

D. (No. 10)

v.

WIPO

139th Session

Judgment No. 4970

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Ms N. D. against the World Intellectual Property Organization (WIPO) on 8 March 2021 and corrected on 14 April 2021, WIPO's reply of 3 August 2021, the complainant's rejoinder of 30 June 2023 and WIPO's surrejoinder of 2 October 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 disciplinary measure demoting her from grade P-3 to grade P-2.

Facts relevant to this case may be found in Judgment 4846, concerning the complainant's first complaint, and in Judgments 4964, 4965, 4966, 4967, 4968 and 4969, also delivered in public this day, concerning the complainant's third, fourth, fifth, sixth, seventh and eighth 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 ("the external investigation company"), which issued its report in January 2018. On 12 September, the complainant filed a complaint of harassment, including sexual harassment, against Mr E. 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 with the United Nations Economic Commission for Europe and NIRAS Indevelop, a consulting firm contracted by the Swedish International Development Cooperation Agency (SIDA), but that the Director, HRMD, had decided not to institute disciplinary proceedings against her and to close the matter without further action.

In May 2018, new information arose about the complainant's further engagement in unauthorized outside activities. Following a preliminary evaluation of the new information received, *prima facie* evidence was found that the complainant had been providing consultancy services to the World Bank in February 2017, without having received authorization from WIPO.

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 3 June 2019.

On 23 August 2018, the complainant was notified of the decision to open a second misconduct investigation against her, which was entrusted to the same external investigation company which had conducted the first investigation. On 24 August, the complainant commenced a period of extended full-time sick leave.

On 27 August, the external investigation company mandated to investigate the complainant's alleged unauthorized outside activities sent an email to the complainant to schedule an interview, to which she did not reply. Following a follow-up email from the external investigation company, the complainant responded that due to her sick leave she was "not in a position to cooperate with [the] investigation".

On 11 September 2018, the complainant filed complaints of harassment against Mr R.V., Mr R.S. and Ms J.E., a P-4 staff member who worked in the Evaluation Section, IOD.

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

As part of its second investigation concerning the complainant's alleged unauthorized outside activities, the external investigation company reached out to Mr H., working as Lead Investigator for the World Bank, who confirmed that the complainant had been providing consultancy services financed by such organization between February 2017 and February 2018.

On 21 November 2018, the external investigation company sent to the complainant a draft investigation report and asked her to provide her comments. On 15 January 2019, IOD forwarded to the Director General the investigation report prepared by the external investigation company, consolidated with the complainant's comments, which concluded that the complainant had engaged in a third unauthorized outside activity with a World Bank financed project while being a WIPO staff member and that she had falsely declared during the first investigation concerning her two other unauthorized outside activities that she was not involved in any other outside activity. The investigation report further mentioned that the complainant had refused to cooperate with the second investigation.

On 15 January 2019, the complainant, referring to Staff Rule 11.4.1 and Office Instruction 47/2016, filed a complaint of harassment against the external investigation company, in which she alleged that “[t]he role of [the external investigation company] in both investigations against [her] [...] [may be] potentially classified as malpractice”.

By letter of 24 January, the Director, HRMD, charged the complainant with misconduct, based on the results of the second investigation against her. The charges involved the complainant’s unauthorized engagement in consultancy services for a project financed by the World Bank and her providing false information during the first investigation about her outside activities. The Director, HRMD, decided not to charge the complainant in relation to the finding contained in the investigation report that she had refused to cooperate with the investigation. The complainant was invited to provide her response to the charges and the WIPO Medical Adviser confirmed that her state of health did not prevent her from doing so.

On 6 February 2019, the Director General informed the complainant of his decision to summarily dismiss her complaint of harassment directed against the external investigation company.

On 15 February, the complainant provided her comments to the charges letter.

By letter of 7 March 2019, the Director General notified the complainant that he had reached the conclusion that she was guilty of two incidents of misconduct, namely having engaged in an unauthorized remunerated outside activity and having provided false information during an investigation. He therefore decided to apply to the complainant the disciplinary measure of “demotion to a lower grade, namely P2, for a period of two years or until [the complainant’s] separation from service, whichever comes earlier”.

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

On 7 June 2019, the complainant lodged an appeal with the WIPO Appeal Board (WAB), directed against the 7 March 2019 decision.

In its report transmitted to the Director General on 5 October 2020, the WAB recommended to dismiss the complainant's appeal as unfounded and to award her moral damages for the delay in issuing its report. The WAB concluded that there was no evidence that the due process rights of the complainant had been violated, that misconduct had been proven by clear and convincing evidence, that the disciplinary measure applied to the complainant was not disproportionate to her misconduct and that the fact that the first and second investigations into the complainant's outside activities were conducted by the same external investigation company did not constitute a conflict of interest.

By letter of 4 December 2020 from the Acting Director, HRMD, the complainant was notified of the Director General's decision to dismiss her appeal as unfounded and to award her 900 Swiss francs for the delay in the internal appeal procedure. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and the 7 March 2019 disciplinary measure and to order the removal from her personnel file of all references to the "disciplinary investigation and such misconduct". She also asks the Tribunal to order that an "investigation of retaliation from the side of IOD and [the external investigation company]" be conducted by an "independent, reputable, [other] external investigation company" which would agree not to conduct any other assignment for WIPO for the next five years. She further seeks an order for the disclosure of the source of the "subject misconduct complaint". She claims material, moral and exemplary damages, in the amount of at least 250,000 Swiss francs. Finally, she requests 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. The complainant had been a member of staff of WIPO from May 2016 until she resigned on 11 March 2019, effective 11 April 2019. This is her tenth complaint. The general background has been set out earlier in this judgment and need not be repeated. Suffice it to note at this point that the complainant had been charged with misconduct in January 2019 and found guilty of the misconduct in March 2019. There were two elements to the charges. One was that the complainant had engaged in an unauthorized remunerated outside activity and the second was that she had given false information during an earlier investigation into a similar allegation of misconduct though based on different facts.

2. The alleged factual foundation of both elements is extremely straightforward. As to the first element it was whether, in fact, the complainant had worked as a consultant, indirectly, to the World Bank during 2017 which was the alleged unauthorized outside activity. As to the second element it was whether, in fact, she had provided information which was false in an earlier investigation into whether she had worked, while a member of staff of WIPO and without authorization, as a consultant to the United Nations Economic Commission for Europe and for NIRAS Indevelop, a consulting firm engaged by the Swedish International Development Cooperation Agency (SIDA).

3. 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.

4. 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.

5. In her pleas, the complainant raises a multiplicity of arguments which concern both procedural issues (but including a contention that a case against her was fabricated) though the arguments also touch upon what motivated the investigation and the laying and prosecution of the charges. The latter includes allegations of systematic harassment as well as “conflicts of interest, obstruction of justice, abuse of [the] system, organized mobbing and harassment, and retaliation”. It also includes an allegation the investigation was for an ulterior purpose, namely, in relation to the complainant, to “finish [her] off” and “completely destroy her mentally, physically and professionally” which potentially, so it is argued, breached the Swiss Criminal Code. As to the impugned decision itself, it is argued it was made on the basis of retaliatory investigations “conducted with numerous and deliberate violations of international norms and standards” and manifests a “cynical abuse of power, institutionalized harassment, and violation of fundamental human rights outlined in the Universal Declaration of Human Rights”.

6. For reasons which follow, it is unnecessary to descend into a consideration of the issues just discussed which, if of substance, would require appropriate attention.

7. It is convenient to focus on the relief sought in the complaint. It is:

- “1. The impugned decision dated 4 December 2020, based on the initial decision of 7 March 2019, and the erroneous finding that the Complainant engaged in misconduct and that disciplinary sanction imposed against her be vitiated and quashed, with all legal consequences flowing therefrom, and that all references to the disciplinary investigation and such misconduct finding be permanently removed from the Complainant’s WIPO service records;
2. That the Tribunal orders that an independent, external investigation of retaliation from the side of [the Internal Oversight Division (IOD)] and Axis Helvetia (and linked to this current case) be undertaken by an independent, reputable, external investigation company acceptable to the Complainant, and one which agrees as part of its mandate to not accept another investigation or other assignment from WIPO for the next five (5) years to avoid any real or apparent conflicts of interest;

3. That the Tribunal orders disclosure of the source of the subject misconduct complaint;
4. That [the] Complainant be awarded moral damages in the amount of not less than two hundred and fifty thousand Swiss Francs (CHF 250,000) for the severe injury to her health and future career prospects both inside and outside of WIPO on account of the wrongful misconduct finding, disciplinary sanctions, retaliation and for being subjected to an irregular disciplinary investigation, the existence of which she will be required to disclose on all future UN-system job applications and which is likely to adversely affect her employability, as well as for the reputational damage caused to the Complainant by the investigator's breach of confidentiality and violation of the due process rights of the Complainant, as well as for WIPO's breach of its duty of care and failure to protect her against retaliation and WIPO's negligence related to multiple conflicts of interest from the side of IOD and Axis Helvetia (which altogether caused severe health and professional injuries to the Complainant).
5. That the Complainant be reimbursed all legal fees she incurred in bringing this appeal;
6. That the Complainant be awarded interest at the rate of five (5%) percent per annum on all amounts she is awarded pursuant to this appeal, from 4 December 2020 through the date all relief granted to her herein is full and finally implemented; and
7. Such other relief as is fair, just, and necessary."

8. It can be seen that the first order, which is pre-eminent, is that the two nominated decisions be quashed. This is consistent with one type of relief contemplated by Article VIII of the Tribunal's Statute, namely the rescission of an impugned decision. However, an essential element of the first order is that the finding that the complainant had engaged in misconduct, was erroneous. That is to say, no finding should have been made, or perhaps could not have been made, that the complainant engaged in the misconduct alleged. No arguments of substance are advanced, or probative evidence furnished, by the complainant to establish that either she did not work, without prior authorization, as a consultant to, indirectly, the World Bank in 2017 or that she did not give false information in the earlier investigation of other allegations of unauthorized outside employment. In its report, the WIPO Appeal Board (WAB) said that after examining the evidence on

file, the complainant's misconduct was substantiated by clear and convincing evidence (a reference to the relevant provision in the WIPO Staff Rules concerning proof).

9. WIPO's pleas in these proceedings do likewise, that is to say, establish the misconduct alleged and, as it is argued correctly, do so beyond a reasonable doubt. In short, there was clear evidence which the complainant did not effectively rebut, of a consultancy agreement she signed on 23 February 2017 to undertake work for 90 days starting on 27 February 2017. While the consultancy contract was being financed by the World Bank, the contract was specifically with the Georgia Innovation and Technology Agency. In the initial investigation, the complainant declared, falsely, in October 2017, that she did not undertake any consultancies for other agencies, that is, other than the United Nations Economic Commission for Europe and SIDA. Accordingly, the finding that the complainant had engaged in the misconduct alleged was not erroneous. The foundation for the first order is not established and the order should not be made.

10. If the first order is not made then there is no basis for making the second, fourth, fifth and sixth order. The third order also should not be made as the identity of the reporter is entirely irrelevant in relation to the nature of the allegations of misconduct involving the complainant (see Judgment 4247, consideration 4). The seventh order would not be made having regard to the Tribunal's case law (see, for example, Judgment 4796, consideration 16).

11. As the orders sought will not be granted, 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