

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

115th Session

Judgment No. 3206

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr A.M. K. against the World Intellectual Property Organization (WIPO) on 7 March 2011 and corrected on 22 July, and the Organization's reply of 26 October 2011, the complainant not having wished to file a rejoinder;

Considering the comments submitted by Mrs H. on 8 March 2013 at the request of the Tribunal and the complainant's comments thereon of 28 March 2013;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Facts relevant to this dispute may be found in Judgment 2712, concerning the complainant's first and second complaints, which was delivered on 6 February 2008, wherein the Tribunal cancelled the appointment of an external candidate – Mrs H. – to the grade D-1 post of Director of the Economic Development Bureau for Arab Countries,

but asked WIPO to shield her from any injury which might result from that cancellation. Pursuant to that judgment, Mrs H. was transferred, with effect from 13 June 2008, to the Office of the Deputy Director General, Technical Assistance and Capacity Building Sector, with the title of Director-Advisor.

On 1 October 2009 the Director General appointed Mrs H. to the grade D-2 position of Senior Project Director. At the end of that month she submitted an application for voluntary separation from service, which was accepted on 18 November.

On 18 December 2009 the complainant asked the Director General to review the decision to appoint Mrs H. to the grade D-2 position without a competition. As his request was refused, he referred the matter to the Appeal Board on 10 May 2010. In its conclusions of 15 October the Board recommended that the Director General should formally advise the complainant that the decision in question had been taken unlawfully. While the Board was of the opinion that filling the position in question by direct recruitment constituted an abuse of authority, it did not consider that Mrs H.'s appointment should be cancelled with retroactive effect, because she had separated from the Organization. By a letter of 2 December 2010, which constitutes the impugned decision, the complainant was advised that the Director General had decided to follow the Board's recommendation, but that recognition of the unlawful nature of Mrs H.'s appointment had no effect on her administrative and legal situation.

B. The complainant draws attention to the fact that, according to the Tribunal's case law, his cause of action in challenging an appointment decision does not depend on whether he had a relatively good chance of having his candidature favourably considered; the fact that he was eligible for the post which was filled suffices.

On the merits, the complainant explains that it is plain from the version of Staff Regulation 4.8(b) of 1 November 2006, which applied at the material time, that "[a]s a general rule" recruitment for posts in the Professional and higher categories must be made on the basis of a competition and that, as announced in Office Instruction No. 58/2006

of 27 October 2006, the reference to direct recruitment procedures had been deleted. In his opinion, the decision to appoint Mrs H. without holding a competition breached not only the principle of *patere legem quam ipse fecisti*, but also the principle of equal treatment, in that its purpose was to give Mrs H. an undue advantage. The complainant, who considers that he was deprived of an opportunity to apply for a post which should have been advertised in a vacancy announcement, contends that Mrs H. received a “promotion appointment as a favour”, in disregard of the case law, which deems any grant of promotion at the time of retirement to be inherently contrary to an organisation’s interests.

The complainant asks the Tribunal to find that his complaint is receivable, that he has a cause of action, that the impugned decision was taken in breach of Staff Regulation 4.8(b) and Office Instruction No. 58/2006 and that it constitutes abuse of authority and a “promotion appointment” contravening the Tribunal’s case law. He also asks it to set aside the impugned decision as well as that appointing Mrs H. to the grade D-2 position and to order WIPO to withdraw the latter decision. Lastly, the complainant requests that Mrs H. be made to repay all the sums which, in his opinion, were unduly received by her and that WIPO be ordered to recalculate her rights under the voluntary separation programme and her pension rights.

C. In its reply WIPO submits that the complaint is irreceivable. It holds that the complainant has no cause of action and that his rights were restored after the Director General recognised the unlawful nature of Mrs H.’s appointment. WIPO adds that the decision to grant her application for voluntary separation caused no injury to the complainant because he had not submitted any such request. The Organization is of the view that the claim that Mrs H. should be ordered to repay the excess amounts which she allegedly received is “purely vindictive”.

On the merits and subsidiarily, the defendant contends that the filing of the complaint attests more to the complainant’s determination

to hound Mrs H. than to a wish to defend his rights. It points out that in Judgment 2712 the Tribunal had specified that she must be shielded from any injury which might result from the cancellation of her appointment to the post of Director of the Economic Development Bureau for Arab Countries, and it explains that the decision to appoint her to the grade D-2 position of Senior Project Director had been taken because the post to which she had been transferred in June 2008 did not fully meet her professional expectations. WIPO denies that there was any abuse of authority and maintains that the decision in question was not prompted by any considerations extraneous to the Organization's interests because, on the contrary, one of the goals pursued was to appoint a "first-rate candidate" and to increase the number of women at director level. Moreover, it states that the claim seeking to have the Tribunal cancel Mrs H.'s appointment has become moot because she has left the Organization.

D. In her comments Mrs H. says that she deplores the manner in which the complainant is hounding her which, in her view, is indicative of "deep-seated resentment" and "unremitting animosity". She says that the complainant himself was directly recruited at the P-5 level in April 1998 and has never won a single competition.

E. In his comments the complainant states that he was given a fixed-term appointment in April 2001 after winning a competition to fill a post of Senior Counsellor at grade P-5. He produces two documents clarifying the circumstances surrounding the appointment of Mrs H. to the grade D-2 post.

CONSIDERATIONS

1. By Judgment 2712, delivered on 6 February 2008, the Tribunal, at the complainant's request, set aside the decisions taken at the end of the selection process initiated by WIPO in March 2005 to fill the grade D-1 post of Director of the Economic Development Bureau for Arab Countries, because it found that the appointee, Mrs H., did not satisfy one of the conditions stipulated in the vacancy

announcement published by the Organization. Although the judgment required WIPO to hold a new competition to fill the post in question, it also specified that the successful candidate, who had accepted her appointment in good faith, had to be shielded from any injury which might result from its cancellation.

2. In order to give effect to this judgment, on 13 June 2008 Mrs H. was appointed to a grade D-1 position in the Office of the Deputy Director General, Technical Assistance and Capacity Building Sector, with the title of Director-Advisor.

3. On 1 October 2009 the Director General appointed Mrs H. as Senior Project Director in the Coordination Sector for External Relations, Industry, Communications and Public Outreach. This appointment to a grade D-2 position was made without first holding a competition.

4. It must be noted that on 18 November 2009 the Director General decided to grant Mrs H.'s application for voluntary separation under the programme which WIPO had introduced for its staff in July 2009, and she therefore left the Organization.

5. The complainant, who considered that Mrs H.'s appointment to her last position was unlawful, challenged it through the internal appeal procedure provided for in Chapter XI of the Staff Regulations and Staff Rules.

6. By a decision of 2 December 2010 the Director General, following the recommendation made by the Appeal Board on 15 October 2010, "formally advise[d] [the complainant] that the decision to appoint [Mrs H.] to the post of Senior Project Director at grade D-2 [had been] taken unlawfully". This decision did not, however, entail the withdrawal of the disputed appointment and the letter notifying the complainant of it even expressly stated that "this statement [...] [had] no effect on [Mrs H.'s] administrative and legal situation".

7. That is the decision which the complainant now impugns. He asks that it be set aside and he accompanies this principal claim with various additional claims seeking rulings in law and the issuance of orders by the Tribunal.

8. The additional claims asking the Tribunal to “find that the [disputed] appointment constitutes a misuse of authority” and that “this decision is a ‘promotion appointment’ contravening the Tribunal’s case law” will be immediately dismissed as irreceivable since, in reality, they must be regarded as pleas advanced in support of the complainant’s claims to set aside the contested decisions. Indeed, precedent has it that a complainant may not seek rulings in law as separate claims when he has no cause of action warranting such rulings, which is the case when he can obtain the quashing of a decision and redress (see, for example, Judgments 1666, under 4(a), 2251, under 6, or 2299, under 5). This is precisely the situation here, because a finding by the Tribunal that the above-mentioned pleas had merit would entail the setting aside of the impugned decision.

9. The Organization raises two objections to the receivability of the complainant’s claims to set aside this decision and the appointment of Mrs H. as a Senior Project Director. It submits, first, that the complainant has no cause of action in impugning these decisions and, secondly, that the claims in question have become moot.

10. These arguments will not be accepted.

11. As the Tribunal has consistently held, any staff member who is eligible to occupy a post has cause of action in seeking the setting aside of the decision to give that post to another person, irrespective of his or her real chances of successful appointment to the post in question (see, for example, Judgments 1272, under 12, 2832, under 8, or 2959, under 3). It is not disputed in this case that the complainant met the legal requirements for the position of Senior Project Director to which Mrs H. was appointed.

12. Furthermore, contrary to the view shared by the Appeal Board and the Director General, Mrs H.'s subsequent separation from WIPO did not affect the complainant's cause of action, nor did it render moot his challenge of her appointment, since this decision had nonetheless been implemented and had thus produced legal effects. In this respect, Mrs H.'s separation from the Organization clearly could not be equated with a withdrawal of her appointment, which is the only circumstance which might have rendered such a challenge irreceivable or moot (see, in this connection, Judgments 1680, under 3, and 2287, under 6).

13. Lastly, the fact that, in his decision of 2 December 2010, the Director General expressly stated that Mrs H. had been appointed through an unlawful procedure does not bar the complainant from impugning that decision. Contrary to the Organization's submissions, recognition of its unlawful nature cannot, in itself, be regarded as a sufficient response to the complainant's request that the disputed appointment be withdrawn. In effect, although in the circumstances of the case this withdrawal would be essentially symbolic, the complainant retains at least a moral interest in ensuring that this appointment disappears altogether from the legal order. Consequently, the Organization therefore has no grounds for arguing that the claims to have this decision set aside are moot, or that the complainant has no cause of action in filing them.

14. On the merits, the Tribunal finds that, as the Organization has admitted, Mrs H.'s appointment to the post of Senior Project Director was unlawful.

15. The version of Staff Regulation 4.8(b) of 1 November 2006, which applies to this case, stipulates that "[a]s a general rule, recruitment for posts in the [...] higher categories shall be made on the basis of a competition". It is also obvious from Office Instruction No. 58/2006 of 27 October 2006 that the purpose of the amendments to that provision introduced on 1 November 2006 was to "delet[e] any reference to direct recruitment procedures" and thus greatly to restrict

the previous practice of resorting to that procedure for appointments to the staff categories in question. It is therefore plain that, although the principle of recruitment by competition applies only “as a general rule”, departures from it can be allowed only in exceptional cases and with proper justification (see, in respect of similar cases, Judgments 2620, under 9 to 11, and 2959 cited above, under 6 and 7). While it was perfectly acceptable to appoint Mrs H. without a competition to a grade D-1 position in 2008, given WIPO’s duty under Judgment 2712 to shield her from any injury which might result from the cancellation of her initial appointment, it must be found that there was no valid reason to assign her to a grade D-2 position the following year through the same procedure. Indeed, this second departure from the principle of recruitment by competition, which this time afforded Mrs H. a promotion, could not legitimately have been based on the duty to shield her from the adverse consequences of the cancellation of her appointment to her first post.

16. The Director General was therefore right to conclude in his decision of 2 December 2010 that Mrs H.’s appointment as a Senior Project Director was unlawful. However, he was mistaken in believing that this did not oblige him to withdraw that appointment. Since this unlawful decision was the subject of an internal appeal validly filed by another staff member who had cause of action, the Director General had no option but to withdraw it. Contrary to the opinion expressed by the Appeal Board, the fact that Mrs H. had left the Organization’s service in the meantime did not alter that duty, for the reasons already stated above.

17. It follows from the foregoing that the decision of the Director General of 2 December 2010 and that of 1 October 2009 appointing Mrs H. as Senior Project Director must be set aside, without there being any need to examine the complainant’s other pleas regarding these decisions.

18. The complainant's claim that WIPO should be ordered to withdraw the disputed appointment has become moot, because the Tribunal's setting aside of the two aforementioned decisions obviously suffices.

19. It will be incumbent upon the Organization to ensure that Mrs H. is shielded from any injury which may result from the cancellation of her appointment to the position in question, which she accepted in good faith.

20. The complainant asks the Tribunal to order WIPO to request repayment of the additional salary received by Mrs H. during her tenure of office as Senior Project Director, to recalculate her pension rights on the basis of her previous pay and to reconsider her entitlement to benefit from the voluntary separation programme. However, as has just been stated, the Organization has a duty to shield Mrs H. from any injury arising from the cancellation of her appointment, which in any case prevents the substance of these claims from being accepted. Furthermore, they are plainly irreceivable, because the complainant has no cause of action in seeking the repayment of Mrs H.'s emoluments or calling into question her pension rights, as these measures would have no bearing on his own situation (see, for example, Judgment 2281, under 4(a) and (b)). The same is true of his request that her entitlement to benefit from the voluntary separation programme be reviewed, because the complainant, who did not himself apply for separation under that programme, could not have been injured in any way by the decision taken with respect to Mrs H. These latter claims are clearly prompted by vindictiveness, which is no substitute for a cause of action, and will therefore be dismissed.

DECISION

For the above reasons,

1. The decision of the Director General of WIPO of 2 December 2010 and that of 1 October 2009 appointing Mrs H. as Senior Project Director are set aside.
2. All other claims are dismissed.
3. WIPO shall shield Mrs H. from any injury which may result from the cancellation of her appointment.

In witness of this judgment, adopted on 26 April 2013, 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 4 July 2013.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet