

TIP OF THE MONTH

September 2007

STRIFE WITHIN THE STAFF UNION: LIMITS OF ADMINISTRATION INTERFERENCE AND FREE SPEECH

It often arises that members of the staff union divide themselves into opposing camps with differing points of view and agendas. When the disputes come to “civil war”, one side may seek the aid of the administration in defending its views and interests and the other side may claim foul play on the part of the administration if aid is given or perceived to be given.

In Judgment No. 2636 delivered in February 2007, the Tribunal was called on to decide whether the administration of the WIPO unlawfully interfered in such a dispute or alternatively should have interfered to prevent the strife. After new Staff Council elections were called following an extraordinary general assembly (EGA), the serving Staff Council President accused the Director General of interfering in Staff Council matters and demanded that he refuse to recognize the call for new elections. In particular, the President said it was inappropriate for the administration to provide use of the e-mails for transmitting the request for the EGA, for failing to act to prevent malicious criticisms of the President’s handling of Staff Council matters by the former President over many years which constituted harassment, and for failing to act in response to physical aggression and verbal assaults a few weeks after the EGA committed by four staff members in the President’s office. The Director General refused to take any action except for referring the latter allegations to internal audit (6 months after they were alleged). Before the Tribunal, the President asserted that his right to freedom of association was breached.

The Tribunal noted that every WIPO staff member is entitled to freedom of association by virtue of the staff regulations which establish a Staff Council. It also noted that freedom of association carries with it freedom of discussion and debate in relation to Staff Association matters. The Tribunal analyzed whether the WIPO administration interfered with Staff Council activity by supporting and encouraging the opposition, and whether it should have intervened on behalf of the serving President to, so to speak, suppress the opposition for its unwarranted attacks on the President. In this regard, it recalled Judgment 274 which held that “activities within the Staff Association constitute an area that is ‘prima facie’ outside the Director-General’s jurisdiction. Here again there may be exceptional cases” for malicious and indefensible slanders spread about other members of the staff whether in the office or outside the office and whether connected or not with the affairs of the Staff Council.

With respect to the former Staff Council’s written criticisms of the President’s performance, the Tribunal found they were marked by sarcasm, irony and strong language that the recipients were entitled to regard as offensive. However, they concerned the activities of the Staff Council and there was nothing to suggest that they were malicious i.e., that they contained knowingly false statements or were sent for a purpose unrelated to the Staff

Association. The Tribunal held that so long as the former President honestly held the opinions expressed, he was entitled to express them in strong terms. Accordingly, there was no obligation on the part of WIPO to take action and if it had it would have been a breach of freedom of association.

On the issue of providing the use of the e-mails to those who had signed the petition for an EGA, the Tribunal held that the administration's actions were taken after the outbreak of the "civil war" and after the sides had taken firm positions. In providing use of the e-mail system, the administration was promoting freedom of speech in relation to a matter of concern to the Staff Association, which was in the interest of both the Association and the Organization. The Tribunal accepted the contention that the administration had encouraged attendance at the EGA and there was an unusually high attendance including by persons in senior positions. These facts did not prove that the administration was "complicit in a campaign to destabilise the Staff Council or to remove the complainant as its President . . . it is equally probable that, if it did encourage attendance at the assembly, it did so in the hope that that would result in a resolution of the differences within the Staff Association". Individual staff members, whether or not in senior positions, were entitled to express their views at the EGA. The Tribunal therefore concluded that there was no basis for finding "institutionalized harassment."

The Tribunal reaffirmed that there are limits to freedom of association and to freedom of discussion and debate. It would not extend, for example, to intimidation, offensive behaviour or aggression. The Tribunal found that the allegations of aggression and verbal assault in the President's office to be serious and unprotected free speech. It was the duty of WIPO, as part of its duty of care of ensuring a safe and secure working environment, to ensure that these allegations were properly and promptly investigated. Since it failed to do so promptly, the Tribunal awarded the President moral damages and costs.

This case is a good lesson that when strife emerges within a staff union or association, it gives the administration the opportunity to lawfully get involved in the disputes by taking sides, voicing their opinions, and otherwise causing further discord. The Tribunal will also not fault the administration for not preventing vigorous debate (free speech) that outside the context of staff association activities would well be considered grounds for disciplinary action. The Tribunal will, however, fault the administration for not taking action if (malicious) false statements are made knowing they are false or if other acts (physical aggression or verbal threats) are undertaken. The Tribunal has not yet decided such a case nor given concrete examples or guidance of what constitutes malicious and indefensible slanders.

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