

118th Session

Judgment No. 3345

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr I. A. (his third), Mr N.B.H. (his third), Mr B. F. (his fifth), Ms C. G. (her fifth), Mr A.M. K. (his seventh), Mr J. P. (his fifth), Mr P. T. (his third), Ms J. T. (her third) and Mr F. U.-H. (his third) against the World Intellectual Property Organization (WIPO) on 17 January 2012, which was corrected on 25 April, WIPO's reply of 27 July, the complainants' rejoinder of 5 November 2012 and WIPO's surrejoinder of 13 February 2013;

Considering the applications to intervene filed on 25 April 2014 by:

B, L.	C., S.
B, V.	C., I.
B.H., N.	D., R.
B.M., M.N.	D., M.
B., N.E.	D., A.
B., C.	D., L.
B., J.	D., S.
C., J.	D., L.
C.-O., L.	F., R.

G., S.	N., S.
G., D.	O., M.
G., C.	P., G.
G., M.	P., M.
G., S.	P.-G., C.
H.-A., V.	R., L.
H., A.	S., N.
H., L.	S., M.
H., R.	S., A.
K., B.	S., S.
L., A.	T., A.
L., H.	T.L., M.
L., D.	U.-H., F.
M., A.	V., G.
M., M.	W., X.
M., M.	W., N.
M., C.-M.	Z.,N.

and the comments thereon of WIPO dated 5 May 2014;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. On 16 June 2010 WIPO's Staff Council sent a memorandum to the Director General with the subject heading "Request for family allowances and access to the internal system of justice for short-term colleagues". The Staff Council indicated that it had set up a task force in order to address issues and grievances relating to the conditions of employment of individuals who the Council characterised as "long-serving short-term colleagues". To that end, the task force had addressed issues of, among other things, the implementation of "equal

pay for equal work”, the date upon which the measures to achieve such equality should be implemented (1 January 2010), and the implementation of the principle of equal access to the internal system of justice for all individuals employed under short-term contracts.

In a memorandum of 24 June 2010 to the Director General the Staff Council stated that one of its priorities was to identify a fair and effective solution to the issue of the regularisation of the contract situation of individuals who had been employed by WIPO for years under serial short-term contracts. It proposed what it characterised as a “three phase regularization plan” and requested that, pending the implementation of that plan, the contract status of all individuals employed under short-term contracts should be revisited by the Administration in order to ensure that they received family allowances “on equal footing” with staff members employed under fixed-term or permanent contracts, that they were employed at the same grade as staff members employed under fixed-term or permanent contracts who performed the same tasks, and that they be given access to WIPO’s internal system of justice. The Staff Council stated that it had already addressed the same aforementioned request to the Director General in the internal memorandum of 16 June.

On 28 July 2010 the Director General sent a memorandum to the Staff Council, copied to all staff, in which he stated that WIPO was committed to regularising the contract situation of long-serving short-term employees who were performing continuing functions. He explained, *inter alia*, that the matters that had been raised in the memoranda of 16 and 24 June would be addressed in the context of the Consultative Group, as part of the ongoing reform process.

In a letter of 13 September 2010 to the Director General the complainants’ (with the exception of Ms G. and Mr P., who were not listed as clients) counsel stated that, by way of his internal memorandum of 28 July the Director General had rejected the Staff Council’s demands of 16 and 24 June and that his response was deemed to be an “administrative decision”. The Director General was asked to review that decision and to implement the aforementioned

demands immediately. Having received no reply, on 3 January 2011 the Staff Council filed an appeal with the Appeal Board, in which the complainants (with the exception of Ms C. G. and Mr J. P.), were listed as members of the Council in a footnote to the appeal and in which they indicated that they were representing, individually and in their role as staff representatives, the interests of 36 current “long-serving short-term employees”, several of whom wished to remain anonymous. The appeal was directed against the rejection of the Staff Council’s requests of 16 and 24 June 2010, on the grounds of unequal treatment, undue discrimination and breach of fundamental principles of international human rights law including breach of the principle of equal pay for work of equal value, and breach of the right of access to a court or equivalent body and the guarantee of a fair and impartial hearing.

The Appeal Board communicated its conclusions to the Director General on 25 August 2011. The Board recommended dismissing the appeal as irreceivable and by a letter of 24 October the complainants were informed that the Director General had decided to adopt the Board’s recommendation. That is the impugned decision.

B. The complainants submit that they have filed the present complaints in their respective capacities as duly elected representatives of WIPO’s Staff Council and in their individual capacities as staff members, on behalf of 36 individuals who have been employed by WIPO for periods of at least one year under what are commonly referred to as “long-term short-term contracts”. Two of the complainants, Mr B.H. and Mr U.-H., are amongst the aforementioned 36 individuals. The complainants contend that the remaining individuals have not filed complaints themselves out of fear of retaliation on the part of WIPO and they wish to remain anonymous. In the event that the Tribunal agrees not to disclose the identities of those individuals to the Administration, their respective employment histories can be provided to the Tribunal *in camera*.

Referring to the Tribunal’s case law, the complainants assert that members of a Staff Council have the right to file a complaint in their

personal capacity and as staff representatives in furtherance of the common rights and interests of the whole or part of the staff. Thus, in their view, they have standing to bring the present complaints. In addition, their complaints are receivable because they were filed within the prescribed time limits.

On the merits, the complainants challenge the impugned decision on several grounds. First, they argue that the Director General erred on a question of law by dismissing their appeal as irreceivable. In their view, the two internal memoranda of 16 and 24 June 2010 contained *inter alia* very clear and specific requests with respect to three issues to be acted upon by the Director General. His response of 28 July constituted an administrative decision, as defined by the case law, rejecting their requests. As technical formalities cannot be used as a trap to prevent staff from exercising the right to appeal, the internal appeal filed by the Staff Council was duly receivable. Furthermore, the decision of 28 July clearly had an effect on the rights and entitlements of long-serving short-term staff members, i.e. by denying them the relief they sought. The complainants submit that neither the request for an administrative decision nor the decision itself is required to be in any particular form.

Second, the complainants assert that WIPO has unlawfully denied long-serving short-term officials several benefits enjoyed by staff members employed under fixed-term or permanent contracts. Contrary to WIPO's arguments, the former are staff members within the meaning of the Staff Regulations and Staff Rules, they are not excluded from the scope of the Staff Regulations and Staff Rules pursuant to paragraph (b) of the Introduction to the Staff Regulations and Staff Rules, and thus, they are entitled to the benefits and conditions of service which were sought in the memoranda of 16 and 24 June and during the internal appeal process. The complainants state that WIPO's designation of these individuals as "short-term employees" by virtue of their contracts is a "legal fiction divorced from reality" and they refer to the case law in this respect.

Third, the complainants argue that WIPO's failure to provide long-serving short-term staff members with the relief now sought is a

violation of the fundamental principles of international law concerning equality and non-discrimination, which has resulted in WIPO's unjust enrichment.

Fourth, the fact that long-serving short-term staff members do not have access to WIPO's internal justice system is a violation of WIPO's Staff Regulations and Staff Rules and established principles of international civil service law regarding the right of appeal.

The complainants seek the disclosure of documents and they ask for oral proceedings. They ask the Tribunal to quash the impugned decision and to order WIPO to treat the long-serving short-term staff members they represent as if they hold regular fixed-term contracts. They seek payment to those 36 individuals of family allowances "on an equal footing" with staff members who hold fixed-term or permanent contracts, with retroactive effect from 1 January 2009. They request that the 36 individuals be awarded, immediately and with retroactive effect, the same grade and step as staff members who are employed under fixed-term or permanent contracts and who carry out the same tasks and that they likewise be awarded step increases on the same grounds and at the same intervals as their colleagues with fixed-term or permanent contracts. They request that the 36 individuals be granted access to WIPO's internal justice system with immediate effect and they seek moral damages. They seek interest at the rate of 8 per cent per annum on all amounts awarded, with effect from 1 January 2009 until the date those amounts are paid in full. They claim costs for the actual legal fees associated with bringing their complaint and any other relief the Tribunal deems fair, just and necessary.

C. In its reply, WIPO states that the Staff Regulations and Staff Rules were amended with effect from 1 January 2012 so as to allow for "temporary appointments", the effect of which provides WIPO with the legal basis to recognise temporary employees as staff members to whom the Staff Regulations and Staff Rules apply. Furthermore, the benefits and allowances that will be offered to short-term employees will be implemented in a phased manner, to

be determined. Thus, as pointed out during the internal appeal proceedings, the complainants' demands are premature as WIPO is in the process of actively addressing the situation of its short-term employees. Also, the complainants' request regarding access to the internal justice system has become moot given the aforementioned amendments to the Staff Regulations and Staff Rules. Nevertheless, WIPO points out that during the material time, the relevant Staff Regulations and Staff Rules were those in effect prior to the coming into effect of those amendments.

WIPO submits that the complaints are irreceivable for several reasons. First, there was no administrative decision that could be challenged. The memoranda of 16 and 24 June did not clearly indicate that the Staff Council was acting on behalf of specific employees for the purpose of obtaining an administrative decision which could become the subject of an internal appeal. Second, the Tribunal is not competent to consider the complaints. The impugned decision does not concern the alleged non-observance of the terms of employment of the short-term employees in question. The short-term contracts issued by WIPO to those employees clearly indicate that the only benefits granted to those employees are the benefits set out in the terms and conditions. Family allowances and access to the WIPO Appeal Board are not among the listed benefits. In addition, the Tribunal does not have jurisdiction to hear complaints challenging matters regarding WIPO's general policy. Third, the complaints are irreceivable on the basis that the complainants are not allowed to file a representative action on behalf of unidentified individuals. Fourth, the brief that accompanied the complaint form is not receivable as it was filed after the prescribed time limit. Fifth, the complainants have included claims for relief in their submissions which were not set out in the complaint form, and thus, those additional claims are irreceivable.

WIPO contests the complainants' demand for disclosure, characterising it as a "fishing expedition". In addition, it asks the Tribunal to deny their applications for oral proceedings.

On the merits, WIPO argues that short-term staff did not have the right, pursuant to the terms and conditions of their contracts, to family

allowances, access to the Appeal Board or to a grade different from that which was agreed upon. The 36 employees allegedly represented by the complainants freely accepted the terms and conditions of each contract offered to them. Referring to the case law, WIPO submits that the Tribunal has previously dismissed arguments similar to those of the complainants regarding the issues of family allowance and grading. WIPO further submits that employees under short-term contracts did have access to alternative means of redress in the form of the WIPO Rebuttal Panel and the Joint Grievance Panel.

WIPO denies that it has breached the principle of equal treatment. It asserts that short-term employees are not similarly situated in fact or in law to staff members employed under fixed-term or permanent contracts. The latter are appointed following a competitive recruitment process, whereas individuals can be employed under short-term contracts without having to participate in a competition. WIPO emphasises that long-serving short-term employees freely accepted their contracts and the complainants have failed to prove that those contracts were unlawful. Referring to the case law, WIPO argues that the Tribunal does not have the authority to reform valid and enforceable contracts or to “remake the bargain which the parties themselves have chosen to make”.

D. In their rejoinder the complainants develop and press their pleas. They assert that they do, in fact, represent 36 long-serving short-term staff. Contrary to WIPO’s arguments, they strongly assert that their complaints are receivable. Referring to the case law, they submit that the use of successive short-term contracts is an abuse of power and the long-serving short-term staff members have been serving WIPO under successive short-term appointments in order to perform functions which are essentially of a permanent nature.

E. In its surrejoinder WIPO maintains its position, with one exception. It states that it no longer wishes to maintain its argument that the Tribunal is not competent to hear the complaints on the basis that they do not concern the alleged non-observance of the terms of employment of the short-term employees in question. It points out that

the complainants have expressly limited the relief they are requesting to the 36 long-serving short-term employees they allegedly represent and thus, they are not seeking to obtain benefits for long-serving short-term employees in general.

CONSIDERATIONS

1. These complaints are brought by nine complainants. As the complainants rely on the same arguments and seek the same redress, their complaints are joined and will be the subject of this single judgment. They have filed complaints in their capacity as the duly elected staff representatives of the WIPO Staff Council in their individual capacities as staff members of WIPO and on behalf of 36 WIPO staff members employed under “long-term/short-term contracts”. The complainants do not identify all of the 36 staff members. Broadly described, the complaints challenge the appropriateness of employment under such contracts and, specifically, whether employees so employed, should be paid a family allowance on the same footing as other staff of WIPO.

2. WIPO challenges the receivability of the complaints on several bases. It is convenient, at the outset, to briefly describe the circumstances leading to the filing of the complaints in order to address the question of receivability. It is tolerably clear that employment of individuals under short-term contracts had been a live and contentious issue within WIPO for some time and was so before action was taken by the Staff Council in June 2010 that became the immediate genesis of these complaints.

3. In a memorandum dated 16 June 2010 from the Staff Council to the Director General, reference was made to a town hall meeting on 30 April 2010 at which the Director General had spoken and announced a number of measures that were to be taken by the Administration to address this issue of concern. This was described in the memorandum as an intention on the Administration’s part “to regularize the Organization’s remaining long-serving short-term

employees over a period of approximately five years”. The memorandum noted that the Staff Council “look[ed] forward to working with the administration in order to facilitate this regularization exercise”. The memorandum went on to note that the Staff Council had proposed setting up a joint task force to consider the position of these employees, that the Administration had proposed another mechanism and that the Staff Council adhered to the view that there should be a separate task force. The memorandum went on to say:

“The task force established by the Staff Council organized its first meeting to set up terms of reference, and addressed the following issues:

1. The implementation of ‘equal pay for equal work’. In this regard, it was agreed to kindly invite the Administration to align the positions of long-serving short-term employees, in all sectors, under the same appellation and classification as their fixed-term and permanent colleagues;
2. Implementation of the measures as indicated above, with effect as of January 1st, 2010, and providing family allowances to all short-term employees; and
3. Implementation of the principle of ‘equal access to the internal system of justice’, to the benefit of all short-termers.”

4. The memorandum then said:

“The Staff Council would be grateful if the Director General would kindly accede, as a first step, to the three above requests as a strong sign from his part and willingness to actively initiate the implementation of the regularization process he underlined during the last Townhall meeting.

The Staff Council wishes to reiterate its special thanks to the Director General for his commitment and dedication, as well as for each step he may undertake in the best interest of both the Organization and the staff at large.

For your consideration please.”

5. A further memorandum from the Staff Council was sent on 24 June 2010. The first page of the memorandum set out what was described later in the memorandum as a “three phase regularization plan” which was said to be “headcount and budget neutral”. The memorandum then concluded:

“Finally, the Staff Council requests that pending the implementation of the above regularization plan the contractual status of all short-term colleagues should be revisited by the administration in order to ensure that these colleagues:

- (i) receive family allowances on equal footing with their colleagues holding fixed-term or permanent contracts;
- (ii) are graded at the same level of holders of fixed-term or permanent contracts who carry out the same tasks (in accordance with the principle of Equal Pay for Equal Work);
- (iii) be given access to the Organization’s internal system of justice.

In respect of points (i) to (iii) above, the Staff Council recalls that a specific request was already addressed to the Director General through its memorandum of June 16, 2010.

The Staff Council looks forward to engaging in a constructive manner, with the administration on the implementation of the measures requested in the present memorandum.”

6. The Director General responded to both memoranda in a memorandum dated 28 July 2010, which was addressed to the Staff Council and copied to “All Staff”. This memorandum contained six numbered paragraphs. The first was introductory and the second and third identified steps that had been or were being taken to address the issue. This included the production by the Administration of a “proposal for the Program and Budget Committee, on a five-year plan for the regularization of long-serving temporary employees in the Organization”. The memorandum noted that this document was currently being prepared and would be “shared with the Staff Council for its comments, before it [was] finalized”. The memorandum went on to say:

- “4. In relation to the conditions of service of temporary employees, I reiterate what was said in Assistant Director General, Mr [S.]’s memorandum to you of March 15, 2010, that the matters you raise in your memoranda of June 16, 2010 and June 24, 2010, will be addressed in the context of the Consultative Group, as part of the ongoing reform process.
- 5. Since the Organization’s intention is for all categories of staff to be governed by the WIPO Staff Regulations and Rules, thus aligning the conditions of service of temporary staff with those of fixed term and permanent staff, the question of short-term benefits and entitlements is

closely linked to the proposed reform of the Staff Regulations and Staff Rules. The Consultative Group, which includes members elected by the staff, is ideally placed to examine, and to present recommendations on these issues.

6. I count on both the Staff Council and the staff representatives of the Consultative Group in ensuring that the issues raised by staff, concerning the conditions of service of temporary employees, are considered by the Consultative Group in the ongoing reform process.”

7. The first legal issue raised by WIPO concerning receivability turns on whether this document and its subsequent affirmation involves an administrative decision justiciable before the Tribunal. The Tribunal notes that seven of the present nine complainants wrote, through their legal representative, to the Director General on 13 September 2010 seeking an internal review of what they characterised as an administrative decision manifest in the memorandum of 28 July 2010. They did not receive a reply and on 3 January 2011 the Staff Council filed an appeal with the Appeal Board. This internal appeal resulted in a recommendation by the Appeal Board dated 15 August 2011 that the internal appeal be dismissed as irreceivable. This recommendation was accepted by the Director General and communicated to the seven appellants and to Ms G. and Mr P. by a letter dated 24 October 2011. This is the impugned decision.

8. Before discussing whether the complaint is receivable, it is desirable to note the relief sought by the complainants and deal with two procedural issues. In summary the relief is, amongst other things, that the impugned decision be quashed, that long-serving short-term staff members be treated as if they were the holders of regular fixed-term contracts (including for the purposes of applying the Staff Regulations and Staff Rules), that long-serving short-term staff members receive family allowances on equal footing with their colleagues, that they immediately be graded at the same level as holders of fixed-term or permanent contracts who carry out the same work and that the long-serving short-term staff members be given access to WIPO’s internal justice system.

9. The first procedural issue is a request by the complainants for the production of documents. The request is cast in the most general terms and constitutes an impermissible “fishing expedition” (see, for example, Judgment 2497, consideration 15). The second procedural issue is a request for oral proceedings. Having regard to the pleas of the parties and the material they have provided, such a hearing is unnecessary.

10. The central legal issue concerning receivability is whether the complaint raises for consideration an issue involving the alleged non-observance, in substance or in form, of the terms of appointment of officials and of the provisions of the Staff Regulations (see Article II, paragraph 5, of the Tribunal’s Statute). WIPO argues, with some force, that the memorandum of 28 July 2010 did not involve a decision, let alone a decision with any legal effect, because the response of the Director General in the memorandum was part of an ongoing dialogue between him and the Staff Council about steps which might be taken to effect administrative and legal changes to improve the lot of long-serving short-term staff members (as to what constitutes a decision, see Judgments 1203, consideration 2, and 1244, consideration 3). But there is a more fundamental difficulty in the complainants’ case.

11. The requests in the memorandum of 16 June 2010 and repeated on 24 June 2010 did not involve the assertion of any existing legal right. Rather they involved requests to implement, as a matter of policy, a regime that would alter the subsisting rights of long-serving short-term employees. Indeed that was the fundamental concern of the Staff Council. The Council was intent upon “regularising” the circumstances of long-serving short-term employees by altering and thereby improving their legal position and the rights they would have as staff members of WIPO. Broadly speaking, that was also the position of WIPO though doubtless there may well have been differences, possibly significant differences, of approach. Nonetheless, the claims of the Staff Council were a request for a change of policy and policy issues of this type are not justiciable (see Judgment 3225,

consideration 6). This conclusion is reinforced by the fact that the request was made at a high level of abstraction. While numbers of affected employees were discussed, particularly in the memorandum of 24 June 2010, no specific employees were then identified. While the complainants now say there are 36 identifiable employees on whose behalf the complaint in the Tribunal is being pursued, a matter conceded by WIPO in its surrejoinder, the legal issue is whether, as of June 2010 and subsequently on 24 October 2011 after the internal appeal, a decision was made concerning the subsisting legal rights of specific (even if not identified) employees. It appears to the Tribunal the answer to that question is no. Accordingly, the complaints are not receivable and should be dismissed. It follows that the applications to intervene must also be dismissed.

DECISION

For the above reasons,

1. The complaints are dismissed.
2. The applications to intervene are also dismissed.

In witness of this judgment, adopted on 9 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO
DOLORES M. HANSEN
MICHAEL F. MOORE
DRAŽEN PETROVIĆ