

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

L. R. (No. 2)

v.

WIPO

128th Session

Judgment No. 4157

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms K. L. R. against the World Intellectual Property Organization (WIPO) on 27 April 2016 and corrected on 21 June, WIPO's reply of 19 October 2016, the complainant's rejoinder of 16 February 2017 and WIPO's surrejoinder of 22 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 challenges the amount of compensation awarded for the moral injury she suffered because her evaluation for 2013 was irregular and contests the partial modification thereof.

At the material time, the complainant held a grade P-5 post at the WIPO Academy. On 21 March 2014 her direct supervisor gave her an overall rating of "effective performance" for 2013 in the context of the Performance Management and Staff Development System (PMSDS). The reviewing officer, who was the complainant's second-level supervisor and against whom the complainant had filed a complaint for harassment on 13 November 2013, made some criticisms of the

complainant in her comments, which took the form of a memorandum dated 16 May 2014 attached to the evaluation report; she gave the overall rating of “improvement in performance required”. Asserting that the reviewing officer’s comments were “incorrect, inappropriate or lack[ed] evidence” and “indicate[d] bad faith”, the complainant requested on 15 September 2014 the removal of these comments and of the overall rating to which they had given rise and also compensation for the injury suffered. By a letter of 15 October 2014, the Director of the Human Resources Management Department (HRMD) informed her that she had decided to confirm the evaluation as it stood since, in her view, there was no evidence that it contained any errors justifying its cancellation.

On 26 January 2015 the complainant referred the matter to the Appeal Board. She requested the setting aside of the decision of 15 October 2014, the removal of the reviewing officer’s comments and overall rating, compensation for the injury she considered she had suffered, and an award of costs. In its conclusions of 15 October 2015, the Appeal Board emphasized amongst other things that there had been a complete breakdown of communication in the Academy, and that this had prevented proper implementation of the PMSDS. Asserting that, since the complainant’s performance evaluation for 2012 had been irregular, it was very likely that problems persisted in 2013, the Appeal Board expressed regret that corrective measures had not been taken, as these could have afforded the complainant the “right to dialogue”, which it considered to be the *raison d’être* of the PMSDS. The Appeal Board therefore recommended that the contested comments and overall rating be removed, that the complainant be awarded moral damages of 500 Swiss francs and that she be reimbursed, to some extent and on production of supporting documents, for the costs incurred in her internal appeal proceedings.

In the meantime, the complainant had been advised, on 17 March 2015, that an investigation had been opened against her. In particular, she was accused of having misrepresented the delivery date for objective 5 – relating to the compilation of data – in her performance evaluation. Rejecting the recommendation of the Internal Oversight Division (IOD), the Director of HRMD decided, on 4 January 2016,

not to initiate disciplinary proceedings against the complainant as she considered that there was no evidence that the complainant had tried to influence the outcome of the evaluation process.

By an e-mail of 29 January 2016, the complainant was informed that the Director General had decided, in accordance with the Appeal Board's recommendation, to remove the contested comments and overall rating. In order to explain the absence of evaluation by a reviewing officer, the Director General had also decided to include a special entry in the evaluation report for 2013 – and this was actually done in February 2016. Moreover, it was explained to the complainant that, after taking account of the IOD report and the decision of 4 January 2016, the Director General had decided to modify the rating of “fully achieved” that her direct supervisor had given her concerning objective 5 in her performance evaluation for 2013 and to replace it with “not fully achieved” since she had only achieved this objective in March 2014. Lastly, she was advised that the Director General had decided to award her compensation in the amount of 2,000 Swiss francs for the moral injury suffered and that WIPO did not normally reimburse costs incurred in internal appeal proceedings. That is the impugned decision.

The complainant requests the setting aside of the impugned decision in that it amended the assessment corresponding to objective 5, limited the amount of moral damages to 2,000 Swiss francs, and refused reimbursement of the costs arising from the internal appeal proceedings. She also requests the Tribunal to order WIPO to award full compensation for her injury and claims 8,000 euros in costs for the internal appeal proceedings and the proceedings before the Tribunal.

WIPO submits that the complaint should be dismissed as unfounded. It points out that it has no obligation to reimburse costs incurred by a staff member in internal appeal proceedings.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the WIPO Director General's decision of 29 January 2016, insofar as it changed her direct supervisor's assessment relating to objective 5 in her 2013

performance appraisal, rejected the requests for compensation above 2,000 Swiss francs, and refused to award costs for the internal appeal proceedings.

2. In its conclusions of 15 October 2015, the Appeal Board considered that the reviewing officer's assessment could not stand but that, particularly because the latter had left the Organization, it was not possible to conduct a new review. It therefore recommended that the reviewing officer's comments and rating be removed from the report, keeping only those made by the complainant's direct supervisor.

During the internal appeal proceedings, the complainant was informed, on 17 March 2015, of the opening of an investigation against her concerning possible violations of the Staff Rules and Regulations relating to achieving objective 5 in her 2013 performance appraisal. The purpose of the investigation was to determine, firstly, whether the complainant had misrepresented the date when this objective was achieved and, secondly, whether she had instructed a supervisee to provide false information regarding overtime worked.

In its report of 27 November 2015, the IOD concluded that the complainant had lied regarding the date on which objective 5 had been achieved but that there was insufficient evidence to substantiate the second accusation. It recommended that disciplinary proceedings be initiated against the complainant. In her decision of 4 January 2016, the Director of HRMD considered that, even though the evidence gathered by the IOD clearly showed that the complainant had not achieved objective 5 in 2013, this was an issue relating to the complainant's performance and not a disciplinary issue. The Director of HRMD therefore decided not to initiate disciplinary proceedings against her.

3. In the impugned decision of 29 January 2016, the Director General decided, *inter alia*, to remove the reviewing officer's rating and comments, to agree on an entry to be included in the evaluation report concerning the absence of evaluation by a reviewing officer, to indicate that objective 5 had been "not fully achieved" instead of "fully achieved" and to point out that it had been achieved in March 2014,

to pay the complainant the sum of 2,000 Swiss francs in moral damages but to refuse any payment in respect of legal costs.

On 11 February 2016 the complainant was informed that the observations relating to objective 5 would be amended as indicated in the decision of 29 January. She was also asked to approve the entry which the administration proposed to include in her evaluation report to explain the absence of evaluation by a reviewing officer. She was informed that if there was no reply from her by 19 February, the Director General's decision of 29 January would be implemented. Since she did not provide any reply, she was informed on 2 March 2016 that the amendments set out in the said decision had been made to her evaluation report. That same day, the complainant indicated her approval.

4. In her first plea, the complainant contends that the change made to her direct supervisor's evaluation regarding objective 5 flouts the letter and the spirit of the applicable rules and disregards her acquired right to keep that evaluation. She emphasizes that, even though her direct supervisor's evaluation must be reviewed by his own supervisor, the latter's opinion neither replaces nor cancels the direct supervisor's assessment. She deduces from this that the Director General's decision to remove her direct supervisor's evaluation from her report is unlawful, especially as this evaluation had become final and could not be modified without her consent and, in any case, her comments.

5. In the context of an appeal against the reviewing officer's unfavourable evaluation, the Director General was not entitled to change the direct supervisor's assessment relating to a point which was favourable to the complainant and which was not challenged by her, nor a fortiori to amend the evaluation report itself by replacing the supervisor's assessment with his own, without indicating that the new assessment was not the one initially made.

The plea is well founded.

It follows that the impugned decision must be set aside to the extent that it changed the assessment given by the direct supervisor to the complainant in relation to objective 5 in the evaluation report.

6. In her second plea, the complainant submits that the moral injury that she suffered cannot be redressed by compensation of less than 30,000 euros.

7. With regard to damages, the complainant bears the burden of proof and she or he must provide evidence of the injury suffered, of the alleged unlawful act, and of the causal link between the unlawful act and the injury (see Judgments 3778, consideration 4, 2471, consideration 5, and 1942, consideration 6).

The mere fact that a decision was initially flawed does not suffice to warrant awarding damages for moral injury. In the present case, the flaw was corrected on the recommendation of the Appeal Board. To be entitled to moral damages, an official must show that she or he has suffered more severe injury than that which an improper decision ordinarily causes (see Judgment 1380, consideration 11).

8. The Appeal Board and the Director General recognized that the complainant had suffered injury as a result of the stress and anxiety caused for the second time in succession, since she had also had to contest the irregular evaluation for the previous year. In the impugned decision, the Director General decided to increase the 500 Swiss francs' compensation recommended by the Appeal Board to 2,000 Swiss francs. The challenge relates solely to the amount of compensation awarded to the complainant.

9. The amount of compensation must be the subject of a specific examination, which takes into account all relevant factors, such as the seriousness, nature and duration of the damage suffered and also whether or not the organization withdrew the irregular decision and rectified the irregularity.

In order to justify increasing the award of compensation, the complainant cites numerous irregularities committed by the reviewing officer, the violation of the adversarial principle owing to the absence of discussion prior to her evaluation, the formal flaw in the evaluation, which was not written in electronic form but handwritten, the lateness of the 2012 evaluation, the absence of dialogue, the clear desire to negate and denigrate her work, misuse of authority, and partiality against her.

The Appeal Board concluded that the shortcomings in the 2013 evaluation for the complainant were “obvious and numerous”. The Director General shared this view and removed the reviewing officer’s comments and rating. Consequently, the complainant’s arguments concerning the irregularities committed by the reviewing officer, as set out above, have become moot and there is no need to examine them.

Furthermore, the cited irregularities are not, in the present case, such as to aggravate the moral injury suffered by the complainant.

However, in view of all the circumstances of the case, and in particular the fact that difficulties of the same order had already arisen the previous year, the Tribunal considers that the compensation awarded to the complainant is insufficient to redress the moral injury suffered and that she should be awarded compensation of 4,000 euros, less the compensation of 2,000 Swiss francs – converted into euros at the rate applied by the Organization on the date of the public delivery of the judgment – which has already been paid to her.

10. The complainant also considers that the final decision increases the initial damage caused by the reviewing officer’s unlawful evaluation. Firstly, she considers the scant recognition given to the damage by “playing it down outrageously”^{*} is hurtful and, as such, an additional source of moral injury. Secondly, she contends that the unlawful modification of her direct supervisor’s assessment relating to objective 5 constitutes additional moral injury, which is all the more substantial for being based on the findings of an “absurd and nonsensical”^{*} investigation which gives every impression of being a measure of reprisal and of constituting an abuse of process.

11. Even though the compensation awarded by the Director General was insufficient, the latter’s decision is not such as to cause additional moral injury in the complainant’s case.

^{*} Registry’s translation.

With regard to the change made to her supervisor's evaluation, the Tribunal notes that it did not affect the overall evaluation of the complainant, who does not provide any evidence that this evaluation caused her moral injury, especially as the documents in the file show that objective 5 was not achieved in 2013 and this is not disputed by the complainant in her submissions.

Hence there are no grounds for increasing the amount of moral damages set in consideration 9, above.

12. Lastly, the complainant requests the payment of 8,000 euros in costs, this amount including both the costs for the internal appeal proceedings and those for the proceedings before the Tribunal.

13. As regards costs relating to the internal appeal, the Appeal Board recommended in its conclusions that a sum should be reimbursed – on production of supporting documentation – corresponding to eight hours of assistance provided by a lawyer. In the impugned decision, the Director General rejected this recommendation on the grounds that the Organization does not normally reimburse the costs of legal assistance incurred in connection with internal appeal proceedings.

The complainant challenges this refusal with the argument that, in the case which led to Judgment 3419, WIPO had agreed to reimburse part of the costs for the internal appeal lodged by the official concerned. She therefore considers that the Organization, in refusing to grant her the same benefit, has breached the principle of equality.

Reference must be made to the Tribunal's consistent precedent that "the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example, Judgments 1990, under 7, 2194, under 6(a), 2313, under 5, or 3029, under 14)" (see Judgments 3787, under 3, and 3902, under 5).

In the case which led to Judgment 3419, the Director General emphasized that it was on an exceptional basis that he agreed to the partial reimbursement of the costs of legal assistance which the Appeal

Board had recommended should be granted on account of the special circumstances that existed. The complainant has failed to provide evidence that she was in an exceptional situation identical to the one described in that judgment. Hence the principle of equality has not been breached.

The plea therefore fails.

Moreover, the Tribunal notes that there is no rule which obliges the Organization to defray legal costs incurred in the context of internal appeal proceedings. In these circumstances, it was open to the Director General to refuse to reimburse them (see Judgments 2996, consideration 23, and 221, consideration 7).

14. Since the complainant succeeds in part, she is entitled to costs in respect of the proceedings before the Tribunal, the amount of which shall be fixed at 5,000 euros. However, the Tribunal considers that there are no grounds for awarding costs in respect of the internal appeal proceedings, since such costs may only be awarded under exceptional circumstances, which do not exist in the present case.

DECISION

For the above reasons,

1. The WIPO Director General's decision of 29 January 2016 is set aside to the extent that it changed the direct supervisor's assessment relating to objective 5 and limited the amount of compensation awarded to the complainant to 2,000 Swiss francs.
2. The Organization shall pay the complainant moral damages as set out in consideration 9, above.
3. It shall also pay her 5,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 10 May 2019, Mr Patrick Frydman, Vice-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 3 July 2019.

(Signed)

PATRICK FRYDMAN

FATOUMATA DIAKITÉ

YVES KREINS

DRAŽEN PETROVIĆ