Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

N. (A.) (No. 3)

v.

WIPO

122nd Session **Judgment No. 3647**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr A. N. against the World Intellectual Property Organization (WIPO) on 21 January 2014 and corrected on 13 March, WIPO's reply of 24 June, the complainant's rejoinder of 6 October 2014 and WIPO's surrejoinder of 12 January 2015;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the validity of a competition process in which he participated and the lawfulness of the ensuing appointment.

On 23 December 2010 WIPO published a vacancy announcement for the post of Head of the Non-Governmental Organizations and Industry Relations Service at P-5 level. The complainant, who held a grade P-4 post, applied and was shortlisted. By an email of 6 December 2011 he was informed that owing to "organizational changes" the competition had been cancelled.

On 26 January 2012 WIPO published a second vacancy announcement for the same post. The complainant applied on 22 February and on 27 June

he was notified that his application had been rejected. On 7 August he submitted a request for review to the Director General challenging the decision to reject his application as well as the appointment made at the end of the competition. He further requested "detailed information" on the organizational changes that had "guided" the wording of the second vacancy announcement.

By a letter of 2 October 2012 the complainant was advised that the Director General had decided to confirm the appointment of the candidate selected for the post, Ms M. He was also informed that the second vacancy announcement had not been "especially" motivated by reorganisation issues but that "the ultimate goal of [its] wording" was to attract the "widest possible choice of applications for the post". On 31 December 2012 the complainant filed an internal appeal with the Appeal Board challenging the decision of 2 October. He asserted that the selection process was tainted with several flaws flowing in particular from a breach of the principles of equality and transparency and failure to respect the prerogatives of the Appointment Board. WIPO filed its reply to the appeal on 4 March 2013. The complainant filed a rejoinder on 2 April and WIPO filed a surrejoinder on 30 April.

On 26 July 2013, at the request of the Appeal Board, the Administration produced a copy of the Appointment Board's report and three emails which showed that on 5 December 2011, as several months had passed since the deadline for submitting applications in the first competition, the Director General had decided to cancel the competition, though his decision had not been put in writing. On 12 August 2013 the complainant submitted "further observations" concerning these emails, as he had been invited to do. Claiming that a new time limit for internal appeal had been triggered by the disclosure of the reason behind the decision to cancel the first competition, he principally requested that the decision be cancelled on the grounds that it was based on an invalid reason and that the first competition be resumed at the stage at which it had been halted. He therefore sought the cancellation of the second competition and the decisions resulting therefrom. In the alternative, he sought the cancellation of the decision to reject his application and of the appointment made at the end of the second competition, and the

resumption of the second competition. In any event, he requested compensation for injury and an award of costs.

In its conclusions dated 30 August 2013, the Appeal Board found that the Appointment Board had omitted an essential fact by failing to mention the complainant's application in its report, even though it had warranted "close examination". The Appeal Board further stated that the decision to cancel the first competition was unlawful since it was based on a reason that lacked all credibility and that had been changed twice. Accordingly, the Appeal Board recommended allowing the internal appeal, either by revoking the disputed appointment or, if the complainant so requested, by reaching an amicable settlement. It also recommended reimbursing the complainant for part of his costs.

By a letter of 24 October 2013, which constitutes the impugned decision, the complainant was informed that the Director General had decided not to follow the Appeal Board's recommendations. He was advised that, on receiving the request for review of 7 August 2012, the Administration had asked the Appointment Board for an explanation as to why its report had not mentioned the complainant's application and why he had not been placed on the short list, which the Appointment Board had duly provided. The Director General, who had thus been able to reach an informed decision on the request for review, considered that as a result, the flaw identified by the Appeal Board had been corrected during the course of the internal appeal proceedings. Moreover, the Director General acknowledged that WIPO had erred in informing the complainant that the first competition had been cancelled because of organizational changes when this was not the real reason. The complainant was therefore awarded compensation in the amount of 500 Swiss francs for moral injury. With respect to costs, the complainant was advised that costs were not reimbursed at the internal appeals stage.

The complainant asks the Tribunal to quash "the impugned decision, which essentially means the decision of 5 December 2011 […] and all the later decisions taken with a view to filling the disputed post", and to order WIPO to resume the first competition at the stage at which it was ended and to produce both competition files. He claims 30,000 euros in compensation for material and moral injury and 7,000 euros in costs.

Ms M., who was invited by WIPO, at the Tribunal's request, to comment on the complaint, emphasised that she does possess the qualifications required for the post.

In its reply WIPO submits that the claim seeking the quashing of the decision of 5 December 2011 is irreceivable on the grounds, among others, that it is time-barred. It further considers that the claim seeking the quashing of all decisions taken after 5 December 2011 "necessarily" includes the decision to make the disputed appointment. However, WIPO asserts that the complainant never requested a review of that decision and that his "challenge" is therefore irreceivable. In the alternative, WIPO argues that the complaint should be dismissed as devoid of merit.

In his rejoinder the complainant contends that the reply is irreceivable as WIPO did not file it within the prescribed time limit.

In its surrejoinder WIPO submits that it filed its reply on 24 June 2014, the day on which the prescribed time limit expired, and provides documentary evidence to this effect. It further contends that the complainant has no cause of action given that he did not have sufficient experience to be appointed to the advertised post.

CONSIDERATIONS

1. The complainant impugns the decision of 24 October 2013 by which the Director General, contrary to the recommendation of the Appeal Board, dismissed his internal appeal against the decisions to end the competition that had initially been opened on 23 December 2010 and to organise a new competition advertised on 26 January 2012 to fill the post of Head of the Non-Governmental Organizations and Industry Relations Service, as well as the decisions to reject his application and to appoint Ms M. at the end of the second selection process.

2. The Tribunal first observes that the complainant's objection to the receivability of WIPO's reply is unfounded. It should be noted that the date of filing of complaints and briefs with the Tribunal is, in principle, the date on which they are sent and not the date on which they are received by the Registry (see, in particular, Judgment 3566, under 3).

In this case, the file contains a delivery receipt showing that the reply was deposited at the International Labour Office, where the Tribunal is based, on 24 June 2014. As the defendant organisation thus sent its reply on that date at the latest, that is, before the time limit expired that same evening, the complainant is wrong to claim that it was filed late.

3. WIPO challenges the receivability of the complaint on several grounds, which refer either to certain claims in particular or to the claims as a whole.

4. The Organization first disputes the receivability of the complainant's claims concerning the decision to end the initial competition.

(a) The Tribunal will not dwell on WIPO's argument that the "decision of 5 December 2011" challenged by the complainant in fact consists of emails from WIPO staff members that merely announce a decision taken by the Director General and hence do not, as such, constitute decisions causing injury. The decision challenged by the complainant is a decision of the Director General, the existence of which is clearly evidenced by these emails. Moreover, WIPO's reliance on this argument is hardly appropriate, given that it is precisely because of the surprising failure to formalise this decision in writing that the complainant has had to challenge it in this indirect way.

(b) WIPO next contends that the complainant did not request a review of this decision within the time limit of eight weeks prescribed for filing such a request under Staff Rule 11.1.1.

Although this point is factually correct, the Tribunal has consistently held that time limits for filing an internal appeal are not binding on a staff member where, for example, the organisation has misled the staff member, concealed some paper from her or him or has otherwise deprived that person of the possibility of exercising her or his right of appeal, in breach of the principle of good faith (see, for example, Judgments 1466, under 5, 2722, under 3, or 3231, under 2). This case law is particularly relevant where a staff member has been misled as to whether she or he

has any interest in challenging a decision (see Judgment 2993, under 8), which is exactly what occurred in the present case.

Indeed, the email dated 6 December 2011, in which the complainant was informed, two days before he was due to attend an interview to which he had been invited in the context of the initial competition process, that this process had been cancelled, stated that this decision stemmed from "organizational changes". However, this reason was patently untrue, as the complainant was subsequently told in the decision of 2 October 2012 that the purpose of opening a new competition was really to attract "the widest possible choice of applications for [the] post". It must also be underscored that the above-mentioned emails of 5 December 2011, which were subsequently disclosed to the Appeal Board but which were not made available to the complainant until then, show that this was not the reason initially given by the Director General for cancelling the first competition either, since these emails indicated that the Director General regarded the decision as being justified by the length of time that had elapsed since the deadline for submitting applications. The Director General himself admitted in his decision of 24 October 2013 that the Administration had "had erred by […] informing [the complainant] that the first competition had been cancelled because of organizational changes when this was not the real reason". Indeed, the Director General awarded the complainant compensation for moral injury on this ground, acknowledging that "this error [was] likely to have damaged the legitimate trust that the Organization's staff members can place in it."

However, the fact that the real reason for the contested decision was initially concealed from the complainant misled him as to whether he had an interest in challenging it. Indeed, although the complainant presumably had no reason to object when he was informed that the selection process had been cancelled because of "organizational changes", which, by their very nature, are made at the Director General's discretion, this was plainly not the case when it became apparent that this decision was really designed to avoid the foreseeable outcome of the competition in which he had been shortlisted. The complainant was therefore unduly deprived of the opportunity to appeal against this decision within the normal time limit, in breach of the principle of good faith.

In the particular circumstances of this case, and having regard to the inseparable link between these two successive selection processes, it is therefore entirely admissible for the complainant to have challenged the cancellation of the initial competition for the first time in his internal appeal to the Appeal Board against the decision of 2 October 2012.

5. WIPO further challenges the receivability of the complainant's claims concerning the appointment of Ms M. on the grounds that the complainant did not challenge this decision within the time limit specified by above-mentioned Staff Rule 11.1.1. However, this objection is factually incorrect, as it is plain from the wording of the letter of 7 August 2012, in which the complainant requested – within that time limit – a review of the rejection of his application, that he "also ask[ed] for [that] appointment to be reviewed". Moreover, the argument raised before the Appeal Board that this challenge was not sufficiently reasoned was irrelevant since the complainant's arguments challenging the rejection of his application in any case provided sufficient reasons to support his challenge to the outcome of the competition.

6. Lastly, WIPO submits in its surrejoinder, for the first time since the start of this dispute, that the complainant did not fulfil the experience requirements stated in the vacancy announcements for the two successive competitions, so that, as he was therefore not really eligible to hold the post in question, he has no cause of action.

However, without there being any need to rule on the merit and legal implications of this objection to receivability, the principle of good faith, from which flow the requirement of mutual trust between an organisation and its staff and the requirement of fairness in appeals proceedings, in any case dictates that such an objection may not properly be raised at this stage of proceedings.

Indeed, the Tribunal first notes that during the initial competition WIPO must perforce have accepted that the complainant met all of the conditions required by the vacancy announcement since, far from being excluded from the competition at the outset, the complainant was shortlisted for an interview with the Appointment and Promotion

Board. It is hence inappropriate for WIPO to suddenly advance this objection, which is apt to cast doubt on the lawfulness of its own conduct.

Secondly, the submissions show that WIPO did not claim that the complainant had no cause of action at any time during the internal appeal proceedings, yet such an objection could equally have been raised at that stage and WIPO does not mention any circumstance that prevented it from so doing. The Tribunal has on a number of occasions held that in such circumstances an organisation may not raise such an objection for the first time in the proceedings before the Tribunal (see, for example, Judgments 1655, under 9 and 10, 2255, under 12 to 14, and 3160, under 14).

Lastly, it is worth recalling that an organisation may not raise a new objection to receivability in its surrejoinder, that is to say at a stage of proceedings when the other party is, in principle, no longer able to respond, where the objection in question could have been raised in the reply, as is the case for an objection such as this, based on the absence of a cause of action (see, in particular, Judgments 1082, under 16, 1419, under 20, and 3422, under 14, *in fine*).

7. These various objections to receivability will therefore be dismissed in their entirety.

8. In support of his claims, the complainant challenges not only the validity of the second selection process itself, but also the lawfulness of the decision by which the Director General had previously ended the initial competition.

Like the Appeal Board, the Tribunal considers that the complainant's submissions on this point are indisputably well-founded.

9. The Tribunal's case law recognises that the executive head of an international organisation may cancel a competition in the interest of the organisation if, among other reasons, it becomes apparent that the competition will not enable the post concerned to be filled, and that she or he may, if need be, decide to hold a new competition on different

terms (see, for example, Judgments 1223, under 31, 1771, under 4 (e), 1982, under 5 (a), and 2075, under 3).

However, the condition relating to the interests of the organisation must actually be met, so that the cancellation of the initial process is based on a legitimate reason. In this matter as in any other, arbitrary decision-making is unacceptable.

10. In the present case, the successive changes, mentioned above, in the reasons put forward by WIPO for cancelling the competition advertised on 23 December 2010 suffice to cast doubt on the genuineness of the reasons that were ultimately advanced by the Organization, especially given that these reasons were formulated in different terms at the various stages of the dispute and that they were presented in contradictory fashion as sometimes exclusive and sometimes cumulative.

11. Moreover, the two reasons provided in the final decision of 24 October 2013, as expressed therein, that is, the "time that had elapsed since the deadline for applications" and the "wish to attract a greater number of more qualified candidates", clearly lack any credibility.

12. It is true that at the time when the competition was halted 10 months had passed since the deadline for applications, but by then the process had entered into its final stage, shortlisted applicants having been invited by the Appointment and Promotion Board to interviews scheduled for the following days. Thus, the Board's final deliberations were imminent.

Furthermore, although this decision mentions that the delay in the process "inevitably had an impact on the availability of the shortlisted applicants", the Tribunal observes that WIPO provides no clear indication in its submissions as to whether the candidates invited to these interviews actually withdrew from the competition.

The Organization's argument that it became urgent to fill the post owing to this delay is also dubious, since the opening of a new competition was bound to cause far more delay in filling the post than the completion of the initial process, which, as stated above, was imminent.

It is also conceivable that WIPO's Administration cited "organizational changes" when notifying shortlisted candidates of the Director General's decision precisely because the length of time that had elapsed since the application deadline seemed implausible as a reason.

13. Nor is the Tribunal convinced that the cancellation of the first competition was occasioned by the "wish to attract a greater number of more qualified candidates", a reason that was in fact advanced by WIPO only at a later stage in the dispute.

A total of 92 applications were submitted for that competition, which can hardly be regarded as manifestly insufficient, and even if WIPO had taken the opposite view, it would surely have ended the competition as soon as the deadline for applications was reached, rather than inexplicably waiting for 10 months to pass before taking this decision.

Furthermore, at the time when the process was halted, there was no basis on which it could reasonably be said that none of the existing candidates was suitable for the post advertised. As stated above, the Appointment and Promotion Board was on the verge of interviewing the shortlisted candidates, and it is difficult to see how WIPO could have reached this conclusion before the Board's deliberations, bearing in mind that the Director General could in any case have cancelled the competition in the event that the outcome of those deliberations justified that course. In this regard, the Appeal Board rightly pointed out that WIPO's assertion, contained in the reply filed during the internal appeal proceedings, that the Appointment and Promotion Board had "considered that the vacancy announcement […] had not enabled candidates who sufficiently matched the desired profile to be identified" was untrue.

Lastly, the Tribunal notes that the eligibility requirements set out in the second vacancy announcement were considerably less stringent than in the first, in particular as far as intellectual property qualifications were concerned. Although this lowering of the requirements was likely to encourage more applications, it was in direct contradiction to the other stated goal, which, according to WIPO, was to attract "more qualified" candidates. The Tribunal cannot fail to be surprised by this.

14. The various inconsistencies and anomalies that emerge from the submissions do not support the conclusion that the decision to cancel the first competition was taken, as the complainant contends, with the sole aim of enabling the candidate who was ultimately selected to be appointed and that the decision hence constituted an abuse of authority. However, the Tribunal considers that WIPO's failure to advance any credible reason to explain that decision shows that the powers vested in the Organization's executive head were exercised in an arbitrary manner, which in itself renders the decision unlawful and warrants setting it aside.

15. The unlawfulness of the Director General's decision to end the initial selection process clearly renders unlawful the subsequent decision to open the new competition for the same post and, by extension, the decisions to reject the complainant's application and to appoint Ms M. at the end of the second competition.

As a result, the impugned decision of 24 October 2013 and all previous decisions must be set aside, without there being any need to rule on the complainant's other pleas or to grant his request for the production of additional documents.

16. The initial competition process advertised in the vacancy announcement published on 23 December 2010 must be resumed from the stage at which it was unlawfully ended, or, if it becomes apparent that the competition itself was flawed, at the stage at which it became flawed. This would be the case particularly if the manager of the programme concerned had unlawfully taken part in the meetings of the Appointment and Promotion Board, as occurred in the cases leading to Judgment 3421, delivered on the complainant's second complaint, and Judgment 3648, also delivered this day. In any event, WIPO must resume the competition on the basis of the vacancy announcement published on 23 December 2010, applying the Staff Regulations and Rules that were in force when this announcement was published and considering only the applications submitted within the time limit specified by the announcement.

17. WIPO must shield Ms M. from any injury that might result from the cancellation of her appointment, which she accepted in good faith (see, for example, Judgments 2712, under 10, and 3157, under 11).

18. The Tribunal considers that, in view of all the circumstances of the case, the complainant does not have any grounds to claim compensation for material injury. However, the unlawfulness of the contested decisions caused the complainant moral injury, for which compensation will be granted in the amount of 10,000 euros, in addition to the sum of 500 Swiss francs that was awarded to him at the end of internal appeal proceedings.

19. As he succeeds for the most part, the complainant is entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The decision of the Director General of WIPO dated 24 October 2013 is set aside, as are the decisions to end the first competition and to hold a new competition and the decisions taken at the end of the second competition to reject the complainant's application and appoint Ms M. as Head of the Non-Governmental Organizations and Industry Relations Service.
2. The initial competition process shall be resumed as indicated under 16, above.
3. WIPO shall pay the complainant compensation for moral injury in the amount of 10,000 euros.
4. It shall also pay him 5,000 euros in costs.
5. All other claims are dismissed.
6. WIPO shall shield Ms M. from any injury which might result from the cancellation of her appointment.

In witness of this judgment, adopted on 29 April 2016, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ