciplinary measure of reassignment with a reduction in grade.

13. Lastly, the Tribunal considers that the disciplinary measure chosen was not manifestly disproportionate given the serious nature of the misconduct.

14. Since the disciplinary measure was justified and in proportion with this misconduct, the other pleas entered by the complainant are of no relevance and must be dismissed.

15. It may be concluded from the above that the complainant's claims must be rejected in their entirety.

### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 7 May 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 8 July 2010.

Seydou Ba  
Claude Rouiller  
Patrick Frydman  
Catherine Comtet