Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

116th Session **Judgment No. 3269**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mrs S. N. against the World Intellectual Property Organization (WIPO) on 21 May 2011 and corrected on 2 September, WIPO's reply dated 15 December 2011 and corrected on 13 January 2012, the complainant's rejoinder of 20 April and WIPO's surrejoinder of 26 July 2012;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

A. Information regarding the complainant's career at WIPO is to be found in Judgments 3185, 3186, 3187, 3225 and 3226, delivered on her five previous complaints respectively. It should be recalled that, at the material time, the complainant, who had been employed on a short-term contract which had been renewed several times, held a post at grade G4 in the Processing Service of the Patent Cooperation Treaty Operations Division.

On 19 October 2009 the complainant submitted a grievance to the Secretary of the Joint Grievance Panel, in which she alleged that her direct supervisor had engaged in harassment and discriminatory treatment. She asserted in particular that her supervisor had concealed the fact that, as from November 2008, she had decided to compile a list of the mistakes which she (the complainant) had supposedly made. The complainant emphasised that, on the basis of that list, in May 2009 her supervisor had given her a "rather mediocre" rating in a periodical report in order to prevent her from obtaining a more permanent position. As her supervisor had already been informed in April 2008 that she had been a victim of computer hacking – into which she had requested the opening of an investigation – the fact that her supervisor had remained indifferent to that situation had given her the feeling that that person was participating in the "acts to sabotage the quality of [her] work", or that she supported them.

The Joint Panel, to which the grievance had been transmitted on 18 November 2009, decided to stay its proceedings and to propose that the complainant should pursue informal resolution of the dispute. It also contacted the Director of the Human Resources Management Department in order to suggest that the Administration should adopt the necessary interim measures to separate the complainant and her supervisor "physically and hierarchically". During a meeting on 11 December 2009 the Joint Panel therefore proposed that the complainant, who had been on sick leave since 15 September of that year, should be transferred when she returned to work. It also encouraged her to seek an amicable settlement of the dispute, but on 23 December 2009 the complainant stated that she wished to proceed with her grievance. In the meantime, she had been informed by a letter of 15 December 2009 – that is to say on the day when she returned from sick leave – that she had been temporarily transferred with immediate effect within the Processing Service to a post equivalent to that which she had held previously. Having noted that all the possibilities of reaching an informal settlement of the dispute had been exhausted, the Joint Panel decided to resume its proceedings and on

2 February 2010 it asked the complainant to clarify her allegations, which she did in a document dated 12 March 2010.

On 23 June the complainant notified the Chairperson of the Joint Panel that she had still not received her supervisor's reply to her grievance. On 30 June the Secretary of the Panel informed her that the doctor of her supervisor – who had been on sick leave since 25 March – had requested that the latter should not be contacted owing to her state of health but that, so as not to delay the proceedings any further, the Joint Panel had asked her to designate a representative who could reply on her behalf.

On 2 August the complainant's supervisor replied to the complainant's grievance, which she had been handed on 5 July, on her return from sick leave. She denied all the allegations made against her and said that they had had serious repercussions on her state of health. She therefore lodged a counter-grievance against the complainant on the grounds that the latter had levelled defamatory accusations at her. On 10 August the complainant was advised that the file had been transmitted on that same date to the Internal Audit and Oversight Division (IAOD) for investigation. On 13 December 2010 the Investigation Officer submitted her confidential report to the Joint Panel. In its report of 24 January 2011 the Panel concluded that neither the complainant's grievance nor that of her supervisor was well founded, but that neither of the protagonists had acted in bad faith or had intended to harm the other and it therefore recommended that no sanction should be imposed on them. It also noted that the complainant's temporary transfer had made for a more congenial working environment in the Processing Service and, for that reason, recommended that the transfer should be made permanent. The complainant was informed by a letter dated 18 February 2011 that the Director General had decided to endorse the Joint Panel's recommendations. That is the impugned decision. In a memorandum of 14 April 2011 the complainant asked the Director of the Human Resources Management Department to confirm that the Director General did not intend to grant her compensation for the injury caused

by the moral harassment to which, she claimed, she had been subjected.

B. The complainant takes the Organization to task for failing to honour its duties of assistance and "good governance" and, in particular, its duty of care towards her during the investigation of the computer incidents she had reported, which lasted more than two years and which, in her opinion, "largely contributed" to her "distress" and worsening working conditions. The complainant also contends that the investigation of her allegations of harassment and discriminatory treatment was not conducted with all due speed, since the file was transmitted to the IAOD almost ten months after she had filed her grievance. She points out that the Investigation Officer did not issue her report until 13 December 2010 whereas, in her view, it is plain from Office Instruction No. 31/2009 that an investigation must be completed within 30 days. She denies that she caused this delay and submits that, in breach of her right to be heard, she was not sent the Investigation Officer's report before the Joint Panel issued its own report.

The complainant further submits that WIPO did not fulfil its duty to provide her with a safe and adequate working environment and she considers that she is the victim of moral harassment. She endeavours to show that a series of incidents, including "computer hacking", which she and her husband experienced, her precarious status as a short-term employee and her supervisor's "malevolent attitude" towards her resulted in a deterioration in her working conditions and "invaded her privacy, undermined her dignity and damaged her psychological health".

She requests the setting aside of the impugned decision "apart from [her] transfer" and, if appropriate, of the implied decision rejecting her claim for compensation of 14 April 2011. She also claims compensation in the amount of 50,000 euros for the injury suffered and 10,000 euros in costs. Lastly, she asks the Tribunal to rule that, should these various sums be subject to national taxation, she would be entitled to a refund of the tax paid from WIPO.

C. In its reply WIPO contends that, as the complainant has never had the status of an official within the meaning of Article II, paragraph 5, of the Statute of the Tribunal, the latter has no competence to entertain her complaint. It further submits that in her grievance of 19 October 2009 the complainant did not in any way suggest that the alleged moral harassment by her supervisor started with the computer incidents that she had reported. WIPO is of the view that, as these incidents are unrelated to the subject matter of this dispute, all pleas pertaining to them are irreceivable. In addition, WIPO emphasises that, as the complainant did not challenge within the prescribed time limit a memorandum which she received on 12 October 2010 and which informed her that the file on those incidents had been closed, the pleadings relating to them are time-barred and therefore irreceivable.

WIPO submits that, given the circumstances and the need to comply with the provisions of Office Instruction No. 31/2009, the proceedings before the Joint Panel were not excessively long. It explains that the Panel stayed its proceedings so that the possibility of informal resolution of the dispute could be explored, in accordance with paragraph 6 of Annex B to the above-mentioned office instruction, a process which "inevitably took some time". Moreover, paragraph 18 of that annex, as amended by Office Instruction No. 46/2009, gave the Joint Panel discretionary authority to add to the procedures and extend the procedural deadlines outlined in Office Instruction No. 31/2009, if it deemed such action necessary in order to consider the matter under review. Thus, for example, it had granted the complainant an extension of the time limit in order that she might clarify her allegations, as she had been asked to do on 2 February 2010. WIPO explains that the sick leave of both the complainant and her direct supervisor likewise caused some delay; since the Joint Panel had decided that, in order to safeguard their rights, no document could be delivered to the parties while they were on sick leave, it was unable to notify the supervisor of the grievance for more than three months. The Organization also explains that another reason why the investigation could not be completed within the two months laid down in the

aforementioned Annex B was that the Investigation Officer was absent until the end of August 2010. However, it considers that the investigation was not excessively long, bearing in mind the need to conduct a thorough investigation in keeping with the Tribunal's case law.

WIPO maintains that the complainant is wrong to allege that her right to be heard was breached, because she was interviewed during the investigation and was able to submit her comments on her supervisor's response to her grievance.

The Organization endeavours to show that it did not fail in its duty to provide the complainant with a safe working environment that safeguarded her dignity. It relies on the Joint Panel's report to state that there is no evidence corroborating the complainant's "insinuations, impressions and speculations" regarding her supervisor. WIPO considers that it dealt diligently and carefully with the situation with which the complainant was confronted on account of the computer incidents that she reported.

D. In her rejoinder the complainant states that WIPO did not file a reply within the prescribed time limit, because the document which she received indicates that it is the Director General's reply. She also points out that in Judgment 3090 the Tribunal found that it may rule on any employment relationship arising between an organisation and its staff, whether under the terms of a contract or under Staff Regulations. She discloses that in a memorandum of 6 April 2009 she requested "the Administration's assistance", particularly because she had been the victim of various computer incidents and moral harassment. In her opinion, that request serves to define the subject matter of her complaint.

On the merits, she takes the Joint Panel to task for dismissing some of her pleas on the grounds that she had not entered them in her grievance, but only later in the course of the investigation, and for disregarding facts occurring prior to November 2008 because she had said that the harassment of which she was complaining had begun during that month.

E. In its surrejoinder WIPO states that it "obviously did" file a reply and stresses that, in accordance with Article 9(4)(b) of the 1967 Convention Establishing the World Intellectual Property Organization, the Director General represents the Organization. On the merits it maintains its arguments in their entirety.

CONSIDERATIONS

1. The complainant entered the service of WIPO in 1999 on a short-term contract which was renewed several times until 1 June 2012, when she acquired the status of staff member.

2. On 19 October 2009 the complainant filed a grievance with the Joint Grievance Panel (hereinafter "the Joint Panel") in which she alleged that she had been the victim of moral harassment by her direct supervisor. She said that working relations between them had deteriorated seriously after November 2008 on account of the hostile and discriminatory conduct which her supervisor had adopted towards her in order to belittle her performance and jeopardise her chances of becoming a staff member. The complainant stated that already in April 2008 and on several occasions thereafter she had in vain tried to draw her supervisor's attention to the distress which she was experiencing owing to the computer hacking of which she had been the victim (paragraph 13(e) of the grievance).

In her first complaint, which she filed on 14 June 2010 against a periodic evaluation report, the complainant mentioned this harassment, but the Tribunal did not examine this allegation because the grievance lodged on 19 October 2009 was still pending before the Joint Panel when that complaint was filed (see Judgment 3185, under 4).

3. Shortly after the complainant had lodged her grievance she was provisionally transferred to another team, with her agreement. It was not until July 2010 that the grievance could be delivered to the supervisor in question, who in turn had had to take more than three months' sick leave. In her response, the supervisor denied all the

complainant's accusations and lodged a counter-grievance against her for defamation.

On 14 December 2010 the IAOD forwarded the investigation findings to the Joint Panel.

In its report of 24 January 2011, the Joint Panel concluded that:

(a) With regard to the merits of the grievance:

"31. The Panel found that the [grievance] was without foundation as the Complainant has not presented any facts that would support the allegation of harassment and discriminatory treatment. The facts that the Complainant provided in her submissions were all work related. They are related to disputes about committing errors and correction of errors, measures of supervision within the hierarchy, distribution of work and communication.

32. The Panel does not find that dealing with errors committed by the Complainant by a supervisor amounted to harassment and discriminatory treatment. Whereas the Complainant expanded extensively on whether or not she committed errors, about procedures related to distribution of work, about information technology problems, the facts provided by her did not demonstrate the alleged improper behavior of harassment and discriminatory treatment. Supervision is not disproportionate if it notes every error. It is careful. There is no reason why errors should be neglected. It is important that work be done correctly and errors need to be identified. It is also important that the supervisee recognizes that errors were committed."

(b) With regard to the supervisor's counter-grievance:

"35. […] The complete file shows a complicated working relationship full of tensions. It shows a lack of communication and also a lack of good will. While a supervisee has to accept that errors that are committed are noted and communicated, a supervisor has to accept that the supervisee has a different view and that such supervisee has a right to defend [her/his] position. These are work related conflicts. But conflict, even when it is long running and painful for the parties, is not necessarily a grievance."

The Joint Panel recommended that the complainant's transfer should be made permanent and that no sanction should be applied to either the supervisor, whose attitude did not amount to harassment or discriminatory treatment, or the complainant, whose accusations were not of a defamatory nature.

On 18 February 2011 the Director General decided to adopt these recommendations. That is the impugned decision.

4. Contrary to WIPO's submissions, the fact that the complainant was employed on a succession of short-term contracts is no obstacle whatsoever to the Tribunal's competence (see, in particular, Judgments 3090, under 7, and 3185, under 4).

5. The complainant contends that WIPO's reply to her complaint should be deemed to be non-existent because it comes not from WIPO itself, but from its Director General acting in a personal capacity. There is no substance in this objection, since the Director General, who may represent the Organization in accordance with Article 9(4)(b) of the Convention Establishing the World Intellectual Property Organization of 14 July 1967, plainly acted on behalf of it.

6. The complainant submits that WIPO did not take appropriate steps to put an end to the computer hacking of which she had been a victim and did not investigate it with due diligence and speed. She maintains that these failings definitely prevented the gathering of sufficient evidence to shed full light on events which had seriously impaired the working atmosphere.

It must be found that, so formulated, these pleas – and likewise those pertaining to the complainant's performance rating which formed the subject of Judgment 3185 – are irrelevant, because the facts to which they relate were not the subject of the grievance procedure that culminated in the impugned decision. The aforementioned computer hacking was certainly alluded to in those proceedings, but only insofar as the complainant alleged – as an example of her supervisor's supposedly hostile and discriminatory attitude – that her supervisor was indifferent to the distress which these acts of cybercrime were causing her and that her supervisor took no action on her complaints in this connection (paragraph 13(e) of the grievance; paragraphs 25 to 33 of the additional information sent to the Joint Panel on 12 March 2010; allegation summarised in point xiii

of a list recapitulating the parties' submissions which the Joint Panel presented in paragraph 28 of its report). The Tribunal will therefore confine its examination here and under 9, below, to whether WIPO abused its discretion in not considering that this particular conduct amounted to harassment.

7. The complainant first taxes WIPO with breaching its duties of assistance and "good governance" by not conducting the harassment proceedings with due speed and by not respecting her right to be heard.

(a) Precedent has it that complaints of harassment or discrimination at work must be dealt with promptly and with particular diligence, not only because of the need to gather testimony as soon as possible, but also because of the repercussions which such acts can have on the alleged victim, on the supervisor in question, to whom the presumption of innocence applies, and on the organisation's services, whose proper functioning may be disrupted by such behaviour and by the proceedings related to the complaint (see Judgment 3233, under 15(b)).

WIPO rightly embodied this principle in Office Instruction No. 31/2009, Annex B of which sets precise time limits for proceedings before the Joint Panel.

Paragraph 11 of that annex reads as follows:

> "[…] The complaint must normally be initiated, completed and the report submitted to the Panel within thirty (30) working days from the receipt of the alleged perpetrator's response by the Panel, or upon expiry of the given time limit of ten (10) working days or of the authorized extension (see paragraph 10 above). The Panel shall forward to the IAOD the documentation by the end of the next working day after the Panel receives the alleged perpetrator's response. In the case where exceptional circumstances warrant an extension of the period of thirty (30) working days, the Chairperson of the Panel, in consultation with the IAOD, may submit such a request to the Director General."

(b) The complainant acknowledges that proceedings were conducted within a reasonable period of time once the IAOD

investigator's report, dated 13 December 2010, had been submitted, but that this was not the case during the previous phases of the proceedings.

The period between the filing of the grievance on 19 October 2009 and the transmission of the file to the IAOD on 10 August 2010 might indeed appear to be particularly long, and it is understandable that by 23 June 2010 the complainant was worried about it, since she had been without news of progress in the proceedings since 12 March. However, in the instant case this undeniable delay compared with what must be the normal course of such proceedings cannot be ascribed to a fault on the part of WIPO. The complainant's sick leave, followed by that of the supervisor suspected of harassment, lasted for a total of more than six months during the period in question. In addition, it was necessary temporarily to transfer the complainant to a suitable post and the Organization rightly tried to pursue informal resolution of a labour conflict which was painful for both the persons concerned. The proceedings were further lengthened by the complex nature of the harassment accusations, which led WIPO to ask the complainant to furnish substantial amounts of additional information. Lastly, it must be recognised that once it had been able to deliver the grievance to the supervisor in question for her comments, in other words on her return from sick leave on 1 July 2010, WIPO ensured that the file was transmitted to the IAOD as rapidly as possible.

The IAOD took more than four months to pass on its findings to the Joint Panel. This period greatly exceeds the 30-day time limit normally applicable under paragraph 11 of the aforementioned Annex B, which in this case had to be extended several times. But these extensions were in order, since they were due either to the parties' further sick leave or to reasons which are acceptable in light of the submissions, such as the absence of the Investigation Officer during the month of August and the fact that she had to have enough time conscientiously to summarise not only the contradictory and often complex allegations made by each of the parties in support of their grievance and counter-grievance, but also the evidence gathered.

The plea regarding the length of proceedings therefore fails.

(c) The complainant contends that her right to be heard has been breached, because she had no opportunity to comment after the investigation had been completed, as she did not receive the report on it.

Paragraph 13 of the aforementioned Annex B specifies that the report which the IAOD investigator submits to the Joint Panel on completing her/his work is confidential. This report merely summarises the facts of the dispute and the evidence gathered during proceedings in which both parties were completely free to comment on all the evidence adduced in compliance with the adversarial principle.

The plea that the complainant's right to be heard was breached is therefore groundless.

8. The complainant further alleges that WIPO failed in its duty to respect employees' dignity and to provide a safe and adequate working environment. She says that having been placed in a precarious situation by the short-term contracts imposed on her and having been publicly defamed in the context of steps to deal with the computer hacking of which she and her husband were victims, she was unable to bear the tension, the existence of which was noted by the Joint Panel. She maintains that this tension was caused by her supervisor's indifference, opaque practices, discriminatory conduct and unremitting hostility.

9. The question as to whether or not harassment has occurred must be determined in the light of a careful examination of all the objective circumstances surrounding the events complained of. An accusation of harassment must be borne out by specific acts, the burden of proof being on the person who pleads it, but there is no need to prove that the accused person acted with intent (see Judgments 2100, under 13, 2524, under 25, and 3233, under 6, and the case law cited therein).

It is clear from the submissions that, in the instant case, WIPO accorded due process by putting in place proceedings in which both parties were able to provide all the explanations they wished, that it thoroughly investigated the events complained of and that it ensured adequate protection of the complainant, particularly by transferring her to another team. The requirements of the case law with regard to the conduct of proceedings concerned with moral harassment have therefore been fully complied with (see, in particular, Judgment 2642, under 8).

Be that as it may, the investigation of the grievance and counter-grievance brought to light great tension between an employee and her direct supervisor. That tension impaired a hitherto courteous professional relationship and led to a working environment that was so noxious and unbearable that the complainant's transfer – to which she does not object – ultimately appears to have been an indispensable, salutary measure. However, whether viewed in isolation or together, the acts complained of which have been duly established do not enable the Tribunal to reach a different conclusion to that of the Joint Panel, which is summarised under 3, above.

The complainant's criticism of the Director General's appraisal of the facts is therefore unjustified.

10. It follows from the foregoing that the complaint is unfounded and that the claims therein must be dismissed in their entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 November 2013, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Claude Rouiller
Seydou Ba
Patrick Frydman
Catherine Comtet