

R.
v.
WIPO

126th Session

Judgment No. 3999

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms N. R. against the World Intellectual Property Organization (WIPO) on 4 August 2014 and corrected on 6 October 2014, WIPO's reply of 19 January 2015, the complainant's rejoinder of 30 April and WIPO's surrejoinder of 5 August 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 not to reclassify her post.

The complainant joined WIPO in 1997. In 2007, following a competition, she was appointed as a Senior Program Officer at grade P-4. By an unsigned internal memorandum of 17 July 2007 the complainant's then supervisor recommended that she be promoted to grade P-5 on merit. The complainant did not receive a promotion at that time.

In July 2010 she was transferred to the Small and Medium-Sized Enterprises (SMEs) Division within the Global Issues Sector.

On 2 May 2011 WIPO issued Office Instruction No. 13/2011 regarding promotion. It informed staff that under the new system of promotions, a staff member would be eligible for promotion in only two

cases: either following the upward reclassification of the post to which she or he was assigned, or through reassignment to a higher grade following a competition.

By an internal memorandum of 26 September 2011 the complainant's direct supervisor, the Director of the SMEs Division, requested that her grade P-4 post of Senior Program Officer be reclassified as Senior Counsellor at grade P-5 and that she be promoted to grade P-5 and appointed to the newly classified post. However, neither the memorandum nor the attached job description was endorsed by Mr W., who, as program manager, had to confirm, in accordance with paragraph 8 of Office Instruction No. 13/2011, that the complainant satisfied the requirements of Staff Regulation 4.3(b). Nor were they forwarded to the Human Resources Management Department (HRMD).

Having met with Mr W. in October, the complainant sent him an email on 15 November 2011 enquiring about the status of the request of 26 September. Mr W. replied the same day that he had discussed the reclassification of her post with Mr P., the Deputy Director General for Innovation and Technology, and that they had agreed not to submit any reclassification requests until such a time as restructuring changes within WIPO which affected the SMEs Division had been implemented.

The complainant subsequently met with Mr P. several times to discuss the matter. In an email of 23 May 2012 she requested that he provide her with the reasons for the delay in forwarding the request for reclassification of her post to HRMD. Mr P. replied the following day and explained, among other things, that at that time no post reclassifications were possible except as a result of the restructuring process. Following another exchange of emails, on 1 June 2012 Mr P. wrote to the complainant and stated that as the request for reclassification of 26 September 2011 had not been endorsed by Mr W., it had not been submitted to HRMD.

On 27 June 2012 the complainant requested the Director General to review Mr P.'s decision of 1 June 2012 not to forward the request for reclassification of her post to HRMD. By a letter of 20 August 2012 she was informed that the Director General maintained the decision not to forward the request.

On 15 November 2012 the complainant filed an appeal with the Appeal Board in which she challenged what she characterized as the decision denying the request to reclassify her post, as affirmed by the Director General on 20 August 2012. In its conclusions of 11 March 2014 the Appeal Board found the appeal receivable on the basis that the decision of 1 June 2012 was a new decision that did not merely confirm the earlier decision of 15 November 2011. It further found that the scope of the appeal was limited to the Administration's refusal to process the request for classification dated 26 September 2011 (and hence did not include matters related to the recommendation of 17 July 2007). The Appeal Board recommended that the Director General award the complainant moral damages in the amount of 200 Swiss francs for each month from 16 November 2011 up until the time she was notified by the Administration of concrete plans for consideration of the recommendation for reclassification of her post or of other appropriate action. It also recommended that she be awarded costs corresponding to the fee paid for eight hours of legal services by her lawyer.

In a letter of 9 May 2014 the complainant was informed that the Director General had decided to endorse the Appeal Board's recommendations only with respect to the award of moral damages. In addition, the complainant's post would undergo a reclassification exercise following the steps set out in the letter. That is the decision that the complainant identifies on the complaint form as the impugned decision.

A Classification Committee subsequently considered the complainant's post during its session in December 2014. It agreed that the post should be confirmed at grade P-4 and the complainant was so informed by an internal memorandum of 13 January 2015.

Before the Tribunal, the complainant seeks the reclassification of her post at grade P-5, with effect from 17 July 2007, and payment of the difference between her current grade P-4 salary, including step increases and benefits, and the amounts she would have received had her post been reclassified at grade P-5 from that date until the date of the reclassification. In the event that the Tribunal does not order the reclassification of her post, she seeks payment of the above mentioned

difference between her current grade P-4 salary and emoluments and a grade P-5 salary and emoluments, with effect from 17 July 2007 and for as long as she continues to perform duties and functions at the grade P-5 level. She claims actual damages as well as moral and exemplary damages. She seeks reimbursement of the full legal fees and expenses she has incurred. She also claims interest on all amounts awarded by the Tribunal.

WIPO objects to the receivability of several of the complainant's claims and states that they are in any case unfounded. It asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. In an unsigned internal memorandum dated 17 July 2007 and addressed to the Director of HRMD, the complainant's then supervisor recommended that the complainant be promoted to grade P-5 on merit. No administrative action was taken and the complainant did not contest the lack of action at that time.

2. In an internal memorandum dated 26 September 2011 and addressed to the Director of HRMD, through Mr W., the complainant's direct supervisor requested the reclassification of the complainant's post to grade P-5 as well as her appointment to that post and her promotion to P-5. Mr W. informed the complainant, in an email dated 15 November 2011, that after consulting with Mr P. he had decided not to forward the request to the Director of HRMD. He stated, inter alia, that he and Mr P. had "agreed not to submit any reclassification request until such time as the SMEs Division ha[d] been transferred and the new structure [was] established". He further stated: "the classification of a post needs to take into account not only the current responsibilities, but also their likely development in the foreseeable future. As you will appreciate, the classification exercise does not look at the person, but only at the post in question and its function within a given organizational set-up. I do not have [the] option of proposing you for a promotion based on your merits since this possibility has been abolished some time ago."

3. By Office Instruction No. 21/2012 of 5 April 2012 the Director General informed staff that the SMEs Division had been renamed the SMEs Section and transferred to the Innovation Division with effect from 1 January 2012. The complainant renewed her request for reclassification following that notification. In an email dated 1 June 2012 Mr P. responded, stating, inter alia: “[I]acking approval from the Program Manager, the draft proposal was not submitted to HRMD, and it has remained merely a draft. I should add that, had I considered it on its merits I would not have approved it myself. It does not focus sufficiently on the requirements of the job or attempt to map them to any standard for a P5 grade. Instead, it conflates the issue of the job with your individual performance in it.”

4. In a letter dated 27 June 2012 addressed to the Director General, the complainant requested a review of the 1 June 2012 decision not to approve and forward to HRMD the request for reclassification of her post. By a letter from the Director of HRMD dated 20 August 2012 the complainant was informed of the Director General’s decision to reject her request for review and to confirm the decision not to forward the request for reclassification to HRMD. The complainant filed an internal appeal against that decision.

5. In its conclusions dated 11 March 2014 the Appeal Board recommended as follows:

- “(a) allow the Appeal to the extent indicated below;
- (b) award the [complainant] moral damages amounting to CHF 200 for every month that will have passed since November 16, 2011 up to the time when she is notified by the Administration of concrete plans for the consideration of the recommendation for the reclassification of her post or of other appropriate action;
- (c) award legal costs to the [complainant] corresponding to the fee paid for eight hours of service of her lawyer.”

6. By a letter dated 9 May 2014 from the Director of HRMD the complainant was notified of the Director General’s decision to endorse in part the recommendations of the Appeal Board. Essentially, although noting several inconsistencies in the Appeal Board’s reasoning, and

reserving the right to raise any and all procedural and substantive issues if a complaint was brought before the Tribunal, the Director General decided to subject the complainant's post to a reclassification exercise and to award the complainant the moral damages as specified under paragraph (b) of the Appeal Board's recommendations, set out in consideration 5, above. He did not endorse the recommendation for the award of legal costs as "the Organization does not normally compensate staff members for any legal costs incurred at th[e] internal, peer-review, level of the proceedings, which are perfectly navigable by staff members without any legal training". This is the decision impugned in the present complaint.

7. The complaint is based on the following grounds: abuse of discretion, violation of the principle of equal pay and fair treatment, mistake of fact, violation of promise, bias and prejudice, and excessive delay in the internal appeal proceedings.

8. The complainant requests oral hearings. As the submissions of the parties are sufficient to allow the Tribunal to reach a reasoned decision, there is no need to hold hearings.

9. The Tribunal notes that the decision which was contested in the internal appeal proceedings was the refusal to submit the complainant's post to a reclassification exercise. That was remedied by the final decision dated 9 May 2014, ordering that a reclassification exercise be undertaken. In fact, the Director General's decision was implemented and a reclassification exercise took place in December 2014, with the result that the Classification Committee found that the complainant's post was properly classified at grade P-4. The complainant was informed of the outcome of the reclassification exercise by an internal memorandum dated 13 January 2015, that is, after she filed the present complaint. In addition, the Tribunal finds it useful to note that even if it were possible to consider the complainant's claim regarding reclassification, it would not be able to order the immediate reclassification of her post as requested. It is well settled in the case law that the Tribunal will not order the promotion or reclassification of a

staff member, as such decisions are discretionary and involve specialist evaluation (see, for example, Judgment 3370, under 8).

10. Insofar as the complainant contests the decision not to submit the request for reclassification of her post to HRMD, the Tribunal finds that this claim is moot as that decision was replaced by the final decision of 9 May 2014. With regard to the issues raised by the complainant to support her claim regarding the unlawfulness of the decision not to consider reclassifying her post, they are superseded by the final decision. Moreover, her claims of bias and prejudice, violation of promise, mistake of fact, violation of the principle of equal pay and fair treatment and abuse of discretion are not proven. In light of the above considerations, the Tribunal limits itself to examining the claim against the Director General's decision not to endorse the Appeal Board's recommendation to award costs, the claim regarding the excessive delay in the internal appeal proceedings, and the claim regarding the amount of moral damages awarded.

11. Taking into account that WIPO does not generally award costs for internal appeals and that the appeal was not complicated, the Tribunal finds that the Director General's decision not to award costs for the internal appeal procedure was open to him.

12. The time that elapsed from the filing of the internal appeal until the Appeal Board issued its conclusions was approximately 16 months. This included a period during which extensions were granted with respect to the filing of the submissions while there were attempts to reach a settlement. The Director General's final decision was notified to the complainant within the time limit provided by the Staff Regulations and Rules. In these circumstances the Tribunal does not consider the duration of the internal appeal proceedings to be excessive.

13. The Director General noted, in his 9 May 2014 decision, that the Appeal Board had recommended an award of moral damages in the amount of 200 Swiss francs per month for the period from 16 November 2011 to the notification of concrete plans for the consideration of the

recommendation for the reclassification of the complainant's post or of other appropriate action, despite the Appeal Board's finding that the decision which the complainant challenged was the decision of 1 June 2012. The Tribunal finds that the 15 November 2011 decision postponed consideration of post reclassification until after the transfer of the SMEs Division and the relevant reorganization. The 1 June 2012 decision did not merely confirm the 15 November 2011 decision, but was a new decision from which the internal appeal stemmed, as it stated the explicit refusal to forward the request for reclassification of the complainant's post after the transfer of the SMEs Division. Even without considering the damages awarded for the period of time from November 2011 to June 2012 in the calculation of moral damages, the Tribunal finds that the award was more than sufficient in the circumstances.

14. In light of the above considerations, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 8 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

YVES KREINS

DRAŽEN PETROVIĆ