

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

**A. (No. 4), B. H. (No. 4), K. (No. 9), P. (No. 7)
and U.-H. (No. 4)**

v.

WIPO

120th Session

Judgment No. 3500

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr I. A. (his fourth), Mr N. B. H. (his fourth), Mr A. M. K. (his ninth), Mr J. P. (his seventh) and Mr F. U.-H.(his fourth) against the World Intellectual Property Organization (WIPO) on 1 October 2012 and corrected on 18 April 2013, WIPO's reply of 12 August, the complainants' rejoinder of 14 November 2013 and WIPO's surrejoinder of 19 February 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 contest the decision to transfer another staff member, Ms R., to the post of Head of the Executive Education Program.

On 23 March 2011 Ms R. was notified by the WIPO Administration that a re-oriented Executive Education Program had been re-introduced in the WIPO Academy and that, in accordance with Staff Regulations 1.2 and 4.3(c), she had been assigned to the position of Head of that

program. Staff members were so informed by way of Office Instruction No. 8/2011 of 25 May 2011.

In a single letter of 20 July 2011 all of 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 Ms R. to the post of Head of the Executive Education Program and to withdraw that decision forthwith. They stated that Ms R.'s appointment was a violation of Staff Regulation 4.8(b) and that the practice of direct recruitment was prohibited pursuant to paragraph 17 of Office Instruction No. 58/2006 of 27 October 2006. In addition, her appointment violated Staff Regulation 4.3, as the post to which she had been appointed was higher in the WIPO hierarchy than her previous position as Senior Counselor and the transfer had been effected without a competition, as required by Staff Regulation 4.3(a).

On 14 September 2011 the complainants were informed that the Director General saw no reason to withdraw his decision to transfer Ms R. to the post of Head of the Executive Education Program, as set out in Office Instruction No. 8/2011 of 25 May 2011. Ms R. had been transferred in accordance with Staff Regulations 1.2 and 4.3(c). Her transfer was not a promotion and, indeed, Staff Regulation 4.3(c) expressly permitted transfers without recourse to a competition. Furthermore, Staff Regulation 4.8(b) did not require that a competition be held in all cases of recruitment for posts in the Professional and higher categories. In a single appeal dated 12 December 2011 all of the complainants challenged the decision of 14 September, maintaining their position that the decision to transfer Ms R. violated the Staff Regulations.

In its conclusions of 31 May 2012 the Appeal Board recommended *inter alia* that the Director General review the question as to whether it was more appropriate, having regard in particular to the interests of WIPO and of staff members potentially interested in occupying the position of Head of the Executive Education Program, to transfer Ms R. to that position or to arrange for recruitment by way of a competition. In the event that the Director General confirmed Ms R.'s

appointment the Appeal Board recommended that the complainants be informed of the reasons why a transfer without recourse to a competition was considered to be the appropriate measure. It further recommended that the complainants be awarded costs in an amount corresponding to eight hours of legal fees for services provided by a lawyer.

By a letter dated 4 July 2012 the complainants were notified that the Director General had decided partially to follow the recommendations of the Appeal Board. In light of Ms R.'s long service within WIPO (she held a permanent appointment) the Director General wished to find her a position which best maximized her legal qualifications and experience. In addition, the decision to transfer her was taken in the context of a "remodelling and reorientation" which was motivated by the intention to reinforce the services that the WIPO Academy provided in support of development goals for developing countries. The Director General noted the Appeal Board's finding that the possibility of transferring staff members in accordance with Staff Regulations 4.3(c) and (d) was a legitimate and necessary managerial tool for meeting organizational needs. Lastly, the Director General rejected the Board's recommendation with respect to legal costs. That is the impugned decision.

As a preliminary matter, the complainants, who filed a single legal brief, request oral proceedings. They ask the Tribunal to quash Ms R.'s appointment to the position of Head of the Executive Education Program and to order that she be protected from all injury in accordance with the Tribunal's case law. They request that a new vacancy announcement be issued with respect to the aforementioned post and that a competitive recruitment process be held in a regular, transparent and unbiased manner. They seek reimbursement of the actual legal costs incurred in bringing their complaints as well as moral damages. They further seek the payment of interest on all amounts awarded, at the "market rate", from the date of Ms R.'s "original irregular appointment" through to the date any and all redress awarded by the Tribunal is fully satisfied, and any other relief

the Tribunal determines to be fair, just and necessary. In their rejoinder they introduce a claim for exemplary damages.

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. Complaints were filed on 1 October 2012 by five individuals who were, at the relevant time, elected members of the Staff Council. They challenge the appointment of Ms R. to the post of Head of the Executive Education Program. It is possible for individual staff members, in certain circumstances, to challenge the direct appointment of a staff member to a position within the organisation (see Judgments 2754 and 2755). Whether the circumstances of each of the five complainants would have given each of them the requisite *locus standi* to challenge the appointment of the staff member in issue in these proceedings is not clear. However, as the complaints are unfounded on the merits the Tribunal will not deal with the question of receivability which might otherwise have arisen. As the complaints rest on the same material facts and raise the same issues of fact and law, they may be dealt with in one judgment, and are joined. The issues in these complaints are raised in other complaints for which judgment will also be delivered this day. Many of the facts are broadly similar. That other judgment is Judgment 3499. Accordingly some of the reasoning in this judgment will repeat what is said in Judgment 3499.

2. On 23 March 2011 Ms R. was advised that she was being transferred to the position of Head of the Executive Education Program. This occurred without competition for the post. On 20 July 2011 the complainants and others (though the difference is, for present purposes, immaterial) wrote to the Director General seeking the review of the decision appointing Ms R. to that position. A reply to this request was sent to the individuals who made it, on 14 September 2011. The letter was signed by the Director of the Human Resources Management

Department and written on behalf of the Director General. The letter detailed why the appointment was not irregular.

An internal appeal to the Appeal Board was lodged on 12 December 2011. The Appeal Board issued its conclusions on 31 May 2012. It recommended that the Director General review the question whether it was more appropriate, having regard to the particular interests of the Organization and all staff members potentially interested in occupying the position of Head of the Executive Education Program, to transfer Ms R. to that position or to arrange for a competition to fill that position. Most of the further recommendations flowed from which path the Director General decided to take as a result of that review. That recommendation was accepted by the Director General who, after reconsidering the matter, concluded that the transfer of Ms R. was an appropriate means of filling the post. One recommendation of the Appeal Board was expressly rejected, namely the recommendation that the complainants be awarded legal costs corresponding to the fee paid for eight hours of service of their lawyer. These conclusions were communicated to the complainants in a letter of 4 July 2012, which is the impugned decision.

3. One procedural issue should be noted. The complainants seek an oral hearing. The Tribunal is satisfied that this is not necessary or appropriate and that the complaints can be adequately determined on the written material.

4. Central to the issue of whether Ms R. could have been transferred without competition, is the interaction of Staff Regulation 4.3 and Staff Regulation 4.8(b) as they existed at the time of the transfer. Staff Regulation 4.3 provided, relevantly, as follows:

c) 'Transfer' shall mean the assignment of a staff member to another post without promotion. A transfer may be effected without having recourse to a competition.

(d) Any staff member may be transferred whenever the interests of the International Bureau so require. Any staff member may at any time request consideration for transfer in his own interest."

Staff Regulation 4.8(b) provided:

“As a general rule, recruitment for posts in the Professional and higher categories shall be made on the basis of a competition. Vacancies shall be brought to the attention of the staff of the International Bureau and the Administrations of Member States, with details as to the nature of the posts to be filled, the qualifications required and the conditions of employment.”

Staff Regulation 4.1 should be noted. That provision required WIPO to secure the service of persons with the highest standards of efficiency, competence and integrity.

5. The complainants do not concede that the option of transferring Ms R. without a competition for the post, in exercise of the power conferred by Staff Rule 4.3, was an available option. However on the assumption that it was, they argue that it was incumbent on the Director General, in a case like the present, to consider which alternative procedure was the more appropriate for WIPO to follow and that a proper consideration of this issue would have resulted in a competition pursuant to Rule 4.8(b).

In support of the argument that transfer was not an available option, the complainants cite Judgment 470. The case leading to that judgment involved a situation where, potentially, two provisions of the Pan American Health Organization (World Health Organization) Staff Rules might have been applied. One rule (Rule 1040) provided that temporary appointments terminated automatically on the completion of the agreed period of service. The other (Rule 1050.2) provided that when a post of indefinite duration was abolished a reduction in force was to take place in accordance with an established procedure. In the case leading to Judgment 470, the staff member held a temporary appointment that came to an end on 28 February 1979. Equally, his post was one of indefinite duration that was abolished. The Tribunal noted that the conditions for applying each staff rule were met and as the provisions conflicted, a choice had to be made. In Judgment 470 the Tribunal declared that Rule 1050.2 should have been applied. The reasons appear to be that it provided to the complainant more generous benefits (and in particular compensation) in circumstances where he had worked for over 12 years for the

organization and was near the age of retirement. The Tribunal noted that its conclusion was a fair one.

However in the present case, there was no conflict between Staff Regulation 4.3 and Staff Regulation 4.8(b). Having regard to the introductory words of the latter provision “As a general rule”, the provision was intended ordinarily to apply but was framed on the assumption that there may have been exceptions to that general rule. One such exception was found in Staff Regulation 4.3. The exception operated when two specific preconditions were met. The first was that it was a transfer that did not involve promotion. The second was that it was in the interests of the Organization to effect the transfer. The Tribunal notes that the Staff Regulation provided that the circumstances must be such that the interests of the Organization require the transfer. The use of the word “require” makes it tolerably clear that the circumstances in which the Staff Regulation could have been used to fill a post were limited and it was not sufficient that the Director General might have believed it was simply preferable to use this power. That said, it was a matter for the Director General to assess whether the interests of the Organization required the exercise of the power. If those two preconditions were met then a decision could have been made to effect the transfer in accordance with Staff Regulation 4.3. That is not to say that a transfer must have been made. It would have remained open to WIPO to fill the post by competition. There is no warrant, having regard to the language of the two provisions and the general context in which they appear, for treating the power to transfer as more limited than that created by the express limits in Staff Regulation 4.3. If circumstances arose where there was a wholesale and widespread use of the power to transfer then issues might arise about whether there was, in any particular case arising in that broader context, a *bona fide* exercise of the power. In such a case the types of arguments advanced by the complainants about the desirability of ordinarily filling posts by competition having regard to the overarching objective of Staff Regulation 4.1 would assume greater significance. However once it is accepted, as it should be, that in an isolated situation of the type under consideration, the power to transfer

conferred by Staff Regulation 4.3 could have been exercised to fill the position, then its use in such a case was unexceptionable.

6. The complainants also argue that the transfer in the present case involved an arbitrary exercise of power, citing Judgment 1234. However the starting point is that the Tribunal recognises the limits on reviewing the exercise of a broad discretionary power in relation to staffing matters by the executive head of an organisation (see Judgment 2226). That said, it is doubtless true that the power cannot be exercised arbitrarily (see Judgment 1234). However the complainants have not demonstrated that the power was exercised arbitrarily. Indeed the Appeal Board appeared to accept that the transfer of Ms R. was not an inappropriate method of filling the position. It noted her experience though with the significant qualification that there was no job description for the post to enable a conclusion that this experience aligned with the tasks of the position.

In the letter of 4 July 2012, the Acting Director of the Human Resources Management Department stated on behalf of the Director General:

“Ms [R.] was deployed in the WIPO Academy as Senior Counselor after her return from special leave without pay. The Director General then transferred Ms [R.] to the position of Head, Executive Education Programme on March 23, 2011, within the context of the remodelling and reorientation, or restructuring if you will (although this was not the word used by Member States) of the Executive Education Program, which was motivated by the desire to reinforce the services that the WIPO Academy provides in support of development goals for developing countries. In light of this development agenda, the Executive Education Programme required a Head with legal qualifications and extensive experience in the area of trade-related intellectual property law, which Ms [R.] has.”

This provides, in the circumstances, a plausible and reasonable explanation for the decision taken and is conformable with the precondition in Staff Regulation 4.3 that the transfer be in the interests of WIPO. The transfer did not involve an arbitrary exercise of discretionary power.

7. A final argument of the complainants is that the remedy proposed by the Appeal Board and the final impugned decision of the Director General was illusory. The Appeal Board, it is argued, should have set aside the appointment and opened the position for competition. However, once the Appeal Board accepted that the transfer of Ms R. was an available option (and it was correct in doing so), then the recommendation that the Director General review his decision on the basis identified in the recommendation (and discussed earlier) was unexceptionable.

The various grounds raised by the complainants are rejected. Accordingly the complaints will be dismissed.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 8 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ