Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M. M. (No. 9)

v.

WIPO

138th Session **Judgment No. 4847**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Ms V. E. M. M. against the World Intellectual Property Organization (WIPO) on 17 August 2020 and corrected on 18 September 2020, WIPO's reply of 7 January 2021, the complainant's rejoinder of 8 April 2021, WIPO's surrejoinder of 12 July 2021, the complainant's further submissions of 6 December 2021, WIPO's comments of 7 March 2022, WIPO's additional submissions of 11 January 2024 and the complainant's final comments thereon of 8 February 2024;

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 contests the rejection of her appeal against an implied decision not to compensate her for alleged constructive dismissal.

Facts relevant to this case may be found in Judgments 3418, 3877, 3946, 4084, 4085, 4086, 4286 and 4607, concerning the complainant's first eight complaints.

On 27 March 2017, the complainant – who had been on sick leave since 18 January 2016 – resigned from WIPO effective 30 June 2017. She indicated in her resignation letter that her departure was due to

"constructive dismissal". She also requested that a special sick leave be granted to her since her annual leave credit would be exhausted by the end of April 2017.

On 10 April 2017, the Director, Human Resources Management Department (HRMD), informed the complainant that the Director General had accepted her resignation and had decided to grant her request for a special sick leave credit and that as a result, the complainant would maintain her full pay status until her last day of service on 30 June 2017. On 24 April 2017, the complainant replied to the Director, HRMD, that she was "appreciative" of the special sick leave credit granted to her but that she was "maintain[ing] that [her] resignation was submitted under duress in view of the likelihood that [she] would soon be denied salary on account of [her] service-incurred sick leave which irregularly caused the exhaustion of [her] annual and statutory sick leave, which [she] also believe[d] amount[ed] to constructive dismissal".

On 29 June 2017, the complainant's counsel wrote a letter to the Director General entitled "Demand for a Final Administrative Decision". In his letter, the counsel stated that the complainant regarded "her mistreatment, over the past several years [...] most of which have required her to file administrative appeals" as well as "the latest steps" taken by the Administration as "part of a series of actions amounting to constructive dismissal of her appointment". He concluded his letter with the following claims: "[the complainant] requests that the Director General accept that she was subject to constructive dismissal by the Organization and that it therefore wrongly terminated her contract. She requests that she be paid all salary and benefits, including full medical insurance for her husband and dependent mother, through her statutory retirement date in 2018 in addition to moral and exemplary damages arising from this treatment, as well as reimbursement of all attorney fees incurred in bringing this demand, and interest on all sums ultimately awarded to her pursuant hereto, plus interest at the rate of five (5%) percent per annum, from 31 July 2017, through the date all such sums awarded or paid to her are satisfied in full."

On 6 October 2017, the complainant filed a request for review of the "implied decision of the Director General [...] rejecting the [complainant's] demand for a final administrative decision dated 29 June 2017 [...] to compensate the [complainant] for being subjected to constructive dismissal".

On 5 December 2017, the Director, HRMD, notified the complainant that her request for review had been rejected. The Director, HRMD, explained that "the Director General categorically rejected the [complainant's] claim that [she was] constructively dismissed, and as a result, saw no reason to award [her] any compensation".

On 5 March 2018, the complainant lodged an appeal to the WIPO Appeal Board (WAB) challenging "the implied decision of the Director General concerning her request for review dated 6 October 2017 [...] pursuant to her demand for a final administrative decision dated 29 June 2017".

In its report dated 16 March 2020, the WAB concluded that the complainant's appeal was irreceivable and recommended that it be dismissed. It further recommended that the complainant be paid moral damages for the delay in issuing its report.

By letter of 21 May 2020, the Director, HRMD, informed the complainant that the Director General had endorsed the WAB's recommendations and had decided to dismiss her appeal and to compensate her for the delay in the consideration of her appeal in the sum of 1,700 Swiss francs. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order that the sick leave days that she used between January 2015 and June 2017 as well as the annual leave days which were deducted to compensate for full pay after exhaustion of her sick leave benefits be recredited to her and that she be paid the equivalent of such recredited days in the form of unused annual leave. She further requests to be paid all salaries and benefits, step increases, WIPO pension contributions, entitlements and other emoluments that she would have been paid from 30 June 2017 through her statutory retirement date on 31 July 2018. She also asks to be awarded moral and exemplary damages in an amount not less than 500,000 Swiss francs. Lastly, she

claims costs as well as any other relief that the Tribunal deems to be fair, necessary and equitable and seeks the payment of interest.

WIPO argues that the complaint is irreceivable and unfounded and asks the Tribunal to dismiss it in its entirety.

CONSIDERATIONS

1. This is the complainant's ninth complaint. The subject matter and outcome of the earlier eight complaints can be summarised in the following way. In her first eight complaints, the complainant respectively challenged her job description, the date on which her retroactive promotion took effect, the amounts she was awarded for the delay in processing her request for compensation for service-incurred illness, the decision to transfer her as well as the appointment of another staff member without a competitive recruitment process, the decision to reject her harassment grievance, the decision to maintain her contested job description, the decision to reject her claim of retaliation/harassment, and the decision to dismiss her allegation that the opening of an investigation against her involved abuse of authority as well as the decision not to investigate her allegations against the Acting Director of the Internal Oversight Division. The complainant was successful in her first, third, fourth, sixth and seventh complaints. Her second, fifth and eighth complaints were dismissed.

2. For present purposes, the facts in this matter are sufficiently set out earlier in this judgment. But four events should be noted. The first is that the complainant, through her counsel, wrote to the Director General on 29 June 2017 demanding a "final administrative decision". The second is that having not received a reply by 6 October 2017, the complainant lodged that day a request for review of an implied decision rejecting the demand of 29 June 2017. The third is that on 5 December 2017 a letter of over four pages was sent on behalf of the Director General rejecting the "specific demands at the end of [her] request for review". Thus, and in substance, the request for review was rejected and detailed reasons provided. The fourth is that on 5 March 2018 the

complainant lodged an appeal to the WIPO Appeal Board (WAB) against what was described in the statement of appeal as "the implied decision of the Director General concerning her request for review dated 6 October 2017 [...] pursuant to her demand for a final administrative decision dated 29 June 2017".

3. In its opinion of 16 March 2020, the WAB accepted an argument advanced by WIPO that the appeal was irreceivable and concluded it was irreceivable. If this is correct, then the complainant's complaint filed with the Tribunal is also irreceivable because she has failed to exhaust internal means of redress as required by Article VII of the Tribunal's Statute. As is apparent from the preceding consideration, the complainant filed an appeal with the WAB against an implied decision in circumstances where a subsequent express decision had already, by the time of filing, been given. The complainant has not pursued, as a central element of her case, in these proceedings in the Tribunal, an argument that she was not notified of the express decision of 5 December 2017. In any event, the argument was correctly rejected by the WAB.

4. The WAB's reasoning on the question of appealing against an implied decision was:

> "In this situation [where there was an express decision notified to the complainant and her counsel and known to them], to then ignore a decision that was squarely dealing with the requests and claims that the [complainant] and her [counsel] had earlier made themselves was not only a course of action that was against the interests of the [complainant] to be able to properly address the position and the arguments of the Administration at the next - the appeal -stage of the proceedings, but failed to comply with the requirements of the internal justice system. The Tribunal concluded for a comparable situation that a complainant 'could no longer properly challenge any implied decision, since there was an express one' [citing Judgment 532, consideration 5]. The [WAB] found that this was the situation here and that within the framework of WIPO's internal justice system, the [complainant] could not ignore the express decision and put forward a challenge on an implied decision that allegedly had the same effect."

5. Given the centrality of Judgment 532 to the approach of the WAB, it is desirable to discuss what the Tribunal decided. The relevant facts in that matter may be briefly stated. The genesis of the complainant's grievance was deductions from his salary for periods when he was on strike, which he said had been wrongly deducted. The complainant appealed against the alleged wrongful deduction on 20 June 1981. The appeal was not decided within two months, namely by 20 August 1981, as required by the Service Regulations for permanent employees of the European Patent Office, and the complainant challenged in the Tribunal the implied rejection of his claims in a complaint filed on 17 November 1981. Earlier, on 30 October 1981, the President of the Office wrote to the complainant saying that as his claims were refused, the matter would be passed on to the Appeals Committee.

6. In Judgment 532, the Tribunal took the view that the letter of 30 October 1981 had two legal consequences. One was that it was a decision within the meaning of Article VII, paragraph 3, of the Tribunal's Statute. Accordingly, and secondly, there was an express decision on his claim. In those circumstances, the Tribunal said that from 30 October 1981, "the complainant could no longer properly challenge any implied decision", Article VII, paragraph 3, did not apply and under Article VII, paragraph 1, the complaint was irreceivable because internal means of redress had not been exhausted. The Tribunal accepted that until the President sent his letter of 30 October 1981 the "complainant could have filed a complaint by virtue of Article VII(3)" but said "[i]n any event, since an express decision was taken on 30 October, there has been no question since then of challenging any implied decision".

7. While the circumstances of the above case are not on all fours with the present, it is a persuasive authority and there is an underlying legitimate rationale for requiring a complainant to challenge only an express decision, if made after an implied decision and before the challenge was initiated. It is true that the Tribunal eschews undue formality in relation to process (see Judgments 3845, consideration 4, 3759, consideration 6, and 3592, consideration 3). But by facilitating a

challenge to an implied decision in the face of an express decision made before the challenge was initiated, the Tribunal would potentially create a licence for a complainant to challenge the relevant decision (on the assumption that both the implied and express decision deal with the same subject matter) without necessarily having to confront the reasons likely to have been given in the express decision and require the internal appeal body to consider and evaluate those reasons. As the WAB clearly seems to suggest, this would be antithetical to the interests of the internal justice system.

8. The Tribunal accepts the conclusion of the WAB, as adopted by the Director General in the impugned decision, that the internal appeal was irreceivable. Accordingly, as noted earlier, this complaint is irreceivable and should be dismissed. In these circumstances, it is unnecessary to grant the complainant's application for oral proceedings.

DECISION

For the above reasons,

The complaint is dismissed.

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