

M. M. (No. 6)

v.

WIPO

127th Session

Judgment No. 4086

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mrs V. E. M. M. against the World Intellectual Property Organization (WIPO) on 16 January 2015 and corrected on 26 March, WIPO's reply of 21 July, the complainant's rejoinder of 26 October, corrected on 2 November 2015, and WIPO's surrejoinder of 8 February 2016;

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 challenges the decision to maintain her contested job description.

Facts relevant to this case may be found in Judgment 3418, concerning the complainant's first complaint, and in Judgment 4084, also delivered in public this day, concerning her fourth complaint. The complainant was informed during a meeting in May 2013 that the Internet Services Section where she worked, which was part of the Information and Communication Technology Department, was to be dissolved and that she would be transferred to the Communications Division. This information was confirmed the following day by email. A few days later she was informed that she would report to Ms M.I., who would head the new Web Communications Section within the

Communications Division. Ms M.I. then gave her a job description for the position of Senior Analytics Officer, on which she made some comments. At the end of May she was handed a job description for the position of Senior Web Analyst. In September she received the finalised job description for the position of Senior Web Analyst.

On 31 October 2013 the complainant wrote to the Director General requesting him to review his “final administrative decision to provide [her] with a job description which [was] not commensurate with [her] skills, training, experience”. She referred to the job description for the position of Senior Web Analyst that she had been given at the end of May 2013 and on which she had commented. She explained that at the time of lodging her appeal against the transfer decision she had not yet received a reply from her supervisor concerning the comments she had made on the job description; hence the job description was not final at that time. She asked that her request for review be added to the appeal she had lodged against the transfer decision.

The Director General rejected her request for review on 23 December 2013, and on 24 February 2014 she lodged an appeal with the Appeal Board against that decision.

On 24 June 2014 the complainant was transferred to her former department and assigned a supervisor who, unlike Ms M.I., held a higher grade than hers.

On 22 August 2014 the Appeal Board issued an Addendum to its conclusions on the appeal the complainant had lodged against the decision to transfer her. The Addendum contained the Board’s conclusions on the appeal lodged against the decision of 23 December 2013. The Appeal Board recalled that, in the context of the appeal against the transfer decision, it had found that no consideration had been given to the complainant’s preferences and interests in the preparation of the job description. It held that, in light of the wording of Staff Regulation 4.3(c), it was not sufficient for the Administration to produce evidence that the duties and responsibilities of the new post were of the same grade as that held by the complainant, there was an additional requirement for comparable responsibilities. It recommended awarding her moral damages and reimbursing her legal costs upon presentation of invoices.

On 21 October 2014 the Director of the Human Resources Management Department (HRMD) notified the complainant of the Director General's decision to reject her appeal. The Director General stressed that since the Appeal Board had issued its recommendations, some of the issues raised in the appeal had been overtaken by subsequent events: she had been transferred on 24 June 2014 to another department and another job description had been drafted. In his view, the Appeal Board had not given sufficient weight to the evidence of the level of the function, as established by an objective classification review carried out by an expert in classification, which ensured that the content of the contested job description had "comparable responsibilities" to those performed by the complainant in her previous post. That is the impugned decision.

The complainant asks the Tribunal to order the Director General to provide her without delay with a job description commensurate with her grade, experience, training and skills. She also asks the Tribunal to order that the Director General assign her to report to a supervisor who is her hierarchical superior in terms of seniority, to award her a minimum of 150,000 Swiss francs in moral damages, and costs. She also claims interest on all amounts awarded and any other relief that the Tribunal determines to be fair, necessary and equitable.

WIPO asks the Tribunal to dismiss the complaint as irreceivable in part on the basis that some claims are moot, and as otherwise unfounded.

CONSIDERATIONS

1. The complainant essentially challenges WIPO's alleged failure to provide her with a proper job description over a period of time. It is noted, however, that she substantially pleads issues which have also been the subject of other complaints which she has filed in the Tribunal. This complaint contains pleas which arose in her fourth complaint in which she challenged the lawfulness of her transfer in 2013 to the post of Senior Web Analyst pursuant to a restructuring of WIPO's Internet

Services Section and the appointment of another as the Head of that Section.

WIPO's contention that this complaint is moot as the complainant was transferred from the post for which the contested job description was issued is rejected. This is because the alleged failure mentioned above may nevertheless have produced legal effects (see, for example, Judgment 3648, under 3).

2. The disparate nature of the pleadings makes it necessary to determine the scope of this complaint, and, in particular, to establish the relevant period to which it relates. The first three paragraphs of the summary at the commencement of the complaint provide the following context:

“This appeal concerns the Organization's failure to provide the Complainant with basic certainty and security in her employment by its refusal to establish a valid and viable post description. Over a period lasting approximately five years, the Complainant carried out tasks for the Organization without a clear framework of duties. This state of affairs created an environment of uncertainty and insecurity for the Complainant. The Organization did nothing to rectify this situation. Instead, it ignored the Complainant's concerns and manoeuvred her, by way of transfer and repeated and illegitimate changes to her post description, to a position of isolation and desperation in the apparent hope that she would leave WIPO.

First, as a result of the reclassification process, the Organization failed to provide the Complainant with a post description with comparable grade, skills, training and experience to her previous posts.

Second, this error of fact and law was extended when the Organization transferred the Complainant to the Web Communications [Section] without a post description including duties commensurate with her experience, skills and training in direct contravention of WIPO Staff [Regulation] 4.3(c). The result was that her post was effectively downgraded with the significant removal of supervisory responsibilities, which she had held since 1999 and had been included in previous post descriptions.”

3. To support her claims, the complainant chronicles a number of events from 1999, when she alleges that she was asked to take responsibility for supervising staff in WIPO's web publishing activities; the evolution of her role from that of a General Service to a Professional category staff member; her complaints to her supervisor and subsequently

to the newly appointed Chief Information Officer concerning not having a proper job description, which she only received by communications dated 15 and 20 October 2010. According to her, this was after she had given a deadline to receive it, but it diminished her duties well below those of the grade level at which she had previously worked and a number of key responsibilities had been removed.

4. The complainant challenged the job description of 15 October 2010, confirmed on 20 October 2010 as a final decision in light of WIPO's 2010 reclassification exercise. When the Tribunal determined that matter in Judgment 3418, it awarded the complainant moral damages and legal costs on the basis that WIPO had breached the duty of care that it owed to the complainant. Inasmuch as the issue of WIPO's alleged failure to properly establish the complainant's job description up until October 2010 was considered and determined in Judgment 3418, those matters are *res judicata* and cannot be re-litigated. When WIPO pointed this out in its reply, the complainant in response stated that the present complaint concerns events that occurred subsequently to her "downgraded job description of 2010 (which led to [Judgment 3418])".

5. However, this complaint extends beyond 2010 with the complainant's further narrative that in 2011, a job description for the post of "Senior Software Engineer", for which she was not suited, was issued for her. On 22 April 2013 she received a finalized job description for the post of "Senior IT Project Officer", although she did not fully meet the requirements for that post. Then, some ten days later, on 2 May 2013 she was informed that she was transferred to the Communications Division, but did not know what work she was to perform until the end of May 2013 when she received a job description for the post of "Senior Web Analyst", the requirements for which she did not fully meet. For four months she was in a state of uncertainty, not knowing when she would be officially transferred, when her job description would be finalized or when she would physically join the new team. Then, in 2014, she was re-transferred to the Information and Communication Technology Department as a Senior Business Analyst, a position for which she needed additional training. The changing job titles caused

her to express concern that she was given five job titles in two or three years and she was then given again the title “Senior Business Analyst”. These actions caused her to suffer significant damage, as her expert knowledge gained over her years of work in the field of website management, user experience, web accessibility and site design had been overlooked, amounting to a gross violation of the respect for her dignity, in line with the Tribunal’s statement in Judgment 1496, under 9. She was left “in a situation of complete uncertainty without the security of a job description that matched the work she was actually undertaking, nor commensurate with her grade, skills, training and experience”. At all material times the posts of Head of the Web Communications Section or Head of Accessible Books Consortium were ideal for her. She could even have retained her 2011 reclassified post within the restructured Web Communications Section as it was designed to manage the web activities and to be the focal point for the website.

6. Much of this narrative is however superfluous as the only decision which the complainant challenged, by way of a request for review and an internal appeal, was that which concerned the job description for the post of Senior Web Analyst to which she was transferred in September 2013. She confirms, in her rejoinder, that the relevant subject of this complaint is the administrative decision “of the Director General of 21 October 2014 rejecting [her appeal] and the recommendations of the Appeal Board, and maintaining her job description of ‘Senior Web Analyst’ [which] effectively condoned the irregular use of a job description to deny [her] a proper administrative position”. This was a grade P-4 post which was created during the 2013 restructuring of WIPO’s Communications Division.

7. The impugned decision dated 21 October 2014 was the Director General’s response to the recommendations contained in the report of the Appeal Board dated 22 August 2014, which was made on the complainant’s internal appeal of 24 February 2014. In that appeal, the complainant had challenged the Director General’s decision of 23 December 2013 rejecting her request for review dated 31 October

2013 alleging that she was provided with a job description which was not commensurate with her skills, training and experience.

In her internal appeal, the complainant had asked the Appeal Board to order WIPO to issue her forthwith a job description which was commensurate with her skills, training and experience; assign her forthwith to report to a supervisor who was her hierarchical superior in terms of seniority and to award her moral damages and costs. In the impugned decision, the Director General did not accept the Appeal Board's recommendation that the appeal be allowed and that the complainant be awarded moral damages and costs.

8. WIPO asks the Tribunal to consider joining this complaint with the complainant's fourth complaint in which she challenges decision to transfer her to the newly created Web Communications Section of the Communications Division in 2013 and the appointment of Ms M.I. as Head of that Section. As the complainant has however pointed out, the scope of this complaint is not within the scope of the fourth complaint. Accordingly the Tribunal does not find it convenient to join them.

9. The complainant applies for an oral hearing pursuant to Article 12, paragraph 1, of the Tribunal's Rules. However, as the issues raised in the proceedings can be resolved having regard to the detailed pleas and the documentary evidence which the parties provide, the application is dismissed. The application which was made for the production of documents is also dismissed because it is cast in the most general and imprecise terms which are an impermissible "fishing expedition" (see, for example, Judgments 2510, under 7, and 3345, under 9).

10. The Tribunal's case law has it that when a staff member of an international organization is transferred to a new post in non-disciplinary circumstances, that transfer is subject to the general principles governing all decisions affecting the staff member's status. The organization must show due regard, in both form and substance, for the dignity of the staff member, particularly by providing her or him with work of the same level as that which she or he performed in her or his previous post and

matching her or his qualifications (see, for example, Judgment 2229, under 3(a)). This requirement is consistent with Staff Regulation 4.3(c), which states:

“A transfer shall be to a post classified at the same grade as that of the staff member and with comparable responsibilities. The staff member must have the required qualifications for the post.”

11. The responsibilities that attach to posts are comparable where on an objective basis the level of the duties to be performed is similar (see, for example, Judgment 1343, under 9). It is not for the Tribunal to reclassify a post or to redefine the duties attaching thereto, as that exercise falls within the discretion of the executive head of the organization, on the recommendation of the relevant manager, and it is equally within the power of the management to determine the qualifications required for a particular post (see, for example, Judgment 2373, under 7). However, every employee has the right to a proper administrative position, which means that she or he should both hold a post and perform the duties pertaining thereto and should be given real work (see, for example, Judgment 2360, under 11).

12. The complainant seeks to challenge the impugned decision on the grounds that:

- (i) WIPO failed in its duty to act in good faith in its dealings with her when it ignored her concerns, treated her unequally and failed to provide her with a proper administrative position and a corresponding valid and finalized written job description in breach of the Staff Regulations and Staff Rules.
- (ii) WIPO failed to respect her dignity and failed to properly consult with her over the preparation of the job description, ignoring her valid inquiries and observations.
- (iii) WIPO caused unreasonable delay in providing her with a proper job description.
- (iv) WIPO's failure to provide a valid job description was part of a concerted attempt to isolate, marginalize and remove her from the Organization and amounted to constructive dismissal.

13. The last-mentioned ground fails as there is no evidence to support it. Neither did the alleged failure to provide the subject job description amount to constructive dismissal, as WIPO did not thereby breach the complainant's contract in such a way as to indicate that it would no longer have been bound by it (see, for example, Judgment 2745, under 13). Additionally, there is insufficient evidence from which to conclude that WIPO acted in bad faith towards the complainant, out of retaliation against her, or treated her unequally. Further, the evidence shows that the complainant was consulted on the job description prior to its final establishment in September 2013.

14. In its report, the Appeal Board stated, correctly, that the appeal related to the content of the job description for the subject post. It referred to Staff Regulation 4.3(c), which requires a staff member to be transferred to a post classified at the same grade as that which the staff member previously held, with comparable responsibilities and for which the staff member has the required qualifications. The Tribunal accepts, as the Appeal Board did, that the requirement for the post to have been classified at the P-4 level was satisfied. It was classified by an external classification expert, as evidenced in a report of 10 September 2013. The Tribunal also accepts, as the Appeal Board did, that the complainant should generally be considered as having the required qualifications for the subject post.

The Tribunal however finds, as the Appeal Board did, that the responsibilities which attached to the post of Senior Web Analyst were not comparable to those which attached to her previous post of Web Systems Officer. They were reduced materially because of the absence of any coordinating, supervisory or focal point duties from the Senior Web Analyst post.

15. It is observed, for example, that the first-stated principal duty in the 2008 job description of the Web Systems Officer post was to:

“coordinate and supervise the web publishing activities for the WIPO Internet web site, ensure up-to-date and timely integration of approved content and consistency of information in all required language versions available on the WIPO web site, and act as focal point for document publishing on the WIPO web site.”

The third-stated principal duty was to:

“coordinate the development of WIPO sub web sites with the responsible service, advise department contacts of the deployment of Internet technologies in order to improve the utilization of the Internet as an information dissemination and collaboration tool at WIPO.”

The ninth-stated principal duty was to:

“reply to queries regarding the retrieval of pertinent information from the WIPO Internet Web site, coordinate web design related activities with WIPO external resources.”

However, there were no duties in the contested job description of 2013 that give similar responsibilities. The scope of the work that attached to that job description is fairly encapsulated in the “Organizational context”, which stated in part:

“The incumbent is responsible for tracking, reporting, and analyzing web site data used to identify optimization opportunities for site content and functionality. The incumbent works under the supervision of the Section Head.”

16. The Tribunal does not accept WIPO’s assertion that the absence of similar responsibilities in the contested job description was insignificant because the coordination/supervisory/focal point roles in the complainant’s former job description did not involve performance evaluation and staff supervision responsibilities. As the duties and responsibilities in the September 2013 job description for the subject post were not comparable to the duties and responsibilities contained in her previous job description, WIPO breached the requirement of Staff Regulation 4.3(c). However, inasmuch as the complainant was awarded moral damages in Judgment 4084 for essentially the same breach, moral damages will not be awarded for this claim in the present complaint. The impugned decision must accordingly be set aside.

17. It is further determined that although WIPO was probably primarily concerned with the results of the restructuring exercise and had no desire to “downgrade” the complainant’s post in the strict sense, it did not act in accordance with its duty of care towards the complainant. For this, the complainant will be awarded moral damages in the amount of 5,000 Swiss francs. She will also be awarded 7,000 Swiss francs in costs.

However, her requests for an order to transfer her to another post to report to a supervisor who is her hierarchical superior in terms of seniority, and to have the subject job description properly reviewed have been overtaken by events, as the complainant was transferred to another post in 2014 in which she reported to a Director with whom she had requested to work. Moreover, the claim for undue delay in the process refers to facts which extend to periods long in advance of the subject transfer and is unfounded.

DECISION

For the above reasons,

1. The impugned decision of 21 October 2014 is set aside.
2. WIPO shall pay the complainant 5,000 Swiss francs in moral damages.
3. WIPO shall pay the complainant 7,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 29 October 2018, 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 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

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