

118th Session

Judgment No. 3344

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr I. A., Mr N.B.H., Mr B. F. (his third), Ms C. G. (her third), Mr A.M. K. (his fifth), Mr J. P. (his third), Mr P. T., Ms J. T. and Mr F. U.-H. against the World Intellectual Property Organization (WIPO) on 17 January 2012, which was corrected on 25 April, WIPO's reply of 27 July, the complainants' rejoinder of 5 November 2012 and WIPO's surrejoinder of 13 February 2013;

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

Having examined the written submissions;

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

A. By a letter of 27 September 2010 to the Director General, seven of the nine complainants in this case sought a review of what they characterised as the administrative decision to issue an Investigation

Procedure Manual of July 2010 (hereinafter “the Manual”). They stated inter alia that the issuance of the Manual was irregular and *ultra vires* and they requested the Director General to immediately withdraw it. On 18 November 2010 they were informed that he was unable to accede to their request. On 16 February 2011 the same seven complainants, acting individually and in their capacity as staff representatives of the WIPO Staff Council, challenged the Director General’s decision before the Appeal Board. They argued that the Director General had failed to submit the Manual to the Staff Council before it was promulgated and that this constituted a procedural irregularity which rendered the Manual invalid *ab initio*. In addition, they asserted that the Manual contained provisions which rendered it invalid and unenforceable.

The Appeal Board communicated its conclusions (dated 15 August 2011) to the Director General on 25 August in which it recommended that he dismiss the appeal. By a letter dated 13 October 2011 the complainants were notified that the Director General endorsed the Board’s findings and its recommendation. That is the impugned decision.

B. The complainants submit that they have filed the present complaints in their respective capacities as duly elected staff representatives of WIPO’s Staff Council and in their individual capacities as staff members. Referring to the Tribunal’s case law, they assert that they have standing before the Tribunal. They contend that their complaints are receivable as they are challenging an explicit administrative decision after having exhausted the internal means of redress, and were filed within the time limit provided for in Article VII of the Statute of the Tribunal.

On the merits, they argue that the issuance of the Manual was a breach of Staff Rule 8.1.1(b) which stipulates that the Staff Council shall be consulted on questions relating to staff welfare and personnel administration and that it shall be entitled to make proposals on such questions to the Director General on behalf of the staff. Referring to the case law, they contend that consultation between the

Administration and a staff or advisory body must be meaningful and proper. In their view, the Director General failed to properly submit the Manual to the Staff Council before the Manual's promulgation and this failure constitutes a procedural irregularity which renders the Manual invalid *ab initio*. In addition, the Manual confers inappropriate discretion on the Director General to independently appoint investigators and it is thus *ultra vires* and invalid. Lastly, the Manual fails to guarantee numerous due process rights and as a consequence it is invalid and unenforceable.

The complainants request oral proceedings. They ask the Tribunal to declare the Manual invalid *ab initio* and to order its immediate withdrawal. Subsidiarily, they request that specific provisions in the Manual be "suspended" pending their removal or revision in line with the applicable case law and principles of international law. They seek moral damages, legal costs, and any other relief the Tribunal deems to be just, necessary and equitable.

C. In its reply WIPO submits that the complainants were notified of the impugned decision on 14 October 2011 and, given that their complaint form was filed on 17 January 2012, their complaints are time-barred and thus, irreceivable. In addition, it points out that the complainants did not file their complaint brief until 25 April 2012 and in WIPO's view, it would be an abuse of process and a violation of the time limit set out in Article VII, paragraph 2, of the Statute of the Tribunal, as well as a violation of Article 6, paragraph 1, of the Tribunal's Rules, to allow a complainant to merely file a complaint form without it being accompanied by detailed pleadings in the form of a brief. WIPO asks the Tribunal to find the complainants' brief irreceivable.

WIPO asserts that the complainants do not, in any capacity, have standing to challenge the validity of provisions in the Manual and it points to the findings of the Appeal Board in this respect. It emphasises that the complainants have failed to show how they, or the staff in general, could have been adversely affected by the alleged decision to uphold the Manual. Thus, they have failed to demonstrate

that they have *locus standi*, in either their individual capacity as staff members or in their representative capacity, to challenge the validity of the Manual. In addition, WIPO contends that the complainants have sought to increase the scope of their claims in this case; several issues that they have raised before the Tribunal were not raised or referred to in their initial request for review. Those issues could not have been considered during the internal appeal proceedings and they are therefore irreceivable.

On the merits, WIPO denies that the Director General failed to engage in a proper and meaningful consultation with the Staff Council regarding the Manual. Referring to the case law, WIPO asserts that any such duty to consult is not absolute, and should not be equated with negotiation or approval. Indeed, it contends that there is an abundance of evidence that proper and meaningful consultations with the Staff Council did take place and it points to the findings of the Appeal Board in this respect. Furthermore, to the extent that the Staff Rules provide for a duty, if any, to consult, the relevant provisions do not stipulate that the Director General must himself or herself personally engage in such consultation.

WIPO also denies that the Manual confers a wide discretion on the Director General to directly designate investigators and points out that this may occur only in certain cases. Lastly, it contends that the complainants have failed to prove that provisions in the Manual contravene fundamental due process rights.

D. In their rejoinder the complainants develop and press their pleas. They contend that their complaints are receivable and they submit that their corrected complaints are admissible as they comply with Article 6, paragraphs 1 and 2, of the Tribunal's Rules and were filed pursuant to express permission granted by the Tribunal's former Registrar. They request the Tribunal to award exemplary damages for what they characterise as the "dilatatory and frivolous" assertion made by WIPO in this respect.

E. In its surrejoinder WIPO maintains its position.

CONSIDERATIONS

1. These complaints are brought by nine complainants (although the complaint form refers to ten complainants). As the complainants rely on the same arguments and seek the same redress, their complaints are joined and will be the subject of this single judgment. They have filed complaints in their capacity as the duly elected staff representatives of the WIPO Staff Council and in their individual capacities as staff members of WIPO. The issue the complainants seek to raise before the Tribunal is, described in general terms, the lawfulness of an Investigation Procedure Manual. The impugned decision is a decision of the Director General recorded in a letter of 13 October 2011 from the Director of the Human Resources Management Department. The impugned decision was to adopt a recommendation of the WIPO Appeals Board to dismiss an appeal brought by seven of the nine complainants against a decision of the Director General of 18 November 2010 refusing to withdraw the Manual.

2. A completed standard complaint form was filed in this Tribunal on 17 January 2012 (though the detailed brief was not filed until 25 April 2012). The complainants are represented by a lawyer. The standard complaint form requires a complainant to identify the date at which the complainant received the text of the decision (or date of publication of the decision if it affects a class of officials). The date “19/10/2011” was the identified date. In the complainants’ brief the following is said about time limits:

“This Appeal has been filed within the requisite timeframe in accordance with ILOAT statutes Article VII [...]”

In its reply, WIPO takes issue with this proposition. It is desirable to set out the submission made by WIPO:

“Complaint Filed Out of Time

9. The Organization submits that the entire Complaint is not receivable on the simple, objective and easily verifiable ground that it was not filed within the time period stipulated in the Statute of the Tribunal.

Article VII(2) thereof provides that '[t]o be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned [...].'

10. The Complainants are challenging the Director General's decision communicated to them by way of letters dated October 13, 2011 (see **Annex 3 to the Complaint**). The Complainants were notified of the decision impugned on October 14, 2011 (see **Annex 5**), and not on October 19, 2011, as the complainants would have the Tribunal believe (see section 3 of the complaint form)."

3. The contents of Annex 5 will be discussed shortly. It is sufficient to note, at this point, that the bold highlighting of the reference to Annex 5 appears in the reply itself. In its reply, shortly after the quoted passage, WIPO refers to Judgment 2772, consideration 3, and the need for strict compliance with time limits.

4. In the complainants' rejoinder, there is a response of sorts to the submission of WIPO. Again it is desirable to set out what is said in the rejoinder:

"3. WIPO provides absolutely no proof of receipt by the Complainants of the impugned decision. In fact, it relies solely on its own unsupported assertion that the Complainants received the decision on 14 October and not 19 October. The burden is on the Respondent to prove that the Applicant actually received the impugned decision prior to 19 October 2011 2011 (sic) (see ILOAT Judgement 2074 under consideration 6) [...] which the Administration in this case fails to do, WIPO's argument must therefore fail."

There is a footnoted reference to a passage from Judgment 2074 in which the Tribunal held that the burden of proving that a document was actually received by the addressee lies with the party which cites it in evidence.

5. Annex 5 to WIPO's reply is constituted by ten documents. Four are documents headed "Record of Transmittal". They take a standard form except for a typed name in a signature block and the signature itself. Each of the four documents has a differently named recipient. Each document clearly records that a Ms D. (who signed each of these four documents herself) had hand delivered a letter

dated 13 October 2011 to a named recipient who also had signed the document. Having regard to surrounding circumstances, an inference can readily be drawn that the letter identified as the “[l]etter dated October 13, 2011” is a reference to the letter containing the impugned decision. Each of these four documents is dated 14 October 2011. The named recipients are four of the complainants, namely Mr A., Mr P., Mr T. and Mr U.-H. Each of these complainants has signed an acknowledgement that they received a copy of the letter containing the impugned decision on 14 October 2011. Thus, there is compelling evidence that four of the complainants were notified of the impugned decision on 14 October 2011.

6. The six remaining documents in Annex 5 are copies of e-mails. Five are addressed to the five remaining complainants, namely Mr B.H., Mr F., Ms G., Mr K. and Ms T. Each of the e-mails is from Ms D. and are in the same general terms and form. Each e-mail is dated 14 October 2011 and they were sent at various times between 4:38 p.m. and 5:41 p.m. Not only are the e-mails addressed to the five remaining complainants, but each commences with the salutation “Dear Mr (or Ms) [and the name of the recipient]”. Each e-mail records that it was sent with a PDF attachment named “To [the name of the recipient of the document] pdf”. With some variations, the body of the e-mail says, as for example in the case of Mr H.:

“I have been instructed to hand deliver to you, in your capacity of Member of the Staff Council, a confidential and sealed envelope by today.

Further to our attempt to contact you per telephone, which remained unsuccessful, please find attached an electronic version of the relevant document.

Upon your return to the office I will appreciate (sic) if you could contact me to advise on the suitable day and time for me to hand deliver the original version of the document.”

7. What is quite clear from these ten documents is that on 14 October 2011, a concerted effort was made to provide each of the

Staff Council representatives with a copy of the impugned decision by delivering a copy to each of them personally on that day and, failing that, by e-mailing a copy. The copy of the letter of 13 October 2011 in the complainants' brief is addressed personally to Mr K. by name but with the names of all nine complainants either at the top or at the foot of the letter. It can be readily inferred, in all the circumstances, that the PDF attachment to each of the e-mails was the letter of 13 October 2011 addressed to the complainant, by name, to whom the e-mail was sent.

8. As it happens, 14 October 2011 was a Friday. The following Wednesday was 19 October 2011, the day on which the complainants assert they were provided with a copy of the impugned decision. It is to be recalled that the complaint form was filed with the Tribunal on 17 January 2012. It is also to be recalled that the time limit in Article VII, paragraph 2, of the Tribunal's Statute requires that a complaint must be filed "within ninety days after the complainant was notified of the decision impugned". That is, the complainant has 90 days after the day on which they were notified of the impugned decision to file a complaint. In the present case, the complaint was filed within time only if the notification of the impugned decision occurred on 19 October 2011 (or later), which is the fact asserted by the complainants.

9. The Tribunal's jurisprudence is that the burden of proof is on the sender to establish the date on which communication was received. If that cannot be done (perhaps because the document was sent by a system of transmission that does not permit actual proof), the Tribunal will ordinarily accept what is said by the addressee about the date of receipt (see Judgment 3253, consideration 7). However these principles do not absolve the Tribunal from evaluating the evidence provided by the parties if there is an issue about date of receipt in the context of an argument about time limits. Examples of the Tribunal doing this can be found in Judgments 3253, considerations 8 to 11, and 2678, considerations 3 to 5.

10. In the present case, it is clear that the complainants' argument in their rejoinder to the submission of WIPO and the evidence in support was unresponsive. No attempt was made to grapple with the contents of Annex 5. It was simply not open to the complainants to argue that there was "absolutely no proof of receipt" and that WIPO had made an "unsupported assertion" about the date of receipt. To the contrary, there was cogent and compelling evidence that the complainants made no attempt to rebut. It is simply untenable, in the absence of any contradicting evidence, for the complainants to argue that four of them were notified of the impugned decision on 19 October 2011 in the face of documents signed by each of them acknowledging receipt on 14 October 2011. In relation to the five complainants to whom e-mails were sent late in the afternoon of Friday, 14 October 2011, it is conceivable that they did not see the e-mail sent to them on that day. However, it is improbable they would not have seen the e-mail on Monday 17 October 2011. An inference can readily be drawn that each of these five were notified of the impugned decision by no later than the end of Monday 17 October 2011. Of course the complainants could have led evidence that each of the five to whom the e-mails were sent were sick or otherwise absent from work on the Monday and Tuesday or that their e-mail practices were to review their e-mails weekly. But there is no such evidence. While the sender bears the burden of proof, as noted earlier, this does not absolve the recipient of a document from adducing evidence contradicting or challenging persuasive evidence from the sender about the likely date of receipt. That is particularly so where the facts which would justify a conclusion other than the conclusion suggested by the persuasive evidence provided by the sender, are peculiarly within the knowledge of the recipient. The Tribunal is satisfied that all complainants were notified of the impugned decision by the end of Monday 17 October 2011.

11. Accordingly, the complaints were filed out of time. In these circumstances, it is unnecessary to consider a legal issue which otherwise might have arisen about the date on which an executive of a

staff association is notified of a decision. A staff association ordinarily has no separate legal identity. Nonetheless, it cannot be assumed that it is necessary to notify all members of the executive in order to notify the executive of an association of a decision nor can it be assumed that the time of notification is the time at which the last of the members of the executive is, in fact, notified.

12. The complaints should be dismissed as irreceivable.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 9 May 2014, Mr Giuseppe Barbagallo, 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 9 July 2014.

GIUSEPPE BARBAGALLO
DOLORES M. HANSEN
MICHAEL F. MOORE
DRAŽEN PETROVIĆ