Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

114th Session **Judgment No. 3185**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs S. N. against the World Intellectual Property Organization (WIPO) on 14 June 2010 and corrected on 28 August 2010, WIPO's reply of 7 January 2011, the complainant's rejoinder of 12 April, the Organization's surrejoinder of 19 July, the complainant's further submissions of 5 December 2011 and the Organization's final observations of 10 February 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Franco-Algerian national born in 1968, entered the service of WIPO in 1999 at grade G2. She was recruited on a short-term contract which was renewed several times. As from 2001 she performed the grade G3 duties of Assistant Examiner in the Processing Service of the Patent Cooperation Treaty (PCT) Operations Division. On 23 May 2003 she was promoted to grade G4 with

retroactive effect from 1 May 2003. The periodical reports which she received as from 2004 showed that her performance was deemed satisfactory without reservation in respect of both the quantity and the quality of her work and her conduct. The last of these reports, which she signed on 5 January 2009, covered the period from 18 December 2007 to 16 December 2008.

On 22 April 2009 WIPO published Office Instruction No. 19/2009 concerning the new "Performance Management and Staff Development System" (PMSDS), which replaced the previous system of periodical reports with immediate effect. On 27 May the complainant had a meeting with her direct supervisor, in the course of which the latter informed her that she was thinking of giving her only the overall rating "mostly meets expectations" for phase I of the PMSDS – covering the period 1 April 2008 to 31 March 2009 – because she had made a number of mistakes, of which the supervisor had handed her a list.

As the complainant contested this rating, she and her supervisor referred the matter to a reviewing officer – her supervisor's supervisor – who initiated mediation in accordance with the guidelines appended to Office Instruction No. 19/2009. During a meeting on 3 June 2009 the complainant handed the reviewing officer and her supervisor a document in which she set out the grounds for her disagreement and asserted that she was being subjected to "acts of professional discrimination, harassment and sabotage undermining the quality of [her] work". The next day she signed her PMSDS report, but added that the overall rating contained therein, that is to say "mostly meets expectations", was not objective. On 10 June the reviewing officer issued his mediation report on the meeting of 3 June, in which he concluded that, despite his efforts, the complainant continued to disagree with her overall rating.

The complainant criticised the mediation procedure and explained in detail why she disagreed with her overall rating in a memorandum of 29 June addressed to her direct supervisor, inter alia, with a copy to the acting Director of the Human Resources Management

Department. On 6 August she sent the Director a reminder by e-mail. He replied the same day that she should abide by the set procedures and follow the appropriate internal appeal channels. On 17 August the complainant therefore submitted her case to the Rebuttal Panel requesting the cancellation of her PMSDS report. On 19 October 2009 she filed a grievance with the Joint Grievance Panel, in which she accused her direct supervisor of harassment and discriminatory treatment.

As the Rebuttal Panel considered that her rebuttal statement was time-barred, the complainant sought the intervention of the Director General who, in the exercise of his discretion, decided to send the case back to the Panel for consideration of the merits. The Panel heard the complainant, her direct supervisor, the reviewing officer and the Head of the Processing Service between 20 January and 1 March 2010. As the complainant forwarded additional documents to the Panel on 3 March, it heard again the reviewing officer and the Head of the Processing Service on 9 March. In its report of 12 March 2010, which constitutes the impugned decision, the Panel concluded that the complainant's performance had been evaluated objectively and fairly and it ordered the addition to her PMSDS report of a paragraph making it clear that her overall rating was positive, although it was not the rating which she had expected, and that the personal issues which she had encountered during the evaluation period might have impacted on the level of her performance.

B. The complainant submits that the Rebuttal Panel disregarded the adversarial principle because, as she was absent from the second hearing of the Head of the Processing Service and the reviewing officer, she was unable to respond to their statements. She also contends that her right to an effective remedy was violated, since the Panel's impartiality and independence were not guaranteed and it chose to disregard an essential fact, namely the harassment grievance which she had filed on 19 October 2009. In her view, the Rebuttal Panel ought to have stayed its proceedings until the grievance had been examined by the Joint Grievance Panel.

The complainant also asserts that, in breach of her duty of transparency, her direct supervisor concealed the fact that she had decided to compile a list of the mistakes she had allegedly made, and she states that she has never received any "clear and precise explanation" of the nature of these mistakes. In her opinion, her PMSDS report is tainted with errors of law in that some of the mistakes with which she is taxed occurred outside the evaluation period covered by the report and that that period was already partly covered by the periodical report which she had signed in January 2009. She submits that the drawing up of the PMSDS report infringed her acquired rights, as it entailed the withdrawal of the periodical report which she was entitled to have maintained. The complainant adds that her PMSDS report is tainted with a manifest error of judgement. She considers in this respect that her direct supervisor failed to take account of the diversity and level of the duties she was performing or of the fact that the evaluation period coincided with a time when she was being sorely tried as a result of intruder attacks on or attempts to hack her computer. She explains, with reference to the harassment by her supervisor, that the overall rating that the latter gave her in the said report was bound to penalise her and, in fact, she was not selected at the end of a series of competitions held in May 2009 with a view to regularising employees in a contractual position similar to her own.

The complainant asks the Tribunal to set aside the impugned decision and the disputed PMSDS report, to order that the said report and all the "comments, opinions or decisions" accompanying it be removed from her personnel file and, if appropriate, to order WIPO to draw up a new PMSDS report. She also claims 40,000 euros in compensation for the injury suffered and 7,000 euros in costs. Lastly, she asks the Tribunal to find that, if these sums were to be subject to national taxation, she would be entitled to obtain a refund of the tax paid from WIPO.

C. In its reply the Organization first makes it clear that it will not reply to the complainant's allegations concerning her non-selection for various posts for which a competition was held in May 2009, or to

those concerning computer incidents, since they form the subject of her second and third complaints (see Judgments 3186 and 3187, also delivered this day).

WIPO then submits that the complaint is irreceivable. It emphasises that subparagraph (2) of paragraph (b) of the introduction to the Staff Regulations and Staff Rules explicitly excludes from the scope thereof staff "engaged for short-term service, that is for periods of less than one year". The complainant, who has always held contracts of less than one year, belongs to that category of short-term staff. It considers that the Tribunal is not competent to rule on her complaint, because she has never had the status of an official within the meaning of Article II, paragraph 5, of the Statute of the Tribunal.

On the merits, the Organization states that the complainant forwarded her comments in writing to the Rebuttal Panel, that she put her case at her hearing, that she was heard under the same conditions as her supervisors and that the composition of the Panel is a guarantee of its independence. In addition, it states that the proceedings before the Joint Grievance Panel and those before the Rebuttal Panel could be held separately from one another.

WIPO is of the opinion that it is "legitimate and necessary" for a supervisor to compile a list of mistakes in order to ensure the objectivity of a subordinate's rating in that person's performance evaluation. It says that none of the mistakes on the list which the complainant received on 27 May 2009 was made after the evaluation period covered by the PMSDS report and that the fact that part of that period had already formed the subject of a periodical report, which still stands and which has not been modified, is not due to an error of law but to the application of Office Instruction No. 19/2009. It also states that the diversity of the tasks performed by the complainant and the difficulties which she faced were duly taken into account, as is evidenced by the comments contained in her PMSDS report. Lastly, the Organization considers that the claim for 40,000 euros in compensation for the injury suffered is unwarranted, as it always acted in good faith and with honesty towards the complainant.

D. In her rejoinder the complainant submits that her complaint is receivable since, as the Tribunal found in Judgment 1272, it may rule on any employment relationship arising between an organisation and its staff, whether under the terms of a contract or under the Staff Regulations.

On the merits, she takes her direct supervisor to task for never warning her when she made so-called mistakes or informing her of the criteria on which she would be evaluated. Furthermore, she contends that Office Instruction No. 19/2009 had an unlawful retroactive effect, since phase I of the PMSDS which it introduced covered a period prior to its entry into force. She informs the Tribunal that her grievance before the Joint Grievance Panel has been dismissed, but she maintains that she has been the victim of personal prejudice and discrimination on the part of her direct supervisor.

E. In its surrejoinder the Organization maintains its position. It comments that the complainant admitted in the document which she handed to her supervisors on 3 June 2009 that in January 2009 she had been informed of the introduction of a system for the "quality control" of her work. WIPO also argues that the complainant's plea that Office Instruction No. 19/2009 was retroactive is irreceivable, because she raised it for the first time in her rejoinder.

F. In her further submissions the complainant repeats her arguments with regard to the Tribunal's competence and asserts that a plea raised for the first time in a rejoinder is receivable. She also explains that she was never warned that there was a connection between the "quality control" system and the PMSDS.

G. In its final observations the Organization reiterates its submissions. In particular, it argues that according to "well-established" precedent the complainant does not have *locus standi*. It considers that the claim seeking a refund of any tax paid on the sums which the Tribunal might award to the complainant is unfounded.

CONSIDERATIONS

1. The complainant entered the service of WIPO in 1999 on a short-term contract which was renewed several times. Since 2001 she has been performing the duties of Assistant Examiner in the Processing Service of the PCT Operations Division. As from 2004 her performance was evaluated in a series of periodical reports, the last of which covered the period from 18 September 2007 to 16 December 2008. All of these reports showed that the quality and quantity of her work and her conduct were deemed satisfactory without reservation.

2. Office Instruction No. 19/2009 concerning the new "Performance Management and Staff Development System" (PMSDS), which applies to all staff members and to short-term General Service employees with at least one year of service, was published on 22 April 2009. Under this system, the overall rating reflects an employee's performance as a whole. This rating may be "exceeds expectations" (outstanding performance), "fully meets expectations" or "mostly meets expectations" (regular performance), or "partly meets expectations" or "does not meet expectations" (underperformance). This rating is proposed to the employee by his or her direct supervisor, who must hold a meeting with the employee. In the event of disagreement, the matter is referred to a reviewing officer, who is usually the supervisor of the employee's head of service and who will try to mediate. If the disagreement persists, the report drawn up by the direct supervisor prevails, but the employee can state the reasons for his or her disagreement.

The above-mentioned office instruction was supplemented on 30 April by Office Instruction No. 22/2009, entitled "Procedures for Rebuttal of Performance Evaluations for Temporary Employees". It specified that disagreements in relation to these employees' PMSDS reports had to be submitted to a Rebuttal Panel consisting of three members drawn from lists compiled by the Director General and the Staff Council. Members of the Joint Grievance Panel and the Appeal Board may not sit on the Rebuttal Panel.

The new system came into force immediately and was launched in phases. The evaluation period for phase I ran from 1 April 2008 to 31 March 2009.

3. In the instant case the complainant had the prescribed meeting with her direct supervisor on 27 May 2009. At that juncture she was informed that, as she had made a large number of mistakes, her supervisor was thinking of giving her the overall rating "mostly meets expectations", in other words a lower rating than the previous ones. The complainant contested this appraisal which, in her opinion, had been prompted by the discrimination, personal prejudice and malevolence of her supervisor and ignored the fact that she had been upset by intruder attacks on or attempts to hack her computer and by the receipt of a defamatory e-mail. As the mediation procedure failed to produce an agreement, the complainant signed the PMSDS report and the mediation report, as did her direct supervisor and the reviewing officer, but she recorded her disagreement therein.

On 17 August the complainant contested her PMSDS report before the Rebuttal Panel and on 19 October 2009 she filed a grievance with the Joint Grievance Panel, in which she accused her supervisor of harassment and discriminatory treatment.

In its report of 12 March 2010 the Rebuttal Panel concluded that the complainant's performance had been evaluated objectively and fairly, upheld her overall rating, but added that the following paragraph should be included in the disputed PMSDS report: "While this is not the rating that Mrs. [N] expected, it is considered to be a positive rating. It is recognized that Mrs. [N] was dealing with difficult personal issues during the period under evaluation due to IT-related problems and that this may have impacted upon her performance and motivation levels. The rating 'mostly meets expectations' indicates that there is room for Mrs. [N] to improve certain aspects in the quality of her work, while at the same time acknowledging positive performance. Finally, Mrs. [N]'s readiness to perform additional duties is acknowledged."

That is the decision impugned before the Tribunal.

4. Contrary to the Organization's submissions, the Tribunal does have competence to rule on the complaint, even though it has been filed by an employee holding a series of short-term contracts (see Judgments 3090, under 4, and 3091, under 10).

However, the Tribunal will not rule on the complainant's allegations regarding her non-selection for various posts and the intruder attacks on or attempted hacking of her computer, which are said to have contributed to the deterioration in her working conditions, because they form the subject of her second and third complaints (see Judgments 3186 and 3187, also delivered this day). Nor will the Tribunal rule on the allegations of harassment, as internal means of redress had not been exhausted when this complaint was filed.

5. The complainant alleges breach of the duty of transparency, of the adversarial principle and of the right to an effective appeal.

(a) It is clear from all the evidence in the file that the last two pleas are completely unfounded. The adversarial principle has been fully respected, since the complainant was able to assert all her rights and explain all her objections in the proceedings before the Rebuttal Panel. She also enjoyed an effective remedy, since the manner in which the members of that Panel were selected guaranteed its independence and impartiality. The Panel heard her in the same way as it heard her direct supervisor, the Head of the Processing Service and the reviewing officer and it plainly did not lend any more weight to their statements than it did to hers. Moreover, the measured wording of the report issued by the Panel at the end of its investigation is a strong indication of its neutrality.

(b) The position is different with regard to the plea concerning a breach of the duty of transparency. In support of this plea, the complainant states that her supervisor concealed from her the fact that in November 2008 she had decided to compile a list of the mistakes made by the complainant during part of the evaluation period.

In principle, a supervisor cannot be criticised for recording the mistakes and errors of a subordinate with a view to preparing that

person's periodical performance evaluation, provided that the purpose of that action is, on the one hand, to ensure that the rating will be objective and, on the other hand, to increase the service's efficiency by improving the performance of the person concerned. In the instant case, however, it is plain from the evidence that this practice was consistently applied to the complainant in order to stigmatise her shortcomings. The explanations provided by the Organization in its submissions, especially in its surrejoinder, are insufficient to warrant the use of this procedure, because in this case it indicates deliberate discrimination against the complainant. Her PMSDS report is thus tainted with a serious flaw which justifies that it be set aside along with the impugned decision.

6. The Tribunal will not rule on the complainant's pleas that facts occurring after the evaluation period were taken into consideration, that essential facts were disregarded and that a manifest error of judgement was committed, since the damages awarded would not be increased even if these pleas were to be accepted.

7. The action which the Organization will have to take further to the setting aside of the disputed report and the impugned decision depends, however, on the response to the complainant's argument that the application of Office Instruction No. 19/2009 to the 12 months preceding the date of its adoption contravenes the principle of the non-retroactivity of administrative acts and violated the rights which she had acquired by virtue of the final adoption of her periodical report of 16 December 2008.

(a) The fact that, as prescribed by the above-mentioned office instruction, the disputed evaluation procedure covered the period from 1 April 2008 to 31 March 2009, resulted in a re-examination of the complainant's performance in 2008, which had already formed the subject of a final evaluation.

(b) The rule that administrative acts cannot apply retroactively is related to the principles of lawfulness and foreseeability. It prevents

an international organisation from altering definitively established legal situations, for example by calling into question an appraisal of service rendered during an evaluation period prior to the adoption of the new rules, as occurred in the instant case.

(c) In this case, Office Instruction No. 19/2009 could not therefore be applied to the evaluation period covered by the periodical report of 16 December 2008 without breaching the principle of non-retroactivity. By subjecting the complainant's work and professional conduct during that period to re-evaluation, WIPO undeniably disturbed a situation which had become established under the earlier rules. Moreover, no overriding public interest worthy of protection justified calling into question the excellent evaluation which the complainant had obtained in that report.

(d) It follows from the foregoing that the impugned decision should also be set aside for this reason.

8. This being so, the complainant's claim to have all "comments, opinions or decisions" accompanying her PMSDS report of June 2009 removed from her personnel file must be allowed.

9. The complainant asks the Tribunal to order WIPO to pay her 40,000 euros in compensation for the injury suffered. This claim is immoderate in view of the fact that the procedure to which she objects nevertheless led to a positive evaluation of her performance. Compensation set *ex aequo et bono* at 8,000 euros under all heads is sufficient to redress the injury which she suffered.

10. As she substantially succeeds, the complainant is entitled to costs in the amount of 4,000 euros.

11. In the absence of a present cause of action in this respect, the claim that the Organization should be ordered to refund the national tax which the complainant might have to pay on the sums awarded under this judgment must be dismissed (see, in particular, Judgment 3144, under 12).

DECISION

For the above reasons,

1. The impugned decision of 12 March 2010 and the complainant's evaluation report (PMSDS) for the period from 1 April 2008 to 31 March 2009 are set aside.
2. WIPO shall proceed as indicated under 8 above.
3. It shall pay the complainant compensation in the amount of 8,000 euros under all heads.
4. It shall also pay her 4,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 6 January 2013, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet