

**M. M. (No. 2)**

*v.*

**WIPO**

**124th Session**

**Judgment No. 3877**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs V. E. M. M. against the World Intellectual Property Organization (WIPO) on 19 April 2014 and corrected on 25 July, WIPO's reply of 13 November 2014, the complainant's rejoinder of 26 January 2015 and WIPO's surrejoinder of 30 April 2015;

Considering Article II, paragraph 5, 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 date on which her retroactive promotion took effect.

Facts relevant to this case may be found in Judgment 3418, delivered on 11 February 2015, concerning the complainant's first complaint. Suffice it to recall that a request for the reclassification of the complainant's position was made in February 2008, but in April 2008 a freeze on reclassifications was imposed. All reclassifications in the complainant's department were put on hold until August 2009. By letter of 20 June 2011 she was informed that the Director General had approved her promotion to grade P4, step 9, with retroactive effect from 1 January 2010. The complainant contested the date of the promotion and was informed on 19 July 2012 that pursuant to the appeal she had filed, the Director General had decided that her promotion should be granted

with retroactive effect from 1 January 2009, and that she should be paid the resulting arrears in salary and other benefits with 5 per cent interest.

At the beginning of December 2012 the complainant wrote to the Director General requesting a review of the decision of 19 July on the grounds that the method applied for the calculation of her retroactive promotion to 1 January 2009 was incorrect. She argued that the calculation should have been made on the basis of the grade and step (P3, step 15) she held when she received her initial letter of promotion on 20 June 2011, and not the grade and step (P3, step 14) she held immediately prior to 1 January 2009, which was the effective date of her promotion.

On 29 January 2013 the complainant was informed that the Director General saw no reason to amend his decision, which he considered to be correct. In the event that she did not accept that decision, she was invited to refer the matter to the Appeal Board as part of another proceeding (WAB/2011/16) she had initiated, given that the dispute arose out of the implementation of the Appeal Board's recommendation. The complainant replied that she preferred to follow the regular course of internal appeal proceedings by filing a separate appeal with the Appeal Board. Hence, on 29 April 2013, she filed an appeal challenging the Director General's decision of 29 January 2013. She asked to be promoted to grade P4 with retroactive effect from 1 January 2009 "in a way that it maintained the step increase dated September 1, 2009". She also claimed exemplary damages, reimbursement of legal fees and interest of 8 per cent per annum on all amounts to be paid to her.

In its conclusions of 29 November 2013 the Appeal Board recommended that the Director General reject the appeal on the ground that the method of calculation provided by the complainant was unsound. It considered that she was entitled to be placed in the same situation as that in which she ought to have been on 1 January 2009, but that to place her in a more favourable position would be unjustified. The Director General endorsed that recommendation and the complainant was informed of his decision by a letter of 28 January 2014. The complainant impugns that decision before the Tribunal.

The complainant asks the Tribunal to order that her retroactive promotion to P4 effective 1 January 2009 be implemented in a manner

that maintains the step increases which she had in fact received on 1 September 2009. She submits that this can be achieved by calculating the difference in pay between what had been compensated at P4, step 8, from 1 January 2009, and the amount that she would have received had she held grade P4, step 9, between 1 January and 30 August 2009, and then P4, step 10, henceforth, plus the difference between the salary, benefits and other emoluments to which she would have been entitled. She also seeks an award of exemplary moral damages and asks the Tribunal to order the reimbursement of the legal fees she incurred during the internal appeal proceedings and in the proceedings before the Tribunal. Lastly, she claims 5 per cent interest per annum on all amounts granted to her, to be calculated as from 1 January 2009 through the date such amounts are paid in full.

WIPO asks the Tribunal to dismiss the complaint in its entirety as unfounded.

#### CONSIDERATIONS

1. The complainant was promoted to grade P4, step 9, with retroactive effect from 1 January 2009. She appealed the implementation of the promotion on the basis that the step calculation was inaccurate and did not take into account that she had been awarded a step increase from P3, step 14, to P3, step 15, with effect from 1 September 2009. In a letter dated 28 January 2014, the complainant was informed of the Director General's decision to endorse the Appeal Board's recommendation not to accede to the complainant's second appeal. This is the impugned decision.

2. The complainant impugns that decision on the grounds that it: violates the principle of non-retroactivity, breaches the complainant's acquired rights and legitimate expectations, violates the principle of equal treatment, and breaches the principle of good faith. The complainant asks the Tribunal to hold oral hearings and to order the Organization to produce "any and all accounting records, documents, reports, correspondence, e-mails, notes, records, memoranda, letters, notices,

file contents, minutes, minuted phone calls, or any other documents or items in the possession of the Administration that in any way describe, comment on, relate or refer to, control, record, and/or evidence, in general or specifically, the reclassification or establishment of [her] post”.

3. As the complaint turns on a simple question of law, and the submissions of the parties are sufficient to allow the Tribunal to reach a reasoned decision, there is no need to hold hearings. With regard to the request for the production of documents, the request was cast in the most general and imprecise terms and is rejected (see Judgments 2497, under 15, 3345, under 9, and 3418, under 13).

4. The question of law on which this case turns regards the implementation of the complainant’s retroactive promotion. The complainant’s request, that the calculation for her retroactive promotion be based on the grade and step (P3, step 15) which she held at the time she received notice of the retroactive promotion (in the letter dated 20 June 2011) rather than the grade and step (P3, step 14) she held immediately prior to the effective date of the promotion (on 1 January 2009), is unfounded.

5. Staff Rule 3.4.2, paragraph 3, in force at the time, provides in relevant part as follows:

“For staff members in the Professional and higher categories, the step of a promoted staff member shall be the lowest in his new grade which will provide an increase in salary at least equal to that which would have resulted from the granting of two steps in his old grade.”

The objective of retroactivity is to put the staff member in the position that she or he would have been in if the decision had been taken at the relevant time. As such, barring a specific rule or regulation to the contrary, only the staff member’s situation at the time of the effect of the retroactive action (and not the staff member’s situation at the time the decision is taken) can be taken into account. The limit to this is that the retroactive action cannot put the staff member in a worse position than she or he would be without the implementation of the action. This has also been explained in the reasoning of the Appeal Board at

paragraphs 16 and 17 of its report regarding the complainant's second appeal (WAB/2013/08), which states as follows:

- “16. The Board considered the [complainant's] method of calculation to be unsound in reason since it would give the beneficiaries of promotions with retroactive effect a bonus of one or (in some cases) several increments over and above the normal entitlement upon promotion. The Board noted that the [complainant] had on September 1, 2009, received an increment to step 15 in the P3 grade, but that, under the Administration's calculation, this step increase had effectively been replaced by an increment to step 9 in the P4 grade with effect on November 1, 2009, that is only two months after she had reached the corresponding P3, step 15. This seemed to be a fair result. Under the [complainant's] calculation, she would in effect have been credited, on January 1, 2009, with that same step eight months before she had actually reached it.
17. The Board considered that the [complainant's] method of calculation was unsound in law since, as correctly noted by the Administration, the Board's recommendation in [the complainant's first appeal] simply reflected the normal remedy of placing an appellant in the situation which he or she would have been [in] if the recommended measure had been taken at the time recommended. The recommendation thus took account not only of arrears in salary and other entitlements as from January 1, 2009, but also of 5% interest as an estimate of the [complainant's] loss of enjoyment of the amounts in arrears as from the time when they were deemed to have been due.”

6. Considering that the complainant was retroactively granted a promotion to P4, step 8, with effect from 1 January 2009, whereas she had previously held the grade P3, step 14, the complainant's arguments that this calculation has violated what she describes as the principle of non-retroactivity and breached her acquired rights and legitimate expectations, must be rejected. The calculation of her promotion to P4, step 8, is in line with the above-cited Staff Rule 3.4.2, paragraph 3, and did not put her in a worse situation than she would have been in without the retroactive promotion. As the complainant was promoted to the P4 grade with effect from 1 January 2009, she was no longer entitled to a step increment at the P3 grade in September of 2009. The step increment to P4, step 9, awarded in November 2009 followed the same general career trajectory, at the P4 grade, that the career trajectory would have followed at the P3 grade, and cannot be considered to have

had a detrimental effect. The complainant did not have any acquired right or legitimate expectation to maintain a step increase at the P3 grade after having been promoted to grade P4.

7. The claims that the impugned decision violated the principle of equal treatment and breached the principle of good faith, are unfounded. The Organization was obliged by Staff Rule 3.4.2, paragraph 3, to calculate the complainant's retroactive promotion at grade P4, step 8, as that Rule specifies that "the step of a promoted staff member shall be the lowest in his new grade which will provide an increase in salary at least equal to that which would have resulted from the granting of two steps in his old grade" (emphasis added). Any calculation varying from that would be unlawful. As there was no discretion in that calculation, there is no possibility of unequal treatment. With regard to the claim of breach of good faith for delay in the promotion proceedings, the Tribunal considers that the delay was addressed in the complainant's first complaint which resulted in Judgment 3418. The Tribunal notes that any injury resulting from the four-month delay in implementing the retroactive promotion was remedied by the retroactive payment of arrears plus interest at 5 per cent. In light of the above, the Tribunal finds that the complaint is unfounded and must be dismissed in its entirety.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 11 May 2017, 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 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ