

**A. (No. 10), B. H. (No. 10) and K. (No. 15)**

**v.**

**WIPO**

**122nd Session**

**Judgment No. 3644**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr I. A. (his tenth), Mr N. B. H. (his tenth) and Mr A. M. K. (his fifteenth) against the World Intellectual Property Organization (WIPO) on 5 November 2013 and corrected on 28 February 2014, and WIPO's single reply of 30 June 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 challenge the procedural and substantive regularity of the appointment of Mr J.K. to the position of Director, Information and Promotion Division, Brands and Designs Sector.

On 10 January 2012 Mr J.K. was appointed, with effect from 1 December 2011, to the position of Director, Information and Promotion Division, Brands and Designs Sector arising from Vacancy announcement WIPO/11/D1/FT022 (the "contested post"). The announcement was posted on 11 May 2011 for selection through a competitive process, although certain specifications in the announcement for the position were modified on 10 November 2011. The competition was open to internal and external candidates and Mr J.K., at that time a consultant with WIPO, was ranked in first place along with Mr G. by the Selection Board. The Director

General decided to select Mr J.K. and his appointment with effect from 1 December 2011 was announced in an Information Circular entitled “Staff Movements of December 2011” on 10 January 2012.

On 2 November 2011 a news agency in South Korea published an article announcing that Mr J.K., formerly a South Korean government official, had been appointed as the WIPO Director of Information and Promotion Division and WIPO was quoted in the article to the effect that Mr J.K. would be appointed to the position as soon as the administrative procedure was complete.

On 6 March 2012 the complainants, along with other WIPO staff members, acting collectively in their capacity as members of the Staff Council, requested the Director General to review the decision to appoint Mr J.K. to the contested post, to withdraw that decision and to re-open a competition for the post on the grounds that Mr J.K. did not possess the requisite linguistic skills for the position and that his behaviour was incompatible with that expected of an international civil servant insofar as he had communicated his appointment to the press before an official announcement had been made. In respect of this aspect the complainants indicated that they would request that an internal investigation be opened by the Director of Internal Audit and Oversight.

On 1 May the complainants were informed that the Director General saw no reason to withdraw the decision to appoint Mr J.K. to the contested post, setting out that he had the requisite skills to meet the requirements of the position and that he took note of the complainants’ intention to request an investigation concerning the alleged declaration made by Mr J.K. to a news agency but would not at this stage enter into the merit of this argument. On 29 August 2012, acting individually as staff members of WIPO and collectively as duly elected staff representatives of the WIPO Staff Council, the complainants submitted an appeal to the WIPO Appeal Board challenging the decision of 1 May, alleging that the appointment of Mr J.K. was procedurally and substantively irregular in that the decision violated Staff Regulation 4.8(b) requiring competition, the principle of equality in the selection process and procedural safeguards against conflict of interest.

By a letter of 24 December 2012 to the Chair of the Appeal Board the complainants objected to Mr R. serving as the Staff Representative on the Appeal Board panel. On 24 January 2013 the Appeal Board issued a report on Mr R.'s conflict of interest in which two members found no reason why Mr R. should recuse himself while one member concluded that Mr R. "may be open to a suspicion of partiality" and should recuse himself.

In its conclusions of 16 May 2013 the Appeal Board recommended that the Director General should dismiss the appeal, finding that while it could not conclude with certainty that a contract to employ Mr J.K. had been formed prior to the newspaper report, it found little evidence that the appointment was politically motivated and considered the Appointment and Promotion Board had given sufficient attention to the possession of language skills in relation to its recommendation of Mr J.K. for the position. Regarding the complainants' challenge to the composition of the Appeal Board, the Appeal Board referred to a summary (dated 24 January 2013) of a discussion it had had on the issue of whether Mr R.'s membership presented a conflict of interest and noted that Mr R. had concluded that there was no reason for him to recuse himself and that the other two members of the Appeal Board panel had agreed.

By a letter of 11 July 2013 the complainants were informed that the Director General accepted the Appeal Board's finding that there was nothing improper about its composition. They were also informed that he had decided to adopt the recommendation of the Appeal Board and dismiss the appeal. That is the impugned decision.

As a preliminary matter, the complainants request oral proceedings. They ask the Tribunal to quash the decision appointing Mr J.K. to the contested post and that a new vacancy announcement be issued with respect to the aforementioned post and that a competitive recruitment process be held. They ask that an investigation be launched into the circumstances under which Mr J.K. was named as the successful candidate prior to the closing of the formal competitive process. They seek reimbursement of all costs incurred in bringing these complaints and that all Staff Association staff members who were recruited through traditional competitive selection processes be awarded appropriate

moral damages. Lastly, they seek such other relief as the Tribunal determines to be fair, just and necessary.

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. On 5 November 2013, complaints were filed with this Tribunal on behalf of three individuals, namely Mr A., Mr B. H. and Mr K.. In their brief, the complainants contend that they are submitting the complaints in their individual capacity and also, collectively, as duly elected staff representatives of the WIPO Staff Council. They challenge the appointment of Mr J.K. to a position within WIPO in January 2012.

2. WIPO argues in its reply that the complaints are irreceivable. It is convenient to deal with this issue at the outset. The issues raised in these complaints concerning receivability have been raised in other proceedings commenced by the same complainants and which will be the subject of a judgment given at the time of this judgment (see Judgment 3642). No party requested the joinder of this matter with the other matter in order that one judgment be given. Also, the facts are different. Accordingly a separate judgment is given in these proceedings though much of the discussion of the legal issues concerning receivability is repetitious of what is said in Judgment 3642.

3. The complainants have requested an oral hearing. Such a hearing is unnecessary and the request is rejected.

4. It is desirable first to set out, in a summary way, the events which led to these proceedings in the Tribunal. On 9 May 2011 a vacancy notice was published for the position of Director, Information and Promotion Division, Brands and Designs Sector, which led to a competition and a report of the Appointment and Promotion Board (APB) dated 12 October 2011 recommending two candidates equally, one of whom was Mr J.K.

The Director-General decided to appoint Mr J.K. and his appointment took effect on 1 May 2011.

5. On 6 March 2012 members of the Staff Council requested the Director General to review the decision to appoint Mr J.K. They contended there had been there had been a violation of WIPO Staff Regulation 4.8(b) and the selection process had been procedurally flawed. By letter dated 1 May 2012 written on behalf of the Director General by the Acting Director, Human Resources Management Department (HRMD), these contentions were rejected and the letter indicated that the decision to appoint Mr J.K. would not be withdrawn.

6. On 29 August 2012 the complainants (and others) lodged an appeal to the WIPO Appeal Board resulting in a report dated 16 May 2013. In its report, the Appeal Board recommended that the Director General dismiss the appeal. By letter dated 11 July 2013 written by the Director HRMD on behalf of the Director General, the appellants were informed that the Director General accepted the recommendation to dismiss the appeal.

7. The Tribunal now turns to consider the standing of the complainants and thus the receivability of the complaints. It is necessary to focus on how this issue arose in the proceedings and the approach of the parties in addressing it. The complainants address the question of receivability in their brief in a summary way but did not file a rejoinder dealing with the arguments of WIPO which are advanced in its reply. This issue arises in the Tribunal against a background in which the Appeal Board had concluded, in substance, that the complainants (and others) as appellants had standing to maintain the internal appeal in their capacity as staff representatives but did not have standing in their individual capacity. The Appeal Board concluded “none of the [a]ppellants had provided evidence” to establish standing in their individual capacity.

In their brief in these proceedings in the Tribunal, the complainants, collectively, merely assert that they are submitting the complaint “in their individual capacities as staff members of WIPO” and they make no attempt in the brief to identify the applicable principles and to establish

the facts which, on the application of those principles, would support a conclusion that all or some of the complainants had standing to maintain the complaint in their individual capacity.

At the forefront of WIPO's submissions in their reply on this question, is the judgment of the Tribunal relied upon by the Appeal Board, namely Judgment 1272. The principle in Judgment 1272 can be summarised as being that standing depends on the complainant wanting the position even though she or he may not be a serious contender and might not care deeply about it and irrespective of the complainant's qualifications or prospects of success. However there are other judgments of the Tribunal that may well take a broader view of the standing of an individual to challenge the appointment of a person to a position which might not require a complainant to demonstrate interest in the position but simply eligibility to occupy the position (see, for example, Judgment 2832, consideration 8).

However the complainants in these proceedings made no attempt to challenge, in a rejoinder, the argument of WIPO. Nor did they attempt to identify in a rejoinder what they say are the applicable principles and, additionally, establish the factual foundation which would result in these complaints being receivable because they can be maintained by the complainants in their individual capacity. In the absence of such evidence it is difficult for the Tribunal to be affirmatively satisfied that the complainants have standing in their individual capacity to bring these complaints. Accordingly, the Tribunal concludes that the complaints are not receivable in so far as they are brought by the complainants in their individual capacity.

8. It is now necessary to consider whether the complainants have standing in their capacity as duly elected staff representatives of the WIPO Staff Council. WIPO argues they do not.

9. The jurisprudence of the Tribunal on the standing of elected staff representatives to take proceedings before the Tribunal in a case such as the present is not uniformly clear. Recently in Judgment 3557, consideration 3, the Tribunal indicated that in certain circumstances staff

representatives may challenge the appointment of another official, but can only do so if they allege breach of their own individual rights. In another recent case, Judgment 3546, the Tribunal concluded it was unnecessary to consider whether a staff representative had standing generally to challenge the extension of the appointment of another official because the complainant, who was a staff representative, had had a right to be advised of the proposal to extend the appointment and that right had been allegedly violated. That was viewed as sufficient to give the complainant standing.

10. On the other hand, the right of a staff representative to file a complaint challenging the appointment of an official has been recognised as an aspect of the right of an elected staff representative to bring proceedings on behalf of a staff committee with a view to preserving common rights and interests of staff (see Judgment 2791, consideration 2, and Judgment 2755, consideration 6).

11. However ultimately, the Tribunal's jurisdiction and the related question of a person's right to invoke that jurisdiction should be determined by reference to the Tribunal's Statute. Article II addresses both questions. The Tribunal is conferred with jurisdiction to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office and other organisations which have submitted to the Tribunal's jurisdiction, as well as complaints alleging non-observance of such provisions of the relevant Staff Regulations as are applicable to the case. Having identified and defined the jurisdiction, Article II identifies in paragraph 6, the class or classes of people who can invoke that jurisdiction. That paragraph provides that "[t]he Tribunal shall be open [...] to the official" and to any person to whom the "official's rights have devolved" on death together with any other person entitled to some right of a deceased official. A legal normative document conferring jurisdiction on a court should not be narrowly construed. However there is little room to doubt that the expression "shall be open to the official" is a reference to the official whose terms of appointment have allegedly not been observed or, in relation to whose circumstances (in "a case"), applicable provisions of

the Staff Regulations have allegedly not been observed. This is reinforced by the reference to “the official’s rights”, in the singular, in relation to rights that have devolved on death. That is to say, standing is directed to the vindication or enforcement of the rights of an individual officer. The clause does not cast the net any wider in relation to who can invoke the jurisdiction of the Tribunal.

12. Similarly in Article VIII, dealing with remedies, the focus of the Article is the provision of relief or a remedy to an individual complainant on the assumption the relief or remedy will overcome the effect or consequences on that complainant of the non-observance by either undoing the effect of the defendant organisation’s conduct (by rescission) or the payment of compensation to the complainant.

13. Accordingly, in the present case, the question is whether any of the complainants is an official with some or all of these characteristics. None had been a candidate for the position to which Mr J.K. was appointed. Any non-observance of the Staff Regulations in relation to the competition which did take place and the appointment of Mr J.K. had no bearing on the position of other officials of WIPO who are not potential candidates, including officials who were elected representatives.

14. It might be thought all officials have a “right” to have the organisation which employs them comply with and observe the organisation’s Staff Regulations irrespective of whether any failure to comply or non-observance had any bearing on their own situation as an official of the organisation. If this was so, all officials would have standing to commence proceedings in the Tribunal in relation to any non-observance of the Staff Regulations. It is highly improbable that the Statute intended this result. But is an elected staff representative able to enforce this “right” even though all other officials cannot unless affected by the non-observance? There is no basis in the language or structure of the Statute or by reference to the nature of the jurisdiction conferred on the Tribunal, to suggest this is so. Consistent with the entire focus of the Statute, the right of an elected representative to enforce the Staff Regulations for the benefit of all staff is limited to

circumstances where the provision (which has allegedly not been observed) confers a right on the elected representative as a member of staff. It might be a right limited to the staff representative (such as the right to be consulted) or it might be a right enjoyed by all staff (such as the right to freedom of association).

15. In the result, the Tribunal does not accept that the complainants have some special standing derived from their status as elected representatives to challenge the appointment of Mr J.K.

16. The complainants do not have standing to bring these complaints. They are irreceivable and, for that reason, should be dismissed.

#### DECISION

For the above reasons,  
The complaints are dismissed.

In witness of this judgment, adopted on 5 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