

*Registry's translation,
the French text alone
being authoritative.*

112th Session

Judgment No. 3102

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr Y. C. and Mr H. S. against the World Intellectual Property Organization (WIPO) on 13 November 2009 and corrected on 7 December 2009, the Organization's single reply of 4 March 2010, the complainants' rejoinder of 30 March and WIPO's surrejoinder dated 3 June 2010;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. Mr C., a Belgian national born in 1962, joined WIPO in 1995 at grade G6 and was promoted to grade P-3 on 1 January 2000. In December 2003 he was assigned the duties of Head of the Processing Support Unit in the International Registrations Administration Department of the Sector of Trademarks, Industrial Designs and Geographical Indications. Mr S., a Swiss national born in 1958, joined WIPO in 1989 at grade G5 and was promoted

to grade P-2 in 1997 and then to grade P-3 on 1 August 2000. In December 2003 he was appointed Head of the Publication Unit in the same department as Mr C.

By internal memoranda of 15 December 2005 the Assistant Director General in charge of the above-mentioned sector asked the Director of the Human Resources Management Department (HRMD) to promote the complainants to grade P-4 as from 1 January 2006. He emphasised the quality of their work and explained that their promotion had already been recommended in November 2004. By an internal memorandum of 28 June 2006 he was informed that on 24 May 2006, at its 11th session, the Promotion Advisory Board had recommended that the complainants' posts should be reclassified, as their duties and responsibilities had evolved, and that the Director General had approved that recommendation. On 22 November 2006 the Senior Director of the department in which the complainants were working sent to HRMD reclassification requests accompanied by the respective job descriptions. The Classification Committee examined these requests on 21 May 2008 and recommended that the posts should be reclassified at grade P-4. By individual letters of 3 July the complainants were informed that the Director General had approved their promotion to grade P-4 as of 1 July 2008.

In a letter to the Director General of 30 July 2008 the complainants pointed out that his decision to promote them was the culmination of a procedure which had begun in November 2004. They asked him to backdate their promotion "to the date on which this promotion should have taken effect". Having received no reply, on 21 October 2008 they submitted a joint request for review of this implied rejection. By a letter of 26 November 2008 the complainants were informed that the Director General had decided to deny their request, referring in particular to paragraph 30 of Office Instruction No. 8/2006 entitled "Guidelines on the Promotion of Staff", which provides that in no case may promotions be made with retroactive effect. On 20 February 2009 they referred the matter to the Appeal Board, which recommended in its report of 13 July 2009 that they should be promoted with retroactive effect as of 1 June 2008 at least, in

other words as from the first day of the month following the Classification Committee's recommendation. By individual letters of 14 August 2009 the complainants were informed that the Director General had decided to backdate their promotion to 1 June 2008. These are the impugned decisions.

B. In a common brief the complainants, relying on the case law of the Tribunal – in particular Judgments 2706 and 2770 – submit that there was a considerable and undue delay in the processing of their requests for promotion. They contend that even before the “request for promotion of November 2004” they had been performing tasks and exercising responsibilities which were more substantial than those matching their grade. In their opinion the Organization therefore flouted the principle of “equal pay for equal work”.

They also consider that the Promotion Advisory Board's recommendation is arbitrary and tainted with errors of law, and that they were discriminated against in that the Board recommended reclassification of their posts, whereas it recommended promotion on merit for two of their colleagues.

They ask the Tribunal to set aside the impugned decisions and to order the Director General to promote them as from 1 March 2005. They also each claim 3,000 Swiss francs for costs.

C. In its reply WIPO draws attention to the fact that the complainants may claim no right to promotion, because promotions are granted at the discretion of the Director General.

It states that HRMD indeed received official requests for their promotion dated 15 December 2005, but that it has no trace of any earlier requests. It says that the 18-month delay between receiving the requests for reclassification of 22 November 2006 and the Classification Committee's recommendation of 21 May 2008 was caused by a backlog of requests that had built up on account of budgetary restrictions which had made it necessary to postpone any promotions.

The defendant submits that the Promotion Advisory Board's recommendation was in no sense arbitrary or tainted with errors of law,

since it was adopted after thorough discussion and examination of the personal files of all the staff members whose promotion had been proposed. It also comments that, according to paragraph 9 of Office Instruction No. 8/2006, promotions on merit are granted only exceptionally.

D. In their rejoinder the complainants reiterate their arguments. They consider that the delay in the promotion procedure constitutes a violation of the principles of good management and equal treatment. They add that budgetary restrictions and the number of requests for post reclassifications which had to be processed are no justification for the slowness of the procedure, because the financial biennium 2008-2009 closed in surplus and the Director General awarded a substantial number of promotions on merit to staff members in 2006 and at the beginning of 2007. In their view, the Director General disregarded the Appeal Board's recommendation by backdating their promotion no further than 1 June 2008.

E. In its surrejoinder the Organization maintains its position. It explains that, in view of the large number of requests for post reclassifications, the decision had been taken to submit them to the Classification Committee at two separate sessions. Hence, at its session in June 2007 the Committee had processed requests concerning lower grades of the General Service category and the Professional category. It had examined the other requests, including those of the complainants, at its session in May 2008. The defendant maintains that, although promotions were granted in 2006 and 2007, there was still a backlog of requests for reclassification. It emphasises that the reclassification procedure is much longer and more complex than that which applies to promotions.

Lastly, it contends that the Director General is not bound by the opinions of the Appeal Board, which is an advisory body. However, in the instant case, he did follow the Board's "minimum" recommendation.

CONSIDERATIONS

1. The complainants, who joined WIPO in 1995 and 1989 respectively, were both promoted to grade P-3 in the year 2000. On 15 December 2005 the Assistant Director General in charge of the sector to which they were assigned asked the Director of HRMD to promote them to grade P-4 as of 1 January 2006. This request, which drew attention to the nature of the two staff members' tasks and the quality of their work, referred to a note of November 2004 concerning promotion of staff in which their promotion had already been recommended. On 28 June 2006 the Deputy Director of the above-mentioned department informed the Assistant Director General that at its 11th session, on 24 May, the Promotion Advisory Board had recommended that the complainants' posts should be reclassified and that the Director General had approved this recommendation.

On 23 October 2006 the Senior Director of the International Registrations Administration Department reminded the Deputy Director of HRMD that a request for the complainants' promotion had been made back in November 2004. The Senior Director submitted on 22 November 2006 the reclassification requests accompanied by a description of the jobs concerned to the Deputy Director.

On 21 May 2008 the Classification Committee recommended that the complainants' posts should be reclassified at grade P-4. On 3 July the complainants were informed that the Director General had approved their promotion to that grade as of 1 July 2008.

2. By a joint letter of 30 July 2008 the complainants asked the Director General to review his decision and to backdate their promotion "to the date on which [it] should have taken effect". As they received no reply to this letter, they asked the new Director General to review this implied rejection. On 26 November 2008 the Director General denied this request, relying in particular on Office Instruction No. 8/2006, paragraph 30 of which provides *inter alia* that "promotions can in no case be made with retroactive effect".

The complainants then referred the matter to the Appeal Board and asked it to recommend that the Director General should backdate their promotion to 1 March 2005, in other words, according to them, to a date three months after the first request for promotion.

On 13 July 2009 the Board indicated that there was strong justification for backdating the complainants' promotion to at least the first day of the month following the Classification Committee's recommendation, namely 1 June 2008.

By two separate decisions of 14 August 2009, which are the impugned decisions, the Director General therefore set the date of the complainants' promotion at 1 June 2008.

3. The governing principles and procedure for the promotion of WIPO staff members are set out in the above-mentioned Office Instruction, paragraphs 5 and 6 of which read:

“5. Based on the findings and conclusions of an experienced United Nations classifier, a post may be reclassified by the Classification Committee [...] to reflect changing operational needs within a Program and to include additional tasks assigned to that particular post.

6. In the case of a reclassified post, the incumbent of the post shall be considered and may be recommended for promotion by a Promotion Advisory Board [...], based on whether the staff member concerned meets the requirements for the promotion to the new grade of his or her post [...].”

Paragraph 30 of the Office Instruction reads:

“The effective date of implementation of the promotions following reclassifications of posts or promotions on merit shall be effective on the first day of the month following the Director General's approval of the recommendations unless he decides otherwise. The implementation can in no case be made with retroactive effect.”

4. The Tribunal finds that in not acceding to the complainants' request to make 1 March 2005 the effective date of their promotion the Director General merely applied the provisions of paragraph 30 quoted above. The complainants' criticism in this respect is therefore unfounded.

5. However, a question remains as to whether the complainants were promoted within a reasonable period of time.

6. Three and a half years elapsed between the first step towards obtaining the complainants' promotion and the Director General's decision of 3 July 2008 on this matter. Indeed, reclassification of the complainants' posts was officially contemplated in November 2004 in a note concerning the promotion of certain staff members in the sector to which the complainants were assigned; the note, contrary to the Organization's submissions, was in the file of the promotion procedure. In the requests of 15 December 2005 the Assistant Director General expressly referred to this note. The Senior Director of the International Registrations Administration Department also clearly mentioned it in his internal memorandum of 23 October 2006.

It has also been established that the complainants' tasks remained essentially the same between the end of 2004 and the middle of 2008. Moreover, it is not disputed that reclassification of their posts and their resultant promotion would have been justified at any time during that period.

7. It must be emphasised that, even if a staff member may claim no right to promotion, promotion procedures must be conducted with due diligence and as swiftly as the normal workings of an administration permit. There is nothing to justify delaying for years a promotion which the staff member may legitimately expect and which naturally has a direct impact on his or her career prospects, unless this delay may be attributed to a fault on the part of the person concerned during the procedure (see Judgment 2706, under 11 and 12).

In the instant case, it must be found that the promotion procedure was excessively long and that the complainants' posts were not reclassified within a reasonable period of time. Indeed, on 28 June 2006 the Assistant Director General was informed that on 24 May 2006 the Promotion Advisory Board had recommended the reclassification of the said posts and that the Director General had approved this

recommendation. But it was not until May 2008 that the Classification Committee finally recommended reclassification of the posts in question, because no action had been taken during 2007. The defendant's explanations, especially that concerning the backlog of files awaiting processing, are no excuse for this slowness, or in particular for the failure to take any action in 2007.

8. The unjustified delay in processing the requests for the complainants' promotion has caused them injury which must be redressed. This redress will take the form of an award of compensation equivalent to the additional remuneration which they would have received up until 31 May 2008 if they had been promoted, as a result of the reclassification of their posts, on a date which may reasonably be set at 1 January 2007.

9. The complaints must therefore be allowed and the decisions of 14 August 2009 must be set aside.

10. The complainants are entitled to costs which should be set at 2,000 Swiss francs for each of them.

DECISION

For the above reasons,

1. The Director General's decisions of 14 August 2009 are set aside.
2. WIPO shall pay the complainants compensation calculated as indicated under 8, above.
3. It shall pay each of them costs in the amount of 2,000 Swiss francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 18 November 2011, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet