

**119th Session**

**Judgment No. 3419**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr A. M. K. against the World Intellectual Property Organization (WIPO) on 4 May 2012 and corrected on 3 September, WIPO's reply of 19 December 2012, the complainant's rejoinder of 3 April 2013 and WIPO's surrejoinder dated 8 July 2013;

Considering Articles II, paragraph 5, VII and VIII 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 complainant joined WIPO in 1998 as Deputy Director of the Cooperation for Development Bureau for Arab Countries. In November 2008 a vacancy notice was issued for the post of Director of the Technical Assistance and Capacity Building Bureau for Arab Countries (hereinafter referred to as "Director, Regional Bureau of Arab Countries"). The complainant applied for the post and was interviewed in April 2009. In November 2009 he wrote to the Director General asking to know the results of the selection process. He was informed by a letter of 8 January 2010 that an external candidate had been selected for the post.

The complainant requested that the decision not to select him for the post be reviewed. His request was rejected by a letter of 28 April 2010. He then filed an appeal with the Appeal Board in July 2010.

In the context of another internal appeal, the Appeal Board found that the selection process for the post of Director, Regional Bureau of Arab countries, had been tainted with irregularities and it recommended that the process be resumed by selecting one of the candidates who fulfilled the requirements set out in the Vacancy Notice. In the event that such a recommendation was deemed not to be in the interest of the Organization, the Appeal Board recommended that the Director General take a new decision concerning a revised vacancy announcement. The Director General endorsed the Appeal Board's findings and decided that a revised vacancy announcement would be issued after which a new selection process would be conducted.

In its report of February 2011 concerning the complainant's internal appeal, the Appeal Board concluded that the complainant's appeal did not provide a sufficient basis for the setting aside of the contested decision. However, noting that it had already concluded that the selection process concerned was irregular and that the appointment of the selected candidate should consequently be annulled, and had informed the Director General accordingly, the Appeal Board recommended that the Director General promptly inform the complainant of the action he intended to take with respect to the contested selection process.

By a letter dated 15 March 2011, the complainant was informed that the Director General agreed with the Appeal Board's conclusion that his appeal did not provide a sufficient basis for the annulment of the decision. However, the Director General had decided to adopt the Board's recommendations and had decided, independently of the complainant's appeal, to declare the selection process for the post of Director, Regional Bureau of Arab Countries, and consequently the external candidate's appointment to that post, to have been irregular. The Director General further decided that a revised vacancy notice would be issued, following which a new selection decision would be made.

Meanwhile, in August 2010, having been informed of the identity of the candidate selected for the post, the complainant requested the Director General to review his decision to select Mr G. for the post.

By a letter of 19 October 2010 he was informed that the Director General had decided to reject his request for review and, on 20 January 2011, he lodged another internal appeal with the Appeal Board.

In its report of July 2011, the Appeal Board noted that the decision to appoint Mr G. had been withdrawn and that, as a result, the complainant's main claim for relief had become redundant. His alternative claims to be directly appointed to the post with retroactive effect or that a new selection be conducted under the auspices and review of an independent external body were also found to be redundant. They conflicted with the arrangements subsequently decided by the Director General, which affected not only the complainant but also other staff members and which had not been the subject of an appeal by the complainant. His direct appointment was not considered appropriate and his claim for review by an external body did not appear justified in the circumstances. In examining his claim for moral damages the Appeal Board observed that "the failure to notify the other candidates of the selection that had eventually been made and the several months' delay in making that notification, as well as the aggravating circumstance that similar irregular selections had been made in the same context in two previous competitions in which the [complainant] had been a candidate" justified an award of "appropriate compensation", as well as reimbursement of part of his legal costs, corresponding to the fee charged for eight hours of service.

By a letter of 21 September 2011 the complainant was informed that the Director General had decided to adopt the Appeal Board's recommendations and to award him, on an exceptional basis, 500 Swiss francs in moral damages. However, the Director General agreed to reimburse only part of the complainant's costs, as he considered that it had been unreasonable for him to have maintained all his claims in the rejoinder to his internal appeal, after having been informed in the course of the proceedings that Mr G.'s appointment had been cancelled. That is the impugned decision.

B. The complainant argues that the quantum of damages awarded by the Director General in response to the Appeal Board's recommendation

does not accurately reflect the damages suffered by him. In deciding to award a negligible sum of moral damages and to reduce the amount of legal fees recommended by the Appeal Board, the Director General demonstrated his bias, malice, ill-will and prejudice towards the complainant. Further the impugned decision amounts to a retaliatory measure against him for his activity as Staff Council President. Concerning the award of legal costs, the complainant argues that it is contrary to the Tribunal's case law, and that it reflects the improper reasoning of the Director General. In his view, it was fully within his right to enter a rejoinder after the impugned decision was set aside.

The complainant requests that the Tribunal order the production of documents relating to his candidacy for the post of Director, Regional Bureau of Arab Countries, as well as documents that in any way describe, comment on, relate to, evidence in general or specifically the decision not to appoint the complainant to that post. He asks the Tribunal to confirm the quashing of Mr G.'s appointment and seeks to be directly appointed to the post with retroactive effect from May 2010. Alternatively, he asks that the Administration be instructed to conduct a new selection in a timely, expeditious and fair manner under the auspices and review of an independent external oversight body. He seeks moral and exemplary damages in the amount of 250,000 Swiss francs, as well as costs, with interest.

C. In its reply WIPO contends that the complaint is irreceivable on the ground that it was filed after the expiry of the deadline specified in Article VII, paragraph 2, of the Tribunal's Statute and that it amounts to an abuse of the Tribunal's filing deadline. On the merits, it submits that the complainant has not shown that the compensation awarded was not appropriate. To the extent that the primary relief originally sought in his internal appeal was the quashing of Mr G.'s appointment, the complainant was awarded an appropriate remedy. He provides no evidence that the injury suffered was greater than that for which he was awarded compensation by the Director General. WIPO objects to the fact that the complainant has increased his claim for damages before the Tribunal. The risk of being unsuccessful is inherent to any selection

process and does not, in and of itself, entitle him to any compensation, and he was already awarded compensation on the ground that a previous selection process had been flawed. The delay in notifying unsuccessful candidates of the selection decision was also appropriately compensated by the award of 500 francs, which is consistent with the Tribunal's awards of damages in similar cases. His allegations of bias and prejudice are wholly unsubstantiated. It was both reasonable and fair for the Director General, in assessing the award of legal costs, to consider the complainant's conduct and the fact that he had pressed all his claims despite having been informed prior to filing his rejoinder of the decision to set aside Mr G.'s appointment. WIPO further submits that the complainant's general request for documents amounts to a fishing expedition and, insofar as it relates to Mr G.'s appointment, it is unnecessary. His request for documents relating to his non-selection should also be rejected, since his request for review only concerned the validity of Mr G.'s appointment. The complainant's claim for the "confirmation of the quashing" of the decision to appoint Mr G. is both unnecessary and beyond the Tribunal's scope of power as defined in Article VIII of its Statute.

D. In his rejoinder the complainant presses his pleas. He maintains that he is entitled to costs under the Tribunal's case law and that the Administration had no legitimate reason to reduce the amount of costs awarded. His request for a direct appointment is reasonable in light of the special circumstances of his case.

E. In its surrejoinder WIPO maintains its position in full. It adds that the complainant's claim for compensation based on the Administration's failure to notify unsuccessful candidates of the selection decision is irreceivable, as it was not raised in the internal appeal proceedings.

## CONSIDERATIONS

1. WIPO raises irreceivability as a threshold issue. It contends that the complainant and his legal counsel are in breach of the

Tribunal's filing deadlines. The deadline for the filing of the complaint was 24 May 2012. The complaint form was filed on 4 May 2012. WIPO accepts that it was filed within the time required under Article VII, paragraph 2, of the Tribunal's Statute, but contends that the filing was incomplete. The complaint form was not filed with the brief or the supporting documents, which were filed some 14 weeks later. The complainant was called upon to correct the complaint in accordance with Articles 6, paragraph 2, and 14 of the Rules of the Tribunal, and there is no indication that the complainant fell afoul of the time afforded by the Tribunal. Accordingly, the complaint is receivable and will be heard on its merits.

2. In the impugned decision, dated 21 September 2011, the Director General accepted the recommendation by the WIPO Appeal Board to dismiss the complainant's internal appeal against the decision to appoint Mr G. to the post of Director, Regional Bureau of Arab Countries. WIPO had itself rescinded the selection of Mr G. and so informed the complainant by a letter of 15 March 2011. This was before the Appeal Board issued its report on 19 July 2011, as well as before the complainant subsequently filed his complaint with the Tribunal on 4 May 2012. This claim was nevertheless repeated in the present complaint seeking to have the Tribunal confirm the setting aside of Mr G.'s appointment. As the nomination was already set aside, the claim in this regard is moot.

3. In the impugned decision, the Director General also accepted the recommendation of the Appeal Board to dismiss the complainant's internal appeal against the decision to appoint him directly to the post, with retroactive effect from May 2010 with all attendant benefits. The Director General also accepted the recommendation of the Appeal Board to reject the complainant's alternative claim that the Administration be instructed to conduct a new selection process, in a timely and fair manner, under the auspices of an outside independent body. These alternative claims were also repeated in the present complaint. They are also dismissed as unfounded. This is because, in the first place, the applicable provisions, Staff Regulations 4.8 and 4.9, confer no right

upon any person to be directly appointed to a post with retroactive effect without going through the selection process which the Staff Regulations and Staff Rules require. This was particularly so as there were other persons, in addition to the complainant, who were affected by the decision to select Mr G. for the post. Further, Staff Regulations 4.8 and 4.9 do not confer a right to the conduct of a selection process by an external body in the given circumstances. Additionally, by the time that the Appeal Board issued its report on 19 July 2011, arrangements were already in place in accordance with which the post was advertised. A candidate was selected in accordance with those arrangements to fill the post with effect from 1 April 2012. This was more than a month before the present complaint was filed. These claims were therefore also moot and will accordingly be dismissed.

4. This brings us to the claims concerning moral damages, costs and interest. These will be considered after assessing the complainant's procedural applications for oral proceedings and the disclosure of documents.

5. In his request for oral proceedings, the complainant wishes his representative to make oral arguments to support his complaint and to question witnesses. However, he named no witnesses, but states that he reserves the right to name specified witnesses later depending on the Administration's reply. By the close of the pleadings he had named no witnesses. Neither did WIPO name any witnesses. The Tribunal will not therefore order oral proceedings. This is particularly as, additionally, no purpose will be served by calling witnesses in this case, which now turns upon the application of the legal principles that are concerned with the issues of moral damages, costs and interest (see, for example, Judgments 3059, under 9, 3058, under 2, 1241, under 2, and 623). Moreover, the resolution of these issues does not require oral arguments over and above the written submissions which both parties have presented (see, for example, Judgments 1233, under 7, 1193, under 3, and 954, under 1). Accordingly, the Tribunal rejects the application for oral proceedings.

6. The Tribunal finds that it is unnecessary to order the disclosure of documents that the complainant requested. In the first place, the request has been overtaken insofar as it relates to documents that concern the challenge to the selection of Mr G. for the post and for the matters related to the complainant's direct appointment. This follows from the finding that those aspects of the complaint are moot. Both parties have supported their submissions on moral damages, costs and interest by extensive and complete submissions and such documents that are necessary to elucidate these issues, which turn primarily on legal principles. In any event, the request for disclosure is quite wide and is of a general nature. It is based on the speculation that something might be found in the documents to further the complainant's case. The Tribunal has consistently held that it will not order the production of documents on that basis (see, for example, Judgment 2497, under 14 and 15). Accordingly, the Tribunal also rejects the requests for the production of documents.

7. To the extent that the complainant seeks compensation in excess of the 50,000 Swiss francs requested in the internal appeal, it will not be considered in the absence of any justification for the increase.

8. The complainant also claims exemplary damages, in addition to compensation for moral damages, on the ground that he suffered malice, bias and harassment by the Administration. The Tribunal considers this claim to be unsustainable as the complainant has provided no evidence or analysis to demonstrate that there was bias, ill will, malice, bad faith or other improper purpose on which to base an award of exemplary damages (see, for example, Judgments 3092, under 16, and 3286, under 27).

9. The Appeal Board found that the complainant was entitled to compensation for moral injury because of the Administration's delay and lack of spontaneity in notifying him, as an applicant for the post, of Mr G.'s selection, and because this was the third occasion on which he had participated in "a flawed competition process" for the same post. In the impugned decision, the Director General accepted this

recommendation and awarded 500 Swiss francs “on an exceptional basis”, which was unexplained. The Tribunal considers that the circumstances set out by the Appeal Board were sufficiently humiliating circumstances to merit an award of 1,500 Swiss francs as compensation. This is notwithstanding that WIPO argues that the award of 500 Swiss francs is reasonable because a person who applies for a post should be aware that there is an inherent risk of rejection and that does not carry an entitlement to compensation; the complainant was already awarded compensation for one of the three flawed selection processes in 2005; the complainant did not raise WIPO’s failure to notify him, as an unsuccessful candidate, of Mr G.’s selection in his internal appeal; and there was only an 8.5 month delay to notify the complainant of Mr G.’s selection.

10. As it relates to costs, the Tribunal notes that WIPO withdrew the decision to select Mr G. for the post by the time that it filed its reply in the internal proceedings. WIPO thereby accepted that the selection process was flawed and unlawful. In the impugned decision, the Director General did not deny that costs were to be awarded, notwithstanding the statement that the reimbursement was on an exceptional basis as legal costs are not normally reimbursed for internal appeal proceedings. However, the Director General reduced the amount that the Appeal Board recommended as the complainant was thought to have unnecessarily pursued the litigation knowing that his claim was moot. The Appeal Board was seized of this when it awarded costs charged at eight hours, which the Tribunal finds was reasonable. Accordingly, the costs aspect of the complaint is well founded.

11. Inasmuch as the complainant prevails on the issues of compensation for moral injury and costs in these proceedings, he is awarded 3,000 Swiss francs costs.

## DECISION

For the above reasons,

1. The impugned decision is set aside to the extent that it relates to the quantum of compensation awarded for moral injury and costs in the internal proceedings.
2. WIPO shall pay the complainant 1,500 Swiss francs in compensation for moral injury.
3. It shall pay him costs in the internal appeal proceedings charged at eight hours.
4. It shall also pay him 3,000 Swiss francs in costs for the present proceedings.
5. All other claims are dismissed.

In witness of this judgment, adopted on 7 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ