

F. (No. 6)

v.

WIPO

122nd Session

Judgment No. 3646

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr B. F. against the World Intellectual Property Organization (WIPO) on 2 September 2013 and corrected on 20 January 2014, WIPO's reply of 24 April, the complainant's rejoinder dated 28 August and corrected on 9 September, and WIPO's surrejoinder of 23 December 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 complainant impugns the decision of the WIPO Director General not to allow him to proceed directly to the Tribunal in respect of his appeal against WIPO's alleged failure to ensure that he was not subjected to intimidation, offensive behaviour or aggression.

In Judgment 2636 the Tribunal set aside the WIPO Director General's decision of 13 December 2005 to the extent that it referred the complainant's claims relating to an incident that occurred in his office on 28 June 2005 to the Internal Audit and Oversight Division (IAOD) and remitted these claims to the Director General for fresh consideration including, if necessary, by the Appeal Board. During the incident of 28 June 2005 the complainant was allegedly subjected to

harassment and aggression by four members of the Staff Association. Following the delivery of Judgment 2636, the Director General again referred the complainant's claims in respect of the 28 June incident to the IAOD and, at the Administration's request, the complainant again submitted them to the Appeal Board, which recommended that they be dismissed. On 17 June 2008 the Director General endorsed that recommendation.

In September 2008 the complainant filed an application for execution of Judgment 2636. This application led to Judgment 2934, in which the Tribunal set aside the Director General's decision of 17 June 2008 on the ground that it was based on the IAOD report, which was flawed, and on the recommendation of the Appeal Board, which it also found to be flawed. The Tribunal considered that the Board had failed to analyse the IAOD report and to address the main question identified in Judgment 2636, namely whether WIPO had failed to ensure that the complainant was not subjected to intimidation, offensive behaviour or aggression. The Tribunal remitted the matter to the Director General for a new decision, if necessary, after proper proceedings before a differently constituted Appeal Board.

Following the delivery of Judgment 2934, attempts were made by the parties to reach a settlement but these proved unsuccessful and the matter was again remitted to the Appeal Board. Further to a request by the Chair of the Board that the Director General take a new decision on the complainant's claims, the complainant was informed by a letter of 28 March 2012 that the Director General was prepared to offer him an apology for the unwelcome behaviour he had experienced during the incident of 28 June 2005, as well as 20,000 United States dollars in damages and 5,000 dollars in costs in final settlement of his claims. It was explained in the letter that this offer was made without any admission by the Director General of liability on the part of WIPO.

The complainant rejected this offer and in June 2012 he filed an appeal against the 28 March 2012 decision. The Appeal Board, nevertheless, was not able to consider this appeal in its regular composition, because the complainant was the staff-elected member on the Board and the first alternate member was impeded from consideration of that particular

appeal. Subsequent proposals made by the Chair of the Appeal Board as well as the Administration for the designation of an ad hoc member by way of a derogation from the Staff Regulations and Staff Rules pursuant to Staff Rule 12.2.1(b) did not result in a mutually acceptable solution. On 13 May 2013 the complainant's lawyer informed the Administration in writing that the only solution acceptable to the complainant was direct recourse to the Tribunal. By an e-mail of 4 June 2013 he was informed that the Director General saw no reason to agree to the complainant's request to proceed directly to the Tribunal. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision dated 4 June 2013, which he deems final, and to award him moral damages in an amount equal to three years of his current gross salary for the injury he suffered on account of WIPO's failure to ensure that he was not subjected to intimidation, offensive behaviour or aggression. He also asks that all sick leave days taken by him in the past four years be fully re-credited to his sick leave account, since they were service incurred, and that the Director General be ordered to publish his apology contained in the 28 March 2012 decision. He claims exemplary damages in an amount equal to three years of his current gross salary for WIPO's egregious delay in addressing his internal appeal and reimbursement of all medical expenses incurred by him as a result of the Administration's failure to protect him and to fulfil its duty of care, amounting to 9,954.27 Swiss francs at the time of filing the complaint. He also claims reimbursement of all legal fees incurred by him in pursuing his claims from 2005 through to final resolution, amounting to 75,000 Swiss francs at the time of filing the complaint, from which may be deducted the 9,500 francs already awarded to him by the Tribunal in Judgments 2636 and 2934, and interest at the rate of 8 per cent per annum on all amounts awarded, calculated from June 2005 through to the date of payment. He requests that his supervisor's recommendation for promotion dated 27 July 2009 be processed without delay.

WIPO denies that the complainant is entitled to any of the relief sought. It requests that the Tribunal dismiss the complaint as irreceivable and, subsidiarily, as unmeritorious.

CONSIDERATIONS

1. The events leading to these proceedings date back to early 2005 and much of what has occurred since then both within the defendant Organization, WIPO, and in the Tribunal has concerned a particular event occurring on 28 June 2005. Sufficient of the general background has been summarised by the Tribunal in two earlier judgments involving the same parties, namely Judgment 2636 and Judgment 2934. The latter judgment dealt with an application for the execution of the first mentioned judgment.

2. In Judgment 2934, the Tribunal set aside a decision of the Director General of WIPO of 17 June 2008 and remitted the matter to the Director General for a new decision. The order contemplated that a new decision of the Director General might be made, if necessary, after proper proceedings before a differently constituted Appeal Board. In purported compliance with that order, the Director General made a decision on 28 March 2012. The complainant lodged a “pro forma” statement of appeal to the Appeal Board against that decision dated 28 June 2012 and a corrected statement of appeal dated 9 July 2012.

3. Chapter XI of the WIPO Staff Regulations and Staff Rules deals with appeals to the Appeal Board. The composition of the Appeal Board is addressed by Rule 11.1.1(d). As a matter of fact, the complainant was a member of the Appeal Board and there was no issue that the complainant could not sit to consider his own appeal. Accordingly it was necessary to resolve the question of the composition of the Appeal Board. Various attempts were made to constitute the Appeal Board in an acceptable way. They were not successful.

4. In the course of correspondence on this question, the complainant adverted to the possibility of the Director General waiving the requirements of Rule 11.2.1(c) that provided that no appeal could be made to this Tribunal before the appeal procedure within the International Bureau, WIPO’s Secretariat, had been exhausted. This was raised in a letter dated 24 October 2012 from the complainant’s lawyer to the Secretary of the Appeal Board, addressing the specific

issue of whether a Mr R. should sit as a member of the Appeal Board. As it later transpired, Mr R. recused himself. In the letter of 24 October 2012 the complainant's lawyer said:

“[I]t is clear that Mr [R.] has a real or perceived conflict of interest in the present case, so therefore, we must respectfully demand that Mr [R.] not be assigned to sit on the [Appeal Board] panel hearing [the complainant]'s appeal. As there is no 2nd alternate staff representative member on the [Appeal Board], we would suggest that such alternate be nominated on an ad hoc basis by the President of the Staff Council for the present case, or alternatively, that a new election be held for a second staff representative alternate member, as it seems clear that Mr [R.]'s tenure is likely to be repeatedly challenged in the near future. Alternatively, the Director General may wish to waive the requirement of Rule 11.2.1(c) and agree that the present Appeal proceed directly to [the Tribunal].”

5. The question of whether the complainant's appeal could proceed, directly, to this Tribunal was again raised in a letter dated 13 May 2013 from the complainant's lawyer to WIPO's Legal Counsel. In that letter the complainant's lawyer said that “for the same reasons set out in my letter to the WIPO Appeal Board, dated 24 October 2012 [...], the only solution acceptable to [the complainant] remains direct recourse to the [Tribunal]”. Later in the letter the lawyer indicated that “should the Director General maintain his own refusal to agree to [the complainant]'s request to proceed directly to the [Tribunal], [the complainant] will simply raise the issue of procedural irregularity and conflict of interest directly with the [Tribunal]”.

6. WIPO's response to this letter was in an e-mail dated 4 June 2013 to the complainant's lawyer. It said:

“It is considered that your client has unreasonably refused to co-operate with the Organization in finding a mutually acceptable solution to enable his case to be considered at the internal appeal level. In these circumstances, the Director General sees no reason to agree to your client's request to proceed directly to the Tribunal.”

This is the impugned decision. In his brief the complainant characterises this e-mail as an “implied final administrative decision” of the Director General “denying the [c]omplainant's claims and redress as set forth in the [a]ppeal”.

7. WIPO argues in its reply that the complaint is irreceivable because the impugned decision is not a final administrative decision and the complainant has not exhausted the internal means of redress. The Tribunal accepts both propositions. It is clear from the correspondence that WIPO remains ready to submit to the Appeal Board, once constituted, the complainant's appeal. The impugned decision was no more than, at most, a decision of the Director General on a tangential procedural question arising during the pursuit by the complainant of his appeal.

8. Situations can arise where the Tribunal entertains and adjudicates on a complaint where the complainant has not exhausted internal remedies but it is apparent that the internal appeal process has paralysed the exercise of the complainant's rights (see, for example, Judgment 2039, consideration 4). However, mere dissatisfaction with the composition of the internal appeal body does not found a right to bring a complaint directly to the Tribunal (see Judgment 3190, consideration 9). Nothing advanced by the complainant establishes that he is entitled to bring his grievance directly to the Tribunal. It is true that his grievance, in the most general sense, has subsisted for many years and has already twice been considered by the Tribunal. But that fact does not absolve the complainant from satisfying the requirement in Article VII, paragraph 1, of the Tribunal's Statute that the impugned decision is a final decision and that the complainant has exhausted the internal means of redress.

9. The complaint is irreceivable and, for that reason, should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 6 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