112th Session **Judgment No. 3069**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. S. against the World Intellectual Property Organization (WIPO) on 17 February 2010 and corrected on 2 May, WIPO's reply of 6 September, the complainant's rejoinder dated 13 December 2010 and the Organization's surrejoinder of 21 March 2011;

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 and the pleadings may be summed up as follows:

A. The complainant is an Indian national born in 1963. He joined WIPO in 1989 under a temporary contract as a clerk at grade G2 and was thereafter promoted several times, reaching grade P-4 in mid-2001. He was appointed Head of the Research and Executive Program (REP) of the WIPO Worldwide Academy in August 2005.

On 1 September 2006 Ms N. G. was appointed as his secretary. As from February 2007 the complainant's working relationship with

Ms N. G. became strained: he was dissatisfied with her attitude and work while Ms N. G. alleged that he was humiliating and intimidating her. In April she requested a transfer but her request was rejected. Two months later the complainant himself asked his supervisor, Mr S., to transfer her out of the Program drawing his attention to their difficult working relationship. In an e-mail of 24 July, Ms N. G., whose work had been criticised by the complainant, accused him of mobbing. The complainant, Ms N. G. and Mr S. met on 2 August 2007 to discuss the situation and Ms N. G.'s periodical report. The complainant informed her that he had prepared a negative periodical report, but that he would replace it with a report rating her performance as satisfactory if she agreed to apologise in writing for having made false allegations of mobbing against him in her e-mail of 24 July. During the meeting Ms N. G. apologised verbally and agreed to send him a written apology. However, when they met again on the following day to sign Ms N. G.'s "satisfactory" periodical report, she informed the complainant and Mr S. that she had had second thoughts about providing a written apology and had finally decided not to do so. Mr S. subsequently withdrew the report.

By a memorandum of 8 August 2007 Ms N. G. wrote to the Director General requesting an immediate transfer out of REP. She stated that she was worried that her contract, which was due to expire on 12 August, would not be renewed given that she had refused to apologise in writing to the complainant. She complained about the complainant's frequent and unjustified criticism of her work, and of "instances of harassment and intimidation". On 10 August Mr S., to whom the memorandum was forwarded, indicated to the Director of the Human Resources Management Department (HRMD) that her allegations were preposterous and unacceptable and requested that disciplinary action be taken against her, adding that he was withdrawing his request for renewal of her contract. The complainant, to whom the memorandum of 8 August was also forwarded, replied on 16 August asking the Director of HRMD, inter alia, that disciplinary

proceedings be commenced against Ms N. G. and that her contract not be renewed. In the event she was transferred on 22 August 2007 to the Office of Strategic Planning and Policy Development.

On 18 December 2007 Ms N. G. wrote a lengthy and detailed memorandum to the Director of HRMD, with copies to the Director General, the complainant and Mr S. amongst others. She alleged therein that she had been harassed and humiliated by the complainant and his supervisor. On 28 January 2008 the complainant submitted an internal written complaint – which he completed on 26 February – to the Director of HRMD, in his capacity as Secretary of the Joint Grievance Panel, contending that Ms N. G. had made "false and malicious allegations of harassment" against him. He stated that these allegations had adversely affected his career and professional reputation, particularly because documents referring to the matter had been placed in his personal file. He requested that Ms N. G. be sanctioned for misconduct and that she be asked to provide him with a written apology. He also asked that all documents referring to the matter be removed from his personal file and that he be granted compensation for moral injury, as well as costs. He further asked for "[s]uch other relief that the Panel deem[ed] necessary, equitable and just".

In accordance with the procedure outlined in paragraph 11 of Annex B to Office Instruction No. 16/2006 (Corr.), on 29 April 2008 the Joint Grievance Panel forwarded the internal complaint to the Internal Audit and Oversight Division (IAOD) for investigation. A month later the IAOD declared a conflict of interest, since Ms N. G. had recently been transferred to that division. An investigator working outside the IAOD was therefore asked to conduct the investigation. The latter issued his report on 31 December 2008, concluding that the complainant had not harassed Ms N. G. On the contrary, he found that Ms N. G.'s behaviour towards the complainant was "borderline", given that her allegations of harassment were not supported by evidence. He concluded that "the balance [went] towards false accusations without reasonable grounds" on the part of Ms N. G.

In the meantime, in July 2008, the complainant was promoted on merit to grade P-5. Following the decision to discontinue REP as from January 2009, he was transferred to the Small and Medium-Sized Enterprises Division, as a Counsellor.

In its report dated 27 October 2009 the Joint Grievance Panel recommended that the case be closed on the ground that no harassment had taken place. However, it found that Ms N. G. had made unsubstantiated allegations to the detriment of the complainant and his supervisor. It recommended that, for administrative reasons, these allegations be mentioned in HRMD's files but that a note be included in the complainant's personal file and that of his supervisor to protect their good name and reputation. It added that Ms N. G. should consider the possibility of apologising to both of them. However, it did not consider it appropriate to recommend the payment of compensation.

By a letter of 16 November 2009 the Director of HRMD, writing on behalf of the Director General, informed the complainant that he had decided to endorse the Panel's recommendations. That is the impugned decision.

B. The complainant submits that Ms N. G. made false unsupported allegations of harassment against him in retaliation for his frank and constructive feedback on her work. He contests the Joint Grievance Panel's failure to give reasons for not recommending that disciplinary measures be imposed on Ms N. G. and the Director General's decision to endorse its view. He indicates that, according to paragraph 10 of Office Instruction No. 17/2006, making unfounded allegations against someone is a serious matter which will lead to the application of a disciplinary measure if the allegations were made in bad faith. The complainant adds that he felt "insult[ed] and injur[ed]" by the decision not to take disciplinary measures against Ms N. G.

He contends that WIPO has failed to observe its duty of care, in particular in deciding to place documents concerning the allegations of harassment in his personal file, as this has adversely affected his career prospects. Since Ms N. G. had not initiated a formal grievance procedure, and given that her allegations of harassment were

unsubstantiated, no documents relating to that matter should have been placed in his personal file. He also alleges that the Organization showed negligence in deciding to transfer Ms N. G. without appointing another secretary straightaway, as this affected the proper functioning of REP. He further submits that the Joint Grievance Panel was biased against him.

The complainant indicates that, as the head of REP, he perceived the Director General's decision to discontinue the successful and much appreciated REP as a disguised disciplinary measure for having filed a complaint with the Joint Grievance Panel. That decision impaired his dignity. He further objects to the excessive delay in dealing with his case, stressing that it took WIPO more than 20 months to issue a final decision.

The complainant seeks a written apology from Ms N. G. and from the Director General and the removal of all documents referring to the matter at issue from his personal file. He also asks the Tribunal to order that Ms N. G. withdraw the allegations she made against him in her e-mail of 24 July 2007, in her letter of 8 August and in her memorandum of 18 December 2007. He further asks the Tribunal to award him moral damages in an amount of 200,000 Swiss francs, or in any other amount it deems appropriate; that amount should include exemplary damages for the delay in the internal proceedings. In addition, he claims compensation for legal fees and costs incurred during the internal appeal proceedings and before the Tribunal, together with interest on any amount granted to him.

C. In its reply WIPO contends that the complaint is irreceivable for failure to exhaust internal remedies. Indeed, the complainant has failed to appeal the decision of 16 November 2009 as provided for under Staff Regulation 11.1, that is to say by submitting a request for review to the Director General followed by an appeal to the Appeal Board.

On the merits, the Organization submits that the Director General properly exercised his discretionary authority in deciding that no

misconduct had occurred and that his decision was well founded. It stresses that the complainant indicated in an e-mail of 27 February 2009 to the Joint Grievance Panel and in another e-mail of 23 April 2009 to the Legal Counsel, that he did not request that disciplinary measures be taken against Ms N. G. in the event that misconduct on her part was confirmed. WIPO denies having acted in breach of its duty of care, pointing out that the complainant availed himself of the procedures set up to deal with harassment-related issues when he referred his case to the Panel, that a thorough investigation of the facts was conducted by an independent investigator and that Ms N. G. was transferred out of REP on 22 August 2007. In its view, the Administration intervened at the right time to resolve the conflict between the complainant and Ms N. G.

The Organization denies that REP was abolished to sanction the complainant for having filed a complaint with the Joint Grievance Panel. It points out that the complainant was promoted to grade P-5 in July 2008, which shows that the inclusion of Ms N. G.'s allegations of harassment in his personal file had no bearing on his career prospects.

WIPO acknowledges delay in the issuing of the Panel's report, but emphasises that the Administration did its utmost to have it finalise the report in good time. Indeed, the Legal Counsel and the Director General wrote to the members of the Joint Grievance Panel on several occasions asking them to issue the report in a timely manner. It adds that the appointment of an independent investigator, due to the possible conflict of interest that had arisen in the IAOD, also took time.

As regards the complainant's claims for redress, it contends that some are irreceivable. Indeed, according to its case law, the Tribunal has no power to order a party to apologise. Moreover, the claim for removal of any documents relating to Ms N. G.'s allegations from his personal file must fail since HRMD has already included such a note in his personal file stating that the Joint Grievance Panel found that the allegations made against him by Ms N. G. could not be left to stand. The Organization takes the view that that note is enough

to protect the complainant's good name and reputation, in particular given that a personal file is confidential. Lastly, it submits that the complainant's request for 200,000 Swiss francs in compensation is not receivable as it goes beyond what he claimed during the internal proceedings, i.e. one Swiss franc. It adds that the complainant has not produced evidence of any legal, medical or other expenses, and that he should not be entitled to exemplary damages since there is no evidence of bad faith, ill will or negligence on the part of the Organization.

D. In his rejoinder the complainant contends that his complaint is receivable indicating that the Joint Grievance Panel "with the Director General's approval, makes final decisions on issues of harassment". He acknowledges that the Tribunal is not competent to order the Director General and Ms N. G. to provide him with a written apology, but he is of the view that it could "strongly encourage" them to do so. He specifies that, in the internal proceedings, he sought compensation from Ms N. G. for the "actual and moral injury suffered" and/or one Swiss franc from the Administration or any other amount deemed appropriate by the Panel.

As to his career prospects, he argues that his transfer to the position of Counsellor at the Small and Medium-Sized Enterprises Division following the abolition of REP amounted to a demotion and precluded him from being considered for the position of Deputy Director of the WIPO Worldwide Academy.

E. In its surrejoinder the Organization maintains its position. It stresses that the Tribunal, in Judgment 2962, ruled that an administrative decision arising from the recommendation of the Joint Grievance Panel must first be appealed to the Appeal Board. With respect to his transfer and the abolition of REP, WIPO indicates that the complainant filed an appeal with the Appeal Board in February 2011, which is still pending, and that consequently he has not exhausted internal means of redress. In any event, it denies that these measures were taken to sanction him.

CONSIDERATIONS

1. The complainant, a serving official of WIPO, lodged a formal complaint of harassment against his former secretary, Ms N. G., on 28 January 2008 with the Director of HRMD, in his capacity as Secretary of the Joint Grievance Panel. He complained that Ms N. G. had made "false and malicious allegations of harassment" against him. In his summary of grievance he referred to "letters and memoranda" sent by Ms N. G. to "various Administration officials […] containing false and defamatory statements". He asked that Ms N. G. be "appropriately sanctioned" and that she be required to apologise in writing and to withdraw unconditionally her written claims against him. He also asked for the removal of all material dealing with the matter in issue from the Administration's files, compensation for moral injury in the amount of one Swiss franc, costs and "[s]uch other relief that the Panel deem[ed] necessary, equitable and just".

2. The dispute between the complainant and Ms N. G. originated in the complainant's expressions of dissatisfaction with aspects of her performance. In an e-mail of 24 July 2007 Ms N. G. informed the complainant that certain of his comments were "unacceptable and unethical", elaborating that statement by saying "[m]ore likely [she] would define [his] repeated negative remarks and [his] trivial nit-picking [...] as a mobbing behaviour". Thereafter, there were various e-mails between Ms N. G., the complainant and his supervisor, in one of which the complainant informed his supervisor of his intention to give Ms N. G. an unsatisfactory periodical report. There then followed discussions involving the complainant's supervisor in which it was agreed that, if Ms N. G. apologised in writing for her e-mail of 24 July, she would be given a positive periodical report. A satisfactory report was prepared but Ms N. G. decided not to apologise in writing. Instead, on 8 August, she wrote to the Director General, with a copy to the Director of HRMD, setting out her version of events, claiming "instances of harassment and intimidation" and asking for an immediate transfer. The complainant was invited to respond and, in so doing on 14 August, he asked, among

other things, that disciplinary proceedings be commenced against Ms N. G. and that her contract not be renewed. Shortly afterwards, Ms N. G. was transferred and the complainant was asked to prepare another periodical report based solely on her performance. In a memorandum to the Director of HRMD, copied to the Director General, the complainant and other officials, Ms N. G. complained of the withdrawal of her "satisfactory" report and claimed that the new report, which had then been prepared, involved "very serious breaches of the appraisal process". No claim of harassment was made in that memorandum. However, on 16 November 2007 Ms N. G. wrote again to the Director of HRMD, with copies to the same people, enclosing the new periodical report, which she had not signed, and denying that the "satisfactory" report was conditional on her written apology. In that memorandum she claimed that statements made by the complainant in his response of 14 August 2007 were "based on personal reasons, and not on professional ones" and constituted an abuse of his position. Thereafter, the complainant was asked to explain certain aspects of his subsequent "unsatisfactory" report and his replies were provided to Ms N. G. for comment. She provided her comments on 18 December, with copies to the recipients of her previous memoranda and to two other persons. She challenged the accuracy of the complainant's statements and said that she considered that his "memoranda containing false allegations and conclusions […] constitute[d] sustained acts of harassment" and caused her "personal humiliation and embarrassment". She concluded by categorising that behaviour as "violat[ing] the [S]tandards of conduct expected of international civil servants". Ms N. G. did not at any stage make a formal complaint of harassment to the Joint Grievance Panel. Nevertheless, the question whether she had been harassed by the complainant was central to its investigation of his claim against her.

3. The complainant's claim of harassment against Ms N. G. was investigated by the Head, Safety and Security Coordination Service. He concluded that the complainant had not harassed Ms N. G. and expressed the view that the complainant's case against Ms N. G. was "borderline". In this last regard, he stated that Ms N. G.'s allegations

were not supported by evidence and, thus, "the balance [went] towards false accusations without reasonable grounds". His report was then referred to the Joint Grievance Panel, which submitted its own report to the Director General on 28 October 2009. It found that the complainant had not harassed Ms N. G. and that Ms N. G. had not harassed the complainant. However, it added that there was "incontrovertible proof that [Ms N. G.] ha[d] made allegations that are not supported by evidence and [...] allegations that are incorrect". It concluded that the complainant's grievance was "entirely founded on th[at] count". This notwithstanding, it concluded that Ms N. G. had been acting to defend her own interests and had to be "allowed broad discretion in the choice of her defence strategy". The Panel found no evidence that the allegations were malicious or made in bad faith. With respect to the complainant's claim that her statements were defamatory, the Panel concluded that she had "serious reasons to believe that her allegations were true" and, thus, "should escape any sanction on th[at] count". So far as is presently relevant, the Panel recommended that, as "no misconduct, as such, ha[d] occurred", the case should be closed but that a note should be placed on the complainant's file to protect his good name. It recommended against requiring Ms N. G. to withdraw formally her allegations and, also, against the payment of "symbolic" compensation and costs.

4. The Director General accepted the recommendations of the Joint Grievance Panel on 16 November 2009. His decision to that effect is the subject of the present complaint. Although the complainant no longer seeks an order that Ms N. G. be sanctioned, he seeks to extend the relief claimed in his original complaint of harassment to include a written apology from the Director General as well as from Ms N. G.; compensation in the sum of 200,000 Swiss francs for "actual and moral injury" at the hands of Ms N. G. and the Administration; compensation and exemplary damages for the delay in finalising his complaint of harassment; interest and costs, including costs of the proceedings before the Joint Grievance Panel.

He maintains his claims that Ms N. G. be required to withdraw her allegations and that all documents relating to the case be removed from his personal file. He also seeks an oral hearing in which to give and call evidence. The application for an oral hearing is rejected. The facts have been thoroughly investigated and are not in dispute. Accordingly, there is no need for an oral hearing.

5. WIPO argues that, as the complainant did not initiate an internal appeal with respect to the Director General's decision of 16 November 2009, the complaint before the Tribunal is wholly irreceivable for failure to exhaust internal remedies. Before dealing with that issue, it is convenient to note that certain of the complainant's claims either are irreceivable on other grounds or must be dismissed as beyond the Tribunal's competence. Although the complainant's claim before the Joint Grievance Panel included a claim for "[s]uch other relief that [it] deem[ed] necessary, equitable and just", that formula could not convert his claim for compensation in the amount of one Swiss franc – a claim for symbolic damages – into a claim for actual and moral damages as now sought. Accordingly, that claim is irreceivable and must be dismissed (see Judgment 2837, under 3, and the cases there cited). Further and insofar as the complainant seeks written apologies from Ms N. G. and the Director General and the withdrawal by Ms N. G. of her allegations, it is to be remembered that, by Article VIII of its Statute, the Tribunal's powers are to rescind impugned decisions, to order the performance of obligations and to award compensation. As pointed out in Judgment 2636, under 16, the Tribunal is not empowered to order apologies. Nor is it empowered to order a staff member, who is not even a party to the proceedings before it, to withdraw his or her previous statements. That leaves in issue the question of receivability, the complainant's claim for removal of documents, his claim for damages for delay in processing his claim of harassment and the question of costs.

6. In arguing that the present complaint is wholly irreceivable by reason of failure to institute an internal appeal, WIPO relies on a

statement in Judgment 2962, a case concerning its own rules, in which the Tribunal considered an argument that "a decision taken in a case concerning harassment may be challenged directly before the Tribunal without first lodging an appeal with the internal appeal body, as occurred in the case giving rise to Judgment 2642". In Judgment 2962, under 13, the Tribunal stated that it did not "share the complainant's opinion that the [Joint Grievance] Panel has sole competence to deal with allegations of harassment and that a decision in a case concerning harassment is not an administrative decision within the meaning of Chapter XI of the Staff Regulations and Staff Rules". However, it stated, under 14, that the "case law established in Judgment 2642", which was concerned with a decision "to approve the conclusions of the Grievance Panel [of another organisation] and to close the case", was not relevant to the issue to be decided in Judgment 2962.

7. The approach taken in Judgment 2642 was based on what had earlier been said in Judgment 2484. Both cases concerned the rules of the same organisation. In Judgment 2484, the Tribunal set out the terms of that organisation's cluster note dealing with allegations of harassment. That note required that, where an internal appeal included an allegation of harassment, that aspect should be referred to the Grievance Panel. The Tribunal observed that the note also required the internal appeal body to be "guided" by the views of the Grievance Panel and provided that the investigation by the Grievance Panel was "not normally [to] be reopened". In this context, it was held that the Tribunal was competent to receive a complaint with respect to a decision closing a case following an investigation of a free-standing complaint of harassment without there first being an internal appeal. The Tribunal said:

> "any other conclusion would result in an extraordinarily cumbersome process. The ultimate decision-maker both for internal appeals and for allegations of harassment is the Director-General, who is assisted (but not bound) by the recommendations of [the internal appeal body] in the former case and of the Grievance Panel in the latter case. To require that any decision reached after receipt and consideration of a recommendation

> from one such body should be followed by a duplicate inquiry and recommendation by the other would be wasteful of time and effort, and not in the interest of either the Organization or its staff members."

8. Office Instruction No. 16/2006 (Corr.) sets out the procedure relevant to this case. It differs from the cluster note considered in Judgment 2484 in that it neither requires the internal appeals body to be guided by the finding of the Joint Grievance Panel nor stipulates that an investigation shall not normally be reopened. However, it relevantly provides in paragraph 27:

> "When the WIPO Appeal Board receives an Appeal that includes an allegation of harassment [...] the Board shall have the power to refer the grievance to the Panel but shall retain jurisdiction over that portion of the complaint which is related to an administrative decision."

An appeal from a decision dismissing a free-standing complaint of harassment is necessarily "an [a]ppeal that includes an allegation of harassment". Construed literally, paragraph 27 has the consequence that the Appeal Board can simply refer an appeal with respect to a decision following a report of the Joint Grievance Panel back to that Panel. Given that and given that the same "extraordinarily cumbersome process" described in Judgment 2484 would result if Office Instruction No. 16/2006 (Corr.) were to be construed as allowing an appeal to the Appeal Board, paragraph 27 should be interpreted in conformity with the approach taken in relation to the cluster note considered in Judgment 2484 with the result that a complainant aggrieved by a decision to close a case following the investigation of a free-standing complaint of harassment may proceed directly to the Tribunal. Accordingly, the complaint is receivable.

9. There is no reason in principle why the actions of a subordinate cannot constitute harassment of his or her supervisor, particularly where those actions consist of persistent unfounded allegations of harassment. However, just as the actions of a supervisor that serve a legitimate managerial or supervisory function do not constitute harassment, so, too, actions taken in good faith by a

subordinate that serve the function of protecting his or her legitimate interests do not constitute harassment. Although the chain of events that eventually led to these proceedings may be said to have resulted from Ms N. G.'s own action in deciding not to apologise in writing to the complainant, the "letters and memoranda" which were the subject of the complainant's complaint of harassment were sent in response to the actions of others, namely the withdrawal of her "satisfactory" periodical report, the complainant's subsequent explanation thereon as well as the complainant's request that disciplinary proceedings be initiated against her and that her contract not be renewed. Although the Joint Grievance Panel found that Ms N. G.'s claims were not supported by evidence or were untrue, it found no evidence that her claims were knowingly false or that she had acted maliciously or in bad faith. Further, and insofar as the complainant contends that her statements were defamatory, it is well settled that statements made in good faith in response to criticism or attack do not attract liability for defamation. The same principle should be applied in relation to harassment. Accordingly, there was no error in the approach taken by the Joint Grievance Panel or in its findings with respect to the claims made by the complainant.

10. Given that there was no error in the approach or in the findings of the Joint Grievance Panel, there is no basis for requiring more than the placing of a note on the complainant's personal file to protect his reputation, as that Panel recommended.

11. Before turning to the question of delay, it is convenient to note that the complainant makes two other claims. He contends that the Administration failed in its duty of care to protect him from the actions of Ms N. G. and, also, that he was "punished" for having taken his internal complaint to the Joint Grievance Panel by the abolition of the Program in which he previously worked. These are not matters that can be agitated in this complaint which is concerned solely with the decision of the Director General of 16 November 2009 to give effect to the recommendations of the Joint Grievance Panel.

12. The complainant is correct in his claim that the proceedings before the Joint Grievance Panel were unduly delayed. Initially, there was a delay in investigating his complaint because of the need to have the matter investigated by somebody other than a member of the Internal Audit and Oversight Division to which Ms N. G. had been transferred. However, and as WIPO points out, most of the delay is referable to the unexplained failure of the Chairman of the Panel to submit the final report, for which he has apologised. The Administration was not directly responsible for the delay and, indeed, took steps to have the Panel's report finalised. However, and as with internal appeal bodies (see Judgment 2904, under 15), an international organisation has an obligation to ensure that an internal body charged with investigating and reporting on claims of harassment is properly functioning. In these circumstances, the complainant is entitled to moral damages in the sum of 2,000 Swiss francs. As the Administration took action to minimise the delay, this is not a case for exemplary damages. The complainant succeeds in part and, thus, he is entitled to costs which the Tribunal assesses at 1,000 francs.

DECISION

For the above reasons,

1. WIPO shall pay the complainant moral damages in the sum of 2,000 Swiss francs for the delay in the proceedings before the Joint Grievance Panel.

2. It shall also pay him 1,000 francs in costs.

3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 2 November 2011, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Mary G. Gaudron
Giuseppe Barbagallo
Catherine Comtet