

**116th Session**

**Judgment No. 3267**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr J. P. against the World Intellectual Property Organization (WIPO) on 5 May 2012, and WIPO's reply of 8 October 2012;

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 and the pleadings may be summed up as follows:

A. The background to this case is described in Judgment 3266, also delivered this day. Suffice it to recall that the complainant, following several unsuccessful attempts at being promoted to the P-5 grade, challenged in his second complaint before this Tribunal "WIPO's failure to promote or reclassify him to a post commensurate with his skills, training, experience, and the actual work he has been fully performing in a more than satisfactory manner since 2000".

In a memorandum of 20 December 2011 the complainant submitted an internal appeal with the WIPO Appeal Board (hereinafter "the Board") challenging the decision of 12 September 2011 to deny his request for review of the decision not to reclassify his post. In the

letter dated 12 September 2011 the Director of Human Resources Management Department (HRMD), writing on behalf of the Director General, had informed the complainant that he had not provided any evidence that his request for review had been filed within the time frame stipulated in the Staff Regulations and Staff Rules and that, in any event, the Director General saw no reason to depart from his decision to approve the recommendation made by the 79th session of the Classification Committee to confirm the complainant's post at its P-4 grade.

The complainant, noting that his appeal dated 20 December 2011 was submitted "a few days" after the expiration of the three-month deadline, requested the Board to waive the time limits for submission of his internal appeal pursuant to Staff Rule 11.1.1(b)(3), having regard to "exceptional personal circumstances" explained in his memorandum. These personal circumstances related to "the intense workload in relation to 2012/2013 Program and Budget exercise, followed by the 2012 work plan exercise currently in full swing, *and further aggravated by [his] active participation as Staff Councilor in the Staff Council, which [...] is facing many challenges, including face to face meetings with the Director General and whose work requires a lot of time after work hours*".

In a memorandum of 10 January 2012 the Chair of the Board informed the complainant that the Board had considered his request but it regrettably could not accede to his request for a waiver of the time limit. The Chair stated that, "having regard to the importance in the interest of legal certainty, referred to in the case law of the ILO Administrative Tribunal, of meeting the time limits set out in Staff Rule 11.1.1(b), the Board considers that a waiver would be justified only if the Board could conclude that this workload had actually prevented you from preparing an appeal during the three-month period allowed". However, the Board was unable to conclude that his appeal could not have been submitted to it at some time during those three months.

By a memorandum of 17 January 2012 the complainant requested the Board to reconsider its decision. He reiterated that the late

submission was due to him giving full priority to his work in the Organization and to matters of collective interest, including many appeals by the Staff Council, at the expense of his own personal issue. He referred to Judgment 1376, under 13, and to Judgment 607, under 8, stating that the rules on internal appeals “are not supposed to be a trap or a means of catching out a staff member who acts in good faith”, and that the purpose of the Board’s Rules of Procedure is to promote the expeditious and orderly hearing of appeals, not to deprive complainants of their right of appeal.

The Board met on 2 February 2012 to consider the complainant’s new request. In its report, the Board considered the complainant’s explanation concerning his exceptional workload but found that despite his workload, he could have submitted a concise statement of appeal during the three-month deadline and concluded that there was no factor which had prevented him from bringing his appeal in time. The Board noted that his workload could possibly have been a contributing factor in the complainant overlooking the deadline for his own appeal, but neither this possibility nor the complainant’s observation that he had given priority to the interests of the Organization and the staff over his own could, in its view, justify an interference with the operation of the rule that an appeal made outside the prescribed time limits is not receivable. The Board therefore confirmed its decision not to waive the time limit and to summarily dismiss the complainant’s appeal as clearly irreceivable. That is the impugned decision.

B. The complainant contends that his complaint is receivable as it is directed against a final decision. Referring to the Tribunal’s case law and in particular to Judgment 3053, under 6, he submits that “[w]here the only body competent to hear an appeal declines jurisdiction, a decision to that effect is a final decision that may properly be the subject of a complaint to the Tribunal”.

On the merits, the complainant argues that the rejection of his request for a waiver is the result of an apparent contradiction in the Board’s reasoning. While the Board acknowledged that his “workload

could possibly have been a contributing factor” in him having overlooked the deadline, it nevertheless concluded by rejecting his request for a waiver of the time limit. In his view, this apparent contradiction in the Board’s reasoning vitiates its conclusion and the dismissal of his appeal. In addition, he contends that the Board should have requested the Administration’s position before unilaterally dismissing his appeal as irreceivable. Consequently, the Board did not follow the correct procedure. Lastly, the complainant submits that since his request for a waiver of the time limit was submitted in good faith, which the Board does not deny, the onus of proof is on the Board to provide evidence to justify its decision to dismiss his internal appeal.

He asks the Tribunal to quash the impugned decision and to order that the Organization re-examine his appeal and rule on its substance. He also claims costs.

C. In its reply WIPO submits that the complainant has failed to prove that the Board’s refusal to grant him a waiver of the time limit was fatally flawed, as required by the Tribunal’s case law. It points out that the Board has a discretionary power over decisions on whether or not to grant a waiver of the time limits, and that the Tribunal will only intervene in cases where the exercise of that discretion is tainted by some fatal flaw. In addition, none of the exceptions for justifying a waiver of the time limits are applicable to his circumstances, as he has not been misled by the Organization and the rule stipulating the filing deadline is not unclear.

Concerning the alleged contradiction in the Board’s reasoning, WIPO submits that there is nothing contradictory about the Board’s conclusion. The fact that the complainant may possibly have overlooked the deadline does not justify an interference with the operation of the rule that an appeal made outside the prescribed time limits is not receivable. This is so because, as the Board rightly underlined, “there was no factor which prevented [him] from bringing his appeal in time”. Indeed, the Board found that the complainant’s exceptional workload did not prevent him from submitting a concise

statement of appeal in time. Moreover, the appeal in question is just over one page in length, making it hard to believe that the complainant could not have found a few moments during the three-month period to draft such a brief appeal.

Lastly, WIPO submits that the complainant misunderstands the procedure for summary dismissal set out in Staff Rule 11.1.1(e)(3), which does not involve an adversarial proceeding. This is made clear in the text of the provision, which expressly authorises the Chair to instruct the Secretary to forward to the Director General an appeal “for information only” if he considers the appeal to be clearly irreceivable or devoid of merit. Therefore, WIPO argues that the Board correctly followed the procedure for summary dismissal.

#### CONSIDERATIONS

1. The complainant is a staff member of WIPO. On 20 December 2011 he sent a memorandum to the Chair of the WIPO Appeal Board purporting to appeal against a decision embodied in a letter of 12 September 2011. The subject matter of the appeal is immaterial but it concerned a “denial to review fairly and on objective grounds the administrative decision regarding the classification of [the complainant’s] post”. In the memorandum he acknowledged that the appeal had not been submitted within three months as required by the Staff Regulations and Staff Rules and sought the waiver of the time limit pursuant to Staff Rule 11.1.1(b)(3). The explanation given for failing to comply with the time limits was the complainant’s intense workload and his participation as a Staff Councillor on the Staff Council.

2. The request to the Board to waive the time limit was refused and communicated to the complainant in a memorandum dated 10 January 2012 from the Chair. By a memorandum dated 17 January 2012, the complainant sought the reconsideration of the decision. Again, the Board decided on 2 February 2012 not to grant the waiver

and dismissed the appeal summarily as irreceivable. Reasons were published. This decision of 2 February 2012 is the impugned decision.

3. It was not in issue that under Staff Rule 11.1.1(b)(3) the discretionary power to waive the time limits can be exercised in exceptional circumstances. That is what the rule said. In its reasons, the Board pointed to the need for certainty that is created by time limits but noted the discretion to waive them in exceptional circumstances. It did not consider there were such circumstances and that the complainant's workload would not have prevented him from bringing his appeal in time, though it accepted that may have contributed to him overlooking the time limits.

4. This reasoning is quite unexceptionable. The complainant argued the reasoning contained a "contradiction". He pointed to the Board's acknowledgement in its reasons that the complainant's heavy workload may possibly have been a contributing factor in the complainant overlooking the deadline. However the substance of what the Board was saying was that it was not satisfied the circumstances were exceptional. It needed to be positively satisfied that they were before it could exercise the discretionary power to waive the time limits. There has been no miscarriage of the exercise of the discretionary power. The Board was not obliged, as the complainant submitted, to involve the Administration and it had power, under Staff Rule 11.1.1(e)(3)(b), to summarily dismiss the appeal as clearly irreceivable. It did so. The complaint to the Tribunal should be dismissed.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo  
Dolores M. Hansen  
Michael F. Moore  
Catherine Comtet