109th Session **Judgment No. 2915**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Ms H. L. against the World Intellectual Property Organization (WIPO) on 15 October 2008, the Organization's reply of 21 January 2009, the complainant's rejoinder of 6 April and the addendum of 14 April, and WIPO's surrejoinder of 8 June 2009;

Considering the second complaint filed by the complainant against WIPO on 15 October 2008, the Organization's reply of 21 January 2009, the complainant's rejoinder of 6 April and WIPO's surrejoinder of 8 June 2009;

Considering the third complaint filed by the complainant against WIPO on 15 October 2008, the Organization's reply of 21 January 2009, the complainant's rejoinder of 6 April, WIPO's surrejoinder of 8 June, the Organization's additional submissions of 26 June, the complainant's comments thereon of 23 November and WIPO's final comments of 17 December 2009;

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. The complainant, an American national, was born on 21 May 1947. She joined WIPO in January 1980 as a legal officer under a fixed-term contract and was granted a permanent appointment in July 1987. As from September 1998 she held grade D-1. She retired on 30 November 2007.

By a memorandum of 27 June 2006 addressed to the Director General and the Director of the Human Resources Management Department (HRMD) the complainant's supervisor recommended that, pursuant to Staff Regulation 9.8 and Office Instruction 10/2006, she be granted a two-year extension of her contract beyond her statutory retirement age of 60. She explained that such an extension was in the best interest of the Organization and was justified in light of the complainant's personal situation and, in particular, the fact that she was solely responsible for her children's educational expenses. She therefore recommended that her contract be extended from 21 May 2007 to 21 May 2009.

By letter of 16 November 2006 the complainant was informed that, on the basis of Staff Regulation 9.8(c) – which provides that the Director General may authorise, in specific cases, extension of retirement age limits up to the age of 65 if he considers it to be in the interest of the Organization – her contract would be extended, on an exceptional basis, up to 30 November 2007 but that no further extension would be made. On 23 November 2006 she wrote to the Director General indicating, inter alia, that she deserved a promotion to grade D-2.

On 6 August 2007 the complainant was notified that she would receive an education grant advance at a 3/9ths prorating for the scholastic year 2007-2008. On 31 August she wrote to the Director of HRMD requesting that she be allowed 50 per cent of the education grant. According to Staff Rule 3.11.1(C)(e), "[w]here a staff member's period of service does not cover the full scholastic year, the amount of the grant shall be that proportion of the annual grant

which the period of service bears to the full scholastic year". The complainant explained that her daughter's full scholastic year consisted of two separate semesters with the first one commencing on 28 August 2007 and ending on 17 December 2007. She added that, even if the Organization wanted to subtract the two weeks in December on the ground that her contract would end on 30 November 2007, she should be awarded slightly less than one half but certainly not one third of the education grant.

The complainant's new supervisor wrote to the Director General on 9 October 2007 to support the recommendation made by the complainant's previous supervisor to grant her a two-year extension until May 2009. He added that an extension even up to May 2008 would resolve the outstanding issue concerning the prorating of the education grant. The complainant put forward the same request in a memorandum of 25 October 2007 and on 14 November she notified the Director General that, without a written response from him by 19 November 2007, she would consider his silence as a negative decision.

On 30 October 2007 the Director of HRMD informed the complainant that the Legal Counsel had been consulted and that, in the latter's view, the prorating calculation of 3/9ths was correctly applied taking into account the full scholastic year of two semesters, i.e. nine months, and her retirement date. Consequently, the pro rata of 3/9ths should be used to finalise her closing claim. In a memorandum of 2 November 2007 to the Director General the complainant pressed her request to be allowed 50 per cent of the education grant. Five days later, she submitted her education grant claim to the HRMD Entitlements and Classification Section indicating that her daughter would take part in a programme ending on 11 April 2008. On 14 November 2007 the Section instructed the Finance Department of the closure of her education grant claim at a prorating of 6/15ths.

Having received no reply to her memorandum of 25 October, the complainant wrote three letters to the Director General on 26 November 2007. In the first letter she requested that he review his implied refusal to extend her retirement age to 62 years. In her second

letter she asked the Director General to award her, in accordance with Staff Rule 3.11.1(C)(e), half of the education grant for 2007-2008. She also claimed "monetary and moral damages". In the third letter she asked in particular to be promoted to grade D-2 with retroactive effect from February 2004 and to have her retirement age extended to 62 years or to be granted equivalent monetary compensation. By a letter of 6 December 2007 the Director of HRMD notified her that the Director General had decided to reject her requests.

The complainant filed three appeals with the Appeal Board by a letter dated 14 February 2008. In her first appeal she challenged the decision not to extend her contract beyond 30 November 2007 and asked that her retirement date be extended until her 62nd birthday in May 2009 or that she be granted equivalent monetary compensation. She also claimed moral damages. In her second appeal she challenged the decisions of 30 October and 14 November 2007 concerning the prorating of the education grant for 2007-2008. In her third appeal she contested a series of decisions, acts and practices, which, when considered as a whole, showed a consistent and ongoing pattern of harassment. She also referred to her first two appeals and the related claims therein. In addition, she alleged discrimination with regard to the refusal to promote her to grade D-2. In the three appeals she alleged that the internal appeal proceedings were flawed by breach of due process and possible conflict of interest.

In its report of 18 July 2008 the Board recommended that the first two appeals be dismissed and that the matter of harassment be referred to the Internal Audit and Oversight Division (IAOD) for investigation. It noted that, in accordance with Staff Regulation 9.8(b), the complainant's compulsory retirement age was 60 and that, in accordance with Staff Regulation 9.8(c), the granting of an extension is at the discretion of the Director General. It also held that the education grant was correctly calculated in accordance with Staff Rule 3.11.1(C)(e).

By letter of 5 September 2008 the Director of HRMD informed the complainant that the Director General had decided to reject her

first two appeals in accordance with the Board's conclusions and that she would be informed in due course about the inquiry process conducted in relation to her allegations of harassment. She brings her three complaints in respect of that decision.

B. In support of her first complaint concerning the extension of her contract, the complainant explains that when the compulsory retirement age was raised in November 1990 from 60 to 62, WIPO was legally compelled to ensure that staff who joined the Organization prior to that date retained their right to retire at the age of 60 with a full pension. That right was embodied in Staff Regulation 9.8(b). However, in her view, Staff Regulation 9.8 is inherently discriminatory as it has transformed a vested right into an obligation, thereby creating two categories of staff: those subject to a compulsory retirement age of 60 and those who must retire at the age of 62. Such a difference is unfair and results in discriminatory employment conditions to the detriment of staff, who like her, are compelled to retire at 60 years of age. She contends that she suffered financial loss as a result of the decision not to extend her retirement age to 62.

She acknowledges that, in accordance with Staff Regulation 9.8(c), the Director General's decision to extend a contract beyond retirement age is discretionary but contends that, in her case, the refusal to grant her an extension of more than six months was arbitrary. She submits that the Director General's decision to depart from her supervisors' recommendations was not substantiated and that the subsequent reasons given to her orally were neither clear nor coherent. She adds that the political context in which the decision-making process took place suggests that the Director General's decision was motivated by bad faith and improper purpose. She contends that the Administration was trying to free up high-level posts, such as hers, to distribute them to the Director General's political allies.

The complainant criticises the lack of transparency in the decision-making process and contests the Administration's assertion that extensions beyond statutory retirement age may be granted only

once and for a maximum of six months. To support her view, she refers to staff who benefited from longer extensions, i.e. ten or 12 months, beyond statutory retirement age. She therefore contends that her right to equal treatment was denied.

In her second complaint the complainant submits that Staff Rule 3.11.1(C)(e) was not applied correctly with regard to the calculation of the education grant for 2007-2008. She argues that she should have been allowed 50 per cent – or at least 50 per cent "minus two weeks" – of the education grant given that her daughter's scholastic year consisted of two semesters, the first of which ended in mid-December 2007. It means that her daughter had almost completed half of her scholastic year by November 2007, when she retired. She points out that, in November 2007, she informed the Administration that her daughter's second semester would end on 11 April 2008. She was subsequently informed that the Administration considered the full scholastic year to consist of seven and a half months and not seven months. She questions the Administration's decision that a month ending on 11 April constituted half a month for the purpose of calculating the education grant.

She contends that she was denied due process insofar as HRMD did not provide her with relevant information concerning the prorating of the education grant. Thus, she was not informed of the rounding-off formulas used nor was she given reasons as to the decision to disregard the documentation she had submitted to justify a 50 per cent prorating. In addition, she did not receive a copy of the opinion of the Legal Counsel concerning the prorating of her education grant. In her view, the lack of transparency shows a lack of good faith on the part of WIPO. She also criticises the Appeal Board's recommendation to endorse the Administration's calculation of the education grant without giving any justification.

The complainant submits that during a meeting held in the summer of 2007 the Director General and the Director of HRMD misled her into the false expectation that she might receive a full education grant. She therefore alleges bad faith and violation of "ethical standards".

In her third complaint the complainant asserts that she was harassed as from late 2003. To support her assertion, she mentions different acts and practices, and alleges abuse of authority and discrimination. She contests the decision to refer the matter to the IAOD and questions its impartiality and independence. She also points to the Director General's inaction after having been informed in 2004 that she was being harassed.

The complainant submits, in her three complaints, that the internal appeal proceedings were flawed by breach of due process. She contends that some members of senior management, including the Director General, exerted pressure to persuade her not to pursue her internal appeals. She also alleges possible conflict of interest and violation of the obligation of confidentiality in the Appeal Board's decision-making process insofar as a staff member, who was providing administrative support to the Appeal Board, was at the same time working for the Director of the Director General's Cabinet. The complainant claims additional irregularities in the internal appeal proceedings. For instance, she claims that the letter of 6 December 2007, denying her requests for review, was signed by the Director of HRMD without any delegation of authority from the Director General, who is, according to Staff Rule 11.1.1(b), the competent authority in that respect. She also points out that the Organization's reply to the Appeal Board was not signed by the Legal Counsel. Moreover, the Board did not meet the time limits set in Staff Rule 11.1.1(e)(7) and (8) with regard to the commencing of deliberations and the submission of conclusions. She alleges confusion as to the date of transmission of the Appeal Board's conclusions. She also criticises the fact that the final decision was not sent to her by registered mail and that no date was visible on the envelope; consequently, the date of dispatch is disputable. She further submits that the Appeal Board's conclusions are incomplete and factually inaccurate.

In each of her complaints the complainant asks the Tribunal to quash the impugned decision, as well as the Appeal Board's recommendations. She claims material and moral damages, as well as costs.

C. In its reply to the first complaint WIPO indicates that Staff Regulation 9.8 provides that staff members recruited between 1 November 1977 and 1 November 1990 "shall not be retained" in service beyond the age of 60 years, which clearly means that the incumbent's consent was not required to apply to her the mandatory retirement age of 60. It stresses that the retirement age of 60 was part of the conditions of employment she had accepted by signing her contract in January 1980. It rejects the argument that Staff Regulation 9.8 is discriminatory or unfair explaining that there is a relevant difference between staff who were recruited between 1 November 1977 and 1 November 1990 and those who were recruited after that last date. The financial situation of the United Nations Joint Staff Pension Fund (UNJSPF) deteriorated over the years and measures had to be taken to reduce an actuarial imbalance of the Fund; one of the measures was to prolong the years of contribution.

The Organization denies that the Director General's decision to grant the complainant an extension of six months was arbitrary or abusive. It recalls that, in the letter of extension, it was indicated that careful consideration had been given to the arguments brought forward concerning the complainant's work and her personal situation. Moreover, there was no basis to allow the complainant's request given that an extension beyond statutory retirement age may be granted only once. It also denies that the letter informing the complainant that her contract would be extended for six months was signed without delegation of authority. It was sent by the Director of HRMD on behalf of the Director General who had authorised it.

Regarding the length of extensions, the defendant indicates that it varies depending on the justifying circumstances; the only limitation is laid down in Staff Regulation 9.8(c), which provides that exceptional extensions shall not be granted beyond the age of 65. The practice of granting extensions only under very exceptional circumstances and on a one-time basis started as an express policy around 2006. Following the issuing of Office Instruction 10/2006 on retirement age in February 2006, the Director General considerably narrowed his discretionary authority with regard to extension of contracts beyond retirement age.

In reply to the second complaint WIPO states that Staff Rule 3.11.1(C)(e) clearly provides that a staff member who retires before the end of the period under consideration is not entitled to a full education grant. Although the Staff Regulations and Staff Rules do not define a "full scholastic year", it argues that it is commonly understood as referring to a period of time that does not exceed 12 months and that it is not divided into semesters, trimesters or other parts for the purpose of calculating the education grant. Explanations as to the prorating are to be found in Staff Regulation 12.3 according to which, in case of doubt as to the interpretation of Staff Regulations and Staff Rules, the Director General shall be guided by the practice in the other intergovernmental organisations with their headquarters in Geneva or New York. It refers in particular to an Administrative Instruction of the United Nations Secretariat on education grant, which provides that periods of 11 to 20 days shall be taken as half a month.

WIPO indicates that the formula used to calculate the education grant is contained in Staff Rule 3.11.1(C)(e) and that the complainant was given reasons for not being allowed half of the education grant. Indeed, by a memorandum dated 30 October 2007 she was informed that she would not receive half of the education grant because the full scholastic year of her daughter consisted of two semesters, i.e. nine months, and that she was due to retire on 30 November 2007. Moreover, she was notified, by an e-mail of 12 November 2007, that the 11 days in April would be rounded up to half a month in conformity with internal practices. As to the fact that she was not provided with a copy of the opinion of the Legal Counsel concerning the method of calculating the education grant, the Organization indicates that it is classified as privileged information and could not be made available to her. It denies any bad faith on the part of the Director General or the Director of HRMD.

In its reply to the third complaint the Organization submits that the allegations of harassment are irreceivable for failure to exhaust internal remedies. It explains that, as recommended by the Appeal Board, the Director General has referred the matter to the IAOD for investigation; since the investigation is pending, no final decision has yet been taken. It submits that the complainant has produced no evidence that the

investigation would not be completed within a reasonable period of time; consequently, there is no reason to refer the matter directly to the Tribunal. It adds that the Revised Internal Audit Charter establishes the independence of the Internal Auditor whose primary mandate is to conduct legal inquiries to examine allegations of unlawful acts and wrongdoings in order to determine whether they have occurred and, if so, the person or persons responsible. The defendant indicates that the matter was not referred to the IAOD in 2004 or 2005 because it was only in March 2008 that the complainant provided details as to the identity of the persons who allegedly created a hostile working environment.

Regarding the alleged procedural irregularities, WIPO contends that the IAOD is conducting an investigation to establish whether the complainant was subjected to harassment. The claims made in that respect are consequently irreceivable for failure to exhaust internal remedies. In any event, it denies any conflict of interest pointing out that the staff member to whom the complainant referred was an administrative assistant who did not take part in the Appeal Board's decision-making process. Regarding the alleged lack of delegated authority, the defendant points out that the Director of HRMD clearly stated in the letter of 6 December 2007 that the Director General had examined her letters of 26 November 2007 and that he was informing her of the Director General's decision in that respect. Regarding the reply to the Appeal Board, it states that a senior legal officer signed it on behalf of the Legal Counsel. The Appeal Board did not submit its conclusions to the Director General within the prescribed 12 weeks from the date on which the appeals were filed because the extensions granted to the parties for submitting their submissions had the effect of closing the pleadings on 20 June 2008. The defendant does not understand why the alleged confusion as to the date of transmission of

the Appeal Board's conclusions affects the complainant, given that the time for filing a complaint with the Tribunal started to run from the time the complainant was notified of the final decision and not from the date of transmission of the Board's conclusions. Regarding the absence of a visible date on the envelope, it indicates that there is no provision in the Staff Regulations and Staff Rules requiring that a final decision be sent by registered mail. It further denies that the Appeal Board's report was incomplete. Since the Board recommended that the allegations of harassment should be investigated by the IAOD, it is not surprising that it did not examine certain issues. In addition, the alleged errors in the Board's report concerned facts that were not relevant to the issues contested in the appeal proceedings.

D. In her rejoinder concerning the first complaint the complainant maintains that the different treatment in Staff Regulation 9.8 between the group of staff whose statutory retirement age is 60 and the group for which it is 62 is not "appropriate and adapted" and it constitutes a breach of the principle of equal treatment. She stresses that allowing a staff member who is subject to the 60-year compulsory retirement age to retire at 62 would not have adversely affected the actuarial balance of the UNJSPF. She contends that the rule contained in Office Instruction 10/2006, according to which extension beyond retirement age may be granted only once, is illegal insofar as it amends Staff Regulation 9.8 without the approval of the Coordination Committee. She adds that, when she signed her contract in January 1980, there was no option as to the retirement age, which was set at 60. She expands her claim for damages to include "monetary damages" for loss of revenue alleging that she was led to believe that WIPO would offer her consultancy agreements after she had retired; however, no offers were made because she had filed appeals with the Appeal Board. She claims additional moral damages and also asks that any "monetary damages" paid to her include interest.

Regarding her second complaint the complainant reiterates her pleas. Concerning her claim for moral damages she asks to be granted interest on any amount paid to her. She adds that the amount of moral

damages should be increased if the Tribunal concludes that the internal appeal process shows a fatal flaw.

Regarding her third complaint the complainant points out that the IAOD has not yet completed its investigation. In her view, this is an unreasonable and unjustified delay in the resolution of her claim of harassment, which constitutes a breach of due process and a failure to treat her with dignity. She increases the amount of moral damages she claims and asks that any damages paid to her include interest.

E. In its surrejoinder concerning the first complaint WIPO maintains that, when the complainant joined the Organization, she accepted the condition to retire at the age of 60. It asserts that Office Instruction 10/2006 was "properly published and issued". The defendant submits that it was not aware of any promise having been made to the complainant regarding a consultancy.

Regarding the second complaint the Organization maintains its position. It points out that the complainant did not give any reasons for raising the amount of moral damages claimed.

F. In additional submissions on the complainant's third complaint, WIPO indicates that the IAOD has completed its investigation and that it held that there was no factual basis to support the complainant's allegation of harassment. The Director General endorsed the IAOD's findings and so informed the complainant by a letter of 26 June 2009.

G. In her reply to the additional submissions the complainant alleges bad faith on the part of the Organization. She also contends that the investigation process was not conducted in a timely manner. Consequently, she asks the Tribunal to set aside the IAOD's report and the Director General's decision to endorse it. She also claims moral damages.

H. In its final comments WIPO denies any delay in the investigation process and provides details of the IAOD's findings concerning the allegation of harassment.

CONSIDERATIONS

1. The complainant challenges decisions with respect to three internal appeals dealing, respectively, with a decision not to extend her retirement date for more than six months, the amount allowed on a pro rata basis for an education grant for her daughter and a claim of harassment. The decisions relating to the first two issues also form part of her claim of harassment and, in each complaint, identical issues are raised as to the internal appeal proceedings. It is therefore appropriate that the complaints be joined, as were her internal appeals.

2. The complainant joined WIPO in 1980 and reached the age of 60 in May 2007. WIPO Staff Regulation 9.8 relevantly provides:

> "(a) Staff members whose appointments took effect on or after November 1, 1990, shall not be retained in service beyond the age of 62 years.
>
> (b) Staff members whose appointment took effect on or after November 1, 1977, and prior to November 1, 1990, shall not be retained in service beyond the age of 60 years.
>
> (c) Notwithstanding paragraphs (a) and (b) above, the Director General may authorize, in specific cases, extension of these limits up to the age of 65 years if he considers it to be in the interest of the Organization."

On 27 June 2006 the complainant's then supervisor recommended a two-year extension beyond her statutory retirement age on the basis that it would be in the best interest of the Organization to "allow her to implement the objectives and strategies she ha[d] set". The recommendation also mentioned the complainant's need, as a single mother, "to continue working to pay for her daughters' education". On 16 November 2006 the Director of HRMD wrote to the complainant informing her that:

> "Pursuant to Regulation 9.8(c) [...] it has been decided to authorize, on an exceptional basis, the extension of your employment contract until November 30, 2007.
>
> No further extension may be made."

The complainant wrote to the Director General on 23 November 2006, thanking him for his approval of a six-month extension and expressing

the hope that it would provide "a reasonable time period to consider various options beyond November 2007".

3. On 9 October 2007 the complainant's new supervisor wrote to the Director General supporting the earlier recommendation of June 2006 for a two-year extension and pointing out that even an extension until May 2008 would be welcome and would resolve the question of the "pro-rating of her younger daughter's education grant for the academic year 2007-2008". The Director General did not reply to that letter or to subsequent memoranda of 25 October and 14 November 2007 in which the complainant sought a longer or further extension of her retirement age. Having received no reply to this correspondence, she initiated her internal appeals on 26 November 2007. In July 2008 the Appeal Board recommended that the appeal relating to the extension of the complainant's retirement age limit be dismissed and she was advised of the Director General's decision to that effect in September 2008. That decision is the subject of the first complaint.

4. Leaving aside her argument with respect to the internal appeal proceedings, the complainant raises two issues with respect to the decision not to extend her retirement date by more than six months. The first concerns the validity of Staff Regulation 9.8(b). It is put that because subparagraph (b) does not allow staff members "the flexibility to continue working at least until age 62 if they so wish, [it] is totally contrary to all legal notions of a vested right, fairness, equal treatment and equity". The second and alternative argument is that the actual decision was flawed.

5. In order to understand the first argument, it is necessary to recount some of the background leading to different compulsory retirement ages for those who joined WIPO before 1 November 1990 and those who joined after that date. Leaving aside those staff members who joined WIPO prior to 1 November 1977, the retirement age was 60. Because of the need to balance the United Nations Joint Staff Pension Fund (UNJSPF), the United Nations General Assembly resolved in December 1989 that "[f]or participants who enter or

re-enter the Fund on or after 1 January 1990, the normal retirement age [should] be 62". Clearly, it was not intended to affect the right of those who had joined the UNJSPF earlier to retire on a full pension at the age of 60. WIPO gave effect to this resolution by introducing Staff Regulation 9.8(a) and by making special transitional arrangements for those who entered service between 1 January and 31 October 1990.

6. The complainant contends, by reference to a statement *in re* State ex rel. Milligan v. Ritter's Estate, Ind. App; 46 N.E 2d 736 at 743, that a vested right is a "right complete and consummated and of such a character that it cannot be divested without the consent of the person to whom it belongs", that "consent" is critical to the definition of a vested right and that continuing consent is necessary to support a compulsory retirement age of 60 for staff members who entered into service prior to 1 November 1990. From this she argues that, following the introduction of Staff Regulation 9.8(a), those staff members "should have the choice of either retaining their vested right [to retire at 60] or […] availing themselves of the [right to retire at] 62". To the extent that the latter proposition is premised on the notion of a vested right, it must be rejected. It is correct that a vested right cannot be divested without the consent of the person to whom it belongs. However, it does not follow that a corresponding condition or obligation – in this case, the condition or obligation to retire at 60 – depends on continuing consent. A condition once accepted or an obligation once entered – as was the case when the complainant joined WIPO – endures unless and until it is performed or the person is released from it either absolutely or by substitution of a different and mutually agreed condition or obligation. The complainant has not been released from the condition or obligation to retire at 60 and, thus, the question whether she should be allowed to choose whether to retire at 60 or 62 depends on whether or not that is required by the principle of equality, which embraces the notions of fairness and equity also invoked in her argument.

7. By reference to what was said in Judgment 2313, the complainant argues that a different date of entry into service is not a

"relevant difference" warranting different treatment with respect to the age of retirement and, if it is, the different treatment is not "appropriate and adapted" to that difference. The different date of entry into service is not the relevant difference in the present case. The relevant difference is that persons who entered into service on or after 1 November 1977 and prior to 1 November 1990 are entitled to retire on a full pension at the age of 60, whereas those who entered service after that date are not so entitled until the age of 62. That difference warrants different retirement ages. The complainant does not contend otherwise. What she contends is that there should be a choice on the part of those in her position to retire either at 60 or at 62. However, that would not bring about a situation of equality, as there would be no equivalent choice for those who entered service after 1 November 1990. It is not to the point that the choice for which the complainant contends would not have an adverse impact on the UNJSPF and that it might not affect the personnel practices of the Organization. The fact remains that those who entered the Organization after 1 November 1990 would not be able to retire with a full pension at the age of 60 and, thus, would not be in the same position as the complainant. In these circumstances and even though the conferral of a choice as to retirement age may have been an appropriate way of dealing with the different pension rights, it cannot be said that the specification of different retirement ages without any choice in the matter was not appropriate and adapted to the change in the Fund.

8. So far as concerns the actual decision to extend the complainant's retirement date by no more than six months, two matters should be noted. The first is that the effect of Staff Regulation 9.8(c) is that the Director General's authority to approve an extension is subject to the condition precedent that he considers that it is in the interest of the Organization to do so. That is a value judgement and the decision in question may be challenged on the same grounds as a discretionary decision. However, the ultimate question in issue is not whether or not the extension is in the interest of the Organization but whether the Director General considers that it is. The

second matter to be noted is that in February 2006, in Office Instruction 10/2006, the Director General advised:

> "[...] posts vacated by retired staff members lend greater flexibility to the post management process of the International Bureau. Such appointment extensions would, therefore, only take place under the most exceptional circumstances, on a one-time basis, based on overriding operational and financial considerations, in keeping with the best interests of the Organization."

The complainant argues that Office Instruction 10/2006 is irrelevant to her case because the letter of 16 November 2006 informing her of the approval of a six-month extension does not make reference to it. That argument must be rejected. The letter refers to the extension being granted on an "exceptional basis" and expressly states that no further extension will be granted, matters which derive from the Office Instruction and not from the terms of Regulation 9.8(c).

9. The complainant's principal argument with respect to the decision to extend her retirement date by only six months is that no reasons were initially given for the decision and that subsequent reasons were not clear, coherent or transparent. She argues that neither Staff Regulation 9.8(c) nor Office Instruction 10/2006 provides any "concrete, objective criteria" and likens the statement as to "post management flexibility" in the Office Instruction to the ground of "rejuvenat[ion of] the Inspectorate" considered in Judgment 2125. In that case the Tribunal stated that that ground was "highly questionable" and although "not in itself reprehensible, [...] it could be used to justify a systematic refusal to depart from the rule governing the normal age of retirement". The present case differs from that considered in Judgment 2125 in that the authority in question there was conditioned on "the interest of the Agency" rather than that the decision-maker considered that to be the case and the staff member, in fact, satisfied the criteria which had earlier been set for granting an extension and which, thus, fettered the decision-maker's discretion.

10. No specific reasons were given in the letter of 16 November 2006 for extending the complainant's retirement date by only six

months. Had there been a refusal of any extension, it may well be that some specific reason should have been given. However, in the context of the requirement that the Director General considered that it was in the interest of the Organization to grant an extension and having regard to the terms of Office Instruction 10/2006, the letter granting a six-month extension could only be construed as a statement that, in the light of the recommendation of the complainant's supervisor, he considered that it was in the operational and financial interest of the Organization to extend her retirement date for six months, but not for any longer period. In the absence of specific criteria fettering the basis on which the Director General might consider that an extension was in the interest of the Organization, this was sufficient reason. In particular, it enabled the complainant to challenge the decision, if she so wished, on the basis that the operational and financial interest of the Organization would not materially change after six months. This she did not do.

11. In relation to the "reasons" later provided for the decision to extend the complainant's retirement date by only six months, she states that the Director of HRMD told her that her post was required to allow for someone's promotion. This is not denied. However, she does not say when this conversation occurred. It is to be recalled that in November 2006 the complainant initially expressed her satisfaction with the extension of six months, although, it seems, there were discussions with her then supervisor in the same month and in December 2006 and January 2007 with her new supervisor with respect to the course she might take to get a longer or further extension. In the result, she met with the Director General and the Director of HRMD in July or August 2007. It seems likely that the conversation with the latter took place at about this time. If so, the statement is explicable on the basis that plans were already in train to promote someone else to her position and she was so informed, rather than that she was given a new or additional reason for the earlier decision with respect to her retirement date. In the absence of further evidence, the statement must be viewed in that manner.

12. Other "reasons", according to the complainant, were advanced for the decision in the meeting with the Director General and the Director of HRMD in July or August 2007. She states that the Director General informed her that "he could not accord any extension, to any staff member, longer than six months and he could not make any exceptions to such a rule, and especially so in the case of a US national". The Director of HRMD denies that these statements were made, apparently on the basis of his contemporaneous note. It is also denied that there was a "six-month rule". There is nothing in Office Instruction 10/2006 to suggest that there is or was a rule to that effect and its non-existence is consistent with the fact that two other persons who retired in 2007 were granted, respectively, a ten and a 12-month extension. In the circumstances, the Tribunal cannot accept that a "six-month rule" was ever advanced as a reason for the decision with respect to the complainant's retirement date and, as it was allegedly part of the same explanation, the Tribunal does not accept that reference was made to her nationality.

13. An issue is also raised by the complainant as to the "one-time basis" limitation in Office Instruction 10/2006. She argues that it imposes a limitation on Staff Regulation 9.8(c) without the required approval of Member States. She also contends that reasons should have been given for its imposition in her case. These arguments must be rejected. The Director General could have established a regime whereby he considered short-term extensions seriatim. However, he established a system for granting extensions on a one-time basis. Office Instruction 10/2006 does not limit the period for which an extension may be granted and, thus, is not inconsistent with Staff Regulation 9.8(c). It is clear from Office Instruction 10/2006 that a recommendation must be made by the relevant Programme Manager before any decision is made with respect to the extension of a staff member's retirement date. It is inconceivable, in the context of that Instruction, that a recommendation would not specify the period of extension sought, as it did in the present case. To the extent that it provides for a shorter period than that requested, the resulting decision

may be the subject of an appeal. If it is not appealed within time, it is beyond challenge. The statement in the letter of 16 November 2006 that "no further extension may be made" gave effect to that general rule and, also, to Office Instruction 10/2006. That being so, there was no need for the Director General to give reasons for the statement.

14. The complainant also contends, by reference to the terms of the letter of 16 November 2006 and the fact that it was signed by the Director of HRMD, that the decision in question was taken by him and not by the Director General who has sole authority to grant or refuse an extension of a staff member's retirement date. Moreover, she points out that the letter does not cite any delegation of authority to the Director of HRMD. The fact that the Director General did not sign the letter does not mean that he did not take the relevant decision. The signing of the letter by the Director of HRMD is consistent with normal personnel practice. Moreover, the presumption of regularity applies in the absence of cogent evidence to the contrary. The complainant's argument is based on speculation, not cogent evidence, and, therefore, must be rejected.

15. The only other arguments that are relevant to the decision not to extend the complainant's retirement date beyond six months is that it was arbitrary and motivated by bad faith and improper purpose. The complainant relies on action taken to change the birth date of a staff member in the Organization's records and to reclassify some staff members from a 60-year to a 62-year retirement category to argue that the decision in her case was arbitrary. However, the birth date in question was changed as a result of a court order that WIPO considered itself bound to respect. The reclassification was a transitional measure with respect to staff members who joined the Organization between 1 January and 31 October 1990 and were not entitled to a full pension at the age of 60 because of the amendment effected to the UNJSPF's rules with effect from 1 January 1990. These actions do not establish that the decision in relation to the complainant was arbitrary. In regard to the argument that the decision

was motivated by improper purpose, it is said that the Director General and some of his close colleagues were "trying to free up as many high-level posts as possible [...] with the intention of distributing those posts [...] as compensation to the Director-General's political allies [...] and to do so by circumventing the appointment and promotion board procedures required by WIPO Staff Regulations and Rules". In support of this argument, the complainant relies on a statement of the Staff Council of 25 January 2008 and articles that appeared in the Geneva press in April, May and July 2008. Much more than a statement from the Staff Council in January 2008 and subsequent press reports is necessary to establish that the Director General's decision of November 2006 was part of a plan to free up the complainant's post for the purpose alleged. Accordingly, the argument is rejected.

16. It is convenient to turn to the second and third complaints before considering the complainant's argument with respect to the internal appeal proceedings. In the second complaint the complainant impugns the decision of the Director General dismissing her appeal with respect to the proportion of the education grant payable for her younger daughter. Staff Rule 3.11.1(C)(e) relevantly provides:

> "Where a staff member's period of service does not cover the full scholastic year, the amount of the grant shall be that proportion of the annual grant which the period of service bears to the full scholastic year."

In a letter dated 31 August 2007 to the Director of HRMD challenging a calculation which allowed only one third of the grant, the complainant explained that her daughter attended a college where:

> "[...] her full scholastic year consists of two separate, self-contained semesters, each representing one half (50%) of the scholastic year (not one third). The first semester, referred to as the Fall Semester, commences in late August and ends in mid-December. The second semester, called the Spring Semester, commences late January and ends in mid-May."

She also pointed out in that letter that all courses began and ended within each semester and did not carry over into the next. On that basis, she claimed that she should receive 50 per cent of the grant or, at the very least, 50 per cent less an appropriate pro rata deduction for the last two weeks of the first semester. It was ascertained in early

November 2007 that the spring semester would end on 11 April 2008 and, on the basis that the full scholastic year extended over a period of seven and one half months, the complainant was then allowed 6/15ths of the education grant. The complainant maintains her claim that she is entitled to 50 per cent of the total grant. Additionally, she questions why, on the basis on which WIPO allowed her claim, the 11 days in April should have been rounded up to half a month, rather than rounded down to nothing.

17. In support of her claimed entitlement to 50 per cent of the education grant, the complainant relies on a letter from the bursar of the college that her daughter attended in which it was said "the fall semester represents one-half of the academic year". However, that does not determine the meaning and effect of Staff Rule 3.11.1(C)(e), particularly as the word "represents" does not mean "equates to". Moreover, it is significant that the expression used in that rule is "full scholastic year". The use of the word "full" indicates that the relevant proportion is to be calculated by reference to an entire period and not a fraction based on a term or semester. Further, and as a matter of ordinary language, the term "scholastic year" refers to the entire period over which academic studies are spread in any given 12 months. And as a matter of ordinary usage, it is said that a student has completed a term or semester, not some fraction of the scholastic year calculated by reference to the terms or semesters into which it is divided. Accordingly, WIPO was correct in calculating the proportion of the grant payable by reference to the entire period, rather than on the basis that her daughter had completed or nearly completed one half of her academic studies when the complainant's retirement took effect.

18. So far as concerns the "rounding-up" of the 11 days in April, WIPO refers to Staff Regulation 12.3 which provides that, in the case of doubt as to the interpretation or application of Staff Regulations and Staff Rules, the Director General shall be guided by the practice of other intergovernmental organisations with their headquarters in Geneva or New York. Pursuant to this Regulation, regard was had to an Administrative Instruction of the United Nations Secretariat which

directs that in prorating an education grant "periods of more than 20 days shall be taken as a full month, [...] 11 to 20 days as half a month [and p]eriods of 10 days or less shall be ignored". Accordingly, there was no error in the approach taken in the present case.

19. The complainant makes two other arguments with respect to the calculation of the education grant for her daughter. The first is that the calculation "lacked transparency and violated [her] rights to due process [because she was not provided] with relevant information [or] the actual formula used". In particular, she complains that she was not provided with the legal opinion on the basis of which her claim for 50 per cent was refused or told why regard was not had to the letter from the bursar of her daughter's college referred to above. It is correct that the complainant was not provided with the legal opinion in question but the Director of HRMD informed her on 30 October 2007, when it was thought that her daughter's second semester would end in late May 2008, that the opinion was that "the pro rata calculation of 3/9ths ha[d] been correctly applied, taking into account the full scholastic year of two semesters, i.e., nine months, and the date of [her] retirement o[n] November 30, 2007 (i.e., three months into the school year)" (emphasis added). As the issue has at all times been whether regard had to be had to "the full scholastic year", as provided in Staff Rule 3.11.1(C)(e), or whether regard could be had to the individual semesters into which it was divided, adequate reasons were then given for the approach taken then and subsequently when it was ascertained that the second semester would end on 11 April 2008. And once it is appreciated that regard must be had to "the full scholastic year", the bursar's letter is irrelevant. However, the only explanation given for the "rounding-up" of the 11 days in April was that "according to internal practices, the 11th or 12th of the final month of tuition is counted as a half month". This was not an adequate explanation and the complainant received no reply to subsequent requests for information. She is entitled to moral damages on this account but, as the principal question has always been the interpretation of Staff Rule 3.11.1(C)(e), those damages will be set at 500 Swiss francs.

20. The complainant's third claim in respect of the decision regarding the education grant is for moral damages for "bad faith and ethically questionable conduct". She claims that she was "intentionally misled [...] into expecting that [she] might be accorded a full education grant" during the meeting with the Director General and the Director of HRMD in July or August 2007. This claim is rejected. According to a letter of 2 November 2007 from the complainant to the Director General, the latter "proposed to accord [her] the full amount of the Education Grant for the current academic year, provided the WIPO Staff Rules [and] Regulations so allowed". The Director of HRMD informed her three days after the meeting, that the Staff Rules did not permit that course. She contends that the Director must have known that that was so at the meeting, as he had previously dealt with "prorating issues" in relation to other staff. The fact that he had dealt with "prorating issues" does not mean that he then knew that the Staff Rules allowed for no other alternative. Moreover, the express qualification by the Director General that a full allowance would be paid "provided the WIPO Staff Rules [and] Regulations so allowed" negates any possibility that the complainant was intentionally misled.

21. The third complaint concerns the referral of the complainant's claim of harassment by the Director General, in accordance with the recommendation of the Appeal Board, to the IAOD for investigation. WIPO contends that this complaint is irreceivable on the basis that, at the time of its filing, no final decision had been made in respect of her claim. The complainant resists this argument on two grounds. The first is that her complaint "goes beyond a consistent and ongoing pattern of harassment in the strict sense", and extends to "abuse of authority and discrimination [...] in disregard of WIPO Staff Regulations and Rules, principles of equity, rights to equal treatment […] and the Organization's duty to ensure a harassment free work environment and to treat [her] with […] respect and dignity". Contrary to what the complainant now asserts, the appeal initiated by her letter of 26 November 2007 clearly states that her claim is with respect to "a series of acts and practices that, as a whole,

amount to a continued and repetitive violation of [her] rights to fair and equal treatment and thus constitute a consistent and ongoing pattern of harassment". Similarly, she described her appeal to the Appeal Board as an appeal "regarding a consistent and ongoing pattern of harassment". Moreover, and although the complainant referred to certain decisions in her letter of 26 November 2007, no challenge was made to any specific administrative decision either in that letter or the subsequent appeal lodged with the Appeal Board. Accordingly, there is no part of the claim that is capable of being dealt with or of being regarded as separate from the harassment claim or as involving a separate decision amounting to a final administrative decision in respect of which internal remedies have been exhausted.

22. The complainant's other argument with respect to her harassment claim is, in effect, that its referral to the IAOD is properly to be regarded as an implied final decision to reject it. In this regard, she refers to the maxim "justice delayed is justice denied" and asserts that WIPO had "numerous opportunities to conduct an internal investigation, starting with [her] memorandum to the Director General of April 18, 2005, and her letter [...] of October 31, 2005". The memorandum of 18 April 2005 concerned work-related issues in respect of which the complainant sought various remedies but did not include a specific claim of harassment. And although the letter of 31 October 2005 complained of verbal abuse, slanderous remarks and malicious actions by "a certain colleague", the colleague was not identified by name. Moreover, the complainant's request at that time was that the Director General "resolve th[e] situation as [he] deem[ed] appropriate". Although there were events after 31 October 2005 upon which the complainant relies for her claim of harassment, no claim in that regard was made until 26 November 2007. In the circumstances there was no delay prior or subsequent to her appeal that would warrant treating the referral of her claim to the IAOD as an implied decision rejecting her claim. Nor is that conclusion to be reached by reference to the complainant's claims as to "the doubtful impartiality and independence of the IAOD" or that the IAOD investigation would "unreasonabl[y] and unjustifiably delay the resolution of [her]

case". Moreover, the complainant is incorrect in her argument that the referral of her claim is without legal authority. The revised WIPO Internal Audit Charter relevantly provides, in paragraph E(14)(g), for "investigation pertaining to cases of alleged wrongdoing or malfeasance".

23. The third complaint is irreceivable on the ground that, at the time of its filing on 15 October 2008, there was no final decision, whether express or implied, rejecting her claim of harassment.

24. It remains to consider the complainant's arguments with respect to the internal appeal proceedings. In each of her complaints, she contends that the proceedings were compromised by reason that the hierarchical supervisors of the Administrative Assistant to the Appeal Board were the Director of the Director General's Cabinet and, thus, the Director General; the letter of 6 December 2007 rejecting her appeals was signed by the Director of HRMD and not by the Director General, himself; the Legal Counsel did not sign the reply filed before the Appeal Board; it is unclear whether the reply was filed within time; it is unclear whether the Appeal Board met prescribed time limits and when its members signed its conclusions; and the letter informing her of the decisions with respect to her appeals was sent by normal priority mail and no date was visible on the envelope. These arguments may be dealt with shortly. The Administrative Assistant to the Appeal Board takes no part in its deliberations and it is not to be supposed that the members of the Board do not exercise their own independent judgement simply by reason of the identity of the Administrative Assistant's supervisors. The letter of 6 December 2007 clearly stated that the Director General had considered the complainant's appeals and that it was his decision that was being communicated. As with the earlier argument with respect to the letter of 16 November 2006, signature by the Director of HRMD was in keeping with normal personnel practice and the presumption of regularity applies. The presumption of regularity also applies to the signature on the reply submitted by WIPO before the Appeal Board. So far as concerns the timeliness of the filing of that reply, the

complainant has not established that her appeals were received by the Board's Secretary prior to 6 March 2008 and that the subsequent request for an extension of time within which to file the reply was not made and granted within time. It is true that the Appeal Board did not submit its conclusions to the Director General within 12 weeks from the date on which the appeals were submitted in writing. However, some part of the delay is referable to the extension granted to the complainant for the filing of her rejoinder and her later request to explore the possibility of mediation. Nothing turns on the date on which the members of the Board signed its conclusions or on the method of posting of the Director General's decision as time runs from the date on which the decision is received.

25. The complainant raises two other matters. First, she argues that the conclusions of the Appeal Board lacked "legal rigor", did not reveal an examination of key claims, relevant facts and applicable law, contained incorrect facts as to her career history and disregarded most of her rejoinder. This, she contends, renders the "considerations and recommendations fundamentally defective in their entirety". Although the Appeal Board's reasoning was brief, its conclusions as to the substantive issues relating to the extension of the complainant's retirement date and the pro rata amount to be paid by way of education grant were correct. And in relation to her claim of harassment, there was no error in its recommendation that it be referred to the IAOD for investigation.

26. The complainant also claims that she was pressured not to pursue her internal appeals. In this regard, she refers to "messages […] through and by several members of senior management" but identifies only two "messages", both from the Director of the Director General's Cabinet. There is a dispute as to what this person said and, also, whether she was speaking to the complainant as a personal friend or in her official capacity. The claim in this regard also forms part of the complainant's claim of harassment. Because the same issue cannot be litigated in separate, concurrent proceedings, it is preferable that this

issue await determination in such subsequent proceedings, if any, as are brought with respect to the final decision on the harassment claim.

27. The complainant has succeeded only in her claim that she was not given adequate reasons for "rounding-up" the 11 days in April in relation to the education grant. That issue was peripheral to her main claim. Accordingly, this is not an appropriate case in which to award costs.

DECISION

For the above reasons,

1. The decision of 5 September 2008 in relation to the complainant's second internal appeal is set aside to the extent that it made no provision for moral damages.
2. In relation to the second complaint, WIPO shall pay the complainant moral damages in the amount of 500 Swiss francs.
3. The second complaint is otherwise dismissed.
4. The first complaint is dismissed in its entirety.
5. The third complaint is dismissed as irreceivable.

In witness of this judgment, adopted on 14 May 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet