

**S. (No. 7)**

**v.**

**WIPO**

**135th Session**

**Judgment No. 4608**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr A. S. against the World Intellectual Property Organization (WIPO) on 18 March 2019 and corrected on 14 May, WIPO's reply of 15 August 2019 and the email of 2 December 2019 by which the complainant informed the Registrar of the Tribunal that he did not wish to file a rejoinder;

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 contests WIPO's decision to maintain Office Instruction No. 10/2016, promulgating, inter alia, the discontinuation of the Small and Medium-Sized Enterprises (SMEs) Section.

The complainant joined WIPO in 1989. At the time of the events giving rise to the present complaint, he was the Head of the SMEs Section in the SMEs and Entrepreneurship Support Division (SESD).

On 29 February 2016 the Administration promulgated Office Instruction No. 10/2016, entitled "Internal Organization of WIPO", by which, among other things, it announced the discontinuation of the SMEs Section.

On 24 May 2016 the complainant sent to the Director General an email, entitled “Office Instruction No. 10/2016”, in which he asked the Director General to share with him “the logic and reasoning” behind the decision to discontinue the SMEs Section, and informed him that he would be contesting it on the grounds that it diminished his role and responsibility, adversely affected his career prospects, and constituted yet another event in a chain of harassment, discrimination and retaliation that had begun in 2008.

The next day, on 25 May 2016, the complainant sent to Mr S., his second-level supervisor, an email with the title: “Seeking an appointment with you”. In that email, the complainant told Mr S. that he refused to accept any further humiliation from him or the Director General, that his self-respect and pride had been badly hurt, and that he was “about to reach a point of no return”. However, “before [he] cross[ed] that threshold, which would not be in the interest of WIPO, its Director General, [Mr S. or the complainant himself]”, he wanted to meet with Mr S. to have “one final chat” about the latter’s proposal to address the “situation of inequity” flowing from Office Instruction No. 10/2016. This email was copied to the Director General, the Assistant Director General and Chief of Staff, and other senior-level officials.

That same day, the Director, Human Resources Management Department (HRMD) decided to suspend the complainant from duty with full pay for an initial period of one month on the ground that his continuance in office was detrimental to the interests of WIPO and presented a risk of serious disturbance at the workplace. The same Director eventually lifted the complainant’s suspension on 15 June 2016, after having been informed by the Internal Oversight Division (IOD) that it appeared that the complainant did not have any intention of behaving in a violent or otherwise inappropriate manner.

By an email of 1 June 2016, the Director, HRMD, responding to the complainant’s question about “the logic and reasoning” behind the decision to discontinue the SMEs Section, as per his email of 24 May 2016, reiterated and confirmed the reasons communicated to the complainant at the meetings held in February and May 2016 with the Head of SESD to discuss the reorganisation.

Having been granted an extension of the relevant time limit, the complainant filed a request for review of the decision contained in Office Instruction No. 10/2016, by an email of 1 August 2016. The request for review, which was submitted in an attachment to the email, was made on the grounds that the contested decision was: (i) another act in a chain of the victimisation, harassment, humiliation, retaliation and discrimination directed against him by the Director General since October 2008; (ii) another attempt by the Director General to disrupt Program 30; and (iii) another act which damaged his dignity and reputation. The complainant asked that Office Instruction No. 10/2016 be reversed, that the SMEs Section be reinstated and he be reappointed as its Head, that his post be reclassified at grade P-5 and that the harassment, victimisation, retaliation and covert discrimination against him cease immediately. He sought 250,000 Swiss francs in moral damages for the injury caused to his health, well-being and reputation, 100,000 Swiss francs in exemplary damages and appropriate compensation for legal expenses. In that same email of 1 August 2016, the complainant indicated that a paper copy of his request for review would be mailed to the Director General the next day, as 1 August was a public holiday in Switzerland and the post office was closed. The next day, on 2 August 2016, the complainant sent a second email to the Director General attaching “a corrected request for review” which included “the missing annexes” and “minor formatting and editorial improvements”.

The Director General recused himself and designated as the competent authority to take a decision on the complainant’s request for review the Assistant Director General who, by a letter of 30 September 2016, informed the complainant that he had decided to maintain the contested decision, contained in Office Instruction No. 10/2016, and to deny the relief claimed by the complainant.

Having been granted two extensions of the relevant time limit, the complainant filed on 20 February 2017 an appeal against the Assistant Director General’s decision of 30 September 2016, seeking, in the main, the same relief he had sought in his request for review. The Appeal Board submitted its Conclusions to the Director General on 19 October 2018. As regards the complainant’s harassment allegations, the Appeal

Board noted that in August 2016 the complainant had filed a separate complaint of harassment against the Director General and other senior officials and, therefore, it considered the complainant's alleged acts and instances of harassment only insofar as they related directly to the issuance of Office Instruction No. 10/2016. On the merits, the Appeal Board did not find sufficient proof to substantiate the complainant's assertion that the purpose of the discontinuation of the SMEs Section was to harass or discriminate against him and that it constituted misuse of the Director General's authority. The Appeal Board recommended that the complainant be awarded moral damages in an amount not less than 1,500 Swiss francs for the delay in the internal appeal proceedings and that the remainder of the appeal be rejected.

By a letter of 18 December 2018, the complainant was informed of the Director General's decision to accept the Appeal Board's recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order WIPO to reinstate the SMEs Section, to reappoint him as the Head of the SMEs Section, with at least three P-4 staff members reporting to him, to reclassify his post at grade P-5 and to cease all acts of harassment, retaliation and discrimination against him. He claims 250,000 Swiss francs for physical, moral and psychological damage and for the injury caused to his personal and professional reputation, 100,000 Swiss francs in exemplary damages and 25,000 Swiss francs in moral damages for the inordinate delay in processing his appeal. He seeks reimbursement of all costs he incurred in bringing this appeal, interest on all amounts awarded at the rate of 5 per cent per annum from the date of the impugned decision through the date all such amounts are paid in full, and such other relief as the Tribunal may deem fair, just, reasonable and equitable.

WIPO asks the Tribunal to dismiss the complaint as devoid of merit insofar as it is directed against Mr S.'s decision of 30 September 2016 to maintain the decision contained in Office Instruction No. 10/2016 and the Director General's decision of 18 December 2018 to dismiss the complainant's appeal. For the remainder, WIPO asks the Tribunal to dismiss the complaint as irreceivable.

## CONSIDERATIONS

1. The complainant challenges the decision of the Director General of WIPO, dated 18 December 2018, which, endorsing the recommendation of the Appeal Board, dismissed the complainant's internal appeal lodged against the Assistant Director General's 30 September 2016 decision to maintain Office Instruction No. 10/2016 of 29 February 2016, announcing organizational changes in the complainant's division.

Before the issuance of Office Instruction No. 10/2016, the complainant was the Head of the SMEs Section in SESD.

The complainant contests Office Instruction No. 10/2016 pleading that it:

- (i) was not adopted in the best interest of the Organization;
- (ii) was adopted without proper prior consultation with him;
- (iii) violated his legitimate expectation of career;
- (iv) constituted an abuse of authority and discretion;
- (v) amounted to harassment against him;
- (vi) was tainted by bias, prejudice, and discrimination to his detriment.

2. The complainant requests oral proceedings. Pursuant to Article V of the Statute of the Tribunal, "[t]he Tribunal, at its discretion, may decide or decline to hold oral proceedings, including upon request of a party". In this case, the Tribunal finds the written submissions to be sufficient to reach a reasoned decision and thus the request is rejected.

3. Firstly, the Tribunal shall address the receivability issues raised by WIPO concerning the following circumstances:

- (i) the complainant refers to a number of events and decisions that occurred before and after the adoption of Office Instruction No. 10/2016;
- (ii) the complainant refers to episodes of harassment allegedly perpetrated against officials other than the complainant;

(iii) the complainant refers to further decisions to suspend him from work and to apply disciplinary measures against him.

4. With regard to the episodes of alleged harassment against him, the complainant, on the one hand, appealed Office Instruction No. 10/2016 internally and, on the other hand, lodged a separate harassment claim that was dismissed by the Director General's decision dated 21 February 2017. However, not all the episodes of alleged harassment described in the present complaint were the subject matter of the complainant's harassment claim dismissed by the 21 February 2017 decision. WIPO submits, in its reply, that the complainant did not appeal the 21 February 2017 decision. The complainant does not contest this statement. Therefore, at this stage, the Tribunal has to consider the 21 February 2017 decision as a final and definitive decision that the complainant was not a victim of harassment with regard to the conduct reported therein. As a result, all the episodes of alleged harassment mentioned in the present complaint, already referred to in the 21 February 2017 decision, cannot be raised in the context of the present complaint. The further episodes of alleged harassment described in the present complaint, not addressed by the 21 February 2017 decision, are beyond what could be considered as the scope of the present complaint, as they should have been reported by the complainant to the competent internal authority prior to filing the present complaint with the Tribunal, pursuant to the relevant Staff Regulations and Rules. Therefore, the complainant has failed to exhaust all internal means of redress, as required by Article VII, paragraph 1, of the Statute of the Tribunal, and thus his complaint is irreceivable in this respect.

In addition, the alleged episodes of harassment against officials other than the complainant are outside the scope of the present complaint for lack of *locus standi*.

Therefore, the Tribunal addresses the plea that Office Instruction No. 10/2016 is in itself an act of harassment by considering only the content of the Instruction and not the context of other episodes or acts. Indeed, these latter elements cannot be raised directly with the Tribunal, since, as already observed:

- (i) there is a definitive decision (adopted on 21 February 2017) stating that there was no harassment against the complainant, which decision was never impugned before the Tribunal and thus is now immune from challenge; and
- (ii) there is no final decision on the further alleged episodes of harassment not covered by the 21 February 2017 decision.

5. The complainant also refers to a decision to suspend him from duty and to a disciplinary sanction, both of which were the subject matter of two separate complaints already adjudicated by the Tribunal in Judgments 4287 and 4478, and therefore they are *res judicata*.

6. For the reasons stated below, the complaint is unfounded. Therefore, there is no need to deal with WIPO's objection that the complainant does not put forward in the complaint specific pleas against the impugned decision, but only reiterates the pleas submitted in the internal appeal against Office Instruction No. 10/2016 by copying and pasting his appeal and rejoinder to the Appeal Board.

7. The Tribunal first considers the case law underpinning some of the complainant's contentions. It is well settled in the Tribunal's case law that decisions concerning restructuring within an international organization, including the abolition of posts, may be taken at the discretion of the executive head of the organization and are consequently subject to only limited review. Accordingly, the Tribunal shall ascertain whether such decisions are taken in accordance with the relevant rules on competence, form or procedure, whether they rest upon a mistake of fact or of law, or whether they constitute abuse of authority. The Tribunal shall not rule on the appropriateness of a restructuring or of decisions relating to it, and it shall not substitute the organization's view with its own (see, for example, Judgments 4405, consideration 2, 4180, consideration 3, and 4004, consideration 2, and the case law cited therein).

It is also well settled that the complainant bears the burden of proving allegations of bias (see Judgment 4097, consideration 14) and that, moreover, the evidence adduced to prove the allegations must be of sufficient quality and weight to persuade the Tribunal. It is also recognized that bias is often concealed and that direct evidence to support the allegation may not be available. In these cases, proof may rest on inferences drawn from the circumstances. However, reasonable inferences can only be drawn from known facts and cannot be based on suspicion or unsupported allegations (see, for example, Judgments 3380, consideration 9, and 2472, consideration 9).

With regard to prejudice, the Tribunal holds that, although evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances, that does not relieve the complainant, who has the burden of proving her or his allegations, from introducing evidence of sufficient quality and weight to persuade the Tribunal. Mere suspicion and unsupported allegations are clearly not enough, the less so where the actions of the organization, which are alleged to have been tainted by personal prejudice, are shown to have a verifiable objective justification (see, for example, Judgments 3912, consideration 13, and 1775, consideration 7).

8. In the light of the cited case law and of the evidence provided by both parties, the Tribunal finds that Office Instruction No. 10/2016 was a lawful exercise of discretionary power.

The reorganisation process carried out by Office Instruction No. 10/2016 determined organizational change in the SESD, Department for Transition and Developed Countries, Office of the Director General and Related Programs. The Innovation Policy Section, the Innovation Structures Section and the SMEs Section were discontinued. There is no evidence that the reorganisation process was not in the best interest of the Organization. Contrary to the opinion of the complainant, the reorganisation process did not sacrifice the projects related to the SMEs but adopted a different distribution of the work within the Division in charge of the projects themselves. It can be read in Office Instruction No. 10/2016:



“The SESD acts as the central reference point within WIPO for SME-related IP [Innovation Policy] issues. It is responsible for developing a solid platform of SME-related content in order to guide the training and capacity building activities targeting SMEs support institutions and other intermediaries. This includes the development of materials tailored to the needs of SMEs and [the] identification of good practices of using the IP system by SMEs to demonstrate the positive impact on economic benefit, employment and competitiveness. The Program also explores opportunities of collaboration with other organizations with dedicated SME programs.

In addition, the Program aims at enhancing national capacity to independently manage IP from the early stage of the research results through to commercializing, licensing or establishing a start-up business. It also assists universities and research institutions in transferring new technologies to parties capable of commercialization, both nationally and across international borders.”

Furthermore, there is no evidence that the reorganisation amounted to an abuse of authority, as alleged by the complainant.

Appropriate consultation with the complainant, as well as with the other heads of sections involved, took place in a meeting on 5 February 2016, prior to the adoption of Office Instruction No. 10/2016. The complainant, contrary to his contention, was given ample opportunity to comment on the reorganisation process, both during that meeting and during a private meeting held the same day.

Finally, the complainant fails to demonstrate that Office Instruction No. 10/2016 was tainted by bias, prejudice, or unequal treatment to his detriment. Nor does he provide evidence that the Instruction was an act of harassment against him. Indeed, the complainant asserts that “there was no real or pressing need to discontinue the SMEs Section which was created in 2012 and which was performing well and delivering the expected results despite the quantitative and qualitative challenges on the human resources front and despite the multiple disruptions caused by Mr [S.]”. It is evident that the complainant tries, inadmissibly, to substitute the Organization’s discretionary decision with his personal assessment that a reorganisation process was not needed.

9. In conclusion, the complaint is for the most part irreceivable and unfounded in the remainder, and shall be dismissed in its entirety.

DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 18 October 2022, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ