

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**M.**  
**v.**  
**WIPO**

**125th Session**

**Judgment No. 3945**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms L.-L. M. against the World Intellectual Property Organization (WIPO) on 14 March 2016 and corrected on 27 June, WIPO's reply of 4 October 2016, the complainant's rejoinder of 9 January 2017 and WIPO's surrejoinder of 18 April 2017;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges her 2013 performance evaluation.

The complainant was first employed by WIPO under a consultancy contract which was extended several times. She was subsequently employed under a temporary appointment which was similarly extended. On 27 January 2014 she began a new assignment (which was also a temporary appointment); her last temporary appointment was for the period from 1 March to 31 August 2014. By a letter of 13 August 2014 she was informed that her appointment would be extended from 1 September to 30 November 2014, but that it would not be extended further.

On 17 November 2014 the complainant filed an appeal with the Appeal Board regarding the non-renewal of her appointment; this appeal was ultimately forwarded to the Director General to be treated as a request for review. By a letter of 16 January 2015 the complainant was informed that the Director General confirmed the non-renewal of her appointment. The complainant did not file an internal appeal challenging this decision.

In the meantime, in August 2014 she initiated a rebuttal of her 2013 performance evaluation in which she had received an overall rating of “Improvement in performance required” from her reviewing officer. On 19 September 2014 the Director of the Human Resources Management Department confirmed that rating. In December the complainant appealed that decision before the Appeal Board and requested that her overall rating be modified to “Effective performance” and that her rebuttal be re-examined by a competent authority. In its conclusions of 16 October 2015 the Appeal Board recommended inter alia that the Director General maintain the complainant’s overall rating. By a letter of 15 December 2015 the complainant was notified that the Director General accepted the Appeal Board’s recommendation that no change be made to her overall rating for 2013. That is the decision that the complainant identifies on the complaint form as the impugned decision.

Also in the meantime, at the beginning of November 2014 the complainant was placed on sick leave. She declared to the Administration that her illness was service-incurred and she sought an extension of her appointment until such a time as she recovered from her illness. On 14 November her sick leave was extended until the end of the month. On 12 January 2015 she contacted the Human Resources Management Department to request the establishment of a medical board; she reiterated this request several times. Following exchanges with the Administration regarding her illness, by a letter of 11 February 2015 she was informed by WIPO’s insurer that it was not accepted that her illness was service-incurred.

The complainant asks the Tribunal to set aside the decisions of 16 January, 11 February and 15 December 2015 and she seeks the removal of her reviewing officer's assessment from her 2013 performance evaluation. She claims "actual" and moral damages, and costs.

WIPO asks the Tribunal to find that several of the complainant's claims are irreceivable for failure to exhaust the internal means of redress, to dismiss the complaint in its entirety and to deny the complainant the relief she seeks.

### CONSIDERATIONS

1. In the complaint form the complainant states the relief which she claims as follows:

"1. The Tribunal is requested to quash the Director-General's [d]ecision of January 16, 2015 in view of abuse or misuse of authority, unlawfulness, irregularity, error of law and incomplete consideration of the facts, and to conclude that [in] not renewing the complainant's contract after November 30, 2014, WIPO acted in breach of its duty of care and good faith. The Tribunal is further requested to conclude that the termination of the complainant's contract was abrupt and unjustified and it damaged her professional reputation and delayed her career development, and to award her actual and moral damages and costs as indicated in the [b]rief.

2. The Tribunal is requested to quash the Director-General's decision of December 15, 2015 and to conclude that in attempting to sign-off the complainant's performance assessment for a partial period (half [of] 2013), not discussing the revised assessment with the complainant, and changing it three times, WIPO acted in breach of due process. In addition, the Tribunal is requested [...] to conclude that [by] not reinstating the complainant's appraisal [rating of] 'effective performance', WIPO acted in breach of its duty of care and good faith. The Tribunal is further requested to conclude that neglecting the duty to provide the complainant with an objective and timely appraisal process was discriminative, abrupt and unjustified and it damaged the complainant's professional reputation and delayed her career development, and to award her actual and moral damages as indicated in the [b]rief.

3. The Tribunal is requested to quash the decision of WIP[O] and of the Medical Service of the [United Nations Office in Geneva] UNO[G] [...] as reflected in the letter [...] of February 11, 2015 [...] to reject the service-incurred character of the complainant's illness as of November 1, 2014 [...] [and] to conclude that in rejecting her request to acknowledge her medical

situation as service-incurred without providing any formal feedback from WIPO and without disclosing to the complainant the results of her examination by [the] UNOG Medical Unit, WIPO acted in breach of due process. In addition, the Tribunal is requested to quash the decision of the Medical Service of [the UNOG] and to conclude that not appointing a medical committee in order to assess her medical condition in view of the opinion of her doctor, WIP[O] acted in breach of its duty of care and good faith and the duty of due process. The Tribunal is further requested to conclude that neglecting the duty to provide the complainant with an adequate opportunity to be examined by a medical committee was abrupt and unjustified and thus, the complainant deserves to be compensated for the actual and moral damages and costs, including all benefits she could have acquired should a medical committee [have been] appointed as indicated in the [b]rief.”

2. In her brief, the complainant challenges the non-renewal of her contract. However, she did not lodge an internal appeal challenging the Director General’s decision of 16 January 2015 with the Appeal Board in accordance with the relevant Staff Regulations and Staff Rules. Staff Regulation 11.5 expressly permitted former staff members of WIPO, as the complainant was at the material time, to file such an appeal. The complainant therefore did not exhaust the internal means of redress which were available to her to challenge the non-renewal decision as Article VII, paragraph 1, of the Tribunal’s Statute requires. None of the exceptions to that requirement, as recalled for example in Judgment 3829, under 3, applies in this case. Accordingly, her claims regarding the decision of 16 January 2015 are irreceivable.

3. The claim which seeks to the decision reflected in the letter of 11 February 2015 rejecting the complainant’s declaration that her illness was service-incurred is also irreceivable.

The complainant presents no evidence to show that she instituted any internal challenge in relation to that decision and the parties have provided no authority that permits her to bring her claim in this respect directly to the Tribunal. She has failed to exhaust the internal means of challenging the decision concerning her alleged service-incurred illness, and her related claims are accordingly irreceivable.

4. The complainant raises a number of other issues in the complaint. These include, for example, the reduction of her remuneration when she was offered a temporary appointment for the period from 14 December 2012 to 28 February 2013 and the Administration's alleged promise of a long-term position. WIPO contends that these issues are irreceivable because they were not raised in the internal appeal. It is observed, however, that the complainant does not raise these matters as substantive claims in her complaint. Precedent has it that a complainant may enlarge on the arguments presented before internal appeal bodies, but may not submit new claims to the Tribunal (see, in particular, Judgments 2837, under 3, and 3420, under 10, and the case law cited therein). The Tribunal will consider any additional plea the complainant has made that may be relevant only to support her claims concerning her 2013 performance evaluation, which is the only receivable aspect of the present complaint.

5. In her complaint brief the complainant urges the Tribunal to set aside the decision of 15 December 2015 as well as the reviewing officer's assessment, and she requests it to order WIPO to pay her 50,000 Swiss francs in "actual damages", 40,000 Swiss francs for "professional, personal and moral suffering" and 5,000 Swiss francs in costs, together with interest from due dates until the date of payment. WIPO insists that the claims for damages and costs are new claims which are irreceivable because the complainant did not raise them in the internal appeal proceedings. This assertion is correct to the extent that Article VII, paragraph 1, of the Tribunal's Statute requires a complainant first to have exhausted her or his internal remedies in relation to a claim before bringing it to the Tribunal. However, the Tribunal's case law states that a complainant may make a claim for consequential relief which was not made in the internal proceedings. Under that case law, claims for moral damages can be treated as consequential relief and thus are not subject to the requirement to exhaust internal remedies (see Judgment 3871, consideration 18). Regarding the claim for costs, the Tribunal has accepted that only a claim for costs with respect to the proceedings before the Tribunal may be receivable (see Judgment 3421, under 2(a)). In the premises, the

claim for “actual” damages is not receivable and must be dismissed. However, the claims for moral damages and for costs are receivable.

6. With respect to her 2013 performance evaluation, the complainant’s underlying challenge is to the “Improvement in performance required” overall rating which she was given by the reviewing officer. That was the rating which the complainant’s direct supervisor had originally contemplated awarding before subsequently, by agreement with the complainant, awarding the overall rating of “Effective performance”. The reviewing officer modified the rating to “Improvement in performance required”. WIPO’s Performance Management and Staff Development System Guidelines (Version 3) (the Guidelines) provide four categories of overall performance ratings. They are, in descending order: Outstanding performance; Effective performance; Improvement in performance required; and Unsatisfactory performance. The Guidelines state that the rating “Improvement in performance required” should be considered when an employee has shortcomings in performance but demonstrates potential to improve performance to meet the organizational needs.

7. The basic applicable principles where a performance appraisal is challenged have been stated as follows, for example in Judgment 3692, consideration 8:

“As the Tribunal has consistently held, assessment of an employee’s merit during a specified period involves a value judgement; for this reason, the Tribunal must recognise the discretionary authority of the bodies responsible for conducting such an assessment. Of course, it must ascertain whether the ratings given to the employee have been determined in full conformity with the rules, but it cannot substitute its own opinion for assessment made by these bodies of the qualities, performance and conduct of the person concerned. The Tribunal will therefore intervene in this area only if the decision was taken without authority, if it was based on an error of law or fact, a material fact was overlooked, or a plainly wrong conclusion was drawn from the facts, or if it was taken in breach of a rule of form or procedure, or if there was abuse of authority (see, for example, Judgment 3006, under 7). This limitation on the Tribunal’s power of review naturally applies to both the rating given in a staff report and the comments accompanying that rating.”

8. The various grounds of the complainant's challenge will be considered below. It suffices at this juncture to observe that at the material time, the process for evaluating WIPO's staff members or employees was governed by the Guidelines. The Guidelines explain that the main purpose of the Performance Management and Staff Development System (PMSDS) is to improve WIPO's performance to its own as well as to its employees' benefit. Paragraph 3.4 of the Guidelines states that continuous feedback should be provided throughout the year and, accordingly, an employee and her or his direct supervisor should discuss and follow up on the work and development-related objectives, key competencies and identified training needs. The Guidelines contemplate that these will be identified prior to an ensuing evaluation year and that the evaluation will be conducted in light of the set work and development-related objectives in particular.

9. The Guidelines provide for a mandatory annual performance evaluation for each employee, and although interim reviews are not obligatory they may be conducted in certain circumstances. For the annual evaluation, there should be preparation and the conduct of an evaluation meeting(s) at the end of the calendar year or at the beginning of the ensuing year. For the evaluation, the direct supervisor is required to provide overall specific comments.

10. Once the evaluation is completed it should be first signed off by the direct supervisor and then by the employee in the Overall Evaluation Sign-Off Section. These steps must be completed by 31 March of the ensuing year to that for which the performance is being evaluated: by 31 March 2014 in the present case. According to the Guidelines, at the end of the evaluation process, the employee is to state agreement or disagreement with the evaluation, make comments if desired and sign off in the electronic performance management and staff development system (ePMSDS) within 10 working days after the direct supervisor signs off. The Guidelines make it plain that by signing the evaluation, the employee acknowledges receipt of it but is not thereby prevented from contesting the ratings or related comments under the

existing appeal/rebuttal procedures. It also permits an employee to discuss the comments with the direct supervisor before finalizing the text.

11. The complainant states that her direct supervisor attempted to sign off her 2013 assessment in July 2013 without waiting for the yearly results to complete the assessment for the entire year and without discussing the contents with her. She contends that this “was a reviewable error, substantial procedural flaw and indicated improper motives [and] was also a breach of due process”. This ground of the complaint is unfounded. The Administration acknowledged that there was an error when that error was identified. WIPO investigated the matter and discovered that at least two other staff members were affected by it. It was found that the direct supervisor had accidentally closed the 2013 evaluation in the electronic system while attempting to complete interim appraisals for part of 2013 at the same time. The evidence shows that the error was corrected when it was discovered and that it did not affect the complainant’s performance evaluation for the 2013 cycle. That error therefore provides no basis for invalidating the 2013 performance evaluation.

12. The complainant further contends that her evaluation “indicated several [w]ork-related [o]bjectives, part of which (see for example item 4) were not related at all to [her] assignment [...] as a Program Analyst and thus [there was a breach of] the duty of due process”. The Tribunal notes that item 4 in the ePMSDS form is a predefined mandatory objective for supervisors which requires supervisors to apply the PMSDS to direct subordinates according to the Guidelines and related documents. This is to ensure that employees whom they evaluate are aware of the requirements of the evaluation process. The complainant’s contention is unfounded as the Tribunal sees no objective in the complainant’s evaluation report for the 2013 cycle with respect to her work assignments which is not relevantly so related.

13. The complainant contends that her overall rating was changed from “Improvement in performance required” to “Effective performance” and then back to “Improvement in performance required” and that this



was a breach of the duty of care and good faith and raised doubts concerning the motives of her direct supervisor and the reviewing officer. In reply, WIPO submits that the changing ratings with which the complainant takes issue were not final, as she only received one final overall rating, after the reviewing officer signed the evaluation. The complainant further contends that comments by the reviewing officer were not related to her performance objectives and thus his evaluation was based on a substantive flaw. She insists that the reviewing officer's appraisal is tainted by fundamental errors. In reply, WIPO submits that this allegation is unfounded as it is clear that the reviewing officer found that the complainant had not adequately addressed his concerns regarding WIPO's core competencies. WIPO insists that the reviewing officer's rating was fully in line with the applicable rules and was a fair representation of her performance.

14. It is noted that under the Guidelines, the reviewing officer is usually the supervisor of the employee's direct supervisor and is primarily responsible for assessing how well supervisors reporting directly to her or him apply the PMSDS. The reviewing officer is to advise the supervisor on the application of the PMSDS, to mediate between the supervisor and the employee in case of disagreements about the evaluation report and to intervene, if required. In cases of persisting disagreement on an evaluation, the reviewing officer should be involved in the process as mediator. The evaluation should only be signed by the direct supervisor, the employee and the reviewing officer once the mediation process has been conducted. Where no agreement can be reached in mediation, the direct supervisor is to provide the ratings and/or related comments and sign off the evaluation. The employee may indicate disagreement with the evaluation and comment on it in the Overall Evaluation and Sign-Off Section. In such an event the reviewing officer must confirm that a mediation process was conducted and document in the "Reviewing Officer's Comments" field the mediation efforts, including "the date(s), participants and outcome of the exchange(s)". If the reviewing officer does not agree with the evaluation given by the direct supervisor "even though the employee may be in agreement, [the reviewing officer] [...] can state the

disagreement in the 'Reviewing Officer's Comment' field, [...] list the areas of disagreement, give reasons and determine the overall rating [...]. If the overall rating is different from the one given by the direct supervisor, **the rating of the reviewing officer will prevail**" (original emphasis). Where there is disagreement and/or where the reviewing officer makes comments, the employee must sign off the evaluation a second time and may indicate any disagreement with the reviewing officer's comment and modified rating, if any. The Guidelines require an employee to sign off the evaluation even if she or he does not agree with the evaluation of the direct supervisor or with the comments or modified rating of the reviewing officer, as the signature merely acknowledges receipt of the evaluation and does not prevent the employee from contesting the ratings and/or related comments under the existing appeal/rebuttal procedures.

15. The complainant's allegations which are set out in consideration 13 above are unfounded. The Tribunal notes that in the 2013 evaluation report, the complainant's direct supervisor awarded her an overall rating of "Effective performance" and indicated that she had fully achieved work-related objectives. However, the direct supervisor also stated that the complainant's "behaviour attitudes such [as effective] communication and team spirit were discussed and clarified in a few cases" and that the complainant had agreed that effective communication and showing team spirit are competencies which can always be upgraded and provide a sound basis for a professional career. The reviewing officer, however, modified the overall rating to "Improvement in performance required", having set out six areas that were highlighted in past discussions in which the complainant's performance needed to be improved that the direct supervisor's comments did not reflect. The Tribunal also notes that the direct supervisor had at first indicated an intention to award the complainant an overall rating of "Improvement in performance required", but that the direct supervisor and the complainant then agreed to the award of an overall rating of "Effective performance". The reviewing officer then modified this rating to "Improvement in performance required" having again set out the reasons for so doing. The reviewing officer was

acting in accordance with the Guidelines. There is no evidence that in modifying the rating the reviewing officer acted in breach of the duty of care and good faith and raised doubts concerning the motives of the complainant's direct supervisor and the reviewing officer, as the complainant alleges. Neither is there any evidence that shows that the reviewing officer's comments were not related to the complainant's performance objectives or that the reviewing officer's evaluation is tainted by fundamental errors. Neither is there any evidence, as the complainant also contends, that the reviewing officer abused his authority and failed to carry out his role with vigilance. Further, the Tribunal finds no basis on which to hold, as the complainant contends, that her direct supervisor, the reviewing officer and the Director General harmed her professional development.

16. The Tribunal further determines that the complainant's related contention that the reviewing officer's failure to discuss the modified overall rating with her was a breach of due process and a breach of duty of care and good faith, is unfounded. There is no provision in the Guidelines which requires such discussion(s). The Guidelines permitted the complainant to see the reviewing officer's evaluation, to comment upon it and to initiate the relevant appeal or rebuttal procedures in the event of disagreement. She exercised that right. Her further contentions that WIPO failed to honour the spirit of the performance appraisal mechanism and thus acted in breach of its duty of care and good faith, and that by failing to embrace the philosophy and objectives of the performance evaluation process her direct supervisor and reviewing officer acted in breach of due process, are also unfounded.

It is further determined that the complainant's request to the Tribunal to conclude that putting in place "a system which has the potential to harm the professional development of an employee is a breach of the duty of care" is speculative and will not be further considered.

17. The complainant contends that WIPO's failure to provide her with an objective and timely appraisal process was discriminatory, damaged her professional reputation and delayed her career development. In reply WIPO states that the delay in the finalization of the evaluation

was caused by disagreement between the complainant and her direct supervisor regarding the overall rating so the reviewing officer cannot be held responsible for the delay.

18. The Guidelines mandate that an evaluation is to be completed by 31 March of the ensuing year of the evaluation cycle at the latest. The Tribunal observes that discussions on the complainant's final evaluation for the 2013 cycle commenced in February 2014. The initial meeting between the complainant and her direct supervisor took place on 25 March 2014. The complainant disagreed with the supervisor's indication that she would award an "Improvement in performance required" overall rating. Attempts to arrange a mediation meeting between 10 April and 25 June 2014 failed. It was on this latter date that the complainant and her direct supervisor agreed that an overall rating of "Effective performance" would be awarded instead. The complainant signed off on that evaluation on 1 July 2014. The Guidelines then required the reviewing officer either to confirm or to modify that evaluation. The reviewing officer modified it to an overall rating of "Improvement in performance required" and signed off on the performance evaluation on 14 July 2014. The complainant presents no evidence to prove that that rating or the delay was discriminatory or damaged her career development, as she alleges. Moreover the delay was due to the fact that the parties were involved in ongoing discussions. Accordingly the claim on the ground of delay is unfounded.

19. In light of the above, the complaint must be dismissed.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ