

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B. (No. 2)

v.

WIPO

131st Session

Judgment No. 4337

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms M. B. against the World Intellectual Property Organization (WIPO) on 2 April 2019 and corrected on 16 May, WIPO's reply of 20 August, the complainant's rejoinder of 28 November 2019 and WIPO's surrejoinder of 4 March 2020;

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

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant challenges the rejection of her requests for reinstatement.

The complainant is a former WIPO staff member who held a D-2 post of Strategic Adviser to the Director General. She resigned on 23 November 2012, with effect from 2 December 2012, in order to take up alternative employment in another international organization.

On 7 February 2014 she filed her first complaint with the Tribunal, contesting the rejection of her request that an investigation be opened into alleged misconduct on the part of the Director General. In Judgment 3645, delivered in public on 6 July 2016, the Tribunal dismissed the complaint on the ground that it did not disclose a cause of action.

In October 2016 the complainant wrote to the Director General, asking to be reinstated in her former post or in another D-2 level position at the Headquarters. She stated that “this would be in the best interests of the Organization and would also be consistent with the Member States’ requests [...] to fully protect whistleblowers at WIPO”. The Legal Counsel replied, in an email of 28 October 2016, that at no point in time had she made a whistleblower report, followed by a request for whistleblower protection, and that her request for reinstatement was therefore ill-conceived and without any basis. The complainant having reiterated her request in January and February 2017, the Legal Counsel reconfirmed that her request was denied in an email of 13 January and a letter dated 9 February respectively. As a concluding remark in this letter the Legal Counsel pointed out that, should the complainant “address further requests for reinstatement to WIPO, the Organization [would] not respond to them in the future, considering that it [had] patiently and more than adequately addressed each of the three requests [she had] made”.

On 22 November 2017 the complainant, represented by her lawyer, sent to the Director General a “Request for a Final Administrative Decision”, seeking her immediate reinstatement. Stating the background of her case she referred to a meeting held in November 2012 during which the Director General informed her that he would not renew her fixed-term contract since she had been “disloyal”, presumably alluding to her status as a witness in the investigation into allegations of misconduct made against the Director General. According to her, this refusal to renew her contract constituted constructive dismissal and had led her to accept a fixed-term position two grade levels below in another organization. She asked the Director General to recuse himself and his subordinates from any adverse administrative decision in relation to her employment at WIPO on the basis of “manifest conflict of interest” and that the decision on her request for reinstatement be taken by the WIPO General Assembly. She sought a reply by 30 November 2017.

On 27 February 2018 the complainant lodged a request for review of the implied final administrative decision dated 30 November 2017, seeking her immediate reinstatement, moral and exemplary damages and the reimbursement of her legal costs. The Director General designated one of the Assistant Directors General, Mr G., to review the matter. In a letter of 23 April 2018 Mr G. stated that the request for review did not meet the requirements of Staff Rule 11.4.3(a) since, in requesting her reinstatement, the complainant was not challenging any administrative

decision. Instead she was seeking to challenge her own decision to resign more than five years earlier. Noting that the complainant alleged to have been constructively dismissed, Mr G. stressed that she had not provided any evidence in support of her claim that her resignation somehow constituted a constructive dismissal and had not challenged, at the relevant time, such constructive dismissal. He considered that the rejection of her belated request for reinstatement, which had been submitted almost four years after her voluntary departure from the Organization, did not constitute an appealable administrative decision and that any such interpretation would enable staff members to “artificially revive time limits after they have expired”. He added that, even assuming that she was able to revive the matter in October 2016, any request for review should have been lodged within 90 days of the receipt of the 28 October 2016 email. Therefore the complainant’s request for review was dismissed as clearly irreceivable.

On 19 July 2018 the complainant lodged an appeal with the Appeal Board, challenging the 23 April decision. In its report dated 6 November 2018, the Appeal Board considered that the complainant’s assertion that she had discovered new evidence (a memorandum dated 2 December 2013) on or about 30 April 2018 to justify that her appeal was receivable was untenable because a copy of the memorandum had been provided to her lawyer on 3 December 2013. It concluded that no exception to the rule of strict adherence to the time limit for lodging an internal appeal was justified and that any challenge to the alleged constructive dismissal was time-barred. It therefore recommended that the appeal be summarily dismissed as irreceivable pursuant to Staff Rule 11.5.3(d). In a letter of 7 January 2019 Mr G. informed the complainant that he had decided to follow the Board’s recommendation and to summarily dismiss her internal appeal as irreceivable. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision with all legal consequences and to order her reinstatement as a permanent staff member in a D-2 level post with full retroactive effect or, alternatively, that she be paid material damages equal to all salary, benefits, entitlements, step increases, pension contributions and any other emoluments she would have received from the date of her constructive dismissal through the date the present judgment is fully executed. She also asks that an independent and external investigation be conducted into the Director General and other senior WIPO officials’ failure to report and mitigate conflicts of interest. She seeks an award of exemplary and

moral damages, reimbursement of her legal fees, interest on all amounts awarded and such other relief as the Tribunal may deem necessary, just and appropriate.

WIPO asks the Tribunal to dismiss the complaint as irreceivable since its underlying legal challenge was filed out of time. It adds that large parts of the complaint are inadmissible as they go far beyond a challenge of the impugned decision. Subsidiarily, it asks the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS

1. This complaint arises from a request for reinstatement the complainant submitted to the Director General after her resignation from WIPO. The determinative issue is whether pursuant to the Tribunal's Statute the Tribunal is competent to adjudicate on the complaint. The following is a summary of the background facts relevant to this issue.

2. The complainant joined WIPO on 20 June 2011 as Strategic Adviser to the Director General on a D-2 level post and resigned from the Organization on 2 December 2012 and took up a post with another organization of the UN system the following day.

3. Approximately four years later, in a 19 October 2016 email to the Director General, the complainant requested that he reinstate her to her former D-2 level position or, alternatively to another D-2 position in Geneva. In his 28 October 2016 reply, WIPO's Legal Counsel informed the complainant that her request for reinstatement was ill-conceived and without any basis. The complainant reiterated her requests for reinstatement to the Director General in January and February 2017. In his response of 9 February, WIPO's Legal Counsel informed the complainant that her request for reinstatement would not be granted and added that the Organization would not respond to further requests for reinstatement.

4. Subsequently, in a 22 November 2017 letter to the Director General, the complainant's lawyer requested her immediate reinstatement and asked that the communication be treated as a request for a final decision on her request for reinstatement. The Organization did not respond to this request. On 27 February 2018, the complainant's lawyer submitted pursuant to Staff Rule 11.4.3 a request for review of the "implied final administrative decision" rejecting the complainant's request for reinstatement.

5. In his 23 April 2018 decision, the Assistant Director General who had been designated by the Director General to review the matter observed that Staff Rule 11.4.3(a) provides that former staff members may seek a review of an “administrative decision” taken by WIPO, however, the complainant’s request for review did not meet the requirements of the rule. In particular, her request for reinstatement was not a challenge to any administrative decision taken by WIPO. The Assistant Director General concluded that the “request for review” was clearly irreceivable. On 19 July 2018, the complainant lodged an internal appeal against the decision to reject her request for reinstatement at WIPO. On 7 January 2019, the Assistant Director General dismissed the internal appeal. This is the impugned decision.

6. Article II, paragraph 5, of the Tribunal’s Statute states that the “Tribunal shall [...] be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations”. As the Tribunal observed in Judgment 3426, consideration 16:

“Framed another way, Article II requires that a complaint must reveal a cause of action and that the impugned decision is one which is subject to challenge. Under Article II, two thresholds must be met for there to be a cause of action. First, the complainant must be an official of the defendant organization or other person described in Article II, paragraph 6. Second, Article II, paragraph 5, requires that a complaint ‘must relate to [a] decision involving the terms of a staff member’s appointment or the provisions of the Staff Regulations’ [...]” (Citation omitted.)

As the Tribunal stated recently in Judgment 4317, consideration 3, “[i]f [a] complainant does not allege the violation of rights which the Tribunal is called upon to protect under the terms of its Statute, the Tribunal cannot adjudicate on the complaint”.

7. In her submissions, the complainant did not identify any right to reinstatement accruing from her former employment. Indeed, an official who resigns does not have the right to be later reinstated. As well, she did not allege that the rejection of her request for reinstatement violated any terms of her former employment. The fact that she contrived and received a final decision from the Organization rejecting her unfounded request is not sufficient to make her complaint receivable before the Tribunal. As the complaint does not disclose a cause of action as required in Article II of the Statute, the Tribunal cannot adjudicate on the complaint and it will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ