

SEVENTIETH SESSION

***In re* ANDREWS, BARTELS,
DONDENNE and MACHADO**

(Interlocutory order)

Judgment 1087

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Patrick Julian Andrews and Mr. Bernard Dondenne against the World Intellectual Property Organization (WIPO) on 6 June 1990 and corrected on 2 July and WIPO's replies of 16 July 1990;

Considering the complaint filed by Mr. Busso Bartels against WIPO on 6 June 1990 and corrected on 5 July and the Organization's reply of 16 July 1990;

Considering the complaint filed by Mr. Bruno Machado against WIPO on 6 June 1990 and corrected on 10 August and WIPO's reply of 22 August 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 11 of the Rules of Court, Articles 8(3)(i) and 9(7) of the Convention of 1967 Establishing WIPO, former Regulation 3.1 bis and Regulations 3.5, 3.12 and 12.1 of the Staff Regulations and Rule 11.1.1 of the Staff Rules of the International Bureau of WIPO;

Having examined the written evidence and decided not to order oral proceedings, which none of the parties has applied for;

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

A. Regulation 12.1 of the WIPO Staff Regulations reads:

"(a) The Director General may propose amendments to these Regulations. Such Amendments shall enter into force after approval by the Coordination Committee. However, any amendment for the purpose of adapting certain provisions of the Staff Regulations to changes in the provisions concerning the staff of the United Nations or the Specialized Agencies of the United Nations ('common system'), and in particular to any adjustment of salaries and allowances within the common system as applied in Geneva, may be provisionally decreed and applied by the Director General, provided the required amounts can be covered by the budget.

(b) Amendments shall be without prejudice to any condition of service specified in the letter of appointment or contract of a staff member, neither shall any amendment affect the application to a staff member of the provisions of the Staff Regulations in force up to the effective date of the amendment; amendments may not have retroactive effect unless the terms of appointment of staff members would thereby be improved".

In 1972 the Coordination Committee of WIPO, which has its headquarters in Switzerland, in Geneva, approved a change in the Staff Regulations of the International Bureau to bring in a new Regulation 3.1 bis as from 1 October 1971. The provision was intended to safeguard staff members' take-home pay against fluctuations in the exchange rate between the dollar and the Swiss franc. The text of 3.1 bis is reproduced in 2 below.

An information circular, No. 78 of 31 October 1988, announced to the staff of WIPO that at its 25th Session the Coordination Committee had decided to repeal Regulation 3.1 bis as from 1 October 1988 and apply a transitional provision to staff serving at 1 October 1988. That provision also appears in 2 below. It was to be superseded on the adoption of permanent rules on variations in exchange rates in the United Nations common system.

The complainants, who at 1 October 1988 were and still are on the staff of WIPO, found on receipt of their pay

slips for July 1989 that their net take-home pay was lower than for the previous month. In memoranda of August 1989 they submitted to the Director General requests under Rule 11.1.1(b)(1) for review of the decisions that had applied the reduction due to the repeal of Regulation 3.1 bis.

Having got no reply within six weeks, they submitted appeals to the Chairman of the Appeal Board in November 1989 under Rule 11.1.1(b)(2). In its report of 14 February 1989 the Board held that, though the complainants' arguments were sound, the Director General had no choice but to give effect to the Coordination Committee's decision and so it could not advise him to act otherwise. In memoranda dated 8 March 1990, the decisions challenged, the Director General informed the complainants that he endorsed the Board's view.

B. The complainants contend that Regulation 3.1 bis, a rule brought in as from 1971 to protect WIPO staff against reductions in pay, is a fundamental and essential condition of service. Repealing it is in breach of their acquired rights and of Regulation 12.1(b), which protects them against change made in their conditions of service by amendments to the Staff Regulations and Staff Rules. Repeal also offends against such basic principles of the international civil service as the rule - stated in Article 9(7) of the WIPO Convention of 1967 - that in determining conditions of service the Director General must secure "the highest standards of efficiency, competence, and integrity" and the requirement that an international organisation show restraint in its dealings with staff.

They submit that the decision to repeal 3.1 bis showed other flaws. There was a procedural one in that the Director General never proposed repeal, though that is what Regulation 12.1(a) and Article 9(7) of the Convention require. Thus 9(7) says that "The conditions of employment shall be fixed by the staff regulations to be approved by the Coordination Committee on the proposal of the Director General". There was a mistake of law since the Coordination Committee, a purely advisory body, is not competent under Article 8(3)(i) of the Convention* (*Article 8(3)(i) provides that the Coordination Committee shall "give advice to the organs of the Unions, the General Assembly, the Conference, and the Director General, on all administrative, financial and other matters of common interest either to two or more of the Unions, or to one or more of the Unions and the Organization, and in particular on the budget of expenses common to the Unions".) to give the Director General instructions on administrative matters. Because the International Civil Service Commission swayed the Coordination Committee's decision with a campaign of "disinformation" the decision rests on mistakes of fact.

The complainants ask the Tribunal to order the Director General of WIPO to continue as from 1 October 1988 to grant them the protection afforded by Regulation 3.1 bis as in force at 30 September 1988 and to award them 3,000 Swiss francs each in costs.

C. WIPO's replies are reproduced in 6 below.

CONSIDERATIONS:

1. The complainants want WIPO to continue to apply to them a text, Regulation 3.1 bis, which its Coordination Committee repealed as from 1 October 1988. They therefore ask the Tribunal to declare null and void the transitional provision the Committee then adopted instead. The nub of their case is reinstatement of the "take-home pay differential" WIPO staff used to be paid to offset falls in the value of the United States dollar, the currency in which salary is stated, against the Swiss franc.

2. The Coordination Committee decided on 3 October 1988 to repeal Regulation 3.1 bis, which read:

"(a) Where, for any given month, the take-home pay, expressed in Swiss francs, of any staff member is, as a result of a variation in the exchange rate between the Swiss and United States currencies, less than for the preceding month, the difference ('take-home pay differential') shall be paid by WIPO to the said staff member until the month for which, for any reason, the amount of the take-home pay reaches the amount paid prior to the said variation."

(b) For the purposes of paragraph (a) above, 'take-home pay' shall mean the salary in accordance with Regulation 3.1, after deduction of the staff member's contribution to the Pension Fund, increased by any post adjustment applicable under Regulation 3.5 and any dependency allowance applicable under Regulation 3.12".

The Committee replaced that text with the following transitional provision:

"Where, for any given month, the take-home pay, expressed in Swiss francs, of any staff member in service as of October 1, 1988, is, as a result of a variation in the exchange rate between the Swiss and United States currencies,

less than for the month of October 1988, the difference ('take-home pay differential') shall be paid by WIPO to the said staff member until the month for which, for any reason, the amount of the take-home pay reaches the amount paid prior to the said variation."

Staff members were told of the decision in information circular No. 78 of 31 October 1988.

3. Not until July 1989, on getting their pay slips for that month, did the complainants first find a fall in their pay in Swiss francs due to the amendment. Towards the end of August 1989 they submitted to the Director General requests for review under Rule 11.1.1(b)(1). Having got no answer within the next six months, they submitted appeals to the Appeal Board under 11.1.1(b)(2). In reports dated 14 February 1990 the Board found that, whatever the merits of the Coordination Committee's decision might be, the Director General could not but give it effect; the Board could not recommend him to alter his position. In replies dated 8 March 1990 he accordingly informed them that he had no alternative but to carry out the Coordination Committee's decision.

4. The complainants accordingly filed complaints with the Tribunal on 6 June 1990 seeking, over and above the claims set out above, and award of 3,000 Swiss francs each in costs. Since they raise the same issues the four complaints may be joined to form the subject of a single ruling.

5. The complainants challenge the lawfulness of information circular 78 of 31 October 1988 and of the Coordination Committee's decision of 3 October 1988, which the circular is based on. They have two pleas.

(1) The impugned decisions were in breach of several provisions of the Staff Regulations on the distribution of authority and on the procedure for decision-making inasmuch as the Coordination Committee may amend the Regulations only in response to a proposal from the Director General. In fact the Director General was against any amendment to Regulation 3.1 bis and made no such proposal. The Coordination Committee may not amend the Staff Regulations proprio motu when it has no proposal from the Director General. So its decision of 3 October 1988 is flawed and circular 78 does not accurately reflect the position in law. The amendments the circular announced afford no valid basis for reckoning pay.

(2) Even supposing that the amendments were intra vires and in keeping with the proper procedure, the complainants doubt that they square with such basic principles of the international civil service as the doctrine of acquired rights, the basic structure of the contract of service, the stability of the system of pay and the rule against discrimination between internationally and locally recruited staff.

6. In reply the Organization goes back to the origins of the dispute and offers no more than a perfunctory defence. All it says is:

"The Director General was opposed to the amendment to the Staff Regulations referred to [in the complaints] and warned the Coordination Committee that any amendment that might allow a fall in take-home pay might be deemed to be in breach of the staff's acquired rights. Notwithstanding that warning the Committee went ahead and [took the decisions the complainants are objecting to]."

7. The complainants having waived their right to rejoin, there would now be no procedural objection to a ruling. The case being an important one, however, further submissions are required from the Organization on the circumstances in which the dispute has arisen and on the consequences in law of whatever ruling the Tribunal may make.

8. Acting under Article 11 of its Rules of Court, the Tribunal issues an interlocutory order to the Organization to state its position. By whatever means it deems fit it shall make the following submissions.

(a) It shall give an account of its financial rules and system of budgeting so as to explain -

(1) how the "differential" prescribed in former Regulation 3.1 bis worked in practice and was financed;

(2) how the transitional rules brought in by the decision of 3 October 1988 work in practice;

(3) how pay is to be reckoned after the transitional rules lapse.

(b) It shall answer the complainant's pleas as summed up in 5(1) above about the distribution of authority and the

procedure for taking decisions.

(c) It shall answer the complainant's pleas as set out in 5(2) above about certain basic principles of the international civil service. The Tribunal wants to know the reasons for repealing 3.1 bis in 1988. The excerpts the complainants have supplied from Coordination Committee papers do not say. In particular, was 3.1 bis repealed on budgetary grounds, for reasons of pay policy or because of other considerations of staff management?

DECISION:

1. The Organization shall file within sixty days of notification of this judgment replies to the instructions in 8 above.
2. The complainants may rejoin within a time limit, also of sixty days, of the dates of receipt of the defendant's replies.
3. The Organization may file final submissions within a further time limit of thirty days.
4. Costs are reserved.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 29 January 1991.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner