B. (No. 2)
v.
WIPO

135th Session **Judgment No. 4606**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms L. B. against the World Intellectual Property Organization (WIPO) on 2 April 2019 and corrected on 3 May, WIPO's reply of 13 August 2019, the complainant's rejoinder of 16 December 2019, WIPO's surrejoinder of 6 April 2020, the complainant's additional submissions of 1 March 2021 and WIPO's final comments thereon of 31 August 2021;

Considering the documents and information provided by WIPO on 9 August 2022 at the Tribunal's request and the email of 18 October 2022 informing the complainant of those exchanges;

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

Having examined the written submissions;

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

The complainant challenges the non-recognition of her illness as an occupational illness and requests that her sick leave entitlements be re-credited to her.

On 6 September 2017 the complainant received a notice of investigation from the Director of the Internal Oversight Division (IOD) informing her that it appeared that she may have engaged in misconduct relating to an abuse of the clocking system. On 15 September 2017 she commenced a period of sick leave. The medical

certificate issued by her treating doctor, dated 25 September 2017, stated that she was diagnosed with work-induced post-traumatic stress disorder. On 27 September she filed a declaration notifying WIPO’s insurer of her service-incurred illness. The insurer informed WIPO of this and WIPO contacted the complainant requesting some information that was missing from the declaration form, which she provided.

On 29 November 2017 the complainant was informed by the Human Resources Management Department (HRMD) that her illness did not meet the definition of a service-incurred illness provided for in the Administrative Manual because an investigation regarding allegations of abuse of the clocking system could not cause an illness attributable to service. It was therefore necessary to wait for the conclusion of the investigation before determining whether her health had been prejudiced.

On 28 December 2017 the complainant submitted a request for review of this decision, asking that “recognition of her claim for compensation for service-incurred illness be considered and granted without further delay, that all [the] statutory sick leave used by [her] to date on account of her recent sick leave be forthwith re-credited to her benefit, and that all future sick leave resulting from her service-incurred illness not be charged to statutory sick leave benefits for as long as she remain[ed] ill on account of her service-incurred illness”. She asked to be reimbursed for all the legal fees she had incurred and to be awarded damages. She insisted that WIPO should submit her request for compensation for service-incurred illness to its insurer for determination on a medical basis alone.

On 22 January 2018 WIPO submitted the complainant’s completed declaration of service-incurred illness to its insurer. On 30 January the complainant’s treating doctor confirmed her previous diagnosis, indicating that the complainant should under no circumstances return to the place of trauma, that is to the WIPO premises.

The request for review was rejected on 26 February 2018 on the basis that the complainant’s “self-categorization” of her illness as service-incurred was premature and that the final determination on this matter would be communicated to her by the insurer in due course. Concerning her claim for the re-crediting of sick leave, she was

informed that there was no basis for the Administration to grant that request. On 22 March 2018 the complainant lodged an appeal with the Appeal Board.

On 5 July 2018, while the internal appeal procedure was still ongoing, the insurer informed the complainant that its medical advisor considered that the events of 6 September 2016 (*recte* 2017) on which her declaration was based could not be considered as a ground for a service-incurred illness, but that she was entitled to submit any additional medical information relevant to her file for further consideration if she so wished. The complainant then asked the insurer to contact the United Nations medical advisor, Dr M., who, according to her, would be able to provide a report confirming the link between her illness and her work. This was not done and, on 23 July 2018, Dr M. informed WIPO that the complainant's periods of sick leave were all certified and medically justified and asked to be kept informed of the decision by its insurer. On 20 August 2018 the complainant contacted the insurer directly and provided it with a copy of all medical reports from her treating doctor. She asked the insurer to disclose the exact reasons and facts that led it to conclude that her illness could not be considered as service-incurred.

The Appeal Board issued its conclusions on 5 November 2018 recommending that the Director General award the complainant no less than 1,000 Swiss francs as moral damages for the delay in processing her declaration of a service-incurred illness and dismiss the remainder of her appeal. By a letter of 7 January 2019, the complainant was informed that the Director General had decided to award her 3,000 Swiss francs in moral damages and to dismiss her appeal on the merits. That is the impugned decision.

On 2 April 2019 she filed her complaint with the Tribunal asking it to quash the impugned decision in its entirety, with all legal consequences, and to order the full reimbursement of all the medical expenses she had to pay out of her pocket. She claims material and moral damages on account of the loss of her salary and all other benefits, entitlements and emoluments she would have received as from 13 March 2019 (the day after she exhausted her sick leave entitlements), as well as exemplary damages in an amount of at least 250,000 Swiss francs. She

further requests reimbursement of all salary, benefits, step increases, pension contributions, emoluments and all other entitlements she should have received from 13 March 2019 through the date of delivery of this judgment, costs for the internal proceedings and those before the Tribunal, and 5 per cent interest on all amounts awarded. Finally, she claims such other relief as the Tribunal may deem necessary, just and fair.

WIPO asks the Tribunal to dismiss the complaint in its entirety and makes a counterclaim for costs on the ground that the complaint is abusive.

CONSIDERATIONS

1. The complainant impugns the Director General’s decision, dated 7 January 2019, which awarded her 3,000 Swiss francs in moral damages in recognition of the delay in processing her declaration of a service-incurred illness and dismissed the remainder of her appeal against the decision of 26 February 2018.

2. In the 26 February 2018 letter, the Director of HRMD conveyed the Director General’s decision on the complainant’s request for review. Noting that her declaration of a service-incurred illness had been submitted to the insurer on 22 January 2018, the Director General apologized for the delay in processing her declaration. He considered that her “self-categorization” of the illness as service-incurred was premature as a decision on the nature of her illness would be communicated to her by the insurer in due course. He also considered her claim for additional compensation equally premature and her claim for re-crediting of sick leave as unfounded. He pointed out that, even if the complainant’s sick leave was found to be occasioned by a service-incurred illness, it would still be charged to her entitlement to sick leave under Staff Rule 6.2.2(b). With regard to her allegations of harassment and mobbing, he noted that the complainant had never made a complaint of harassment, even though, according to her statement, problems with her supervisor dated back to 2008.

3. The complainant bases her complaint on the following main grounds:

(a) WIPO erred in finding that her illness was not service-incurred;

(b) statutory sick leave taken due to service-incurred illness should be re-credited to her as compensation under Staff Rule 6.2.2(b) and Staff Regulation 6.2; and

(c) WIPO violated its duty of care towards her by delaying the processing of her declaration of a service-incurred illness.

4. WIPO asserts that the complainant's internal appeal was premature given that, when she started the proceedings, the insurer had not determined the status of her claim for service-incurred illness. The complainant only received a determination from the insurer on 5 July 2018, after she had submitted her rejoinder before the Appeal Board. WIPO notes that any appeal of the insurer's determination on medical issues should be made in compliance with Article 15.2 of the insurance contract between the Organization and the insurer. It also submits that many of the complainant's claims are not based on the impugned decision, focusing instead on a series of past events that allegedly contributed to her current health situation or events that postdate the matter at hand. Her claims for alleged harassment, constructive dismissal and non-renewal of her appointment are therefore not the subject matter of the present complaint. With regard to the new evidence submitted by the complainant in this proceeding, namely a medical report of 17 February 2021, made by the arbitrator, Dr C., which determined that her illness was serviced-incurred, WIPO submits that such evidence should not be considered as the lawfulness of a measure must be appraised as at the date of its adoption, and that all subsequent facts are accordingly irrelevant.

5. Regarding the receivability and scope of the complaint, the complainant argues that, due to WIPO's "repugnant behaviour", she had no other choice but to initiate the internal appeal and that, consequently, her appeal was not premature. In referring to the acts of harassment and to the non-renewal of her appointment, her purpose was merely to provide the Tribunal with all the pertinent information and circumstances

relevant to her allegation that her illness was caused by the work environment over a period of time culminating in her prolonged service-incurred sick leave.

6. Before turning to the merits of the case, it is convenient to deal with some preliminary issues.

First, it is noted that the complainant withdraws her request for oral proceedings in the rejoinder by confirming that the facts of the case are sufficiently clear without a hearing being necessary. The Tribunal decides not to hold oral proceedings as the parties have presented the case extensively and comprehensively in their written submissions, which are sufficient to enable the Tribunal to reach a reasoned and informed decision.

Second, as to the scope of the complaint, the impugned decision only dealt with four issues, namely the refusal to recognize the complainant's illness as service-incurred on the ground that her claim was premature, the rejection of her claim for re-crediting of sick leave under Staff Rule 6.2.2(b), the rejection of her claim for additional compensation under Staff Regulation 6.2, and the award of damages for the delay in processing her declaration. The impugned decision is not based on medical reports, but on the consideration that the claim was premature pending the ongoing medical assessment. The Tribunal is being asked to answer whether WIPO erred, in the impugned decision, in considering the complainant's illness as not service-incurred, pending the outcome of the medical assessment procedures in accordance with the provisions of the insurance contract. The issues of alleged harassment and non-renewal of appointment, which the complainant alleges as being culminating factors to her service-incurred illness, not as grounds to challenge the impugned decision, should not be considered by the Tribunal because both of them fall outside the scope of the case.

7. The complainant contends that her illness should be deemed as service-incurred on four grounds. However, it is unnecessary to address these arguments because, after the written proceedings had concluded, a binding decision has been made by an arbitrator. It arose

this way: after the impugned decision had been made, the complainant requested an arbitration procedure pursuant to Article 15.2.2 of the insurance contract between WIPO and the insurer. The arbitrator, Dr C., assessed her state of health on 19 January 2021 and issued his final report on 17 February 2021 in which he found that her illness was to be considered as service-incurred as from 6 September 2017. Pursuant to the provisions of the insurance contract, Dr C.'s decision is final and binding on both the complainant and the insurer. A letter was sent to the complainant on 26 February 2021 to inform her of Dr C.'s final decision. Accordingly, the question of whether she suffered a service-incurred illness is now moot. The only remaining issue is whether she should have been or should be re-credited with her sick leave.

8. The complainant claims that statutory sick leave taken due to service-incurred illness should be re-credited to her as compensation in accordance with Staff Regulation 6.2 and Staff Rule 6.2.2(b). In her view, WIPO's failure to provide her with a safe working environment and to take reasonable steps to protect her would be a repudiation of her employment contract and constitute constructive dismissal.

9. WIPO submits that there is no breach of the complainant's employment contract or working conditions, nor any constructive dismissal. Staff Regulation 6.2 would only apply to the complainant had her illness been determined as service-incurred. According to the Organization, the complainant misunderstood how sick leave is calculated and there was no basis for the Administration to re-credit her sick leave. The sick leave for a service-incurred illness or accident was to be deducted from the staff leave entitlements under the relevant rules.

10. Staff Rule 6.2.2(b), entitled "Sick Leave and Special Leave for Prolonged Illness", relevantly provides as follows:

> "(b) Maximum Entitlement to Sick Leave
>
> [...] A staff member who has completed at least three years of continuous service shall be entitled to sick leave up to 18 months, of which up to nine months shall be at full pay and up to nine months at half pay in any period of four consecutive years. [...]"

The above provision does not provide sick leave for service-incurred illness as an exception to the general sick leave entitlements. Furthermore, by a letter of 18 December 2014, HRMD had already informed all staff members that one of the changes contained in Office Instruction No. 79/2014, which took effect as of 1 January 2015, was that "[s]ick leave for a service-incurred illness or accident w[ould] be charged to the staff member's sick leave entitlement". The practice has remained in force, as stated in paragraph 13 of Office Instruction No. 11/2016:

> "Certified sick leave occasioned by illness or accident attributable to the performance of official duties shall be charged to the staff member's entitlement to sick leave [...] However, in any case where hardship is occasioned by the prior use of sick leave as the result of illness or accident attributable to the performance of official duties, a special sick leave credit may be granted by the Organization, if and as required in the individual case, equal in whole or in part to the authorized sick leave previously so utilized."

11. From the above-mentioned provisions, WIPO's rule concerning sick leave credit is clear and unambiguous. Even if the complainant's illness is service-incurred, the sick leave for such illness shall be charged to her sick leave entitlements. Neither Staff Regulation 6.2 nor Staff Rule 6.2.2(b) imposes the obligation on WIPO to re-credit sick leave for a service-incurred illness to her sick leave entitlements. Therefore, her argument for re-crediting sick leave for her illness is without legal foundation.

12. Under paragraph 13 of Office Instruction No. 11/2016, granting a special leave credit would have only been possible if all conditions were satisfied. The power to grant a special leave credit in circumstances of hardship is discretionary and there is no evident basis for saying that the decision not to grant it was legally flawed. The complainant's second plea is therefore dismissed.

13. The complainant claims that WIPO was negligent, unjustly enriched itself and breached the principle of good faith and its duty of care towards her by preventing a timely determination of the nature of her illness. She further contends that the insurer's refusal, since August 2018, to provide her with an explanation as to the reasons why it had

not considered her illness as service-incurred, has caused additional stress to her.

14. It is well settled in the Tribunal’s case law that international organizations must respond to requests from their staff members within a reasonable time (see, for example, Judgment 3188, under 5). In the present case, WIPO’s delay in processing the complainant’s declaration lasted approximately four months, for which the Director General apologized and granted her 3,000 Swiss francs in moral damages. The Tribunal considers the amount appropriate since the complainant, who bears the burden of proof as regards the injury allegedly suffered, fails to prove the contrary.

15. After her declaration was submitted by WIPO to the insurer, the insurance contract provisions governed the determination procedure. The complainant adduces no evidence to prove that WIPO has prevented a timely determination. Accordingly, her allegations of negligence, unjust enrichment, breach of good faith and duty of care are all unfounded.

16. The complainant claims that she suffered anxiety and severe stress as a result of the insurer’s determination to reject her declaration without an explanation. However, no insurance contract provisions impose such an obligation for explanation on the insurer. It is further noted that the complainant does not provide evidence of the injury suffered; instead, the evidence shows that she has received a disability benefit paid to her by the United Nations Joint Staff Pension Fund retroactively to begin 13 March 2019, the day after she exhausted her sick leave entitlements. To be entitled to moral damages, as consistently stated by the case law, the complainant bears the burden of proof and must provide evidence of the injury suffered, the alleged unlawful act and the causal link between the unlawful act and the injury (see, for example, Judgments 4158, under 4, 4157, under 7, and 4156, under 5). The complainant’s claim for moral damages is therefore unfounded.

17. The Tribunal also finds that WIPO's action was not tainted by bias, ill will, malice, bad faith or other improper purposes such as to justify an award of punitive damages (see, for example, Judgments 4506, under 10, 4286, under 19, and 3419, under 8).

18. In conclusion, the complaint must be dismissed.

19. With regard to WIPO's counterclaim for costs, the Tribunal notes that WIPO has not justified its request. Its delay in processing the complainant's declaration of a service-incurred illness entitled her to seek redress through internal proceedings and the proceedings before the Tribunal. WIPO's counterclaim for costs must also be dismissed since the complaint is not vexatious nor frivolous.

DECISION

For the above reasons,

The complaint is dismissed, as is WIPO's counterclaim for costs.

In witness of this judgment, adopted on 28 October 2022, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ