

**A. (No. 5), B. H. (No. 5), G. (No. 6), K. (No. 10), P. (No. 8)
and U.-H. (No. 5)**

v.

WIPO

120th Session

Judgment No. 3501

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr I. A. (his fifth), Mr N. B. H. (his fifth), Ms C. G. (her sixth), Mr A. M. K. (his tenth), Mr J. P. (his eighth) and Mr F. U.-H. (his fifth) against the World Intellectual Property Organization (WIPO) on 1 October 2012 and corrected on 6 May 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 M., to the post of Deputy Director of WIPO's Communications Division. This decision was announced in Information Circular No. 9/2011 of 10 May 2011.

In October 2009 Ms M. sent an email to the WIPO Administration in which she suggested that, given an anticipated change in the core functions of her work, she should be relocated to the Communications Division. On 15 March 2011 she was notified that, pursuant to Staff

Regulation 4.3(c) and (d), she was being transferred, with effect from 1 April 2011, from the Office of the Director General to the Communications Division, with the title of Deputy Director.

By a letter of 5 July 2011 all of the complainants, acting individually and collectively in their capacity as members of WIPO's Staff Council, requested the Director General to review what they characterised as the decision to "directly appoint" Ms M. to the post of Deputy Director of the Communications Division and to withdraw that decision forthwith. They stated that Ms M.'s direct appointment was a violation of Staff Regulations 4.3 and 4.8(b) and was prohibited by paragraph 17 of Office Instruction No. 58/2006 of 27 October 2006.

On 30 August the complainants were informed that the Director General saw no reason to withdraw the decision to transfer Ms M. to the post of Deputy Director, Communications, as set out in Information Circular No. 9/2011 of 10 May 2011. Ms M. had been transferred in conformity with Staff Regulation 4.3(c) and (d) and the Director General considered that their request was vexatious and an abuse of process as it was using the platform of the Staff Council in an attempt to usurp the authority of the Director General wherever possible. The complainants (with the exception of Mr U.-H., who was not listed as an appellant) submitted a single appeal to the Appeal Board dated 28 November 2011 in which they challenged the decision of 30 August and maintained their position that the decision to transfer Ms M. 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 those of staff members potentially interested in occupying the contested position, to transfer Ms M. to that position or to arrange for recruitment by way of a competition. In the event that the Director General confirmed Ms M.'s appointment the Appeal Board recommended that the complainants be informed of the reasons why a transfer without recourse to a competition was 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. He confirmed Ms M.'s transfer. In his view, the transfer decision was appropriate given that it had been taken pursuant to Ms M.'s own request for a transfer (in October 2009) in accordance with Staff Regulation 4.3(d). He noted that the Appeal Board concurred with WIPO's position that the possibility of transferring staff members in accordance with Staff Regulations 4.3(c) and (d) was a legitimate and necessary managerial tool and he explained that Ms M.'s request had coincided with organizational needs within WIPO. 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 annul Ms M.'s appointment as Deputy Director, Communications Division 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 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 M.'s 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 six individuals who were, at the relevant time, elected members of the Staff Council. They challenge the appointment of Ms M. to the post of Deputy Director, Communications Division.

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 judgments will be given at the time this judgment is delivered. Many of the facts are broadly similar. Those other judgments are Judgments 3499 and 3500. Accordingly some of the reasoning in this judgment will repeat what is said in those other judgments.

It is possible for individual staff members, in certain circumstances, to challenge the direct appointment of a staff member within the organisation (see Judgments 2754 and 2755). Whether the circumstances of each of the six 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 that of Mr U.-H. which is irreceivable – are unfounded on the merits, the Tribunal will not deal with the question of receivability which might otherwise have arisen.

Mr U.-H. did not pursue an internal appeal following the rejection of his request for review. His complaint is irreceivable for failure to exhaust internal remedies.

2. On 15 March 2011, Ms M. was advised that she was being transferred to a position of Deputy Director, Communications Division. This occurred without competition for the post. On 5 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 M. to the position of Deputy Director, Communications Division. A reply to this request was sent to the individuals who made it, on 30 August 2011. The letter was signed by the Director of the Human Resources Management Department and

was expressed to be 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 by five of the six complainants on 28 November 2011. Mr Ul-Haq was not listed as an appellant. 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 Deputy Director, Communications Division, to transfer Ms M. 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 M. was an appropriate means of filling the post. One recommendation of the Appeal Board was expressly rejected, namely the recommendation that the appellants be awarded legal costs corresponding to the fee paid for eight hours of service of the lawyer. These conclusions were communicated to the complainants on 4 July 2012 in a letter written on behalf of the Director General, which is the impugned decision.

3. 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 M. 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 M. 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 the organisation 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. That case 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 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 required 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 M. was not an inappropriate method of filling the position.

In the letter of 4 July 2012, it was said on behalf of the Director General:

“After [Ms M’s.] excellent performance in the ODG for two and half years, which period nonetheless was fairly stressful and onerous, the Director General wished to accede to her request to return to the Communications Division where she had worked for four years prior to being transferred to the ODG and for which she had the necessary experience and qualifications. This coincided with the Organization’s needs, since the Communications Division was understaffed at the time given the emphasis and importance placed on communications within the context of the Strategic Realignment Program. The Director General had designated Ms [M.] to head the Initiative to ‘Strengthen Internal Communications’, which kicked off on April 8, 2011, and she was better placed to take the project forward once she was transferred back to the Communications Division on April 1, 2011.”

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 the Organization, though it must be said, in this case, the reasons are not as compelling as the reasons of the Director General in the other two judgments given in this session dealing with a similar issue. Nonetheless, the Tribunal is not satisfied that the transfer did 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 M. 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 complainants also advanced an argument that the present complaint was neither frivolous nor devoid of merit. They did so anticipating an argument by WIPO in these proceedings that had been advanced in the internal appeal. It was not, so nothing more need be said.

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