

M. M. (No. 4)

v.

WIPO

127th Session

Judgment No. 4084

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mrs V. E. M. M. against the World Intellectual Property Organization (WIPO) on 7 October 2014 and corrected on 7 November 2014, WIPO's reply of 4 March 2015, the complainant's rejoinder of 22 June and WIPO's surrejoinder of 28 September 2015;

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 transfer her, and the appointment of another staff member without a competitive recruitment process.

Facts relevant to this case may be found in Judgment 3418 concerning the complainant's first complaint, and in Judgment 4086, also delivered in public this day, concerning her sixth complaint. The complainant, who held grade P-4, was informed during a meeting on 2 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 by email on 3 May. A few days later the complainant and her colleagues

were informed that they 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 P-4 position of Senior Analytics Officer, on which she made some comments. At the end of May, she was handed a job description for the P-4 position of Senior Web Analyst.

On 16 May 2013 the complainant submitted a request for review to the Director General, challenging the decision to transfer her to the Web Communications Section and the decision to deny her request for a copy of an internal memorandum of 28 February 2013 (*recte* 27 February 2013) concerning, amongst other things, the mandate of the Internet Services Section. She asked the Director General to cancel the appointment of the Head of the Web Communications Section, and to advertise and fill the post of Head of the Web Communications Section through a proper and regular competition. She also sought damages and costs. On 4 July 2013 she was informed that her request for review was denied.

On 10 September the complainant received a finalised job description for the position of Senior Web Analyst. The formal notification of her immediate transfer as Senior Web Analyst was made by a letter of 18 September 2013, which superseded an earlier letter of 13 September 2013 that contained an error with respect to the name of the supervisor.

On 4 October 2013 the complainant lodged an appeal with the Appeal Board against the decision of 4 July 2013.

In its report of 13 May 2014 the Appeal Board held that the Director General had a broad discretion in relation to structural reform; however it noted that when the complainant was made aware on 2 May 2013 that the Section where she worked was dissolved, she was given no precise idea of the functions that she would perform in her new position. The Board found that the decision to appoint Ms M.I. as Head of the Web Communications Section could have been reasonable in the circumstances but that it could also have been reasonable to appoint the complainant. It considered that it was an affront to the complainant's dignity to place her under the supervision of Ms M.I., who held the same grade and whose qualifications and experience were certainly not greater, overall, than hers. It also noted that the complainant's

comments concerning her job description did not appear to have been examined on the merits, and that no attempt had been made to transfer her to a position which best matched her profile. It recommended that the Director General revoke the contested decision of 4 July 2013, and that he reconsider the decisions to transfer the complainant to the position of “Senior Analytics Officer” in the Web Communications Section and to assign Ms M.I. as Head of that Section. It also recommended awarding the complainant 5,000 Swiss francs in moral damages and reimbursing her legal costs upon production of invoices.

On 11 July 2014 the Director of the Human Resources Management Department (HRMD) notified the complainant that the Director General had decided not to accept the Appeal Board’s recommendations as he disagreed with some of its findings. He stressed that since the Board had issued its recommendations, the facts surrounding the contested transfer had to a large extent been overtaken by subsequent events: on 24 June 2014 the complainant had been transferred with immediate effect to another unit and another job description had been drafted. The Director General stressed that decisions concerning restructuring were discretionary, that he had considered all the options available to him during the restructuring process, and that the merits of the complainant had been duly considered. That is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to order the immediate cancellation of Ms M.I.’s appointment, and to order that the post created for Ms M.I. be advertised and filled through a proper and regular competitive selection process without delay. She seeks a minimum of 150,000 Swiss francs in moral damages together with damages for delay in providing her the internal memorandum of 28 February 2013 (*recte* 27 February 2013). She also claims costs, and interest on all amounts awarded. She further claims any other relief that the Tribunal determines to be just, fair and necessary.

WIPO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant impugns the decision communicated to her by letter dated 11 July 2014 from the Director of HRMD on behalf of the Director General. That letter informed her that the Director General had decided not to accept the recommendations of the Appeal Board presented in its report dated 13 May 2014. The Appeal Board had therein recommended that her internal appeal against the decision to transfer her to the P-4 post of Senior Analytics Officer in the newly created Web Communications Section, as well as the decision to appoint Ms M.I. as Head of that Section, be allowed.

These decisions were taken following events which culminated in her receipt of the letter of 18 September 2013 containing her finalised job description for the P-4 position of Senior Web Analyst and the final notification of her immediate transfer to that post in the Web Communications Section which was to replace the Internet Services Section pursuant to a restructuring programme. The legality of the restructuring process itself is not challenged in the complaint.

2. It was in May 2013 that the complainant was informed that she was to be transferred to a Section which was to be created and to be headed by Ms M.I. On 16 May the complainant requested a review of that decision. She challenged, among other things, the decision to transfer her to the Section that was to be created and to deny her request for a copy of the internal memorandum of 28 February (*recte* 27 February 2013). She also asked the Director General to cancel the “illegal direct appointment” of Ms M.I. as head of that Section “taken without proper consultation [and] based on mistakes of fact”, and to fill that position through a proper and regular competition. She also sought an award of moral and “actual” damages and costs. As she was notified on 4 July 2013 that her request for review was rejected, she lodged an appeal with the Appeal Board on 4 October 2013. The outcome of that appeal is recalled above.

3. WIPO asks the Tribunal to consider joining this complaint with the complainant's sixth complaint in which she centrally challenges WIPO's alleged failure to provide her with proper job descriptions over the period from 2010 to 2014. WIPO states that although the complainant filed a separate request for review, which culminated in the sixth complaint and does not form part of her fourth complaint, it (WIPO) recognizes that there can be efficiency and judicial economy in joining them in a single judgment. On the other hand, the complainant states that although the complaints may be related as "the process of establishing her job description [was an aspect] of [her] transfer" to the Communications Division, they deal with different subject matters. This, she submits, is because her sixth complaint "concerns the ongoing delay and ultimate failure [by WIPO] to establish an appropriate job description (ongoing since 2010 [...])". The Tribunal observes that the factual origin and bases of the sixth complaint date from 2010, prior to the factual origin in 2013 of the subject matters of the present complaint. Accordingly, the Tribunal does not find it convenient to join them.

4. The complainant applies for an oral hearing, and, pursuant to Article 12, paragraph 1, of the Tribunal's Rules, identifies persons "whose testimony will establish that the Organization transferred [her] in breach of her rights". The application is dismissed in view of the ample submissions and evidence provided by the parties, which fully inform the Tribunal about the case.

5. The complainant applies for the disclosure of documents in these terms:

"The Complainant hereby requests that she be provided with true copies of the following documents or items simultaneously with the submission of the Administration's Reply in order to allow for the Complainant to analyse and comment on same in her Rejoinder: any and all accounting records, documents, reports, correspondence, e-mails, notes, records, memoranda, letters, notices, file contents, minutes, minuted phone calls, or any other documents or items in the possession of the Administration that in any way describe, comment on, relate or refer to, control, record, and/or evidence, in general or specifically, the reclassification or establishment of the Complainant's post. [...]"

The application is dismissed because, cast in these general and imprecise terms, it is based on the mere speculation that something will be found in those documents that will further the complainant's case. It constitutes an impermissible "fishing expedition" (see, for example, Judgments 2510, under 7, and 3345, under 9).

6. A brief perspective of this complaint shows that on 12 April 2013 the complainant's Departmental Director informed her that she was likely to be transferred to the Communications Division with other staff members from the Internet Services Section. On 2 May 2013, she was informed at a meeting held within the Division of the actual dissolution of the Internet Services Section. The following day the Director confirmed this information in an email to the staff of the Department. On 7 May 2013, it was announced in a meeting that the complainant and other colleagues would report to Ms M.I. as Head of the Web Communications Section.

7. In the meantime, at the end of May 2013, Ms M.I. sent the job description for the post of Senior Analytics Officer in the Web Communications Section to the complainant and asked her to comment on it as a matter of urgency. The complainant submitted comments on 31 May 2013. On 10 September 2013, Ms M.I. sent a finalized job description to the complainant. In her reply of 13 September 2013, the complainant stated that she noted that all of her comments on the job description had been disregarded. She received a revised letter of transfer on 18 September 2013, which notified her that, pursuant to Staff Regulation 4.3, she was transferred, with immediate effect, to the Web Communications Section within the Global Issues Sector, to the post of Senior Web Analyst under the supervision of Ms M.I. On 31 October 2013, the complainant filed a request for the review of the "final administrative decision" to provide her with a job description which was not commensurate with her skills, training, experience and for which she states that she did not meet the stated requirements.

8. On the merits, it is convenient to recall that an executive head of an international organization has wide discretionary powers to manage the affairs of the organization pursuant to the policy directives

and its rules. The discretion includes making decisions relating to the structure of the organization, its departments, divisions or sections, including their restructuring to meet policy objectives, as well as decisions relating to the creation and abolition of posts and the transfer of staff as a part of the process. Firm precedent has it that such decisions are consequently subjected to only limited review. Accordingly, the Tribunal will ascertain whether the decisions are taken in accordance with the relevant rules on competence, form or procedure; rest upon a mistake of fact or law or whether they amount to abuse of authority. The Tribunal will not rule on the appropriateness of the decisions as it will not substitute the organization's view with its own (see, for example, Judgments 2742, under 34, and 3488, under 3).

9. The complainant claims that Ms M.I.'s appointment as Head of the Web Communications Section breached Staff Regulation 4.9(a) as it was a direct appointment without a competitive process. The complainant argues that she was a better candidate for the post than Ms M.I. Staff Regulation 4.9(a) states that:

“As a general rule, recruitment shall be made on the basis of a competition. Vacancies in the Professional and higher categories shall be brought to the attention of the staff members of the International Bureau and the Member States, with details as to the nature of the functions to be fulfilled, the qualifications required and the conditions of employment.”

10. This claim is unfounded. This rule is not applicable in a case such as the present: Ms M.I. was transferred laterally from a P-4 post to another P-4 post in re-assigning staff in the process of the restructuring exercise and Staff Regulation 4.9(a) did not require a competitive process for that appointment. The rule is expressly for the recruitment of persons to fill vacant posts. The Appeal Board wrongly recommended that Ms M.I.'s transfer to the post of Head of the Web Communications Section, as well as the complainant's transfer to the post of Senior Web Analyst, be reconsidered because, in its view, inadequate consideration was given to the position to which the complainant was transferred, and, accordingly, “[i]t appeared legitimate to presume that inadequate consideration had [...] been given to the merits of the [complainant] as a possible Head of the [...] Section”.

11. The transfers in the context of the restructuring process fell within the Director General's discretion. It had been decided that someone was to be appointed Head of the Section to facilitate coordination. In the impugned decision, dated 11 July 2014, the Director General reiterated that, before the Internet Services Section was dissolved, it had been decided, as part of the restructuring process, to formalize the web communications team into the Web Communications Section, with Ms M.I. as Head. According to the Director General, the decision to appoint Ms M.I. as Head was reconsidered in light of the complainant's imminent transfer to the Web Communications Section taking into account the latter's particular experience and qualifications, but it was considered necessary to maintain the decision to appoint Ms M.I. to head the Section "due to her extensive experience in communications of all types, her broad experience in management, her experience as a content creator, and her demonstrated project management skills". The Director General further stated that "[t]his experience was considered crucial to building a new, cohesive section and executing an extremely challenging web restructuring and redesign project, not to mention further developing the Organization's web-based communications". The Tribunal is satisfied that the Director General had properly exercised his discretion to appoint Ms M.I. as Head of the Section. As the Director General had stated in the impugned decision, there is nothing irregular about a staff member reporting to another who holds the same grade. He noted that it happens in other organizations which are part of the United Nations common system; that the Tribunal has recognized it and that, therefore, there is no support for the complainant's assertion that this was unlawful and an affront to her dignity; and the Appeal Board's opinion that this was insensitive.

12. The complainant contends that the decision to transfer her to the Web Communications Section was made in breach of Staff Regulation 4.3. This provision, which is about transfers, states as follows:

"(a) A staff member may be transferred whenever the interests of the International Bureau so require. Due consideration shall be given to respecting the staff member concerned.

- (b) Any staff member may at any time request consideration for a transfer in his or her own interest.
- (c) 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.
- (d) The reasons for the transfer shall be communicated to the staff member in writing.
- (e) Exceptionally, the incumbent may be transferred, subject to his or her written consent, to a post classified one level below the grade of the post. In such a case, the staff member shall retain his or her grade at the personal level.
- (f) [...].”

13. The complainant contends that, contrary to Staff Regulation 4.3(a), her transfer was not in the best interest of WIPO and that no consideration was given to her interests. The Tribunal has consistently stated that what is in the interest of an organization should be left to the organization to decide (see Judgment 2105, under 17) and that greater caution must be shown before interfering with such decisions because the executive head must ordinarily be deemed to be the best judge of what the interests of the organization are (see Judgment 1050, under 4, and Judgment 3193, under 9).

14. The Web Communications Section was created after a lengthy and dispassionate restructuring exercise in an attempt to rationalize, streamline and improve WIPO’s communications services. As the Appeal Board noted, for several years preceding the decision to transfer the complainant to that Section, it must have been clear to all concerned that conflicting work circumstances between the Internet Services “Web support” team and the Communications Division could occasion restructuring and the complainant’s transfer.

15. The Tribunal rejects the complainant’s assertion that her transfer was unlawful because there were “irregularities and/or inconsistencies regarding the dissolution of the Internet Services Section [which] demonstrate that her transfer was not the product of a proper evaluation of the best interests of the Organization”. This is because the complainant’s

supporting arguments are based on her subjective views as to the position which she should have held in the new Web Communications Section, which are irrelevant considerations for the purpose of Staff Regulation 4.3(a). This is evidenced from her conclusion that “it would seem logical, in the best interest of the Organization and in order to ensure a productive work environment, given that [she] had extensive experience in the web field, in several web design projects, had thorough specific web-related training, and had managed the web publishing activities since 1999, that the Organization would have placed [her] in the position of Head, Web Communications Section, the added value being that Ms. MI could benefit from [her] knowledge and that [she, the complainant], who had some four years to her statutory date of retirement, would [be allowed] to enjoy her last years at WIPO on a satisfactory and fulfilling note, and this would not compromise the career of Ms. MI who would then take over from the Complainant”. The complainant’s further statement that “[i]nstead, [she] was put into a position for which she was not fully qualified, her interests and career development were ignored, and she was made to report to a Manager who did not have the extensive knowledge she [the complainant] had acquired in the position over 17 years” is also noteworthy.

16. Neither does the Tribunal accept the complainant’s submission that WIPO has failed to meaningfully consult her in advance; made the decision and conducted all considerations regarding the reorganisation in secret; did not allow her to participate in the discussions and placed her in a post the requirements for which she did not fully meet. First, there is no requirement in Staff Regulation 4.3(a) that a staff member who is being transferred as a result of a reorganisation must consent to it or be consulted in the manner which the complainant suggests. Staff Regulation 4.3(e) requires the written consent of a staff member who is being transferred to a post at a grade level below the grade currently held. In that event, she or he must retain the current grade on transfer. Moreover, the evidence shows that the process leading to the transfer was an open one; that the complainant was aware of and participated in the discussions; that notwithstanding that in such matters the interest of

WIPO is paramount (see Judgment 1050, under 5), WIPO endeavoured to take the complainant's interest into consideration.

17. The evidence shows that, contrary to the complainant's submission, she was consulted concerning her transfer. The facts set out in consideration 6 of this judgment bear this out. It also shows why the complainant's submission that the decision to transfer her was unlawful because WIPO failed to provide the reasons for her transfer in writing must also be rejected. So too must her submissions that her transfer was a hidden sanction motivated by bias and prejudice and that the transfer process violated the principle of equal treatment, as the Tribunal finds no evidential bases to support these submissions.

18. However, the complainant's submission that, contrary to Staff Regulation 4.3(c), she was transferred to a post without comparable responsibilities is well founded. Although she maintained her P-4 grade on her transfer to the post of Senior Web Analyst, the transfer was made in violation of Staff Regulation 4.3(c) because she was not given comparable responsibilities as those which were attached to her former Web Systems Officer position. Her responsibilities in the new post were reduced because of the absence of any coordinating, supervisory or focal point duties in the job description of Senior Web Analyst. Accordingly the impugned decision will be set aside to the extent that the Director General stated therein that there was no irregularity in the complainant's transfer to the post of Senior Web Analyst in the Web Communications Section. Inasmuch, however, as the complainant was subsequently transferred from the latter position, the matter will not be remitted to WIPO for that transfer decision to be reconsidered. The complainant will be awarded moral damages which the Tribunal puts at 20,000 Swiss francs for that unlawful transfer in violation of Staff Regulation 4.3(c). She will also be awarded costs in the amount of 7,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision is set aside to the extent indicated in consideration 18, above.
2. WIPO shall pay the complainant 20,000 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

DRAŽEN PETROVIĆ