

D.
v.
WIPO

138th Session

Judgment No. 4846

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms N. D. against the World Intellectual Property Organization (WIPO) on 10 October 2019 and corrected on 2 December 2019, WIPO's reply of 9 March 2020, the complainant's rejoinder of 11 June 2020, WIPO's surrejoinder of 14 September 2020, the complainant's additional submission of 13 January 2021, WIPO's comments of 20 April 2021, the complainant's second additional submission of 30 September 2021 and WIPO's final comments of 16 December 2021;

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 may be summed up as follows:

The complainant challenges a finding made in the decision not to initiate disciplinary proceedings against her.

On 15 May 2016, the complainant started working as Evaluation Officer, at grade P-3, in the Evaluation Section of the Internal Oversight Division (IOD).

On 24 May 2017, the IOD received an anonymous complaint stating that the complainant had engaged in unauthorized outside activities while being a WIPO staff member. The IOD conducted a

preliminary evaluation of the matter which concluded that there was *prima facie* evidence that the complainant had engaged, without WIPO's authorization, in two outside activities with a governmental agency and a United Nations (UN) entity, during her employment with WIPO. On 31 May 2017, the complainant was notified of the opening of an investigation against her. On 11 September 2017, an external investigation company was assigned to conduct the investigation into the allegations.

On 19 December 2017, the external investigation company's draft investigation report was shared with the complainant for her comments. The complainant provided her comments on 19 January 2018.

By letter of 22 February 2018, the Director, Human Resources Management Department (HRMD), informed the complainant that, after full consideration of the investigation report, including the complainant's comments, "it [was] established that [the complainant] engaged in misconduct", however the Director, HRMD, had decided not to institute disciplinary proceedings against her and to close the matter without further action.

On the same day, the complainant's attorney requested – on the complainant's behalf – to be provided with a copy of the investigation report. On 5 March 2018, the Administration denied such request, on the basis that "in accordance with established policy, and in particular Chapter X of the Staff Regulations and Rules, investigation reports are only provided in the context of disciplinary proceedings".

On 22 May 2018, the complainant submitted a "statement of appeal" directed against the 22 February 2018 letter. On 6 August 2018, the Deputy Director, HRMD, advised the complainant that the WIPO Appeal Board (WAB) had found that the 22 February 2018 letter could not be considered as a disciplinary measure directly appealable before it pursuant to Staff Rule 10.1.5 and that, as a result, the Director General had treated her statement of appeal as constituting a request for review and had rejected it.

On 2 November 2018, the complainant lodged an appeal before the WAB, directed against the 6 August 2018 decision. As part of its evaluation of the appeal, the WAB requested and reviewed *in camera* the investigation report prepared by the external investigation company.

On 11 March 2019, the complainant resigned from WIPO effective 11 April 2019.

On 14 May 2019, the WAB submitted its report to the Director General, in which it recommended to dismiss the complainant's appeal.

By letter of 12 July 2019, the Director General notified the complainant of his decision to follow the WAB's recommendation to dismiss her appeal. He nevertheless added that he had decided to slightly amend the content of the 22 February 2018 letter from the Director, HRMD, replacing the words "engaged in misconduct" by "engaged in two unauthorized outside remunerated activities". The Director General concluded his letter stating the following: "in any event, I wish to stress that the impugned letter of the Director of HRMD, as originally formulated, did not have any adverse administrative effects, since it was never placed on your personnel file." That is the impugned decision.

The complainant asks the Tribunal that the "impugned decision dated 6 August 2018, based on the initial decision of 22 February 2018, finding that [she] engaged in misconduct" be quashed and that "all references to the disciplinary investigation and such misconduct finding be permanently removed from [her] WIPO service records". She requests to be provided with the IOD preliminary evaluation report and the external investigation company's investigation report as well as the identity of the anonymous source who had filed the 24 May 2017 complaint about her. She further asks for moral damages in the amount of at least 250,000 Swiss francs as well as the reimbursement of her legal costs. Finally, she seeks the payment of interest and such other relief "as the Tribunal finds to be necessary, just and fair".

WIPO contends that the complainant has no cause of action and that her complaint is irreceivable and asks the Tribunal to dismiss it in its entirety. WIPO further argues that the complaint constitutes an abuse

of process and requests that an order of costs be made against the complainant.

CONSIDERATIONS

1. At relevant times, the complainant was a member of staff of WIPO until she ostensibly resigned effective 11 April 2019. She contends she was constructively dismissed. The factual background is sufficiently set out earlier in this judgment. Central to her grievance founding her complaint filed in the Tribunal on 10 October 2019, was a letter dated 22 February 2018.

2. The letter of 22 February 2018 was from the Director, Human Resources Management Department (HRMD) to the complainant. It comprised 17 numbered paragraphs. The first paragraph broadly outlined the investigation that had been undertaken into the complainant's conduct. The second and third paragraphs addressed, again broadly, what may constitute misconduct of the type potentially relevant and who might institute disciplinary proceedings, namely the author of the letter. In the fourth paragraph, the Director, HRMD, said:

“After full consideration of the Investigation Report, including the explanations and documents you provided in the course of the investigation and your ‘notes’ on the relevant excerpts of the draft investigation report, I consider that it is established that you engaged in misconduct.”

3. The following eight paragraphs involved an explanation for this conclusion and related observations. The Director, HRMD, then said in paragraph 13:

“The above notwithstanding, and although I consider that it is established that you engaged in misconduct, I have decided not to institute disciplinary proceedings against you, but to close the matter without further action.”

The remainder of the letter concerned, briefly, consequential matters of detail including why the Director, HRMD, had taken this position.

4. On 22 May 2018, the complainant lodged what purported to be a “Statement of Appeal” but which ultimately was treated within the organisation, uncontroversially, as a request for review by the Director General. Part II of this document was headed “ADMINISTRATIVE DECISION” under which the following was stated:

“The Appellant is appealing the decision of [...] Mrs [M.], Director HRMD, dated 22 February 2018 (ANNEX 1) by which it found that the Appellant had engaged in misconduct by undertaking two external consultancies in 2016 and 2017.”

Thus, the complainant was identifying the subject matter of her grievance as a decision of the Director, HRMD, finding the complainant had engaged in misconduct.

5. The complainant was sent a letter dated 6 August 2018 on behalf of the Director General responding to the request for review. His primary position was that he could not entertain the request for review because the decision impugned was not an “appealable administrative decision pursuant to Chapter XI of the Staff Regulations and Rules”. He noted that the decision was not to institute disciplinary proceedings and was a decision entirely favourable to the complainant. He referred to Judgment 3198, considerations 13 and 14, in which, as summarised, the Tribunal said for a complaint to be receivable, it must be brought against a decision that adversely affects the status or legal situation of a staff member. Most of the remainder of the letter was given over to a critique of the complainant’s conduct and the processes undertaken to investigate it.

6. On 2 November 2018, the complainant lodged an internal appeal to the WIPO Appeal Board (WAB). In the statement of appeal, again under the heading “ADMINISTRATIVE DECISION”, the impugned decision is said, wrongly, to be that of the Deputy Director of Human Resources of 6 August 2018 confirming the initial decision of 22 February 2018, and described the decision in substantially the same words as set out in consideration 4 above, though adding “[...] but elected not to impose a disciplinary sanction against the [complainant]”.

7. Again, the organisation challenged in the appeal, its receivability on the footing there had been no administrative decision. The WAB thought otherwise, basing its conclusions on the existence of a cause of action if there is a reasonable presumption that a decision will bring injury, citing Judgment 1712, consideration 10. It concluded the appeal was receivable “insofar as it challenges the finding of misconduct”. On the merits, the WAB accepted the complainant’s misconduct was established and rejected a number of collateral attacks on the procedures adopted in establishing that misconduct. Accordingly, it recommended that the appeal be dismissed in its entirety. The WAB issued its opinion on 14 May 2019.

8. The appeal was dismissed in its entirety by decision of the Director General dated 12 July 2019 and he effectively adopted its conclusions. Nonetheless, he addressed the statement that had been made by the Director, HRMD, to the complainant in the letter of 22 February 2018 about her conduct. He observed the statement, set out at consideration 2 above, “neither constituted, nor was intended to constitute, an administrative decision on your misconduct”. The Director General pointed out that, as he perceived it, any such decision could only be taken following the conclusion of disciplinary proceedings.

9. The Director General went on to say that “in order to avoid any possible misunderstanding of the statements made”, he would revise the text of the letter of 22 February 2018 to read:

“4. After full consideration of the Investigation Report, including the explanations and documents you provided in the course of the investigation and your ‘notes’ on the relevant excerpts of the draft investigation report, I consider that it is established that you engaged in ~~misconduct~~ two unauthorized outside remunerated activities.”

and:

“13. The above notwithstanding, ~~and although I consider that it is established that you engaged in misconduct~~, I have decided not to institute disciplinary proceedings against you, but to close the matter without further action.”

The Director General also observed that the letter of 22 February 2018 had never been placed on the complainant's personnel file.

10. In these proceedings before the Tribunal, the organisation maintains its plea that there was no reviewable administrative decision, which is foundational to the Tribunal's jurisdiction and implies any act by an officer of an organisation which has a legal effect (see Judgment 4672, consideration 4). A decision that does not alter the legal situation of an official is not a decision that adversely affects her or him and it cannot, therefore, be challenged before the Tribunal (see Judgment 4675, consideration 11). The final and impugned decision of the Director General was dismissing the complainant's appeal though, at the very least, impliedly endorsing the decision not to commence disciplinary proceedings, but in the context of having modified the letter of 22 February 2018. The Tribunal recalls that whether a complainant has a cause of action is to be determined by reference to circumstances existing at the time of the filing of the complaint.

11. There is no material difference between the circumstances arising in this case and those that were considered by the Tribunal in Judgment 4295. In that case, the complaint was dismissed because the complainant had no cause of action. A decision had been made by the Director General that no disciplinary measure would be imposed on the complainant. As the Tribunal observed, the decision was beneficial to the complainant, and thus he had no cause of action. To the extent that a finding of fact (contested by the complainant) had been made which led to the decision, that finding, as the Tribunal explained, "forms part of the reasons articulated in arriving at the decision". In the present case, the decision not to commence disciplinary proceedings was likewise favourable to the complainant. To the extent findings of fact were made and adhered to in the impugned decision and reflected in the modified text of the letter of 22 February 2018, they were findings informing what was ultimately the favourable decision. Given the modification of the letter, there was no conclusory finding that the complainant had engaged in misconduct, the matter that troubled the WAB.

12. The complainant has no cause of action and her complaint should be dismissed. But this is not a case where costs should be awarded in favour of the organisation, as it seeks, since the complaint cannot be regarded as vexatious or frivolous (see, for example, Judgment 4780, consideration 9). Thus, the counterclaim for costs is dismissed.

DECISION

For the above reasons,

The complaint is dismissed, as is the counterclaim for costs.

In witness of this judgment, adopted on 2 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER