

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

N. (A.) (No. 5)

v.

WIPO

(Application for execution)

124th Session

Judgment No. 3824

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 3421 filed by Mr A. N. on 17 February 2016, the reply of the World Intellectual Property Organization (WIPO) of 1 June, the complainant's rejoinder of 17 August and WIPO's surrejoinder of 21 November 2016;

Considering Article II, paragraph 5, of the Statute of the Tribunal;
Having examined the written submissions;

CONSIDERATIONS

1. This application for execution concerns Judgment 3421, delivered in public on 11 February 2015, in which the Tribunal decided:

- “1. The impugned decision is set aside, as is the appointment which was made at the end of the competition.
2. The competition procedure shall be resumed at the stage at which it became flawed.
3. WIPO shall pay the complainant 3,000 Swiss francs in compensation for moral injury.
4. It shall also pay him costs in the amount of 2,000 francs.
5. All other claims are dismissed.
6. The person who was appointed at the end of the competition shall be shielded from any injury.”

2. On 2 March 2015 WIPO advised the complainant that it had taken all the necessary steps to execute points 3 and 4 of that decision, the sums in question having been paid on 20 February. On 1 May it informed him that the grade P-5 post of Head, Operations Service, in the International Trademarks Registry – the post that had been filled by the competition the result of which was set aside in Judgment 3421 – had been abolished, and in essence told him that the judgment could no longer be executed so far as the resumption of that competition was concerned.

3. The complainant contends that the abolition of that post is merely a strategy to avoid execution of Judgment 3421, and that WIPO has thus abused its authority, disregarded the *res judicata* authority of the judgment and breached the principle of good faith. Moreover, he submits that the fact that WIPO kept silent about the decision to abolish the post in question until its email of 1 May 2015 is incompatible with its duty to inform and to ensure transparency.

4. At the stage of execution of a judgment by the parties, pursuant to Article VI of the Statute of the Tribunal and according to its case law, the judgment has *res judicata* authority and must be executed as ruled (see Judgment 1887, under 8). However, an exception must be made to this principle when execution proves to be impossible owing to facts of which the Tribunal was unaware when it adopted its judgment (see Judgments 2889, under 6 and 7, 3261, under 16, and 3332, under 4).

5. Regardless of the fact that the Tribunal has a limited power of review over the structural arrangements adopted by an international organisation with a view to ensuring the smooth operation of its departments, which may involve creating or abolishing posts and, more generally, redeploying staff (see, inter alia, Judgments 269, under 2, 1131, under 5, 1614, under 3, 2090, under 6, and 2510, under 10), it must be observed that in this case the complainant's suspicion is not based on tangible evidence. The written submissions show that the post filled by the competition procedure of which the result was set aside by the Tribunal was in fact abolished as part of a restructuring of the International Trademarks Registry. As WIPO credibly explains with

supporting evidence, and as it also indicated to the complainant in a letter dated 1 November 2013, that restructuring was necessitated by a sizeable increase in the number of registration operations which resulted, in part at least, from a number of new states joining the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks.

The written submissions, in particular the corresponding vacancy announcement, likewise show that the creation by WIPO of the post of Director, Operations Division, can reasonably be seen as part of that restructuring exercise. There is no evidence to bear out the complainant's assertion that the appointment to that new post of the person whose appointment was cancelled by Judgment 3421 evidences a deliberate ploy to avoid executing point 2 of the decision in that judgment. That appointment was, furthermore, made at the end of a completely separate competition procedure that took place before the public delivery of Judgment 3421 and in which the complainant participated.

6. The plea that WIPO has breached its duty to inform and to ensure transparency is likewise unfounded.

In her letter of 1 November 2013, written to the complainant during the course of proceedings leading to the delivery of Judgment 3421 of which execution is requested, the Director of the Human Resources Management Department answered two questions put by the complainant. The first question concerned the needs fulfilled by the creation of a post at grade D-1 for which the complainant had just applied. The second was whether the grade P-5 post filled by the competition which was the subject of his complaint then pending before the Tribunal was to be re-advertised. The Director replied to the second question by informing him that the post was to be reallocated to another division of the new Madrid Registry and that in due course it would be re-advertised as such, at the same grade of P-5. The complainant cannot therefore contend that he did not know that the resumption of the above-mentioned competition had become impossible as a result of the restructuring of the Madrid Registry.

7. In view of the foregoing, the Tribunal concludes that it was impossible for the defendant to execute Judgment 3421, which would have been inconsistent with any objective analysis of its organisational needs.

WIPO executed Judgment 3421 as far as possible having regard to the change in circumstances since the end of the disputed competition. It did not act unlawfully by stating that it was impossible for it to re-open the competition, because this was prevented by a restructuring, the need for which cannot be contested. Nor did it act unlawfully by failing to provide additional information to the complainant, beyond that which it had provided at his request in the letter dated 1 November 2013.

8. Nevertheless, the defendant's failure to inform the Tribunal of a change in circumstances that would have rendered moot the complaint leading to Judgment 3421 led to the adoption of that same judgment, the execution of which is partly impossible. The complainant is thus entitled to moral damages, though it must also be taken into account that he too could have informed the Tribunal of the change in circumstances. Having regard to these factors, he will be awarded moral damages in the amount of 3,000 euros.

WIPO must also pay the complainant costs, set at 500 euros.

DECISION

For the above reasons,

1. WIPO shall pay the complainant 3,000 euros in moral damages.
2. It shall also pay him 500 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 28 April 2017, 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 28 June 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ