

B. H. (No. 12), M. (No. 3) and S.

v.

WIPO

(Applications for execution)

131st Session

Judgment No. 4387

THE ADMINISTRATIVE TRIBUNAL,

Considering the applications for execution of Judgment 4155 filed by Mr N. B. H., Mr C. M. and Mr O. S. on 30 September 2019 and corrected on 21 October 2019, the reply of the World Intellectual Property Organization (WIPO) of 22 January 2020, the complainants' rejoinder of 10 March and WIPO's surrejoinder of 29 June 2020;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. On 3 July 2019 the Tribunal delivered in public Judgment 4155. Some of the complainants in the proceedings leading to that judgment have made an application for its execution. The Tribunal finds it convenient to join these applications in order to render one judgment.

2. The subject matter of those proceedings were two decisions of the Director General of WIPO and, effectively, the implementation of one of those decisions. The first decision was taken by the Director General in December 2015. It was to adopt an interpretation of Staff Regulation 8.1 at odds with long-standing practice. It is unnecessary to repeat in this judgment discussion of these matters in Judgment 4155.

Suffice it to note that the regulation addressed, amongst other things, who constituted the electorate for the election of the Staff Council. The second decision was the dismissal by the Director General of an appeal that the complainants had filed against the first decision. The implementation of the first decision involved the Organization conducting an election in March 2017 of the members of the Staff Council amongst an electorate constituted by all staff of WIPO.

3. The Tribunal concluded that WIPO had engaged in an abuse of power and made, relevantly, two orders in its decision. They were:

“2. [...] the impugned decision of 27 July 2017 and the decision of 21 December 2015 are set aside.

3. The results of the elections of March 2017 of members to constitute the ‘Staff Council’ are set aside.”

4. There appears to be an issue in the applications for execution whether anything was required to be done by WIPO or the Director General consequential upon the making of these orders. It is not part of the complainants’ case that either WIPO or the Director General acted as if the orders had not been made or took steps inconsistent with them in relation to the election of members of the Staff Council. WIPO submits, correctly, that the orders were self-executing at least in the sense that the orders of the Tribunal themselves nullified the two decisions and their effect as well as the results of the elections. Nothing further was required of WIPO or the Director General to enliven or perfect the orders. In the absence of conduct inconsistent with the orders, no occasion arises for any order in these proceedings requiring compliance with those orders.

5. The Tribunal does note, however, that the complainants allege, at least implicitly, that the WIPO Staff Association was removed from offices then occupied by the Association in a WIPO building, WIPO ceased paying funds, including subsidies, to the Association as it had in the past and WIPO ceased granting release time for the Association officials and secretaries as it had in the past. When, and the context in which, these events occurred (if the allegations are true) is not clear from the pleas in these applications. But the lawfulness of this conduct of WIPO was not an issue raised in the complaints leading to Judgment 4155 and, accordingly, the orders made in that judgment were

not intended to, nor did they, prevent the conduct now complained of by the complainants.

6. One further matter of significance should be mentioned. The complaints leading to Judgment 4155 were filed in October 2017. In January 2018 Regulation 8.1 was amended to, it appears, align with WIPO's prior view about the scope of the earlier version of that regulation. That is to say, the regulation explicitly identified the electorate as all staff members. In its pleas in the present proceedings, WIPO contends:

“[...] when issuing [Judgment 4155], the Tribunal was fully aware that the Organization had amended Staff Rule 8.1.1(a) in January 2018, as it formed part of the impugned decision before it. The Tribunal did not find fault with the amendment to Staff Rule 8.1.1(a) in its Judgment, which has the effect of *res judicata*. In these circumstances, the Complainants are mistaken in their belief that they have the right to re-open a matter that has been authoritatively settled by the Tribunal in a final and binding manner.”

It is true that the Tribunal was aware of the amendment to Staff Rule 8.1.1(a) in the earlier proceedings. However, it is palpably incorrect to say, or imply, that the lawfulness of the amendment has been “authoritatively settled by the Tribunal”. That simply was not an issue raised by the complaints or otherwise raised in the pleas. The principle of *res judicata* operates only on the judicial determination of issues raised in proceedings (see, for example, Judgment 2316, consideration 11).

7. The matters referred to in the preceding two considerations may, either separately or jointly, raise important issues about the possible violation of the principle of freedom of association of WIPO staff. However, it is not for the Tribunal to address, tangentially, these issues in an application for execution of a judgment already rendered focusing on a different subject matter.

8. The applications for execution should be dismissed.

DECISION

For the above reasons,

The applications for execution are dismissed.

In witness of this judgment, adopted on 22 March 2021, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 14 April 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ