

**SEVENTY-FIFTH SESSION**

***In re* DIOTALLEVI  
and TEDJINI**

**Judgment 1272**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Miss Marina Diotallevi and Mr. Patrice Tedjini against the World Tourism Organization (WTO) on 7 October 1992, the WTO's replies of 30 December 1992, the complainants' rejoinders of 22 February 1993 and the Organization's surrejoinders of 30 March 1993;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Regulation 15(a) and (c) of the WTO's Staff Regulations, Rule 15.1 of the WTO Staff Rules and paragraph 7(a) of the Rules of the Joint Appeals Committee of the Organization;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Mr. Tedjini, a Frenchman, joined the WTO in 1976 as an assistant in charge of technical documents and information at grade P.1. He got promotion to P.2 in 1979 and in 1986, after promotion to P.3, was appointed head of the Documentation Section. In 1987 the Section was renamed the Information and Documentation Section. On 1 June 1990 it was abolished and Mr. Tedjini went to Marketing and Promotion.

Miss Diotallevi, an Italian, joined the Organization in 1984 as a statistics assistant at grade G.3. She got promotion to G.5 in 1989 and in 1990 was made assistant to the Director in charge of Press and Publications. After the events that prompted this dispute she got a temporary assignment to a regional representation post.

In March 1991 Mr. Tedjini's supervisor told him several times of the Secretary-General's wish to put a new staff member, Mr. Scott Wayne, in charge of the Organization's Press and Publications sector.

Miss Diotallevi heard the news from the Secretary-General himself when they met on 3 May and 17 June 1991.

In a memorandum of 8 July 1991 the Secretary-General informed the staff that he had made Mr. Wayne Director of Communications.

On 16 July the complainants protested to the Secretary-General under paragraph 7(a) of the Rules of the Joint Appeals Committee against the appointment on the grounds of breach of the procedure in the Staff Regulations and Rules. Replying on the Secretary-General's behalf in letters of 14 August, the Chief of Personnel reserved the issues of receivability and the Committee's and the Tribunal's competence but rejected their protests as groundless. He pointed out that Mr. Wayne had a fixed-term appointment for "service with a mission" under Staff Rule 15(1)(c)(i) and held no post that any WTO official might be appointed to.

On 24 September the complainants and another staff member appealed against the Secretary-General's decision of 14 August. The Joint Appeals Committee reported on 28 May 1992 with one dissenting opinion. It declared itself competent and the appeals receivable. It saw Miss Diotallevi as "the only serious contender" for Mr. Wayne's post since neither Mr. Tedjini nor the third appellant had shown particular interest in it. It recommended one of three courses of action: if the Secretary-General believed that he already had all the information he needed he might uphold his original decision; or he might refer the case to the Appointment and Promotion Board for clarification; or he might apply forthwith the procedure prescribed in the Staff Regulations.

In memoranda dated 4 September 1992 the Secretary-General conveyed his final decisions to the complainants. He

rejected Mr. Tedjini's appeal on the grounds that insofar as the Committee questioned his interest in Mr. Wayne's job and he was "not at all qualified" to be Director of Communications his appeal appeared "utterly contrived". The Secretary-General told Miss Diotallevi that the second and third options which the Committee had suggested were not acceptable in law since they infringed the rights of a third party, Mr. Wayne; though her qualifications were "plainly inadequate" for the post he would bear in mind her interest in a senior post; and since she had not had a chance to compete for Mr Wayne's job he offered her a special increment of one step and invited her to apply for any suitable vacancy that interested her.

Those are the decisions under challenge.

B. The complainants submit that the Tribunal is competent to hear their complaints and that there is no bar to receivability. They are objecting not, as the WTO argued in the internal appeal proceedings stage, to its contract with Mr. Wayne, but to the Secretary-General's refusal to reverse his appointment and follow the procedure properly. They have a cause of action because the impugned decision has impaired their right to career opportunities.

On the merits they contend that the decisions are unlawful and put forward two pleas.

First, the WTO was in breach of the procedure set out in the Staff Regulations and Rules: it never announced that the post of Director of Communications was vacant or held a competition to fill it, and it failed to consult the Appointment and Promotion Board as Staff Rule 15(1)(c) says it must in the case of posts which, like the material one, are not expressly referred to in Rule 15(1)(c)(i). Whatever basis it may suggest for the appointment in law, the reasons it offers for dodging the Staff Regulations and Rules so as to recruit Mr. Wayne are all beside the point. Nor is there any merit in its contention that it recruited him for a "mission" in the Secretary-General's own office: it appointed him to a vacant post. Besides, as it acknowledges, his duties were essential and there was nothing temporary about them. Otherwise why should he have started with a two-year appointment?

The complainants' second plea is that the Secretary-General drew plainly mistaken conclusions from the evidence. Following the procedure in the Staff Regulations and Rules would have allowed comparison of the complainants' qualifications with the other candidates', including Mr Wayne's. That, they contend, would not have been an idle exercise. They compare Mr. Wayne's qualifications - academic attainments, experience and knowledge of languages - with their own. They conclude that their claims to the post of Director of Communications are genuine, especially in the light of Mr. Wayne's scant professional experience and glaring linguistic shortcomings, which have hampered his performance.

They seek the quashing of the Secretary-General's decisions of 4 September 1992 and of Mr. Wayne's appointment as Director of Communications, the resumption of the procedure and awards of 31,500 French francs each in costs.

C. In its replies the WTO observes that the complainants purport to be challenging not Mr. Wayne's contract but the Secretary-General's decision to let Mr. Wayne's appointment stand rather than resume the appointment procedure. Though they regard the two things as "quite distinct", the WTO fails to see how the Secretary-General could reverse Mr. Wayne's appointment without breaking his contract. Conversely, if his contract is to stand - and the complainants seemingly do not contest it - his appointment plainly cannot be set aside, being a direct and indissociable consequence of the contract. So, whatever they may say they want, they are really challenging Mr. Wayne's contract.

The contract is headed "Special Service Agreement", and that is a clear, albeit implicit, reference to recruitment "specifically for service with a mission" under Rule 15.1(c)(i). Although Mr. Wayne is an employee of the WTO his mission is temporary and he lacks the status of an official.

The Tribunal is not competent *ratione materiae* because, as the case law says, it may not entertain complaints against contracts; were it to set the disputed agreement aside it would be infringing the rights of a third party.

The Organization further contends that the complaints are irreceivable on two counts. First, having filed their internal appeals after expiry of the one-month time limit in paragraph 7(a) of the Rules of the Joint Appeals Committee, the complainants have failed to exhaust the internal remedies open to them. Secondly, their complaints show no cause of action since the decisions they are objecting to caused them no injury.

On the merits the WTO rejects the complainants' two pleas.

It did not misread the evidence. It was pure conjecture on the complainants' part to assume that there was a post of Director of Communications and that they were better fitted for it than Mr. Wayne. There was no vacant post for a Director of Communications, only the temporary mission; in any event their backgrounds were not suitable for Mr. Wayne's duties.

Nor was there any breach of procedure. It was impossible to advertise Mr. Wayne's "post" because he does not hold one. By the same token there was no reason to consult the Appointment and Promotion Board.

The Organization asks the Tribunal to dismiss the complaints as irreceivable or, subsidiarily, as without merit.

D. In their rejoinders the complainants maintain that the Tribunal is competent. In formal terms they are challenging administrative decisions to reject their internal appeals and in substance Mr. Wayne's appointment was what their appeals were about. As to the alleged peculiarity of Mr. Wayne's legal bonds with the WTO, the distinction is spurious since the complainants find themselves in the same position with respect to him as they might have been if they had opposed the appointment of a regular staff member.

They did not miss any time limit for appeal, since there was no basis in law for appeal against unofficial information about the Secretary-General's mere intentions.

On the merits they press their earlier pleas and point out that the WTO has failed to show why it could not have filled Mr. Wayne's post by transfer or promotion. They had a right under the Staff Regulations to apply for the post.

E. In its surrejoinders the Organization presses its pleas in full.

#### CONSIDERATIONS:

1. The World Tourism Organization appointed Mr. Scott Wayne as Director of Communications. The complainants each appealed against his appointment to the Secretary-General and then to the Joint Appeals Committee and have now done so to the Tribunal. Though not in like case as to the appointment, they have much the same arguments and the same claims. So their complaints are joined to form the subject of a single ruling.
2. A new Secretary-General took over in January 1990. A review he made of management and work methods showed a low standard of efficiency in the area of press relations and publications. He decided to overhaul the units in charge. A circular of 24 May 1990, with an organisation chart appended, announced that Press Relations and Publications were to be immediately responsible to the directorate. A general coordinator was put in charge of policy-making and the supervision of the units of the secretariat and was to head staff in Press Relations and Publications. Miss Diotallevi was assigned to his office as press and publications assistant. Mr. Tedjini, who as head of Information and Documentation had been responsible for the marketing and sale of publications, became subordinate to the Chief of Marketing and Promotion in the Division of Programme Activities.
3. In but a few months, however, the Secretary-General found the new structure unsatisfactory: there was little or no improvement in press relations and publications and he felt, says the defendant, that he had to "strengthen them by taking on someone energetic who knew both about press relations and publications and about tourism ... relieve the general coordinator of them and take charge himself".
4. So it came about that the Secretary-General recruited Mr. Wayne under a contract known as a "special service agreement" which Mr. Wayne signed on 6 June 1991. He was to "carry out the duties entrusted to him by the Secretary-General in the field of Press, Publications and International Relations". The contract was for two years and he was not to be "considered in any respect as being a staff member", the aim being to bring someone in from outside to make reforms under the direct supervision of the Secretary-General, who remained free to call off the experiment if it did not turn out well.
5. But Mr. Wayne was introduced, at first orally and then in a memorandum of 8 July 1991 from the Secretary-General, as "our new Director of Communications", who was to assume "responsibility for press relations and publications". Such were the circumstances in which Miss Diotallevi became his subordinate. Mr. Tedjini's duties altered, too, because some passed to Mr. Wayne. Each of them asked the Secretary-General to reverse the appointment of Mr. Wayne as Director of Communications. Their requests having been rejected, they went to the

Joint Appeals Committee. The Committee found inconsistencies between the terms of Mr. Wayne's contract and his actual duties. All things considered, it concluded that the Secretary-General had been empowered not to consult the Appointment and Promotion Board before making the appointment but ought in future to go through "all procedures specified in the Staff Regulations"; he "could maintain his decision, if he feels that he had, at the time he took the decision, all the necessary elements of information". The Committee distinguished between Miss Diotallevi, whom it saw as a "serious and motivated candidate" for Mr. Wayne's position, and Mr. Tedjini, who had, it believed, no direct interest in challenging the appointment.

6. On 4 September 1992 the Secretary-General took two decisions rejecting the complainants' appeals. He told Mr. Tedjini that careful review showed him to be quite unqualified for Mr. Wayne's duties and his appeal, being "utterly contrived", must fail. He told Miss Diotallevi that her action could not impair Mr. Wayne's rights under the special service agreement and she was unqualified for his duties anyway, but inasmuch as the procedure, though held to be proper, had denied her the opportunity of applying she would get an exceptional step increment.

7. Being dissatisfied with those decisions, the complainants are impugning them before the Tribunal. The Organization pleads that the Tribunal is not competent to hear the complaints, that they are irreceivable and, as to the merits, that it did not misappraise the evidence or misapply the rules of procedure.

Competence:

8. In the Organization's submission the Tribunal lacks competence because what the complainants are challenging is a contract, an act which Article II(5) of its Statute does not allow it to review and which it may not set aside without impairing a third party's rights.

9. The plea is unsound. According to its Statute the Tribunal may rule on any relationship of employment there may be between an organisation and its staff, whether under the terms of a contract or under the Staff Regulations. The Tribunal is competent to rule on the effects that the recruitment of Mr. Wayne may have on the complainants' rights under the regulations because the Organisation established a special relationship with him: see what the Tribunal said on the subject, albeit in another context, in Judgment 122 (in re Chadsey) - in the second paragraph. The grant of an appointment, whether by contract or not and, if by contract, for a fixed-term or not, may affect staff rights that the Tribunal is competent to safeguard under Article II of its Statute. If so, it may rule on the lawfulness of the appointment. What is at issue is not whether the WTO's agreement with Mr. Wayne ought to be set aside: what the complainants are challenging, and were objecting to in the internal appeal proceedings, was his appointment as Director of Communications. The Organization argues that "appointment and contract make a single act in law". It is wrong. Mr. Wayne's appointment as Director is quite distinct from the contract with him. Under the special service agreement he was appointed to carry out the duties the Secretary-General entrusted to him, and his appointment under contract to perform special duties is not under challenge. But his appointment to a post that fits into the Organization's structure and carries senior responsibility and authority over WTO staff is the effect, not of the special service agreement, but of a later decision. Though probably never stated in any formal or official terms, that decision was disclosed in the Secretary-General's memorandum of 8 July 1991, which plainly declared him to be the new Director of Communications. As such he took over duties from the general co-ordinator and was empowered to give orders to staff in Press and Publications and assess their performance. Being in any event independent of his contract with the Organization, his appointment is not immune to review.

Receivability:

10. The WTO has two objections to receivability. One is that even supposing the challenge is to an appointment distinct from the contract it is out of time because the Secretary-General had told the complainants much earlier that Mr. Wayne was to be in charge of Press and Publications. The second objection is that the complaints show no cause of action.

11. Both pleas fail. The complainants did hear on several occasions from March to May 1991 what sort of duties the Secretary-General was going to give Mr. Wayne, who had not yet started, the contract he signed on 6 June not coming into force until 10 June. But whatever he may have said of his intentions before taking Mr. Wayne on, it did not amount to a challengeable decision adversely affecting anyone. The staff were not officially told of Mr. Wayne's appointment as Director until the memorandum went out on 8 July. Miss Diotallevi may have had an opportunity at work meetings in June to find out just what he was to be doing, but neither did she get notice of the decision in any terms that set off a time limit for appeal. So, contrary to what the Organization maintains, the

internal appeals of 16 July 1991 were not filed after the one-month time limit in the rules.

12. As for the second objection, an international civil servant does derive a cause of action from an appointment by an organisation and it does not, as the WTO seems to think, depend on his being a serious contender for the post or caring deeply about it. All that is required is that he want the vacant post and, whatever his qualifications for it or his prospects of success may be, the Tribunal will acknowledge the cause of action by enforcing any rights the organisation may have infringed. Both Miss Diotallevi, as the Joint Appeals Committee held, and Mr. Tedjini have shown a sufficient cause of action in that they were WTO staff members and might have applied for Mr. Wayne's post. So they may challenge his appointment.

The merits:

13. There is no need to entertain the parties' pleas comparing the complainants' qualifications with Mr. Wayne's. Although the complainants contend that there were mistaken conclusions from the evidence, they say that the Tribunal does not on that account have to assess them against Mr. Wayne, but just to recognise their right to apply for his post and declare the process of appointment unlawful in that applications were not invited and the Appointment and Promotion Board was by-passed.

14. So the nub of the case is the lawfulness of the proceedings that led to appointing Mr. Wayne. The complainants plead disregard of the rules on recruitment of staff to vacancies. The Organization answers that Mr. Wayne was recruited under a contract which gave him, not the status of a staff member, but special duties, and that the rules on recruitment to vacancies are irrelevant because he was not put on any post that already existed:

"The Secretary-General gave him duties by way of experiment and only if it works will he consider creating a permanent post. That is a deliberate choice and a matter of broad policy on cost management and staff retrenchment."

15. Though it has some force the argument fails. There is no denying the right of the WTO and other organisations to entrust special duties for a limited period to someone picked on the strength of experience and qualifications. But if such an appointee is given responsibilities that confer authority over serving staff or entail even a temporary change in the organisation's structure, his appointment must comply with the usual rules on the establishment and filling of posts. That is so even where the contract he signs stipulates that he shall not be an international civil servant.

16. Regulation 15(a) of the Staff Regulations reads:

"The paramount consideration in the filling of any vacancy shall be the necessity of securing staff of the highest standards of competence, efficiency and integrity. ..."

And Regulation 15(c) provides:

"Subject to the provisions of paragraph (a) above ... fullest regard shall be had, in filling vacancies, to the requisite qualifications and expertise of persons already in the service of the Organization."

What those rules mean is that at the very least the staff must be told of the vacancy or of the creation of a post and anyone who wants to apply must be allowed to do so and must have the application considered according to objective criteria.

17. The Organization having failed to comply with those rules, the complainants may have Mr. Wayne's appointment as Director of Communications set aside, though his entitlements under his contract remain unimpaired. Since the decision is quashed there is no need to take up the complainants' other plea that the WTO failed to consult the Appointment and Promotion Board as Regulation 15.1 required. The Organization must properly resume the process of appointment to the senior post held by Mr. Wayne.

18. Since the complainants succeed they are entitled to costs, and the Tribunal awards each of them 20,000 French francs.

DECISION:

For the above reasons,

1. The Secretary-General's decision to appoint Mr. Scott Wayne as Director of Communications is set aside.
2. The Organization shall resume the process of appointment to that post.
3. The WTO shall pay each of the complainants 20,000 French francs in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda  
P. Pescatore  
Michel Gentot  
A.B. Gardner