

M. M. (No. 8)

v.

WIPO

135th Session

Judgment No. 4607

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Ms V. E. M. M. against the World Intellectual Property Organization (WIPO) on 9 April 2019, WIPO's reply of 21 August 2019, the complainant's rejoinder of 2 December 2019 and WIPO's surrejoinder of 5 March 2020;

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 decision to dismiss her allegation that the opening of an investigation against her involved abuse of authority and the decision not to investigate her allegations against the Acting Director of the Internal Oversight Division.

Facts relevant to this case may be found in Judgments 3418, 4084 and 4086, concerning the complainant's first, fourth and sixth complaints, respectively. The complainant was transferred in September 2013 to a new position that she viewed as unsatisfactory in several respects. Relations with her new supervisors were tense from the outset and they deteriorated to such an extent that in April 2014 her second-level supervisor (or "reviewing officer") wrote to the Director of the Human Resources Management Department (HRMD) with an urgent request that a solution be found to what he described as an "untenable situation".

Having obtained the complainant's comments on this request, the Director of HRMD referred the matter to the Acting Director of the Internal Audit and Oversight Division (IAOD) for an independent investigation into a "workplace-related conflict involving allegations of misconduct". Shortly afterwards, IAOD became the Internal Oversight Division (IOD).

In January 2016 the complainant, who in the meantime had been transferred to another position, was notified by the Acting Director IOD that she was the subject of an IOD investigation into allegations that she might have committed misconduct by rejecting instructions from, and/or the authority of, her former supervisor. On 31 May 2016 she wrote to the Director General alleging that, in deciding to open the investigation against her, the Acting Director IOD had abused his authority and had committed misconduct. Referring to the relevant provisions of the Internal Oversight Charter, she requested that the matter be brought to the attention of the Chair of the Independent Advisory Oversight Committee (IAOC) and the Chair of the Coordination Committee, and that the matter be referred to an independent external investigative authority. The Director General consulted the Chairs of the IAOC and Coordination Committee, both of whom considered that the complainant's allegations were unfounded. The Director General then notified the complainant, on 11 October 2016, of his decision not to take any further action on her allegations against the Acting Director IOD.

The complainant's request for review of that decision was rejected and in September 2017 she appealed to the Appeal Board. In its Conclusions dated 15 November 2018, the Appeal Board recommended that the appeal be dismissed. By a letter of 14 January 2019 the complainant was informed that the Director General had decided to dismiss her appeal, in accordance with the recommendation of the Appeal Board, but to award her 800 Swiss francs for the Board's delay in issuing its report. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, with all legal consequences, and to order an independent external investigation into her allegations of misconduct on the part of the Acting Director IOD. In addition, she claims "actual, moral and exemplary

damages” in an amount of not less than 250,000 Swiss francs on the basis that her internal complaint was improperly dismissed and that she was subjected to a “specious, retaliatory investigation”, as well as for delay in the internal appeal proceedings. She also claims costs, interest on all amounts awarded to her and such other relief as the Tribunal determines to be fair, necessary and equitable.

WIPO asks the Tribunal to dismiss the complaint in its entirety on the merits.

CONSIDERATIONS

1. The complainant had been a member of staff of WIPO. Much of the relevant background is found in a trilogy of judgments concerning earlier complaints filed by her, namely Judgments 3418, 4084 and 4086. The genesis of this particular complaint was a letter dated 31 May 2016 from the complainant to the Director General of WIPO alleging misconduct against the Acting Director IOD. By letter dated 11 October 2016 the Director General said he was not going to take any further action in relation to the complainant’s allegations. A request for review of this decision made by the complainant on 7 April 2017 was rejected by letter dated 9 June 2017. A subsequent appeal was dismissed by letter dated 14 January 2019 based on the recommendation of the WIPO Appeal Board in a report dated 15 November 2018. The defendant organisation does not challenge the receivability of this complaint, though it does challenge the scope of the subject matter to which the complaint is directed.

2. The complainant has requested oral proceedings. However, as the submissions and documents produced by the parties are sufficient to enable the Tribunal to resolve the issues raised in this case, the request is rejected.

3. It is desirable to address at the outset the question of receivability, and the Tribunal can do so *ex officio* (see, for example, Judgments 3139, consideration 3, and 2567, consideration 6). The letter of 31 May 2016 commenced with an allegation of misconduct against the Acting Director IOD. Immediately following the making of the allegation, the complainant identified the legal foundation for the complaint, namely paragraph 20, which was quoted, of the WIPO Internal Oversight Charter, which identified to whom complaints of misconduct against the Director IOD should be made, and in the letter, this was followed by a quotation from the WIPO Whistleblower Policy of a provision obliging staff to report wrongdoing which may amount to misconduct. Thereafter, in the letter, there was an intermingling of more specific complaints about the conduct of the Acting Director IOD together with the impact of that conduct and other events on the circumstances of the complainant and her rights of protection. Throughout the review and internal appeal process the complainant has persisted, unsuccessfully, with her allegation of misconduct, though she has continued to discuss the impact of that conduct and other events on her circumstances.

4. In her pleas in the Tribunal, the complainant traverses not only the alleged misconduct and the failure to take any further action on her allegation but also, as before, wider issues. But the substance of her grievance in the Tribunal can be gleaned from the relief she seeks. It is firstly that the impugned decision be quashed. That relief, as is often the case, is a precursor to the result actually sought by way of legal remedy. So much is apparent in this case having regard to the second and third orders sought by the complainant by way of relief. The second is that there be an investigation into her allegations of misconduct against the Acting Director IOD. The third order is for various types of damages for the improper dismissal of her allegation of misconduct and “resulting specious, retaliatory investigation for alleged insubordination” and for delay.

5. There is a fundamental difficulty in much of the substance of the grievance the complainant seeks to prosecute in the Tribunal. She has no enforceable legal interest in the fate of her allegation of misconduct

against the Acting Director IOD which can be vindicated by orders of the Tribunal. The subject matter, namely the decision not to open an investigation on the alleged misconduct and abuse of authority by the Acting Director IOD, does not concern non-observance of the terms of her appointment or relevant non-observance of provisions of the Staff Regulations, as provided for in Article II of the Tribunal's Statute (see Judgment 4145, consideration 5, and the case law cited therein).

6. It may be thought that, to the extent that the complainant has been pursuing, and does so in these proceedings, a contention that the investigation of her was tainted by illegality, this is a grievance she can pursue in the Tribunal. However, all that happened, as a matter of fact, was that an investigation was opened. As WIPO points out in its reply, correctly, a decision to open an investigation is not a final decision that can give rise to a cause of action in the Tribunal, citing Judgment 3236, consideration 12.

7. In the result, the complaint is irreceivable and should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2022, Mr Michael F. Moore, President of the Tribunal, Mr Clément Gascon, Judge, and Ms Rosanna De Nictolis, 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

CLÉMENT GASCON

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ