119th Session **Judgment No. 3418**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms V. E. M. M. against the World Intellectual Property Organization (WIPO) on 13 April 2012 and corrected on 17 July, WIPO's reply of 22 October 2012, the complainant's rejoinder of 23 January 2013 and WIPO's surrejoinder of 30 April 2013;

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 joined WIPO in 1982 as a Secretary at grade G3. At the material time she held the position of Web Systems Officer at grade P3 in the Information and Communication Technology Department (ICTD). In February 2008 her supervisors submitted a request for the reclassification of her post to the Human Resources Management Department (HRMD). In April 2008 the reclassification process for all positions in ICTD was suspended pending the appointment of a new Chief Information Officer (CIO). It resumed in April 2010, when HRMD requested that updated job descriptions be sent to it. On 9 April 2010 the new CIO sent to HRMD revised job descriptions for the complainant's colleagues – four of whom were subsequently promoted with retroactive effect from 1 July 2008 – but not for the complainant because, as he explained in an e-mail sent to her on 28 April 2010, there were significant differences between her and her supervisors regarding its content.

After several unsuccessful efforts to resolve the issue, one of the complainant's supervisors forwarded to her on 15 October 2010 an updated job description which, he said, had been approved by the other supervisors and had also been submitted to HRMD. By an internal memorandum of 20 October 2010, the CIO sent that same job description to HRMD, asking that it be considered "in the context of the previous reclassification request". On 29 November 2010 the complainant wrote to the Director General requesting a review of the decision to "[establish] a false and inaccurate job description". She argued that the job description provided to HRMD on 20 October 2010 had been drafted "in a deliberate effort to downgrade [her] position" and that it did not reflect her duties. She also referred to a harassment grievance that she had filed in April 2010 and complained that that she had not yet received any decision from the Joint Grievance Panel. She requested that her position be reclassified on the basis of the job description that she provided. In an internal memorandum of 23 December 2010 she was informed that no action would be taken on the job description of 20 October 2010, but that in an attempt to overcome the impasse concerning her job description, the original reclassification request, as submitted in February 2008, would be presented to the Classification Committee at its next session in March 2011.

Following the rejection of her request for review on 24 January 2011, the complainant filed an internal appeal on 21 April 2011, requesting a promotion to grade P4 with effect from 1 July 2008, moral damages for the harassment and stress that she had suffered and which had adversely affected her health, reimbursement of all related medical expenses, and costs. On 20 June 2011, while that appeal was pending, she was informed that, further to a recommendation by the Classification Committee, she had been promoted to grade P4 with retroactive effect from 1 January 2010. Following a recommendation of the Appeal Board in a separate appeal, her promotion was subsequently back-dated to 1 January 2009. The Appeal Board submitted its report on 21 November 2011. It concluded that the unwarranted delay in the classification process had given the complainant a feeling of unequal treatment and that the various attempts to diminish her responsibilities had caused her considerable anxiety. It recommended

that the Director General award her an appropriate amount for the moral injury she had suffered due to the decision to establish and forward to HRMD a new job description for her post and to reimburse her, upon the production of satisfactory evidence, the costs she might had incurred for eight hours of legal service, in connection with the preparation of her request for review and internal appeal. By a letter of 19 January 2012, the complainant was informed that the Director General had decided to adopt the Board's recommendation and to award her 1,000 Swiss francs in compensation and to exceptionally reimburse her costs for eight hours of legal service. That is the impugned decision.

B. The complainant argues that the Director General's decision to award her 1,000 Swiss francs in compensation for the injury she suffered is based on errors of fact, mistaken conclusions and failure to take into account material facts. Indeed, 1,000 francs is not an appropriate amount of compensation for the injury that she suffered, in particular the harassment and mobbing to which she was subjected and which culminated in the downgrading of her job description and the manipulation and delay of her reclassification.

She contends that she was not afforded equal treatment because, contrary to her legitimate expectation, she was not promoted with effect from 1 July 2008, as was the case with her colleagues in ICTD, but rather with effect from 1 July 2010, i.e. two years later. She notes that the Administration delayed the reclassification process by three and a half years which, in her view, was excessively long. She adds that by failing to conduct the reclassification process swiftly, fairly and with due diligence, HRMD breached its duty to act in good faith. She believes that the Director General did not give proper consideration to the facts of her case and to the Appeal Board's conclusions relating to the damage she suffered. She explains that the harassment and discrimination to which she was subjected in connection with the downgrading of her job description caused significant damage to her health.

The complainant requests that her promotion to grade P4 be made retroactive to 1 July 2008. She claims 60,000 francs in compensation

for WIPO's actions in downgrading her job description, 40,000 francs for the delay, the harassment and the bias surrounding the establishment of her job description, 40,000 francs for the unwarranted delay in reclassifying her post, 40,000 francs for moral injury and 60,000 francs for the irreversible damage to her health caused by the excessive stress that she suffered. She also claims costs and such other relief as the Tribunal deem fair. She asks the Tribunal to hold an oral hearing and to order WIPO to provide her with all documents relating to the reclassification of her post.

C. In its reply WIPO argues that the complaint is irreceivable because it was not submitted within the 90-day time limit prescribed in Article VII, paragraph 2, of the Tribunal's Statute. Indeed, the complainant's original submission to the Tribunal consisted merely of a complaint form without a brief "stating the facts of the case and the pleas", as required by Article 6 of the Tribunal's Rules. In addition, the complainant raises several issues that do not properly form the subject of the present complaint. Her claim that her promotion be made retroactive to 1 July 2008 and her claim of harassment, in particular, are irreceivable because they fall outside the scope of the complaint. WIPO also notes that the complainant has introduced a number of new claims in her complaint before the Tribunal and has put "astronomical" amounts to her hitherto non-quantified claim for damages. With regard to her request for the production of documents, it argues that she is not entitled to such documents and that, in any event, it should be rejected as being too general and vague. Similarly, her application for hearings should be denied because she has not provided any grounds for such request.

On the merits, WIPO submits that the difficulty in establishing a new job description for the complainant must be considered against the background of a changing operational environment and that the changes proposed to the complainant's 2008 job description were based on objective reasons. Emphasising that the impugned decision was discretionary and, therefore, subject to only limited review, it denies that the Director General exercised his discretion in a wrongful or improper manner, or that his decision was based on mistaken

conclusions. While recognising that requests for the reclassification of posts in ICTD were not processed as swiftly as desired, it underlines that the complainant was ultimately granted promotion to P4 as from 1 January 2009, which is less than one year after her reclassification request had been submitted, and she was also granted interest on the resulting remuneration arrears. In effect, her promotion became effective eleven months after the submission of her request for reclassification, which is well within the period considered reasonable by the Tribunal. WIPO strongly rejects the allegation that it failed to carry out the reclassification process with due diligence or that it acted in bad faith. It asserts that the Director General gave full consideration to the Board's conclusions and recommendations before taking his decision.

D. In her rejoinder the complainant submits that her complaint is fully receivable, as she has complied with the prescribed deadlines and formal requirements. She explains that, contrary to what WIPO alleges, she has not introduced new claims but has merely provided information that is material to the issues raised in her complaint.

E. In its surrejoinder WIPO considers that the complainant has not put forward in her rejoinder any argument that would prompt it to change its position.

CONSIDERATIONS

1. The complainant has been employed by WIPO for over 30 years. She joined WIPO in 1982. The complainant describes her career in her brief as evolving from an administrative role to an Information Technology oriented role as a Web Information Specialist. In November 2007 the complainant discussed with her supervisors, the reclassification of her position and steps were taken to effect a reclassification. This led to a request in February 2008 for the reclassification of her position (the February 2008 request). However in April 2008, a freeze on reclassifications was imposed. As it turned out all reclassifications in the Information and Communication Technology Department (ICTD) were put on hold until the arrival of a

new Chief Information Officer (CIO) in August 2009. Thereafter, reclassifications did take place within ICTD and were approved by a Classification Committee in April 2010. However, and notwithstanding this, the reclassification of the complainant's position had not occurred and there were differences between the complainant and her immediate supervisor about her job description. The CIO endeavoured to facilitate agreement on her job description. However, no agreed job description eventuated. By October 2010, the complainant thought it was necessary to provide her supervisor with a two-week deadline to provide her with a job description. She did so by internal memorandum dated 1 October 2010.

2. On 15 October 2010 the complainant received from her direct supervisor an e-mail attaching what was described as her updated job description which had been reviewed and approved by her supervisors. The e-mail noted a copy had been sent to the Director of Human Resources Management (HRMD). On 20 October 2010 the complainant received from the CIO a copy of an e-mail he had sent to HRMD. The CIO asked HRMD to note "the attached new Job Description". The e-mail also said "[s]hould HRMD consider that, based on the new Job Description, the post should be reclassified, we would welcome and support such consideration".

On 29 November 2010 and against this background and particularly the events of 15 and 20 October 2010, the complainant applied to the Director General for a review of "this administrative decision". In the application for review, the complainant raised harassment and discrimination against her. On 23 December 2010 HRMD wrote to the complainant indicating that a request would be made for her post to be reclassified on the basis of the February 2008 request.

3. On 24 January 2011 the complainant was informed that her request for review of 29 November 2010 had been denied on the basis that no administrative decision had been taken. The complainant thereupon brought an internal appeal to the WIPO Appeal Board

on 21 April 2011 against the decision of 24 January 2011. The Appeal Board reported to the Director General recommending that he should allow the appeal in part and award the complainant an appropriate amount for the moral injury caused to her by the decision of her supervisors to establish and forward to HRMD a new job description for her post. The Board also recommended that the complainant be reimbursed costs for legal services in a way specified in the report.

By letter dated 19 January 2012 the complainant was informed that the Director General had accepted the Appeal Board's recommendations and had quantified the compensation in the sum of 1,000 Swiss francs. The letter indicated legal costs would also be paid subject to establishing the quantum.

4. Before addressing the issues raised by the complainant in her brief, it is necessary to address a challenge by WIPO to the receivability of the complaint. The complainant filed her complaint with the Tribunal on 13 April 2012. WIPO contends that the complaint is not receivable. It does so on a basis that is raised in other cases in this session and which has been raised in the past. The Tribunal's response to the argument has been consistent. While the completed complaint form was filed on 13 April 2012, the brief was not filed until 17 July 2012. This occurred in circumstances where the Registrar exercised a power to enable the complainant to "correct" the complaint under Article 6(2) of the Tribunal's Rules. Article 14 of the Rules also appears to have been engaged. WIPO argues that this is an impermissible use of the power conferred on the Registrar by Article 6 and, in the result, the completed complaint (complaint form and brief) was filed out of time. However, the exercise of the power conferred by Article 6(2) in similar circumstances has been sanctioned by the Tribunal's jurisprudence (see Judgment 1500, considerations 1 and 2). Whether it is desirable for a Registrar to routinely use the power in this way is another question. WIPO's challenge to receivability is rejected.

5. It is important, at this point, to focus on the subject matter of the impugned decision. In her brief the complainant identifies three separate appeals she filed in 2011 with the Appeal Board. One was

filed on 21 April 2011 that is identified in the brief as an appeal concerning the "downgrading of her job description by her supervisors without her consent". It is noted in the brief that it is the decision of the Director General, on that appeal, which is challenged by the present complaint. The other two appeals were filed on 1 and 6 December 2011. The former concerned the alleged failure of the administration to provide the complainant with the same retroactive promotion as given to the ICTD group of which she was part. The latter concerned a decision of the Director General that the Joint Grievance Panel did not find any actions of harassment and mobbing in the workplace.

The relief sought by the complainant in this complaint is, in aggregate, orders requiring WIPO to pay her 240,000 Swiss francs as damages and, additionally, further amounts being the amounts payable if she was retroactively promoted as she seeks in one of the orders.

6. It is to be recalled that the complaint to this Tribunal had its genesis in a request by the complainant to the Director General to review an administrative decision pursuant to Staff Rule 11.1.1(b)(1). The request was embodied in an internal memorandum from the complainant which contained 34 numbered paragraphs. The first eight paragraphs recounted some of the background. The eighth paragraph said: "On October 15, 2010, I received a final job description from my supervisor. On October 20, 2010, this final job description was sent to [Mrs D.] with a request to her leaving it to the discretion of HRMD to reclassify my position if HRMD thinks it is necessary." The next numbered paragraph, paragraph 9, was under the heading "Issues for Review". That paragraph commenced by saying: "I request your kind review of this administrative decision (establishing a false and inaccurate job description) […] for the following reasons […]." The remainder of the paragraph contained three dot points setting out the reasons why the review was requested. The reply to this request, dated 24 January 2011, took the point that there had been no administrative decision as the job description had never been finalised. However the author of the letter, the Acting Director of HRMD, went on to address what were described as "a number of miscellaneous points that you [the complainant] have raised in your memorandum".

7. In her statement of appeal to the Appeal Board of 21 April 2011, the complainant again provided a document with numbered paragraphs, 29 paragraphs in all. After an Executive Summary, the first substantial topic discussed in the statement of appeal was under a heading "Absence of Administrative Decision". In that discussion the complainant said that the job description sent to her on 15 October 2010 and confirmed on 20 October 2010 "can be considered as 'final' in the light of the procedure for the reclassification exercise". At the conclusion of the statement of the appeal, under the heading "Legal Claims", the complainant said:

> "Based on all of the foregoing, I respectfully submit to the [Appeal Board] that the Director General's failure to reclassify my post is a final administrative decision which can therefore be appealed before the Appeal Board. Such *failure* on the part of the Director General to grant me my requested relief is in and of itself an appealable decision. I further submit, as detailed above, that such decision was also tainted by harassment, malice, bias and prejudice, and violates the principle of equal treatment, and is an affront to the dignity and respect which I am owed as an international civil servant. It is also tainted by factual mistakes, errors of law and incorrect conclusions. The impugned reclassification process was also adversely impacted by procedural irregularity (excessive and inexplicable delay, etc.) as detailed above."

The complainant then identified the relief she sought. Firstly, she sought retroactive promotion to July 2008 and recompense for benefits lost, moral damages for the harassment and bias, actual damage caused by the excessive stress (a skin disorder), attorney fees and such other relief as the Appeal Board determined to be fair, necessary and equitable.

8. In its report the Appeal Board addressed the scope of the internal appeal. The Board concluded that there was a final administrative decision constituted by the correspondence of 15 and 20 October 2010 involving the sending of a job description. It noted that, ultimately, the Director General had confirmed that the 2008 job description would be used in the reclassification process and not the description circulated in October 2010. The Board indicated that it agreed with WIPO that the complainant's main concern identified in the request for review had been met. However it observed that the complainant still had, to a limited extent, a cause of action since her claim that the

new job description had been deliberately established to downgrade her post could, if well-founded, justify a claim to moral damages. However it concluded that the request for retroactive promotion was insufficiently covered by the request for review and, in any event premature. In relation to the claim for moral damages, the Appeal Board concluded that the claim for moral damages for harassment and bias was receivable but only with respect to harassment and bias arising in connection with the establishment and forwarding to HRMD of the 2010 job description and, similarly, the claims for damages and medical expenses arising from stress were receivable only to the extent that they could be proved to be linked to the establishment of the 2010 job description.

Having regard to the various documents generated by the complainant in the internal appeal process, the approach of the Appeal Board to what was comprehended and not comprehended by the internal appeal, is correct. This conclusion informs the scope of the proceedings in this Tribunal. WIPO did not raise, in these proceedings before the Tribunal, any issue about receivability in relation to the subject matter of the grievance as identified by the Appeal Board. Moreover, whether the characterisations of the correspondence of 15 and 20 October 2010 as a final decision is correct or not is really of no significance, because the substance of the Appeal Board's recommendation and the Director General's decision was that there had been a breach of the Organization's duty of care towards the complainant.

9. In addition, the report of the Appeal Board manifests a comprehensive and thoughtful consideration of the evidence and applicable principles. Its conclusions are rational and balanced. In these circumstances its findings warrant "considerable deference" (see Judgment 2295, consideration 10). It found that the job description of October 2010 involved a significant diminishment of the complainant's responsibilities. However, as to what motivated the formulation and circulation of the 2010 job description, the Appeal Board found that the evidence was consistent with a desire of the supervisors to overcome a problem in working relations, rather than an intention to

subject the complainant to harassment or bias. It concluded that the supervisors probably had no desire to "downgrade" in the strict sense.

Nonetheless, the Appeal Board found that the action taken by the complainant's supervisors and the failure of WIPO to properly carry out its duty of care and protection could have caused the complainant significant moral injuries. The Board pointed to the delay in the classification process which it viewed as unwarranted. This, the Board concluded, had given the complainant a feeling of unequal treatment with respect to other staff members whose positions were being considered for reclassification at the time (culminating in the classification round of April 2010), and in general the various attempts to diminish her responsibilities appeared to have caused the complainant considerable anxiety. Notwithstanding this general conclusion, the Appeal Board thought there was inadequate proof of any deterioration in the complainant's health.

WIPO has not, in its reply and surrejoinder, demonstrated that the conclusions of the Appeal Board about the scope of the internal appeal and on the merits of the appeal were inappropriate or incorrect. To the contrary, they were correct.

10. The Board did not venture a concluded view (by way of recommendation) as to the quantum of compensation the complainant should be paid. It said that a possible objective for the assessment of compensation would be to give the complainant confidence that her loyalty to WIPO was appreciated and this might obviate any further proceedings or claims. It also suggested it might be possible for this objective to be met if the compensation was equivalent to the amount that would be payable if the complainant's claim to greater retroactivity in the application of her promotion to grade P4 proved to be well founded though noting, however, that this claim fell outside the scope of the appeal.

11. The complainant, through her counsel, has called in aid not only these findings and recommendations but also the recommendations of the Appeal Board in a separate report dated 31 May 2012 as a basis for

the calculation of damages in these proceedings. This is impermissible. The complainant has elected, presumably advised to do so by her legal adviser, to commence and prosecute several internal appeals. Whether this was desirable or necessary, is not a matter on which the Tribunal should comment. However, in assessing damages, the Tribunal should, in a case such as the present, focus on the subject matter of the complaint informed by the scope of the internal appeal.

12. The Tribunal notes the medical report of 16 January 2012 concerning the complainant's medical condition and the schedule of medical expenses she has incurred. The report really does not separately address the effect on her medical condition of the specific events of October 2010 involving the circulation of the job description and the consequences of delaying her reclassification. Rather, it addresses the effect on the complainant's health of events over many months in 2010 and 2011. Nonetheless the Tribunal has had regard to the report in assessing damages. The Tribunal has assessed the appropriate amount of moral damages as 15,000 Swiss francs. The Tribunal will order WIPO to pay the complainant 7,000 Swiss francs by way of legal costs. It rejects the submission that the order should cover costs actually incurred.

13. Two procedural issues should be noted in conclusion. The complainant requested an oral hearing. However the Tribunal is satisfied that the issues raised in the proceedings can be resolved having regard to the pleas and the documentary evidence. A request was made for the production of documents. The request was cast in the most general and imprecise terms and should be rejected.

DECISION

For the above reasons,

1. WIPO shall pay the complainant 15,000 Swiss francs by way of moral damages.

2. WIPO shall pay the complainant 7,000 Swiss francs for legal costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 14 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ