

M. M. (No. 5)

v.

WIPO

127th Session

Judgment No. 4085

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mrs V. E. M. M. against the World Intellectual Property Organization (WIPO) on 20 October 2014 and corrected on 21 November 2014, WIPO's reply of 4 March 2015, the complainant's rejoinder of 18 June and WIPO's surrejoinder of 21 September 2015;

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

Having examined the written submissions;

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

The complainant challenges the decision to reject her harassment grievance.

Facts relevant to this case can be found in Judgments 4084 and 4086, also delivered in public this day, concerning the complainant's fourth and sixth complaints respectively.

In April 2010 the complainant filed a harassment grievance with the Joint Grievance Panel (JGP) against three supervisors. In July 2011 she was informed that the Director General had decided to dismiss her harassment grievance. She challenged that decision before the Appeal Board and was informed by a letter of 31 July 2012 that the Director General had decided to annul the decision on her harassment grievance and to refer the matter back to the JGP for the resumption of the

procedure as from the forwarding of the documentation to the Internal Audit and Oversight Division (IAOD) pursuant to paragraph 11 of Annex B of Office Instruction No. 31/2009.

A new JGP was constituted and it issued its report to the Director General on 12 July 2013. On 21 August the complainant was informed that the Director General had decided to endorse the JGP's recommendation to dismiss her harassment grievance. She was forwarded a copy of the JGP's report. On 29 August she requested the Director General to review his decision, arguing that the JGP's report was based on a flawed report from the IAOD.

Her request for review was rejected on 23 October 2013, and she lodged an appeal with the Appeal Board against that decision on 17 December 2013.

In its report of 28 May 2014, the Appeal Board stated that it did not consider itself as a forum for the re-litigation of the harassment case which had already been heard by the JGP. It therefore limited its consideration to making sure that there had been no procedural flaws and that no elements gave rise to any significant doubts concerning the validity of the JGP's treatment of the case. It recommended to the Director General that he maintain the contested decision insofar as it confirmed that, on the evidence available, the complainant's supervisors had not been guilty of harassment in the sense of misconduct, as she had alleged. It also recommended that the Director General should express to the complainant his readiness to look further into the subject matter of her harassment grievance to the JGP from the point of view of assessing the extent to which, if any, she had been victim of poor management or of a failure in the Organization's duty of care and to consider, in light of such further inquiry, the extent to which, if any, her claims for moral damages were justified.

By a letter of 25 July 2014 the complainant was notified that the Director General had decided to maintain his decision. The Director General found that there was no evidence of harassment on the part of her former supervisors. He disagreed with the Appeal Board's suggestion to look into the question as to whether she had found herself in a situation of harassment (or similar to harassment) or whether she had

been the victim of “poor management”. In his view, the Appeal Board had not properly recognised the mandate of the JGP itself, which was centered on establishing whether misconduct had occurred on the part of the staff members against whom she had brought the grievance. The allegations she made in the harassment complaint filed with the JGP were limited to an inquiry as to whether misconduct had occurred, and did not extend to an inquiry as to whether she was the victim of “poor management”. In any event, he considered that none of the incidents described by the Appeal Board could reasonably be interpreted in this light. That is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to set aside the impugned decision with respect to the harassment grievance, to order that the IAOD immediately take such necessary action to ensure that all harassing or retaliatory actions towards her cease, to order that her “job description” be properly reviewed to reflect a job that is commensurate with her grade, skills, training, expertise and the needs of the service. She also asks the Tribunal to order that an external and independent investigation into her claims of harassment be undertaken and that, based thereon, appropriate disciplinary action be undertaken against the alleged harassers and that she be promptly informed of the name of “each such sanctioned official”, and the disciplinary measure applied. She further asks the Tribunal to order that she be provided the “Usability training she was accorded in 2013 and which was subsequently cance[l]led through retaliation by the Director, Communications Division”. She seeks an award of moral damages for harassment and mismanagement, and costs. She claims interest on all amounts awarded to her. Lastly, she asks the Tribunal to grant her any other relief the Tribunal determines to be fair, just and necessary.

WIPO asks the Tribunal to dismiss the complaint as inadmissible insofar as it concerns issues raised in separate internal appeal proceedings or in other complaints filed with the Tribunal, and as otherwise unfounded.

CONSIDERATIONS

1. The complainant applies for oral hearings, pursuant to Article 12, paragraph 1, of the Tribunal's Rules. The application will be dismissed in view of the ample submissions and documentary evidence provided by the parties, which fully inform the Tribunal about this complaint.

2. The complainant's request for the disclosure of documents is rejected because, cast in the most general and imprecise terms, it is made on the speculative basis that something will be found in those documents to further her case. It constitutes an impermissible "fishing expedition" (see, for example, Judgments 2510, under 7, and 3345, under 9).

3. The grievance of 1 April 2010 fell under the formal complaint procedure for the investigation of harassment complaints by the JGP constituted pursuant to Office Instruction No. 31/2009, which was then in force. Paragraph 19 of that Office Instruction empowered the JGP to investigate allegations of "discriminatory treatment, as well as allegations of harassment, which may include mobbing, bullying, intimidation and sexual harassment", amongst other things. Paragraph 20(b) exempted grievances concerning an evaluation report as defined in two other Office Instructions of 2009 "and any subsequent Office Instruction governing the handling of performance-related disagreements and the evaluation report".

4. Pursuant to paragraphs 11 to 14 of Annex B to Office Instruction No. 31/2009, the IAOD investigation is to establish the facts and to determine whether the facts tend to corroborate or disprove the allegations. The IAOD's report is to be submitted to the JGP, which will "consider the findings of the report, on the basis of which [it] will submit its recommendations to the Director General". The JGP's report, which is advisory in nature, is to comprise of: (a) a summary of the arguments made by the parties; (b) a brief description of the procedure which the JGP followed; (c) a detailed evaluation of the facts of the case and the claims of the parties; (d) its findings as to whether or not the allegations are borne out; and (e) recommendations on measures required, if any, including the initiation of disciplinary proceedings.

In making its recommendation, the JGP was required to “apply the standard burden of proof: the burden of proof of an assertion shall accordingly be on the staff [member] making the assertion, who shall prove his or her case on a balance of probabilities”.

5. Paragraphs 3 to 6 of Office Instruction No. 17/2006, which was in force at the material time, describe the conduct that could have amounted to harassment. They state as follows:

“3. All staff members and temporary employees bear responsibility for the maintenance of a work environment free of harassment, in keeping with the Standards of Conduct for the International Civil Service, the WIPO Staff Regulations and Staff Rules, and Office Instructions.

4. Harassment is unwelcome verbal or physical behavior that unreasonably interferes with work or creates an intimidating, hostile or offensive work environment. It includes conduct, comments or displays, whether made on a cumulative or, in exceptional cases, a one-time basis, and may be related to race, religion, color, creed, ethnic origin, physical attributes, age, gender or sexual orientation and which threatens, demeans or belittles a staff member or temporary employee, or causes personal humiliation or embarrassment, or has the effect of offending, intimidating or discriminating against a person. It may also include bullying and mobbing and may take the form of isolation, gossip or withholding of essential information. Harassment violates the standards of conduct expected of international civil servants.

5. Staff members and temporary employees, therefore, shall avoid actions or words which would prevent the full participation of any of their colleagues in the work of the Organization under conditions of equality, dignity and respect. This extends to situations of harassment which occur at or away from the workplace, during or outside working hours, if such situations are linked to working relationships and would affect performance and job security.

6. At the same time, it is the responsibility of all staff members and temporary employees to ensure that satisfactory levels of performance continue to be achieved. Reasonable actions by supervisors to this end are not to be considered acts of harassment. Supervisors have a responsibility to give frank and constructive feedback and to take appropriate corrective action, and may have to take negative decisions on, for example, performance or work assignments, which normally do not, in themselves, constitute harassment. Actions are considered reasonable if taken in the best interest of the Organization, in line with the provisions of the Standards of Conduct for the International Civil Service, WIPO Staff Regulations and Staff Rules, and Office Instructions or accepted principles of managerial and supervisory duties and responsibilities within the UN Common System.”

6. The pleadings in this complaint are prolix and contain allegations that are foundational to other internal appeals and complaints in the Tribunal filed by the complainant. It is therefore necessary to determine the scope of this case. WIPO submits that the vast majority of the pleadings in this complaint are inadmissible because they are concerned with eight separate internal appeals (six of which are not relevant to the dispute in the present case), with one on-going internal work-place related conflict and grievance, and with four complaints which she has filed in the Tribunal challenging different administrative decisions.

7. It is observed that the complainant supports this complaint detailing events from 2007 to late 2014 and raising issues in a manner which violates the general principle of law that a person cannot simultaneously litigate the same issues in separate or concurrent proceedings (see, for example, Judgments 3291, under 6, and 2742, under 16). Moreover, some of the allegations in the present complaint have also been foundational subjects of Judgments by the Tribunal and are now *res judicata* (see, for example, Judgment 3950, under 6 and 7).

8. In her harassment grievance of 1 April 2010 the complainant alleged that she had suffered from acts of harassment, discrimination, mobbing, intimidation and bullying, gender inequality and retaliation at the hands of three of her supervisors beginning in 2009. The IAOD and the JGP considered the following allegations:

- (1) The actions and decisions taken by her supervisors between 2009 and 2010 in connection with a Joint WIPO-ITU Accessibility Workshop constituted harassment and discrimination in that they criticized her work during the preparatory meeting in 2009; failed to provide her with adequate staff support; redrafted her memorandum to the Director General and discarded her report following the workshop and refused to publish it on the WIPO website.
- (2) They refused her requests for training.
- (3) Mr L. had unfairly reprimanded her in a meeting and consequent memorandum of 23 April 2013 about visits which she had made to a Geneva-based organisation dedicated to the social integration of

individuals suffering from physical and intellectual limitations in January and February 2010.

- (4) In the process of the revision of her job description and delayed reclassification of her post in 2010, concomitant with removing her supervisory activities by downgrading her objectives in her performance appraisal and duties in 2010, she was left essentially with G-6/G-7 and P-3 grade tasks to perform.
- (5) Failure to take steps to prevent her two General Service staff colleagues to be insubordinate to her thus creating a hostile work environment for her.

9. In her appeal to the Appeal Board, the complainant maintained allegations of harassment against her three supervisors. However, her case was primarily pleaded in terms of ongoing institutional harassment on essentially the same evidence. In the executive summary the complainant stated that she was subjected to unwelcome verbal and/or other offensive behaviour that interfered with her work and created a hostile and offensive work environment, which demeaned and belittled her, caused her great personal humiliation and embarrassment and repeatedly offended and intimidated her. The complainant further stated that the incidents “covered every possible aspect of harassment and mobbing in the work place, including [...] discrimination, unequal treatment, isolation, disrespect, gender inequality, verbal abuse, humiliation, and embarrassment [...] and [that] when an investigation was finally undertaken, this was not done in an objective way as only biased witnesses were selected to be interviewed by IAOD and the full volume of evidence submitted by [her] was not critically examined”. The complainant insisted that she was systematically harassed by her supervisors, in conjunction with the Human Resources Management Department (HRMD), by her workplace colleagues and by an external HRMD consultant. She stated that this was not merely a case of a conflicted work environment, but one of a continuous combination of mobbing and harassment in a concerted effort against her. She stated that “[t]he Administration [had] failed in its responsibility of duty and care to protect [her] from further injury and to treat [her] case in a fair and just manner [and that the] whole

process of finding some justice internally became an act of harassment [...] resulting in multiple requests for reviews and seven appeals, resulting directly or indirectly, from institutional harassment [...]”.

10. It is noteworthy that in the pleadings in the Appeal Board, the complainant referred to further incidents of harassment and discrimination which had allegedly occurred after her grievance of 1 April 2010 up until 2013. She stated that some of the incidents were acts of retaliation and abuse of power carried out by WIPO because she had filed the grievance of 1 April 2010. She highlighted, additionally, alleged downgrading and other incidents related to her 2009, 2011 and 2012 performance appraisals which she stated caused severe damage to her health, her professional relationships and career prospects. She also referred to alleged defamatory statements made against her by her supervisors in June 2011 and April 2013. The complainant further alleged that she was harassed and treated in a discriminatory manner because she was made to pay her travel fare to conferences in San Diego and San Francisco in 2012 when two of her male colleagues were fully funded. She further pleaded an alleged miscalculation of her retroactive promotion effective 1 January 2009 as a basis of harassment. She also raised, as further evidence of harassment, the Administration’s alleged failure to take account of medical evidence related to actions concerning sick leave which she was forced to take as a result of harassment.

11. The matter summarized in item (4) in consideration 8 of this judgment is *res judicata* and will therefore not be reconsidered in this judgment as it was substantially the subject of the complainant’s first complaint to the Tribunal, which was determined in Judgment 3418. In her internal appeal in that case, the complainant had alleged delay in reclassifying her job and in establishing a job description and attempts to downgrade her duties. She claimed, among other things, moral damages for harassment and the stress that she suffered adversely affecting her health. The Appeal Board concluded that unwarranted delay in the process had caused the complainant a feeling of unequal treatment and that the various attempts to diminish her responsibilities had caused her considerable anxiety. It recommended, among other things, that she be

awarded an appropriate amount for moral injury. In the Tribunal, the complainant challenged the Director General's decision to accept the Appeal Board's finding and recommendations. She contended that by failing to conduct the reclassification process swiftly, fairly and with due diligence, HRMD breached its duty to act in good faith, and that the harassment and discrimination to which she was subjected as a result of the process caused significant damage to her health. She claimed compensation for the actions in downgrading her job description; for the delay, harassment and the bias surrounding the establishment of her job description; for unwarranted delay in reclassifying her post and for damage to her health caused by the excessive stress that she suffered.

The Tribunal determined that the Appeal Board had correctly concluded that the job description of October 2010 involved a significant diminishment of the complainant's responsibilities; that although her supervisors probably had no desire to "downgrade" her responsibilities in the strict sense, WIPO did not act properly in carrying out its duty of care which caused significant moral injuries; that there was undue delay in the reclassification process and in its attempt to diminish her responsibilities, WIPO was trying to solve a working relations problem. The Tribunal accordingly awarded the complainant moral damages and costs.

12. As to her allegation that miscalculation of payments for her retroactive promotion effective 1 January 2009 is a basis of harassment (which she first raised in the Appeal Board and maintains in the present complaint), it is observed that in her second complaint to the Tribunal, the complainant sought, in addition to being awarded a retroactive promotion, an award of exemplary moral damages on account of the unreasonable withholding of the benefits of the promotion "and the failure to comport with the principle of equal treatment". She had also pleaded that as a result of the miscalculation, WIPO had breached its duty to act in good faith and with respect for her dignity. The Tribunal determined, in Judgment 3877, that those pleas were unfounded. Raising the circumstances surrounding the same unmeritorious allegations in the present complaint as having "contributed to her already stressful existence at [WIPO]" is accordingly *res judicata* in addition to being

unfounded as was determined in Judgment 3877 and will not be considered in this judgment.

13. In her executive summary to the Appeal Board the complainant raised, as bases of further harassment, allegations concerning actions and decisions taken in 2013 and subsequently that related to her transfer to the Communications Division. Those allegations are substantially reproduced in the present complaint. They include allegations concerning other transfers thereafter and the concomitant incidents relating to her job reclassification and description exercises; issues and incidents concerning office space; the establishment of her performance appraisal objectives and evaluations from 2013; baseless allegations made against her and decisions concerning medical compensation and sick leave. These matters were not before the IAOD and the JGP during the investigation process. At the time when these allegations were raised before the Appeal Board in the present case, the complainant had already initiated another harassment grievance substantially on the bases of the said actions and decisions that allegedly occurred from 2013. That grievance has culminated in her seventh complaint to the Tribunal and will not be considered in this complaint.

14. Premised on the foregoing, the incidents or decisions which are to be considered in this complaint are mirrored in consideration 8 of this judgment, with the exception of item (4), and the allegations set out in consideration 10, with the exception of the allegation that miscalculation of her retroactive promotion effective 1 January 2009 was a basis of harassment.

15. In the impugned decision, the Director General accepted the Appeal Board's recommendation to maintain the contested decision insofar as it confirmed that, on the evidence available, the complainant's supervisors had not been guilty of harassment in the sense of misconduct, as she alleged. In making its recommendations, the Appeal Board stated that it did not consider itself as a forum for the re-litigation of the harassment case which had already been heard by the JGP. It accordingly limited its consideration to ensuring that there had been no procedural

flaws and that no elements gave rise to any significant doubts concerning the validity of the JGP's treatment of the case. That statement was incorrect and is not justifiable by reliance on cases in which the Tribunal had explained its own purview rather than that of an internal appeals body. While the Appeal Board was not required to find the facts, that being within the purview of the IAOD, it was nevertheless required to weigh the evidence, as it eventually seems to have done. It is also observed that the Appeal Board, in contradistinction to the IAOD and the JGP, correctly stated that proof of harassment did not require proof of intention (see, for example, Judgment 3871, under 12).

16. The complainant argues that the IAOD and the JGP erred because they did not call witnesses whom she named or whose names arose during the course of the investigation. It is however apparent that those persons did not actually witness the incidents that were complained of, and, in any event, the relevant allegations identified in consideration 14 of this judgment did not amount to harassment. They were actions taken in a tense working environment in the context of supervisory responsibility pursuant to paragraph 6 of Office Instruction No. 17/2006. The incidents cannot be a basis on which to find institutional harassment and the complainant provides no evidence of actions or inactions on the part of the Administration that would constitute institutional harassment. Moreover, the evidence which she provides does not show that there was a lack of good faith that constituted gross negligence, bias or abuse of authority, as she contends. Finally, the Tribunal has no purview to issue the order that the complainant be provided the "Usability training she was accorded in 2013 and which was subsequently cancel[le]d through retaliation by the Director, Communications Division". In the foregoing premises, the complaint is unfounded and will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ