M. M. (No. 3)

v.

WIPO

125th Session **Judgment No. 3946**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms V. E. M. M. against the World Intellectual Property Organization (WIPO) on 4 August 2014 and corrected on 25 September 2014, WIPO's reply of 19 January 2015, the complainant's rejoinder of 27 April and WIPO's surrejoinder of 30 July 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 contests the amounts she was awarded for the delay in processing her request for compensation for service-incurred illness.

On 31 January 2012 the complainant, a WIPO staff member, wrote to the Human Resources Management Department (HRMD) requesting compensation under Staff Regulation 6.2 with respect to her service-incurred illness.

Following an exchange of correspondence with WIPO's Administration and the Medical Services Section of the United Nations Office in Geneva, on 2 August 2012 she wrote a memorandum to the Director General, again requesting compensation for her service-incurred illness. She added that, in the absence of an express final decision within 15 days, she would consider that her request was

definitively rejected. Further correspondence ensued between the Administration and the complainant but without arriving at a decision regarding her request. Thus, on 16 February 2013 she submitted a request for review to the Director General against the implied rejection of her request for compensation. She sought the award of proper and adequate compensation for her service-incurred illness, reimbursement of "actual and moral damages" for the egregious delay in dealing with her request for compensation, and reimbursement of legal fees.

On 15 April the complainant was informed that the Director General had rejected her request for review on the ground that there was no administrative decision to review at that stage. On 12 July 2013 she filed an appeal with the Appeal Board challenging that decision and alleging that WIPO's failure to take a decision was an affront to her dignity, which warranted an award of "exemplary damages". She asked the Director General to take without delay a definitive decision on her request for compensation, to award her "exemplary moral damages" and to reimburse her legal fees. She also claimed interest on all amounts to be awarded to her, and any other relief that the Appeal Board determine to be fair, necessary and equitable.

In its report of 7 March 2014 the Appeal Board held that the memorandum of 2 August 2012 could be considered as an election by the complainant to treat the Administration's failure to act within the next 15 days as an implied decision to reject her request for compensation, and noted that she had not requested a review of that implied decision within the prescribed time limits. However, it concluded that she was entitled to consider the further period of inactivity up to 16 February 2013, when she made her request for review, as an implied decision of rejection. The appeal was therefore found to be receivable. The Appeal Board considered that the delay in processing her request for compensation was unreasonable, stating that after 12 months she should have been notified of the conclusions made on her compensation claim or a decision should have been made with a view to finding a speedy solution. It also concluded that the Administration was responsible for the delay, and therefore recommended that the complainant be awarded moral damages in an amount of 1,000 Swiss francs per month

as from 1 February 2013 until the date of notification of the insurer's conclusions on her request for compensation or until a decision was taken to rapidly overcome any problems related to lack of evidence or conflict of medical opinion. It also recommended that she be reimbursed, on the production of the relevant invoice, part of the legal fees incurred.

By a letter of 6 May 2014 the complainant was notified that the Director General considered that the Appeal Board's conclusions on receivability were contradictory and not supported by adequate reasoning. He could have rejected the appeal as irreceivable, and reserved the right to raise this procedural issue before the Tribunal if she filed a complaint, but instead he decided to endorse the Appeal Board's recommendation to award her moral damages in the hope that the matter could be laid to rest. Consequently, he awarded her an interim sum of 14,000 Swiss francs for the time that had elapsed between 1 February 2013 and the date of his decision. The situation would be assessed by the Human Resources Management Department (HRMD) every three months from May 2014 and further payments would be made if necessary following each assessment until the issues were resolved. He rejected the recommendation to reimburse her legal fees on the ground that, at the internal level, the proceedings were navigable by a staff member without any legal training. That is the impugned decision.

The complainant asks the Tribunal to award her at least 100,000 Swiss francs in compensation for her "actual and consequential injuries arising from her service-incurred illness". She also seeks the award of at least 150,000 Swiss francs in moral damages plus "exemplary moral damages" for the delay in treating her request for compensation and for WIPO's unreasonable withholding of such benefits. She claims reimbursement of the legal fees incurred in bringing her complaint, including the costs incurred in the internal appeal procedure. She further seeks interest on all amounts awarded at the rate of 5 per cent per annum from 31 January 2012 until such amounts are paid. Lastly, she seeks any other relief the Tribunal would deem fair, necessary and just.

WIPO asks the Tribunal to dismiss the complaint as time-barred. It also asks the Tribunal to dismiss the claims for compensation that were not raised during the internal appeal proceedings as irreceivable for failure to exhaust internal means of redress. On the merits, WIPO asks the Tribunal to dismiss the complaint on the ground that the impugned decision was lawful and should be upheld.

CONSIDERATIONS

1. On 31 January 2012 the complainant submitted a request for compensation for a service-incurred illness pursuant to Staff Regulation 6.2. Following many exchanges between the complainant and the Administration, on 16 February 2013 the complainant submitted a request for review pursuant to Staff Rule 11.1.1(b)(1). At paragraph 3 of the request, she stated:

> "Given the fact that over a year has passed since I submitted a request for compensation under Staff [Regulation] 6.2, I treat the failure to award me compensation as of the present date as an implied final decision, rejecting my demand for compensation, for which I kindly request your redress pursuant to SR 11.1.1(b)(1)."

2. On 15 April 2013, the Director of HRMD informed the complainant that the Director General was not "in a position to entertain [her] request for review, as there [was] simply no administrative decision to review at [that] stage". The Director further noted that the Administration had been engaged in trying to arrange medical appointments for the complainant which was hindered by her requirement of a medical expert who was a native English speaker. The complainant lodged an appeal against this decision on 12 July 2013. The complainant framed the appeal as follows:

> "I am appealing the decision taken by [the] Director, HRMD, on behalf of the Director General on April 15, 2013, [...] to fail to treat my request for compensation dated January 31, 2012 [...], under Staff Regulation and Rules (SRR) 6.2 and the additional injury caused to me by the Administration's dilatory treatment of my claim."

3. On 7 March 2014, the Appeal Board issued its conclusions and recommendations. For reasons that will be discussed in greater detail below, the Appeal Board concluded that the appeal was receivable. The Appeal Board also concluded that the Administration was responsible for the delay in processing the complainant's request for compensation (one year delay could be understandable but not above), and recommended that the Director General award her moral damages in the amount of 1,000 Swiss francs per month as from 1 February 2013 up to the date when she would be notified of the insurer's conclusions on her request for compensation or when a further decision would be taken to rapidly overcome any problems related to lack of evidence or conflict of medical opinion. It also recommended the reimbursement of the complainant's legal fees to a certain extent.

4. In the impugned decision of 6 May 2014, the Director General found the Appeal Board's conclusion that the internal appeal was receivable to be contradictory and not supported by adequate reasoning. However, he opted not to reject the appeal as irreceivable and endorsed the Appeal Board's recommendation to award the complainant moral damages for the delay in taking a decision on her request for compensation pursuant to Staff Regulation 6.2 calculated at that point in time to be 14,000 Swiss francs. He added that the situation would be addressed regularly and further payments would be made if necessary. He rejected the recommendation to reimburse legal fees and reserved the right to raise the issue of receivability should the case be the subject of a complaint to the Tribunal.

5. The present complaint is brought against the Director General's 6 May decision. Two issues arise concerning the receivability of the complaint. The first is whether the complainant's request for review was time-barred. The second is whether the claim in the present complaint for "actual and consequential" injuries exceeds the scope of the claims brought in the internal appeal and is consequently irreceivable for failure to exhaust the internal means of redress.

6. Before dealing with the receivability issues, it is noted that the complainant applies for oral hearings and seeks the production of a vast array of documents. It is observed that the parties' briefs and the evidence they have produced are sufficient to enable the Tribunal to reach an informed decision. Therefore, the complainant's application for hearings is rejected. As to the request for the production of documents, as it is framed in very general and imprecise terms it is rejected.

7. The following additional facts are relevant to the first issue. On 31 May 2012, the Appeal Board issued its report in another of the complainant's internal appeals. This appeal concerned the complainant's claim of harassment and mobbing. At paragraph 40 of its report, the Appeal Board made a number of recommendations, including that the Director General annul his previous decision concerning the complainant's harassment complaint and refer the complaint back to the Joint Grievance Panel. In addition to the payment of legal fees, the Appeal Board, at paragraph 40(c), also recommended that the Director General:

> "[A]rrange for consideration to be given to the [complainant's] claim relating to alleged health impairment in the framework of the arrangements made, in accordance with Staff Regulation 6.2, for compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the International Bureau."

It is convenient to note that when the Appeal Board issued its report and made the above recommendation regarding Staff Regulation 6.2, it was unaware of the complainant's 31 January 2012 request for compensation.

8. On 31 July 2012, the complainant was informed, by a letter, of the Director General's decision to adopt the Appeal Board's recommendations of 31 May 2012 except for the payment of legal fees. In relation to the recommendation at paragraph 40(c), the relevant articles of WIPO's accident insurance policy which provide coverage for service-incurred illness were enclosed with the letter. The letter drew the complainant's attention to the specific articles in the policy dealing with the application procedure should the complainant wish to submit a claim.

9. In a 2 August 2012 memorandum to the Director General, the complainant reviewed the actions that she and the Administration had taken following her 31 January 2012 request for compensation. She noted that on 27 March she contacted Ms G., Human Resources Operations Manager, to ascertain the next steps that had to be taken for a determination under Staff Regulation 6.2 and was informed on 5 April that HRMD would get back to her shortly. The complainant observed that having not heard from HRMD, she wrote to Ms G. on 4 June pointing out that two months had passed since she was informed that HRMD would contact her "shortly" and, in fact, she had still not heard from HRMD. The complainant then referred to the Appeal Board's recommendation at paragraph 40(c) of its report of 31 May 2012 and stated:

> "Accordingly, notwithstanding your letter of July 31, 2012, I therefore respectfully request that you forthwith award me appropriate compensation pursuant to Staff [Regulation] 6.2 for my service incurred injuries. Please treat this as a request for a final administrative decision. In the absence of an express decision in response hereto from you within fifteen (15) days of the date of this letter, I shall deem my request definitively rejected, and will proceed to vindicate my rights as appropriate."

10. On 29 August 2012 Ms G. responded to the complainant's 4 June email. She apologized for the late reply and stated that she did not understand the complainant's earlier question and the relationship/ application of Staff Regulation 6.2 and asked for clarification of the request. She added that if the complainant was seeking information about the same subject, "*[c]onvocation au service médical*", Human Resources Operations was unable to take a position or give any information as it was still waiting for a reply from the medical service. On 30 August Ms G. wrote to the complainant about her memorandum to the Director General regarding her request for compensation under Staff Regulation 6.2 and suggested a meeting to clarify the regulation and the procedures that should be followed. In her 3 September email to Ms G., the complainant confirmed the procedure she was to follow with respect to compensation under Staff Regulation 6.2, namely, that she should complete the insurer's form and send it to Human Resources Operations with a copy to Ms G. and the form would then be sent to the insurer.

On 4 September the complainant submitted the declaration of service-incurred illness as required.

11. WIPO submits that the Appeal Board in its report of 7 March 2014 erred in finding that the complainant's request for review was receivable. WIPO points out that in its report, the Appeal Board described the applicable time limit in the following terms:

> "In the WIPO context, this means that a request for review must be made within eight weeks from the date on which the staff member elects to treat the delay as an implied decision of rejection. That date must however fall at a moment when the delay is still continuing."

WIPO argues that if the complainant's 2 August 2012 memorandum is considered as an election by her to treat the Administration's failure to act as an implied decision, as the Appeal Board did find, the complainant failed to submit a request for review of the decision within the requisite time limit of eight weeks. As she submitted the request for review approximately four months later in February 2013, contrary to the Appeal Board's finding, the complaint is irreceivable.

12. Under Staff Rule 11.1.1(b), an internal appeal is a two-step process. A staff member wishing to appeal against an administrative decision must first send a letter to the Director General requesting a review of the administrative decision within eight weeks of the notification of the decision to the staff member. A staff member wishing to appeal against the Director General's answer must submit the appeal to the Chair of the Appeal Board within three months of the receipt of the answer. If the staff member has not received an answer within eight weeks of sending the letter to the Director General, the staff member must submit an appeal to the Chair of the Appeal Board within the following eight weeks.

13. In Judgment 3089, at consideration 7, the Tribunal explained when a staff member may engage the internal appeal process on the basis of an implied decision. It reads:

> "In Judgment 2600 the Tribunal set out the various events that had occurred between the complainant's submission of her claim of harassment and the filing of the complaint under consideration in that case. It stated, under consideration 10, that:
>
> 'at any time between November 2004, when she was informed of the unavailability of Panel members, and 23 June 2005, when the first attempt was made to arrange a hearing, the complainant could have treated the failure to constitute a Panel as an implied decision by the Director of [the Human Resources Management Division] to close the case.'
>
> It is on the basis of this statement that the FAO argues that the complainant's appeal of 11 May 2007 was time-barred. However, that argument overlooks the Tribunal's further statement that 'the complainant did nothing [between November 2004 and 23 June 2005] to indicate that she had elected to treat that delay as an implied decision'. An implied decision occurs only when a person who has submitted a claim is entitled to treat delay, inactivity or some other failure as constituting a decision to reject his or her claim and elects to do so. As there was no election by the complainant during the period in question, there was no implied decision at that time. Accordingly, the argument of the FAO as to receivability must be rejected."

14. It is evident from the fact of the inclusion of the information regarding the making of a request for compensation for service-incurred illness with the letter of 31 July 2012 and the observation in the same letter that it was included in the event the complainant wished to make a claim, the Director General was unaware that the complainant had already submitted a claim. When the complainant responded on 2 August it is also evident from the frustration she expressed that she assumed the Director General knew she had submitted a claim. Also, at that point in time, the complainant was not aware that an error had occurred in the processing of her claim. Article 12.2 of the insurer's policy states:

> "In case of service incurred incidents, the insured person must inform the Policyholder as soon as possible. The Policyholder will confirm that the insured person was on duty at the moment of the incident and provide the insured person with a declaration form. The Policyholder will copy the Insurers in this communication to the insured. The insured person must complete this form, add any other relevant information (medical reports, other reports of police or witnesses, etc.) and send this information to the Insurers for processing."

Contrary to what is required in the policy, the Administration failed to provide the complainant with a declaration form and obviously did not copy the insurers. Following the receipt of the complainant's 31 January 2012 claim, the only step taken by the Administration was to refer her on 17 February to the United Nations Office in Geneva's Medical Services Section to arrange an appointment for an assessment.

15. It was not until the end of August 2012, as detailed above, that the confusion and misunderstandings were finally dealt with and, at least, for a certain period of time the process was back on track. In these circumstances, it cannot be said that in early August the complainant was in a position to make any knowledgeable election that would trigger the applicable time limit. The Tribunal concludes that in these circumstances the 16 February 2013 request for review pursuant to Staff Rule 11.1.1(b)(1) was not time-barred.

16. It is also noted that shortly after the impugned decision was rendered, on 16 May 2014, the insurer informed the complainant that her declaration of service-incurred illness was accepted effective the date of declaration and that all costs related to the treatment of the service-incurred illness would be paid. Thus, the complainant's claim pursuant to Staff Regulation 6.2 was fully satisfied.

Regarding the claim for additional moral damages for delay, it is observed that the confusion and misunderstanding surrounding the processing of the complainant's claim and the delay this occasioned is attributable in large measure to WIPO's failure to follow the required procedure in Article 12.2 of the insurer's policy for which the complainant is entitled to additional moral damages in the amount of 5,000 Swiss francs.

However, the complainant's allegations that WIPO's actions in processing her claim amounted to harassment, retaliation or reflected bad faith are without foundation.

17. Turning to the second question as to whether the claim for "actual and consequential" injuries exceeds the scope of the claims brought in the internal appeal, as set out above, the subject matter of the internal appeal was limited to a claim for compensation pursuant to Staff Regulation 6.2 under the Organization's no-fault regime. A claim for compensation for "actual and consequential" injuries is an entirely different claim that extends an organisation's liability beyond its liability under a no-fault regime. As the Tribunal has consistently held, establishing such a claim requires proof of negligence on the part of the organization or the intentional breach of a duty (see Judgment 2843, consideration 3). As the claim for "actual and consequential" injuries exceeds the scope of the claims brought in the internal appeal, it is irreceivable for failure to exhaust the internal means of redress. At this juncture, it must also be added that the complainant's allegations regarding matters that occurred after the impugned decision was made are also clearly beyond the scope of the present complaint.

18. In the circumstances, no costs will be awarded.

DECISION

For the above reasons,

1. WIPO shall pay the complainant moral damages in the amount of 5,000 Swiss francs.
2. All other claims are dismissed.

In witness of this judgment, adopted on 31 October 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