

A. (No. 7), B. H. (No. 7) and K. (No. 12)

v.

WIPO

122nd Session

Judgment No. 3642

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr I. A. (his seventh), Mr N. B. H. (his seventh) and Mr A. M. K. (his twelfth) against the World Intellectual Property Organization (WIPO) on 23 September 2013 and corrected on 6 February 2014, and WIPO's single reply of 5 June 2014;

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 may be summed up as follows:

The complainants challenge the lawfulness of the procedure followed to fill an Administrative Assistant position.

In May 2011 Ms G. was appointed as the successful candidate in the competition for Vacancy No. G2090 for the G6 level post of Administrative Assistant, Conference and Language Department, Administration and Management Sector (the "contested post"). The competition was open to internal candidates only; Ms S. had also applied and was considered for the position but was not selected.

In December 2011, following a decision by the Administration that Ms G. should be transferred to another post, Ms S., who previously held a G4 position, was notified that, pursuant to competition G2090, she was being promoted to the contested post with effect from 1 January 2012.

In a single letter of 10 April 2012 the complainants, acting individually and collectively in their capacity as members of the Staff Council, requested the Director General to review the decision to “directly appoint or otherwise wrongly transfer” Ms S. to the contested post without competition and they asked that he withdraw that decision forthwith. They stated that Ms S.’s appointment was a violation of Staff Regulations 4.8 and 4.3 and that the practice of direct appointment was prohibited pursuant to paragraph 17 of Office Instruction No. 58/2006 of 27 October 2006.

On 5 June the complainants were informed that the Director General saw no reason to withdraw the decision to promote Ms S. to the contested post since her promotion was the result of a reassignment following a competitive process, pursuant to Staff Regulation 4.3(a). In a single appeal dated 5 September 2012 the complainants challenged the decision of 5 June maintaining their position that Ms S. was directly appointed without a competitive process in violation of the Staff Regulations.

By a letter of 24 December 2012 to the Chair of the WIPO Appeal Board the complainants objected to the inclusion of Mr R. (who was the staff-elected alternate member of the Appeal Board) on the Appeal Board panel; in April 2013 they reiterated their opposition to his participation.

In its conclusions of 25 April 2013 the Appeal Board recommended that the Director General should take a reasoned decision as to whether or not the Administration was required under Staff Regulation 4.8(c) to hold a new competition for the replacement of the successful candidate in the previous competition. In the event the Director General decided that a new competition was required, he should annul Ms S.’s appointment to the contested post and require that a new competition be held. The Appeal Board also recommended that the complainants be awarded legal costs for eight hours of work undertaken by their lawyer. Regarding the complainants’ challenge to the composition of the Appeal Board, the Appeal Board referred to a summary (dated 24 January 2013) of a discussion it had had on the issue of whether Mr R.’s membership on the Appeal Board presented a conflict of interest and noted that Mr R. had

concluded that there was no reason for him to recuse himself and that the other two members of the Appeal Board panel had agreed.

By a letter of 25 June 2013 the complainants were informed that the Director General accepted the Appeal Board's finding that there was nothing improper about its composition. Furthermore, at the time of Ms S.'s appointment, the Director General had held the view (which he maintained) that the contested post had been filled on a competitive basis, in compliance with the version of Staff Regulation 4.8(c) then in force. He considered that, in the particular circumstances of the case, a new competition was not warranted and rejected the Appeal Board's recommendation with respect to the award of legal costs. That is the impugned decision.

As a preliminary matter, the complainants request oral proceedings. They ask the Tribunal to quash the impugned decision and Ms S.'s appointment to the contested post. They request that a new vacancy announcement be issued with respect to the aforementioned post and that a competitive recruitment process be held. They ask that an investigation be launched into the circumstances under which Ms S. was named as the successful candidate. They seek reimbursement of all costs incurred in bringing their complaints. They request that all Staff Association staff members who were recruited through traditional competitive selection processes be awarded appropriate moral damages. Lastly, they seek such other relief as the Tribunal determines to be fair, just and necessary.

WIPO denies that the complainants are entitled to any of the relief that they seek and it requests the Tribunal to dismiss the complaints in their entirety.

CONSIDERATIONS

1. On 23 September 2013, complaints were filed with this Tribunal on behalf of four individuals, namely Mr A., Mr B. H., Mr K. and another official who later withdrew from the proceedings, which is recorded by the Tribunal in a separate judgment. In their brief, the complainants contend that they are submitting the complaints in their

individual capacity and also, collectively, as duly elected staff representatives of the WIPO Staff Council. They challenge the appointment of Ms S. to a staff position within WIPO in December 2011, effective 1 January 2012, and the associated regrading of Ms S.

2. WIPO argues in its reply that the complaints are irreceivable. It is convenient to deal with this issue at the outset.

3. The complainants have requested an oral hearing. Such a hearing is unnecessary and the request is rejected.

4. It is desirable first to set out, in a summary way, the events which led to these proceedings in the Tribunal. On 1 October 2010 a vacancy notice was published for a position (R396) which led to a competition and a report of the Appointment and Promotion Board (APB) dated 28 February 2011 recommending Ms G. (who was then unmarried and was known by her maiden name) be appointed as a first preference to the position though identifying, as a second preference, Ms S. The recommendation to appoint Ms G. was approved by the Director General on 14 March 2011 and her appointment took effect on 1 May 2011. However as a result of tension within the workplace, steps were taken to transfer Ms G. in late 2011 from the position (R396) to another position. It thus became necessary to fill the position to which Ms G. had been appointed effective 1 May 2011. The Administration did so by appointing Ms S. without further competition and, in the process, regrading Ms S. by two grades. The decision to appoint Ms S. was made in December 2011 effective 1 January 2012.

5. On 10 April 2012 a letter was written to the Director General by a lawyer acting on behalf of the then members of the Staff Council that included the four original complainants in these proceedings. They sought the review of the decision to promote and allegedly directly appoint Ms S. to position R396, contending that the appointment had occurred without a valid competition and, accordingly, there had been a violation of WIPO Staff Regulations 4.8(b) and 4.3(a). It was further contended that the assignment of Ms S. to the position contravened

Staff Regulation 4.3 insofar as it involved an assignment to a position two grades higher than the position then occupied by Ms S. By letter dated 5 June 2012 written on behalf of the Director General by the Acting Director, Human Resources Management Department (HRMD), these contentions were rejected and the letter indicated that the decision to promote Ms S. would not be withdrawn. In particular, the suggestion that there had not been a competition was rejected, pointing to the competition that had occurred in late 2010 and early 2011 culminating in the report of the APB of 28 February 2011 in which Ms S. had been recommended (as a second preference) for appointment to the position.

6. On 5 September 2012, the complainants (and others) lodged an appeal to the WIPO Appeal Board resulting in a report dated 25 April 2013. In its report, the Appeal Board recommended that the Director General take, and communicate to the appellants, a reasoned decision as to whether or not the Administration was required under Staff Regulation 4.8(c) to hold a new competition for the replacement of the successful candidate (Ms G.) in the previous competition having regard to the seven and a half months that elapsed since the completion of the previous competition. If the decision was that there should be a new competition, the Appeal Board recommended that the appointment of Ms S. should be annulled and a new competition held. A further recommendation was made concerning the payment of the appellants' legal fees. By letter dated 25 June 2013 written by the Director HRMD on behalf of the Director General, the appellants were informed that the Director General accepted the recommendations save for the recommendation about legal fees and, seemingly to give effect to the first recommendation, explained why he had decided it was open to him to appoint Ms S. without further competition. His rationale was that there had been a competition and the Staff Regulations did not specify any time limit within which an appointment should be made following the holding of a competition.

7. The Tribunal now turns to consider the standing of the complainants and thus the receivability of the complaints. It is necessary to focus on how this issue arose in the proceedings and the

approach of the parties in addressing it. The complainants address the question of receivability in their brief in a summary way but did not file a rejoinder dealing with the arguments of WIPO which are advanced in its reply. This issue arises in the Tribunal against a background in which the Appeal Board had concluded, in substance, that the complainants (and others) as appellants had standing to maintain the internal appeal in their capacity as staff representatives but did not have standing in their individual capacity. In relation to individual capacity, the Appeal Board relied on a test said to have been established by the Tribunal in Judgment 1272 which required that individuals show they had a real interest in being appointed to the position that was alleged to have been filled in violation of the WIPO Staff Regulations. The Appeal Board concluded there was “insufficient evidence of a real interest” to sustain standing on the part of the only two appellants who might have standing in their individual capacity.

Thus the complainants are addressing the issue of standing in these proceedings against a background in which, in the internal appeal, a particular test had been applied resulting in a conclusion that no appellant could, in their individual capacity, challenge the appointment. However in their brief in these proceedings in the Tribunal, the complainants, collectively, merely assert that they are submitting the complaint “in their individual capacities as staff members of WIPO” and they make no attempt in the brief to identify the applicable principles and to establish the facts which, on the application of those principles, would support a conclusion that all or some of the complainants had standing to maintain the complaint in their individual capacity.

At the forefront of WIPO’s submissions in their reply on this question is the judgment of the Tribunal relied upon by the Appeal Board, namely Judgment 1272 supplemented by reference to Judgment 3118. The principle in Judgment 1272 can be summarised as being that standing depends on the complainant wanting the position even though she or he may not be a serious contender and might not care deeply about it and irrespective of the complainant’s qualifications or prospects of success. However there are other judgments of the Tribunal that may well take a broader view of the standing of an individual to challenge the

appointment of a person to a position which might not require a complainant to demonstrate interest in the position but simply eligibility to occupy the position (see, for example, Judgment 2832, consideration 8).

However the complainants in these proceedings made no attempt to challenge, in a rejoinder, the argument of WIPO. Nor did they attempt to identify in a rejoinder what they say are the applicable principles and, additionally, establish the factual foundation which would result in these complaints being receivable because they can be maintained by the complainants in their individual capacity. In the absence of such evidence it is difficult for the Tribunal to be affirmatively satisfied that the complainants have standing in their individual capacity to bring these complaints. Accordingly, the Tribunal concludes that the complaints are not receivable in so far as they are brought by the complainants in their individual capacity.

8. It is now necessary to consider whether the complainants have standing in their capacity as duly elected staff representatives of the WIPO Staff Council. WIPO argues they do not on two bases. The first is that the rights of the staff representative must have been allegedly violated and it was those rights that could be enforced. The second was that none of the complainants had been lawfully elected.

9. The jurisprudence of the Tribunal on the standing of elected staff representatives to take proceedings before the Tribunal in a case such as the present is not uniformly clear. Recently in Judgment 3557, consideration 3, the Tribunal indicated that in certain circumstances staff representatives may challenge the appointment of another official, but can only do so if they allege breach of their own individual rights. In another recent case, Judgment 3546, the Tribunal concluded it was unnecessary to consider whether a staff representative had standing generally to challenge the extension of the appointment of another official because the complainant, who was a staff representative, had had a right to be advised of the proposal to extend the appointment and that right had been allegedly violated. That was viewed as sufficient to give the complainant standing.

10. On the other hand, the right of a staff representative to file a complaint challenging the appointment of an official has been recognised as an aspect of the right of an elected staff representative to bring proceedings on behalf of a staff committee with a view to preserving common rights and interests of staff (see Judgment 2791, consideration 2, and Judgment 2755, consideration 6).

11. However ultimately, the Tribunal's jurisdiction and the related question of a person's right to invoke that jurisdiction should be determined by reference to the Tribunal's Statute. Article II addresses both questions. The Tribunal is conferred with jurisdiction to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office and other organisations which have submitted to the Tribunal's jurisdiction, as well as complaints alleging non-observance of such provisions of the relevant Staff Regulations as are applicable to the case. Having identified and defined the jurisdiction, Article II identifies in paragraph 6, the class or classes of people who can invoke that jurisdiction. That paragraph provides that "[t]he Tribunal shall be open [...] to the official" and to any person to whom the "official's rights have devolved" on death together with any other person entitled to some right of a deceased official. A legal normative document conferring jurisdiction on a court should not be narrowly construed. However there is little room to doubt that the expression "shall be open to the official" is a reference to the official whose terms of appointment have allegedly not been observed or, in relation to whose circumstances (in "a case"), applicable provisions of the Staff Regulations have allegedly not been observed. This is reinforced by the reference to "the official's rights", in the singular, in relation to rights that have devolved on death. That is to say, standing is directed to the vindication or enforcement of the rights of an individual officer. The clause does not cast the net any wider in relation to who can invoke the jurisdiction of the Tribunal.

12. Similarly in Article VIII, dealing with remedies, the focus of the Article is the provision of relief or a remedy to an individual complainant on the assumption that the relief or remedy will overcome

the effect or consequences on that complainant of the non-observance by either undoing the effect of the defendant organisation's conduct (by rescission) or the payment of compensation to the complainant.

13. Accordingly, in the present case, the question is whether any of the complainants is an official with some or all of these characteristics. None was likely to have been a candidate for the position to which Ms S. was appointed without competition (putting to one side the competition in late 2010 and early 2011) in late 2011. Even assuming there should have been a competition and the obligation on WIPO to conduct the competition gave rise to a right in potential candidates to require a competition in order to further their candidacy, this non-observance of the Staff Regulations had no bearing on the position of other officials of WIPO who are not potential candidates, including officials who were elected representatives.

14. It might be thought all officials have a "right" to have the organisation which employs them comply with and observe the organisation's Staff Regulations irrespective of whether any failure to comply or non-observance has any bearing on their own situation as an official of the organisation. If this were so, all officials would have standing to commence proceedings in the Tribunal in relation to any non-observance of the Staff Regulations. It is highly improbable that the Statute intended this result. But is an elected staff representative able to enforce this "right" even though all other officials cannot unless affected by the non-observance? There is no basis in the language or structure of the Statute or by reference to the nature of the jurisdiction conferred on the Tribunal, to suggest this is so. Consistent with the entire focus of the Statute, the right of an elected representative to enforce the Staff Regulations for the benefit of all staff is limited to circumstances where the provision (which has allegedly not been observed) confers a right on the elected representative as a member of staff. It might be a right limited to the staff representative (such as the right to be consulted) or it might be a right enjoyed by all staff (such as the right to freedom of association).

15. In the result, the Tribunal does not accept that the complainants have some special standing derived from their status as elected representatives to require WIPO to hold a competition for the position to which Ms S. was appointed in late 2011.

16. The complainants do not have standing to bring these complaints. They are irreceivable and, for that reason, should be dismissed.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 5 May 2016, Mr Giuseppe Barbagallo, Vice-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 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ