

The Administrative Tribunal,

Considering the complaint filed by Mr G. P. against the World Intellectual Property Organization (WIPO) on 6 May 2005 and corrected on 19 August, WIPO's reply of 23 November, the complainant's rejoinder of 14 December 2005 and the Organization's surrejoinder of 17 March 2006;

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 and the pleadings may be summed up as follows:

A. The complainant, a French national born in 1958, was recruited by WIPO in 1992. After a series of short-term contracts, he was granted a fixed-term appointment on 1 August 1996 as a Reproduction Equipment Operator at grade G.3. He was promoted to grade G.4 in February 1999 and was given two within-grade step increases effective as from 1 July 2004 and 1 July 2005.

From 1999 onwards the complainant presented the Organization with a series of medical certificates indicating that he should not lift heavy loads and/or that he was to avoid repetitive movements and activities placing a strain on his back or arms. On medical grounds he was transferred to the Patent Cooperation Treaty (PCT) Publication Section, in December 1999, where he was employed as a pamphlet maker. His medical condition did not improve however and during the next few years he made several requests for a transfer, whilst his supervisors endeavoured to adapt his duties and workload to his physical limitations.

In the event he was transferred again on 1 June 2002 to the newly created Processing Team 5 of the PCT Operations Department in the context of a reorganisation of the PCT Publication Section. However, he still found it difficult to carry out some of his duties and on 12 December 2003 he wrote to the Ombudsperson requesting a transfer to a post adapted to his state of health and "outside the PCT".

Following his return from sick leave in February 2004, the complainant verbally informed his supervisor that for medical reasons he was unable to carry out tasks involving the use of a bar-code reader. Although he did not provide a new medical certificate attesting to this particular limitation, his supervisor decided to relieve him of his normal duties pending a decision on his transfer request.

On 1 April 2004 the complainant sent an e-mail to the Director of the Human Resources Management Department (HRMD) informing him that his supervisor had given him no work since 25 February, when she had told him that he was "no longer part of the Patent Cooperation Treaty System". He made it known in the e-mail that he would be happy to carry out any tasks as long as he was not required to make repetitive gestures, put strain on his back or his forearms, stand for long periods, or lift anything heavy. He suggested several transfers to posts he felt would have tasks suited to these limitations. In a memorandum of 5 April he explained his situation to the Director General in similar terms and requested a transfer. By an e-mail of 7 April to the Director of PCT Operations the complainant objected to the decision to move him in mid-April, taken as a result of a reorganisation of office space, which he had just learned of, because this implied *inter alia* that he would be sharing an office with a colleague who had insulted him several months earlier. That Director replied on 8 April pointing out that sharing an office required tolerance and respect between colleagues and asking him to let him know if any problems arose.

In a note attached to the complainant's periodical report established on 6 July 2004, his supervisor observed that she was unable to evaluate his performance within the structure of the form. When the complainant had come back from sick leave in February she had opted – in agreement with her own supervisors and pending his transfer – for "a prudent attitude" concerning his health situation and had decided "not to give him any tasks at his level". Consequently, she felt that she was unable to establish a meaningful report on his performance. The complainant wrote to the Director of HRMD on 16 August objecting to this note. He pointed out that at the very least his

supervisor could have evaluated his performance between 21 May 2003 – the date of his previous performance report – and 23 February 2004 when she had decided not to give him any more work. He again expressed the hope that a post better adapted to his medical situation would be found for him. On 6 September he was transferred to the WIPO Knowledge Management Center and e-Library where he was employed as a Clerk.

On 24 September 2004 the complainant's counsel wrote to the Director General recalling that the latter's attention had already been drawn to his "blank performance appraisal" corresponding to a period in which he was not provided with any work, in breach of international civil service law. She asked for "final" administrative decisions: as to why the complainant had not been granted his latest within-grade step increase; on the question of the complainant's permanent appointment; and regarding compensation for workplace harassment. Responding on 19 October to the complainant's memorandum of 16 August, the Director of HRMD informed him that the within-grade salary increment had been granted with retroactive effect from 1 July 2004, but that the decision to grant a permanent appointment was discretionary and that a staff member's performance had a bearing on such a decision.

The complainant filed an appeal with the Appeal Board on 16 December 2004. In its report dated 7 February 2005 the Board noted that the complainant had already been granted his within-grade step increase. Although it recognised the discretionary nature of a decision whether to grant a permanent appointment, it recommended that the Director General reconsider the complainant's request in this regard. It also recommended, for any assignment given to the complainant, that his state of health be taken into account. Concerning the allegations of harassment, it considered that there had been no "intended" mobbing or harassment directed at him, and it noted that the Administration had taken the necessary steps to redress his various grievances.

By a letter of 28 February 2005 the complainant was informed by the Director General that he was awarded a permanent appointment. He impugns the Director General's implied decision not to award him compensation for mobbing or psychological harassment.

B. The complainant contends that over the years he has sustained "several serious work-related injuries" due to heavy lifting tasks, and that subsequently he has become the victim of mobbing or harassment. He states that during six months he was subjected to numerous insults and was not provided with any meaningful work; he then filed a claim for compensation – on 24 September 2004 – for workplace injury and an intense period of harassment.

He puts forward three pleas. Firstly, the Organization breached its fundamental duty to protect him from psychological injury. He contests the finding by the Appeal Board that, "as the Administration had taken corrective steps", there had been no intended mobbing or harassment. He submits that under the Tribunal's case law the test used for assessing if harassment has occurred is whether the conduct impugned can "reasonably" be regarded as constituting harassing behaviour. Contrary to what the Board implied, it is not necessary to show that an "intent" to harass exists; the Board, therefore, has committed an error of law. He adds that the decision by which the Director General implicitly accepted that finding is consequently flawed. As examples of harassment he cites the fact that he was provided with no tasks upon his return from sick leave in February 2004, his "blank" periodical report and his move into the office of a colleague who had insulted him. He asserts that WIPO has breached its obligation to create a harassment-free workplace. He further contends that a six-month delay in taking action regarding his requested transfer shows harassment; in particular when considered in the light of his repeated complaints to management about ongoing bullying.

Secondly, there has been a misuse of authority because the decision to transfer him was taken for an improper purpose. According to the complainant, international organisations must provide appropriate work to staff and treat them with dignity.

Thirdly, he submits that the Organization breached its duty to protect its staff from physical injury. He points out that his employer was well aware of his medical condition and of the restrictions placed on the use of his right arm. By asking him to carry out tasks that aggravated this condition, WIPO failed to take the necessary steps to protect him against injury. The complainant alleges further that despite his transfer to the e-Library the harassment continues: his current supervisor has given him tasks which are clearly unsuited to someone with a back injury.

He asks the Tribunal to award him 100,000 Swiss francs in moral damages for psychological injury and for injury to his dignity and honour, as well as compensation for "all related medical expenses incurred" while he has been employed by the Organization. He claims compensation in the amount of 80,000 francs for "aggravation to physical injury suffered as a consequence of ongoing poor management". He wants WIPO to provide him with a written

apology and assurances that it will respect the medical restrictions placed on his workplace duties. He also asks that appropriate action be taken to ensure that the behaviour of certain staff members does not go unpunished.

C. In its reply WIPO objects to any claims related to the alleged harassment on the grounds that the complainant filed his internal appeal out of time.

The Organization denies that the complainant was subjected to harassment. It submits that, far from harassing him, because of his medical condition his supervisor opted for “a prudent and responsible approach”, even though the complainant did not provide a medical certificate attesting to his physical limitations. His medical condition contributed to the difficulty the Administration had in identifying an appropriate post to which he could be transferred, but it nevertheless made numerous attempts until one was found. It points out that the tasks the complainant “selectively” requested to be assigned were the preferred tasks of most of his colleagues. It recalls that he was awarded a permanent appointment in February 2005 and adds that such action would not have been taken if he were being harassed.

WIPO considers that the complainant has failed to substantiate his claim of harassment regarding his office reassignment. It says that he “was merely expressing a preference” not to be assigned to the same office as a colleague who had insulted him four months earlier. Furthermore, when he expressed that preference the Director of PCT Operations asked him to give the arrangement a chance and to inform him if any problems arose. The complainant did not raise any new objection until after he was transferred to the WIPO Knowledge Management Center and e-Library several months later.

Recalling the Tribunal’s case law, WIPO asserts that the burden of proof with regard to his allegations of harassment lies with the complainant. It notes that he now takes issue with his transfer to the WIPO Knowledge Management Center and e-Library, but points out that he was the one to request it. If the complainant believes that he is being harassed in his current position, then he must follow proper procedure and first exhaust the internal remedies.

The Organization submits that it took reasonable measures, acted diligently and showed good faith towards the complainant. Despite the fact that the complainant had a pre-existing back problem that he did not disclose to WIPO upon recruitment, the Organization has been as accommodating as possible towards him. It points out that he has failed to demonstrate that his physical problems were work-incurred.

D. In his rejoinder the complainant asserts that he did file his internal appeal in a timely manner and he provides supporting documentation from the Swiss postal service. Furthermore, he says that, as required under WIPO’s “Procedures for the Handling of Harassment at Work”, he had numerous discussions with the Ombudsperson in an attempt to resolve the situation. He points out that in December 2005 the Ombudsperson’s post was vacant, making it difficult to use that procedure.

He submits that he was unaware that he had a pre-existing back problem when he joined the Organization, which is why it was not disclosed. In any event, medical evidence suggests that the problem was aggravated by the work he carried out at WIPO.

Relying on the case law, he recalls that international organisations have an obligation to treat their staff with dignity. Not only was he not given any work, but his requests for help were disregarded. He provides statements from colleagues attesting to the treatment he was subjected to by his supervisor.

E. In its surrejoinder WIPO presses its objection to receivability in that the complainant has failed to exhaust the internal remedies insofar as his complaint is against alleged harassment occurring in his new position. He could have referred the matter to the Ombudsperson prior to her departure in May 2005, but he did not.

The Organization otherwise maintains its position. It asserts that, on the basis of information provided on one of the complainant’s medical certificates, he was indeed aware of his back problems prior to being employed with WIPO.

It questions any link between his physical condition and his work at WIPO and asserts that he had provided no medical certificates attesting to such a link until after WIPO had filed its reply with the Appeal Board.

CONSIDERATIONS

1. The complainant joined WIPO in 1992. Initially employed on a number of short-term contracts and then on successive fixed-term contracts, he was awarded a permanent appointment on 28 February 2005.

2. He has suffered ongoing health problems from as early as 1991. Notably, he suffers from inflammation in his back and in both arms. He has difficulty lifting any weight, performing tasks requiring the use of his back or arms, performing repetitive tasks or standing for too long.

His medical situation is well documented. For example, in a letter of 14 October 1999, his doctor outlines the type of work that the complainant cannot do and notes that his back problems have been ongoing for eight years. In a memorandum dated 19 October 1999 the Head of the Medical Unit states that the complainant should be transferred due to back problems. In a memorandum of 7 November 2000 the same doctor states that the complainant's post in the PCT Publication Section is compatible with his medical limitations.

3. However, the complainant reported injuries from many of the tasks he was required to do and requested a transfer "outside the PCT". In February 2004 he took days off work, medically certified, and complained that he experienced pain from using a bar-code reader.

4. Over the next six months, the complainant made a number of enquiries into the status of his transfer. He states that until the time of his transfer to the WIPO Knowledge Management Center and e-Library in September 2004, he was not provided with any meaningful work. His periodical report of 6 July 2004 was left blank and his supervisor attached a note stating that "awaiting the outcome of Mr. P.'s request [...] for a transfer, [she had] decided, in agreement with [her] Supervisors, to opt for a prudent attitude vis-à-vis Mr. P.'s health situation and not to give him any tasks at his level".

5. In June 2004 the Joint Medical Service found that the complainant's medical profile was appropriate for the post description of Clerk in PCT Operations.

6. In April 2004, as a result of office reassignments, the complainant had been moved into an office with a colleague with whom he had had a prior encounter in November 2003. The complainant contested the office assignment because his colleague had insulted him. The Director of PCT Operations responded that as space was limited it was necessary to share office space and that colleagues were expected to respect and tolerate each other. He also told the complainant that he should be informed in the event of any conflicts in the new office. The complainant states that he was harassed for six months while he was in the new office.

The complainant sought help from a psychotherapist to deal with the anxiety and depression he was suffering as a result of the above circumstances.

7. Following an appeal to the Appeal Board on the issues of the non-awarding of a within-grade salary increase and of a permanent contract, in which the complainant also raised allegations of work-related injuries and mobbing or harassment, the Director General awarded him on 28 February 2005 a permanent appointment. However, he did not make an express ruling on the issue of harassment and did not make a compensation award. That is the implied decision at issue in the present proceeding.

Receivability

8. Although the complainant's claim of harassment was not specifically addressed in WIPO's response of 19 October 2004, it was clearly raised in the earlier correspondence from the complainant's counsel. As well, the claim of harassment was considered by the Appeal Board. The Organization cannot now plead irreceivability on the basis of its own initial failure to address fully the claim.

9. With regard to the Organization's contention that the complaint is irreceivable because the complainant has not made a claim for invalidity with the WIPO Staff Pension Committee in accordance with the Regulations and Rules of the United Nations Joint Staff Pension Fund (UNJSPF), the Tribunal notes that since the complainant is not claiming relief based on his inability to work but only on the Organization's failure to protect him from workplace injury, there was no need to pursue the claim with the Staff Pension Committee.

10. The Tribunal also rejects the Organization's contention that the complaint is irreceivable because the complainant failed to bring his harassment complaint to the Ombudsperson. The evidence shows that the

complainant did bring his complaint to the Ombudsperson but nothing was done. And after the Ombudsperson's office became vacant he took his concerns to another official as directed in the Staff Association's newsletter of October 2005.

11. However, it is beyond the competence of the Tribunal to make recommendations to an organisation regarding the implementation of specific procedures on workplace harassment and to order an organisation to make an apology.

Request for an oral hearing

12. The complainant requested an oral hearing with witnesses "to determine the disputed instance of mobbing" within WIPO. He indicated that the full list of witnesses would be provided after he had had an opportunity to review the Organization's pleadings but he did not pursue this request in his rejoinder. The Tribunal sees no reason for an oral hearing and consequently rejects the request.

Misuse of authority

13. The complainant submits that the decision to transfer him constitutes a misuse of authority. It is not entirely clear from the complainant's submissions which transfer he alleges constitutes such a misuse. The Organization appears to assume that it is the last transfer to the WIPO Knowledge Management Center and e-Library. However, given the complainant's reference to the "blank" periodical report, the Tribunal takes from this that it was the transfer to the Processing Team 5. In either case, there is no evidence to support a finding of misuse of power.

14. The duty of an organisation to treat its workers with dignity and respect and to provide them with work in accordance with their skills, training and abilities is well entrenched in the Tribunal's jurisprudence. The case law is also clear that to substantiate a plea of abuse of power, or of misuse of authority, the complainant "must be able to identify the improper purposes for which the authority [...] has been exercised" (see Judgment 2104).

15. Aside from assertions that there was no need to transfer the complainant and that neither the Organization nor the complainant benefited from the transfer, the complainant has failed to adduce any evidence regarding the circumstances surrounding the transfer from which an improper purpose could be inferred. With respect to the "blank" periodical report, his supervisor provided a reasonable explanation for not completing the appraisal that does not support an allegation of misuse of authority.

Breach of duty to protect from psychological injury

16. The complainant submits that the Appeal Board erred in concluding that it "could not find or infer from the Administration's attitude that there was an intention for alleged mobbing or harassment". He argues that, according to the Tribunal's case law, intention is not a requisite element to a finding of harassment. This assertion is correct (see Judgment 2370), however, as it will become evident this error is immaterial to the outcome of the present proceeding. This comment is equally applicable to the complainant's submission that the Appeal Board's recommendation was flawed because it failed to consider the evidence of other staff members who also had issues with the complainant's immediate supervisor.

17. In Judgment 2370, under 9, the Tribunal also stated the following in relation to harassment:

"However, allegations of harassment must be supported by specific facts, and on this point the Tribunal can only confirm its case law (see especially Judgments 2067 and 2100) to the effect that it is up to the person alleging that he or she has suffered harassment to prove the facts. That proof will, of course, often be difficult to establish, and in this context both internal appeal bodies and the Tribunal itself must be particularly careful to take into account all the elements resulting from an adversarial examination of the alleged facts; but the burden of proof cannot be reversed [...]."

18. The Organization maintains that to prove harassment the complainant must demonstrate an accumulation of events over a period of time. This submission is not supported by WIPO's definition of harassment nor is it supported by the case law, which requires an examination of the relevant definition of harassment to determine whether the definition allows for a single incident to be sufficient to constitute harassment. In Office Instruction No. 15/2004, paragraph 4, WIPO defines harassment as follows:

“Harassment is unwelcome verbal or physical behaviour that unreasonably interferes with work or creates an intimidating, hostile or offensive work environment. It includes conduct, comments or displays, whether made on a cumulative or, in exceptional cases, a one-time basis, and may be related to race, religion, color, creed, ethnic origin, physical attributes, age, gender or sexual orientation and which threatens or belittles a staff member or employee, or causes personal humiliation or embarrassment. [...]”

From this definition, it can be seen that in exceptional cases a single incident of the type of conduct described can amount to harassment.

19. There are two components to the complainant’s claim that he was the victim of harassment throughout a period of approximately six months. First, he claims that he was forced to share an office with a person who had insulted him in the past despite the fact that his supervisor was well aware of the prior disagreement. The complainant submits that, in these circumstances, it was entirely foreseeable that he would be harassed by that colleague. During the following six months, the complainant states that his colleague alternated between insulting him and ignoring him, deprived him of light and subjected him to noise pollution.

Second, throughout this same six-month period, the complainant states that he was not given any meaningful work which effectively excluded him from the workplace. He contends that his repeated pleas for help to a number of officials were ignored. This intolerable situation coupled with rumours of his imminent dismissal caused him to suffer from depression and anxiety requiring professional treatment.

20. Concerning the first component of his harassment claim, the Tribunal observes that at the time the complainant voiced his objection to sharing an office with a particular person, his concerns were specifically addressed. The Director of PCT Operations noted that sharing office space required respect and tolerance between occupants but if this was not the case in his new office he wished to be informed and the matter would be addressed. Although the complainant sent a number of e-mails to his supervisors regarding the status of his transfer and complaining about not being given any work, it was not until the complainant’s counsel wrote to the Director General in September 2004, some six months later, in relation to a salary increase and a permanent appointment that the Administration was also informed of the difficulties with his colleague. The fact that there had been one earlier incident with that colleague, particularly in light of the absence of any complaint during the six-month period when the complainant was specifically invited to bring forward any difficulties he encountered, is insufficient to ground a finding of harassment during the period in question. Nor can it be concluded that the Organization failed to take the necessary steps to protect the complainant from psychological injury stemming from the actions of a colleague when it was not made aware of the problems.

21. With respect to the second component of his harassment claim, the complainant submits that a six-month delay in taking any action regarding his request for a transfer, when considered in the light of his repeated complaints to management about ongoing bullying and suggestions as to alternative posts he might usefully occupy, constitutes harassment.

He points to the unilateral decision of his supervisor to deprive him of all his duties as evidence of harassment. He also alleges that the same supervisor’s statement, on the “blank” periodical report, that he had not submitted a medical certificate, is evidence that she disbelieved him and was harassing him. As further evidence regarding the conduct of his supervisor, the complainant provided a list of a number of staff members who had received transfers out of Processing Team 5 and e-mails from staff members, including from two of those who were transferred, stating that the supervisor was not professional and that they did not like her management style.

22. Turning first to the evidence regarding other staff members, there is nothing in the record to suggest that these transfers were linked in any way to the conduct of the supervisor. Further, although the e-mails from the staff members call into question the supervisor’s professionalism and her management style, they do not support any inference that other staff members were the subject of harassment and clearly do not establish that the complainant was harassed by his supervisor.

23. With respect to the complainant not being assigned any duties during the six-month period starting in February 2004, the Tribunal is of the view that, regarding the facts within the overall circumstances and especially considering that the complainant was subsequently awarded a permanent appointment, the evidence shows that the decision was taken to address in a prudent fashion the concerns surrounding the complainant’s health. In light of

the lengthy and ongoing health issues and the earlier attempts to accommodate the complainant's health problems, this prudent course of conduct does not amount to harassment.

The Tribunal acknowledges that the six-month period was a stressful period of time for the complainant while he was waiting for a decision to be made regarding his transfer but there is no basis on which it can be concluded that the Administration engaged in mobbing or harassment against him or that the Administration failed to protect the complainant from psychological injury.

*Breach of duty to protect
from physical injury*

24. It is clear that "an international organisation is under an obligation to take proper measures to protect its staff members from physical injury occurring in the course of their employment" (see Judgment 2403). However, in the present case, the complainant has failed to establish that WIPO breached its duty to protect him from physical injury and that it should be held accountable for the deterioration in his physical health.

25. The evidence adduced reveals that the Organization went to great lengths to accommodate the complainant and protect him from physical injury. For example, numerous meetings were held with various departments to find him a position compatible with his physical limitations. The Administration relied upon medical opinion to determine whether the complainant could perform the tasks listed in his job description. It reassigned tasks, twice reorganised Processing Team 5 and provided additional training in an attempt to provide him with tasks that would not exacerbate his health problems. In addition, as noted earlier, it refrained from assigning any work until another position could be found to accommodate his health issue.

26. In terms of the allegation that his medical condition was not only aggravated by his work but directly caused by it, the Tribunal finds that the complainant has failed to discharge his burden of proving that his injuries were work-incurred. The complainant maintains that having to use a hole punch for three weeks caused him injury. The medical opinion of 15 February 2005 stating that the injury was caused by this particular activity was based on a medical consultation some ten months after performing the work that allegedly caused the injury. That medical opinion is based on the complainant's account of the onset of pain in relation to the injury and this account is consistent with injury as a result of repetitive actions as described in the medical literature. Having regard to the severity of the injury it would be reasonable to expect that some medical consultation would have been sought around the time of the onset of the symptoms. This together with the medical opinion concerning his right epicondylitis caused by repetitive gestures at work is insufficient evidence to establish that the condition was caused by the hole-punching activity.

27. The Tribunal notes that the medical opinion of January 2005 that the complainant's chronic back problems were worsened by his work, does not identify the work-related activities or the types of activities that caused a worsening of the condition. Nor does the opinion address the role that the complainant's non-work-related activities may have played in the exacerbation of the back problems. The Tribunal finds that the complainant has failed to adduce sufficient evidence to meet his burden of proving that the worsening of his back condition is work related.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.