

S. (No. 8)

v.

WIPO

139th Session

Judgment No. 4971

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr A. S. against the World Intellectual Property Organization (WIPO) on 28 September 2021 and corrected on 11 February 2022, WIPO's reply of 24 June 2022, the complainant's rejoinder of 9 September 2022 and WIPO's surrejoinder of 14 December 2022;

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 contests his dismissal from service for misconduct.

The complainant joined WIPO in 1989. At the material time, he was a Counsellor in the Small and Medium-Sized Enterprises (SMEs) and Entrepreneurship Support Division, Department for Transition and Developed Countries.

On 17 September 2018, the Internal Oversight Division (IOD) received a report that the complainant had possibly engaged in unauthorised outside activities by taking management responsibilities in a non-governmental organization. Further to a preliminary evaluation, the Director, IOD, decided to open a full investigation into these allegations and, by memorandum of 11 January 2019, the complainant was notified of the investigation. On 22 January, he was

interviewed by the IOD. On the same day, the complainant sent an email to the then Director General, copying several staff members, informing him of a number of outside activities in which he had participated. The complainant affirmed that, according to his interpretation of the applicable rules and regulations, none of these activities required a formal declaration or an authorization from the Director General.

In February and March 2019, the IOD unsuccessfully sought additional information from the complainant. In parallel, the complainant filed a report of misconduct against the Director, IOD, before the Independent Advisory Oversight Committee (IAOC), which led to the suspension of the investigation. In April 2019, the IAOC informed the complainant that it considered that there was no impediment for the IOD to continue with the investigation, which was subsequently resumed.

In its report dated 26 September 2019, the IOD found that there was evidence that the complainant had engaged in outside activities through his contribution to “the formation and operationalization” of an association under Swiss Law, the Association of Indian Professionals (AIP), without having requested prior approval from the Director General. The IOD noted that the complainant had acknowledged that he did not request such approval and had failed to cooperate during its investigation. It recommended that disciplinary proceedings be initiated against him.

On 4 November 2019, the Director of the Human Resources Management Department (HRMD) sent the complainant a charge letter informing him that disciplinary action was being initiated against him. Four charges were listed: first, engaging in an outside activity without seeking prior authorization from the Organization; second, lacking independence and impartiality vis-à-vis the Government of India by playing an instrumental part in forming and operationalizing the AIP; third, failing to cooperate with the IOD; and fourth, making the interests of the AIP prevail over those of the Organization. The complainant was invited to comment, which he did on 6 December 2019, after requesting an extension of the time limit. He admitted that he had participated in the AIP’s activities but stated that, nonetheless, this did not reflect any

disloyalty towards the Organization and that no prior authorization was required. He emphasised that, in any event, he had informed the Director General and sought his authorization for his social activities in January 2019. The complainant also stated that he had participated in the interview conducted by the IOD, but he had not answered questions that pertained to the internal work of the AIP and were therefore confidential and “irrelevant” to the suspected misconduct.

In January 2020, the complainant was notified of another charge letter, issued by the Deputy Director of HRMD – following the recusal of the Director of HRMD on the grounds of conflict of interest – concerning a different set of charges brought against him. He was informed that he was charged with eight counts of misconduct, including inappropriate criticism of the Organization and its staff, using abusive language against a number of serving and former staff members, disseminating false and defamatory statements as well as airing personal grievances and criticizing WIPO in public resulting in a breach of his duty of loyalty in his letters addressed to the Chairs of the Organization’s General Assembly and Coordination Committee in which he made allegations of misconduct against the Director, IOD, and his current and former IOD colleagues. He was invited to comment, which he did on 3 February 2020, after requesting an extension of the time limit, in a letter addressed to the Deputy Director General, Copyright and Creative Industries Sector (CCIS), who was appointed by the Director General as the competent authority, the latter having also recused himself on the grounds of conflict of interest. The complainant denied all charges brought against him asserting, inter alia, his freedom of expression as well as his duty to report misconduct and reiterating his allegations against several staff members of the Organization.

By a letter dated 11 March 2020, the Deputy Director General, CCIS, informed the complainant that she had decided to dismiss him with immediate effect and to grant him a termination indemnity equivalent to six months’ salary as well as a sum equivalent to three months’ salary in lieu of notice.

On 16 August 2020, the complainant lodged an appeal with the WIPO Appeal Board (WAB). In its conclusions dated 17 June 2021, the WAB found that there was clear and convincing evidence that the complainant had engaged in misconduct as charged in the charge letters, however, it noted that one count contained in the second charge letter was not duly established. It recommended that the appeal be dismissed. On 30 June 2021, the complainant was informed that the newly appointed Director General – who took up office on 1 October 2020 – had decided to adopt this recommendation. That is the impugned decision.

The complainant asks the Tribunal to order “[t]he current complaint be expeditiously examined and investigated by a competent agency outside WIPO”, to order the Organization to issue a public apology recognizing the unlawfulness of his dismissal, to set aside the impugned decision and to remove all reference to it from his personnel records (with the exception of a copy of the public apology that he is requesting) and to reinstate him. The complainant also asks the Tribunal to award him moral damages in the amount of 500,000 Swiss francs, exemplary damages in the amount of 250,000 Swiss francs and costs. Lastly, he asks the Tribunal to grant him any other relief it deems equitable, fair and just.

The Organization asks the Tribunal to dismiss the complaint as unfounded in its entirety.

CONSIDERATIONS

1. The complainant requests oral proceedings and lists witnesses. Pursuant to Article V of the Statute of the Tribunal, “[t]he Tribunal, at its discretion, may decide or decline to hold oral proceedings, including upon request of a party”. In this case, the Tribunal finds the written submissions to be sufficient to reach a reasoned decision, and, therefore, rejects the request.

2. The following discussion proceeds against the background already set out in the facts described above. The complainant challenges the 30 June 2021 decision by which the newly appointed Director

General, endorsing the 17 June 2021 report of the WIPO Appeal Board (WAB), confirmed almost entirely the 11 March 2020 decision by which the Deputy Director General, Copyright and Creative Industries Sector (CCIS), decided to dismiss him with immediate effect on disciplinary grounds, based on Staff Rule 10.1.1(a)(5). The 11 March 2020 decision found that the complainant had engaged in multiple acts of misconduct, as described in two letters of charges, issued on 4 November 2019 and on 3 January 2020. It held the complainant responsible for the acts described in the four counts contained in the first letter of charges and for the acts described in the first six counts of the second letter of charges (whilst the seventh and eighth counts were not pursued). In turn, the WAB report found that the charge contained in the sixth count of the second letter of charges was not duly established, and the 30 June 2021 decision found the complainant guilty of the charges contained in the four counts of the first letter of charges and those contained in the first five counts of the second letter of charges.

3. It is appropriate, at the outset, to establish the scope of the present complaint.

Firstly, the complainant challenges, inter alia, a charge which he identifies as “Charge 9” and describes as follows: “Charge 9 Meeting with the Executive Director of the South Centre [...] to discuss [the complainant’s] personal grievances against two fellow citizens in its employ”. This charge actually corresponds to the sixth count contained in the second letter of charges. Considering that this particular count was not pursued in the WAB report and in the impugned decision, the complaint is moot in this respect.

Secondly, the complainant makes multiple references to episodes of harassment allegedly perpetrated by WIPO management against officials other than the complainant. Such episodes are outside the scope of the present complaint for lack of *locus standi ratione personae* and they will not be addressed by the Tribunal.

Thirdly, the complainant refers to a pattern of institutional harassment allegedly perpetrated against him. He contends that since the arrival of the former Director General and the Chief of Staff, he has been harassed, denied opportunities for advancement, suspended, and he unjustly received an unsatisfactory evaluation report. In his view, the challenged decision is tainted with institutional mobbing, retaliation, and abuse of power which have been directed against the complainant since 2008. He adds that he submitted, each time, evidence in support of his complaints of harassment, retaliation, or misconduct. However, the complaints were dismissed because the organs of the Organization had been compromised. In brief, he recalls multiple episodes, in addition to the impugned decision and the disciplinary decision, which have either been the subject matter of other complaints already adjudicated by the Tribunal or have been the subject matter of internal complaints never submitted to the Tribunal, or have never been reported internally.

The scope of the present complaint is only the assessment of the lawfulness of the impugned decision and of the disciplinary decision. The Tribunal will obviously assess whether they might amount, by themselves, to acts of harassment. However, the Tribunal cannot address the facts and decisions already dealt with in Judgments 4608, 4478, 4288, 4287, and 4002, which dismissed the complainant's claims. Indeed, in accordance with a recognised general principle of law, a person cannot submit the same matter for decision in two separate proceedings (see, for example, Judgments 4778, consideration 5, 4530, consideration 7, 4085, consideration 7, 3291, consideration 6, and 2742, consideration 16). Nor can the Tribunal address alleged further acts of harassment which the complainant has never reported internally, or which were reported and adjudicated internally but were not appealed and then challenged before the Tribunal, for failure to exhaust the internal means of redress (see Article VII, paragraph 1, of the Tribunal's Statute). The complainant insists that episodes of harassment already adjudicated should be addressed by the Tribunal in the present complaint, as he was, allegedly, a victim of a "miscarriage of justice". The Tribunal considers that this allegation is merely speculative and unproven. Furthermore, the Tribunal notes, to the extent that the

complainant calls into question its earlier rulings, that the complainant had the possibility to file an application for review under Article VI, paragraph 1, of the Tribunal's Statute, but did not pursue it.

4. The complainant alleges a number of procedural errors in the disciplinary proceedings, as follows:

- (i) the Internal Oversight Division (IOD) has become an instrument of oppression, repression and persecution;
- (ii) the former Director General influenced the Organization's organs of governance and justice;
- (iii) he was not consulted at the stage of the preliminary evaluation;
- (iv) the investigation of the allegations brought against him was fraudulent and its real aim was to intrude into the internal affairs of the Association of Indian Professionals (AIP); and
- (v) his arguments presented in his replies to the two letters of charges were ignored or misconstrued.

As to the arguments summarized in (i) and (ii) above, the Tribunal recalls that bias, bad faith, and abuse of authority must be proven, and the complainant bears the burden of proof. Although evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances, that does not relieve complainants, who bear the burden of proving their allegations, from introducing evidence of sufficient quality and weight to persuade the Tribunal. Mere suspicion and unsupported allegations are clearly not enough, the less so where, as here, the actions of the Organization, which are alleged to have been tainted by personal prejudice, are shown to have a verifiable objective justification (see Judgments 4745, consideration 12, 4608, consideration 7, and the case law cited therein; with regard to misuse of authority, see also Judgment 4427, consideration 12; with regard to bad faith, see also Judgment 3738, consideration 9). In the present case, the allegations concerning the IOD and the former Director General are merely speculative and, thus, unfounded.

The complainant's argument summarized in (iii) above is unfounded, as no rules entitled him to be consulted at the stage of the preliminary evaluation. In addition, the allegations summarized in (iv), that the investigation was fraudulent and that its real aim was to intrude into the internal affairs of the AIP, are mere unsubstantiated speculations.

His fifth argument is also unfounded, as the disciplinary decision took into due consideration the complainant's submissions concerning the two letters of charges.

5. In his further arguments, the complainant tries to establish that the impugned decision and the disciplinary decision are substantially flawed. He specifically contests all the counts he was charged with.

Before addressing the complainant's arguments concerning each charge, it is appropriate to recall the scope of the Tribunal's review in disciplinary matters and the standard of evidence required for disciplinary convictions.

Firstly, the Tribunal shall not interfere with the findings of an investigative body in disciplinary proceedings unless there was a manifest error (see Judgments 4770, consideration 12, 4745, consideration 5, 4579, consideration 4, 4460, consideration 8, and the additional cases quoted therein).

In disciplinary matters, the Tribunal has consistently found that the burden of proof rests on an organization, which has to prove allegations of misconduct beyond reasonable doubt before a disciplinary sanction can be imposed (see Judgment 4749, consideration 5). The role of the Tribunal is not to assess the evidence itself and determine whether the charge of misconduct has been established beyond reasonable doubt but rather to assess whether there was evidence available to the relevant decision-maker to reach that conclusion (see Judgment 4362, consideration 7). Part of the Tribunal's role is to assess whether the decision-maker properly applied the standard when evaluating the evidence (see Judgment 3863, consideration 8).

6. The Tribunal now will address the complainant's arguments concerning the first, second and fourth charges contained in the first letter of charges. These charges were formulated as follows. The complainant:

- “engaged in an outside activity, namely forming and operationalizing the AIP, without seeking prior authorization from WIPO. In doing so, [he] failed to comply with Staff Regulation 1.6(a), the authorization procedure contained in paragraphs 24 and 25 of Office Instruction No. 1/2018 (‘Outside Activities’), and paragraph 45 of the Standards of Conduct for the International Civil Service (‘Standards of Conduct’);”
- “lacked independence and impartiality vis-à-vis the government of the Republic of India, in breach of Staff Regulations 1.5(a) and 1.9, by playing an instrumental part in forming and operationalizing the AIP, although the stated purpose of this association was notably to contribute to development goals and aspirations of India”;
- “made the interests of the AIP prevail over those of the International Bureau. [The complainant] thus failed to act with the integrity, independence and impartiality required by [his] status under Staff Regulations 1.5(a) and 1.9, paragraphs 2, 5 and 8 of the Standards of Conduct, and to regulate [his] conduct only with the interests of WIPO in view as mandated by Staff Regulation 1.1 and paragraph 4 of the Standards of Conduct.”

The complainant considers these charges as an “assault on freedom of association of Indians” and contends, in brief, that:

- (i) international civil servants have the right to form and join associations, unions or other groupings in light of the right to freedom of association, with no need for prior authorization;
- (ii) the Organization failed to establish that his engagement with the AIP had any relation to his official functions or was incompatible with his status;

- (iii) in any event, although the authorization was not required, he asked the Director General to grant him authorization to participate in the AIP after receiving the notice of investigation, but he never received a reply;
- (iv) the AIP is a private non-remunerated outside social activity. Nothing on the record suggests that the complainant's involvement with it could be qualified as "occupation" or "employment" in violation of Staff Regulation 1.6 (a)(1) and paragraph 1 of Office Instruction No. 1/2018 nor that it interfered with his obligations towards the Organization;
- (v) in the event that his involvement with the AIP was an unauthorized external activity, the Organization should have warned him that he was in breach of the WIPO Staff Regulations and Rules and given him an opportunity to put his affairs in order;
- (vi) the Organization considered that the AIP's aim to contribute to the development of India breached the complainant's impartiality towards the Government of India. However, such goal was never pursued and was only one among many others that were ignored by the Organization;
- (vii) nothing on the record suggests that the complainant made the interests of the AIP prevail over those of the Organization. During the complainant's long career with WIPO, no-one has complained that he has failed to promote or protect the interests of the Organization; and
- (viii) he was subject to unequal treatment and to discrimination. A colleague who had an equivalent level of participation to his own in the AIP was exonerated from disciplinary sanctions.

It is appropriate to recall the relevant Staff Regulations and Rules concerning "outside activities" of staff members and the purposes of the AIP as described in its Statute.

Pursuant to Staff Regulation 1.5(a):

"Staff members shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity which is incompatible with the proper discharge of their duties with the International Bureau. They shall avoid any action, and in particular any

public pronouncement, which may adversely reflect on the international civil service or which is incompatible with the integrity, independence and impartiality required by their status. While they are not expected to disregard their national sentiments or their political or religious convictions, they shall at all times act with the reserve and tact incumbent on them by reason of their international status.”

Staff Regulation 1.6(a), under the heading “Activities and Interests outside the International Bureau”, adds that:

“Staff Members:

(1) shall not engage, without the prior authorization of the Director General, in a continuous or intermittent manner, in any occupation or employment, remunerated or not, outside the International Bureau;”.

Staff Regulation 1.9, under the heading “Political Activities”, highlights that:

“Staff members may not engage in any political activity which is incompatible with or might reflect upon the independence and impartiality required by their status as international civil servants.”

The Standards of Conduct reads, in the relevant parts:

“8. If the impartiality of the international civil service is to be maintained, international civil servants must remain independent of any authority outside their organization; their conduct must reflect that independence. In keeping with their oath of office, they should not seek nor should they accept instructions from any Government, person or entity external to the organization. It cannot be too strongly stressed that international civil servants are not, in any sense, representatives of Governments or other entities, nor are they proponents of their policies. [...]

9. Impartiality implies tolerance and restraint, particularly in dealing with political or religious convictions. While their personal views remain inviolate, international civil servants do not have the freedom of private persons to take sides or to express their convictions publicly on controversial matters, either individually or as members of a group, irrespective of the medium used. This can mean that, in certain situations, personal views should be expressed only with tact and discretion.”

The obligations arising from Staff Regulations 1.5, 1.6, and 1.9 are clarified by Office Instruction No. 1/2018, which also establishes procedures for requesting authorization for such activities. For the purposes of the present complaint, it is appropriate to quote paragraphs 2, 14, 15, 24, and 25:

“Definitions

2. In this Office Instruction:

(a) ‘occupation or employment’ shall include self-employment and the exercise of a profession, whether as an employee or an independent contractor;

(b) ‘outside activity’ shall mean any activity which is not included in the scope of the staff member’s official functions.

[...]

Activities related to WIPO

14. Subject to the foregoing, outside activities may be beneficial both to staff members and the Organization. They may foster contacts with private and public bodies and thus serve to maintain and enhance their professional and technical competencies. Outside activities that are of benefit to the Organization or the achievement of its goals and/or contribute to the development of professional skills of staff members are welcome, provided that (1) the outside activity in question is authorized pursuant to Staff Regulation 1.6, and (2) staff members exercise the utmost discretion with regard to all matters of official business and avoid any public statement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

Specific outside activities

Social, artistic, religious or charitable activities

15. Private non-remunerated activities for social, artistic, religious or charitable purposes which have no relation to the staff member’s official functions or to the Organization, and take place outside working hours or while the staff member is on leave, may be engaged in at the staff member’s discretion. Staff members shall in every instance ensure that the activity is and remains compatible with their status as international civil servants.

[...]

Authorization procedure

24. Before undertaking an outside activity or confirming acceptance to participate in it, the staff member shall request authorization from the Director of [Human Resources Management Department (HRMD)] (under the authority delegated by the Director General), using the form provided in Annex 2. The staff member shall send it via the relevant supervisor(s) and Program Manager if the subject matter is or may reasonably be considered to be related to the staff member’s official duties.

25. The request shall specify:

(a) the nature of the activity;

(b) the employer, sponsor or organizer of the activity;

(c) when the activity will take place, its frequency (where appropriate), its anticipated duration, and the number of hours per week/month that are expected to be devoted thereto;

(d) whether or not the activity is remunerated and if so, the expected amount of the remuneration;

(e) why, in the staff member's view, the outside activity is not incompatible with his or her duties and obligations under Regulations 1.5 and 1.6 as well as sections 45 to 49 of the Standards of Conduct for the International Civil Service;

(f) any other relevant facts linked to the request;

(g) the staff member shall submit extracts of materials he or she wishes to publish, or any other relevant documentation to support the request."

As to the AIP's purposes, its Statute, in the relevant parts, reads:

"ARTICLE 1

The Association of Indian Professionals (AIP) is a non-profit association. As an association governed by the present Statutes, Rules and Articles 60 et seq. of the Swiss Civil Code, the AIP has legal personality. It is politically neutral, non-denominational and of unlimited duration.

[...]

OBJECTIVES

ARTICLE 3

The Association has the following objectives:

[...]

- o To enhance good governance, transparency and accountability, especially in international intergovernmental and non-governmental Organizations.
- o To serve as a platform to garner professional excellence and contribute to:
 - o Better relations between Switzerland, the country of residence of members, their respective international intergovernmental and non-governmental Organizations and India;
 - o India's developmental goals and aspirations.
- o To safeguard the professional interests of its members, inter alia, by:

[...]

- o Identifying specific problems, concerns and challenges and seeking solutions;

[...]

- o To promote an understanding of major issues of importance to India and the Indian community in international relations by providing a forum to study, discuss and exchange views.
- o To attain the aforementioned objectives in cooperation with relevant institutions, bodies and authorities.
- o The Association may add any other aim and objective in pursuit of the general objectives.”

In light of the aforementioned Staff Regulations and Rules, and the Standards of Conduct, international civil servants must be impartial and independent from national States, and cannot engage in outside activities which can undermine their independence and their impartiality. There can be no doubt that freedom of association is a well-recognised and acknowledged universal right which all workers, including international civil servants, should enjoy (see Judgment 4551, consideration 9, and the case law cited therein). International civil servants have the right to join trade unions without seeking prior authorization from their employer.

In addition, the private activities of WIPO staff members are respected to the extent that the Staff Regulations and Rules allow staff to engage in “specific outside activities” which are defined as “[p]rivate non-remunerated activities for social, artistic, religious or charitable purposes which have no relation to the staff member’s official functions or to the Organization”, with no need for prior authorization. However, in order to join other kinds of private associations included in the definition of “outside activities”, WIPO staff members need to seek the prior authorization of their employer, aimed at assessing that the purposes of the private associations are not in conflict with the staff members’ duty to be impartial and independent. Having regard to the statutory purposes of the AIP, this Association cannot be included in the definition of “Specific outside activities – Social, artistic, religious or charitable activities” provided for by paragraph 15 of Office Instruction No. 1/2018. Nor can it be characterized as a trade union or staff association. Although Article 1 of its Statute states that AIP is a “non-profit association” and that “[i]t is politically neutral”, these statements are contradicted by Article 3 of the Statute. The purposes illustrated in Article 3 concern the interests of India and Indian

nationals, and are political in nature, as they refer, inter alia, to improving relations between India, Switzerland, and the respective international and non-governmental organizations of the members of AIP, and contributing to India's developmental goals and aspirations. Therefore, the complainant could not have engaged in the AIP at his own discretion without requesting prior authorization from his employer.

In light of the foregoing, the Tribunal is satisfied that the impugned decision and the disciplinary decision are free from flaws with regard to the first, second and fourth counts of the first charge letter. They correctly considered that the AIP's objectives are inconsistent with a WIPO staff member's duty of impartiality and independence, and that, accordingly, the complainant engaged in an outside activity in contrast with his duties without even trying to seek prior authorization. In addition, the disciplinary decision provided persuasive evidence of the complainant's "instrumental contribution in forming and operationalizing the AIP", as:

- he was one of the eight members of the preparatory committee which organized and convened, by an email dated 4 June 2018, the AIP constituent assembly that was held on 9 June 2018, and prepared the draft statutes of the AIP; and
- during the AIP constituent assembly, the complainant was elected as its chair, and appointed as one of the 14 members of the AIP's transitional executive committee whose role was to "assume executive and administrative functions in order to lay down the foundations of the [A]ssociation and operationalize the Association".

As to the complainant's contention that he requested the authorization after he was notified of the charges, the Tribunal notes that he should have requested the authorization prior to his engagement in the AIP and not only after he was charged for failure to seek prior authorization. In any event, even after he was notified of the charges, the complainant did not request authorization in compliance with the relevant rules, as to the authority to whom to address the request and as to the information to be provided. The Organization had no duty to warn him that he needed the authorization, as he was expected to know the Staff Regulations and Rules and to comply with them (see Judgment 4823,

consideration 23, and the case law quoted therein). It was not the Organization's duty to advise him about his outside activities, but it was his duty to promptly inform the Organization about them.

As to the complainant's contention that the AIP's aim to contribute to the development of India was never pursued and was only one among many other aims that were ignored by the Organization, the Tribunal reiterates that the AIP's Statute is unequivocal in stating political objectives in the interest of India. Accordingly, it is immaterial whether the complainant actually took action to reach the statutory objective. It is also immaterial to consider the many purposes of the AIP, because those that were taken into account by WIPO are inconsistent with the duties of an international civil servant.

Moreover, the mere fact that the complainant had a significant role in forming and operationalizing the AIP, as described in the first charge letter, amounts to evidence of the charge that he made the interests of the AIP prevail over those of the Organization.

As to the allegation of unequal treatment, firstly, the Tribunal recalls its case law, stating that the principle of equal treatment cannot ordinarily be invoked to challenge a finding of misconduct. A decision not to initiate proceedings against other staff members has no bearing on the lawfulness of the measure applied to a staff member (see Judgments 4247, consideration 13, and 3575, consideration 5, and the case law cited therein). It is also entrenched in case law that unequal treatment presupposes that two persons being in the same situation are treated differently. The principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other hand, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see Judgment 4712, consideration 5). This is not the case here, as the complainant and the other member of the AIP who was not dismissed on disciplinary grounds, Mr Sa., were not in the same position. As the complainant himself acknowledges, at the relevant time Mr Sa. was not a staff member, as he held an Individual Contractual Service.

In conclusion, the Tribunal is satisfied that it was open to the Organization to find, on the evidence, that the first, second and fourth counts contained in the first letter of charges were proven beyond reasonable doubt. Accordingly, the complainant's related pleas are rejected.

7. In the present consideration, the Tribunal will address the complainant's arguments concerning the third charge contained in the first letter of charges. This charge was formulated as follows. The complainant:

"[...] failed to cooperate with IOD, thus breaching Staff Regulation 1.7(b), paragraph 13 of the WIPO Internal Oversight Charter, paragraph 26 of the Investigation Policy, as well as paragraph 110 of the Investigation Manual".

The complainant objects that he participated in an hour-long interview with the IOD investigators and that he only declined to answer questions from the IOD that were irrelevant and which he considered to be a "fishing expedition" aiming to interfere with the affairs of the AIP.

It is appropriate to recall the relevant Staff Regulations and Rules concerning the duty of staff to cooperate with the investigators.

Staff Regulation 1.7(b) reads:

"Staff members have the duty to report suspected wrongdoing in WIPO and to cooperate with any duly authorized investigation. [...]"

This is reiterated in paragraph 13 of the WIPO's Internal Oversight Charter, as follows:

"[...] WIPO staff members, contractors and other personnel have the duty to cooperate with any duly authorized investigation."

Paragraph 26 of the Investigation Policy adds that:

"[...] intentionally and knowingly making allegations or providing information that is false or misleading or that recklessly disregard the accuracy of the information constitutes serious misconduct and may result in disciplinary or other appropriate action".

According to paragraph 110 of the Investigation Manual:

“Exceptionally, the Director, IOD may relieve a staff member from the duty to participate in an interview and require him/her to instead provide written answers to written questions. This may be the case, in particular, when the staff member concerned is medically unfit to attend the interview.”

It is useful to recall that according to the Tribunal’s case law, where such staff rules are established, the persons subject to an investigation carried out by an international organization have a duty to cooperate with the investigation and may be sanctioned if they fail to do so (see Judgment 4858, consideration 25).

The complainant himself acknowledges that he did not answer questions that he perceived as “an unwarranted intrusion and an unacceptable investigation in the internal affairs of an independent and ‘sovereign’ organization”. By doing so, the complainant violated not only his duty to cooperate with the investigation but also his duty to put the interests of the Organization before his own private interests. In his capacity as an international civil servant, he was not allowed to invoke a duty of confidentiality towards the AIP to refuse to respond to the questions of the IOD. In so doing, he violated his duty of independence and impartiality. In conclusion, the allegations challenging the third charge of the first letter of charges are unfounded and are rejected.

8. In the present consideration, the Tribunal will address the complainant’s arguments concerning the first five counts contained in the second letter of charges. These charges were formulated as follows. The complainant:

- (1) “made highly inappropriate criticisms of WIPO and WIPO staff at large in the April and May 2018 Letters, and [...] trivialized the atrocities suffered by those who were sent to concentration camps and forced labor camps [so failing] to adhere to the highest standards of conduct as required in paragraph 2 of the Standards of Conduct for the International Civil Service [...] [He] conducted [him]self in a manner that is unbecoming [his] status as an international civil servant and that is incompatible with the integrity and impartiality required by [his] status, in breach of Staff

Regulation 1.5(a) ('Conduct'). By making such criticisms, [he] also breached [his] duty of loyalty to the Organization provided under Staff Regulation 1.11 ('Oath or Declaration') and paragraphs 4 and 37 of the Standards of Conduct. [He] further breached Staff Rule 1.5.1 ('Discrimination or Harassment'), which prohibits verbal abuse in the workplace or in connection with official functions";

- (2) he "used abusive language against a number of WIPO staff members and former staff members, as well as parties external to the Organization, in the April 2018 and May 2018 Letters, in Annex 1 to the Letters, and in the December 2019 Response [so failing] to adhere to the highest standards of conduct as required in paragraph 2 of the Standards of Conduct. On the contrary, [he] conducted [him]self in a manner that is unbecoming [his] status as an international civil servant, and that is incompatible with the integrity and impartiality required by [his] status, in breach of Staff Regulation 1.5(a). By making such statements, [he] also breached Staff Rule 1.5.1, which prohibits verbal abuse in the workplace or in connection with official functions";
- (3) he "made statements in the April and May 2018 Letters, which [he] knew to be false or misleading, or with reckless disregard for their accuracy, within the meaning of Staff Regulation 1.7(e) ('Communication of Information')";
- (4) he "made defamatory statements about Mr. [P.] and the Director General, in breach of the obligations contained in Staff Regulation 1.5(a) to conduct [him]self in a manner befitting [his] status as an international civil servant, and to avoid any action which may adversely reflect on the international civil service, or which is incompatible with the integrity required by that status"; and
- (5) he "aired personal grievances, criticized WIPO in public and thus failed to promote a positive image of the international civil service and of WIPO, by sending to unauthorized parties external to the Organization the April 2018 and May 2018 Letters [so acting] in breach of paragraph 37 of the Standards of Conduct and Staff Regulation 1.5(a). [He] also failed to act with the restraint, tact and

discretion expected of international civil servants pursuant to paragraph 9 of the Standards of Conduct, and to regulate [his] conduct only with the interests of WIPO in view, as required by Staff Regulations 1.1 ('Status of Staff Members') and 1.11, as well as paragraph 4 of the Standards of Conduct. Furthermore, [he] breached [his] duty of loyalty to the Organization provided under Staff Regulation 1.11 and paragraphs 4 and 37 of the Standards of Conduct."

The complainant considers these charges an "assault on [his] right to freedom of expression, [his] duty to report misconduct and wrongdoing and [his] inalienable right to seek justice". He contends that none of his statements rose to the level of abusive or offensive language.

In essence, he alleges that he duly exercised his freedom of expression and his duty to report misconduct and that his language should be contextualized. He tries, through multiple arguments, to demonstrate that the Organization mischaracterized his expressions.

As to the first charge (of the second letter of charges), he contends that this charge:

- was factually inaccurate and presented a distortion of his statements. He did not make a comparison, in the literal sense, between Auschwitz and a Gulag and the Organization, he just used a metaphor to compare the oppression and persecution he had witnessed and experienced; the focus of this comparison was on the actors who perpetrated the horrors, not on the victims;
- the analogy he made between the International Federation of Association Football (FIFA) and WIPO was meant to denounce the former Director General's policies;
- he referred to the My Lai massacres in the context of his suspension from duty in 2016; he meant, by this analogy, to convey the message that the staff member who notified him of it should have "resisted" the implementation of the suspension decision issued by the Director General;

- he made a comparison between his situation and racial segregation to denounce covert racism within WIPO without disrespecting the victims of segregation.

As to the second charge (of the second letter of charges), he contends that it is inaccurate as:

- he only defended himself from the defamation he suffered from the Director General and illustrated that the IOD is no longer a repository of oversight;
- he used the term “snitch” to describe Mr Sa. since Mr Sa. was working as an informant for the IOD.

As to the third and fourth charges (of the second letter of charges), he contends that his statements were not defamatory, as, in his letters of 2018 and 2019, he referred to misconduct by Mr P., denounced in 2016. He adds that he has never made unsubstantiated or reckless allegations against anyone, his allegations have been based on reasonable grounds.

As to the fifth charge (of the second letter of charges), he objects that he sent copies of his complaint of misconduct against Mr Si. to the members of the Coordination Committee and the Chair of the WIPO General Assembly because the internal justice system does not offer justice.

It is appropriate to quote the relevant Staff Regulations and Rules, upon which the charges above are based.

Apart from Staff Regulation 1.5(a) and paragraph 9 of the Standards of Conduct, already quoted in consideration 6 above, the relevant rules are Staff Regulations 1.7(e) and 1.11, Staff Rule 1.5.1, and paragraph 37 of the Standards of Conduct.

According to Staff Regulation 1.7(e):

“Reports, statements or claims which are intentionally and knowingly false or misleading or made with reckless disregard for accuracy of the information shall be regarded as serious misconduct.”

Staff Regulation 1.11 concerns the oath or declaration made by staff members on taking up their duties.

Pursuant to Staff Rule 1.5.1:

“Discrimination or Harassment

Any form of discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse in the workplace or in connection with official functions, is prohibited.”

According to paragraph 37 of the Standards of Conduct:

“It would not be proper for international civil servants to air personal grievances or criticize their organizations in public. International civil servants should endeavour at all times to promote a positive image of the international civil service, in conformity with their oath of loyalty.”

In order to address the complainant’s pleas, which rely upon the fundamental rights of freedom of speech and of defence, it is appropriate to recall the Tribunal’s case law on the subject matters of freedom of speech and its limits, defamation, and “in court privilege”.

As to freedom of speech, in Judgments 4551 and 3156, the Tribunal stated that freedom of speech is not unlimited. The right to freedom of speech does not encompass action that impairs the dignity of the international civil service, or gross abuse of this right and, in particular, damage to the individual interests of certain persons through allusions that are malicious, defamatory, or which concern their private lives (see Judgments 4551, consideration 9, and 3156, consideration 15).

As to defamation, in Judgment 3106, consideration 9, the Tribunal identified two crucial aspects of the law of defamation, which is not concerned solely with the question of whether a statement is defamatory in the sense that it injures a person’s reputation or tarnishes her or his good name. It is also concerned with the question of whether the statement was made in circumstances that afford a defence. Broadly speaking, the defences to a claim in defamation mark out the boundaries of permissible debate and discussion. As illustrated in Judgment 3106, consideration 9, as a general rule, a statement, even if defamatory in the sense indicated, will not result in liability in defamation if it was made in response to criticism by the person claiming to have been defamed or if it was made in the course of the discussion of a matter of legitimate interest to those to whom the statement was published and, in either case, the extent of the publication was reasonable in the circumstances.

For the first aspect, it is for the organisation to prove the statement was defamatory. The standard is whether the publication of a statement injures a person's reputation or tarnishes her or his good name (see also Judgment 4478, consideration 7). Neither the complainant's intention nor malice are essential elements of defamation (see Judgment 4478, consideration 8). For the second aspect, it is for the complainant to prove that he has a valid defence. In Judgment 3106, consideration 9, the Tribunal listed two defences: a discussion of legitimate interest and a response to criticism or attack. In Judgment 2751, consideration 5, the Tribunal recognised another defence, namely that statements are privileged if made in legal proceedings, and the same applies to those of internal appeal bodies, because it is necessary for the proper determination of proceedings and the issues that arise in their course: "A litigant whose submissions contain language that is unacceptable, or ill-chosen, or damaging, or unseemly, does not thereby lose the immunity that attaches to statements made in judicial proceedings, however much the breach of good taste may be deplored." The Tribunal's case law affirms that "[s]tatements made in legal proceedings are privileged, whether those statements are made in writing in the pleadings or orally in the course of a hearing. The consequence is that, even if defamatory, they cannot be the subject of legal proceedings or sanction. The privilege, sometimes referred to as 'in court privilege', exists, not for the benefit of the parties or their representatives, but because it is necessary for the proper determination of proceedings and the issues that arise in their course" (see Judgment 2751, consideration 3). However, according to the cited case law, the "in court privilege" attaches to the Tribunal's proceedings as well as those of internal appeal bodies (see again Judgment 2751, consideration 3, and the case law cited therein). The Tribunal's case law does not attach the "in court privilege" to other proceedings.

In the present case, the letters sent by the complainant and considered in the charges, did not fall under a privileged category, as they were not made in legal proceedings before Courts or internal appeal bodies. Nor might these letters be considered as a due report of misconduct, because they were not addressed to the authority in charge of receiving reports of misconduct. Accordingly, the complainant's

letters of April and May 2018 cannot be considered as an exercise of his right of defence. Thus, in order to assess whether the language used by the complainant was justified, it is inappropriate to rely on the right of defence. Reference will be made only to the freedom of speech. In light of the abovementioned case law, freedom of speech is not unfettered, as it “does not encompass action that impairs the dignity of the international civil service” and does not allow defamation. In turn, defamation does not require intention or malice. Its requirements are (i) injuring statements and (ii) the lack of valid reasons for making those statements.

Having regard to the content of the complainant’s letters of April and May 2018 and 2019, to the charges against him, and to his arguments submitted in the present proceedings, the Tribunal is satisfied that the impugned decision and the disciplinary decision are free from legal flaws. The complainant used inappropriate and offensive language which was apt to impair the dignity of the international civil service and was defamatory towards staff whose alleged responsibility had never been proven. Moreover, the complainant’s language was gratuitous and not required by the need to defend his rights or to report misconduct. Nor is there any evidence that he was “provoked” and that he had to react in response to criticism against him.

In conclusion, the Organization has proven that the complainant’s statements were defamatory, and the complainant has not proven the occurrence of circumstances that afforded a defence, namely that he made his statements in response to criticism or in the course of the discussion of a matter of legitimate interest. In addition, the complainant has been charged not only with the accusation of inappropriate criticism and abusive language but also with breach of Article 1.7(e) of the Staff Regulations, that is for statements made “with reckless disregard for accuracy of the information”. In conclusion, the Organization correctly and lawfully found that the complainant had engaged in inappropriate criticism of WIPO and WIPO staff members at large, abusive language against a number of WIPO staff members, former staff members, and parties external to the Organization, dissemination of false and defamatory statements, airing of personal grievances and criticism in public, and

failure to protect the image of the international civil service and of WIPO.

9. The complainant also alleges that the disciplinary sanction was the last act of a chain of institutional harassment against him. As already discussed, the complainant bears the burden of proving that the decision was tainted by bias, abuse, and prejudice. In the present case, the disciplinary decision had objective justifications and there is no evidence that it was aimed at harassing the complainant.

10. As all the complainant's pleas are unfounded, all his claims are rejected, and the complaint will be dismissed without any need to address the receivability issues raised by the Organization, other than those already specifically addressed by the Tribunal.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 17 October 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER