

M. M. (No. 7)

v.

WIPO

130th Session

Judgment No. 4286

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Ms V. E. M. M. against the World Intellectual Property Organization (WIPO) on 20 July 2018 and corrected on 17 August, WIPO's reply of 12 December 2018, the complainant's rejoinder of 18 March 2019, corrected on 22 March, and WIPO's surrejoinder of 25 June 2019;

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 reject her claim of retaliation/harassment.

In November 2014 the complainant, who was a staff member of WIPO, wrote to the Director General seeking protection pursuant to Office Instruction (OI) No. 7/2014 of February 2014 on Workplace-related conflicts and grievances. She alleged that she was subjected to reprisal actions following her claims of harassment, discrimination and unequal treatment. She asked that the retaliation and reprisals cease immediately and that an investigation be undertaken by the Internal Oversight Division (IOD). The matter was referred to the IOD for preliminary investigation in accordance with Staff Rule 11.4.1. On 14 January 2016 the Acting Director of IOD informed the complainant that he had decided to close her case. On the same day she was also

notified that the Acting Director of IOD had decided to open an investigation into possible misconduct by her for allegedly rejecting her former supervisor's instructions and her authority two years earlier. On 11 April 2016 the complainant was informed that the Director General had examined her claims together with the position of those against whom she had alleged harassment/retaliation and the IOD report. The Director General stated that it was not established that the actions she described, viewed individually or cumulatively, constituted harassment (whether institutional or otherwise) or could be considered as retaliation against her for having initiated a number of internal appeals. However, he considered that she should be compensated for the delay in finalising the process on her claims.

On 8 July 2016 the complainant filed an appeal with the Appeal Board against that decision. In its report of 21 February 2018 the Appeal Board recommended rejecting her appeal. It noted that she had several complaints pending before the Tribunal, which at least in part raised issues that she had raised in the appeal. It therefore considered that she could not rely on the following issues: her transfer to another position; the investigation opened by IOD concerning allegations of misconduct on her part (of which she was notified in January 2016); and the denial of the whistleblower protection under OI No. 58/2012. It found that the circumstances surrounding the sending of the memorandum of 25 April 2014 in which her supervisor had complained to the Human Resources Management Department (HRMD) about her behaviour at work were "unfavourable" to her, in particular with respect to the timing, but it found no indication of retaliation or of harassment. The Appeal Board found that the compensation granted by the Director General concerning the delay in the investigation and closure of her case was sufficient in the circumstances.

On 23 April 2018 the complainant was informed that the Director General had decided to endorse the Appeal Board's recommendation to dismiss her appeal. He did not, however, expressly endorse the Appeal Board's finding concerning the memorandum of 25 April 2014. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and order the Director General to withdraw the "impugned decisions forthwith". She claims moral damages, exemplary damages and costs. She also seeks 5 per cent interest per annum, from 16 May 2013

through the date of payment, on all amounts awarded to her. Lastly, she asks the Tribunal to award her any other relief that it deems necessary, just and fair.

WIPO asks the Tribunal to reject the complaint as irreceivable in part, and devoid of merit.

CONSIDERATIONS

1. The complainant applies for oral hearings, pursuant to Article 12, paragraph 1, of the Tribunal's Rules. The application is rejected in view of the ample submissions and documentary evidence provided by the parties, which fully inform the Tribunal about this complaint.

2. The complainant's request for the disclosure of documents is also rejected as it is cast in general, imprecise and speculative terms, which constitute an impermissible "fishing expedition" (see, for example, Judgments 4086, under 9, and 3345, under 9).

3. The complainant, who had on various prior occasions in 2014 complained that she was being subjected to retaliation, harassment and unequal treatment by her three hierarchical supervisors (Mr J.T., Ms E.M. and Ms M.I.), filed a formal harassment complaint on 1 November 2014. She alleged therein that from dates in September 2013 to the end of 2014 she was subjected to some twenty incidents of retaliation and reprisals by those supervisors, as well as by Ms C.M. and Ms J.H. of HRMD. She sought "protection against further reprisal resulting from [her] prior claims of harassment, discrimination and unequal treatment, pursuant to OI 7/2014". She further alleged that the reprisals and retaliation, including being initially informed of her transfer on 2 May 2013, occurred after she had filed internal appeals complaining of irregularities in her transfer to the Web Communications Section, in the Communications Division, and after she contested the job description for the post to which she was being transferred. She also alleged that her supervisors and the two HRMD personnel subjected her to "inappropriate and unwarranted reactions/decisions" as "evidence of continued harassment, in an effort to condemn [her] as incompetent, difficult and worthy of disrespect and mobbing". She further alleged that she suffered institutional harassment because the Administration

supported their acts of retaliation and reprisals against her and did nothing to protect her.

4. The complainant's harassment complaint was at her request referred to the IOD, pursuant to Staff Rule 11.4.1. The Acting Director of IOD issued the Preliminary Evaluation Report (PER) of the investigation recommending that the harassment complaint be closed, apparently pursuant to paragraph 28 of Office Instruction (OI) No. 7/2014. On 11 April 2016 the Director General dismissed the complaint pursuant to paragraph 28(a) of OI No. 7/2014. He found, in effect, that the complainant's allegations of retaliation and reprisals, on the basis of the incidents which she had cited, were not established. She appealed to the Appeal Board on 8 July 2016. In its report of 21 February 2018, the Appeal Board recommended that the appeal be dismissed and found that the 1,000 Swiss francs compensation which the Director General had awarded the complainant for delay in the investigative process of the IOD was sufficient in the circumstances. The complainant impugns the decision of 23 April 2018 in which the Director General accepted the Appeal Board's recommendation.

5. Before considering the grounds on which the complainant challenges the impugned decision, it is necessary to determine the scope of this complaint. The complainant has challenged various decisions culminating in eight complaints to the Tribunal, most of which have been resolved in already delivered judgments. In this complaint, she relies on some allegations and issues which were foundational to other complaints. WIPO therefore raises receivability as a threshold issue in relation to aspects of this complaint. It also submits that several of the allegations contained in the complainant's pleadings go beyond the scope of the allegations and issues which she raised in the internal appeal.

6. Judgment 4085 dealt with the complainant's fifth complaint. In that complaint, she had contested the decision to reject a harassment grievance which she filed on 1 April 2010 against the same three hierarchical supervisors whom she alleged with others harassed her. She also alleged institutional harassment against the Administration. The allegations initially concerned actions and decisions from April 2009 and prior to May 2013. In her fifth complaint, however, she extended them to include incidents which allegedly occurred from 2 May 2013. The Tribunal determined that the scope of her April 2010

harassment grievance included allegations of incidents between April 2009 and prior to May 2013. It also noted that the present complaint had been filed, and, in consideration 13, observed that incidents which allegedly occurred subsequently that related to her transfer to the Communications Division and to her job reclassification and description exercises; issues and incidents concerning office space; the establishment of her performance appraisal objectives and evaluations from 2013; her suggestion that baseless allegations were made against her and decisions concerning medical compensation and sick leave, which were not before the Internal Audit and Oversight Division (IAOD) and the Joint Grievance Panel (JGP) during the investigation were within the scope of this, her seventh, complaint.

7. In her statement of appeal of 8 July 2016 to the Appeal Board, the complainant mirrored her dissatisfaction with the decision of the Acting Director of IOD, dated 14 January 2016, to close her harassment complaint. She stated, among other things, that inordinate delay in the IOD's investigative process breached WIPO's duty to protect employees. She submitted that that delay exposed her to further wrongdoing. These allegations are however the subject of the complainant's eighth complaint and will not be considered in this judgment by virtue of the general principle of law that a person cannot simultaneously litigate the same issues in separate or concurrent proceedings. Additionally, in her present complaint, the complainant states that she also challenges the subsequent decision of 14 January 2016 by the IOD to open an investigation into "possible misconduct" by her for allegedly rejecting her supervisor's instructions two years earlier. That issue is not receivable as it was not raised in the internal appeal.

8. Based on the foregoing, it is plain that the allegations that are relevant in the present complaint are those which the complainant raised in her harassment complaint of 1 November 2014 and which the IOD investigated and the Appeal Board considered in its report.

9. The complainant challenges the impugned decision on the following grounds:

- (1) The Appeal Board's refusal to consider all the relevant facts establishing a pattern of retaliation was prejudicial to her and a breach of due process.

- (2) The Appeal Board's interpretation of the events surrounding her submission of her "complaint of retaliation" was based on errors of fact and law, as well as mistaken conclusions drawn from the facts.
- (3) She was entitled to whistleblower protection on the basis of the general law of the international civil service.
- (4) The unreasonable delay in the IOD's investigation and its issuance of its PER and its failure to address her claim of retaliation in keeping with the Investigation Manual constituted further retaliatory acts against her.
- (5) The decision of 14 January 2016 (the date on which she was informed that her harassment case was closed) to undertake a performance-based investigation of events which allegedly occurred two years prior to that date constitutes an escalation of retaliation against her with malicious intent to find grounds to dismiss her.
- (6) WIPO caused unreasonable delay and ultimately failed to protect her from the retaliation which she suffered, which continued unabated.
- (7) There was unreasonable delay in the internal appeal process.

10. As observed in consideration 7 of this judgment, ground 5 is the subject of the complainant's eighth complaint and will not be considered in this judgment.

11. Grounds 4 and 6, in which the complainant raises the issue of delay, are unfounded. In her submissions, the complainant links the delay in the IOD's process with alleged delay in the internal appeal process. In doing so she essentially claims that the delay spanned the period from July 2014 or 1 November 2014, when she filed the underlying harassment complaint, to 23 April 2018, when the impugned decision was issued. She submits that the delay was not merely due to negligence but was "deliberate and irregular retaliatory treatment". However, she provides no evidentiary basis to support this submission.

12. WIPO had accepted that there was unreasonable delay in the IOD's process when it awarded the complainant 1,000 Swiss francs. The IOD had issued its PER on the 1 November 2014 harassment complaint in January 2016 and the Director General issued his decision

thereon on 11 April 2016. While the complainant correctly notes the settled principle that the quantum of compensation for unreasonable delay should take into account the length and the effect of the delay on a staff member, she provides no evidence on these bases to justify an increased award.

13. The allegation of unreasonable delay in the internal appeal process is unmeritorious. The complainant filed the internal appeal on 8 July 2016. The Director General issued the final decision on 23 April 2018. The complainant's circumstances contributed to delay in the process. As the Appeal Board noted in its report, WIPO filed its reply to the complainant's statement of appeal on 12 October 2016. The complainant then requested an "indefinite extension" of time to submit her rejoinder until she recovered from illness and returned to work. She subsequently requested and was granted two further extensions, eventually submitting the rejoinder some seven months later on 19 May 2017. WIPO then submitted its surrejoinder in a timely manner on 28 June 2017.

14. Ground 3 is also unfounded as the record does not disclose that there was a violation of the whistleblower protection as the complainant claims.

15. In grounds 1 and 2, the complainant is critical of the manner in which the Appeal Board arrived at its recommendation "that the Director General dismiss the Appeal in its entirety".

16. In her appeal to the Board, the complainant had argued, among other things, that the Director General's decision (and the recommendation in the IOD's PER which he accepted) to dismiss her harassment complaint was flawed because it did not properly assess her allegations of harassment by retaliation and reprisals. The Board decided to address only two of the incidents of retaliation and reprisals which the complainant had raised. This, it stated, was because the complainant only substantiated those two incidents in her appeal. One incident was listed as 14A in the 1 November 2014 complaint. She alleged that immediately after her transfer to the Web Communications Section in September 2013 Ms M.I. gave her a task which was impossible to achieve in the particular circumstances. The second was listed as incident 2 in the complaint. It related to a memorandum dated

25 April 2014 which Mr J.T. sent to HRMD seeking “a more satisfactory solution for all concerned” because of “what has become an untenable situation following the transfer of [the complainant] to the Web Communications Section”. That memorandum was sent before the complainant, who was on sick leave at the time, had the opportunity to fully respond to the suggestion. The Board opined that the circumstances which surrounded the sending of the memorandum including the timing, were unfavourable to the complainant and suggested that Mr J.T. and Ms E.M. should have awaited the complainant’s return from sick leave before sending it to HRMD.

17. The Appeal Board’s approach to the substance of the complainant’s allegations of retaliation and reprisals, endorsed by the Director General in the impugned decision, was flawed on two bases. In the first place, its statement that the complainant had only substantiated two of the incidents upon which she relied was inaccurate. Her rejoinder in the Appeal Board’s proceedings shows that she substantiated other alleged incidents. In the second place, the Board did not appreciate that although it was not required to find the facts, that being within the purview of the IOD, it was nevertheless required to weigh the detailed evidence (including the rebuttals) which the IOD had adduced in its investigations (see Judgment 4085, under 15). As a result, the Board failed to consider whether there was an accumulation of repeated events which deeply and adversely affected the complainant’s dignity and career objectives. It also failed to consider whether there was a long series of examples of mismanagement and omissions by the Organization that compromised her dignity and career constituting institutional harassment (see, for example, Judgment 3250, under 9). The Board therefore did not consider all relevant facts and drew wrong conclusions from the facts. These failures constitute an error of law (see, for example, Judgment 2616, under 24), as well as a violation of the complainant’s right to effective appeal proceedings (see, for example, Judgment 3424, under 11(a) and (b)).

18. Additionally, the complainant is right in contending that the Director General failed to respond appropriately to the Appeal Board’s finding, recalled in consideration 16 above, concerning the circumstances in which the memorandum of 25 April 2014 was sent.

19. In light of the foregoing findings, the Tribunal would in principle set aside the impugned decision and remit the matter to the organization concerned. However, in view of the effluxion of time that course of action would be impracticable. The complainant is no longer a staff member of WIPO and the result of her harassment complaint is yet to be determined. The Tribunal concludes that the complainant suffered moral injury for which she will be awarded 25,000 Swiss francs in compensation.

The Tribunal considers the complainant's claim for exemplary damages to be unsustainable as she has provided no evidence or analysis to demonstrate that there was bias, ill will, malice, bad faith or other improper purpose on which to base an award of exemplary damages (see, for example, Judgment 3419, under 8).

WIPO will also be ordered to pay the complainant 7,000 Swiss francs costs.

DECISION

For the above reasons,

1. WIPO shall pay the complainant 25,000 Swiss francs in moral damages.
2. WIPO shall pay the complainant 7,000 Swiss francs costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 3 July 2020, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President of the Tribunal, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ