

108th Session

Judgment No. 2880

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 2706, filed by Ms C. C. against the World Intellectual Property Organization (WIPO) on 30 January 2009, the Organization's reply of 18 May, the complainant's rejoinder of 20 August and WIPO's surrejoinder of 8 October 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant is a staff member of WIPO and currently holds grade G.4. In Judgment 2706, which was delivered on 6 February 2008 on the complainant's first complaint, the Tribunal set aside the Director General's decision not to promote her and ordered the Organization to review the classification of her post within six months of the date of delivery of that judgment and, if appropriate, to promote her retroactively. In particular, it ordered that an experienced external United Nations classifier evaluate the complainant's post and, should

he or she conclude that the post ought to be reclassified, that he or she also determine the date on which reclassification should take effect. Thereafter, a proposal for reclassification should be examined by the Classification Committee. If reclassification actually occurred, the complainant's application for promotion should then be submitted to the Promotion Advisory Board, which should also consider it from the point of view of possible promotion on merit. In the event that the meetings of the above bodies did not fall within the six-month deadline set by the Tribunal, the Organization should convene a special meeting of these bodies. It would be incumbent upon the Director General to decide, on the basis of the proposals submitted to him, whether to promote the complainant and, if appropriate, to backdate her promotion. The Tribunal also ordered the Organization to pay her 40,000 Swiss francs in compensation and 7,000 francs in costs.

On 19 February 2008 the complainant's counsel wrote to WIPO's Legal Counsel to request payment of the amounts awarded by the Tribunal and to enquire as to the steps the Organization had taken concerning the reclassification of her post and her promotion. The payment of the amounts due was made that same day and by letter of 20 February the complainant's counsel was informed that regarding the execution of the judgment the competent departments had been given appropriate instructions.

Prior to the delivery of Judgment 2706, by letter of 11 December 2006, the complainant was charged with serious misconduct in connection with the publication in the local press on 3 December 2006 of an article which reflected badly on the Organization's and the Director General's reputation. The Joint Advisory Committee, to which the matter was referred, concluded in a report dated 26 July 2007 that the complainant was responsible for the damage caused to the Organization, the Director General and other staff members through the publication of the newspaper article. It recommended *inter alia* that she be relegated to a lower salary step within the same grade and that her advancement to the next salary step be delayed for a consecutive period of three years, without the possibility of promotion during at least that same period, regardless of any upward

reclassification of her post. By memorandum of 15 October 2007 the complainant was informed that the Director General had decided to endorse the Joint Advisory Committee's recommendations for the imposition of disciplinary sanctions, which, as she was subsequently advised, would take effect on 1 November 2007. On 25 October she requested a review of that decision, but she was informed by memorandum of 12 November 2007 that the Director General had decided to maintain it. She lodged an appeal with the Appeal Board on 12 February 2008.

Prior to that, an earlier classification review of the complainant's post resulted in the Director General's approval on 13 July 2007 of the Classification Committee's recommendation that the post be reclassified at grade G.5, in line with the results of a desk audit that had been carried out on 6 February 2007. The decision was communicated to the complainant orally and to her manager by memorandum of 26 July 2007.

On 15 May 2008 the Appeal Board rendered its conclusions on the complainant's appeal against the disciplinary sanctions imposed by the Director General. It considered the sanctions applied as "unnecessarily harsh" and recommended that they be considerably reduced and that the complainant's file be revised accordingly. On 22 May an external classifier was engaged to review the complainant's post. She issued a report the following day, in which she recommended that the post be confirmed at grade G.5 and that the post description, on the basis of which it had been evaluated, become effective as from December 2006. By letter of 23 July 2008 the complainant was informed that the Director General had decided to refer the Appeal Board's report to the Joint Advisory Committee before taking a final decision on the matter of disciplinary sanctions. The following day, her application for promotion was considered by the Promotion Advisory Board at its 17th session.

In a letter of 30 July to the Director General, the complainant's counsel denounced what he described as the Organization's failure to take any steps to implement Judgment 2706 or the Appeal Board's recommendations. By a memorandum of the same day the Director of

Human Resources Management advised the complainant that the Director General had taken the steps outlined in Judgment 2706, but that he had been unable to promote her because of the decision to impose disciplinary sanctions. He noted in particular that on 13 July 2007 the Director General had approved the Classification Committee's recommendation that the post be reclassified at grade G.5 and that she had been accordingly informed at the time.

The Appeal Board's recommendations were referred to the Joint Advisory Committee on 17 September 2008. In its report of 16 October the Committee found that there was no basis on which to reduce the disciplinary sanctions that had been applied to the complainant or to revise her file. By memorandum of 28 November 2008 the complainant was informed that the Director General had decided to accept the Joint Advisory Committee's recommendations and to maintain the disciplinary sanctions imposed on her on 15 October 2007. That decision is the subject of the complainant's third complaint before the Tribunal (see Judgment 2879, also delivered this day). On 30 January 2009 the complainant filed her application for execution of Judgment 2706.

B. The complainant argues that the Organization has failed to promote her within the six-month deadline set by the Tribunal in Judgment 2706 and has ignored its orders for consideration by the Promotion Advisory Board of the questions concerning the effective date of her promotion and her application for a merit promotion. Instead, WIPO has obstructed her promotion through the imposition of unjustifiable disciplinary sanctions and has thereby frustrated the purpose of Judgment 2706.

She accuses the Administration of giving no weight to the recommendations of the Appeal Board, as evidenced by its decision to refer them back to the Joint Advisory Committee, the same committee whose recommendations formed the basis of the appealed decision. She also accuses the defendant of deliberately delaying the imposition of disciplinary sanctions until after the closure of the written procedure in the case leading to Judgment 2706, so as to prevent the Tribunal from considering their validity when ruling on her first complaint.

In the complainant's opinion, the Organization's failure to promote her is all the more unacceptable since the requirements for promotion are fulfilled: her post has been reclassified at grade G.5 and the case has been examined by the Promotion Advisory Board. Moreover, had the Organization followed the Tribunal's orders, the external classifier would also have confirmed that the duties of her post corresponded to grade G.5 as from 11 March 2003.

The complainant asks that the Organization be ordered to promote her to grade G.5 with retroactive effect from 11 March 2003 and to pay her the corresponding difference in salary and in pension fund contributions so as to place her financially in the position she would have been in had she been promoted on that date. She also asks that WIPO be ordered to review, within two months from the date of delivery of the judgment, her application for a merit promotion based solely on the events up to 31 July 2006 and, if appropriate, to promote her to grade G.6 with retroactive effect from 31 July 2006 and to pay her the corresponding difference in salary and in pension fund contributions. She claims 40,000 Swiss francs in moral damages and 7,000 francs in costs.

C. In its reply WIPO requests that the Tribunal order a stay of proceedings pending delivery of its judgment on the lawfulness of the disciplinary sanctions imposed on the complainant, which are the subject of separate proceedings before the Tribunal. It observes that the matters examined by the Tribunal in Judgment 2706 related to events that occurred prior to those giving rise to disciplinary sanctions and that these sanctions made it impossible for the Director General to consider the complainant's promotion.

However, the Organization submits that it took every reasonable step to implement Judgment 2706 within the six-month deadline, but that it was prevented from promoting the complainant in light of the three-year ban on promotion applied to her. It explains that a classification review of the complainant's post was undertaken, and the matter was submitted to the Classification Committee, whose recommendation that the post should be reclassified at grade G.5 was approved by the Director General. Subsequently, pursuant to

the judgment, a further review was carried out by an external classifier, who was also asked to consider the appropriate date for the reclassification to become effective. In addition, the amounts awarded by the Tribunal in damages and costs were promptly paid and the application for promotion was submitted to the Promotion Advisory Board for its consideration.

Emphasising that the Tribunal's order was for the complainant to be promoted "if appropriate", the defendant argues that promotion would not only have been "manifestly inappropriate" but also contrary to the Staff Regulations, given that the complainant had been found guilty of serious misconduct. It points out that the procedure leading to the imposition of disciplinary sanctions was fully in line with the applicable rules and that the complainant was given the opportunity to present her case orally. Moreover, it notes that the charges levied against her were reviewed by the Joint Advisory Committee with great care and that its finding of serious misconduct was not in fact invalidated by the Appeal Board.

D. In her rejoinder the complainant submits that the request for a stay of proceedings is a further example of the Organization's continued attempts to delay her overdue promotion. She accuses WIPO of bad faith and failure to observe its duty of care towards her. With regard to the contention that the Tribunal's order was for the complainant to be promoted "if appropriate", she points to the authoritative French text, which clearly requires the Director General to promote the complainant "*le cas échéant*", that is if the external classifier, the Classification Committee and the Promotion Advisory Board make recommendations to that effect. She asserts that the classifier who reviewed her post in May 2008 was not given access to all relevant information and was thus prevented from determining the level of her responsibilities prior to December 2006. Moreover, she

was never informed of the outcome of the Promotion Advisory Board's deliberations with respect to her promotion based on reclassification of her post or on merit.

The complainant asks that the Organization be ordered to produce the report of the Promotion Advisory Board at its 17th session, which was held on 24 July 2008, and to grant her the opportunity to submit her comments on that report. She modifies her initial claim that WIPO be ordered to review her application for a merit promotion and to promote her to grade G.6, by replacing the phrase "if appropriate" by the phrase "if so recommended by the Promotion Advisory Board".

E. In its surrejoinder WIPO reiterates that the complainant's promotion was not appropriate in view of her misconduct that gave rise to disciplinary proceedings. It asserts that it acted in good faith in implementing the Tribunal's orders and that its interpretation of the words "*le cas échéant*" as "if appropriate" was not only correct but also in line with the Registry's translation. It denies that important information was withheld from the external classifier and submits that the latter's determination of the effective date of the complainant's post description was the result of a "professional assessment". Concerning the complainant's request that it produce the report of the Promotion Advisory Board, the Organization offers to provide a copy of the report to the Tribunal for examination *in camera*.

CONSIDERATIONS

1. The complainant filed a complaint with the Tribunal against WIPO on 8 November 2006 that resulted in Judgment 2706, delivered on 6 February 2008. She now brings an application for execution of that judgment. In addition to setting aside the impugned decision, the Tribunal, in its judgment, granted the complainant the following relief:

- “2. The Organization shall, within six months from the date of delivery of this judgment, review the classification of the post and the complainant's application for promotion, as specified in consideration 15 above.

3. If appropriate, WIPO shall promote the complainant, retroactively if need be, in accordance with the terms set forth in that consideration.
4. It shall pay the complainant the sum of 40,000 Swiss francs in compensation for all the injuries suffered.
5. It shall also pay her costs in the amount of 7,000 francs.”

2. In consideration 15 of the judgment, the Tribunal specified that:

- the complainant’s post should be evaluated by an experienced United Nations classifier;
- the evaluation could be conducted on the basis of a job description issued by WIPO in December 2006;
- if the post classifier reached the conclusion that the post should be reclassified, the classifier should also determine the date on which the contents of the post started to match the new classification proposed;
- depending on the outcome of the evaluation, the Classification Committee should examine the proposal for reclassification of the post;
- if reclassification occurred, then the complainant’s application for promotion should be submitted to the Promotion Advisory Board which should also consider it from the point of view of possible promotion on merit; and
- the Director General should decide on the basis of the proposals submitted whether to promote the complainant to the new grade thus determined and, if appropriate, to backdate the promotion to the date on which it should have taken place.

3. As the awards of compensation and costs have been paid, the application only concerns the Tribunal’s orders in relation to reclassification and promotion.

4. Shortly after the filing of the complaint giving rise to Judgment 2706, the complainant was charged with serious misconduct.

This led to the imposition of disciplinary sanctions on 15 October 2007 including a three-year ban on any promotions or advancements in salary step. The complainant challenged this decision internally. Ultimately, on 28 November 2008 she was advised that the Director General had decided to uphold the finding of serious misconduct and the sanctions imposed in October 2007.

5. The complainant filed a complaint with the Tribunal impugning the Director General's decision. In Judgment 2879, also delivered this day, the Tribunal set aside this decision on the basis that the finding of misconduct was unfounded and, in relief not material to this application, awarded the complainant moral damages and costs.

6. Many of the arguments advanced in WIPO's pleadings in this application have been overtaken by the ruling in Judgment 2879 and will not be considered. WIPO maintains that it has taken every reasonable step to execute Judgment 2706. In addition to having paid the damages and costs, it has had an external classifier evaluate the complainant's post and it submitted the complainant's application for promotion to the Promotion Advisory Board for its consideration. The only step it has not actually taken is to promote the complainant.

7. According to the record, on 22 May 2008 WIPO engaged an external classifier to review the complainant's post. In her report, the external classifier recommended that the post be confirmed at grade G.5. In accordance with the Tribunal's instructions in consideration 15 of Judgment 2706, the external classifier also considered the effective date that should be recommended for the reclassification of the post; she concluded that the effective date should be December 2006. She also compared the December 2006 job description with an unsigned job description dated May 2005 and found that the earlier job description had clearly lower responsibilities and thus was not the same as the more recent one. WIPO states that it is prepared to provide a copy of the 2008 report of the Promotion Advisory Board to the Tribunal on a confidential basis. It notes that it

will show that the Board was made aware of the pending proceedings involving the complainant.

8. It would appear, therefore, that as the Classification Committee has already found that the post should be reclassified at grade G.5, the remaining steps to be taken in accordance with Judgment 2706 are a consideration of the complainant's application for promotion by the Promotion Advisory Board and for the Director General to decide on the basis of the latter's proposals whether to promote the complainant. The Tribunal wishes to make it clear that the Board is to consider the complainant's application for promotion on the basis of both reclassification and merit, as contemplated in Judgment 2706.

9. The Tribunal also wishes to clarify another matter, namely the meaning of the phrase "*le cas échéant*" in the authoritative French text of its orders in Judgment 2706. Having regard to the context in which it is used and the instructions given by the Tribunal in Judgment 2706, under 15, it is clear that the order means that "if the required conditions are met" or "in such a case" the complainant is to be promoted. That is, the Director General is to base his decision on relevant materials, namely the proposals of the Classification Committee and the Promotion Advisory Board.

10. The main consequence of the Tribunal's conclusion that the finding of misconduct was unfounded is that the imposition of the sanctions, and particularly the three-year ban on promotions, was unlawful. This means that a decision to promote the complainant must be retroactive to December 2006. A further consequence is that the complainant was denied the opportunity to have her application for promotion considered while the ban was in place, for which the complainant is entitled to moral damages in the amount of 15,000 Swiss francs.

11. The Tribunal will order that the consideration of the complainant's application for promotion by the Promotion Advisory Board and the decision to be taken by the Director General on the basis of the Board's proposals shall both be concluded within sixty days of the delivery of this judgment. The complainant is also entitled to costs in the amount of 5,000 francs.

DECISION

For the above reasons,

1. The application for the execution of Judgment 2706 is granted.
2. Within sixty days of the delivery of this judgment, the Promotion Advisory Board shall consider the complainant's application for promotion and the Director General shall take a decision on the matter, in accordance with considerations 8 to 11 above.
3. WIPO shall pay the complainant moral damages in the amount of 15,000 Swiss francs.
4. It shall also pay her 5,000 francs in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 6 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Dolores M. Hansen
Patrick Frydman
Catherine Comtet