

108th Session

Judgment No. 2879

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms C. C. against the World Intellectual Property Organization (WIPO) on 6 February 2009, the Organization's reply of 3 June, the complainant's rejoinder of 20 August and WIPO's surrejoinder of 8 October 2009;

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

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

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

A. The complainant's service history and the background to this case are to be found in Judgment 2706, delivered on 6 February 2008, on the complainant's first complaint. In that judgment the Tribunal found *inter alia* that the complainant had been the victim of sexual harassment by her former supervisor and that, in responding to that situation, the Organization had failed in its duty of care towards her.

Prior to the filing of her first complaint on 8 November 2006, the complainant signed a power of attorney dated 2 October 2006 by which she authorised Mr A. to act as her counsel in her dispute with

WIPO and in any related proceedings before the Tribunal. In a letter of 3 October addressed to the Director General, Mr A. stated that the gravity of the acts to which the complainant had been subjected required action on the part of the Organization at the highest level, failing which, the complainant would be within her right to initiate proceedings before the Tribunal and to give the matter all the publicity which, in his view, inevitably attaches to such proceedings. He requested that the Organization pay the complainant 1 million United States dollars in moral damages and that it refrain from any retaliatory action against her.

On 3 December 2006 an article appeared in a local newspaper, *Le Matin Dimanche*, under the headline “WIPO employee accuses two of her supervisors of repeated rape”. The article, which featured a photograph of the then WIPO Director General with a caption stating that “WIPO’s Director General is said to have punished the two perpetrators with no more than a verbal reprimand”, alluded to the complainant’s case, without, however, revealing her name or the names of her alleged harassers. On 8 December Mr A. wrote a letter to WIPO’s Legal Counsel, in which he explained that neither he nor the complainant had any direct or indirect involvement in the publication of the article.

By letter of 11 December 2006 from the Director of the Human Resources Management Department, the complainant was charged with serious misconduct for having alleged publicly that WIPO had failed to take action in response to her allegations of rape and that the Director General had only given a verbal reprimand to the alleged perpetrator, when in reality the allegations made by her were of a much less serious nature; for actions amounting to defamation of the Director General and abuse of the process of administration of justice; for making public pronouncements which reflected adversely on the Organization and for using the media to further her interests and to air her grievances in public. She was informed that, if she was found to have committed those acts, she would be subject to disciplinary

sanctions and that the Joint Advisory Committee would be consulted before any decision on disciplinary action was taken. She was invited to submit a written response to the charges levied against her by 19 December 2006.

On 5 January 2007 the complainant wrote to the Director of the Human Resources Management Department to inform him that Mr A. was no longer authorised to act as her counsel and that she wished to see the case resolved in an amicable manner. She categorically refuted the allegations made in the newspaper article and denied any involvement in its publication. In a letter of 10 January to the President of the Geneva Bar Association (*Bâtonnier de l'Ordre des Avocats de Genève*), she denounced Mr A. for having violated his duty of professional secrecy by disclosing information concerning her case without her permission. Mr A. denied any involvement in the publication of the article in a letter to the President of the Geneva Bar Association, and on 6 February 2007 the President informed the complainant in writing that, in the absence of evidence to the contrary, no further action could be taken.

In the meantime, the Joint Advisory Committee was convened on 21 December 2006. In its report of 26 July 2007, it found that the power of attorney the complainant had accorded Mr A., her admission that it was he who had been the source of the information leak to the media, and the absence of immediate action on her part to distance herself from the article firmly established her responsibility for its publication. It concluded that the complainant was guilty of misconduct and responsible for the damage caused to the Organization, the Director General and two staff members and their families. It recommended inter alia that she be relegated to one step lower within the same grade; that her advancement to the next salary step be delayed for a consecutive period of three years, without the possibility of promotion during at least that period, regardless of any upward reclassification of her post; that she offer a public apology to the Organization and its staff; and that the Organization announce to

the staff that the allegation of rape made by a staff member in December 2006, via the press, had proven to be false, and that sanctions had been applied to the staff member concerned.

By memorandum of 15 October 2007 the complainant was informed that the Director General had decided to endorse the Joint Advisory Committee's recommendations for the imposition of disciplinary sanctions, which, as she was subsequently advised, would take effect on 1 November 2007. On 25 October she wrote to the Director General, expressing her disagreement with the Administration's demand for a public apology. She also requested a review of his decision for the imposition of disciplinary sanctions, but was informed by memorandum of 12 November that he had decided to confirm it. By e-mail of 15 November 2007, the Director of the Human Resources Management Department informed all staff that the allegation of rape that had been made in the newspaper article had proven to be false and that disciplinary sanctions had been imposed on the staff member concerned.

On 12 February 2008 the complainant lodged an appeal with the Appeal Board against the Director General's decision to impose disciplinary sanctions. The Board submitted its conclusions on 15 May 2008. It considered that the complainant could not be held directly responsible for the publication of the article on the sole basis that she had given Mr A. a power of attorney in respect of the proceedings within WIPO and before the Tribunal. It found that there was a disparity between the level of the sanctions applied to the complainant for the publication of the newspaper article and those applied to her former supervisor for sexual harassment. It thus recommended that the sanctions applied to the complainant be considerably reduced and that the contents of her personnel file be revised accordingly.

By letter of 23 July 2008 the Director of the Human Resources Management Department informed the complainant that the Director General had decided to refer the Appeal Board's conclusions to the

Joint Advisory Committee before taking a final decision on the matter of disciplinary sanctions. The Appeal Board's recommendations were then referred to the Committee on 17 September 2008. In its report of 16 October, the Committee found that there was no basis on which to reduce the disciplinary sanctions applied to the complainant or to revise the contents of her file. By memorandum of 28 November 2008 the complainant was informed that the Director General had decided to endorse the Committee's recommendations and to maintain the disciplinary sanctions imposed on her on 15 October 2007. That is the impugned decision.

B. The complainant submits that she was not the source of the information leak to the press and that she had no involvement in the publication of the newspaper article. She also submits that, if Mr A. was the person behind it, he acted without her permission and knowledge in excess of the power of attorney accorded to him and in violation of his duty of professional secrecy. She adds that she was made aware of the content of her first complaint long after Mr A. had filed it with the Tribunal and that other persons had access to documents concerning her case.

The complainant asserts that WIPO has not established her personal responsibility for the publication of the article nor that of Mr A., who has in any event formally denied any involvement. Its reliance on her alleged admission that he was the source of the leak is therefore tainted with bad faith. It has rather sought to justify the imposition of disciplinary sanctions on the basis that she had granted Mr A. a power of attorney. However, that fact alone does not constitute sufficient grounds to entail her responsibility; the power of attorney which she signed did not contain any wording on which Mr A. could legitimately have relied to disclose information concerning her case to third parties, and she could reasonably expect her counsel to comply with his duty of professional secrecy to which he was bound by the Rules and Customs of the Geneva Bar Association. Thus, in light of the fact that neither her responsibility

nor that of Mr A. have been proven beyond reasonable doubt and, given that any unlawful acts which he might have committed cannot be attributed to her, the presumption of innocence applies and the decision to impose disciplinary sanctions cannot stand.

The complainant argues that, even under the assumption that she was responsible for the publication of the article, the disciplinary sanctions applied to her were clearly disproportionate, especially considering that she had been subjected to sexual harassment and other unlawful acts, following which the Organization had failed in its duty of care towards her, and that the person who had committed these acts had been given a mere verbal reprimand, the least severe sanction foreseen in the Staff Regulations and Staff Rules, and had subsequently been granted two extensions of appointment beyond retirement age. Moreover, the complainant immediately distanced herself from the publication of the article, and has always denied its contents and sought to keep the matter confidential. She contends that by sending the e-mail of 15 November 2007, informing all staff of the outcome of the disciplinary proceedings, the Organization imposed a sanction not contemplated by its Staff Regulations and Staff Rules, thereby violating not only its internal regulations but also the principle *nulla poena sine lege*. In addition, its deliberate disclosure of such information to third parties showed a lack of respect for her dignity, which is contrary to a consistent line of the Tribunal's case law. In her opinion, the timing and type of disciplinary sanctions imposed on her leave little doubt as to the true intention underlying them, namely to delay even more her overdue promotion and to deprive her of the benefit of Judgment 2706.

The complainant requests that the impugned decision be quashed. She also requests that WIPO be ordered to remove from her file all documents pertaining directly or indirectly to the disciplinary sanctions and to send, through its Human Resources Management Department, an e-mail to all staff indicating that the staff member accused in its e-mail of 15 November 2007 of being responsible

for the publication of an article in *Le Matin Dimanche* of 3 December 2006 has been cleared of any wrongdoing and that the disciplinary sanctions imposed on him/her have been lifted. She claims 40,000 Swiss francs in moral damages and 10,000 francs in costs.

C. In its reply WIPO argues that the article which appeared in the local press on 3 December 2006 was highly damaging to the Organization, the Director General and his family, and the complainant's former supervisors and their families, given that it contained allegations of "repeated rape" by her supervisors and "indulgence" by the Director General. It considers that the complainant was ultimately responsible for its publication and the resulting damage, given that it was Mr A. who had leaked to the press information on her first complaint before the Tribunal – as the complainant herself admitted first in her letter to the President of the Geneva Bar Association and subsequently before the Joint Advisory Committee – and also given that Mr A.'s action is properly attributable to the complainant by virtue of the power of attorney she had granted him and which afforded him wide authority, including the implicit authority to release information to the media when he considered such an action indispensable to her interests.

The defendant points out that the complainant's conduct was in breach of WIPO's Staff Regulations and Staff Rules and the Standards of Conduct for the International Civil Service, which relevantly provide that "[i]t would not be proper for international civil servants to air personal grievances or criticise their organizations in public" and that "in no circumstances should [staff members] use the media to further their own interests [or] to air their own grievances". It contends that it was fully justified in seeking to uphold these provisions and that, in view of the seriousness of the allegations, it was in its overall interest to initiate disciplinary proceedings. It denies that its decision to do so was motivated by bad faith.

The Organization submits that the Joint Advisory Committee took great care to ensure that the complainant was afforded due process and

that its proceedings were not tainted with any flaw. Emphasising that the relevant standard of proof is that of “precise and concurring presumptions”, it maintains that the Committee’s findings were fully supported by the evidence. It further submits that the disciplinary sanctions imposed on the complainant were proportional to the gravity of her conduct, namely, her deliberate orchestration of a leak to the press of false allegations, and in any event her failure to take corrective action, for example by distancing herself from the publication, seeking and obtaining an immediate retraction from the newspaper – which she alone could do – or taking action against it. With regard to the e-mail of 15 November 2007 informing staff about the imposition of disciplinary sanctions, WIPO asserts that it was appropriate in the circumstances, since it was the only way to repair the damage caused through the complainant’s conduct.

D. In her rejoinder the complainant reiterates that the Organization imposed disciplinary sanctions on her without having established her responsibility for the publication of the article in question. She considers it disingenuous for WIPO to claim that she “admitted” Mr A.’s responsibility for the information leak to the press, especially in light of the fact that he subsequently denied any involvement in the publication of the article. She points out that, contrary to the defendant’s assertion, she was not the only one who could seek and obtain retraction of the allegations contained in the newspaper article, since Swiss law affords a right of response to any person directly affected by a presentation of facts concerning him or her in the media.

E. In its surrejoinder the Organization maintains that the complainant must be held responsible for the actions of Mr A., her counsel at the time. It considers that the evidence it has adduced fully substantiates her responsibility in connection with the publication of the article. It rejects the complainant’s suggestion that it could have sought its retraction under Swiss law, noting that such action would have compromised its best interests, which require that it consider very carefully the waiving of its privileges and immunities.

CONSIDERATIONS

1. The complainant has been a WIPO staff member since 1995. On 11 December 2006 she was charged with violating the Staff Regulations and Staff Rules and the Standards of Conduct for the International Civil Service by using the media to further her interests and to air her grievances against WIPO in public.

2. The charges stem from an article that appeared in *Le Matin Dimanche* on 3 December 2006. The article reported that a WIPO employee had been repeatedly raped by two supervisors and suggested that the Director General had been indulgent. Although the harassers and the victim were not named in the article, there is no dispute between the parties that the article referred to the complainant. Additionally, there is no dispute that those allegations were false insofar, at least, as they adverted to the outrageous charge of “rape” instead of the lesser allegation of sexual harassment and insofar as they involved two of the complainant’s supervisors instead of one.

3. It is useful at this point to set out a brief account of the first complaint the complainant filed with the Tribunal. In 2003 the complainant complained of sexual harassment by her supervisor. The supervisor was given a verbal reprimand and the complainant was transferred to another unit. Since then, the complainant repeatedly sought a promotion but was unsuccessful. This ultimately led her to file a first complaint with the Tribunal. For this purpose, she retained the services of a counsel, Mr A., and gave him a power of attorney which, in effect, was authority to act on her behalf in the WIPO and Tribunal proceedings. Mr A. wrote to WIPO on 3 October 2006 threatening Tribunal proceedings and “all the publicity that inevitably attaches to this type of proceedings”. He drafted and submitted the complaint to the Tribunal on 8 November 2006. The complainant maintains that she did not see the complaint until long after it was filed and without her knowledge it included an allegation of rape against her former supervisor.

4. In Judgment 2706, delivered on 6 February 2008, the Tribunal concluded that the complaint was well founded and ordered WIPO to review the classification of her post and her application for promotion, to promote her, if appropriate, and to pay damages and costs. The Tribunal fixed a deadline of 6 August 2008 for compliance. In a separate proceeding, the complainant has filed with the Tribunal an application for execution of that judgment.

5. Returning now to the subject matter of this case, the complainant states that she confronted Mr A. soon after discovering the article and that he boasted that he was the journalist's source. A few days later, Mr A. denied being the source in a letter to WIPO's Legal Counsel.

6. The complainant maintains that she was not the source and that she had no advance knowledge of the article. She states that she took several steps to distance herself from the article and to seek its correction. She insisted that Mr A. write a letter to the newspaper denying the allegations of rape and seeking a correction, which he said he did on 14 December 2006. She told one of the Assistant Directors General of WIPO that Mr A. could deny the allegations. In January 2007 she dismissed Mr A. and complained about his conduct to the President of the Geneva Bar Association.

7. The charge against the complainant was forwarded to WIPO's Joint Advisory Committee which issued its report on 26 July 2007. The Committee considered that its mandate was to determine whether the complainant had breached the Staff Regulations and Staff Rules and the Standards of Conduct for the International Civil Service and to what extent the complainant's responsibility might have been mitigated by her subsequent actions.

It found that the complainant was responsible for the article, a serious offence that would normally warrant a severe sanction. However, in light of the mitigating factors, it recommended relegating the complainant to a lower step in salary; a three-year ban on any

promotions or advancements in salary step; a communication to all staff indicating that the allegations in the article had proven to be false and that sanctions had been imposed on the staff member concerned; and a public apology from the complainant.

8. On 15 October 2007 the complainant was informed that the Director General had decided to adopt the Committee's recommendations. The three-year ban came into effect on 1 November 2007 and the communication to all staff was sent on 15 November. As well, the complainant was advised on 12 November 2007 that the Director General had denied her request for review.

9. The complainant appealed to the Appeal Board. In its 15 May 2008 conclusions the Board considered that the complainant could not be held directly responsible for the publication of the article on the sole basis that she had given Mr A. a power of attorney in connection with the proceedings within WIPO and before the Tribunal. Having regard to the disparity between the sanction imposed on the complainant's former supervisor and those imposed on her, the Board recommended that the latter sanctions be considerably reduced and that her file be revised to reflect the change.

10. On 23 July 2008 the Director General decided to remit the Appeal Board's conclusions to the Joint Advisory Committee for further consideration. In its 16 October 2008 report the Committee found that there was no basis upon which to reduce the severity of the sanctions. On 28 November the complainant was notified that the Director General had endorsed the Committee's recommendations to maintain the disciplinary sanctions imposed in October 2007.

11. The determinative issue in this complaint centres on the finding that the complainant was responsible for the publication of the article. It is well established that the individual accused of wrongdoing is presumed to be innocent. It is equally well established that the accuser bears the burden of proof. WIPO does not deny that it bears the burden of proof but submits that the standard of proof is "precise and

concurring presumptions”. The Tribunal does not accept this submission. In Judgment 2786, under 9, it held that in the case of misconduct the standard of proof is beyond a reasonable doubt.

12. In its report of 26 July 2007 the Joint Advisory Committee found that two key considerations “firmly” placed the responsibility for the article on the complainant. The first consideration was the power of attorney the complainant had given to Mr A. and her admission that it was he who had been the source of the article and who had organised its publication. The second consideration was the letter written by Mr A. to the President of the Geneva Bar Association in response to a letter by the complainant complaining about his conduct. The Committee held that Mr A.’s letter gave rise to differences in fact and it concluded that “it would not be possible to obtain an exact picture of what had indeed transpired since it was one party’s word against the other’s”.

The Committee expressed concern at the absence of immediate action by the complainant to distance herself from the article and at the fact that she had not come forward to the Administration, the Staff Council, or the Ombudsman. In their deliberations, the Chairman of the Committee reminded the members “to base themselves on the facts of the matter in order to arrive at a conclusion and to not lose sight of the damage inflicted on third parties [the Organization, the Director General, and two staff members] with regard to which [the complainant] had taken no remedial action by way of apology”.

13. In its report of 16 October 2008, following the review requested by the Director General on the issue of culpability, the Committee noted that in making its original recommendations it had provided the complainant with all the procedural safeguards and that it had afforded her a fair hearing.

14. In its submissions WIPO engages in an extensive analysis of the facts in an attempt to establish the complainant’s responsibility for the publication of the article. However, it is not the Tribunal’s role to

engage in fact-finding and to make a determination on the question of culpability. Instead, the Tribunal's role is to assess whether the decision taken by the Director General is well founded.

15. The Tribunal observes that at no time throughout the various proceedings was there a finding that the complainant herself was the source of the article. As already indicated, in its report of 26 July 2007 the Joint Advisory Committee identified two key considerations that led to its conclusion that the complainant was responsible. As to the first consideration and the reliance on the power of attorney, it must be observed that the power of attorney only authorised and was limited to the taking of lawful actions and has to be understood in the light of the professional duties promulgated by the Rules and Customs of the Geneva Bar Association. If in fact Mr A. was the journalist's source, that was clearly contrary to his professional duty and beyond the scope of the authority granted in the power of attorney. Consequently, the finding that the granting of a power of attorney made the complainant responsible for the article is an error of law. Further, the Committee's characterisation that the complainant had admitted that Mr A. was the source is incorrect. It was not an admission by the complainant. Rather, the complainant simply relayed the admission made to her by Mr A.

16. In terms of the second consideration, namely, the letter from Mr A. to the President of the Geneva Bar Association, the Committee itself observed that no conclusion could be drawn as to what had occurred. The Tribunal finds it astonishing that the Committee appears to have relied on the content of the letter to cast blame on the complainant and yet at the same time states that no conclusion could be drawn from the letter as to what had indeed transpired.

17. As to the complainant's alleged failure to take immediate action to distance herself from the article, not only must it be observed that that statement is in fact incorrect, but also that, even if it were

correct, no adverse inference could be drawn from it. As detailed above, the complainant took immediate and appropriate action to deal with the situation. Similarly, no adverse inference can be drawn from the lack of immediate communication with the authorities identified by the Committee. In fact, the Committee did not explain the relevance of this lack of communication to the issue of culpability.

18. Lastly, the observation of the Chairman of the Committee to its members not to lose sight of the damage inflicted on third parties, which was made in the context of the deliberations on the question of guilt, is at best the taking into account of a highly irrelevant factor and at worst a presumption of guilt.

19. As the conclusion that the complainant was guilty was first reached in the Committee's report of 26 July 2007 and was unchanged in subsequent reviews, there is no need to examine in detail its report of 16 October 2008 as it mainly dealt with the question of sanctions. In the Tribunal's view, the evidence fell far short of establishing beyond a reasonable doubt that the complainant was responsible for the article.

20. The Tribunal concludes that the Joint Advisory Committee's finding, in turn endorsed by the Director General, namely that the complainant was responsible for the publication of the article, was tainted by the failure to consider the evidence against the correct standard of proof, by error of law, and by the drawing of adverse inferences which were not supported by the facts. Accordingly, the impugned decision must be set aside. Having reached this conclusion, there is no need to address the question as to whether the sanctions would have been appropriate in the circumstances had the complainant been responsible for the publication of the article.

21. However, there are troubling aspects with respect to the sanctions imposed, including the tailoring of a sanction to preclude

specifically a promotion to which the complainant would have been entitled on the basis of a reclassification. Moreover, the Tribunal notes that at least some of the sanctions imposed do not come within the available sanctions for disciplinary matters contained in the Staff Regulations and Staff Rules. The Tribunal also observes that the finding of serious misconduct appears to have been taken with a complete disregard of the relevant standard of proof.

22. Further, following the Director General's first endorsement of the Committee's recommendations, an e-mail was sent to all WIPO staff regarding the article that had appeared in the newspaper. The e-mail stated that the allegations in the press had proven to be false. It also stated that in light of the seriousness of the breach of the Staff Regulations and Staff Rules and the Standards of Conduct for the International Civil Service sanctions were applied to the staff member concerned. Even though the complainant was not named, her alleged connection with the article was well known to many staff members. This constituted a violation of her privacy and was an affront to her dignity. Further, it was made before the complainant had exhausted the internal means of redress.

23. In addition to setting aside the impugned decision, the complainant is entitled to moral damages in the amount of 40,000 Swiss francs and costs in the amount of 10,000 francs. WIPO will also be ordered to remove all documents and references to the disciplinary proceedings from her file. As WIPO is under a continuing obligation to remedy the injury caused by its e-mail of 15 November 2007 (see Judgment 2720, under 17) it will be ordered to send an e-mail to all staff stating that, with reference to its e-mail of 15 November 2007 concerning the staff member who had been found responsible for the publication of the article in *Le Matin Dimanche* of 3 December 2006, that staff member has been cleared of any wrongdoing and that the disciplinary sanctions have been lifted.

DECISION

For the above reasons,

1. The Director General's decision of 28 November 2008 as well as his earlier decisions of 15 October and 12 November 2007 are set aside.
2. WIPO shall pay the complainant moral damages in the amount of 40,000 Swiss francs.
3. It shall within seven days of the delivery of this judgment remove all documents and references to the disciplinary proceedings from the complainant's file.
4. The Organization shall within seven days of the delivery of this judgment send an e-mail to all staff stating that, with reference to its e-mail of 15 November 2007 concerning the staff member who had been found responsible for the publication of the article in *Le Matin Dimanche* of 3 December 2006, that staff member has been cleared of any wrongdoing and that the disciplinary sanctions have been lifted.
5. WIPO shall pay the complainant costs in the amount of 10,000 francs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 6 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Dolores M. Hansen
Patrick Frydman
Catherine Comtet