

**109th Session**

**Judgment No. 2931**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs A.I. M. against the World Intellectual Property Organization (WIPO) on 11 September 2008 and corrected on 8 November 2008, WIPO's reply of 3 March 2009, the complainant's rejoinder of 14 April and the Organization's surrejoinder of 27 July 2009;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Finnish national born in 1957, joined WIPO in 1993 as a clerk under a short-term contract at grade G3. Following numerous contract extensions and several promotions, on 14 March 2001 she was granted a permanent appointment. With effect from 1 November 2002 she was appointed to the post of Project Officer at grade P-2 in the IT Projects Division, and on 28 July 2003 she was transferred at the same grade to the PCT Information Systems Division.

In a memorandum dated 9 August 2004 to the then Director of the Human Resources Management Department, the complainant's supervisor requested that her post be reclassified from grade P-2 to grade P-3 at the earliest opportunity on the grounds that her performance, skills and responsibilities exceeded her grade. He appended a revised job description signed by himself and the Acting Chief Information Officer of the IT Division. On 18 August the Administration advised the complainant's supervisor that a classification exercise regarding the post would be undertaken in due course, on the basis of the revised job description. Subsequently, as a result of restructuring, the title of the complainant's post was changed with effect from 20 December 2004 from "Project Officer" to "Head", but the grade of the post remained the same. In May 2005 the complainant signed an updated job description which indicated that her post was at grade P-2.

Having received no further information regarding his request for reclassification, the complainant's supervisor reiterated that request on 15 September 2005 and provided additional supporting information. On 28 September he was again informed that the complainant's post would be the subject of a classification exercise. He was asked to provide an electronic version of the revised job description and he did so on 30 September 2005.

The supervisor sent a memorandum to the Administration on 16 January 2006 referring to the two earlier reclassification requests and by a memorandum of 30 January he was informed, inter alia, that the recommendation for promotion had been registered and that it was important for the Human Resources Management Department to receive an updated job description, which was provided on 9 March. On 12 July he again requested a reclassification of the complainant's post and in November 2006 he completed, at the request of the Human Resources Management Department, a new electronic form entitled "Request for classification of a post". In December an updated job description was finalised which indicated that the post was at grade P-2 and that the "reclassification exercise [was] ongoing".

On 4 April 2007 an external classification expert completed an evaluation of the post and recommended that it be graded at P-3. Following recommendations from the Classification Committee which met in 2007 and the Promotion Advisory Board, the complainant was informed by a letter of 9 October 2007 that the Director General had approved her promotion to grade P-3 with effect from 1 October 2007. On 22 November she wrote to the Director General requesting additional incremental steps and that the promotion be awarded retroactively as compensation for the delay in processing the reclassification request. Having received no reply within the prescribed time limit, on 13 February 2008 she lodged an appeal with the Appeal Board. The Board submitted its conclusions on 15 May and recommended that the appeal be dismissed in its entirety. By a letter dated 17 June 2008 the complainant was informed that the Director General had decided to endorse the Board's recommendation. That is the impugned decision.

B. The complainant submits that the decision to reclassify her post and to promote her more than three years after the initial reclassification request is based on errors of law because the Staff Regulations and Staff Rules, and Office Instructions 12/1998 and 8/2006, setting out the guidelines on the promotion of staff, were breached. She argues that the decision was unduly delayed to her detriment. First, she points out that she was promoted to grade P-2 in November 2002. According to Office Instruction 12/1998, which was in force when her supervisor made the initial request for reclassification, the three-year in-grade seniority requirement for promotion from grade P-2 to P-3 was only indicative. Therefore, based solely on changes in the quality and level of her duties, which were clearly reflected in the revised job description appended to the request, she was entitled to promotion as early as August 2004. Furthermore, an electronic version of the aforementioned job description was provided to the Human Resources Management Department in September 2005, well before the Classification Committee's meeting in January 2006. In addition, as of

November 2005 she met the minimum in-grade seniority requirement set out in Office Instruction 8/2006.

Second, the complainant recalls that, pursuant to Office Instruction 8/2006, all staff members who are eligible for promotion shall be considered in a periodical comparative exercise. In her view, this means that the exercise must be conducted on a regular basis, not at the discretion of the Classification Committee. Furthermore, objective criteria must be used by the Administration to determine when such cases should be submitted to the Committee. The absence of objective criteria will result in discrimination and in a breach of the principle of equal treatment.

Third, she notes that Office Instruction 8/2006 provides that the Promotion Advisory Board may, without informing staff members, adopt additional criteria when undertaking evaluations. This introduces an arbitrary element to the promotion process and could result in unequal treatment. She states that, based on the level of the duties she assumed, her performance, and the fact that she was the incumbent of the post, the reclassification process should have been conducted at the earliest possible opportunity. She emphasises that any administrative delay should not have interfered with her right to have her post reclassified and to be promoted with effect from August 2004.

With respect to the various updates of the job description for her post, the complainant contends that the description of May 2005, stipulating that her post was at grade P-2, was prepared in response to a memorandum from the Director General requesting programme managers to update job descriptions for all staff members. She states that, although she had concerns about the grade level, she signed the job description in good faith after receiving assurances that the classification exercise was being dealt with separately. Indeed, she received similar assurances before she signed the job description which was completed in December 2006. She points out that, despite the various updates, it was the August 2004 job description that was provided to the Classification Committee and that, accordingly, her post ought to have been reclassified well before 2007.

The complainant submits that WIPO could promote her retroactively. Although Office Instruction 8/2006 stipulates that implementation of a promotion following reclassification cannot be made with retroactive effect, Office Instruction 12/1998, which was in force at the time of the initial request, is silent on this issue. Referring to the case law, she argues that the Director General has the discretion to backdate her promotion.

The complainant asks the Tribunal to order the complete disclosure of documents related to her work history and the reclassification exercise. In particular, she seeks all records from the Classification Committee and the Promotion Advisory Board dating back to August 2004. By way of relief, she asks the Tribunal to quash the decision of 17 June 2008 and to order WIPO to grant retroactively the reclassification of her post and her promotion with effect from December 2004. Alternatively, she claims four within-grade step increases as compensation for the financial loss she has incurred due to the delay in the reclassification process. She also seeks moral damages and costs.

C. In its reply WIPO submits that, to the extent that the complainant claims a retroactive promotion, the complaint is time-barred and therefore irreceivable. On the merits, it contends that according to its case law the Tribunal will only substitute its own classification assessment or direct a new assessment in limited circumstances. Furthermore, the decision to promote and the timing of a promotion lie at the discretion of the Director General.

The Organization states that the request for reclassification was dealt with in accordance with standard procedures. Based on the in-grade seniority requirements stipulated in Office Instructions 12/1998 and 8/2006, the complainant was not eligible for consideration until 1 November 2005. Therefore, her arguments related to a delay prior to November 2005 are irrelevant. The defendant states that between 2004 and 2006 the consideration of all reclassification requests was delayed due to severe financial constraints, and that the request regarding the complainant's post was treated no differently from requests of similarly situated staff members. The Classification Committee that

met in January 2006 only considered posts that had been evaluated by an external classification expert in July 2004. It was not until November 2006 that the Organization resumed processing its backlog of classification requests. As the evaluation of the complainant's post by the external classification expert was not completed until April 2007, her supervisor's request was considered at the next session of the Classification Committee, which was held in June 2007. Her promotion was then considered by the Promotion Advisory Board that met in September that year. The Organization contends that the issue is whether there was an undue delay after November 2006, which it denies, and it contests the complainant's allegation that the request for her promotion following reclassification was not considered at the earliest opportunity.

WIPO asserts that it was not the Administration that decided which job description was to be considered by the external expert and the Classification Committee. It explains that the Committee was asked to consider the description submitted by the complainant's supervisors in November 2006.

Lastly, the Organization opposes the complainant's claim for disclosure of documents on the grounds that she has seen the documents relevant to her request for reclassification and that those concerning other staff members are confidential.

D. In her rejoinder the complainant argues that her complaint is receivable because she did not receive a written decision regarding her supervisor's request until October 2007 and she subsequently pursued the internal means of redress within the prescribed time limits. She maintains that there was undue delay in processing the request for the reclassification of her post and she reiterates her claim for disclosure of documents.

E. In its surrejoinder the Organization maintains its position.

## CONSIDERATIONS

1. The complainant joined WIPO in November 1993. Since March 2001 she has held a permanent appointment.

On 9 August 2004 her supervisor submitted a request to the Human Resources Management Department for a reclassification of her post from grade P-2 to grade P-3 enclosing a revised job description. That request was reiterated on 15 September 2005 and an updated job description was provided on 9 March 2006.

2. In November 2006 the form “Request for classification of a post” provided by the Human Resources Management Department was submitted electronically by the supervisor. In December another new job description for the complainant’s post was completed.

3. On 4 April 2007 the external classification expert submitted his evaluation in which he concluded that the duties of the post were at grade P-3. The Classification Committee unanimously agreed with that conclusion and in September the Promotion Advisory Board recommended that the complainant should be promoted accordingly. The Director General accepted the recommendation and promoted her to grade P-3 with effect from 1 October 2007.

4. In summary, the complainant submits that the delay of three years and two months from the date the request for reclassification was first made violates the standards provided in the Staff Regulations and Staff Rules and Office Instructions 12/1998 and 8/2006.

5. WIPO objects to the receivability of the complaint which it characterises as a claim for an alleged failure to promote the complainant to P-3 following the requests of her supervisor for reclassification of her post. It maintains that, to the extent that the complainant claims a retroactive promotion in relation to the actions or inactions of the Administration prior to 2007, the complaint is time-barred. The Tribunal rejects this submission. A distinction is to be drawn between the subject matter of the complaint and the relief

sought. The complainant is not advancing a claim for the failure to promote her. Rather, she is seeking various forms of relief for the delayed process. The Tribunal finds that the complaint is receivable.

6. In response to the allegation of undue delay, the Organization submits that any arguments of delay prior to November 2005 are irrelevant since the complainant was “not eligible for her post to be considered for reclassification prior to then”. This argument is flawed as it is premised on the requirement for in-grade seniority. This requirement is relevant to eligibility for promotion. It has no bearing on the timing of a classification exercise, even if it could be said that the earliest date on which the complainant could have been promoted was November 2005.

7. As to the subsequent delay, the Organization explains that “[t]he consideration of all reclassification requests was delayed due to severe financial constraints on the Organization between 2004 and 2006”. The Tribunal observes that this explanation is offered for the first time in the context of the defendant’s reply to the complaint. This explanation was not provided at the time of the internal appeal. Further, the fact that no classification exercise would be undertaken due to budgetary constraints is not mentioned in any of the letters from the Human Resources Management Department. In fact, the latter indicated in its response dated 18 August 2004 to the request for reclassification of 9 August 2004 that “[a] classification exercise of the post of [the complainant] w[ould] be undertaken in due course on the basis of the submitted revised job description” and that “[it would] revert as soon as possible with the results of the said classification exercise”. Further, in the response of 28 September 2005 to the supervisor’s memorandum of 15 September 2005, it stated: “we wish to inform you that a classification exercise of the post of the staff member will be made on the basis of the description of tasks and required qualifications which we have received from you”. Leaving aside the question as to whether budgetary constraints is a legitimate reason to delay post reclassification, it would be expected that that information would have been communicated to the complainant’s

supervisor. In these circumstances, the Tribunal rejects the explanation that the delay was due in part to severe financial constraints.

8. In its materials, the Organization appears to rely on the fact that the job description of the complainant's post was not finalised until 7 December 2006 as a further reason for the delay in the reclassification exercise, and that it was this updated job description that formed the basis for the external classification expert's evaluation. There were no substantive differences between this later job description and the earlier one and, in any event, it does not excuse the failure to start the reclassification process in a timely manner following the request submitted in August 2004.

9. The Organization also advances arguments based on the Tribunal's limited scope of review in relation to classification and the exercise of the discretionary authority to promote. As the issue in the present case centres on the question of delay on the part of the Administration and not on the classification exercise itself or the exercise of the discretionary authority to promote, these arguments are of no assistance.

10. In the Tribunal's view, there was undue delay in processing the request for reclassification of the complainant's post. Although the complainant claims a delay of three years and two months, part of that time is attributable to the classification exercise, the meetings of the Classification Committee and the Promotion Advisory Board. Having regard to the length of time that it took for the classification and promotion process to be completed, had the process started at the time of the initial request it would have likely been concluded in approximately 18 months.

11. Accordingly, the complainant is entitled to compensation in an amount equivalent to the difference between the salary and benefits to which she would have been entitled had her promotion become effective on 1 March 2006 and the salary and benefits which she received up to 1 October 2007 together with interest thereon at

8 per cent per annum. Additionally, she is to be compensated for the additional time it will now take to become eligible for promotion to P-4 and for the possibility of receiving earlier step increases. The Tribunal fixes this compensation at 15,000 Swiss francs. Further, it was an affront to her dignity and a breach of the principle of equal pay for work of equal value to expect the complainant to work at a post that was graded below the level of the duties actually being performed. For this, she is entitled to moral damages in the amount of 5,000 francs. She is also entitled to costs in the amount of 3,000 francs. In the light of the above conclusions, a consideration of the disclosure request is unnecessary.

## DECISION

For the above reasons,

1. To the extent that the decision of 17 June 2008 did not take account of the delay in the classification exercise, that decision is set aside.
2. WIPO shall pay the complainant an amount equivalent to the difference between the salary and benefits to which she would have been entitled had her promotion become effective on 1 March 2006 and the salary and benefits which she received up to 1 October 2007, together with interest thereon at 8 per cent per annum.
3. WIPO shall pay the complainant compensation in the amount of 15,000 Swiss francs and moral damages in the amount of 5,000 francs.
4. It shall also pay her costs in the amount of 3,000 francs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet