

E.
v.
WIPO

127th Session

Judgment No. 4083

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms E. E. against the World Intellectual Property Organization (WIPO) on 15 February 2017 and corrected on 6 March, WIPO's reply of 26 June, the complainant's rejoinder of 27 October 2017 and WIPO's surrejoinder of 1 February 2018;

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 decision not to reclassify her post.

In a memorandum of 16 March 2015 addressed to her supervisor, the complainant stated that her 2011 job description and its revised 2015 version for her post of Information Assistant in the Information and Promotion Division (IPD) of the Madrid Registry Department did not correspond to the duties assigned to her since 2009. She requested the reclassification of her G6 post at grade P-3 or P-4 with retroactive effect from 2011 and asked him to revise the 2011 and 2015 job descriptions.

On 4 May 2015 her supervisor rejected her request for reclassification and provided her with a slightly modified 2015 job description.

By a memorandum of 2 June 2015 the complainant requested the Director General to review the decision not to reclassify her post. She claimed that an audit would establish the disparities between her actual duties and her job descriptions and alleged that she had been discriminated against by her supervisors who had deliberately removed some of her responsibilities to maintain her post at a lower grade.

By a letter of 31 July 2015 the Director of the Human Resources Management Department (HRMD) informed the complainant that, as an exceptional measure, a desk audit would be conducted. If the conclusion reached at the end of the desk audit was that the post should be reclassified at a higher grade, a request would be made for the reclassification exercise to be initiated. The Director rejected the complainant's request for outright reclassification of her post and stated that, although the complainant had not established a *prima facie* case of discriminatory treatment, she could follow the formal process set out in Staff Rule 11.4.1 and Office Instruction No. 7/2014 if she believed she had been subjected to discrimination.

The complainant appealed against that decision in September 2015. The appeal proceedings were suspended pending the outcome of the desk audit by an external classification expert, who recommended in a report dated 10 December 2015 that the complainant's post be confirmed at grade G6. On 29 January 2016 the complainant submitted a revised statement of appeal in which she also challenged the process and outcome of the desk audit.

In its conclusions of 19 September 2016, the Appeal Board recommended dismissing the appeal as unfounded, which the Director General did in a letter of 18 November 2016. In that letter, the Director General also considered that some of the complainant's claims concerning the absence of a job description from 2008 to 2011 and the content of her 2011 job description were time-barred. That is the impugned decision.

The complainant asks the Tribunal to order that her job description be updated and that the classification of her post be reviewed by an independent classification expert based on the tasks completed since 2009. She claims material and moral damages, as well as costs.

In her rejoinder, she asks that the update of her job description be carried out with retroactive effect.

WIPO submits that the complaint is unfounded in its entirety. It argues that the only receivable issue is whether the complainant's post was correctly graded at grade G6 and that the complainant's other claims are irreceivable for failure to exhaust internal remedies as well as time-barred. It objects to the complainant's attempt to modify her claims in the rejoinder.

CONSIDERATIONS

1. This complaint originated with the complainant's March 2015 request to her supervisor for the reclassification of her G6 post to grade P-3 or P-4 with retroactive effect from 2011 on the basis that her grade was not compatible with the level of complexity of the duties and responsibilities assigned to her since 2009. She also requested the revision of her 2011 and 2015 job descriptions. The supervisor rejected the request for the reclassification of the complainant's post and provided the complainant with a slightly modified 2015 job description. The complainant submitted a request to the Director General for a review of the decision "not to reclassify [her] post and not to allow an audit [of that post]". In the same communication, the complainant alleged that she was the subject of discrimination by her supervisors who had deliberately removed some of her responsibilities to maintain her post at a lower grade.

2. Subsequently, on 31 July 2015, the Director of HRMD informed the complainant that her request for review of the decision not to reclassify her post was rejected, however, as an exceptional measure a desk audit would be conducted. As to the allegations of discrimination, the Director stated that, although in her view the complainant had not established a *prima facie* case of discrimination, she was entitled to pursue her claims of discrimination through the formal process found in Staff Rule 11.4.1 and Office Instruction No. 7/2014.

3. On 23 September 2015, the complainant lodged an internal appeal with the Appeal Board against the 31 July decision that she framed as “denying [her] a new classification of her post and the recognition of mismanagement of her responsibilities by her supervisors”. Subsequently, with the Board’s approval, the parties agreed to suspend the appeal proceedings pending the outcome of the desk audit and that the complainant would have an additional two weeks to supplement the appeal. On 29 January 2016 the complainant filed a revised statement of appeal against the 31 July 2015 decision “denying [her] the recognition of mismanagement by her supervisor aiming at declassifying her post and diminishing her responsibilities as well as denying her an audit of that post.”

4. In its conclusions of 19 September 2016, the Appeal Board recognized that classification was a technical exercise and, as such, was subject to limited review. It concluded that there was no manifest error in the external classification expert’s evaluation of the post; that the complainant’s request for a new job description should be rejected; and recommended that the appeal be dismissed. In the 18 November 2016 impugned decision, the Director General agreed with the Appeal Board’s conclusions and recommendation and dismissed the appeal.

5. Before turning to the merits of the complaint, it is convenient to deal with a procedural matter raised by WIPO. The Organization submits that the only admissible issue in this proceeding is whether the post encumbered by the complainant is correctly graded at level G6. WIPO contends that rather than confining her pleadings to this issue, the complainant attempts to challenge a range of matters including the level of her duties between 2001 and 2008; the absence of an updated job description between 2008 and 2011; the contents of the job description she received in 2011; earlier requests for reclassification, and the discriminatory actions of her supervisors in the alleged removal and replacement of some of her duties and responsibilities. The Organization argues that these matters are all beyond the scope of this complaint. As well, the complainant has never filed a harassment complaint in relation to the allegations of discrimination; and, she never formally

challenged at the relevant time her 2011 job description, the absence of a job description between 2008 and 2011 and the rejection of her earlier requests for reclassification. WIPO also argues that as these matters have never been the subject of a request for review, they are now time-barred and are irreceivable pursuant to Article VII, paragraph 1, of the Tribunal's Statute.

6. The complainant submits that the matters which WIPO describes as irreceivable are intrinsically linked to her current post description and to the irregular removal of tasks and the inadequate job description used for the desk audit. She also notes the many "complaints" she made about her job description since 2011 were only examined in 2014 and 2015. She adds that as WIPO used the 2011 job description for the desk audit, fairness dictates that she should be able to "raise the issue". It is observed that the two versions of the complainant's statement of appeal dated 23 September 2015 and 29 January 2016 stated that the "[a]ppeal [was] against the decision dated 31 July 2015". In the 31 July 2015 letter, the Director of HRMD informed the complainant that her request for review of the decision not to reclassify her post was rejected, however, a desk audit would be conducted. As to the allegation of discrimination, the complainant was informed that she should pursue her claim through the formal process in accordance with the relevant Staff Rule and Office instruction. Although the complainant framed the content of the decision differently in her statements of appeal, this does not alter or broaden the scope of the decision being challenged. Accordingly, to the extent that the complainant attempts to challenge in this complaint the matters identified by WIPO as stated in consideration 5 above, her claims are irreceivable.

7. The complainant advances several submissions in support of her position that the desk audit was "irregular and partial" and is tainted by "serious material flaws". The first is that the external classification expert was "technically incompetent and unqualified to handle the audit process". The complainant argues that the external classification expert's incompetence resulted in several false statements, omissions and misguidances. The allegation of incompetence is grounded on the

complainant's position that an evaluation of the work requires that the classification expert must have training and experience in the technical area of the work being evaluated, in this case, trademarks.

8. In support of this position, the complainant relies on the Tribunal's observation in Judgment 1067, consideration 2, in relation to the grading of the post, that "[t]he evaluation must be done by those who by training and experience are able to apply the relevant technical criteria". As the consistent case law shows, the complainant's interpretation of that observation is mistaken. For example, as the Tribunal stated in Judgment 2614, consideration 11, "[i]t is not in dispute that a classification review, a highly technical exercise, must be conducted by an individual having the requisite training and experience". It is also clear in the case law that the required training and experience is in the area of classification and evaluation. This is reflected in Judgment 3479, consideration 5, where the Tribunal stated that "an evaluation or classification exercise is based on the technical judgement to be made by those whose training and experience equip them for that task [...]".

9. The complainant's second submission concerns her 2015 job description. The complainant submits that the external classification expert based her report on the 2015 job description that was not finalized. Underlying this submission is the complainant's assertion that job descriptions must be accepted or agreed to by the incumbent. The complainant relies on Judgment 2904 as stating that a "desk audit should refer to a post description properly reviewed and accepted by all parties". As WIPO points out, this statement does not appear in Judgment 2904. Moreover, the Tribunal in fact stated at consideration 9 of that judgment that "as the revised post description had not been properly reviewed and accepted by the relevant division [...], the specialist was correct to disregard it while conducting the desk audit, referring instead to the post description on file". It is also observed that while the incumbent of a post should be consulted on their job description, it is for management to determine the duties and responsibilities of a particular post.

10. Third, the complainant submits that the desk audit report is tainted by a number of errors of substance that she alleges stem from a lack of objectivity on the part of the external classification expert. She claims that the lack of objectivity together with the external classification expert's lack of appreciation of her working environment resulted in a report with misleading statements, omissions, contradictions and misinformation. The complainant argues that the external classification expert's involvement of one of her colleagues reflects a conflict of interest on the part of the colleague and a breach of confidentiality on the part of the classification expert. However, the complainant does not explain or provide any basis for these assertions. The individual to whom the complainant refers was a Senior Legal Officer responsible for, among other things, the distribution of "Intreg" (international registration) queries to staff in the IPD for reply. The external classification expert did not interview this individual. She simply sought information regarding the type and complexity of the queries delegated to the complainant for treatment. This type of inquiry was clearly within the external classification expert's mandate and, in fact, the classification expert would have been remiss if she had not done so.

11. In her pleadings, the complainant sets out at length what she alleges are misleading statements, alleged omissions, misinterpretation, contradictions, misinformation and the external classification expert's lack of understanding of her working environment in the desk audit report. A review of the report does not support these allegations. Rather, the complainant's allegations can be attributable to: the complainant's misinterpretation of the text in the report; in some instances, her unsubstantiated broad sweeping statements; inaccurate factual assertions; attempts to alter the meaning of the text; and a misquoting of the text. Additionally, as WIPO points out, in some instances there is no corresponding paragraph or footnote in the desk audit report against which the complainant's assertions can be assessed.

12. It is well established that "the grounds for reviewing the classification of a post are limited and ordinarily a classification decision would only be set aside if it was taken without authority, had been made

in breach of the rules of form or procedure, was based on an error of fact or law, was made having overlooked an essential fact, was tainted with abuse of authority or if a truly mistaken conclusion had been drawn from the facts (see, for example, Judgments 1647, consideration 7, and 1067, consideration 2). This is because the classification of posts involves the exercise of value judgements as to the nature and extent of the duties and responsibilities of the posts and it is not the Tribunal's role to undertake this process of evaluation (see, for example, Judgment 3294, consideration 8).” (See Judgment 3589, consideration 4.)

13. On reviewing the desk audit report, the Tribunal finds that it is comprehensive and fully addresses the external classification expert's mandate and that there is no manifest error in the process of the evaluation carried out. Accordingly, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is 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