

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

L. R.

v.

WIPO

128th Session

Judgment No. 4156

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms K. L. R. against the World Intellectual Property Organization (WIPO) on 9 April 2015 and corrected on 30 May, WIPO's reply of 15 September 2015, the complainant's rejoinder of 6 January 2016 and WIPO's surrejoinder of 11 April 2016;

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 the amount of compensation awarded for the moral injury she suffered because her evaluation for 2012 was irregular.

At the material time, the complainant held a grade P-5 post at the WIPO Academy. On 13 May 2013 her direct supervisor gave her an overall rating of "effective performance" for 2012 in the context of the Performance Management and Staff Development System (PMSDS). The reviewing officer, who was the complainant's second-level supervisor, made some severe criticisms of the complainant in her comments and, on 2 September 2013, gave her the overall rating of

“unsatisfactory performance”. The complainant submitted her comments on 16 October.

On 28 October the complainant sent a request for review to the Director General. Asserting that the reviewing officer’s comments formed part of a pattern of harassment against her, she requested that these comments and the overall rating to which they had given rise be removed. By a letter of 23 December 2013, the complainant was informed that the Director General had decided to confirm the contested overall rating but that he endorsed the amended comments which the reviewing officer had drafted, a copy of which was attached to his letter. He added that the allegations of harassment had been referred to the Joint Grievance Panel.

On 24 March 2014 the complainant referred the matter to the Appeal Board. She requested the withdrawal of the decision of 23 December 2013, the removal of the reviewing officer’s comments and overall rating, compensation for the injury which she considered she had suffered, and an award of costs. In its conclusions of 11 November 2014, the Appeal Board found that during the evaluation period the reviewing officer had not made any remark to the complainant regarding her work and considered that the reviewing officer’s critical comments should be discounted in view of the appearance of partiality on her part. The Appeal Board therefore recommended that the decision of 23 December 2013 be withdrawn, that the contested comments and overall rating be replaced by those of a new reviewing officer deemed to be impartial, that the complainant be awarded compensation for the moral injury suffered and that she be reimbursed, to some extent and on production of supporting documents, for the costs incurred in her internal appeal.

By a letter of 9 January 2015, the complainant was informed that the Director General had decided, in accordance with the recommendations of the Appeal Board, to withdraw the decision of 23 December 2013 and to award her compensation – in the amount of 1,000 Swiss francs – for moral injury. It was also explained to her that no other reviewing officer would be appointed, since the only official who could have performed this role had left the service of WIPO, and that the Director General had decided to delete the reviewing officer’s comments and overall rating, as well as the complainant’s comments in reply.

Consequently, her final overall rating for 2012 would be the one given to her by her direct supervisor, namely “effective performance”. Lastly, the letter indicated that WIPO did not normally reimburse costs incurred in internal appeal proceedings. That is the impugned decision.

The complainant requests the setting aside of the impugned decision inasmuch as it limited the amount of moral damages to 1,000 Swiss francs and refused reimbursement of the costs which she incurred in the internal appeal proceedings. She also requests the Tribunal to order WIPO to compensate her for all the damage suffered and to instruct it to draw all the consequences of the irregularity of her evaluation report, in particular by including in the evaluation report for 2012 an “appropriate entry”^{*} explaining the absence of evaluation by a reviewing officer and by removing from her administrative file the contested evaluation itself and also any reference to it. Lastly, she seeks 7,000 euros in costs for the internal appeal proceedings and the proceedings before the Tribunal. In her rejoinder, the complainant indicates that in October 2015 she agreed that the part of the abovementioned evaluation report concerning evaluation by the reviewing officer be replaced by an indication that it had not been possible to undertake this part of the evaluation and that the Director General had decided that only the direct supervisor’s assessment should be taken into consideration for 2012. The complainant states that she therefore “no longer ha[s] any reason to continue seeking the partial setting aside of the [impugned] decision regarding her evaluation for 2012”^{*}.

WIPO submits that the complaint should be dismissed as unfounded. It points out that it has no obligation to reimburse costs incurred by an official in internal appeal proceedings.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the WIPO Director General’s decision of 9 January 2015, in that it limited the amount of compensation for moral injury to 1,000 Swiss francs and

^{*} Registry’s translation.

refused reimbursement of the costs she incurred in the internal appeal proceedings. The complainant also requests the Tribunal to order WIPO to draw all the consequences of the irregularity of her evaluation report, in particular by inserting an “appropriate entry”^{*} explaining the absence of evaluation by a reviewing officer and by removing the irregular evaluation and any reference to it from her administrative file.

2. In her internal appeal, the complainant asked in particular for the withdrawal of the reviewing officer’s comments and overall rating, stating that the latter, whom she considered to have shown partiality, could not be involved in the new evaluation procedure. The Appeal Board recommended that the Director General allow the appeal and replace the contested comments and overall rating with those of a reviewing officer who could be deemed impartial.

Observing that the only official who could have performed this role had left the service of WIPO, the Director General decided not to appoint a reviewing officer and indicated, in the impugned decision, that the complainant’s final overall rating for 2012 would be the one given by her direct supervisor, namely “effective performance”.

3. In her complaint, the complainant submits that the final evaluation is not in the prescribed form since the reviewing officer’s appraisal is missing. In her view, it follows that the impugned decision is unlawful since there is no reference to its irregular form in the report. Hence she requests the Tribunal to order WIPO to indicate in the evaluation report the reason why it is incomplete.

During the proceedings, the Organization added to the evaluation in the manner requested by the complainant, who indicated her agreement with it. In her rejoinder, the complainant therefore withdraws her request for the inclusion of an entry explaining the absence of evaluation by a reviewing officer.

^{*} Registry’s translation.

Moreover, regarding the complainant's request to remove from her administrative file any document referring to the contested evaluation, WIPO replies, and this is not disputed, that the complainant's file does not contain any such documents.

The complainant's requests concerning the reviewing officer's irregular evaluation have therefore become moot. Consequently, it is not necessary to rule on this point (see, for example, Judgments 2784, consideration 7, and 3179, consideration 3).

4. The complainant considers that, in view of the nature and seriousness of the errors committed by the Organization, compensation for the moral injury which she suffered should not be less than 15,000 euros.

In the impugned decision, the Director General awarded the complainant compensation of 1,000 Swiss francs, in line with the Appeal Board's recommendation that she should be granted moral damages because the evaluation procedure was irregular.

The irregularity of the procedure referred to by the Appeal Board was based on three findings: firstly, the requirement of ongoing dialogue, which is central to the evaluation procedure, was not met in that the criticisms made by the reviewing officer were not brought to the complainant's attention at the time; secondly, the manner in which these criticisms were formulated gave the appearance of partiality; thirdly, the reviewing officer did not make any positive point in favour of the complainant.

5. With regard to damages, the complainant bears the burden of proof and she or he must provide evidence of the injury suffered, of the alleged unlawful act, and of the causal link between the unlawful act and the injury (see Judgments 3778, consideration 4, 2471, consideration 5, and 1942, consideration 6).

The mere fact that a decision was initially flawed does not suffice to warrant awarding damages for moral injury. In this case, the flaw was corrected on the recommendation of the Appeal Board. To be entitled to moral damages, an official must have suffered more severe injury than that which an improper decision ordinarily causes (see Judgment 1380, consideration 11).

6. In this case, WIPO admitted that the complainant suffered moral injury. The challenge relates solely to the amount of compensation to be awarded.

The complainant cites Judgment 3185, which also concerned an irregular evaluation and in which the Tribunal awarded *ex aequo et bono* a sum of 8,000 euros under all heads. But the circumstances of the case which gave rise to that judgment are not identical to those of the present complaint.

The amount of compensation must be the subject of a specific examination, which takes into account all relevant factors, such as the seriousness, nature and duration of the damage suffered and also whether or not the organization withdrew the irregular decision and rectified the irregularity. In this case, the evaluation – which, incidentally, was belated – contained unjustified and inappropriately worded criticisms. The complainant states that her dignity was hurt by the irregularities committed and that she was shocked at the aggressive and hostile behaviour of the reviewing officer, who expressed her views using excessive language. She emphasizes that, even though the disputed evaluation was withdrawn, this was only done after more than 16 months, during which time she suffered “severe stress and anxiety”.

In view of all the circumstances of the case, the Tribunal considers that the compensation awarded to the complainant is insufficient to redress the moral injury suffered and that she should be awarded compensation of 2,000 euros, less the compensation of 1,000 Swiss francs – converted into euros at the rate applied by the Organization on the date of the public delivery of the judgment – which has already been paid to her.

7. Lastly, the complainant requests the payment of 7,000 euros in costs, this amount including both costs for the internal appeal proceedings and those for the proceedings before the Tribunal.

8. As regards costs relating to the internal appeal, the Appeal Board recommended in its conclusions that a sum should be reimbursed – on production of supporting documentation – corresponding to eight hours of assistance provided by a lawyer. In the impugned decision, the Director General rejected this recommendation on the grounds that the

Organization does not normally reimburse the costs of legal assistance incurred in connection with internal appeal proceedings.

The complainant challenges this refusal with the argument that, in the case which led to Judgment 3419, WIPO had agreed to reimburse part of the costs for the internal appeal lodged by the official concerned. She therefore considers that the Organization, in refusing to grant her the same benefit, has breached the principle of equality.

Reference must be made to the Tribunal's consistent precedent that "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, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example Judgments 1990, under 7, 2194, under 6(a), 2313, under 5, or 3029, under 14)" (see Judgments 3787, under 3, and 3902, under 5).

In the case which led to Judgment 3419, the Director General emphasized that it was on an exceptional basis that he agreed to the partial reimbursement of the costs of legal assistance which the Appeal Board had recommended should be granted on account of the special circumstances that existed. The complainant has failed to provide evidence that she was in an exceptional situation identical to the one described in the said judgment. Hence the principle of equality has not been breached.

The plea therefore fails.

Moreover, the Tribunal notes that there is no rule which obliges the Organization to defray legal costs incurred in the context of internal appeal proceedings. In these circumstances, it was open to the Director General to refuse to reimburse them (see Judgments 2996, consideration 23, and 221, consideration 7).

9. Since the complainant succeeds in part, she is entitled to costs in respect of the proceedings before the Tribunal, the amount of which shall be fixed at 5,000 euros. However, the Tribunal considers that there are no grounds for awarding costs in respect of the internal appeal proceedings, since such costs may only be awarded under exceptional circumstances, which do not exist in the present case.

DECISION

For the above reasons,

1. The WIPO Director General's decision of 9 January 2015 is set aside to the extent that it limited the amount of compensation awarded to the complainant to 1,000 Swiss francs.
2. The Organization shall pay the complainant moral damages as set out in consideration 6, above.
3. It shall also pay her 5,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 10 May 2019, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ