

H.
v.
WIPO

134th Session

Judgment No. 4504

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms D. H. against the World Intellectual Property Organization (WIPO) on 13 May 2019 and corrected on 11 July, WIPO's reply of 25 November 2019, the complainant's rejoinder of 7 February 2020 and WIPO's surrejoinder of 12 May 2020;

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 to demote her from grade P4 to grade P3 for a period of two years.

At the material time the complainant was working as a Counsellor, at grade P4, in the Copyright Infrastructure Division of the WIPO Academy.

On 7 December 2016 the complainant was requested by Mr S., her second-level supervisor, to meet in his office with Mr K., her direct supervisor, to discuss a mission report which the complainant had drafted. The complainant was being told that she had not modified the draft report as she had undertaken to do (that she had "not change[d] a line") and she was disputing that this was true (the WIPO Appeal Board concluded that factually this allegation was wrong). As the participants started

raising their voices and the meeting started to become contentious, the complainant left the room, slammed the door and was heard saying “fuck” and “assholes”. A few days later, she sent an e-mail to her supervisors in which she apologized for the words she had uttered “in frustration on [her] exit of the office”.

On 20 January 2017 Mr K. sent a memorandum to the Human Resources Management Department (HRMD) requesting that the complainant be transferred out of the WIPO Academy.

On 24 January 2017 the complainant was informed that the Internal Oversight Division (IOD) had opened an investigation into allegations of “inappropriate and disrespectful attitude and/or language when addressing colleagues”.

On 25 January 2017 the complainant wrote to IOD alleging that Mr K. and Mr S. had physically and verbally assaulted her during the meeting of 7 December 2016 and that they had since been conducting a defamation campaign against her. She requested IOD to investigate her allegations.

By a memorandum of 14 March 2017 IOD informed the complainant that it had decided to close the case without a full investigation as it had not found any credible information supporting her allegations.

In its investigation report on the allegations made against the complainant, dated 7 November 2017, IOD concluded that the complainant had used offensive language while exiting the meeting and that these words could only have been directed at her supervisors and were shouted loudly enough to be heard in nearby offices. It also found that there was no evidence of abuse on the part of her supervisors during the meeting and concluded that, on the contrary, “evidence gathered during the investigation suggests that animosity during the meeting was mainly from [the complainant’s] side”. It recommended that disciplinary proceedings be initiated against her.

On 11 December 2017 the complainant received a charge letter in which she was informed by the Deputy Director General of his decision to initiate disciplinary proceedings against her for having directed

abusive language at her supervisors. She was asked to provide her comments, which she did on 24 December 2017.

On 31 January 2018 the complainant was informed that the Director General had concluded that the charge of having directed abusive language at her supervisors was established beyond reasonable doubt. He had decided to demote her from the P4 grade to the P3 grade for a period of five years, with effect from 1 February 2018.

On 1 May 2018 the complainant filed an appeal against that decision with the WIPO Appeal Board. In its report of 14 December 2018 the Appeal Board disagreed with the conclusions of IOD that the words were “directed at or towards” her supervisors, as she had left Mr S.’s office and closed its door when she uttered the words. It noted that she had uttered the words in a highly emotional state that had been brought about by her supervisors’ accusations that her mission report had not been amended, when in fact it had, and by a question allegedly addressed by Mr S. to the complainant which had a demeaning connotation. It also found that IOD’s conclusions rested on a flawed investigation report and were tainted with an error of fact, and that the complainant had made very serious allegations against her supervisors, which IOD had failed to investigate thoroughly. In light of its findings, the Appeal Board concluded that the disciplinary measure imposed was manifestly out of proportion with the complainant’s conduct. It recommended to quash the decision of 31 January 2018, to apply the disciplinary measure of written reprimand and to award her costs.

By a letter of 8 February 2019, the Director General informed the complainant that he had decided to reduce the duration of the demotion from five to two years, which he considered to be a proportionate sanction, and to award her costs corresponding to the fee charged by her lawyer for eight hours of service. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to declare that a proportionate sanction would be a verbal warning, or alternatively a written reprimand. Alternatively, she asks that the Tribunal declare that a proportionate sanction could be a reduction of the duration of her demotion to the three-month period from 1 February 2018 to 30 April 2018. She claims material damages for any loss of

salary, pension rights and other benefits, incurred as a result of the decision impugned, as well as costs in the amount of 30,000 Swiss francs, which includes costs incurred for the internal appeal. In her rejoinder she claims 20,000 francs in moral damages.

WIPO requests the Tribunal to dismiss the complaint as unfounded in its entirety. It objects to her claim for moral damages, on the ground that a complainant may not, in the rejoinder, enter new claims not contained in the original complaint.

CONSIDERATIONS

1. The disciplinary measure with which this case is centrally concerned was originally imposed upon the complainant because of the words she uttered in the circumstances disclosed by the facts as she left a meeting on 7 December 2016. She had attended that meeting with her direct supervisor, Mr K., at the request of Mr S., her second-level supervisor, in the latter's office. In the letter dated 31 January 2018 in which the Director General imposed upon the complainant the disciplinary measure of demotion from grade P4, step PP1 to grade P3, step PP2 for a period of five years (the original decision), he summarized the charge as follows: "The specific charge that was laid against you was that you had directed abusive language at your supervisors, Messrs. [K. and S.], which, if established, would amount to a breach of Staff Regulation 1.5(a) ("Conduct"), Staff Regulation 11.1 ("Respectful Workplace"), Staff Rule 1.5.1 ("Discrimination or Harassment"), and the Standards of Conduct for the International Civil Service ("Standards of Conduct") (in particular paragraphs 2,3,6 and 14)".

2. Under Staff Rule 10.1.1, the disciplinary measures which may be imposed upon a staff member were, in order of severity: written reprimand; delayed advancement, for a specified period of time, to the next salary step; relegation to a lower salary step within the same grade; demotion to a lower grade for a specified period of time; dismissal, and summary dismissal for serious misconduct. The fourth most severe disciplinary measure was imposed upon the complainant.

3. The complainant's internal appeal was directed against the original decision of 31 January 2018. In the impugned decision, dated 8 February 2019, the Director General, departing from the recommendations of the Appeal Board to quash the original decision, to reduce the sanction and to impose instead the disciplinary measure of a written reprimand as provided in Staff Rule 10.1.1(a)(1) and to award the complainant her legal costs subject to her submitting the relevant evidence, maintained the original demotion but for a period of two years instead of five years. He also awarded the complainant eight hours of legal fees. WIPO has reimbursed the complainant 3,015.60 Swiss francs, while the complainant actually incurred 15,663 francs in legal costs for the internal appeal proceedings, for which she claims reimbursement before the Tribunal.

4. The Tribunal finds it convenient to consider this latter claim at this juncture and before setting out the complainant's other claims for relief. Under the Tribunal's case law, legal costs for internal appeal proceedings may be awarded only in exceptional circumstances (see, for example, Judgment 4369, consideration 22). Such circumstances are not evident in this case. However, in awarding the complainant eight hours of legal fees, in the impugned decision, the Director General stated that that decision "was taken on an exceptional basis, as legal costs are not normally compensated at the stage of the internal proceedings before the Board" but that he took the decision "in light of the fact that [the complainant] challenged before the Board a disciplinary measure with a financial component and also because [she] succeeded in part". The Director General thereby provided the basis for awarding the complainant eight hours of legal costs without indicating how he arrived at that amount. Given that the internal appeal resulted in a substantial reduction of the original demotion period it was reasonable, in the Tribunal's view, to award the complainant a half of the legal costs which she incurred in the internal appeal, deducting therefrom the amount already paid to her for such costs. The Tribunal will so order.

5. Regarding other relief, the complainant asks the Tribunal to quash the impugned decision, to find that the sanction imposed was disproportionate and that a proportionate sanction would be a verbal warning or a written reprimand, or, alternatively, a reduction of her demotion to the three-month period from 1 February 2018 to 30 April 2018. She also, in effect, asks the Tribunal to order WIPO to repay her for any loss of salary, pension rights and other benefits resulting from the decision to demote her and to reimburse the legal costs she incurred for the proceedings before the Tribunal.

In her rejoinder, the complainant claims for the first time 20,000 Swiss francs in moral damages. This claim for moral damages is irreceivable as the Tribunal's case law states that it will not grant a complainant's claims for compensation for new heads of injury which were submitted for the first time in her or his rejoinder (see, for example, Judgment 4215, consideration 29).

6. Consistent precedent has it that decisions which are made in disciplinary cases are within the discretionary authority of the executive head of an international organization and are subject to limited review. The Tribunal must determine whether a decision taken by virtue of a discretionary authority was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the organisation's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the file, or finally, whether there has been a misuse of authority. Additionally, the Tribunal will not interfere with the findings of an investigative body in disciplinary proceedings unless there is manifest error (see, for example, Judgment 4444, consideration 5).

7. The complainant challenges the impugned decision on the bases that it is not sufficiently motivated; that, in effect, the decision is vitiated by errors of fact because she did not direct her words to her supervisors, rather she was muttering to herself; that she said the offending words while she was in a state of shock, which is a far greater

mitigating circumstance than being in a state of high emotion as was concluded in the impugned decision; that she presented apologies spontaneously immediately after the incident, which should also have been taken into account as a mitigating circumstance in addition to the events that followed the incident, including her attempts at reconciliation while HRMD made no attempts to resolve the conflict; that her supervisors' treatment of her is also highly relevant and constitutes a mitigating circumstance that must be taken into account; that the investigation was flawed; that the Director General did not have access to all the relevant facts and that demotion for a period of two years is a disproportionate measure in all of the circumstances of the case.

8. Except for the complainant's request to set aside the impugned decision on the bases that it is not sufficiently motivated and that the investigation was flawed, her submissions focus on the severity of the disciplinary measure of demotion from grade P4 to P3 for a period of two years. She essentially defends the Appeal Board's findings and recommendations to impose a written reprimand while suggesting the imposition of a verbal warning as one of the alternative measures.

9. What is critical is the manner in which the Director General used the outcome of the investigation report in making the original decision, and, more particularly, in making the impugned decision. In the Tribunal's view, the complainant cannot successfully maintain that her conduct in the circumstances at the material time did not amount to misconduct. This is given that Staff Regulation 11.1 imposes a duty upon WIPO's staff members to contribute to a respectful and harmonious workplace, and, peripherally, paragraphs 2 and 14 of the Standards of Conduct for the International Civil Service, applicable to WIPO's staff members by Staff Regulation 1.5(c), which respectively require international civil servants to adhere to the highest standards of conduct and call for constant sensitivity as to how words and actions may look to others. It was open to the Director General to charge the complainant for "breach of Staff Rule 1.5.1 [...] by reference to the prohibition of any 'verbal abuse in the workplace', with which [the complainant] did not comply".

10. Regarding the plea that the impugned decision was not sufficiently motivated, Staff Rule 11.5.3(k) requires the Director General when taking a final decision in a case to give full consideration to the Appeal Board's opinions and recommendations. Inasmuch as the Appeal Board's role in an internal appeal is an advisory one, the Director General may depart from its recommendations provided that she or he must state clear and cogent reasons for doing so (see, for example, Judgment 2699, consideration 24). A reading of the impugned decision shows that the Director General provided clear and cogent reasons for departing from the reasoning and recommendations of the Appeal Board, the complainant's plea to the contrary is unfounded.

11. Regarding the severity of the disciplinary measure, 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 question is whether or not, in the instant case, the sanction of demotion from grade P4 to P3 imposed upon the complainant for a period of two years was disproportionate to the misconduct that was established. In reviewing the proportionality of the sanction, the Tribunal cannot substitute its evaluation for that of the disciplinary authority, the Tribunal limits itself to assessing whether the decision falls within the range of acceptability. Lack of proportionality is to be treated as an error of law warranting the setting aside of a disciplinary measure even though a decision in that regard is discretionary in nature. In determining whether disciplinary action is disproportionate to the offence, both objective and subjective features are to be taken into account (see Judgment 4478, consideration 11, and the case law cited therein).

12. In the impugned decision of 8 February 2019, the Director General considered that the disciplinary measure of a written reprimand recommended by the Appeal Board was not commensurate with the complainant's misconduct. He essentially maintained, as aggravating

circumstances, the nature and gravity of the complainant directing abusive language at her hierarchical superiors, which he stated could not be tolerated in the workplace particularly in WIPO that is part of the UN Common System. He also maintained the mitigating circumstances upon which he had relied in the original decision: the fact that the complainant apologised in writing for using the words soon after the subject incident; she was a long-serving staff member “with a largely satisfactory performance record” and her personal circumstances, particularly the fact that she was a single mother with a dependent child. The Director General also took account of the complainant’s emotional state at the time when she used the inappropriate words and accepted the Appeal Board’s conclusion that although the complainant’s use of the words in the circumstances was serious, her conduct did not amount to insubordination.

13. Although the Director General correctly took the complainant’s apology into account as a mitigating circumstance, he stated that apart from this, incidents highlighted by the Appeal Board that occurred after the meeting were not to be taken into account as mitigating factors. Thereby, in error, the Director General rejected the Appeal Board’s conclusion that the apologies and the attempts the complainant made after the meeting to resolve the dispute with her supervisors (who acted otherwise) were to be taken into consideration as a mitigating factor.

14. The Appeal Board had also noted the Director General’s conclusion in the original decision that the complainant’s submission that she used the inappropriate words in a state of shock could not be used as a mitigating circumstance. In doing so, while he did not dispute that the complainant needed medical attention, he surmised without any evidential basis that she sought medical attention immediately after the meeting as a result, as the IOD had concluded, of her own perception of the possible consequences of her use of the inappropriate words towards her supervisors. He had however recognized that the complainant used the words out of a feeling of “frustration”.

15. In the impugned decision, the Director General recalled the Appeal Board's conclusion that "frustration" and "shock" are "both states of high emotion" and that the nomenclature used was irrelevant. He adopted the expression of "a state of high emotion" to describe the complainant's emotional state at the time she used the inappropriate words, "given that it may more appropriately reflect the intensity of [the complainant's] emotional state" than the term "frustration" used in the original decision. He cited this, as well as his acceptance of the Appeal Board's conclusion that insubordination was not proved, as bases for reducing the disciplinary measure to demotion to two years instead of five years.

16. The Director General also erred by not taking into consideration as a mitigating factor the impact of the source and nature of the dispute which unfolded at the meeting between the complainant and her supervisors, which revolved around their insistence that she had not modified whatsoever her draft mission report, as requested. The Director General had in fact accepted that further to the complainant's direct supervisor's comments she had made significant, numerous and obvious modifications to the report. Yet, in the impugned decision, the Director General maintained the conclusion he made in the original decision that those circumstances could not serve as justification to direct abusive language at colleagues, without considering, as he should have done, the mitigating effect of those circumstances on the complainant's conduct.

17. Accordingly, the impugned decision will be set aside to the extent that it found that demotion from grade P4, step PP1 to grade P3, step PP2 for a period of two years was a proportionate disciplinary measure. The matter will be remitted to WIPO for reconsideration of whether, in all the circumstances, any lesser disciplinary sanction should be imposed and, if so, what.

As a result of setting aside the impugned decision to the extent determined in this consideration, WIPO will be ordered to reimburse the complainant, as material damages, all salaries and allowances which she would have been paid if the disciplinary sanction of demotion was not imposed upon her.

The complainant will be awarded 8,000 Swiss francs costs in these proceedings.

DECISION

For the above reasons,

1. The impugned decision will be set aside to the extent stated in consideration 17 above and the matter will be remitted to WIPO for reconsideration in light of this judgment.
2. WIPO shall, by way of material damages, reimburse the complainant all salaries and allowances which she would have been paid if the disciplinary sanction of demotion had not been imposed upon her.
3. WIPO shall pay the complainant 8,000 Swiss francs in costs for the proceedings before the Tribunal.
4. WIPO shall also pay the complainant a half of the legal costs which she incurred in the internal appeal proceedings, deducting therefrom the amount it had already paid her for such costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 16 May 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ