

A. (No. 9), B. H. (No. 9) and K. (No. 14)

v.

WIPO

122nd Session

Judgment No. 3643

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr I. A. (his ninth), Mr N. B. H. (his ninth) and Mr A. M. K. (his fourteenth) against the World Intellectual Property Organization (WIPO) on 28 October 2013 and corrected on 26 March 2014, and WIPO's single reply of 30 June 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 lawfulness of the procedure followed to appoint Ms R. to a P4 position in the Human Resources Management Department, Administration and Management Sector.

With effect from 1 August 2011 Ms R. was transferred to WIPO from the Office of the United Nations High Commissioner for Refugees (UNHCR) in accordance with the "Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among Organizations applying the United Nations Common System of Salaries and Allowances" (hereinafter "the Inter-Organization Agreement") of 25 June 2003.

Ms R. was employed under a Project Personnel Contract and was appointed – in the absence of a competition – for a fixed-term of one year (renewable subject to satisfactory performance) at grade P-4 as

Peoplesoft HRMS Functional Lead, Human Resources Management Department, Administration and Management Sector (hereinafter “the post” or “the contested post”). Ms R.’s appointment was made pursuant to Office Instruction No. 12/2011 entitled “Requests for Human Resources for Projects Funded under the Reserve Funds: Procedures for Program Managers”. The post was financed from resources reserved for project posts and could not be converted to a post financed under the regular budget. Ms R.’s appointment was announced to WIPO staff by way of Information Circular No. 27/2011 of 9 September 2011.

In a single letter of 4 November 2011 the complainants, acting individually and collectively in their capacity as members of the Staff Council, requested the Director General to review the decision to appoint Ms R. to the contested post and they asked that he withdraw that decision forthwith. They stated that Ms R.’s appointment was tainted with procedural flaws and irregularities, in violation of Staff Regulations 4.9(a), 4.9(b), 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. In addition, as the appointment had been purportedly made pursuant to Office Instruction No. 12/2011 of 30 March 2011 which had been “revoked and rescinded” by the Administration by way of Office Instruction No. 29/2011 of 29 September 2011, the appointment was null and void *ab initio*.

By a letter of 23 December 2011 the complainants were informed that the Director General was unable to withdraw or overturn his decision to appoint Ms R. to the contested post. She had been transferred from the UNHCR in accordance with the Inter-Organization Agreement and Staff Regulation 4.8(b) expressly provided for the possibility of recruitment without the need for a competitive process. In addition, Ms R.’s letter of appointment had implicitly made reference to Office Instruction No. 12/2011, which had been in force at the time the letter of appointment was issued. Nevertheless, upon the expiration of her contract, Ms R. would be offered a temporary appointment under the new Staff Regulation 4.14bis and it was anticipated that this proposed action would alleviate the Staff Council’s concerns regarding the matter.

In a single appeal (submitted in summary form on 19 March 2012 and received by the WIPO Appeal Board in completed form on 14 May 2012) the complainants challenged the decision of 23 December 2011, maintaining their position that Ms R.'s appointment was a violation of Staff Regulation 4.8(b) and paragraph 17 of Office Instruction No. 58/2006 and that Office Instruction No. 12/2011 did not provide any basis for departing from the general rule regarding the need to hold a competitive recruitment process. On 24 December 2012 they objected to the inclusion of Mr R. (who was the staff-elected alternate member of the Board) on the Appeal Board panel.

In its conclusions of 31 January 2013 the Appeal Board found that the evidence suggested that no consideration had been given to the requirement that recourse to a competition was necessary as a general rule. Ms R. had simply been transferred to the contested post in reliance on the Inter-Organization Agreement and her appointment in this manner should be considered as having been invalidly made. The Appeal Board recommended that the Director General arrange for the contested post to be filled in accordance with Staff Regulation 4.8(b) by inviting expressions of interest from staff. If no staff member with comparable qualifications and suitability to Ms R. expressed an interest in being selected for the post, the Director General could confirm Ms R.'s appointment. It further recommended that the complainants be awarded legal costs for eight hours of work undertaken by their lawyer. Regarding the complainants' challenge to the composition of the Appeal Board, the Board referred to a summary (dated 24 January 2013) of a discussion it had had on the issue and noted that Mr R. had concluded that there was no reason to recuse himself and that the other two members of the Appeal Board panel had agreed.

By a letter of 28 March 2013 the complainants were informed that the Director General had decided to adopt the Appeal Board's recommendations with one exception relating to the reimbursement of legal fees. Expressions of interest would be invited for the contested post by way of an e-mail sent to all WIPO staff; a four-week deadline would apply. In the event that there were expressions of interest by staff members whose qualifications and suitability for the post were

comparable to those of Ms R., the Human Resources Management Department would then hold a competition for the post in accordance with Staff Regulation 4.9(a). In the event that no suitable candidates expressed interest in the contested post, the Director General would confirm Ms R.'s appointment.

By a letter of 30 July 2013 the complainants were informed that, following implementation of the Director General's decision of 28 March, one candidate had expressed interest in the contested post. The Administration had subsequently concluded that this individual did not meet the requirements of the job description and thus, the Director General had confirmed Ms R.'s appointment. This is the impugned decision.

As preliminary matters, the complainants request oral proceedings and seek the discovery of documents related to the applicant who expressed an interest in the contested post. They ask the Tribunal to quash the "promotion" of Ms R. to the contested post. They request that a new vacancy announcement be issued with respect to that post and that a competitive recruitment process be held in a transparent manner. They seek appropriate moral damages, reimbursement of all costs and the actual legal fees that they incurred in bringing their complaints. They request that all Staff Association staff members who were recruited through traditional competitive selection processes be compensated for moral damage. They claim additional and exemplary moral damages for delay in the internal appeal process. Lastly, they seek such other relief as the Tribunal determines to be fair, just and necessary.

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. On 28 October 2013, complaints were filed with this Tribunal on behalf of three individuals, namely Mr A., Mr B. H. and Mr K.. In their brief, the complainants contend that they are submitting the complaints in their individual capacity and also, collectively, as duly

elected staff representatives of the WIPO Staff Council. They challenge the appointment of Ms R. to a position within WIPO in 2011.

2. WIPO argues in its reply that the complaints are irreceivable. It is convenient to deal with this issue at the outset. The issues raised in these complaints concerning receivability have been raised in other proceedings commenced by the same complainants and which will be the subject of a judgment given at the time of this Judgment (see Judgment 3642). No party requested the joinder of this matter with the other matter in order that one judgment is given. Also, the facts are different. Accordingly a separate judgment is given in these proceedings though much of the discussion of the legal issues concerning receivability is repetitious of what is said in Judgment 3642.

3. The complainants have requested an oral hearing. Such a hearing is unnecessary and the request is rejected.

4. It is desirable first to set out, in a summary way, the events which led to these proceedings in the Tribunal. Ms R. was appointed as Peoplesoft HRMS Functional Lead, Human Resources Management Department, Administration and Management Sector following a transfer to WIPO from the UNHCR. The transfer took place under the terms of the Inter-Organization Agreement. The transfer and appointment took place without any vacancy announcement or competition. The appointment was announced in Information Circular 27/2011 published on 9 September 2011 which indicated that the appointment had been effective 1 August 2011.

5. On 4 November 2011 members of the Staff Council requested the Director General to review the decision to appoint Ms R. They contended there had been a violation of WIPO Staff Regulations 4.9(a) and 4.8(b) and the selection process had been procedurally flawed. By letter dated 23 December 2011 written on behalf of the Director General by the Acting Director, Human Resources Management Department (HRMD), these contentions were rejected and the letter indicated that the decision to appoint Ms R. would not be withdrawn.

6. In May 2012 the complainants (and others) lodged an appeal to the WIPO Appeal Board resulting in a report dated 31 January 2013. In its report, the Appeal Board recommended that the Director General allow the appeal and that, in substance, the Director General invite expressions of interest in the position and that unless no staff member with comparable qualifications and suitability expressed interest, the position be filled by competition as contemplated in Staff Regulation 4.8(b). In a letter dated 28 March 2013, the complainants were informed that the Director General had agreed to invite expressions of interest as proposed by the Appeal Board. In a further letter dated 30 July 2013 written by the Director HRMD on behalf of the Director General, the appellants were informed that only one candidate expressed interest in the position but that person had been assessed as having neither the educational background nor the work experience which met the requirements of the job description. The complainants were informed that the Director General had confirmed Ms R.'s appointment to the position. This is the impugned decision.

7. The Tribunal now turns to consider the standing of the complainants and thus the receivability of the complaints. It is necessary to focus on how this issue arose in the proceedings and the approach of the parties in addressing it. The complainants address the question of receivability in their brief in a summary way but did not file a rejoinder dealing with the arguments of WIPO which are advanced in its reply. This issue arises in the Tribunal against a background in which the Appeal Board had concluded, in substance, that the complainants (and others) as appellants had standing to maintain the internal appeal in their capacity as staff representatives but did not have standing in their individual capacity. The Appeal Board concluded "none of the [a]ppellants had provided evidence" to establish standing in their individual capacity.

In their brief in these proceedings in the Tribunal, the complainants, collectively, merely assert that they are submitting the complaint "in their individual capacities as staff members of WIPO" and they make no attempt in the brief to identify the applicable principles and to establish the facts which, on the application of those principles, would support a

conclusion that all or some of the complainants had standing to maintain the complaint in their individual capacity.

At the forefront of WIPO's submissions in their reply on this question is the judgment of the Tribunal relied upon by the Appeal Board, namely Judgment 1272. The principle in Judgment 1272 can be summarised as being that standing depends on the complainant wanting the position even though she or he may not be a serious contender and might not care deeply about it and irrespective of the complainant's qualifications or prospects of success. However there are other judgments of the Tribunal that may well take a broader view of the standing of an individual to challenge the appointment of a person to a position which might not require a complainant to demonstrate interest in the position but simply eligibility to occupy the position (see, for example, Judgment 2832, consideration 8).

However the complainants in these proceedings made no attempt to challenge, in a rejoinder, the argument of WIPO. Nor did they attempt to identify in a rejoinder what they say are the applicable principles and, additionally, establish the factual foundation which would result in these complaints being receivable because they can be maintained by the complainants in their individual capacity. In the absence of such evidence it is difficult for the Tribunal to be affirmatively satisfied that the complainants have standing in their individual capacity to bring these complaints. Accordingly, the Tribunal concludes that the complaints are not receivable in so far as they are brought by the complainants in their individual capacity.

8. It is now necessary to consider whether the complainants have standing in their capacity as duly elected staff representatives of the WIPO Staff Council. WIPO argues they do not.

9. The jurisprudence of the Tribunal on the standing of elected staff representatives to take proceedings before the Tribunal in a case such as the present is not uniformly clear. Recently in Judgment 3557, consideration 3, the Tribunal indicated that in certain circumstances staff representatives may challenge the appointment of another official, but

can only do so if they allege breach of their own individual rights. In another recent case, Judgment 3546, the Tribunal concluded it was unnecessary to consider whether a staff representative had standing generally to challenge the extension of the appointment of another official because the complainant, who was a staff representative, had had a right to be advised of the proposal to extend the appointment and that right had been allegedly violated. That was viewed as sufficient to give the complainant standing.

10. On the other hand, the right of a staff representative to file a complaint challenging the appointment of an official has been recognised as an aspect of the right of an elected staff representative to bring proceedings on behalf of a staff committee with a view to preserving common rights and interests of staff (see Judgment 2791, consideration 2, and Judgment 2755, consideration 6).

11. However ultimately, the Tribunal's jurisdiction and the related question of a person's right to invoke that jurisdiction should be determined by reference to the Tribunal's Statute. Article II addresses both questions. The Tribunal is conferred with jurisdiction to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office and other organisations which have submitted to the Tribunal's jurisdiction, as well as complaints alleging non-observance of such provisions of the relevant Staff Regulations as are applicable to the case. Having identified and defined the jurisdiction, Article II identifies in paragraph 6, the class or classes of people who can invoke that jurisdiction. That paragraph provides that "[t]he Tribunal shall be open [...] to the official" and to any person to whom the "official's rights have devolved" on death together with any other person entitled to some right of a deceased official. A legal normative document conferring jurisdiction on a court should not be narrowly construed. However there is little room to doubt that the expression "shall be open to the official" is a reference to the official whose terms of appointment have allegedly not been observed or, in relation to whose circumstances (in "a case"), applicable provisions of the Staff Regulations have allegedly not been observed. This is reinforced by the reference to "the official's rights", in

the singular, in relation to rights that have devolved on death. That is to say, standing is directed to the vindication or enforcement of the rights of an individual officer. The clause does not cast the net any wider in relation to who can invoke the jurisdiction of the Tribunal.

12. Similarly in Article VIII, dealing with remedies, the focus of the Article is the provision of relief or a remedy to an individual complainant on the assumption that the relief or remedy will overcome the effect or consequences on that complainant of the non-observance by either undoing the effect of the defendant organisation's conduct (by rescission) or the payment of compensation to the complainant.

13. Accordingly, in the present case, the question is whether any of the complainants is an official with some or all of these characteristics. None was likely to have been a candidate for the position to which Ms R. was appointed without competition. Even assuming there should have been a competition and the obligation on WIPO to conduct the competition gave rise to a right in potential candidates to require a competition in order to further their candidacy, this non-observance of the Staff Regulations had no bearing on the position of other officials of WIPO who are not potential candidates, including officials who were elected representatives.

14. It might be thought all officials have a "right" to have the organisation which employs them comply with and observe the organisation's Staff Regulations irrespective of whether any failure to comply or non-observance has any bearing on their own situation as an official of the organisation. If this were so, all officials would have standing to commence proceedings in the Tribunal in relation to any non-observance of the Staff Regulations. It is highly improbable that the Statute intended this result. But is an elected staff representative able to enforce this "right" even though all other officials cannot unless affected by the non-observance? There is no basis in the language or structure of the Statute or by reference to the nature of the jurisdiction conferred on the Tribunal, to suggest this is so. Consistent with the entire focus of the Statute, the right of an elected representative to enforce the Staff Regulations for the benefit of all staff is limited to circumstances where the provision

(which has allegedly not been observed) confers a right on the elected representative as a member of staff. It might be a right limited to the staff representative (such as the right to be consulted) or it might be a right enjoyed by all staff (such as the right to freedom of association).

15. In the result, the Tribunal does not accept that the complainants have some special standing derived from their status as elected representatives to require WIPO to hold a competition for the position to which Ms R. was appointed.

16. The complainants do not have standing to bring these complaints. They are irreceivable and, for that reason, should be dismissed.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 5 May 2016, 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 6 July 2016.

GIUSEPPE BARBAGALLO

DOLores M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ