Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

A. (No. 6), B. H. (No. 6), G. (No. 8), K. (No. 11), P. (No. 9) and U.-H. (No. 6)

v.

WIPO

121st Session **Judgment No. 3607**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr I. A. (his sixth), Mr N. B. H. (his sixth), Ms C. G. (her eighth), Mr A. M. K. (his eleventh), Mr J. P. (his ninth) and Mr F. U.-H. (his sixth) against the World Intellectual Property Organization (WIPO) who filed a single brief on 19 October 2012 and corrected it on 11 March 2013, WIPO's single reply of 12 August, the complainants' rejoinder of 14 November 2013 and WIPO's surrejoinder of 19 February 2014;

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

Having examined the written submissions;

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

The complainants challenge the decision to transfer another staff member, Mr G., to the post of Director-Advisor, Office of the Deputy Director General, Development Sector (hereinafter "the contested post").

With effect from 8 April 2011 Mr G. was transferred to the contested post. Staff members were so informed by way of Information Circular No. 9/2011 of 10 May 2011. The transfer decision was taken following the endorsement by the Director General of recommendations by the Appeal Board in internal appeal No. 2010/07 that WIPO should find a

new position for Mr G. in order to protect his interests given that the Board had found that his appointment to a prior post had been irregular and that it should be quashed.

In a single letter of 5 July 2011 all of the complainants, acting individually and collectively in their capacity as members of the Staff Council, requested the Director General to review the decision to "directly appoint" Mr G. to the contested post and to withdraw that decision forthwith. They stated that Mr G.'s appointment was a violation of Staff Regulation 4.8(b) and that the practice of direct recruitment/appointment was prohibited pursuant to paragraph 17 of Office Instruction No. 58/2006 of 27 October 2006.

On 30 August 2011 the complainants were informed that the Director General had decided to deny their request. Mr G. had not been directly recruited; he had been transferred on the basis of the Director General's acceptance of a clear recommendation made by the Appeal Board in internal appeal No. 2010/07. The decision to transfer Mr G. strictly implemented the accepted recommendations of the Board and was in conformity with Staff Regulations 4.3(c) and (d). In addition, the transfer did not breach Staff Regulation 4.8(b), which expressly provided for the possibility of recruitment without the need for a competitive process.

The complainants submitted a single appeal to the Appeal Board dated 30 November 2011 in which they challenged the decision of 30 August and maintained their position that the purported transfer of Mr G. violated the Staff Regulations.

On 22 May 2012 the Administration confirmed for the Appeal Board that Mr G.'s appointment had been extended for three years with effect from 20 May 2012.

In its conclusions of 31 May 2012 the Appeal Board recommended that the Director General should clarify to Mr G. his contractual status in WIPO by pointing out that proper implementation of the Board's recommendation in appeal No. 2010/07 should not have led to the extension of his two-year appointment with the aim of enabling him to find a suitable position in WIPO by way of competition, or outside of WIPO, unless there were exceptional circumstances, in which case an

extension by a certain period, such as one year, might be reasonable. The Board also recommended that the complainants be awarded legal costs for eight hours of work undertaken by their lawyer.

By a single letter dated 25 July 2012 the complainants were notified that the Director General had decided to partially follow the recommendations of the Appeal Board. He would clarify the matter with Mr G. as recommended by the Board, in the form of a letter. However, Mr G.'s contract could not be unilaterally modified, according to the applicable Staff Regulations and Staff Rules and the general principles of contract law. The Director General rejected the Board's recommendation with respect to legal costs. That is the impugned decision.

As a preliminary matter, the complainants request oral proceedings. They ask the Tribunal to annul Mr G.'s appointment to the contested post. They request that a new vacancy announcement be issued with respect to the aforementioned post and that a competitive recruitment process be held within a maximum of three months following the issuance of the judgment on these complaints. They seek reimbursement of the costs incurred in bringing their complaints as well as appropriate moral damages. They further seek the payment of interest on all amounts awarded, at the "market rate", and any other relief as the Tribunal deems to be fair, just and necessary. In their rejoinder the complainants seek exemplary damages.

WIPO submits that the complainants' claims for compensation and for the holding of a competition are irreceivable. Furthermore, the complainants have failed to exhaust internal remedies concerning the decision to extend Mr G.'s appointment. WIPO denies that the complainants are entitled to any of the relief that they seek and it requests the Tribunal to dismiss the complaints in their entirety.

CONSIDERATIONS

1. In May 2010 Mr G. was appointed to a Director position in WIPO. This appointment was the subject of an internal appeal (No. 2010/07) and on 25 January 2011 the Appeal Board upheld the

appeal. It made, relevantly, two recommendations. The first was that the selection had been irregular and that the appointment should be quashed. It also recommended that the Director General should "ensure that the necessary steps are taken to protect the interests of [Mr G.], including finding an appropriate new position for him". Such a recommendation is consistent with the Tribunal's jurisprudence (see, for example, Judgment 2712, consideration 10).

The Director General accepted the recommendation and appointed Mr G. to the contested post. On 5 July 2011, 10 members of the Staff Council, including the complainants, filed a single request for review directed to the Director General challenging the appointment of Mr G. to the contested post. In their letter, they requested that the Director General review the decision to appoint directly Mr G. to the position and to "withdraw same forthwith". The grounds for the request were that the appointment had been in direct violation of WIPO Staff Regulation 4.8(b) and the fact that the practice of direct recruitment/appointment was prohibited pursuant to Office Instruction No. 58/2006 issued on 27 October 2006. By a letter dated 30 August 2011 from the Administration the complainants were informed on behalf of the Director General that the request for review had been denied.

On 30 November 2011 an appeal to the Appeal Board was lodged. The appeal was, in terms, against "the Director-General's final administrative decision dated 30 August 2011 refusing to withdraw the decision to directly appoint [Mr G.] to the [contested post] without holding a competitive recruitment process". On 31 May 2012 the Appeal Board issued its conclusions which were forwarded to the Director General and also to the complainants (as part of the group of appellants) on 5 June 2012.

2. It is desirable to refer to several aspects of the Appeal Board's report. The Appeal Board said that it had initially been of the view that the principal purpose of the transfer had been to protect the interests of Mr G. in accordance with the earlier Appeal Board recommendation in internal appeal No. 2010/07. While noting that there might have been ways of better implementing the earlier

recommendation, the complainants and others as appellants had not shown that the Director General had in any way acted in bad faith. The reason why the Board referred to its initial view was because it was informed in May 2012 that WIPO had extended the contract of Mr G. from 20 May 2012 until 19 May 2015. The Appeal Board went on to discuss what was required to give effect to the recommendation made in the earlier internal appeal proceedings, noting that the recommendation spoke of "necessary steps" to protect the interests of Mr G. The Appeal Board then said that this three-year extension involved WIPO taking a step that the Appeal Board "could not possibly be considered as having recommended". That is to say, the three-year extension could not be justified by reference to the original recommendation. However, the Appeal Board later observed that the recent decision to extend Mr G.'s contract by three years "fell outside the scope of the present Appeal" though it indicated that it took into account that development in formulating its recommendations. The relevant recommendation was in the following terms:

> "In light of the foregoing conclusions, the Board recommends that the Director General should clarify to [Mr G.] his contractual status in the Organisation by pointing out that a proper implementation of the Board's recommendation in [internal appeal No. 2010/07] should not have led to an extension of his two-year appointment aimed at enabling him to find a suitable position in the Organization, through competition, or outside the Organization, unless there were exceptional circumstances, in which case an extension by a certain period, such as one year, might be reasonable."

3. On 25 July 2012 the Administration wrote to Mr G. on behalf of the Director General. The letter indicated that the Director General had decided to accept the recommendation quoted in the previous paragraph. The letter also said that the Director General wished to clarify to Mr G. that "an extension of your contract of three years did not constitute a proper implementation of the Board's former recommendation in [internal appeal No. 2010/07]" and that the extension of his contract for one year may have been more "adequate in this regard". Notwithstanding, the letter went on to say that "[t]he Organization however confirms that the terms of your current contract

remain unchanged" while encouraging Mr G. to apply during the period of his contract for any suitable post that was open to competition.

4. Before considering the merits of the complaints, it is necessary to deal briefly with procedural issues. First, as the complaints are based on the same material facts and raise the same issues of fact and law, they may be dealt with in a single judgment, and are joined.

Secondly, a procedural argument was raised by WIPO. It is that the complaints were not filed within the time specified by Article VII of the Tribunal's Statute having regard to the applicable Rules of the Tribunal. The argument is based on the fact that while the complaint form was filed within the specified time, the single brief accompanying the complaints was not filed until sometime later and outside the specified time and as a correction of the complaints. Substantially the same arguments have been repeatedly rejected by the Tribunal and should be rejected in this matter (see, for example, Judgments 3499, 3419 and 3421).

Thirdly, the complainants seek oral proceedings. The Tribunal is satisfied that the written material provided by the parties both in their pleas and annexures is adequate to dispose of the complaints fairly and with due regard to the interests of the parties.

5. The first possible issue is whether the "assignment" (to use the language of the complainants in their brief) of Mr G. to the contested post was a direct appointment without recourse to competition or a transfer. In their brief, the complainants simply assert that this "assignment" was a direct appointment and only purported to be a transfer. They say they are reiterating the submission that they made in their initial request for review. However that submission in the letter of 5 July 2011 simply involved the same assertion. There is no argument developed as to why the Tribunal should conclude that Mr G. was not transferred to the position. Indeed, the substance of the complainants' argument which follows this assertion is that the provisions in the Staff Regulations permitting the transfer of staff do not operate in isolation and are governed by the more general provision requiring that the

recruitment for posts be on the basis of competition. The Tribunal proceeds on the basis that it was a transfer.

6. It is necessary to consider the interaction of Staff Regulation 4.3 and Staff Regulation 4.8(b) as they existed at the time of the transfer. Staff Regulation 4.3 provided, relevantly, as follows:

> "(c) 'Transfer' shall mean the assignment of a staff member to another post without promotion. A transfer may be effected without having recourse to a competition.
>
> (d) Any staff member may be transferred whenever the interests of the International Bureau so require. Any staff member may at any time request consideration for transfer in his own interest."

Staff Regulation 4.8(b) provided:

> "As a general rule, recruitment for posts in the Professional and higher categories shall be made on the basis of a competition. Vacancies shall be brought to the attention of the staff of the International Bureau and the Administrations of Member States, with details as to the nature of the posts to be filled, the qualifications required and the conditions of employment."

Staff Regulation 4.1 should be noted. That provision required WIPO to secure the services of persons with the highest standards of efficiency, competence and integrity.

7. The interaction of these provisions was recently considered by the Tribunal in Judgment 3501 (a judgment delivered after the pleas had been finalised in this matter). The Tribunal said at consideration 5:

> "The complainants do not concede that the option of transferring Ms M. without a competition for the post, in exercise of the power conferred by Staff Rule 4.3, was an available option. However on the assumption that it was, they argue that it was incumbent on the Director General, in a case like the present, to consider which alternative procedure was the more appropriate for the organisation to follow and that a proper consideration of this issue would have resulted in a competition pursuant to Rule 4.8(b).
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> In support of the argument that transfer was not an available option, the complainants cite Judgment 470. That case involved a situation where, potentially, two provisions of the Pan American Health Organization (World Health Organization) Staff Rules might have been applied. One rule (Rule 1040) provided that temporary appointments terminated automatically on the completion of the agreed period of service. The other (Rule 1050.2) provided that when a post of indefinite duration was abolished a reduction in force

was to take place in accordance with an established procedure. In that case, the staff member held a temporary appointment that came to an end on 28 February 1979. Equally, his post was one of indefinite duration that was abolished. The Tribunal noted that the conditions for applying each staff rule were met and as the provisions conflicted, a choice had to be made. In that case the Tribunal declared that Rule 1050.2 should have been applied. The reasons appear to be that it provided to the complainant more generous benefits (and in particular compensation) in circumstances where he had worked for over 12 years for the organization and was near the age of retirement. The Tribunal noted that its conclusion was a fair one.

However in the present case, there was no conflict between Staff Regulation 4.3 and Staff Regulation 4.8(b). Having regard to the introductory words of the latter provision 'As a general rule', the provision was intended ordinarily to apply but was framed on the assumption that there may have been exceptions to that general rule. One such exception was found in Staff Regulation 4.3. The exception operated when two specific preconditions were met. The first was that it was a transfer that did not involve promotion. The second was that it was in the interests of the Organization to effect the transfer. The Tribunal notes that the Staff Regulation provided that the circumstances must be such that the interests of the Organization required the transfer. The use of the word 'require' makes it tolerably clear that the circumstances in which the Staff Regulation could have been used to fill a post were limited and it was not sufficient that the Director General might have believed it was simply preferable to use this power. That said, it was a matter for the Director General to assess whether the interests of the Organization required the exercise of the power. If those two preconditions were met then a decision could have been made to effect the transfer in accordance with Staff Regulation 4.3. That is not to say that a transfer must have been made. It would have remained open to WIPO to fill the post by competition. There is no warrant, having regard to the language of the two provisions and the general context in which they appear, for treating the power to transfer as more limited than that created by the express limits in Staff Regulation 4.3. If circumstances arose where there was a wholesale and widespread use of the power to transfer, then issues might arise about whether there was, in any particular case arising in that broader context, a *bona fide* exercise of the power. In such a case the types of arguments advanced by the complainants about the desirability of ordinarily filling posts by competition having regard to the overarching objective of Staff Regulation 4.1 would assume greater significance. However once it is accepted, as it should be, that in an isolated situation of the type under consideration, the power to transfer conferred by Staff Regulation 4.3 could have been exercised to fill the position, then its use in such a case was unexceptionable."

8. While the complainants' general argument in this matter was put slightly differently, it is effectively disposed of by the reasoning of the Tribunal quoted in the preceding consideration. However one specific argument needs to be addressed. The complainants argue that the "exceptional circumstances provision" in Staff Regulation 4.8(b) cannot be exercised in circumstances where WIPO's "irregular actions have caused the alleged exceptional circumstance". The complainants do not cite any jurisprudence of the Tribunal in support of this argument but rather cite jurisprudence of a domestic court in the United States of America. The better view is probably that an organisation's conduct does not render inapplicable the relevant provisions of staff rules or regulations or denies an organisation powers conferred under them (see, by analogy, Judgment 891, consideration 9). However, in the present case, WIPO was obliged, if the recommendation of the Appeal Board in internal appeal No. 2010/07 was accepted (as it was), to comply with the recommendation by whatever means were available under the Staff Regulations. It is true that the Appeal Board in the present matter suggested other unspecified mechanisms might have been more appropriate, however, it does not follow that WIPO was precluded from exercising the transfer power conferred by Staff Regulation 4.3(b).

9. An exception to this last mentioned conclusion may well arise if the power to transfer was not being exercised *bona fide* or, as the complainants argue, it was an arbitrary exercise of a discretionary power. That is to say, in the present case, it would not have been a *bona fide* exercise of the power to transfer if it was exercised after the adoption of the recommendation in internal appeal No. 2010/07 but with a view to creating a platform to do what was ultimately done, namely extend Mr G.'s contract for a further three years. However the Tribunal notes the Appeal Board's observation that it had not been shown that the Director General had in any way acted in bad faith when making the initial transfer and this observation was made with full knowledge of subsequent events involving the extension of Mr G.'s contract. There is no evidence before the Tribunal which establishes bad faith. The Tribunal should add that the extension of the contract and the response to the recommendation of the Appeal Board in the letter of 25 July 2012

to Mr G. may be viewed as manifesting an inappropriate level of cynicism on the part of the Administration, but the issue of the extension of the contract does not arise for consideration in these proceedings.

10. The question as to whether the transfer was an arbitrary exercise of power and indeed whether, as the complainants argue, it did not involve giving effect to the recommendation of the Appeal Board in internal appeal No. 2010/07, is answered by a comparatively recent decision of the Tribunal in Judgment 3206, delivered in public on 4 July 2013. Unfortunately the parties did not have the benefit of this decision when they identified the issues and joined issue in the brief (dated 24 January 2013 before the decision was delivered) and in the reply (dated 12 August 2013, very shortly after the decision was delivered) though it was referred to in the rejoinder and surrejoinder. That decision also involved WIPO and one of the complainants in these proceedings. The complainant successfully challenged the appointment of an external candidate to a D-1 position. The decision regarding that challenge is found in Judgment 2712 referred to in consideration 1 of this Judgment. As noted earlier, having set aside the decision to appoint the external candidate, the Tribunal ordered that WIPO shield the successful candidate. In fact, in 2008 WIPO transferred the external candidate whose appointment had been set aside, to another D-1 position. While that transfer was not directly in issue (a subsequent appointment to higher grade was), the Tribunal said of that transfer in Judgment 3206 at consideration 15:

> "it was perfectly acceptable to appoint [the external candidate who had originally been appointed to a position but whose appointment was set aside] 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".

That approach is equally applicable here.

11. The last issue raised by the complainants concerns the recommendation of the Appeal Board and the Director General's response to it in the impugned decision and the letter to Mr G. of 25 July 2012. The complainants characterised the recommendation

and response as "illusory". However this argument proceeds on a false premise, namely that it was open to the Appeal Board to make a recommendation intended to have a direct and immediate legal effect on the three-year extension and the Director General could have decided to act on such a recommendation. The subject matter of the internal appeal was the initial transfer of Mr G., as noted by the Appeal Board in the Board's conclusions of 31 May 2012, and not the extension. While the Board took what might be thought to be a commendably practical and principled approach (when formulating its recommendation), to the fact that had emerged during the appeal (that a later decision had been taken to extend Mr G.'s contract), it could do no more.

12. In the result the complaints should be dismissed. It is unnecessary to deal with other issues raised by the pleas.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 21 October 2015 Mr Giuseppe Barbagallo, Vice-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 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ