

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

**A. (No. 2), B. H. (No. 2), F. (No. 4), G. (No. 4), K. (No. 6), P.
(No. 4), T. (No. 2), T. (No. 2) and U.-H. (No. 2)**

v.

WIPO

120th Session

Judgment No. 3499

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr I. A. (his second), Mr N. B. H. (his second), Mr B. F. (his fourth), Ms C. G. (her fourth), Mr A. M. K. (his sixth), Mr J. P. (his fourth), Mr P. T. (his second), Ms J. T. (her second) and Mr F. U.-H. (his second) against the World Intellectual Property Organization (WIPO) on 17 January 2012 and corrected on 25 April, WIPO's reply of 27 July, the complainants' rejoinder of 5 November 2012, WIPO's surrejoinder of 13 February 2013, WIPO's additional submission of 26 July and the complainants' comments thereon of 2 September 2013;

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 rejection of their appeal against the creation of the Ethics Office and the decision to transfer another staff member, Mr B., to the position of Chief Ethics Officer.

On 10 May 2010 WIPO's Administration notified Mr B. of his (within-grade) transfer, with immediate effect and pursuant to Staff

Regulation 4.3(c) and (d), to the Ethics Office to the position of Chief Ethics Officer. The following month WIPO published Office Instruction No. 25/2010, which established the new Ethics Office and informed staff of Mr B.'s assignment as Chief Ethics Officer.

On 3 August 2010 seven of the nine complainants in this case (with the exception of Ms G. and Mr P.), acting as staff representatives and in their individual capacities, wrote to the Director General and requested that he review and withdraw the decision to transfer Mr B. on the grounds, among other things, that it violated Staff Regulation 4.8(b) and that recruitment to the post of Chief Ethics Officer should have been by way of a competition. The Director General denied their request and in an appeal dated 22 December 2010 to the WIPO Appeal Board the same seven complainants challenged not only the "appointment" of Mr B. but also the decision to create the Ethics Office by way of Office Instruction No. 25/2010.

In its conclusions of 15 August 2011 the Appeal Board recommended that the decision to transfer Mr B. be annulled in view of the fact that the Director General had not considered applying Staff Regulation 4.8(b) instead of Staff Regulation 4.3, and also because there was no evidence that an exception to the general rule whereby vacancies are to be filled by competition was justified. The Board held that the issue regarding the creation of the Ethics Office was irreceivable, having not been raised in the initial request for review. 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 of 18 October 2011 the complainants were informed that the Director General rejected the Appeal Board's recommendation regarding the annulment of the decision to transfer Mr B. and its recommendation with respect to legal costs and that he accepted its findings regarding the creation of Ethics Office. That is the impugned decision.

The complainants, who filed a single legal brief, request an oral hearing and they seek disclosure of numerous documents. They ask the Tribunal to quash the impugned decision and to order that the

“establishment of the WIPO Ethics Office pursuant to [Office Instruction No. 25/2010] be quashed as being void *ab initio*”. They request that Mr B.’s appointment be annulled and that a proper and lawful competition be held for the post of Chief Ethics Officer forthwith. They also claim costs, legal fees, moral damages and any other relief the Tribunal considers to be just, necessary and equitable.

WIPO requests the Tribunal to dismiss the complaints in their entirety and it denies that the complainants are entitled to any of the relief they seek.

CONSIDERATIONS

1. Complaints were filed on 17 January 2012 by nine individuals who were, at the relevant time, elected members of the WIPO Staff Council. They challenge the creation of an Ethics Office within WIPO and the appointment of a staff member within the Ethics Office.

As the complaints are based 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.

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 nine 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 – other than those of Ms G. and Mr P. that are irreceivable – are unfounded on the merits, the Tribunal will not deal with the question of receivability which might otherwise have arisen.

Ms G. and Mr P. did not seek any review at all of any decision, nor did they pursue an internal appeal. Their complaints are irreceivable in their entirety.

2. On 10 May 2010, Mr B. was advised that he was being transferred to a position of Chief Ethics Officer within WIPO. This occurred without competition for the post. On 9 June 2010, the Director

General published Office Instruction No. 25/2010 establishing the WIPO Ethics Office. The Office Instruction noted that Mr B. would head the Office.

On 3 August 2010 several, but not all, of the complainants and one other staff member wrote to the Director General seeking the review of the decision appointing Mr B. to the position of Chief Ethics Officer. The request did not expressly or even impliedly challenge the creation of the Ethics Office. A reply to this request was sent to the individuals who made it, on 27 September 2010. The letter was signed by the Acting Director of the Human Resources Management Department and was written on behalf of the Director General. The letter identified the request to which it was responding as the review of the administrative decision to appoint Mr B. The letter detailed why the appointment was not irregular as had been contended in the request for the review.

An internal appeal to the Appeal Board was lodged on 22 December 2010. The statement of appeal identified the subject matter of the appeal as not only the appointment of Mr B. but also the decision to implement Office Instruction No. 25/2010.

The Appeal Board issued its conclusions on 15 August 2011. Insofar as the appeal concerned the decision to implement Office Instruction No. 25/2010, the Appeal Board concluded, in effect, that the challenge to the decision to implement Office Instruction No. 25/2010 had not been preceded by a request for a review of that decision within the time specified in Staff Rule 11.1.1(b) and that claim could not be pursued in the appeal. This conclusion founded an argument made by WIPO in these proceedings to similar effect in relation to the complaint filed in this Tribunal. This objection will be sustained.

3. In the present complaints there are two distinct decisions being challenged and the issue of the unlawfulness of the decision to implement Office Instruction No. 25/2010 is distinct from that of the unlawfulness of the decision to transfer and appoint Mr B. The complainants did not seek a review of the former decision and the Appeal Board correctly concluded that insofar as the appeal challenged the implementation decision, it was not sustainable. Accordingly the

complainants have not exhausted internal remedies in relation to the implementation decision and, insofar as the complaints challenge that decision, they shall be dismissed as irreceivable.

4. WIPO also challenges the receivability of the entire complaints on the basis that while the complaint forms were filed within the 90-day time limit prescribed by Article VII of the Tribunal's Statute, the brief setting out the grounds, relief and argument was not filed within the specified time and it was not permissible to allow the complainants the opportunity to "correct" the complaints by filing documentation (effectively the brief) well after the 90-day time limit had expired. This argument has been repeatedly rejected by the Tribunal and is rejected in this matter (see, for example, Judgments 3419, under 1, 3421, under 2, and 3425, under 2).

5. It should be noted that in relation to the decision to transfer Mr B., the Appeal Board recommended that the decision should be annulled. That recommendation was not accepted by the Director General who concluded that the transfer had been lawful and impliedly dismissed the appeal in a letter dated 18 October 2011. This is the receivable aspect of the impugned decision.

6. Two procedural matters should be mentioned. The first is that the complainants seek the production of documents. However they do so in the most general terms which are tantamount to a fishing expedition (see, for example, Judgments 2510, under 7, 2142, under 17). This request is refused. The complainants also seek oral proceedings. The Tribunal is satisfied that this is not necessary or appropriate and that the complaints can be adequately determined on the written material.

7. Central to the issue of whether Mr B. could have been transferred without competition, is the interaction of Staff Regulation 4.3 and Staff Regulation 4.8(b).

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

8. The complainants accept that an individual can be transferred without a competition for a post, in exercise of the power conferred by Staff Rule 4.3. However 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. This was the view of the Appeal Board and informed its recommendation to annul the appointment.

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 that case, 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 that case the Tribunal declared that

Rule 1050.2 should have been applied. The reasons appear to be that Rule 1050.2 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 be 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 WIPO 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 WIPO 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 had to be made. It would have remained open to the Organization to fill the post by competition.

9. The complainants also argue that the transfer 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. Mr B. was a senior staff member with a range of experience appropriate to fill the position of Chief Ethics

Officer. While the complainants may take a different view about his suitability for the position (particularly having regard to his role in defending WIPO as legal counsel in internal appeal cases), that does not sustain a conclusion that the power to transfer him was exercised arbitrarily. The transfer did not involve an arbitrary exercise of discretionary power.

10. An allied argument of the complainants is that the appointment of Mr B. was unlawful because it was in violation of the principles of independence and neutrality. The gravamen of this submission is that because of Mr B.'s role in defending WIPO in internal appeals, he would not bring to bear an appropriate level of impartiality in the role of Chief Ethics Officer or would not appear to do so. However this submission assumes that an individual with legal training cannot prosecute cases and arguments on behalf of a body without personally embracing the position advanced on behalf of the body. While this may be true in some cases, it cannot be assumed that it is true generally. Indeed the professional training of a lawyer would ordinarily lay the foundations enabling a lawyer to advance the interests of a client without embracing, personally, the causes of the client.

11. One final argument of the complainants should be mentioned. It is to the effect that the Ethics Office as created and the appointment of Mr B. as Chief Ethics Officer was unlawful as they failed to comply with the standards and criteria set by the report of the UN Joint Inspection Unit, "Ethics in the United Nations System". However, in substance, this is not a challenge to the appointment of Mr B. but rather a challenge to the creation of the Ethics Office and the allied and antecedent creation of the position to which Mr B. was then appointed. It is an argument that cannot be considered as it falls within the claim the Tribunal has determined is irreceivable for failure to exhaust internal remedies.

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