Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

Z.

v.

WIPO

122nd Session **Judgment No. 3648**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms O. Z. against the World Intellectual Property Organization (WIPO) on 21 January 2014 and corrected on 4 April, WIPO's reply of 25 July, the complainant's rejoinder of 5 November 2014, WIPO's surrejoinder of 9 February 2015, the complainant's additional submissions of 22 June and WIPO's final comments thereon of 12 October 2015;

Considering Article II, paragraph 5, 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 she participated and the lawfulness of the ensuing appointment.

On 18 May 2011 WIPO published a vacancy announcement for the post of Director, Regional Bureau for Arab Countries, at grade D-1. The complainant, who held grade P-5 *ad personam*, applied and, having been shortlisted, was invited to an interview by the Appointment and Promotion Board. On 16 March 2012 she was informed that her application had been rejected, as the Board considered that she did not possess sufficient managerial experience.

On 16 May the complainant submitted a request for review to the Director General, challenging the decision to reject her application. She contended that the application of the successful candidate, Mrs H., was not better than hers. By a letter of 11 July, she was informed that the Director General had decided to reject her request, considering that there was no reason to alter the decision to appoint Mrs H.

On 12 October 2012 the complainant filed an internal appeal with the Appeal Board challenging the decision of 11 July 2012. She alleged that the composition of the Appointment and Promotion Board was unlawful, that the latter had committed an error of judgement in finding that she had insufficient managerial experience, and that the principle of equality between the candidates had been breached. She hence requested the cancellation of the selection procedure and the resulting decisions, as well as compensation for the injury suffered and costs.

In its conclusions of 30 August 2013 the Appeal Board noted that the report of the Appointment and Promotion Board – which it had studied *in camera* – did not provide the Director General with sufficient information on the merits of each candidate to enable him to take a decision "in full knowledge of the facts". It therefore recommended that the Director General cancel Mrs H.'s appointment and reconvene an appointment and promotion board that would submit a new, sufficiently detailed report or, failing this, that he open a new competition process.

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. She was told that the role of the Appointment and Promotion Board was to advise the Director General when a competition was held to fill a post, and that it was "perfectly reasonable to expect it merely" to provide a concise explanation of the reasons for its recommendation.

The complainant asks the Tribunal to quash the impugned decision, as well as the decisions resulting from the disputed selection procedure, and to order WIPO to resume the procedure from the stage at which it became flawed and to disclose the competition file. She seeks 15,000 euros in compensation for the injury suffered and 7,000 euros in costs.

Mrs H., who was invited by WIPO, at the Tribunal's request, to comment on the complaint, stated that the competition process had taken place "in a satisfactory manner" from her perspective.

In its reply WIPO argues that the complaint should be dismissed as groundless. Alleging that the complainant's serious, unfounded accusations against it have caused it injury, it requests that the Tribunal order the complainant to pay WIPO the token sum of one Swiss franc.

In her rejoinder the complainant maintains her claims.

In its surrejoinder WIPO reiterates its position. Relying on the Tribunal's case law, it adds that the complainant has no cause of action since, in its view, she did not possess the experience required by the vacancy announcement.

In her additional submissions, the complainant argues that it is contrary to the "principle of fairness" to raise such an objection, the validity of which she disputes, in a surrejoinder and that under the Tribunal's case law, it must be declared irreceivable. She further contends that the surrejoinder is irreceivable on the grounds that WIPO failed to file it within the prescribed time frame.

In its final comments, WIPO submits documentation showing that it filed its surrejoinder on 9 February 2015, that is to say, on the day that the prescribed time limit expired. It further submits that Mrs H.'s transfer to a new post in January 2015 has rendered the complaint moot.

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 her internal appeal against the decisions to appoint Mrs H. and to reject the complainant's own application following the selection procedure to fill the post of Director, Regional Bureau for Arab Countries, advertised on 18 May 2011.

2. The Tribunal first observes that the complainant's objection to the receivability of WIPO's surrejoinder 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 surrejoinder was deposited at the International Labour Office, where the Tribunal is based, on 9 February 2015. As the defendant organisation thus sent its surrejoinder on the date at the latest, that is, within the prescribed time limit, which ended that evening, the complainant is wrong to claim that it was filed late.

3. In the final comments that it submitted to the Tribunal, WIPO asserts that the complaint is now moot. In support of this contention, it points out that Mrs H. was transferred to another post in January 2015 and that a new selection procedure advertised on 20 April 2015 resulted in the appointment of another staff member as Director, Regional Bureau for Arab Countries, with effect from 1 August 2015. However, the fact that Mrs H. has now been replaced in the post to which she was appointed at the end of the disputed competition does not by any means render moot the complaint against the decision to appoint her to that post, since that decision was nevertheless implemented and produced legal effects (see, for example, Judgments 1680, under 3, 3206, under 12, 3449, under 4, *in fine*, and 3546, under 3).

4. In its surrejoinder WIPO submits, for the first time since this dispute began, that the complainant did not fulfil one of the conditions of the vacancy announcement published on 18 May 2011, namely, that candidates should have "[a]t least 15 years' experience in technical cooperation or external relations". It infers from this that the complainant, who was therefore not eligible for the post advertised, has no cause of action to challenge the outcome of the disputed selection procedure and that her complaint is hence irreceivable.

5. However, without there being any need to rule on the merit and the 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 the proceedings.

Indeed, the Tribunal notes, firstly, that during the competition WIPO must perforce have accepted that the complainant met all of the conditions specified by the vacancy announcement since, far from being excluded from the competition at the outset, the complainant was shortlisted and the subsequent rejection of her candidature resulted solely from a comparison between her merits and those of the other shortlisted staff members. It is hence inappropriate for WIPO to suddenly raise 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).

Thirdly, 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 the proceedings when the other party is, in principle, no longer able to respond, where the objection could have been raised in its reply, as is the case for an objection 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*). The fact that in this case the complainant was allowed by the Tribunal to file additional submissions enabling her to respond to the new argument raised by WIPO in its surrejoinder does not alter the fact that this manner of proceeding is not acceptable.

Lastly, WIPO's argument that the Tribunal itself could have raised the issue of the complainant's lack of a cause of action is of no avail. Indeed, although it is well-established case law that, because they involve the application of mandatory provisions, issues of receivability can be raised by the Tribunal of its own motion (see, for example, Judgments 2567, under 6, 3139, under 3, and the case law cited therein), the Tribunal

may only do so when irreceivability is clearly apparent from the evidence submitted. That is plainly not the case here, especially if one considers only the submissions as they stood before the surrejoinder was filed, which is how the issue must be approached here.

6. In support of her claims the complainant challenges the lawfulness of the composition of the Appointment and Promotion Board that was responsible for advising the Director General on the choice of a candidate to fill the advertised post.

7. It should be noted that Staff Regulation 4.9 and Annex II to the Staff Regulations, which govern the Board's composition, were significantly amended with effect from 1 January 2012, that is, while the disputed competition was taking place, though the amendments introducing these changes did not include transitional provisions stating how they should be applied to selection procedures that were already under way at that time.

8. WIPO took the view that the Appointment and Promotion Board which had been set up on 18 November 2011, following the opening of the competition, and which had started to meet on 14 December 2011, should continue to function with its original membership until the end of this competition. The complainant contends that the Organization thereby committed an error of law. In her view, the new provisions that entered into force on 1 January 2012 should have been applied immediately to the competition that was under way.

9. This argument is unfounded.

As the Tribunal has already stated in a similar case (see Judgment 564, under 5 and 6), in the event that the applicable regulations change in the course of a competition, the rules governing the membership of the body responsible for selecting candidates that were in force at the time when the competition was advertised continue to apply. This is the case unless there are express provisions to the contrary (see Judgment 2051, under 5 to 8).

In support of her argument, the complainant seeks to rely on the well-established case law under which any administrative decision should in principle be based on the provisions in force at the time it is adopted (see, in particular, Judgments 2459, under 9, and 2985, under 15). She infers from this that the decisions taken at the end of the disputed competition, including with regard to the arrangements for the prior consultation of the selection body, should have complied with the provisions in force at the time when they were taken.

However, the same case law makes plain that it is appropriate to depart from this rule where, for example, applying it would breach the principle of good faith. The replacement of the Appointment and Promotion Board that had been set up initially with another selection body with a different membership would have infringed this principle, as it would have undermined the candidates' legitimate expectation that the competition would take place in the conditions stipulated at its opening.

WIPO was therefore right in considering that it must, in this case, continue to apply the previous version of Staff Regulation 4.9 and the Rules of Procedure cited above.

10. However, the complainant goes on to argue in the alternative that the former provisions which were thus applicable were not complied with either. In this regard, she particularly objects to the fact that the staff member who would supervise the holder of the advertised post took part in the meetings of the Appointment and Promotion Board, although the provisions in question, which listed the Board's members exhaustively, did not provide for his participation.

This plea is, in contrast, well founded.

WIPO does not dispute the fact that this staff member was present throughout the Board's work, but states that it has long been the practice of the Organization for the Programme Manager of the programme concerned by the recruitment to be invited to attend the Board's meetings, and that the Appeal Board has found this practice to be legitimate.

However, in a recent judgment, Judgment 3421 delivered on 11 February 2015, the Tribunal, ruling on the same issue in another case involving WIPO, held that the Programme Manager's participation in

meetings of the Appointment and Promotion Board rendered the process unlawful. Under consideration 3 of the Judgment, the Tribunal found that the participation in the proceedings, albeit in a purely advisory capacity, of a third party, and in particular of the staff member who would supervise the successful candidate, was liable to have an undue influence on the Board's recommendations to the Director General and hence on the outcome of the competition.

In its submissions WIPO emphasises, as it did in that previous case, that the Programme Manager's role was confined to that of technical expert and that he merely explained to Board members what duties were entailed by the vacant post and what professional skills were expected of its holder. However, this argument was rejected in Judgment 3421 cited above, where the Tribunal held that these considerations did not suffice to dispel the non-selected candidates' very real impression that unlawful influence was exercised over the final decision to reject their application.

In the absence of any circumstance that would justify a different approach in the present case, the Tribunal must once again draw the consequences of this procedural flaw.

11. The Director General's decision of 24 October 2013, and likewise the decisions to appoint Mrs H. and reject the complainant's application, must therefore be set aside on these grounds, without there being any need to rule on the complainant's other pleas.

12. There is no need to order, as the complainant requests, the disclosure of the competition file, which in any case would be pointless in view of the decision taken.

13. Nor is it appropriate, in the circumstances of this case, to order WIPO to resume the selection procedure because, as noted above, another staff member has since been appointed to the post of Director, Regional Bureau for Arab Countries, following a new competition.

14. WIPO must ensure that Mrs H. is shielded from any injury that may result from the cancellation of her appointment, which she

accepted in good faith (see, for example, Judgment 2712, under 10, or Judgment 3157, under 11).

15. Although the complainant's submissions do not establish material injury, the unlawfulness of the contested decisions did cause her moral injury, for which compensation should be granted in the amount of 3,000 euros.

16. As the complainant succeeds for the most part, she is entitled to costs, which the Tribunal sets at 2,000 euros.

17. WIPO has made a counterclaim for the complainant to be ordered to pay it a token sum of one Swiss franc as compensation for moral injury caused by the complainant's pleadings. However, the Tribunal considers that, although their unnecessarily argumentative tone is regrettable, the complainant's pleadings do not exceed the boundaries of the freedom of expression that the parties must be accorded during legal proceedings. This counterclaim must hence be dismissed.

DECISION

For the above reasons,

1. The decision of the Director General of WIPO of 24 October 2013 is set aside, as are the decisions taken at the end of the disputed competition to appoint Mrs H. as Director, Regional Bureau for Arab Countries, and to reject the complainant's application.
2. WIPO shall pay the complainant compensation for moral injury in the amount of 3,000 euros.
3. It shall also pay her the sum of 2,000 euros in costs.
4. All other claims, including WIPO's counterclaim, are dismissed.
5. WIPO shall shield Mrs H. from any injury that may result from the cancellation of her appointment.

In witness of this judgment, adopted on 28 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