Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

N. (No. 9)

v.

WIPO

120th Session **Judgment No. 3503**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Ms S. N. against the World Intellectual Property Organization (WIPO) on 4 March 2013, WIPO's reply of 19 June, the complainant's rejoinder of 24 July and WIPO's surrejoinder of 28 October 2013;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests the lawfulness of the appointment of two staff members to grade G-6 posts.

Information regarding the complainant's career at WIPO is to be found in Judgments 3185, 3186, 3187, 3225, 3226, 3269 and 3270, delivered on her first seven complaints respectively. It should be recalled that, at the material time, the complainant held a post at grade G-4 and was serving under a short-term contract that had been renewed several times. She was appointed to the post of Assistant Examiner under a fixed-term contract as from 1 June 2012.

In December 2010 WIPO published several vacancy notices for 16 posts of Examiner at grade G-6. The complainant applied for nine of these posts, but her applications were turned down in July 2011.

On 10 January 2012 WIPO published an information circular announcing, among other things, the appointment of two staff members to posts of Examiner at grade G-6 as from 1 December 2011. On 25 January 2012 the complainant sent the Acting Director of the Human Resources Management Department (HRMD), with a copy to the Director General, a memorandum asking her to "review" these appointment decisions since, in the complainant's view, they had not been taken after holding a competition. In a memorandum of 24 February, the Acting Director replied that the appointments contested by the complainant "were the outcome of a competition" and explained that when the two posts in question had fallen vacant, the incumbents having been appointed to other posts following a competition, the administration had decided not to organize a separate competition in order to fill them but to "join" them to the competitions held in order to fill the aforementioned 16 posts. She also informed the complainant that, with the agreement of the Staff Council and WIPO's Legal Counsel, "the candidates who had initially applied for the [16] posts ha[d] been considered for the two additional posts without having applied for them". Since the complainant had applied for nine of the 16 posts, her "application" for the two posts in question had been considered, but it had been turned down.

On 21 May the complainant lodged an appeal with the Appeal Board, contesting the decision of 24 February and requesting that the two appointments in question be cancelled, that the decision to turn down her "application" – since she had been told that it had been considered – be rescinded and that she be awarded compensation for the injury suffered. On 24 May the Chair of the Appeal Board drew her attention to "several procedural issues". He pointed out that the memorandum of 24 February 2012 was not, in his view, a reply to a request for review addressed to the Director General, but rather a reply to her memorandum of 25 January 2012 by the Acting Director of HRMD. Referring to Staff Rule 11.1.1(e)(3), he invited her to submit

"any additional comments, information or materials" relating to the matter. Later that day, the complainant replied that since the request for "review" that she had submitted on 25 January had been rejected by the Acting Director on 24 February, she was entitled to contest that decision before the Appeal Board.

On 4 June the Chair of the Appeal Board requested the complainant to send him a copy of the memorandum of 25 January 2012 so that he could forward her appeal to the Director General. Having received no reply, he repeated his request on 13 June, stating that, unless he received the memorandum within five working days, he intended to follow the procedure set out in Staff Rule 11.1.1(e)(3)(a). She sent the requested memorandum to the Chair of the Appeal Board on 15 June, and on 20 June he informed her that her appeal "as submitted to the Board" was clearly irreceivable. He explained that, under Staff Rule 11.1.1(b), in order to be the subject of an appeal, the memorandum of 24 February would have to have been signed by the Director General or an official acting on his behalf and to have constituted a reply to a request for review. He therefore invited the complainant to submit a new version of her appeal, explaining why she considered that she had submitted the appeal in accordance with the aforementioned paragraph (b), and to attach in annex a "copy […] of the alleged request for review". The following day, the complainant replied that her appeal was receivable because she had submitted it within the prescribed time period and because it contested a clearly identified decision taken in response to a request for "review".

On 1 October the Appeal Board informed the complainant that it confirmed the opinion of its Chair that the appeal was irreceivable. It nevertheless gave her "four more weeks" in which to reply to his invitation of 20 June. On 5 November the complainant sent the Chair of the Appeal Board a new version of her appeal, attaching, among other things, a copy of the memoranda of 25 January and 24 February 2012. She stated that she was contesting the decision of 24 February 2012 and requested the Board to take into account, in the context of relief for the injury suffered, the Chair's vexations attitude towards her and the fact

that, at the material time, her employment on a short-term contract had left her vulnerable and subject to discrimination.

On 4 December 2012 the Chair of the Appeal Board sent the Director General a memorandum, with a copy to the complainant, stating that, pursuant to Staff Rule 11.1.1(e)(3)(b), the Board had decided to reject the appeal as clearly irreceivable. He attached to this memorandum a copy of the Board's decision dated 3 December 2012, stressing that the Board had "made an unprecedented effort" to allow the complainant to correct her appeal and explaining that the two memoranda of 25 January and 24 February 2012 did not meet the requirements of Staff Rule 11.1.1(b).

On 18 December 2012 the complainant wrote to the Director General, stating that she failed to understand the Appeal Board's decision. She requested him to indicate whether she had exhausted the internal means of redress or whether she had to await his decision on the appeal. On 4 March 2013, having received no reply, she filed a complaint with the Tribunal, impugning the Appeal Board's decision of 3 December 2012.

The complainant requests the Tribunal to set aside the impugned decision or, if necessary, the subsequent implicit decision of the Director General and to cancel the appointments published in the information circular of 10 January 2012. She also requests the Tribunal to order WIPO to fill the posts in question through a new procedure and claims 15,000 euros in compensation for the injury suffered and 6,000 euros in costs.

WIPO maintains that the appeal is irreceivable because the complainant did not follow the internal appeal procedure and, subsidiarily, because it is without merit.

CONSIDERATIONS

1. Under WIPO Staff Rule 11.1.1(b)(1), any staff member is entitled to submit an appeal against an administrative decision by, as a first step, addressing a letter to the Director General requesting that

the decision be reviewed. The impugned decision, by which the Appeal Board rejected the complainant's appeal, was based on, among other things, the ground that she had not demonstrated that the reply to her memorandum of 25 January 2012 constituted an administrative decision within the meaning of this provision.

2. On 25 January 2012, after learning that two other staff members had been appointed to posts that had fallen vacant, the complainant requested HRMD to "review" these appointment decisions. She stated that she was contesting them "in order to ensure equal opportunity in access to vacant posts" and requested HRMD to inform her of, among other things, the means of redress through which she could do so. She sent a copy of her request to the Director General of the Organization.

3. On 24 February 2012 the Acting Director of HRMD replied to this request, explaining that the two posts in question had been filled after a second review of the applications – including that of the complainant – that had been submitted during other competitions in which she had participated.

In her appeal to the Appeal Board, the complainant stated that she was "contesting the decision of which she had been notified by [this] letter, following a request for review, concerning two appointments that [had been] made without holding a competition and [had] therefore [been] unlawful". She requested, among other things, "that these appointments be cancelled and, since the administration [was] claiming that her application ha[d] been considered, that the decision to turn down her application be rescinded".

4. It has been established that, although the complainant was employed on a short-term contract at the material time, she was entitled to contest through internal means of redress decisions that, in her view, had adversely affected her.

5. There is no doubt that this was the case with the decision to appoint two other people, without holding a competition, to posts for

which her application had been considered and, in so doing, to turn down her application definitively.

6. In her request for review, the complainant clearly expressed her wish that these decisions be rescinded. She personally gave the intended recipient, the Director General, a copy of that request, which she addressed to HRMD. She therefore followed the instructions set out in paragraph (b)(1) of the aforementioned provision.

7. In that regard, it should be recalled that, for a letter addressed to an organization to constitute an appeal, it is sufficient that the person concerned clearly expresses therein his or her intention to contest the decision adversely affecting her or him and that the request thus formulated can be granted in some meaningful way (see Judgments 3068, under 16, and 3127, under 8, and the case law cited therein).

While it is true that the applicable provisions in this case required that the request for review be substantiated, the complainant, who clearly indicated the grounds for her challenge, did in fact meet that obligation.

8. The foregoing considerations lead the Tribunal to find that the impugned decision was unlawful and to note that the complainant has, in this case, been unlawfully denied the benefit of her right to an internal appeal, a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority (on this point, see, for example, Judgments 2781, under 15, and 3068, under 20).

9. The Tribunal will therefore remit the case to WIPO in order that the Director General take a decision on the merits of the complainant's request for review pursuant to Staff Rule 11.1.1.

10. The unjustified refusal to consider this request has delayed the final settlement of this dispute, no matter what solution may be found to it in due course. This decision has therefore itself caused the complainant injury for which fair redress may be given by ordering WIPO to pay her compensation in the amount of 3,000 euros.

11. As the complainant succeeds in part, she is entitled to costs, which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The decision of 3 December 2012 is set aside.
2. The case is remitted to WIPO for action as indicated under 9, above.
3. WIPO shall pay the complainant moral damages in the amount of 3,000 euros.
4. It shall also pay her costs in the amount of 2,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 30 April 2015, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

(Signed)

CLAUDE ROUILLER SEYDOU BA PATRICK FRYDMAN

DRAŽEN PETROVIĆ