

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

119th Session

Judgment No. 3421

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. N. against the World Intellectual Property Organization (WIPO) on 15 February 2012 and corrected on 2 May, WIPO's reply of 14 August, the complainant's rejoinder of 15 November 2012 and WIPO's surrejoinder of 13 June 2013;

Considering the comments submitted by Ms V. on 26 June 2014 at the Tribunal's request;

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 and the pleadings may be summed up as follows:

A. Information regarding the complainant's career at WIPO is to be found in Judgment 3287, delivered on 5 February 2014, on his first complaint. Suffice it to recall that the complainant entered WIPO's service in 1999 and obtained a permanent appointment on 1 September 2007. At the material time he was performing duties at grade P4.

On 27 April 2010 WIPO published a vacancy announcement for a grade P5 post. The complainant applied on 3 June and, having been shortlisted, he was interviewed by the Appointment and Promotion Board on 8 July. On 30 August he was informed that his application had been unsuccessful.

On 22 October 2010 the complainant asked the Director General to review the decision to reject his candidature, arguing in particular that his non-selection was due to bias and harassment to which he had been subjected as an African staff member and that the selection procedure had been flawed. By a letter of 17 December 2010 he was informed that the Director General had decided to deny his request. The explanation he was given for his non-selection was that he did not possess one of the required qualifications listed in the vacancy announcement, namely experience at a senior level within a national or regional intellectual property office.

On 11 March 2011 the complainant submitted an appeal to the Appeal Board. In its report of 19 September 2011, the Board concluded that the complainant had not been a victim of bias and that the selection procedure had not been improperly conducted. The Board therefore recommended the dismissal of his appeal. On 17 November 2011 the complainant was informed that the Director General had decided to adopt the Board's recommendation. That is the impugned decision.

B. The complainant contends that the selection process was tainted with several flaws relating in particular to the membership of the Appointment and Promotion Board and the wording of the vacancy announcement. In addition, he submits that the procedure in question lacked transparency and that the Appeal Board did not fully review the decision to reject his candidature, in breach of his right to an effective internal appeal.

He emphasises that the decision not to select him was based primarily on the fact that he lacked experience at a senior level within a national or regional intellectual property office, though in the vacancy announcement this qualification was described as an advantage and not as a minimum requirement. Moreover, he takes WIPO to task for having stated in the proceedings before the Appeal Board that he had not been selected owing to his lack of proven managerial skills, which is "materially incorrect" in light of his employment history. He also submits that the Appointment and Promotion Board's opinion that he

was “still too young” for appointment to a grade P5 post constitutes age discrimination, since he met the requirements of experience defined in the vacancy announcement. He asserts that the successful candidate did not fulfil the condition of “experience in working in a multinational, multicultural environment”. Lastly, he provides examples in support of his assertion that the competition procedure was neither objective nor impartial and that he was thus denied the opportunity to compete with the other candidates on an equal footing.

The complainant asks the Tribunal to set aside the impugned decision as well as the decisions resulting from the disputed selection procedure, and to order WIPO to resume the procedure at the stage at which it became flawed and to provide him with a copy of the competition file. He seeks compensation for material and moral injury and he claims costs in the amount of 10,000 euros. Lastly, he asks the Tribunal to find that, should these various sums be subject to national taxation, he would be entitled to a refund of the tax paid from WIPO.

C. In its reply WIPO submits that, in breach of Article 6, paragraph 1, of the Rules of the Tribunal, the complainant did not append his brief when he filed his complaint. In WIPO’s opinion, the fact that he did not correct his complaint until 2 May 2012 constitutes misuse of the time limit prescribed by Article VII, paragraph 2, of the Statute of the Tribunal. It also points out that the complainant’s claims for costs, for a tax refund and for disclosure of the competition file have been made for the first time in the proceedings before the Tribunal, and that some of the allegations made in his complaint were not made in the proceedings before the Appeal Board. It infers from this that internal means of redress have not been exhausted in respect of these claims and allegations.

On the merits, WIPO submits that the selection procedure was not tainted with flaws or improperly conducted, especially with regard to the membership of the Appointment and Promotion Board, and that the vacancy announcement contained sufficient information to enable any staff member to submit an application in full knowledge of the facts. It denies that the procedure lacked transparency and that the

complainant was deprived of his right of appeal. Moreover, it disputes the complainant's contention that experience at a senior level within a national or regional intellectual property office was not a minimum requirement. It emphasises that the Appointment and Promotion Board considered that the complainant did not possess the experience needed to hold the advertised post and states that his application was not rejected because he was too young. Lastly, WIPO explains that the successful candidate was particularly well-qualified for the advertised post, and it points out that the complainant has not provided any evidence to support his allegations that his application was not treated objectively and impartially.

D. In his rejoinder the complainant, referring to the Tribunal's case law, contends that he corrected his complaint in accordance with the Rules of the Tribunal and with the right to a fair trial. In his view, the claims to which WIPO objects are not subject to the rule that internal means of redress must first be exhausted, and according to the case law he was at liberty to enter new pleas in his complaint. He also considers that WIPO did not file its reply within the prescribed time limit, since the title page of the document which he received shows that it is the Director General's reply. On the merits, the complainant reiterates his arguments.

E. In its surrejoinder WIPO states that it "quite obviously" filed a reply, and it draws attention to the fact that pursuant to Article 9, paragraph 4(b), of the 1967 Convention establishing the World Intellectual Property Organization, the Director General represents the Organization. On the merits, WIPO maintains its position.

F. In her comments, Ms V. stresses that she has the requisite qualifications for the post as advertised, particularly in terms of managerial skills and experience working in a multinational and multicultural environment.

CONSIDERATIONS

1. The complainant impugns the decision of 17 November 2011 by which the Director General adopted the Appeal Board's recommendation to dismiss his appeal against the rejection of his candidature for a position subject to a selection procedure and the other decisions ensuing from that procedure.

2. None of the objections to receivability raised by WIPO can be sustained.

(a) The complaint form was filed within the time limit prescribed by Article VII, paragraph 2, of the Statute of the Tribunal, albeit without the brief and supporting evidence which, according to Article 6, paragraph 1(b) and (c), of the Rules of the Tribunal, had to be appended to it. Contrary to WIPO's submissions, this does not signify that the complaint was submitted out of time, since Article 6, paragraph 2, in conjunction with Article 14, if appropriate, affords the complainant the possibility of correcting a complaint that does not meet the requirements of the Rules. In the instant case, the complaint was corrected on 2 May 2012, within the time limit allocated for that purpose (see also Judgment 3225, under 5).

Furthermore, as the claim to an award of costs relates only to the complainant's representation in the proceedings before the Tribunal, it could not be entered during the internal appeal procedure (see Judgment 2457, under 4 *in fine*). It is therefore receivable, as is the request for disclosure of the competition file, which is not in the nature of a claim, but concerns discovery of evidence.

(b) Some of the complainant's submissions, which WIPO invites the Tribunal to disregard on the grounds that they were not put forward during the internal appeal procedure, are receivable, since they are merely new pleas which the complainant is perfectly entitled to enter in the proceedings before the Tribunal in support of his claims, provided that these claims fall within the scope of those which were made during the internal appeal procedure (see, in particular, Judgment 1519, under 14).

(c) On the other hand, the Tribunal must once again point out that, in the absence of a present cause of action, the claim to a refund by the defendant organisation of any national tax which might be paid on the sums possibly awarded under this judgment is not receivable (see, in particular, Judgment 3097, under 9).

3. The complainant challenges the lawfulness of the membership of the Appointment and Promotion Board, which, at the material time, was governed by Staff Regulation 4.9 and by Annex II to the Staff Regulations, which contained the Board's Rules of Procedure. In accordance with these provisions, the Board is designated on an ad hoc basis by the Director General to advise him in all cases where a vacancy has been the subject of a competition, including in the Professional category. It consists of a chairman and three members whose grade shall not be lower than that of the vacant post. The Director of the Human Resources Management Department is a member of the Board ex officio and acts as Secretary to the Board. He does not have the right to vote, and he may be represented.

The complainant objects to the fact that the staff member who would be the supervisor of the person appointed to the advertised post attended all of the Board's meetings.

It is plain from the submissions that this staff member participated in the interviews of the shortlisted candidates. Staff Regulation 4.9 and the Board's Rules of Procedure – the texts which clearly establish the Board's membership – make no provision for such participation in the Board's deliberations. They draw a distinction between the members who each have one vote, on the one hand, and the Director of the Human Resources Management Department, or his representative, on the other, who has no right to vote. The fact that this list is exhaustive is not without significance, because a third party's influence, especially that of the staff member under whose direct authority the holder of the advertised post will work, might well have a decisive bearing on the Board's recommendations to the Director General and hence on the latter's choice.

It is true that this participation was on an advisory basis only, and WIPO emphasises that this staff member's opinion was sought only with respect to matters on which the Board's deliberating members needed information pertaining to the technical requirements of the post advertised. In the circumstances of the case, however, to merely assert, as WIPO does, that the staff member in question was only asked to provide information and explanations and had no right to vote, cannot suffice to dispel the non-selected candidates' very real impression that unlawful influence was exercised over the final decision to reject their candidature.

It follows from the foregoing that the provisions of the Staff Regulations concerning the membership of the Appointment and Promotion Board were not respected and that the selection procedure was therefore flawed.

4. The impugned decision must be set aside for this reason, as must the disputed appointment, without there being any need to rule on the other pleas. The procedure must be resumed at the stage at which it became flawed.

5. The Organization must shield the candidate who was appointed at the end of the competition from any injury that might result from the cancellation of her appointment, which she accepted in good faith (see, in particular, Judgment 3157, under 11).

6. The complainant is entitled to compensation in the amount of 3,000 Swiss francs for the moral injury suffered as a result of the aforementioned flaw.

7. As the complainant largely succeeds, he is also entitled to costs, which the Tribunal sets at 2,000 francs.

DECISION

For the above reasons,

1. The impugned decision is set aside, as is the appointment which was made at the end of the competition.
2. The competition procedure shall be resumed at the stage at which it became flawed.
3. WIPO shall pay the complainant 3,000 Swiss francs in compensation for moral injury.
4. It shall also pay him costs in the amount of 2,000 francs.
5. All other claims are dismissed.
6. The person who was appointed at the end of the competition shall be shielded from any injury.

In witness of this judgment, adopted on 14 November 2014, 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 11 February 2015.

(Signed)

CLAUDE ROUILLER

SEYDOU BA

PATRICK FRYDMAN

DRAŽEN PETROVIĆ