

**B. H. (No. 12), F. (No. 7), L.,
M. (No. 2), M. (No. 3) and S.**

v.

WIPO

128th Session

Judgment No. 4155

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr N. B. H. (his twelfth), Mr B. F. (his seventh), Mr W. L., Mr F. M. M. (his second), Mr C. M. (his third) and Mr O. S. against the World Intellectual Property Organization (WIPO) on 5 October 2017, WIPO's single reply of 16 January 2018, the complainants' rejoinder of 27 March and WIPO's surrejoinder of 9 July 2018;

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 allow all staff to vote when members of the Staff Council are elected.

The complainants are WIPO staff members. At the material time, with the exception of Mr L., they were duly elected members of the Staff Council. Staff Regulation 8.1 provides: "The staff shall have the right of association. The interests of the staff shall be represented before the Director General and his representatives by a Staff Council elected by the staff members."

On 3 November 2014 the Director General wrote to all staff informing them that, following the resignation of five Staff Council

members, the remaining members had announced that elections for the vacated seats in the Staff Council would be organised. He pointed out that although, for several years the Staff Council of the Staff Association had assumed the role of the Staff Council referred to in Staff Regulation 8.1, according to that provision the Staff Council was elected not only by members of the Staff Association but by the staff members. The Director General therefore encouraged all staff to take action to ensure that Staff Regulation 8.1 was faithfully adhered to in the forthcoming elections for the vacated seats in the Staff Council.

In February 2015 the Joint Advisory Group (JAG) received a petition from 71 staff members asking it to recommend that the Director General revise the Staff Rules pertaining to Staff Regulation 8.1 in order to: (i) clearly reflect the spirit as well as the letter of the regulation; (ii) clarify the relationship between the Staff Council and any association of staff; and (iii) ensure that all staff have the opportunity to elect the Staff Council. They attached proposals for the wording of new Staff Rules 8.1.1, 8.1.2 and 8.1.3.

On 21 December 2015 the Director General informed all staff that he had decided to endorse the following recommendations made by the majority of the members of the JAG in its report of 30 June 2015: (i) the meaning of the words “the staff” and “the staff members” in Staff Regulation 8.1 should be interpreted as meaning “*all* staff”; (ii) the substance of the provisions on staff representation should be the subject of open and fair discussions and negotiations between the Administration and the staff representative body; (iii) the role of the Administration in the process of establishing a new framework governing staff representation should be limited to providing guidance with a view to ensuring that certain minimum requirements were met, in particular that all staff were eligible to vote for the Staff Council; and (iv) that the Administration should consider taking transitional measures, such as setting a reasonable time limit for the organisation of elections ensuring that all staff members were eligible to vote and to be elected in the first elections of a new Staff Council.

On 21 March 2016 the complainants (save Mr L. and Mr S.), acting in their personal capacity and also in their capacity as staff

representatives, requested the Director General to review his decision. Their request was rejected on 23 May. In August 2016 all the complainants, with the exception of Mr L., lodged an appeal with the Appeal Board challenging the decision of 23 May acting in their personal capacity and also as staff representatives.

In March 2017 elections took place with all staff members being entitled to vote and eligible to stand for election to a new Staff Council. The six complainants presented their candidacy for the elections; Mr F. was elected. In June 2017 the Staff Association held elections for its own executive organ, which was renamed “Staff Council of the WIPO Staff Association”.

In its conclusions of 20 June 2017, the Appeal Board recommended that the Director General dismiss the appeal and consider a revision of Staff Regulation 8.1, in accordance with the applicable procedures, so as to stipulate expressly whether or not all staff were entitled to elect the Staff Council under that provision.

By a letter of 27 July 2017 the complainants, with the exception of Mr L., were informed that the Director General had decided to endorse the Appeal Board’s recommendation. They were awarded a total amount of 500 Swiss francs for the delay by the Appeal Board in issuing its conclusions. Since the Director General had concluded that the appeal was unfounded, he had not considered it necessary to reach a conclusion on the issue of their standing to appear before the Appeal Board, though WIPO reserved its rights to raise that issue in the event that they filed a complaint with the Tribunal. That is the decision the complainants impugn before the Tribunal.

The complainants ask the Tribunal to quash the impugned decision, to cancel the elections held in March 2017, to order the Administration to cease and desist from interfering in the electoral process of the duly established and elected Staff Council and Staff Association and to revert to its “established practice”. They also claim “actual costs”, and moral and exemplary damages. They further ask the Tribunal to grant them interest at the rate of 5 per cent per annum on all amounts awarded and to grant them any other relief it deems equitable, necessary and just.

WIPO asks the Tribunal to dismiss the complaints as irreceivable for lack of standing and unfounded.

CONSIDERATIONS

1. The complainants impugn a decision of the Director General of 27 July 2017 to dismiss an appeal by them (save for Mr L.) against an earlier decision of the Director General not to withdraw a decision embodied in a memorandum dated 21 December 2015. The substance of the last mentioned decision was, relevantly, that the Administration would facilitate the election of a new Staff Council in an election in which all members of staff were eligible to vote.

2. WIPO raises, as a threshold issue, the standing of the complainants to maintain their complaints before the Tribunal. The Tribunal is satisfied they have standing. It is unnecessary to address the question of whether they have because of their status as officers of the WIPO Staff Association. It is sufficient to note that these proceedings, as will be apparent shortly, concern fundamentally the right of each staff member to freely associate and the duty of WIPO to respect it which is a necessary incident of their employment (see, for example, Judgment 911, consideration 3). It is a right enjoyed by each of the complainants as a member of the staff of WIPO. Each is entitled to commence proceedings intended to defend that right or challenge an alleged breach of it.

3. These six complaints, which are similarly drafted and based on the same pleas, seek the same redress. They are therefore joined to form the subject of a single judgment.

The Tribunal however notes that one complainant, Mr L., did not seek a review of the decision of 21 December 2015, nor did he pursue an internal appeal. His complaint is irreceivable.

The complainants apply for the production of certain documents and for oral hearings. The Tribunal is satisfied that the matter can fairly

be resolved having regard to the material in the file and oral hearings are unnecessary.

4. Staff Regulation 8.1 established, at relevant times, a Staff Council. Staff Rule 8.1.1 required consultation with the Staff Council on questions relating to staff welfare and personnel administration, in particular principles governing appointment, promotion and termination and on questions pertaining to salaries and entitlements. It also allowed for proposals on such questions to be directed by the Staff Council to the Director General “on behalf of the staff”. The opening paragraph of the Regulation described the body as “a Staff Council elected by the staff members”. These words are of central importance in these proceedings.

5. In their brief, the complainants recount that the Staff Association was formed in December 1958 and that “[b]efore November 2014, the longstanding practice at WIPO for the past 56 years was that the Staff Council was elected by WIPO staff members who were also members of the Staff Association”. Later in the brief the complainants recount that the practice of WIPO was that the Staff Association represented the interests of all WIPO staff members and that “the Staff Council, elected by the Staff Association members, represented the interests of all staff members before the Director General, in conformity with Regulation 8.1”. Indeed, as the complainants point out, this long-standing role of the Staff Association’s Staff Council was recognised by WIPO in its pleas to the Tribunal in the proceedings leading to Judgment 2672, as summarised in the facts in that case (section C). Moreover WIPO does not contest, in these proceedings, what is said by the complainants about the history of the Staff Association and the long-standing role of its Staff Council as the body constituted under Staff Regulation 8.1.

6. The pleas of both the complainants and WIPO traverse a number of issues. However two, in combination, are clearly decisive. The complainants contend, firstly, that the impugned decision to introduce new measures for Staff Council elections violated the right of freedom of association and, secondly, that a long-standing practice in which only members of the Staff Association vote for the election of

officers to the Staff Council was a binding element of WIPO policy and to withdraw from such a practice after so many years was a gross breach of the principle of good faith and fair dealing. The answer of WIPO, as to the second element concerning practice, is that a practice which is inconsistent with staff regulations cannot obtain legal force, citing Judgment 3071, consideration 28. The answer of WIPO in relation to the first element is, in substance, dependent on the view WIPO takes of the proper construction of Staff Regulation 8.1 coupled with an argument that staff who are not members of the Staff Association have a right not to join or belong to an association/union and that “the principle of freedom of association in fact dictates that all staff members should have the right to vote for the Staff Council established under Staff Regulation 8.1, irrespective of whether they belong to a particular staff association/union”.

7. In November 2014, the Director General sent a message to the staff effectively declaring that Staff Regulation 8.1 required all staff to be able to vote in an election for the Staff Council. Thereafter the Administration, guided by an opinion of the JAG, took steps to alter the *status quo ante* and bring about the election of members of the Staff Council by all staff rather than only those who are members of the Staff Association. The majority of the members of the JAG had made the following relevant recommendations:

- “The meaning of the words ‘the staff’ and ‘the staff members’ in Staff Regulation 8.1, including in the phrase ‘[...] by a Staff Council elected by the staff members’, should be interpreted as meaning ‘all staff’.”
- “To the extent that staff representation related issues were to be included in the Staff Regulations and Rules, having due regard to the principle of Freedom of Association and Protection of Right to Organize, the substance of all such provisions should be the subject of open and fair discussions and negotiations between the Administration and the staff representative body.”

8. The circumstances prevailing immediately before November 2014 were that the body described in Staff Regulation 8.1 was constituted by members of the Staff Association who had been elected to the Association's Staff Council under the rules of the Association. This involved, at least implicitly, an acceptance by the Administration that Staff Regulation 8.1 permitted or authorised the constitution of the Staff Council in this way. What, in effect, WIPO has done, is adopt and assert an interpretation of Staff Regulation 8.1 which is partisan in the sense that it is an interpretation which was obviously aimed at disadvantaging the Staff Association and its members, having regard to the long-standing practice concerning the constitution of the Staff Council, and favouring the Administration in the sense that it does not have to deal with individuals, as members of the Staff Council, with, necessarily, what is almost certainly significant authority deriving from the membership of the Staff Association and their election by that membership. This constitutes an abuse of power.

9. The complainants seek, by way of relief, firstly an order quashing the impugned decision, secondly an order setting aside the elections held in March 2017 for members of the Staff Council held in accordance with the Administration's view of the scope of Staff Regulation 8.1, thirdly an order requiring the Administration to desist from interfering in the Staff Association's electoral process, fourthly an order for costs, and fifthly and finally an order for moral and exemplary damages and interest.

10. Helpfully, WIPO addressed, separately, each element of the relief claimed. No submission is made that, in the event that the complainants are successful on the merits, the impugned decision should not be set aside. It should be. In relation to setting aside the March 2017 elections, WIPO points to the fact that a separate internal appeal has been brought against the conduct of those elections. However, as far as the Tribunal can ascertain, these are proceedings alleging procedural and other irregularities in the election process. They do not concern the fundamental question of whether the Administration should have, as it did, facilitated the conduct of those elections on its

view of the operation of Staff Regulation 8.1. It should not have and an order should be made setting aside those elections. There is no evidence that would sustain a conclusion that WIPO has interfered with the Staff Association's elections. The third order should not be made.

11. No moral damages should be awarded, nor should be exemplary damages.

12. The complainants seek an order for their "actual costs". This is not an order made by the Tribunal, at least ordinarily. However the complainants are entitled to an order for costs which the Tribunal assesses in the sum of 8,000 Swiss francs payable within 30 days of the date of the public delivery of this judgment. All other claims should be dismissed.

DECISION

For the above reasons,

1. The complaint filed by Mr L. is dismissed as irreceivable.
2. With respect to the other complainants, the impugned decision of 27 July 2017 and the decision of 21 December 2015 are set aside.
3. The results of the elections of March 2017 of members to constitute the "Staff Council" are set aside.
4. WIPO shall pay the complainants (not including Mr L.), collectively, 8,000 Swiss francs costs payable within 30 days of the date of the public delivery this judgment.
5. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ