

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**113th Session**

**Judgment No. 3144**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms S. N. G. against the World Intellectual Property Organization (WIPO) on 27 March 2010 and corrected on 14 June, WIPO's reply of 24 September 2010, the complainant's rejoinder of 31 January 2011 and WIPO's surrejoinder of 9 May 2011;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgment 3069, delivered on 8 February 2012. The complainant, who has dual Italian and Uruguayan nationality, was born in 1958. She entered WIPO's service on 1 September 2006, as a secretary at grade G5, in the Research and Executive Program (REP) of the WIPO Worldwide Academy, on a one-month short-term contract which was regularly renewed for the following four years.

Her first periodical report, which was entirely satisfactory, was drawn up on 1 February 2007. Shortly afterwards her working relationship with her direct supervisor, the Head of REP, began to deteriorate. On 25 July she forwarded some e-mails which she had exchanged with her direct supervisor to the Dean of the Worldwide Academy, who was her second-level supervisor. In one of these e-mails, dated 24 July, she accused the Head of REP of mobbing. On 27 July the latter sent an e-mail to the Dean complaining in detail about the complainant's conduct and her e-mail of 24 July. On 1 August 2007 he drew up a new periodical report, which was not forwarded to the complainant and which rated her performance as satisfactory with reservations. The Dean met the protagonists separately and then invited them to a joint meeting on 2 August to discuss the situation. That day another periodical report was drawn up by the complainant's supervisors, which she signed on 3 August. In that report, both the quality and quantity of her work as well as her conduct were deemed to be satisfactory without reservation.

In a memorandum of 8 August, addressed to the Director General and the Director of the Human Resources Management Department, the complainant stated that, at the meeting of 2 August, the Head of REP had asked her for a written apology. The next day she had informed the Dean that such a request was inappropriate, whereupon he had withdrawn her periodical report and informed her that her contract would not be renewed. She had therefore "felt obliged" to comply with the request, but on reflection she had changed her mind. She complained of "instances of harassment and intimidation" by her direct supervisor and requested an immediate transfer. The Director of the Human Resources Management Department forwarded this memorandum to the Dean of the Worldwide Academy and the Head of REP. They replied to him in memoranda dated 10 and 14 August 2007 respectively. The Dean explained that, after his meetings with the Head of REP, the latter had agreed to replace the initial, unfavourable periodical report with a favourable report, provided that the complainant apologised. The Head of REP denied

the allegations of harassment and complained of the complainant's conduct and performance.

On 22 August the complainant was transferred to the Office of Strategic Planning and Policy Development and the WIPO Worldwide Academy to be under the direct supervision of its Executive Director. On 26 September the Director of the Human Resources Management Department informed her that he had asked the Head of REP to draw up a new periodical report covering the period from 2 February to 12 August 2007 to replace the previous report. On 12 October she asked the Director to confirm the validity of the periodical report of 2 August. On 5 November he refused to do so, on the grounds that it could not be accepted that a periodical report had been produced as a result of negotiation, and at the same time he informed her that the report of 2 August, which was regarded as invalid, had been removed from her personal file.

On 7 November the complainant received a periodical report, signed by the Head of REP and the Dean of the Worldwide Academy, for the period from 2 February to 1 August 2007. It indicated that her conduct and the quantity of work done by her were unsatisfactory, while the quality of her work was satisfactory with reservations. On 16 November the complainant informed the Director of the Human Resources Management Department that she refused to sign the new periodical report and contended that the report of 2 August was not the subject of a conditional agreement, but had been drawn up in accordance with the existing rules. In addition, she pointed out that the appraisal it contained was different to those which the Head of REP had recorded previously.

Having been asked by the above-mentioned department to explain the divergences noted by the complainant, the Head of REP and the Dean replied in two memoranda dated 30 November and 7 December 2007 respectively, copies of which were forwarded to her.

In a memorandum of 18 December 2007 to the Director of the Human Resources Management Department the complainant asserted that her supervisors had harassed her and she contested

the allegations contained in the two above-mentioned memoranda. On 18 January 2008 she was informed that the three last memoranda would be attached to the periodical report which she had received on 7 November 2007, a copy of which was again forwarded to her for signature. On 28 January 2008 she once more refused to do so.

On 26 February the Head of REP filed a brief in support of the written complaint which he had submitted to the Joint Grievance Panel, in which he stated that the complainant had made in bad faith “false”, “malicious” and unfounded assertions about him. In accordance with the procedure set out in Annex B to Office Instruction No. 16/2006 (Corr.), on 16 April the complainant submitted her “response” to the complaint made against her and she in turn alleged that she had been harassed by her direct supervisor. An investigator was then appointed. In his report of 31 December 2008 he concluded that the Head of REP had not harassed the complainant. On the other hand, he considered that her behaviour towards her supervisor had been “borderline”, since her allegations of harassment were not supported by evidence. In its report of 27 October 2009 the Joint Grievance Panel recommended that the case should be closed on the grounds that no harassment had taken place. It found that the complainant had made unsubstantiated allegations to the detriment of her supervisors and it therefore recommended that a note should be included in their personal files to protect their good name and reputation. In the circumstances, it considered that it was not necessary for the complainant formally to withdraw these allegations, nor was it appropriate to recommend the payment of compensation. By a letter dated 16 November 2009 the complainant was informed that the Director General had decided to endorse those recommendations.

On 15 December 2009 the complainant asked the Director General expressly to indicate to her whether he had rejected her “claims” regarding inter alia the “moral harassment” to which she thought she had been subjected and the withdrawal of her favourable periodical report. By a letter dated 14 January 2010 – which constitutes the impugned decision – the Director of the Human

Resources Management Department reminded her that, in respect of her allegations of harassment, the Joint Grievance Panel had concluded that the Head of REP had not harassed her and that she had never submitted a harassment complaint to the Panel. He also pointed out that she had never contested her periodical report before the Rebuttal Panel. Her “claims” were therefore dismissed.

B. The complainant acknowledges that she did not challenge the withdrawal of her favourable periodical report of 2 August 2007 either before the Rebuttal Panel, because in her opinion it was not competent, or before the Appeal Board, because it could not hear appeals from a temporary employee. However, she says that on 10 April 2008 she submitted an internal appeal to a superior administrative authority, the Director General – which, she maintains, “is within the time limit for bringing a case to the Tribunal”. The Director General had decided not to respond until such time as the grievance procedure in connection with the internal complaint lodged by the Head of REP was completed. The complainant holds that the impugned decision definitively dismissed her requests for the withdrawal of the periodical report in question and that her complaint is therefore receivable in that respect. On the issue of her allegations of mobbing, she contends that, since she complained of mobbing on 8 August 2007, the Organization had a duty to refer the matter to the Joint Grievance Panel. She adds that, although her response to that body of 16 April 2008 was only a “counterclaim”, the Panel did examine her claims during the procedure initiated by the Head of REP, and the Director General then reached a decision on the merits of the case. She infers from this that her complaint is also receivable in respect of her allegations of mobbing.

On the merits, she emphasises that she was not heard prior to the adoption of the decision to withdraw her favourable periodical report and that she was entitled to have the latter retained, as it was incontestably lawful.

In her opinion, the periodical report which she received on 7 November is tainted by several flaws, because her reporting officers,

in other words the Head of REP and the Dean of the Worldwide Academy, were not objective, as they had displayed their animosity towards her in their memoranda of 10 and 14 August 2007. In addition, they took account of occurrences outside the assessment period and did not respect the adversarial principle. She also contends that they drew up this report in retaliation for her allegations regarding mobbing.

Lastly, the complainant argues that she was the victim of mobbing by the Head of REP and that the Organization offended her dignity by not ordering an investigation of her accusations against him, although it was under an obligation to do so.

She asks the Tribunal to set aside the impugned decision, to declare non-existent the periodical report which she received on 7 November 2007, or at least to cancel it, to order WIPO to remove that report and all the documents accompanying it from her personal file and to replace it with the report of 2 August. Subsidiarily, she asks for the drawing up of a new report for the period in question. She also requests 75,000 euros plus interest of 8 per cent per annum as from the date on which she filed her complaint, and costs in the amount of 10,000 euros. Lastly, she asks the Tribunal to find that, should these various sums be subject to national taxation, she would be entitled to obtain a refund of the tax paid from WIPO.

C. In its reply WIPO submits principally that the complaint is irreceivable. It draws attention to the fact that paragraph (b)(2) of the Introduction to the Staff Regulations and Staff Rules explicitly excludes from their scope “staff specifically engaged for short-term service, that is for periods of less than one year” and that the complainant, whose contracts were always for less than one year, belongs to this category of temporary staff. In its opinion, as she has therefore never had the status of an official within the meaning of Article II, paragraph 5, of the Statute of the Tribunal, the complainant has no *locus standi* before the Tribunal. This does not mean however that she has been deprived of any means of redress, as she could

have referred the matter to the Rebuttal Panel, a body set up under Office Instruction No. 19/2006 to examine and decide on formal contestations of periodical reports of short-term General Service employees, or to the Joint Grievance Panel established under Office Instruction No. 16/2006 (Corr.). Since she has not referred the issue to either of these bodies, she has not exhausted the internal means of redress.

On the merits and subsidiarily, the Organization submits that the periodical report of 2 August 2007 was fatally flawed and should therefore be regarded as invalid. It explains that all the “documentation enclosed” with the complaint demonstrates that this report was unquestionably the product of a negotiated agreement to the effect that the complainant would receive a favourable assessment if she presented a written apology to the Head of REP. It adds that it would have been wrong to retain this report which did not rest on a sincere and objective appraisal of the complainant’s work. The decision to draw up a new report was therefore lawful and justified.

WIPO considers that it adopted an “impartial and professional” attitude in handling the dispute between the Head of REP and the complainant and draws attention to the fact that the Joint Grievance Panel concluded that she had not been harassed. It infers from this that the claim for compensation is unfounded and unsound.

D. In her rejoinder the complainant expresses the opinion that, since the jurisdiction of the Tribunal *ratione personae* is determined exclusively by its Statute, the provisions of the Staff Regulations and Staff Rules of WIPO do not prevent her from filing a complaint.

On the merits, she presses her pleas and comments on the complaint which the Head of REP himself filed with the Tribunal, a copy of which had been forwarded to her by WIPO. In her opinion, many of the enclosed appendices attest to the “spite” and “animosity” which he displayed towards her and which offended her dignity.

E. In its surrejoinder the Organization maintains its position.

## CONSIDERATIONS

1. The complainant has been working in WIPO since 1 September 2006 under a short-term contract which was regularly renewed. Her performance was the subject of a first periodical report on 1 February 2007. Both the quality and quantity of her work as well as her conduct were then deemed to be “satisfactory without reservation”. A second report was drawn up on 1 August in which the quantity of the complainant’s work and her conduct were described as satisfactory, but with the following reservations: she should show more initiative and improve her attitude towards her direct supervisor – the Head of REP – by not making unfounded and malicious allegations about him and by showing a more pleasant and less arrogant disposition. Those comments were supposed to contribute to improving the working atmosphere.

At a meeting on 2 August the direct supervisor and the second-level supervisor – the Dean of the Worldwide Academy – apparently agreed that the above-mentioned reservations would be withdrawn if she apologised in writing to her direct supervisor for what he described as her condescending attitude. As the complainant agreed to apologise in writing another, entirely satisfactory, periodical report was drawn up that day. However, on 8 August she announced that she had felt obliged to consent and requested her immediate transfer, a request which was granted on 22 August.

A new periodical report was subsequently drawn up to replace that of 2 August. It deemed the quality of the work done by the complainant to be satisfactory with reservations, but stated that the quantity of her work and her conduct were unsatisfactory. This report was attached, for her signature, to a memorandum of 6 November 2007 which indicated that, if she did not agree with her performance evaluation, she could challenge it before the Rebuttal Panel in accordance with the procedure laid down in Office Instruction No. 19/2006.

2. The complainant refused to sign this new report but, instead of submitting a rebuttal statement to the aforementioned Panel, she challenged the content of the report in a memorandum to the Director of the Human Resources Management Department, who proceeded to request from the reporting officers an explanation as to why this report was less favourable than that of 1 August 2007.

An exchange of memoranda then followed between the parties. This exchange led the Head of REP to submit a harassment complaint against the complainant to the WIPO Joint Grievance Panel in accordance with the procedure set out in Office Instruction No. 16/2006 (Corr.). During the investigation of this grievance, the complainant contended that she had been herself harassed by the Head of REP and she took issue with his evaluation of her performance and conduct when she was under his supervision.

The internal investigation of the above-mentioned grievance formed the subject of a report of 31 December 2008 which concluded that no harassment had taken place. The Joint Grievance Panel based its decision on those conclusions and on 27 October 2009 recommended that the Director General should close the case without ordering the compensation requested by the Head of REP. In order to protect the reputation of him and of the second-level supervisor, against whom serious allegations had been made by the complainant, the Panel recommended that a note should be included in their personal files. In those circumstances, it considered that it was unnecessary for the complainant formally to withdraw her allegations.

On 16 November the Director General decided to endorse these recommendations. The Head of REP, who was the complainant's former direct supervisor, and had submitted the harassment grievance against her, then filed a complaint impugning that decision. Most of his claims were dismissed by the Tribunal in Judgment 3069.

3. On 15 December 2009 the complainant sent a memorandum to the Director General in which she took him to task for not dealing

with her own grievance. She asked him to indicate expressly whether he had rejected her “claims” relating inter alia to moral harassment and the withdrawal of her periodical report of 2 August 2007.

On 14 January 2010 she was informed on behalf of the Director General that none of her claims could be accepted. This decision is impugned before the Tribunal.

4. WIPO submits that the Tribunal has no competence to hear the complaint because, as a temporary employee, the complainant is not an official within the meaning of Article II of the Statute of the Tribunal. This objection is unfounded.

In two recent cases concerning WIPO the Tribunal recalled that it may rule on any employment relationship arising between an international organisation and its staff, whether under the terms of a contract or under Staff Regulations. If a decision to appoint an employee, or to terminate his or her employment, is challenged on the grounds that it affects the rights of the person concerned which the Tribunal is competent to safeguard, the Tribunal must rule on the lawfulness of the disputed decision. It is immaterial whether the employee in question was recruited under a contract and whether that contract was for a fixed term. In addition, the Tribunal has noted that paragraph (b) of the introduction to the Staff Regulations and Staff Rules, on which the Organization relied then and is again relying in this case, in fact refers to persons engaged for short-term service as “staff members” (see Judgments 3090, under 4, and 3091, under 10). Under Article II, paragraph 5, of the Statute of the Tribunal, this case law applies to any complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations.

5. The Organization also submits that the complaint is irreceivable because internal means of redress have not been exhausted as required by Article VII of the Statute of the Tribunal.

6. This objection as to receivability is groundless as far as the allegations of mobbing are concerned. The complainant responded to the grievance filed by the Head of REP in what could be termed a “countergrievance” denouncing the harassment of which she claimed to have been the victim. The alleged conduct of both parties was then investigated and the Joint Grievance Panel examined their arguments in its report.

7. Although the complaint is receivable with regard to the allegations of mobbing, it is, however, devoid of merit.

The question as to whether any particular act, or a series of acts, amounts to harassment within the meaning of the Tribunal’s case law is one of fact to be answered only after careful consideration of the deciding factors and an examination of all the surrounding circumstances (see Judgment 2553, under 6). In the instant case, it must be found that when the Joint Grievance Panel drew up the report which formed the basis of the Director General’s decision to close the case, thus rejecting equally the arguments of both the complainant and her former direct supervisor, it did not commit any error open to censure by the Tribunal in its evaluation of the facts.

8. The Organization’s objection as to receivability on the grounds that the complainant did not, as she had been advised to do, challenge the lawfulness and substance of her periodical reports before the Rebuttal Panel before filing a complaint with the Tribunal, is also unfounded.

Office Instruction No. 19/2006 establishes a special procedure for the resolution of disagreements regarding the ratings contained in the periodical reports of short-term general service employees. The Rebuttal Panel established by the Director General is responsible for examining and deciding on such contestations. Although the complainant did not submit a rebuttal statement to this Panel, she did challenge the contents of the periodical report replacing that of

2 August 2007 in a memorandum to the Director of the Human Resources Management Department. The only tangible result of the ensuing correspondence was the lodging of the above-mentioned harassment grievance. No final decision was, however, taken on the complainant's contestation of her performance appraisal. While the Administration could indeed criticise her for not complying with Office Instruction No. 19/2006, because she did not submit a rebuttal statement to the Rebuttal Panel, that did not in any way exempt it from passing on her contestation to the Panel, as its duty of care required of it. Failure to take that step resulted in a denial of justice, because the complainant was deprived of her right to have the form and substance of her contestation examined independently by the appointed body.

For that reason and to that extent, the complaint must be allowed, as the Organization's objection to its receivability in this respect is irrelevant.

9. It follows that the impugned decision must be set aside and the case remitted to the Organization in order that it process the complainant's contestation of her performance appraisal in accordance with Office Instruction No. 19/2006.

10. Having regard to all the circumstances of the case, the complainant is entitled to an award of damages set *ex aequo et bono* at 10,000 euros.

11. As she succeeds in part, the complainant will be awarded costs, which the Tribunal sets at 3,000 euros.

12. The complainant asks the Tribunal to find that, if these sums were to be subject to national taxation, she would be entitled to obtain a refund of the tax paid from the Organization. In the absence of any present cause of action, this claim must be dismissed.

DECISION

For the above reasons,

1. The decision of the Director General of 14 January 2010 is set aside and the case is remitted to WIPO which shall proceed as indicated under 9, above.
2. The Organization shall pay the complainant damages in the amount of 10,000 euros.
3. It shall also pay her 3,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2012, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba  
Claude Rouiller  
Patrick Frydman  
Catherine Comtet