

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

C.-W. (No. 2)

v.

WIPO

129th Session

Judgment No. 4244

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms M. C.-W. against the World Intellectual Property Organization (WIPO) on 8 April 2016 and corrected on 23 July, WIPO's reply of 1 November 2016, the complainant's rejoinder of 6 February 2017 and WIPO's surrejoinder of 16 May 2017;

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 contests the decision to relegate her by two salary steps.

Facts relevant to the present case are set out in Judgment 4243, also delivered in public this day, concerning the complainant's first complaint. Suffice it to recall that the complainant was placed on sick leave following an injury at work (lumbago) which occurred on 18 March 2013.

On 26 February 2014 the Director of the Internal Audit and Oversight Division (IAOD) informed the complainant that she was the subject of an investigation. According to the information in IAOD's possession, she appeared to have infringed Staff Regulation 1.6 as she

was suspected of having worked outside the International Bureau of WIPO as a ski instructor and as the manager of a commercial company without obtaining prior authorization from the Director General. Moreover, the medical grounds or family-related emergency cited in support of certain absences in 2013 were alleged to have been fictitious. After compiling the complainant's explanations and her observations on the draft investigation report, IAOD submitted its report to the Director General on 28 August 2014. Considering that there was "clear and convincing evidence"* that the complainant had committed misconduct, firstly, by working as a ski instructor and managing a commercial company without authorization from the Director General and, secondly, by using the WIPO e-mail system for commercial purposes, IAOD recommended that disciplinary proceedings be opened.

By a letter of 17 September 2014, the Director of the Human Resources Management Department (HRMD) sent the complainant a copy of the IAOD report and informed her that disciplinary proceedings had been opened against her. This letter indicated four charges: (1) taking uncertified sick leave for a fictitious family-related emergency on 12 February 2013; (2) engaging in a paid professional activity as a ski instructor until January 2013 without prior authorization; (3) chairing and managing a commercial company since August 2009 without prior authorization; and, lastly, (4) using the WIPO e-mail service for an unauthorized activity between 26 July 2009 and 23 January 2014. On 5 November the complainant replied to the charges against her. On 19 November 2014 the Director of HRMD informed her that she had reached the conclusion that the first charge was not sufficiently substantiated but that the other three were established and that she had decided to relegate the complainant by two salary steps as from 1 December 2014. On 17 February 2015 the complainant lodged an appeal with the Appeal Board to request the setting aside of this decision.

On 1 May 2015 the Director of HRMD invited the complainant to seek the Director General's authorization to continue only her activity as chairperson of the commercial company, since the complainant had

* Registry's translation.

stated that she had stopped working as a ski instructor owing to her injury at work in March 2013. The complainant made the request on 14 May 2015 and received authorization from the Director General on 19 June.

On 11 December 2015 the Appeal Board recommended that the Director General reconsider the decision of 19 November 2014 and the proportionality of the disciplinary sanction in the light of a number of factors, “especially as the complainant ha[d] been cleared of certain allegations [...] and she ha[d] received authorization from the Director General, without any substantive reservations, to engage in her external activities”. By a letter of 9 February 2016, which constitutes the impugned decision, the Director General informed the complainant that in view of the fact that there was no irregularity in the procedure and that the disciplinary sanction was proportional to the misconduct committed, he had decided not to accept the Appeal Board’s recommendations.

The complainant asks the Tribunal to make a number of declarations of law, to set aside the impugned decision, the decision of 19 November 2014 and the investigation conducted by IAOD, to award her “substantial”^{*} damages for “serious professional, moral and psychological injury”^{*} and to order the reimbursement of all her legal representation costs.

WIPO requests the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. By her second complaint, the complainant impugns the Director General’s decision of 9 February 2016 not to accept the Appeal Board’s recommendations to reconsider the HRMD Director’s decision of 19 November 2014 imposing on her the disciplinary sanction of relegation by two salary steps.

^{*} Registry’s translation.

2. In her decision of 19 November 2014, the Director of HRMD did not uphold the allegations concerning the fictitious nature of the family-related emergency invoked to justify an absence on 12 February 2013. However, she considered that the complainant had committed misconduct by working as a ski instructor and by chairing and managing a commercial company without prior authorization from the Director General, and by using the WIPO e-mail system in the context of the latter activity.

3. With regard to the charge concerning the complainant's activities as a ski instructor, the total hours worked were 130.75 hours over two seasons (2011-12 and 2012-13). It is not disputed that these activities were undertaken exclusively during the complainant's annual leave.

The main objective of the commercial company chaired by the complainant was the management and promotion of the image of her daughter, who was an international ski champion. It should be noted in this regard that, after the sanction was imposed by the Director of HRMD but before the impugned decision was taken, the complainant received authorization, on 19 June 2015, to continue to serve as chairperson of that company.

With regard to the charge concerning the use of the WIPO e-mail system, the formulation thereof makes it clear that it is closely linked to the charge of engaging in an unauthorized activity. In its reply, WIPO emphasizes that the complainant is not charged with having used the e-mail system for personal ends but with having used it for an unauthorized activity. It follows that if the activity had been authorized, this charge would not have been upheld.

In summary, as the Director General explained in the impugned decision, the misconduct with which the complainant is essentially charged is her failure to declare her activities as a ski instructor and as chairperson of the company referred to above.

4. In one of her pleas, the complainant, who does not deny the charges against her, contends that the sanction was excessive.

Regarding the severity of the sanction, the Tribunal's case law has it that "[t]he disciplinary authority within an international organisation has a discretion to choose the disciplinary measure imposed on an official for misconduct. However, its decision must always respect the principle of proportionality which applies in this area" (see, for example, Judgments 3971, consideration 17, 3953, consideration 14, 3944, consideration 12, and 3640, consideration 29).

The Tribunal will therefore examine the question of whether or not, in the instant case, the sanction of relegation by two salary steps was proportional to the misconduct that was established.

5. In this regard, the Tribunal observes that the Appeal Board examined in detail the charges against the complainant. It criticised the context in which the disciplinary sanction was imposed. With regard to the allegation concerning sick leave on account of a fictitious family-related emergency, the Appeal Board observed that the complainant had been fully cleared of this charge. As regards the charge of engaging in unauthorized external activities, the Appeal Board considered that WIPO, in view of the context and the nature of the allegations, should have warned the complainant that she was in breach of the Staff Regulations and Rules and given her an opportunity to put her affairs in order so as to avoid the imposition of a disciplinary sanction. In conclusion, the Appeal Board recommended that the Director General reconsider the HRMD Director's decision of 19 November 2014, especially regarding the proportionality of the sanction.

Although the complainant, in breach of Staff Regulation 1.6(a)(1), failed to request the prior authorization of the Director General to engage in certain activities, thereby committing professional misconduct, the Organization concedes that "it has not been proven that [these] external activities had an impact on [her] work within the Organization"* or that "they were incompatible with the performance of [this] work"*.

* Registry's translation.

In the instant case, the case file does not reveal any reason to refuse authorization for the complainant to engage in her activities as ski instructor, which only took place during her annual leave. Moreover, these activities ceased in 2013 owing to the complainant's illness. As regards her activity as chairperson of the company referred to above, it should be recalled that after the sanction was imposed, the complainant received the necessary authorization. These various circumstances were such as to mitigate the seriousness of the complainant's misconduct.

Furthermore, as rightly observed by the Appeal Board, the complainant admitted to the activities in question and cooperated fully with the investigation, especially by supplying the record of the skiing lessons, despite her ongoing dispute with HRMD regarding the validation of her medical certificates and the fact that her state of health was deteriorating.

Moreover, as WIPO itself recognises, in determining the sanction, account needed to be taken of the fact that the complainant had given satisfactory service to the Organization for many years.

Lastly, account should be taken of the very particular context in which the sanction was imposed. This context is examined in detail in Judgment 4243, also delivered in public this day, concerning the complainant's first complaint.

6. Staff Rule 10.1.1 lists the sanctions which can be imposed on staff members. On the scale of disciplinary measures, relegation to a lower salary step is third in terms of severity, coming after a written reprimand and delayed advancement to the next salary step and before demotion to a lower grade, dismissal and summary dismissal. Hence, the sanction imposed on the complainant is fairly serious.

In view of the above, the Tribunal considers that, in the specific circumstances of the case, this sanction was disproportionate.

It follows that, without there being any need to examine the complainant's other pleas, the Director General's decision of 9 February 2016 must be set aside. The same applies to the HRMD Director's decision of 19 November 2014.

WIPO will therefore be required to pay the complainant an amount equivalent to the reduction of her salary and related allowances of all kinds resulting from the relegation by two salary steps which was imposed on her. The amounts in question will bear interest at the rate of 5 per cent per annum from their due dates until the date of payment.

7. The complainant seeks “substantial”^{*} damages for the actions that caused her “serious professional, moral and psychological injury”^{*}, manifesting in particular in the deterioration of her state of health and “harm to her professional reputation among colleagues after more than 31 years of service”^{*}.

The complainant made the same claim in the context of her first complaint, in which she impugned the rejection of her complaint of harassment. In Judgment 4243, also delivered in public this day in relation to that first complaint, the Tribunal has ruled on her claim to redress the injury in question, which included the injury resulting from the imposition of a disproportionate disciplinary sanction, so there is no need to rule on this matter a second time.

8. The complainant asks the Tribunal to make a number of declarations of law. According to the Tribunal’s established case law, such claims are irreceivable (see Judgments 3876, consideration 2, 3764, consideration 3, 3640, consideration 3, and 3618, consideration 9).

9. Since the complainant succeeds, she is entitled to costs, which the Tribunal sets at 5,000 Swiss francs.

10. All other claims must be dismissed.

^{*} Registry’s translation.

DECISION

For the above reasons,

1. The Director General's decision of 9 February 2016 and the decision of the Director of the Human Resources Management Department of 19 November 2014 are set aside.
2. WIPO shall proceed as set out in consideration 6, above.
3. WIPO shall pay the complainant 5,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2019, Mr Patrick Frydman, 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 10 February 2020.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ