

**R. (No. 2)**

*v.*

**WIPO**

**126th Session**

**Judgment No. 4001**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr P. R. R. against the World Intellectual Property Organization (WIPO) on 7 September 2015 and corrected on 13 October 2015, WIPO's reply of 22 February 2016, the complainant's rejoinder of 13 June, corrected on 22 June, and WIPO's surrejoinder of 26 September 2016;

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 challenges the decision to confirm the appointment of Ms S. to the post of Head of the Caribbean Section.

At the material time, the complainant was Head of the Caribbean Unit and held grade P-3. On 3 September 2013 he was informed that, as a result of a reorganization, the Caribbean Unit would become the Caribbean Section and that a new post of Head of the Caribbean Section at grade P-4 would be advertised. The complainant applied for the post and was interviewed in January 2014, but on 9 March 2014 the Director General appointed an external candidate, Ms S., to the post. The complainant was informed that he had not been selected by an email of 26 March 2014. The email indicated that both the complainant and Ms S. had been recommended by the Appointment Board in its report

of February 2014 without an order of preference. He filed a request for review of the decision to appoint Ms S., which was rejected by a decision of 6 June 2014.

By Office Instruction No. 43/2014 the Administration announced that the Caribbean Unit was discontinued and the Caribbean Section created and headed by Ms S. as of 1 July 2014.

On 8 September 2014 the complainant lodged an appeal against the decision of 6 June 2014 before the Appeal Board, which reviewed *in camera* the report of the Appointment Board and the applications of the complainant and Ms S. In its conclusions of 31 March 2015, the Appeal Board recommended by a majority that the Director General maintain his decision to appoint Ms S. and dismiss the complainant's appeal. A minority recommended that the selection process and the resulting decision to appoint Ms S. be cancelled on the ground that she did not satisfy an essential requirement stipulated in the Vacancy Announcement. The minority also recommended that a new competition be held for the post of Head of the Caribbean Section, that a new Appointment Board be constituted for that purpose, and that moral damages as well as costs be awarded to the complainant.

By a decision of 8 June 2015 the Director General decided to allow the appeal in part, because three matters had not been addressed by the Appointment Board in its report, namely the selected candidate's experience in a specific area identified as an essential requirement, the level of the recommended candidates' proficiency in desirable languages and the examination of the complainant's performance. He would therefore reconvene the Appointment Board in the same composition, in order for it to submit a revised report examining or confirming that it had considered those matters. In light of the revised report, a decision would be taken to either make a new appointment or confirm Ms S.'s appointment.

The Appointment Board met on 7 July 2015 and submitted its revised report on 27 July. By a letter of 25 August 2015 the complainant was informed of the Director General's decision to maintain his earlier decision to appoint Ms S., on the ground that the Appointment Board had confirmed that it had considered all of the above-mentioned matters

in its original recommendation of February 2014. That is the impugned decision.

The complainant asks the Tribunal to quash the decision to appoint Ms S. to the post of Head of the Caribbean Section, and to order that the competition for that post be re-opened. In addition, he requests to be “granted reclassification at P-4 level and awarded the post of Head of the Caribbean Section, alternat[iv]ely the classification at P-4 in the proposed post within the Caribbean Section”. He also asks the Tribunal to declare the decision of 6 June 2014 null and void and to remit the matter to the Director General for reconsideration based on regulatory criteria and instructions by the Tribunal. He claims damages in an amount equal to 12 months’ salary at grade P-4, moral damages in the amount of 20,000 Swiss francs, as well as costs.

WIPO requests the Tribunal to dismiss the complaint as partially irreceivable, as it considers that the only receivable issue is the lawfulness of the decision to appoint Ms S. to the post of Head of the Caribbean Section. In its view, some of the complainant’s claims are incomprehensible and incongruent, and his claims for 12 months’ salary at grade P-4 and for moral damages are irreceivable for failure to exhaust internal remedies. It argues that the complaint is entirely without merit.

## CONSIDERATIONS

1. The complainant has requested that this complaint be joined with his first complaint, which is the subject of a judgment also delivered in public this day. However, it is appropriate to deal with them separately because they raise different legal issues which warrant different consideration. No order joining the two complaints will therefore be made.

2. The complainant also applies for an oral hearing. He names a former Deputy Director General as the person whom he wishes to be called as his witness. The Tribunal notes that that person has already provided the complainant with a witness statement dated 21 November 2014. Moreover, the complainant provides no reasons why an oral

hearing should be held nor any indication that the witness would provide evidence which is relevant to the issues in this complaint. In any event, in view of the abundant and sufficiently clear evidence produced by the parties, the Tribunal considers that it is fully informed about the case and does not therefore deem it necessary to hold an oral hearing. The application will therefore be dismissed.

3. In this complaint, the complainant impugns the decision of 25 August 2015 by which the Director General confirmed his earlier decision to appoint Ms S. to the post of Head of the Caribbean Section (the contested post), which post was advertised on 9 September 2013 by Vacancy Announcement WIPO/13/P4/FT085.

4. The following basic principles as stated, for example, in Judgment 3652, consideration 7, guide the Tribunal where a decision such as this is challenged:

“The Tribunal’s case law has it that a staff appointment by an international organisation is a decision that lies within the discretion of its executive head. Such a decision is subject to only limited review and may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence (see Judgment 3537, under 10). Nevertheless, anyone who applies for a post to be filled by some process of selection is entitled to have her or his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right which every applicant must enjoy, whatever her or his hope of success may be (see, inter alia, Judgment 2163, under 1, and the case law cited therein, and Judgment 3209, under 11). It was also stated that an organisation must abide by the rules on selection and, when the process proves to be flawed, the Tribunal can quash any resulting appointment, albeit on the understanding that the organisation must ensure that the successful candidate is shielded from any injury which may result from the cancellation of her or his appointment, which she or he accepted in good faith (see, for example, Judgment 3130, under 10 and 11).”

A complainant is required to demonstrate that there was a serious defect in the selection process. The following was accordingly relevantly stated in Judgment 1827, consideration 6:

“The selection of candidates for promotion is necessarily based on merit and requires a high degree of judgment on the part of those involved in the selection process. Those who would have the Tribunal interfere must demonstrate a serious defect in it; it is not enough simply to assert that one is better qualified than the selected candidate.”

However, when an organization conducts a competition to fill a post the process must comply with the relevant rules and the case law. The following was accordingly relevantly stated in Judgment 1549, considerations 11 and 13:

“When an organisation wants to fill a post by competition it must comply with the material rules and the general precepts of the case law.

[...]

The purpose of competition is to let everyone who wants a post compete for it equally. So precedent demands scrupulous compliance with the rules announced beforehand: *patere legem quam ipse fecisti*. See Judgments 107[...], 729 [...], 1071 [...], 1077 [...], 1158 [...], 1223 [...] and 1359 [...].”

5. In the internal appeal, the complainant had challenged the decision not to select him for the contested post on the grounds that there were procedural flaws, inconsistencies and a lack of transparency in the selection process, including the insertion of a new requirement for the post during the selection process which was not in the job description or in the Vacancy Announcement; that the advertisement for the post was illegal; that the principles of equal treatment and fairness were breached; and that WIPO’s substantive rules were breached by, among other things, permitting the selection of an external candidate, Ms S., when he (the complainant) was informed that he was on an “equal footing” with that candidate.

It is noted that the Appointment Board had recommended both Ms S. and the complainant to fill the contested post without expressing any preference on their merits. In the letter of 8 June 2015 to the complainant, it was stated that the Director General “considered that it is entirely legitimate for Appointment Boards not to reflect an order of preference, in cases where no clear preference emerges from their deliberations, as happened in this particular case”. The Director General had appointed Ms S. to the contested post as it was his view that she

was more suitable for the post because she possessed more intellectual property management experience than the complainant.

6. The majority of the Appeal Board recommended that the complainant's internal appeal be dismissed. The minority recommended that the selection process and the decision to select Ms S. be cancelled on the ground that she did not satisfy an essential requirement of the Vacancy Announcement. The minority also recommended that a new competition be conducted by a newly constituted Appointment Board. The minority noted that the Appointment Board's report was silent as to whether Ms S. satisfied the essential requirement of experience in relation to region-specific development projects and cooperation programmes, as to the two recommended candidates' level of proficiency in "desirable" languages and as to the examination of the complainant's performance records. The Director General allowed the appeal in part as he did not accept the recommendation of the minority to cancel Ms S.'s appointment and to hold a new competition. However, he remitted the matter to the reconvened Appointment Board which did the initial selection requesting it to submit a revised report after examining the three matters on which its original report was silent.

7. After the Director General, in the impugned decision, confirmed Ms S.'s appointment to the contested post on the basis of the revised report of the Appointment Board, the complainant challenged that decision in this complaint on a number of grounds. Some of those grounds are beyond the scope of the present complaint, which is solely concerned with the decision not to select the complainant to fill the contested post. The complainant challenges, for example, the re-classification of his post in the reorganized Caribbean Unit/Section. However, that is the central challenge in his first complaint and is beyond the scope of the present complaint. It will therefore not be considered in this judgment.

The complainant also challenges the reorganization of the Caribbean Unit/Section and the creation of the new post of Head of the Caribbean Section; the definition of his role in the newly created Section and what he describes as the effective abolition of his post as a

result of the creation of the post of Head of the Caribbean Section which he alleges has identical functions to those which he carried out as Head of the Caribbean Unit. The Tribunal observes that the complainant did not challenge these decisions internally within the required time. He therefore did not exhaust his internal remedies in relation to these matters, as Article VII, paragraph 1, of the Statute of the Tribunal requires. These grounds are irreceivable.

8. The complainant contends that the Director General was wrong to have remitted the matter to the same Appointment Board after the Appeal Board had submitted its conclusions to him. He insists that a new Appointment Board should have been convened, as recommended by the dissenting member of the Appeal Board. This plea is unfounded. These circumstances are not the same as those in Judgment 3184, for example, in which the Tribunal stated, in consideration 15, that if a member of an internal appeal board had already expressed a concluded view on the merits of an appeal and was later appointed to a new internal appeal board to express an opinion on the same merits in a later appeal, their impartiality and objectivity could be questioned.

In the present case, the letter of 8 June 2015 shows that the Director General, in effect, accepted the conclusions and recommendation of the majority of the Appeal Board and remitted the matter to the Appointment Board for it to confirm whether or not it had taken into consideration the three matters on which its report was silent. There is no authority for the proposition that it was incumbent upon the Director General to have constituted a new Appointment Board for this purpose. The complainant's further contention that when the matter was remitted to it, the Appointment Board merely rubber-stamped the Director General's initial decision is also unfounded. The Board confirmed that it had taken the three matters into consideration in its prior deliberations. Neither is there evidence of bias on the part of the Appointment Board, and, in particular, in Mr T.'s explanations in the revised report or that there was conflict of interest which should have caused Mr T., as the hiring manager, to recuse himself. These pleas are therefore unfounded.

9. The complainant contends that experience in intellectual property (IP) management did not appear in the Vacancy Announcement but was introduced as a new requirement into the selection process and used as a basis to give preference to Ms S. He states that Mr T., the Senior Director of the Regional Bureau for Latin America and the Caribbean, so informed him at a meeting on 13 March 2014. On the other hand, Mr T. declared, in his written statement in the internal appeal, that he had explained to the complainant that the main matter which the Director General took into consideration in selecting Ms S. to fill the contested post was “her significant senior management experience in an intellectual property institution”. It is noted that the letter of 8 June 2015 stated that the Director General had considered it entirely appropriate for him to select Ms S. to fill the post, over the complainant, on account of her superior management experience, including IP management experience.

10. The Vacancy Announcement states as follows under the heading “Main duties”:

“The incumbent performs the following principal duties:

[...]

(d) Manage and coordinate key issues relating to the design, development, implementation, monitoring and assessment of national IP strategies, country plans and development cooperation programs in the region, in line with WIPO’s results-based management framework. Identify gaps and areas of concern in IP strategies and methodologies; make recommendations for improvement and design new simplified methodologies to enhance the development of future national strategies.”

The Vacancy Announcement further states as follows, under the heading “Skills”:

“Essential:

Sound project management skills and knowledge of project management methodologies.

Excellent management skills, with the ability to direct, train and motivate staff in line with applicable administrative policies and procedures.”

The Tribunal determines that, in the context of the management requirements contained in the Vacancy Announcement, a new requirement was not introduced into the selection process, as the

complainant alleges. The Director General could take Ms S.'s management experience into account, including her IP management experience, if indeed the candidates were equally well qualified to fill the contested post. Accordingly, the plea that a new requirement was introduced into the selection process is unfounded.

11. The complainant contends that he was disadvantaged when he was not selected to fill the contested post while Ms S., who lacked region-specific experience and did not properly fulfil all the language requirements for the post, was selected. He insists that the manner in which the language requirements were treated clearly indicated discrimination against him.

12. The language requirements for the selected post were listed as follows in the Vacancy Announcement:

“Essential:

Excellent knowledge of English.

Desirable:

Knowledge of French or Spanish.”

In the original version of its report, the Appointment Board gave consideration to English as the required language, but none to the desirable languages. In its revised version, the Appointment Board noted that the complainant's application showed that he speaks both French and Spanish and that when Ms S. applied for the post she did not speak French and had basic knowledge of spoken Spanish. The Tribunal notes that the complainant and Ms S. both had excellent English skills. The complainant's application showed that he speaks both French and Spanish. The Appointment Board concluded by stating, in the revised report, that:

“While [the complainant's] language knowledge may give him a competitive advantage over candidates who do not speak those languages given the multi-lingual nature of the work of the Bureau – but not necessarily the Caribbean region as such – the Board had considered that, all elements taken into account, knowledge of the desirable languages was not sufficiently important for the specific functions of the post.”

13. In effect, notwithstanding that the Vacancy Announcement identified French or Spanish as desirable languages, the Appointment Board expressly ignored this in its evaluation on the ground that they were not sufficiently important for the specific functions of the post. In so doing, the Appointment Board relied on its own anecdotal surmise rather than upon the provision contained in the Vacancy Announcement that French or Spanish were desirable languages. This was wrong, and that tainted the impugned decision which accepted the Appointment Board's reasoning. The complaint is therefore well founded on this plea.

14. Regarding the allegation that Ms S. lacked the requisite experience, the complainant insists that she did not have region-specific experience. The Tribunal notes that the Vacancy Announcement provides, under "Required Qualifications", an essential experience requirement of "[a]t least nine years of relevant professional work experience including experience working in an IP institution or other institution responsible for development cooperation policies and procedures [and] [e]xperience in formulating, designing, implementing and evaluating country and region-specific development projects and cooperation programs [and] [e]xperience supervising staff".

15. According to the Tribunal's case law, an international organisation must observe the essential rule in every selection procedure, which is that the person appointed must possess the minimum qualifications specified in the vacancy notice (see Judgment 3372, under 19). The case law further states that an international organisation which decides to hold a competition in order to fill a post cannot select a candidate who does not satisfy one of the required qualifications specified in the vacancy notice. Such conduct, which is tantamount to modifying the criteria for appointment to the post during the selection process, incurs the Tribunal's censure on two counts. Firstly, it violates the principle which forbids the Administration to ignore the rules it has itself defined (*tu patere legem quam ipse fecisti*). In this respect, a modification of the applicable criteria during the selection procedure more generally undermines the requirements of mutual trust and fairness which international organisations have a duty to observe in

their relations with their staff. Secondly, the appointment body's alteration, after the procedure has begun, of the qualifications which were initially required in order to obtain the post, introduces a serious flaw into the selection process with respect to the principle of equal opportunity among candidates. Irrespective of the reasons for such action, it inevitably erodes the safeguards of objectivity and transparency which must be provided in order to comply with this essential principle, a breach of which vitiates any appointment based on a competition (see Judgment 3641, under 4(a)).

16. In his submissions on this issue, the complainant relies on the findings of the minority of the Appeal Board, according to which the Appointment Board gave no indication that Ms S. satisfied the subject requirement. The minority noted that Ms S.'s application indicates that she had experience in "technical assistance programmes between Jamaica and international organizations and Bi-lateral Partners" but that this did not satisfy the stated requirement. The minority opinion noted, correctly in the Tribunal's view, that the Appointment Board stated in its preliminary report that Ms S. had comprehensive knowledge of the region, but that it was silent on her experience in formulating, designing, implementing and evaluating region-specific development projects and cooperation programs, whereas the complainant's profile in his application and his functions as Head of the Caribbean Unit satisfied that requirement.

17. With regard to this issue, the majority of the Appeal Board stated that they "had to rely on the positive evaluation of the Appointment Board in this respect and did not find any proof to the contrary except the personal view of the [complainant], although one panel member agreed with [him] on this point". In the Tribunal's view, the minority opinion was correct on this issue and the majority's reliance on the Appointment Board's evaluation on the issue was misplaced. It is necessary to set out fully how the Appointment Board addressed the issue in its revised report. It stated as follows:

“The Board re-convened on July 7, 2015 and confirmed that all the [points referred back to it by the Director General] had been considered when the original recommendation [was] made. The Board members recalled specifically the following elements:

- (a) As part of the description of her most recent work experience as Executive Director at the Jamaican Intellectual Property Office, [Ms S.] listed ‘coordinate and ensure implementation of technical assistance programmes between Jamaica and international organizations and bi-lateral partners’ as well as ‘supervise the planning and execution of national, regional and international conferences, seminars and workshops hosted on behalf of the Government of Jamaica’. During the meeting of July 7, 2015, [Mr T.] reiterated that the Caribbean region works on the basis of regional projects and that, as part of her work as the Executive Director of the Jamaican IP Office, the formulation, design, implementation and evaluation of region-specific development projects and cooperation programs was part of [Ms S.’s] work.

[Mr T.] further recalled that as a member of the Caribbean Community (CARICOM), Jamaica and its IP Office make a significant contribution to the promotion of economic integration and cooperation among CARICOM members, with major activities involving coordination of economic policies and development planning, devising and instituting special projects for the less-developed countries within its jurisdiction, operating as a regional single market for many of its members and handling regional trade disputes. Hence, as the Executive Director of the Jamaica IP Office, many of the above activities were inherent in [Ms S.’s] work.”

18. In the Tribunal’s view, there is an inherent danger in depending upon the anecdotal statements of one person rather than upon the written record to make a determination as to whether an applicant for a post meets an important requirement. In the second place, even in their full context, the above statements do not show that Ms S. fully met the subject requirement as advertised. In this regard, it is noteworthy that when the Appointment Board was given the opportunity to explain its initial silence on this issue it concluded that many, but not all, of the elements of the subject requirement were inherent in the work of Ms S. as Executive Director. It is therefore determined that the plea that the selection process was flawed because the selected candidate did not meet one of the required qualifications for the contested post is also well founded.

19. Given the findings that the complaint is well founded on the two pleas on the conclusions in considerations 13 and 18 above, the impugned decision dated 25 August 2015, as well as the Director General's prior decision to appoint Ms S. to the contested post, will be set aside. This will be on the understanding that WIPO shall shield the selected candidate from any injury that may flow from the setting aside of the impugned decision and the resultant quashing of an appointment which was accepted in good faith (see Judgment 3742, under 14). The case will be remitted to WIPO for the Director General to obtain a new recommendation from the Appointment Board on the applications originally submitted and to take a new decision.

20. The Tribunal cannot grant the complainant reclassification at the P-4 level or appoint him to the contested post, as he has requested. The applicable provisions, Staff Regulations 4.8 and 4.9, confer no right upon any person to be directly appointed to a post with retroactive effect without going through the selection process which the Staff Regulations and Rules require. Neither is it within the purview of the Tribunal to reclassify the complainant's post, as he has requested. There is no legal basis upon which the Tribunal may grant the complainant an award of material damages. However, although the complainant's submissions do not establish material injury, the unlawfulness of the contested decisions did cause him moral injury, for which he will be awarded compensation in the amount of 20,000 Swiss francs. He will also be awarded costs in the amount of 8,000 francs.

#### DECISION

For the above reasons,

1. The impugned decision dated 25 August 2015 and the Director General's prior decision to appoint Ms S. to the contested post are set aside.

2. The case is remitted to WIPO for the Director General to obtain a new recommendation from the Appointment Board on the applications originally submitted for the post of Head of the Caribbean Section and take a new decision.
3. WIPO shall ensure that the selected candidate is shielded from any injury that may flow from the setting aside of the impugned decision and the resultant quashing of an appointment which she had accepted in good faith.
4. WIPO shall pay the complainant 20,000 Swiss francs in moral damages.
5. WIPO shall pay the complainant costs in the amount of 8,000 Swiss francs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ