

D. (No. 3)

v.

WIPO

139th Session

Judgment No. 4964

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms N. D. against the World Intellectual Property Organization (WIPO) on 17 September 2020 and corrected on 2 November 2020, WIPO's reply of 8 February 2021, the complainant's rejoinder of 1 May 2023 and WIPO's surrejoinder of 2 August 2023;

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, taken following an investigation, to dismiss her complaint of harassment and sexual harassment against Mr E.

Facts relevant to this case may be found in Judgment 4846, concerning the complainant's first complaint, and in Judgments 4965, 4966, 4967, 4968, 4969 and 4970, also delivered in public this day, concerning the complainant's fourth, fifth, sixth, seventh, eighth and tenth complaints, respectively.

On 15 May 2016, the complainant started working as Evaluation Officer, at grade P-3, in the Evaluation Section of the Internal Oversight Division (IOD), under the supervision of Mr E., who was a P-5 staff member at the time, and Head of the Internal Audit Section and had

been designated as Acting Director, IOD. The IOD comprised of three sections: Evaluation, Investigation, and Internal Audit. Mr E. remained the Acting Director, IOD, until 1 February 2017, when Mr R.S. was appointed as the new Director.

On 24 May 2017, the IOD received an anonymous complaint stating that the complainant had engaged in unauthorized outside activities while being a WIPO staff member. On 31 May, the complainant was notified of the opening of an investigation against her.

On 1 June 2017, the complainant went on sick leave. On 28 June, the complainant submitted to WIPO's medical insurance a claim of service-incurred illness, containing allegations of "grooming, sexual harassment, abuse of power and mobbing" by Mr E. and that the latter "coerc[ed] [her] into a non-consensual intimate relationship". The complainant's claim of service-incurred illness was referred to the Director of IOD, in view of the allegations of misconduct contained therein.

Effective 30 June, Mr E. separated from WIPO to join another international organization.

On 12 July 2017, the Director of IOD, Mr R.S., notified the Independent Advisory Oversight Committee (IAOC) that the IOD had received a complaint against a former IOD staff member and sought the IAOC's advice on how to proceed, pursuant to paragraph 19 of the Internal Oversight Charter. On 1 August 2017, the IAOC responded that it was of the view that Mr R.S. did not have a conflict of interest, and therefore could "retain full control of the preliminary evaluation and of the resulting [...] investigation, if any" of the complainant's allegations against Mr E. However, the IAOC found that "any other staff member of IOD would be in a conflict of interest situation" and therefore advised "not to assign internal resources to the investigation of this case".

On 11 September 2017, the Director of IOD decided to outsource the preliminary evaluation of the complainant's allegations against Mr E. to an external investigation company.

On 12 September, the complainant filed a complaint of harassment against Mr E. in which she alleged that Mr E. had engaged in “improper and unwelcome conduct beginning in early 2017 which created for [her] an intimidating, hostile and offensive work environment as defined in [Office instruction] 47/2016 at paragraphs 10 (a) abuse of authority; 10 (d) harassment; and 10 (f) sexual harassment”. In her complaint, the complainant further alleged that Mr E. “forced [her] to engage in intimacy” on 21 May 2017.

Upon completion of the preliminary evaluation of the complainant’s harassment complaint, the full investigation of the matter was entrusted to a second external investigation company. The manager of the second investigation company conducted the investigation as the external investigator (“the external investigator”).

On 16 May 2018, the Director of IOD sought again the advice of the IAOC on whether he should continue to overview the investigation. On 23 May, the IAOC confirmed its previous advice that there was no conflict of interest preventing him from managing the investigation.

On 16 August 2018, the complainant filed a request for protection against retaliation with the Chief Ethics Officer. Upon review, the Chief Ethics Officer found the complainant’s allegations of retaliation to be unsubstantiated. The Chief Ethics Officer’s determination was ultimately confirmed by the Ethics Office of the United Nations Office for Project Services (UNOPS).

On 24 January 2019, the external investigator notified the complainant of the completion of the investigation into her harassment complaint and provided her with the “overall conclusion” section of the investigation report. According to the report, the complainant’s allegations of sexual harassment and sexual assault were found to be unsubstantiated. Specifically, the investigation found that the complainant and Mr E. engaged in an intimate relationship consensually. However, the investigation substantiated that Mr E. failed “to avoid the perception of abuse of authority and impropriety resulting from the inequality between [Mr E.] and [the complainant]” and harassed the complainant “through repeated approaches and communications between 1 June 2017 and 7 August 2017, and 19 October 2017”. The

investigation further revealed that Mr E. had engaged in unauthorized outside activities and that he had failed to recuse himself from being involved in the preliminary evaluation phase of the investigation into the allegations of unauthorized outside activities involving the complainant.

By letter of 26 February 2019, the Director General informed the complainant of his decision to dismiss her complaint of harassment in its entirety and to award her 2,000 Swiss francs for the delay in issuing the investigation report. The Director General noted that Mr E. ceased to be a WIPO staff member on 30 June 2017 and concluded that Mr E.'s attempts to contact the complainant in June 2017 "should be seen in the very specific context in which they were made, that is, in the immediate aftermath of a love affair between two adults who, up until late May 2017, shared mutual feelings and were considering a life together". Regarding the complainant's allegations of abuse of authority, the Director General noted that "what the External Investigator considered to be a perceived or potential 'abuse of authority' is not an actual abuse of authority against [the complainant] within the meaning of Office Instruction No. 47/2016". Regarding the investigation launched against the complainant, the Director General found that "the evidence [...] tends to support a finding that Mr [E.] breached confidentiality", but that such disclosure was to the complainant's benefit, and that any failure on his part to recuse himself from taking part in the investigation did not constitute harassment. Finally, the Director General observed that the finding concerning Mr E.'s engagement in unauthorized outside activities was entirely irrelevant insofar as the complainant's complaint of harassment was concerned. The Director General attached to his letter "relevant excerpts of the Investigation Report", in the form of a redacted investigation report, without annexes.

On 11 March 2019, the complainant resigned from WIPO, with effect from 11 April 2019.

On 26 May 2019, the complainant lodged an appeal with the WIPO Appeal Board (WAB), directed against the 26 February 2019 decision. In her appeal, the complainant requested to be provided with "a fully

unredacted copy of the complete investigation report into her complaint, with all annexes and attachments”.

In its report dated 20 April 2020, the WAB concluded that the complainant’s allegations of sexual harassment and assault, abuse of authority and harassment were unsubstantiated. It also found that the investigation into the complainant’s complaint had been conducted in a “fair, transparent and professional way” and was not tainted by any conflict of interest. As a result, the WAB recommended to dismiss the complainant’s appeal as unfounded. Additionally, the WAB recommended to award the complainant moral damages for the delay in issuing its report. It further recommended that WIPO, through a change of policy, clarify in which cases external investigative entities may be called upon to conduct investigations involving WIPO personnel and the criteria against which these entities are selected. Regarding the complainant’s request to be provided with an unredacted copy of the investigation report, the WAB noted that the complainant had been provided with a copy of the investigation report which was “redacted only with respect to the investigative findings concerning the subject of the investigation [...] in order to protect the confidentiality of information exclusively concerning the latter” and that “the relevant excerpts of the investigative findings [had been] provided to the [complainant] in compliance with paragraph 23 of [Office Instruction] 47/2016”.

By letter of 19 June 2020 from the Director, Human Resources Management Department (HRMD), the complainant was notified of the Director General’s decision to dismiss her appeal. The Director General stated that he concurred with the WAB’s findings on the merits of her complaint and that he had decided to award her 350 Swiss francs for the delay in the internal appeal procedure. The Director General noted that the complainant had been provided with “relevant excerpts of the investigation report, in accordance with paragraph 23 of Office Instruction No. 47/2016”. Regarding the WAB’s recommendation involving policy considerations, the Director General indicated that he had conveyed the points raised to the Director of IOD for appropriate consideration. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order that a new investigation into her harassment complaint against Mr E. be conducted by an “independent, reputable, external investigation company” which would agree not to conduct any other assignment for WIPO for the next five years. She further asks the Tribunal to order that an external investigation of “WIPO Administration” and the external investigation company it mandated “covering up of the sexual harassment and assault complaint” be conducted. She requests to be provided with a copy of the unredacted investigation report issued by the external investigator into her harassment complaint as well as “all annexes and witnesses transcripts undertaken by WIPO”. She claims material, moral and exemplary damages, including for the delay in completing the investigation, in the amount of at least 250,000 Swiss francs. Finally, she seeks the reimbursement of her legal fees, the payment of interest as well as “[s]uch other relief as is fair, just and necessary”.

WIPO asks the Tribunal to dismiss the complaint in its entirety and submits that some aspects of the complaint are irreceivable.

CONSIDERATIONS

1. In her complaint filed before the Tribunal on 17 September 2020, the complainant challenges a decision of the Director General of WIPO made on or about 19 June 2020. By that decision he dismissed an appeal against an earlier decision to dismiss a complaint by the complainant of sexual harassment of her by Mr E. An overview of the relevant facts is set out earlier in this judgment and need not be repeated.

2. The complainant sought oral proceedings, but the Tribunal is satisfied it is in a position to make a fair and balanced decision having regard to the written material provided by the parties.

3. In her brief, the complainant advances her legal arguments under five general headings. The first is headed: “Contrary to the false statement of WIPO Administration and the [WIPO Appeal Board (WAB)], the investigation of the sexual harassment complaint was conducted with violations of Uniform Principles and Guidelines for Investigations to cover up sexual harassment and assault at WIPO”. The second is headed: “WIPO Administration breached it[s] duty of care to ensure quality and impartiality of the investigation, which constitutes obstruction of justice and is potentially subject to criminal charges”.

4. The third is headed: “The impugned decision of the former Director General of WIPO [as] well as [the] Administration and [the] WAB and the roles they played in covering up sexual harassment and assault served the only purpose of avoiding any responsibility for creating a hostile work environment which was favorable for intimidation, harassment, mobbing and sexual harassment and assault”. The fourth heading is: “The impugned decision of the former Director General of WIPO constitutes obstruction of justice and violence against women. It violated the basic human rights of the Complainant as well as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”. The fifth and final heading is: “The impugned decision of the former Director General of WIPO threatens institutional credibility and security of the [United Nations (UN)] system”.

5. These headings have a certain, and probably entirely unnecessary, *ad hominem* character to them. But in her pleas there is a straightforward point favourable to the complainant and decisive of these proceedings. The point concerns the definition of both sexual harassment and harassment in normative legal documents.

6. The relevant definition of sexual harassment was found in Office Instruction 47/2016 and provided:

“Sexual harassment is any unwelcome sexual advance, request for sexual favor, verbal or physical conduct or gesture of a sexual nature, or any other behavior of a sexual nature that might reasonably be expected or be perceived to cause offense or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an

intimidating, hostile or offensive work environment. While typically involving a pattern of behavior, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders.”

7. The relevant definition of harassment in the same office instruction provided:

“Harassment is any improper and unwelcome conduct, whether verbal or physical, that might reasonably be expected or be perceived to cause offense or humiliation. It may take the form of words, gestures or actions made on a cumulative or, in exceptional cases, a one-time basis, which threaten, demean, isolate, or belittle a staff member, cause personal humiliation or embarrassment, or create an offensive, hostile or intimidating work environment.”

8. For present purposes, both definitions contain two relevant elements. The first is that the conduct is unwelcome. The second is that the conduct might reasonably be expected or be perceived to cause offence or humiliation. Additionally, the Tribunal’s case law clearly establishes that the intention of the alleged harasser is not a necessary element (see, for example, Judgment 4837, consideration 4). That is to say, it is unnecessary to establish the alleged harasser intended to engage in conduct which causes offence or humiliation. A third element in the definition of sexual harassment is that the impugned conduct has a sexual element which is described in a variety of ways in the opening words of the definition.

9. The complainant’s allegation of sexual harassment first emerged, in a formal context, when the complainant submitted in June 2017, a claim of service-incurred illness involving, amongst other things, allegations of sexual harassment by Mr E. In September 2017, she filed a complaint of harassment, including sexual harassment, by Mr E. A day before this occurred, a decision had been made by the Administration to outsource to an external investigation company the preliminary evaluation of the complainant’s allegations, including the allegation of sexual harassment, which led to a full investigation by another external investigation company. The report of that latter investigation was finalized in January 2019. Following the provision of

the final investigation report, the Director General decided in February 2019 to dismiss the complainant's complaint of harassment. This led to an appeal by the complainant considered by the WAB which issued its report on 20 April 2020 recommending, relevantly, the appeal be dismissed. The Director General did so in the impugned decision made on or about 19 June 2020.

10. The difficulty with the approach taken by the investigator, the WAB and the Director General – whose approaches were essentially the same – was that insufficient attention was paid to the precise words of the definition of sexual harassment and related case law.

11. Before descending into detail, it is appropriate to note the approach of the Tribunal to findings of fact made by investigative bodies particularly where individuals have been interviewed by the investigator. The Tribunal gives deference to the body and its findings of fact and will only interfere with its findings in the case of manifest error (see, for example, Judgment 4674, consideration 5). That is not to suggest that conclusions reached from the facts as found, particularly if they involve a legal element, are to be afforded the same status.

12. The Tribunal first considers the approach of the investigator though, in material respects, it does not differ from the approach of the WAB and the Director General. The material before the investigator included what were described in the investigation report, as voluminous WhatsApp messages exchanged between the complainant and Mr E. between 11 January 2017 and 21 May 2017. They spanned 426 pages of Word and were constituted by close to 19,000 exchanges over a period of 130 days. In a section of the report headed “Expressions of reticence and response [by the complainant]”, the investigator found, as a matter of fact:

“It is noted that indeed, on many occasions in WhatsApp [the complainant] voiced resistance about [Mr E.]’s advances, and on several occasions, she stated she felt ‘lost’ or ‘confused’ or asked him to ‘stop’ [...] However, these messages also show ambiguity or a change of mind and reciprocation later on in conversations.”

These findings of fact clearly raised for consideration whether any communications between Mr E. and the complainant and his conduct more generally was unwelcome as comprehended by the first element of the definition referred to in consideration 8 above. It is quite conceivable, and consistent with the definition, for conduct to constitute sexual harassment even if other conduct between the harasser and the victim might not be. It is not a question of notionally “averaging out” the conduct of the harasser. No consideration was given by the investigator to this issue of whether any of the communications and conduct more generally of Mr E. was unwelcome. Nor was it considered by the WAB and the Director General.

13. As noted earlier, the second element is that the conduct might reasonably be expected or be perceived to cause offence or humiliation. It is not a large step to conclude that conduct is of that character if, in fact, it is unwelcome conduct. Whether any of Mr E.’s conduct might be expected or perceived to have caused offence or humiliation was not an issue addressed by the investigator nor the WAB and the Director General.

14. The ultimate conclusion of the investigator on the question of sexual harassment, based on the findings of fact made, was in the following terms:

“[I]nitially, there were no clear signs [the complainant] objected to [Mr E.]’s advances and flirtations. In time she became ambiguous in her responses. However, while she seemed to have conveyed her objections, and feelings of confusion and guilt to her friends, she was ambiguous to [Mr E.] and showed reciprocity in their exchanges and communicated her feelings for him. And while [the complainant] regularly raised her concerns with [Mr E.], most notably about involvement with a married man and their frequent and possibly conspicuous interaction at the office, there is no clear and convincing evidence that [Mr E.] manipulated [the complainant] into a relationship. She did not state unequivocally to [Mr E.] that she wanted him to stop approaching her, or that she considered his approaches as sexual harassment.

Considering the reciprocal actions during the relationship, the mutual expressions of appreciation and affection, the number of occasions during which [the complainant] and [Mr E.] shared moments of intimacy, and the

absence of unequivocal opposition to [Mr E.]’s advances (not to be confused with [the complainant’s] frequently voiced opposition and objection to his marital status), the allegation of sexual harassment is not supported.”

15. This analysis pays scant regard to the definition of sexual harassment. Why the investigator had recourse to notions such as “unequivocal opposition” is far from clear. Even if the complainant’s approach was equivocal, it does not resolve the question of whether there was sexual harassment. Moreover, this analysis may possibly be treating the perceptions and intentions of Mr E. as relevant. If so and as noted earlier, his intentions would not be to the point.

16. Of some significance is the context in which Mr E.’s conduct should be assessed together with the position of the complainant and how her responses should be evaluated and characterized. In this respect, the following findings of the investigator are relevant:

“However, [Mr E.]’s proximity to [the complainant]’s office, his supervisor’s position in January 2017, his informal management role over the Evaluation Section from 1 February 2017 onwards, his role during the period of the handover of responsibilities to [Mr S.], his seniority over [the complainant], the inequality of their positions and the appearance of being in a position of influence, together constitute an environment which would have made it difficult for [the complainant] to truly make her own choices and not be influenced or feel obligated by [Mr E.]’s seniority, especially in the beginning of their relationship. [The complainant] would have not been able to refuse approaches from [Mr E.] if they commenced for legitimate, professional reasons, and it would have been difficult to cut them off once they started to get more personal. Further, there may well have been professional situations where it would have been difficult for [the complainant] to extricate herself if confronted by [Mr E.]’s presence, if she had tried to do so.

[...] Therefore, while there is no evidence to support the allegation that [Mr E.]’s purposely abused his position of authority with nefarious intentions, he failed to take the utmost care to avoid the perception of the potential for abuse of power and impropriety resulting from the inequality between himself and [the complainant].”

While the above quotation is not complete, it is not selective in a way which distorts the findings of the investigator.

17. In the result the impugned decision dismissing the complainant's internal appeal should be set aside as should the initial decision rejecting her claim of sexual harassment.

18. In the complainant's brief, the central elements of the relief she seeks is another investigation into her harassment claim as well as material, moral and exemplary damages as a result of the wrongful dismissal of her sexual harassment complaint.

19. As to the first claim seeking a further investigation, there is considerable merit in making such an order given the failings of the initial investigation upon which much of the subsequent decision-making was based, particularly having regard to the conclusions reached by the investigator and subsequently repeated, in substance by WAB and the Director General. However, the time when the relevant events occurred is now well and truly in the past. As the Tribunal said in Judgment 4035, consideration 4: "the Tribunal considers that it was [...] no longer possible to conduct such an investigation, not only because the [person the subject of the allegations] had left the Organization, but also because of the time that had elapsed since the incidents in question, which in particular made it difficult to gather reliable testimony from witnesses as to whether those incidents occurred and how third parties may have perceived them. The Tribunal has already found in similar cases that [...] it is not appropriate to order that an investigation be re-opened if that course would raise practical difficulties of this nature (see, for example [...] Judgment 3639, [considerations] 8 to 10)."

20. For similar reasons, no further investigation will be ordered in this matter. However, the complainant is entitled to compensation for the failure of the investigation process and the subsequent decision-making based on it. The Tribunal assesses moral damages for this in the sum of 25,000 Swiss francs.

21. For the various other claims for damages, no arguments at all are advanced in the brief justifying them. Insofar as further moral damages are concerned, there is evidence concerning the ultimately negative effect on the complainant of the relationship she had with Mr E. including an effect on her health. However, on the material presently before the Tribunal, it cannot be said that this was the result of any possible sexual harassment, given that the Tribunal is unable to determine whether there was such harassment.

22. The complainant's request for an unredacted copy of the investigation report is rejected since she received a redacted version of the investigation report and there is no right to an unredacted copy of the investigation report under the Tribunal's case law (see, for example, Judgments 4703, consideration 9, 4471, consideration 23, and 3995, consideration 5). Her further request presented in the "Relief claimed" section of her complaint form for "all annexes and witnesses transcripts undertaken by WIPO into her harassment complaint" is moot since those documents were included in the Organization's reply before the Tribunal.

23. As the complainant has succeeded in part, she is entitled to costs.

DECISION

For the above reasons,

1. The decisions of the Director General of WIPO of 19 June 2020 and 26 February 2019 are set aside, except to the extent that they awarded the complainant compensation for the delay in the investigation and in the internal appeal procedure.
2. WIPO shall pay the complainant 25,000 Swiss francs in moral damages.
3. WIPO shall pay the complainant 10,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 16 October 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER