

D. (No. 7)

v.

WIPO

139th Session

Judgment No. 4968

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Ms N. D. against the World Intellectual Property Organization (WIPO) on 30 November 2020 and corrected on 12 January 2021, WIPO's reply of 15 April 2021, the complainant's rejoinder of 28 June 2023 and WIPO's surrejoinder of 28 September 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 contests the decision, taken following a preliminary evaluation, to dismiss her complaint of harassment against Mr R.S.

Facts relevant to this case may be found in Judgment 4846, concerning the complainant's first complaint, and in Judgments 4964, 4965, 4966, 4967, 4969 and 4970, also delivered in public this day, concerning the complainant's third, fourth, fifth, sixth, 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 1 September 2017, Mr R.V. joined WIPO as Head of the Evaluation Section and became the complainant's direct supervisor.

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. The investigation was outsourced to an external investigation company, which issued its report in January 2018. On 22 February 2018, the Director, Human Resources Management Department (HRMD), informed the complainant that the investigation substantiated that she had engaged in two unauthorized outside activities but that the Director, HRMD, had decided not to institute disciplinary proceedings against her and to close the matter without further action.

On 12 September 2017, the complainant filed a complaint of harassment, including sexual harassment, against Mr E.

On 23 November 2017, the complainant sent an email to Mr R.S., alleging potential "bullying" by a colleague, Ms J.E., who worked in the Evaluation Section, IOD.

In May 2018, new information arose about the complainant's engagement in another unauthorized outside activity. A new investigation was launched, which was entrusted to the same external investigation company which had conducted the first investigation.

On 31 May, the complainant had a meeting with her supervisor Mr R.V. to discuss her performance appraisal. On 1 June 2018, the complainant attended another meeting about her performance in presence of Mr R.V., Mr R.S. and a secretary staff who worked in the IOD. In August 2018, the complainant submitted a rebuttal of her performance appraisal for the period from June 2017 to May 2018, requesting that the rating of her performance be changed from "Effective performance" to "Outstanding performance".

On 16 August 2018, the complainant filed a request for protection against retaliation with the Chief Ethics Officer of WIPO. 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 11 September 2018, the complainant filed complaints of harassment against her supervisor Mr R.V. and against Ms J.E.

Also on 11 September, the complainant filed a complaint of harassment against Mr R.S., in which she alleged that Mr R.S. "ha[d] engaged in improper and unwelcome conduct [...] 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; and 10(d), harassment". On 20 September, the Director General, taking note that the complaint was directed against the Director of IOD, sought the advice of the Independent Advisory Oversight Committee (IAOC) on how to proceed, pursuant to paragraph 20 of the Internal Oversight Charter. The IAOC advised that the complaint should be shared with Mr R.S. for his comments.

On 26 October 2018, the complainant filed a complaint of harassment against Mr S., Head of the Investigation Section, IOD.

On 9 November 2018, Mr R.S. submitted his response to the complainant's complaint of harassment. On 14 November, the IAOC advised the Director General that it had decided to arrange for a preliminary evaluation of the complainant's complaint against Mr R.S. to be conducted by an external investigator. On 20 December 2018, Mr R.S.'s response was transmitted to the complainant.

On 2 January 2019, the external investigator mandated by the IAOC to conduct a preliminary evaluation of the complainant's complaint of harassment against Mr R.S. transmitted a preliminary evaluation report to the IAOC in which it recommended that the matter be closed. On 14 January, based on the outcome of the preliminary evaluation, the IAOC recommended to close the matter.

By letter of 25 February 2019, the Director General informed the complainant of his decision to dismiss her complaint of harassment against Mr R.S. as devoid of merit.

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

On 25 May 2019, the complainant lodged an appeal with the WIPO Appeal Board (WAB), directed against the 25 February 2019 decision.

In its report dated 3 July 2020, the WAB concluded that, having examined the totality of information before it, including the preliminary evaluation report, there was no *prima facie* evidence that the alleged actions by Mr R.S. “considered both individually and cumulatively, could reasonably and objectively be interpreted as constituting a form of harassment, in accordance with the definition laid down in paragraph 10(d) of the [Office Instruction] 47/2016, as such to warrant the referral for an independent investigation pursuant to paragraph 21 of the said [instruction]”. The WAB however noted that Mr R.S. “failed to take an adequate managerial response to address the roots of the known tension between the [complainant] and her colleague(s), and look into any potential claim of bullying”. The WAB further observed that “[the complainant]’s right to due process was not respected when [the IOD secretary staff] was invited to take notes” during the 1 June 2018 meeting. As a result, the WAB recommended that the complainant’s appeal be dismissed but that “the inadequate response of [Mr R.S.] to potential complaints of bullying” and “the conducting of a meeting on evaluation of staff performance appraisals” be addressed. The WAB further recommended that the complainant be granted moral damages for the delay in issuing its report.

By letter of 1 September 2020 from the Director, HRMD, the complainant was notified of the Director General’s decision to dismiss her appeal as unfounded and to award her 700 Swiss francs for the delay in the internal appeal procedure. The Director General agreed with the WAB that, despite his actions not constituting harassment, Mr R.S. should have sought the complainant’s consent before allowing the IOD secretary staff to be present during the 1 June 2018 meeting and “should have addressed [the complainant’s] broad reference to an alleged

potential ‘bullying attempt’ against [her]” contained in her 23 November 2017 email. Therefore, the Director General decided that Mr R.S. would be required to attend a meeting with the Head of the Policy and Law Section, HRMD, during which it would be explained to him that his managerial response to the complainant’s allusions to possible bullying was not adequate and that the meeting of 1 June 2018 should not have been attended by a third party without the complainant’s express consent, and that he would also be invited to seek guidance from the Office of the Ombudsperson to better equip him as a manager to address potential conflicts in the workplace. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order that an investigation into her complaint of harassment against Mr R.S. 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 claims material, moral and exemplary damages, including for the dismissal by the Director General of her harassment complaint “without a proper, independent investigation” and “the excessive 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 contends that the complaint is irreceivable and, in any event, unfounded, and asks the Tribunal to dismiss it in its entirety.

CONSIDERATIONS

1. The complainant was, at relevant times, a member of staff of WIPO. On 11 September 2018, she lodged a complaint of harassment against Mr R.S., the Director of the Internal Oversight Division (IOD). She expressly did so pursuant to Staff Rule 11.4.1 of the WIPO Staff Regulations and Rules and also by reference to Office Instruction 47/2016. Her complaint failed. By a decision of 25 February 2019, the

Director General dismissed the complaint in its entirety, considering it to be clearly devoid of merit.

2. Thereafter, she appealed to the WIPO Appeal Board (WAB) but was generally unsuccessful in persuading it she had been harassed. The WAB recommended, in relation to the substance of the appeal concerning the allegation of harassment, that it be dismissed. It concluded there was no *prima facie* evidence that the alleged actions of Mr R.S. considered both individually and cumulatively, could reasonably and objectively be interpreted as constituting a form of harassment. It issued its report on 3 July 2020. Her appeal was ultimately rejected by a decision of the Director General of 1 September 2020 which is the impugned decision in these proceedings commenced by the filing of a complaint with the Tribunal on 30 November 2020.

3. This is the complainant's seventh complaint. The Tribunal's approach to this complaint is much the same as its approach to the complainant's sixth complaint. Accordingly, there will be some repetition of the language and analysis.

4. The complainant asks the Tribunal to "combine" the eleven complaints that she has filed before the Tribunal. While the facts in each of these complaints are part of the same continuum of events, the legal issues raised are quite discrete. Accordingly, the complaints will not be joined.

5. 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.

6. The complainant advances her legal arguments under two general headings. The first general heading is: "Mr. [R.S.] committed numerous acts of gross misconduct, including obstruction of justice and cover-up of sexual harassment and assault, retaliation, breach of duty of care and abuse of authority, sanctioned harassment and mobbing, misuse of WIPO resources, cover-up of discrimination and harassment,

and the creation of a hostile work environment”. Under seven subheadings the complainant details the conduct of Mr R.S. seeking to make good the proposition in the first general heading.

7. The second general heading is: “The WAB and WIPO Administration intentionally disregarded all the evidence submitted by the Complainant and covered up all the violations committed by Mr. [R.S.]. It reflects the institutionalized culture of harassment, rape culture, retaliation, abuse of power, and obstruction of justice that contaminated the [Organization] and [...] penetrated all the layers of WIPO’s internal justice system”.

8. Before considering the arguments mentioned above, it is convenient to refer to the relief sought by the complainant. It is identified in the form filed by the complainant on 30 November 2020 initiating these proceedings. The relief sought informs a consideration of the complainant’s pleas and how they should be understood. The first order sought is that there be an independent, external misconduct investigation of the complainant’s harassment claim against Mr R.S. by an independent, reputable external investigation company which, *inter alia*, has been approved by the complainant. The second order sought includes an award of material, moral and exemplary damages as a result of the alleged wrongful dismissal of her harassment complaint without such an investigation. It is tolerably clear that the complainant is seeking the Tribunal to determine on the material before it that the allegations in the complaint of 11 September 2018, should have been investigated further by an external investigation company.

9. In fact, as recounted in the report of the WAB, the Independent Advisory Oversight Committee (IAOC) decided in November 2018 to commission an external investigator to undertake a preliminary evaluation of the allegations against Mr R.S. As a result of that preliminary evaluation, the IAOC recommended the matter be closed. Also in the WAB report was a brief discussion about whether there should have been a full investigation. It said:

- “92. During its initial consideration of the allegations put forward by the [complainant], the Board noted that one member felt that there might be *prima facie* evidence for a full investigation. In stating the above, this member felt that although the procedure could not be faulted, an independent investigation would have erased any doubt of conflict of interest, since after all, this case was special in that it involved the most senior official of IOD. In other words, while justice was done, an independent investigation would have dispelled any lingering doubts.
93. That being said, however, the Board as a whole was of the view that the [complainant] did not make a strong case for the full investigation in her argumentation. Moreover, having examined the totality of information before it, including the Preliminary Evaluation Report, the Board did not find any *prima facie* evidence that the alleged actions by Mr. [R.S.], considered both individually and cumulatively, could reasonably and objectively be interpreted as constituting a form of harassment [...]”

10. It cannot be doubted that the complainant was well aware of the fact that there had been a preliminary evaluation by an external investigator. Accordingly, the orders sought and referred to in consideration 8 above, must be taken to be requesting a full investigation by an external investigator.

11. As noted earlier, the Tribunal now considers the arguments advanced under the first general heading referred to above, namely “Mr [R.S.] committed numerous acts of gross misconduct, including obstruction of justice and cover-up of sexual harassment and assault, retaliation, breach of duty of care and abuse of authority, sanctioned harassment and mobbing, misuse of WIPO resources, cover-up of discrimination and harassment, and the creation of a hostile work environment”. Under seven subheadings the complainant details the conduct of Mr R.S. seeking to make good the proposition in the first general heading. The conduct impugned and related matters are described extensively and in detail over 26 pages.

12. It is unnecessary to descend into a detailed analysis of what is then said under this first general heading. That is because the approach of the complainant fundamentally misconceives what would be required to persuade the Tribunal that the allegation of harassment

should have been investigated further. The yardstick for determining whether the matter should have been investigated further is not what is subsequently said by the complainant in pleas in the Tribunal about the conduct of Mr R.S. and a range of other matters, but rather what was said in the initial complaint lodged on 11 September 2018. Office Instruction 47/2016 prescribes the procedure for the consideration of a complaint. Indeed, as it did in this case, it can lead to the dismissal of the complaint without full investigation. That initial complaint, but subject one qualification, created the parameters for assessing the scope of the inquiry into the complainant's allegations and the mechanisms WIPO arguably should have adopted to undertake it (including appointing an independent external investigator to undertake a full investigation), as part of determining the fate of the complaint. It is not the role of the Tribunal to assume the considerable burden of assessing what is said in the complaint of September 2018 and comparing and correlating it with what is said in the pleas which are considerably more expansive. On their face, they are not co-extensive.

13. The qualification referred to in the preceding consideration concerns the preliminary evaluation report. Ordinarily, in addition to the initial complaint, it would be appropriate to review the findings, doubtless preliminary in nature, in the preliminary evaluation report and the material on which it was based to assess what further steps, if any, should have been taken. However, no reliance was placed by the complainant on this report and indeed it is not even in evidence before the Tribunal. This plea under the first general heading is unfounded and should be rejected.

14. Under the second general heading, the complainant contends the Administration and the WAB intentionally disregarded all the evidence of all the violations committed by Mr R.S and that this reflects the institutionalized culture of harassment, rape culture, retaliation, abuse of power, and obstruction of justice that contaminated the Organization and "penetrated" all the layers of WIPO's internal justice system.

15. In support of this argument, the complainant descends into the detail of the conduct of Mr R.S. particularized under the first general heading. Again, the approach of the complainant fundamentally misconceives what would be required to persuade the Tribunal that the allegation of harassment should have been investigated further. As just noted, the yardstick for determining whether the matter should have been investigated further is not what is subsequently said in pleas in the Tribunal about the conduct of Mr R.S. and a range of other matters, but rather what was said in the initial complaint lodged on 11 September 2018 and in the preliminary evaluation report. This plea under the second general heading is unfounded and should be rejected.

16. In the result and for the foregoing reasons, the complaint should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 17 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