

118th Session

Judgment No. 3347

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms H. L. against the World Intellectual Property Organization (WIPO) on 1 September 2011 and corrected on 3 November 2011, WIPO's reply of 8 February 2012, the complainant's rejoinder of 15 May and WIPO's surrejoinder dated 16 August 2012;

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

Having examined the written submissions and decided not to order oral proceedings, for which neither party has applied;

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

A. Facts relevant to this case are set out in Judgment 2915 delivered on 8 July 2010. Suffice it to recall that on 26 November 2007, four days prior to her retirement, the complainant wrote to the Director General alleging, *inter alia*, that she suffered from a consistent and ongoing pattern of harassment and seeking damages on that ground. Her request was rejected by a decision of 6 December 2007 which she appealed before the Appeal Board, together with other matters (three appeals altogether). The claim of harassment was referred to the

Internal Audit and Oversight Division (IAOD) for investigation. The complainant contested that referral before the Tribunal on 15 October 2008, questioning the IAOD's independence and impartiality. She was informed on 25 June 2009 that the investigator had found no evidence that she was subjected to harassment, whether through a single incident or as an ongoing pattern, and that the Director General agreed with his findings. She was also informed that the Director General's decision concerning the investigation would be forwarded to the Tribunal.

On 28 July 2009 the complainant requested the Director General to review his decision. Her request was denied in September and on 23 November 2009 she filed another appeal with the Appeal Board against the Director General's decision to accept the IAOD's findings. That same day she filed additional submissions before the Tribunal (in the proceedings that led to Judgment 2915), asking it to set aside the IAOD's report. The Appeal Board then forwarded her statement of appeal to WIPO for information only and decided on 21 December 2009 to suspend the internal appeal proceedings pending the delivery of Judgment 2915. The Tribunal concluded in that judgment that the harassment claim was irreceivable, because at the time she filed her complaint she had not received a final decision, whether express or implied, rejecting her claim of harassment. The internal appeal proceedings resumed in September 2010, pursuant to the complainant's request of 2 August 2010.

In its report of 11 April 2011 the Appeal Board found no evidence of a pattern of harassment. Having regard to the evidence relating to one incident of harassment in 2005, namely the removal of the complainant's name from the list of speakers at a WIPO event, it held that this could have been attributable to ill will or prejudice and thus could have constituted a possible act of harassment; however, it concluded that her appeal was time-barred in that respect, because she had initiated the internal appeal proceedings only on 26 November 2007, approximately two years after the incident had occurred.

By a letter of 6 June 2011 the complainant was informed of the Director General's decision to endorse the Board's recommendation to

dismiss her appeal. She requested him to review his decision and was informed by a letter of 14 July that her request was denied. She impugns before the Tribunal the decision of 6 June and that of 14 July.

B. The complainant alleges that she was subjected to an ongoing pattern of harassment, abuse of authority and discrimination between 2003 and November 2007, when she retired. She explains that she did not file her internal appeal at the time of the first event because she feared retaliation. She stresses that, according to the Tribunal's case law, where a pattern of harassment exists, the date to be taken into consideration with respect to receivability is the date on which the last event occurred; in her case, it was in November 2007. She adds that she tried to avail herself of several informal conflict resolution mechanisms, by talking to her supervisors and by writing to the Ombudsman and the Director General, but with limited results.

On the merits, she indicates that she was transferred several times within WIPO to positions which did not correspond to her level of expertise. She states that her name was unexpectedly removed in late 2005 from the list of speakers at a WIPO event and that, in November 2007, the Director of the Director General's Cabinet screamed at her and told her that she should not expect any consultancy contracts after retirement if she filed an internal appeal. She adds that, on occasions, she was subjected to aggressive, intimidating, humiliating conduct and bad faith by certain members of senior management and close advisors to the Director General.

The complainant alleges procedural irregularities with respect to the IAOD investigation. There was delay in referring her case to the IAOD and it then took the investigator six months to draw his conclusions. She also criticises the Organization for not having forwarded the IAOD report to her with the letter of 25 June 2009 notifying her of the Director General's decision to accept the IAOD findings. In her view, WIPO acted in violation of her due process right to have access to all information reasonably necessary to prepare the filing of her case, and in violation of the principle of confidentiality, when it forwarded on 17 December 2009 (during the proceedings

which led to Judgment 2915) the IAOD report to the Tribunal without her consent. Further, she alleges lack of independence and impartiality on the part of the IAOD Director and the investigator; the latter failed to examine thoroughly all facts and arguments, and he interviewed some witnesses alone. She emphasises that one witness refused to sign the transcript of her interview and that another was interviewed by telephone without any record of that interview being made. She also criticises the investigator for having rejected her request to be assisted by a legal representative during the IAOD investigation. Consequently, she considers that the IAOD's report should be set aside, and likewise the Appeal Board's report, insofar as it is based on the IAOD's findings. The Director General's decision to uphold the Board's recommendation should also be set aside. The complainant submits that she suffered moral injury by reason of the procedural flaws in the investigation of her allegations of harassment.

She also contends that the internal appeal proceedings were procedurally flawed. The Appeal Board issued its report six weeks beyond the time frame set out in Staff Rule 11.1.1(e). She also alleges undue delay in the proceedings, as they lasted more than 33 months, which in her view demonstrates bad faith on the part of WIPO and failure to treat her with respect and dignity. She further submits that the Board misinterpreted the facts of the case and failed to consider all facts and arguments thoroughly. In addition, she alleges breach of confidentiality insofar as, without her consent or without informing her, the Appeal Board forwarded to WIPO the brief by which she had initiated her internal appeal of 23 November 2009, before the Board had decided whether or not to suspend the appeal proceedings pending the Tribunal's judgment; consequently, it prematurely and unlawfully disclosed her claims and "litigation strategy" to WIPO and acted in breach of her right to due process.

The complainant asks the Tribunal to quash the impugned decision of 6 June 2011 as confirmed by that of 14 July, to award her material damages equivalent to the loss of remuneration and pension benefits, and to grant her 90,000 Swiss francs in moral damages. She also claims 9,000 Swiss francs in costs.

C. WIPO submits that, as the complainant's appeal was irreceivable as time-barred, so is her complaint. The alleged harassment took place in 2005 and she filed her initial request for review in November 2007. According to Staff Rule 11.1.1(b)(1), a staff member who wishes to appeal a decision shall as a first step send a request for review within eight weeks of the date on which it was notified to her or him. The Organization adds that the complainant did not avail herself of the procedures set out to deal with allegations of harassment. It denies that she would have suffered retaliation had she pursued the matter at the time, and stresses that the Tribunal, in Judgment 2915, held that the memorandum addressed to the Director General, in which she allegedly indicated that she was being harassed, did not include a specific claim of harassment. WIPO also submits that the complainant did not comply with the ninety-day limit for filing a complaint under Article VII, paragraph 2, of the Tribunal's Statute, because the complaint form she handed in on 1 September 2011 was not accompanied by a brief. In its view, she abused the correction procedure set out in Article 6(2) of the Tribunal's Rules. Further, it submits that the complainant's claim for moral damages is irreceivable for failure to exhaust internal means of redress to the extent that it exceeds the amount claimed in the internal appeal proceedings.

On the merits, WIPO denies any procedural irregularities with respect to the IAOD investigation. It stresses that the complainant was late in initiating the appeal proceedings, and asserts that the Administration requested the IAOD in due time to investigate in September 2008. The investigation began only in February 2009 due to limited resources, a heavy workload and the backlog of cases, but a report was issued in May 2009 following the appointment of a new investigator. According to the applicable rules, WIPO had no obligation to communicate the IAOD report to the complainant (mainly because of the confidential information it contained); it merely had to provide her with a summary of the investigator's conclusion, which it did. The Organization emphasises that she did not ask for a copy of the investigation report in her request for review.

In its view, the investigator properly interviewed witnesses – the Uniform Guidelines for Investigations do not require that interviews be conducted by two persons – and considered all facts. WIPO consequently denies that he showed a lack of independence or impartiality. It adds that the investigator was correct in advising her that she was not entitled to be assisted by a legal representative while being heard by him, because that possibility is granted only if it is justified by exceptional circumstances, which the complainant did not demonstrate.

The Organization denies any irregularities in the internal appeal proceedings. The delay was only of a few weeks and the complainant was not prejudiced given that the time limit prescribed for filing a complaint with the Tribunal starts on the date of notification of the Director General's final decision, in accordance with the Tribunal's case law. It also asserts that the Appeal Board applied the correct standard of review and considered all her arguments and all relevant facts. The Board did not try to legally and factually distinguish between harassment, abuse of authority and discrimination, but it did examine all the arguments she raised in that respect.

WIPO indicates that the complainant wrote to the Director of the Director General's Cabinet, one week after she allegedly screamed at her, thanking her for facilitating the process of exploring possibilities for granting her a consultancy contract after her retirement. The Appeal Board therefore legitimately concluded that there was little evidence of intimidation and harassment on the part of that Director. It asserts that it did not gain any advantage from having received her statement of appeal before the Appeal Board had decided to suspend the internal appeal proceedings, and emphasises that the Board did not solicit the Organization's views about the possibility of suspending the appeal.

D. In her rejoinder the complainant indicates that she seeks moral damages in addition to those sought in the course of the internal appeal proceedings, because of the manner in which those proceedings

were conducted. Thus, she could not have included them in her initial claim for moral damages.

E. In its surrejoinder WIPO maintains its position.

CONSIDERATIONS

1. The background facts for this complaint may be found in Judgment 2915. In February 2008, the complainant filed three internal appeals. The first appeal challenged the decision not to extend her mandatory retirement age and the second challenged decisions regarding the prorating of her daughter's education grant. In her third appeal, the complainant alleged that a series of decisions, acts and practices when considered as a whole, showed a consistent and ongoing pattern of harassment. The decisions challenged in the first two appeals also formed part of her harassment claim, as did the alleged discrimination in relation to a refusal to promote her to grade D-2. The Director General rejected the first two appeals. In accordance with the recommendation of the Appeal Board, the Director General referred the harassment claim to the IAOD.

2. Judgment 2915, delivered on 8 July 2010, arises from the complaints filed in relation to the above three decisions. The Tribunal dismissed the first complaint concerning the retirement age and set aside the decision giving rise to the second complaint to the extent that no provision was made for moral damages. As to the harassment claim, the Tribunal rejected the complainant's argument that the referral of the claim to the IAOD was without legal authority. However, as there was no final decision rejecting the harassment claim, the complaint was dismissed as irreceivable.

3. On 25 June 2009, before the delivery of Judgment 2915, the complainant was informed that the IAOD had concluded its investigation and issued its report, and that the Director General agreed with the IAOD's finding that there was no factual basis to

support the harassment allegation. Subsequently, the Director General denied the complainant's request for a reconsideration. The complainant filed an internal appeal against the 25 June decision in late November 2009.

4. It is convenient to add here that at the time she filed her internal appeal, the complainant had not been given a copy of the IAOD's report. However, in the context of the Judgment 2915 proceeding, the Organization forwarded a copy of the report to the Tribunal on 17 December which the Tribunal sent to the complainant on 21 December. On 22 December, the Appeal Board suspended the internal appeal until the conclusion of the proceeding before the Tribunal. The internal appeal proceedings resumed in September 2010.

5. In its 11 April report, the Appeal Board observed that the complainant had made out a case that insufficient action had been taken in relation to the dissolution of her Division in 2004. Additionally, in the Appeal Board's opinion, insufficient attention had been given to concerns expressed by the complainant to the Director General in 2005 about her career development and alleged prejudice by an influential staff member. The Appeal Board found no ongoing pattern in unrelated administrative decisions for the three-year period starting at the end of 2003. As to an incident in 2005 when the complainant's name was removed from a conference speakers list, the Appeal Board "did not exclude the possibility that the various adverse or insufficiently positive decisions had been influenced by prejudice"; however, "the evidence [was] insufficient to support the [complainant's] claim relating to '*a consistent and ongoing pattern of harassment*'", particularly into 2007, the last year of her service.

6. The Appeal Board concluded that the claim was "unfounded and several months time-barred by November 26, 2007, when the [complainant] appealed to the Director General" and recommended that the appeal be dismissed. On 6 June 2011, the Director General adopted the recommendation of the Appeal Board and dismissed the appeal.

7. WIPO adopts the Appeal Board's analysis and conclusion that the complainant's request for review and internal appeal were time-barred. WIPO submits that the 26 November 2007 initial request for review and the 14 February 2008 lodging of the internal appeal were many years after the alleged events occurred and beyond the time limits in the Staff Regulations and Staff Rules. WIPO claims it therefore follows that the complaint before the Tribunal is time-barred. The Organization also disputes the complainant's position that the last actionable event determines the commencement of the time limit. Rather, as the Appeal Board found, it is the establishment of a pattern of harassment that governs.

8. It is well settled that "an allegation of harassment must be borne out by specific facts, the burden of proof being on the person who pleads it, and that an accumulation of events over time may be cited to support an allegation of harassment" (see Judgment 2100, under 13, and the case law cited therein). Where the allegation of harassment is based on an accumulation of events, the date of the last event is the date for the purpose of calculating the relevant time limits.

9. In the present case, for the purpose of determining receivability, the Appeal Board failed to appreciate the distinction between allegations of incidents that cumulatively give rise to the claim of harassment and the merits of the allegations. The Appeal Board first found that there was insufficient evidence to support the claim of a consistent and ongoing pattern of harassment, "especially relating to the continuation of any such harassment into the last year of her service, 2007", and then concluded that the appeal was "several months time-barred". In effect, the Appeal Board conflated the assessment of the merits with the threshold question of receivability. This led the Appeal Board to erroneously conclude that the claim was time-barred. As the request for review was sent to the Director General within the statutory eight weeks from the date of the last incident and the internal appeal from the Director General's review was also filed within the prescribed time limit, the claim was clearly receivable.

10. An additional observation is required. Contrary to the Organization's assertion, the determination of the receivability of an internal appeal itself has no bearing on the receivability of a complaint filed with the Tribunal. The latter is governed by the Tribunal's Statute. Indeed, a decision on receivability in an internal appeal is reviewable by the Tribunal.

11. WIPO also contends that the complainant's original submission consisted of a complaint form without an accompanying brief in contravention of Article 6(1)(b) of the Tribunal's Rules. This position is rejected. In Judgment 3299, under 1, the Tribunal stated:

“The Organization has raised irreceivability as a threshold issue on the ground that when the complaint was filed on 20 April 2011, it was filed without the supporting brief which Article 6(1) of the Rules of the Tribunal requires. The Tribunal has consistently held that a complaint would not thereby be rendered irreceivable because Article 6(2) of the Rules of the Tribunal permits a complaint to be corrected within the time signified by the Registrar (see, for example, Judgment 3225, under 5). The Tribunal has stated that the Rules provide this facility to international civil servants as a means of protecting them against the strict procedures of the Statute and the Rules with which they are not necessarily familiar (see, for example, Judgment 2439, under 4). Article 6(2) directs the Registrar of the Tribunal to call upon the complainant or her or his agent to meet the requirements for correction within 30 days.”

In the present case, the Registrar asked the complainant to correct her complaint form within thirty days by submitting her brief and supporting documents. Before that time had expired the complainant requested and was granted an extension of time within which she filed the required materials.

12. The complainant alleges unreasonable delay in the IAOD investigation and in the overall internal appeal process. The complainant claims that there was an inordinate delay from the time of the decision to refer the claim to the IAOD, 18 September 2008, until the Director General notified his decision confirming the IAOD findings on 25 June 2009. This, the complainant submits, is a breach of the Organization's duty to investigate harassment claims promptly and thoroughly.

13. WIPO maintains that the investigation was conducted in a timely manner. The investigation could only be started on 1 February 2009 due to the IAOD's limited resources, heavy workload and backlog of cases. Additionally, as the IAOD had only one investigator in September 2008, one had to be recruited externally. Once the investigator started the investigation, it was completed promptly.

14. It is accepted that once the investigation was started it was completed in a timely manner. However, given the serious nature of a claim of harassment, an international organization has an obligation to initiate the investigation itself in a timely manner and the corollary obligation of ensuring that the internal body responsible for investigating and reporting on claims of harassment has the necessary resources to carry out that responsibility (see Judgment 3069, under 12). A delay of five months before the investigation of a claim of harassment is undertaken is unreasonable and, in this case, also contributed to the overall length of the internal appeal process.

15. As to the internal appeal process, in addition to her broader claim of unreasonable delay, the complainant also argues that the Appeal Board's submission of its conclusions to the Director General six weeks past the deadline provided in the rules requires that the impugned decision be set aside. There is no legal basis for this assertion. Other than in extraordinary circumstances, the appropriate remedy for delay is an award of moral damages. It is true that the Appeal Board did not meet the deadline for the submission of its conclusions. However, it is also observed that the claim was both factually and legally complex, involving a detailed examination of multiple alleged incidents. This observation should not be taken in any way as condoning a failure to meet a deadline. However, in assessing whether a delay is unreasonable, the complexity of the matter is a relevant consideration. It is noted that the complainant's requests for reconsideration added to the overall processing time of the internal appeal. Additionally, as a consequence of the Tribunal proceeding there was in effect the equivalent of two internal appeal processes.

16. While the internal appeal process was certainly lengthy, only a portion of that duration can be attributed to unreasonable delay on the part of the Organization for which the complainant will be awarded moral damages.

17. The complainant also submits that the investigation of her claim is tainted by procedural irregularities. Only one of these has merit. She submits that the failure to provide her with a copy of the IAOD report at the time she was notified of the Director General's decision amounts to a violation of her due process right to have access to all information reasonably necessary to prepare her case. She also alleges that the forwarding of the report to the Tribunal without her consent constitutes a breach of confidentiality by the Organization.

18. The Organization points out that the complainant did not request a copy of the report in her July 2009 request for review. Relying on the Revised WIPO Internal Audit Charter, paragraphs 9 and 10, it is asserted that investigation reports are confidential and that an exception was made to the Organization's standard procedures by forwarding the report to the Tribunal. Moreover, in accordance with the WIPO Investigation Manual, the complainant was given a brief confidential summary of the report's conclusion on 25 June 2009.

19. It is well settled that a staff member must have access to all evidence upon which a decision concerning that staff member is based. As the Tribunal observed in Judgment 3264, under 15:

“It is well established in the Tribunal's case law that a ‘staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him’. Additionally ‘[u]nder normal circumstances, such evidence cannot be withheld on grounds of confidentiality’ (see Judgment 2700, under 6). It also follows that a decision cannot be based on a material document that has been withheld from the concerned staff member (see, for example, Judgment 2899, under 23).”

It is equally well settled that a statement in a staff regulation or other internal document that a report is confidential will not “shield a report [...] from disclosure to the concerned official”. Moreover, “[i]n the

absence of any reason in law for non-disclosure of the report, such non-disclosure constitutes a serious breach of the complainant's right to procedural fairness" (Judgment 3264, under 16).

20. The fact that the complainant did not request a copy of the report of the IAOD, which investigated her claim of harassment, is irrelevant. She was entitled to receive a copy of it. Equally, it is not an answer to say that the complainant was given a summary of the report. In addition to the fact that she was entitled to the entire report, the summary did not contain any of the evidence upon which the conclusion was based. It simply stated that "[t]he IAOD investigation has not found facts that support the complainant's allegations or that show she was entitled to have matters requested by her approved or that she was subjected to harassment, whether through a single incident or as an on-going pattern". The complainant was effectively precluded from challenging the factual assertions and credibility of the witnesses interviewed and was left not knowing what evidence if any should be marshalled to counter the investigator's conclusions.

21. As stated in the case law, a decision cannot be based on a material document that has been withheld from the staff member. In the present case, the failure to provide the complainant with a copy of the investigation report prior to the Director General taking his 25 June decision renders that decision fundamentally flawed. However, as that decision was overtaken by subsequent events, the only remedy today is an award of moral damages.

22. The complainant claims that the investigator breached her right to have a legal representative to assist her during her interview. There is no basis for this position in the case law or in the Staff Regulations, Rules or other internal documents.

23. The complainant raises concerns arising from the investigator's witness interviews. She points out that Ms W.-G. refused to sign her transcript; both Ms W.-G. and Mr S. were interviewed by the investigator alone; the investigator was unprepared

for his interview with Mr S.; Mr N. was only interviewed by telephone and there was no record of a signed statement or transcript.

24. She also makes a number of allegations against the IAOD investigator and the IAOD Director. She claims that the investigator threatened and intimidated her, and breached his duty of confidentiality in relation to another staff member. As detailed above, she makes a number of criticisms regarding the report itself. She also points out that the WIPO Staff Association challenged the investigator's re-engagement. As concerns the IAOD Director, the complainant claims that he made false statements in his May 2009 memorandum regarding her review of the transcript of her interview and being absent. She notes that he is no longer with the Organization and adds that the Staff Association shares her concerns. In the complainant's view, these concerns cast doubt on the integrity, credibility and impartiality of the internal investigation process.

25. With the exception of one matter, these assertions and allegations are without an evidentiary foundation. However, as the Appeal Board found, the investigation into the complainant having been removed from a conference speakers list was not sufficiently pursued and was clearly inadequate. It is not possible to say whether this would have had any impact on the conclusion that the complainant had failed to prove the claim of harassment. However, the lack of thoroughness does entitle the complainant to moral damages.

26. As to the Appeal Board's opinion and conclusions, the Appeal Board conducted a very detailed and thorough examination of the evidence, and carefully and objectively weighed the evidence in making its findings of facts and in arriving at its conclusions. The Tribunal is unable to conclude that the Appeal Board's conclusions involved reviewable error.

27. However, for the reasons indicated above, the complainant is entitled to moral damages in the global amount of 2,500 Swiss francs and, as she was partially successful, costs in the amount of 500 Swiss francs. All other claims will be dismissed.

DECISION

For the above reasons,

1. WIPO shall pay the complainant moral damages in the amount of 2,500 Swiss francs.
2. WIPO shall also pay her costs in the amount of 500 Swiss francs.
3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 15 May 2014, 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 9 July 2014.

GIUSEPPE BARBAGALLO
DOLORES M. HANSEN
HUGH A. RAWLINS
DRAŽEN PETROVIĆ