

The Administrative Tribunal,

Considering the complaints filed by Mr S.G. G. (his fourth), Mr H. L. and Mr J. P. against the World Intellectual Property Organization (WIPO) on 3 August 2006 and corrected on 17 October 2006, WIPO's reply of 18 January 2007, the complainants' rejoinder of 16 March and the Organization's surrejoinder of 14 June 2007;

Considering the *amicus curiae* brief submitted by the Staff Council of WIPO on 16 July 2007, the complainants' comments thereon of 21 September and the Organization's final comments of 10 October 2007;

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 and the pleadings may be summed up as follows:

A. The complainants are staff members of WIPO who, during the spring and summer of 2005, took steps to form a new staff association, which they named the "WIPO Staff Union", alongside the existing and recognised Staff Association. At the material time the Staff Union counted around 85 members.

By a letter of 1 June 2005 two of the complainants, Mr G. and Mr P., informed the Director General that they had constituted the "WIPO Staff Union" and asked him to make facilities available for that new body. On 10 June they asked the Director of the Conference, Communications and Records Management Division to give the Staff Union access to a room in order to organise a meeting on 24 June. By a memorandum of 16 June the Director of the Human Resources Management Department (HRMD) informed these two complainants that the facilities made available to the Staff Council would not be granted to the Staff Union because it was "an informal body" not recognised within the framework of the WIPO Staff Regulations and Staff Rules as the official representative of the interests of the staff. He also asked them to provide further information on the intended purpose and planned activities of the Union.

In September 2005 the complainants' lawyer wrote several times to the Director of HRMD concerning the recognition of the Staff Union but received no reply. On 16 November 2005 he wrote to the Director General indicating that the absence of reply constituted a negative decision and that consequently he requested, on behalf of the Staff Union, a review of that decision. He also asked that the Staff Union be granted the same facilities as those offered to the Staff Association. By a letter of 5 December the complainants' lawyer was informed that if the staff members he was representing wished to pursue the matter further, they should pursue it directly with the Administration in the first instance.

The complainants lodged an appeal with the Appeal Board on 3 February 2006 alleging that the Staff Union was treated differently to the Staff Association. They asked that the Staff Union be recognised as a staff association and that it benefit from the same facilities as were provided to the Staff Association. In its report of 22 March 2006 the Board noted that no Staff Regulations or Staff Rules dealt with the recognition of a new staff association and that the complainants had not adopted statutes defining the purpose and functioning of the Union. The Board concluded that in the absence of such statutes, the appeal was premature. Consequently, it held that the complainants should not be allowed to use the Organization's facilities unless and until the Staff Union was recognised by the Administration. In addition, it recommended that the latter adopt guidelines concerning the constitution and recognition of new staff associations or unions and that consultations be held between the Administration, the Staff Association and the complainants on that issue.

By a letter of 4 May 2006, which constitutes the impugned decision, the Director of HRMD informed the complainants that the Director General considered, in accordance with the Board's recommendation, that the appeal was premature and that there was no entitlement to the use of facilities by the Staff Union.

B. The complainants allege that they have been deprived of their right to freedom of association. Citing the

Tribunal's case law, they indicate that it is for the staff to organise itself and not for the Administration to organise it. They explain that since the Staff Association did not represent their interests they decided to form the Staff Union. They assert that together with 82 other staff members they have legally formed a new staff association, which represents the interests and rights of over 15 per cent of the non-union affiliated staff members of WIPO. They were consequently entitled to be granted the facilities provided to a representative staff association.

They point out that Staff Regulation 8.1 provides that staff shall have the right of association but does not set out objective criteria for creating new staff associations or unions. Consequently, the Administration is free to "subjectively rule over" the complainants' right to freedom of association. According to them, the Administration has relied on outdated Staff Regulations and Staff Rules to reject their request for facilities and did so for "vindictive purposes" as shown by the "vindictive attack" or "threat" made by the Administration against certain complainants. They add that the right of association being a general principle of law it should not be left to the Administration, as suggested by the Appeal Board, to "rectify" the Staff Regulations and Staff Rules in that respect.

The complainants ask the Tribunal to set aside the impugned decision, and to order that the Staff Union be recognised as a "valid and legal staff association" enjoying the same facilities as those enjoyed by the Staff Association, including the use of the WIPO name, acronym and emblem. They request that they and the Staff Union be provided with "all ancillary rights that accompany the formation of a new staff association/union, including but not limited to office space, office supplies, photocopier service, telephone service, use of the WIPO bulletin board, administrative leave for Union officials and an e-mail address within the [...] Intranet infrastructure". They also claim costs. Lastly, they ask the Tribunal to hold public hearings and to order the disclosure of documents referring to a group called the "Co-signatories for an Extraordinary Assembly of the Staff Association".

C. In its reply the Organization contends that the complaint is irreceivable on several counts. Firstly, the complainants have failed to exhaust internal remedies, since they did not make an initial submission as required under Staff Rule 11.1.1(b)(1). Indeed, the request for review of 16 November 2005 was sent not by the complainants but by their lawyer, and there is no right of representation of staff members by third parties at that stage of the appeal procedure. The Appeal Board consequently was not competent to hear the appeal, since it was not submitted in accordance with the Staff Regulations and Staff Rules. Secondly, the complainants' claim concerning the use of the WIPO name and emblem and the request that they and the Staff Union be granted "all ancillary rights that accompany the formation of a new staff association/union" are new. It adds that, in the event that the Tribunal finds the complaint receivable, the complaint should be considered as personal to the three complainants as there is no evidence showing that other members of the Union support their views and, in any case, the Tribunal does not recognise class actions.

WIPO indicates that according to Staff Regulation 8.1 "[t]he interests of the staff shall be represented before the Director General and his representatives by a Staff Council elected by the staff members". The Director General is therefore required to recognise only one representative Staff Council and he has done so for many years. The defendant argues that when the complainants initiated internal appeal proceedings in November 2005 the Staff Union had not yet adopted its statutes. Consequently, the Tribunal cannot rule on the validity of the existence of a staff association or union that was not properly constituted at the material time.

The Organization denies that any pressure was exerted on individuals who wished to adhere to the complainants' union and submits that the complainants have produced no evidence to support their allegation. It refutes that the Administration can "subjectively rule over" the staff members' right of freedom of association. It explains that there is an active and representative Staff Council which has existed for several years and which meets regularly with the Administration. Citing the Tribunal's case law, it asserts that it has wide discretion in determining what facilities should be granted to the Staff Council and even greater discretion in the case of an unrecognised union. With regard to the complainants' assertion that the Staff Association does not represent their interests, it submits that the Staff Association has no representative functions. It indicates that if the complainants in fact referred to the Staff Council, they can hardly expect any staff council to represent their personal interests since that Body represents the collective interests of staff members. It adds that the complainants could have joined the Staff Association and voted for candidates to the Staff Council or stood as candidates.

The defendant asserts that the right of association is recognised in WIPO and that the Staff Council is properly constituted and is the "recognised interlocutor" of the Administration. It points out that the Staff Council has not

questioned the facilities that are granted for its functioning. It indicates that HRMD is looking at the practice of other agencies with a view to considering whether to adopt guidelines on a possible recognition of new staff associations.

D. In their rejoinder the complainants submit that their claims are receivable on the ground that they relate to the Administration's decision denying them the rights to freedom of association and to organise. They contend that they have not put forward new claims before the Tribunal but have merely provided detailed explanations on the relief sought. They add that Staff Rule 11.1.1(b)(1) does not require staff members personally to draft the letter whereby they request a review of an administrative decision.

They point out that, according to Staff Rule 8.1.1(a), the Staff Council is elected by WIPO staff at large, regardless of any participation in a staff association. However, in practice only members of the Staff Association are allowed to become members of the Staff Council, which is a violation of the principle of freedom of association. They argue that until recently only the Staff Association members were allowed to vote for the election of Staff Council members. Moreover, the Administration has provided the Staff Association with office space to hold meetings and has supplied photocopiers. It has also allowed the Staff Association to use the Organization's name and acronym. Consequently, the complainants object to WIPO's assertion that the Administration only recognises the Staff Council.

E. In its surrejoinder the Organization indicates that Mr G.'s appointment was terminated on 28 February 2007, and that he therefore has no legal standing. It also explains that the financial support and facilities granted to the Staff Council have spilled over to the greater Staff Association more by "historical incident" than intent of the Organization. Indeed, historically WIPO staff members who had decided to organise themselves have done so by establishing the Staff Association.

The defendant agrees with the complainants' assertion that the Staff Council is mandated to represent all staff members and not only the members of the Staff Association. It produces a copy of the Annual Report of the Staff Council showing that the latter had entered into discussions with the Administration on a wide range of issues affecting all staff members and not only members of the Staff Association. The defendant adds that if the complainants wish that Article 13(2) of the Staff Association Statutes, which provides that any active member of the Association who has been employed by the Organization for a minimum of one year may be elected to the Council, be amended they should raise the matter with the Staff Association, since it is not for the Administration to interfere in such matters.

F. In its *amicus curiae* brief the Staff Council asserts that both the Staff Association and the Staff Council represent the staff members of the Organization. According to its Statutes, the Staff Association acts to safeguard the collective and individual rights and interests of all staff, whether in service or retired, to maintain and enhance unity within the staff as a body of international civil servants and to ensure that the working conditions of the staff are satisfactory and remain in conformity with applicable rules and regulations.

It explains that the "Staff Association is constitutive of [...] a Staff Council, which is the Staff Association executive body [and] the assembled members of the associated staff (OGA), which is the only decision-making body of the Staff Association". The OGA can accept or reject Staff Council proposals. The Staff Council points out that non-members of the Staff Association can and do attend and participate in OGA discussions. It asserts that the complainants have not approached the Staff Council to request a change with regard to the election of its members.

G. In their comments dated 21 September 2007, the complainants object to the Tribunal's consideration of the comments made by the Staff Council, which, in their opinion, cannot be regarded as the neutral views of a disinterested third party. According to them, the Staff Council's comments do not reflect the opinion of the staff at large. They submit that the existing Staff Council is "an unofficial extension of the WIPO Administration over which the Administration exercises dominion and control". They argue that they were wrongly denied the right to participate in the Staff Council because they had refused to join the Staff Association.

H. In its final comments the Organization stresses that the Staff Association counts approximately 725 members who elect the Staff Council; it therefore rejects the allegation that the views expressed by the Staff Council are not representative. It denies exercising control over the Staff Council. Lastly, it contends that the claim concerning the complainants' right to participate in the Staff Council is irreceivable since it is a new claim.

CONSIDERATIONS

1. The complainants are staff members* of WIPO. Together with 82 other staff members, they met during the spring and summer of 2005 to form a new staff association or staff union which they called the “WIPO Staff Union”. There was already a body called the WIPO Staff Association which represented and continues to represent employees of the Organization and whose members elect the WIPO Staff Council.
2. On 1 June 2005 three of the staff associated with the formation of the Staff Union, including two of the complainants, wrote to the Director General introducing the Staff Union and seeking recognition of it by the Organization as well as facilities for that new body. Later, on 10 June, they wrote to the Director of the Conference, Communications and Records Management Division requesting that a room be made available for a meeting. On 16 June they were informed, amongst other things, that “facilities extended to the WIPO Staff Council [...] would not be applicable to the [new] group”, that the group’s activities should take place outside working hours and that “as an informal body not recognized within the framework of the WIPO Staff Regulations and Staff Rules [...] it [was] not [...] possible for [them] to retain the proposed title for [their] group”.
3. The three staff members concerned wrote to the Director of HRMD on 28 June 2005 and requested, by virtue of the principle of equality, that the Organization provide the Staff Union with comparable facilities to those enjoyed by the Staff Association. They also claimed that the “effort [made] by the Administration to limit the [Staff Union’s] activities ‘outside working hours’ was a [...] violation of [their] members’ right to associate”. They asked that their request be treated as a request for a final administrative decision.
4. The Director of HRMD replied to the memorandum of 28 June stating that the Organization was “not prepared to grant permission for the use of its name in connection with any group other than the WIPO Staff Association and the WIPO Staff Council”. He added that “[n]o release time [was] recognized for staff members or employees who [were] not members of the Staff Council”. A number of letters, including one dated 16 November 2005, were then sent to the Director General by the lawyer retained by four employees who were described as members of the committee of the new body. The letter of 16 November included a request for administrative review of the negative decision implied by virtue of the failure to reply to the lawyer’s earlier correspondence. He was advised by a letter of the Organization’s Legal Counsel dated 5 December 2005 that, if the four employees for whom he was acting wished to pursue the matter further, they should pursue it directly with the Administration. The employees concerned, being the present complainants and one other person, then instituted proceedings before the Appeal Board.
5. In its report dated 22 March 2006 the Appeal Board expressed the opinion that, although otherwise receivable, the appeal was premature in that the Administration had indicated that it would have pursued further discussions with the complainants. It also expressed the view that the complainants were not entitled to use WIPO’s facilities unless and until the Staff Union was recognised “in accordance with new Staff Regulations and Staff Rules to be created, approved and implemented”. It made recommendations with respect to the creation of guidelines and procedures for the formation of new staff associations or unions and for consultations between the Administration and the complainants. The latter were informed by a letter dated 4 May 2006 that the Director General agreed with the Appeal Board that their appeal was premature and that there was no entitlement to the use of facilities as claimed. That is the decision which the complainants challenge before this Tribunal.
6. The complainants seek orders requiring the recognition of the Staff Union as a “valid and legal staff association under the applicable WIPO Staff Rules and Regulations”, the provision of various facilities and authorisation to use the WIPO name, acronym and emblem, as well as costs. In addition, they seek the production of various documents relating to the grant of facilities to a group called the “Co-signatories for an Extraordinary Assembly of the Staff Association” and a public hearing for the calling of witnesses.
7. It is convenient to deal first with the application for discovery and for public hearings. The complainants provide nothing to indicate the relevance of the documents in question, if they exist, to the issue whether the Staff Union should be recognised and provided with facilities by WIPO. Presumably, the purpose of the application for discovery is to make some argument that WIPO has acted discriminatorily in the provision of facilities. However, this is not relevant to the question whether the Staff Union should be recognised as a staff association. Moreover, the complainants provide nothing to suggest that their position is comparable to that of the “Co-signatories for an Extraordinary Assembly of the Staff Association” who were granted limited facilities for limited purposes (see

Judgment 2636). For these reasons, the application for discovery is dismissed.

8. The complainants identify the central issue in the present case as whether they and other WIPO staff members have “legally formed a new representative staff association [...] in accordance with general principles of law as well as the law of [the] international civil service”. That is a question of law on which evidence is not necessary. Accordingly, the application for a public hearing and the calling of witnesses is also dismissed.

9. A staff association or union is, in essence, a voluntary association of employees and/or others in a relationship pursuant to which they perform services by way of personal exertion, who have agreed together to act collectively through that association or union to protect and promote their industrial interests. The powers of the association may extend to the protection and promotion of the industrial interests of those who are eligible to belong to the association. Many countries require other formalities including, sometimes, registration under the relevant domestic law. Those laws cannot apply to a staff association or union the membership of which is restricted to international civil servants. However, that is not to say that no formality is necessary for the formation of a staff association or union representing international civil servants.

10. For the creation of a staff association or union representing international civil servants, there must, at the very least, be some means of identifying the agreement voluntarily to associate for the purpose of protecting and promoting the industrial interests of members, the terms of that agreement and the means by which it may be varied, both in relation to individual employees and the purposes or objects of the association. So, too, because it is a voluntary association, there must be an agreement as to the persons by or through whom the association acts, the means by which those persons are selected or elected, the matters in respect of which they have authority to act and the powers that they have in relation to those matters. In the absence of agreement as to each of those matters, the agreement to associate would, in accordance with general principles of law, be void for uncertainty. And to have an agreement covering those matters, there must be rules incorporated in a charter, a statute or some other document to which the members subscribe and by which they agree to be bound.

11. The staff members of WIPO who wished to form a new staff association had not adopted rules, whether by charter, statute or other means, at the time of the decision which was the subject of the internal appeal. That being so, there was then no new staff association or union that WIPO could recognise or otherwise deal with. Accordingly, there was no error in the decision of the Director General that the internal appeal was premature and that there was no entitlement to the use of WIPO facilities.

12. Because the complaint must be dismissed on the basis that no new staff association or union had been brought into existence at the relevant time, it is unnecessary to consider the arguments of WIPO as to the receivability of the present complaint.

13. For the sake of completeness, it may be added that while freedom of association involves the right to form a staff association or union, even if one already exists, and precludes discrimination against those involved in that process, there is no evidence that WIPO has infringed the complainants’ freedom in either respect. Certainly, it is not infringed by an organisation’s refusal to assist in the formation of a new staff association or union.

Other issues raised by the complainants are premature.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 9 November 2007, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet

*One of them was separated from service in February 2007.

Updated by SD. Approved by CC. Last update: 27 February 2008.