

G.-C.

v.

WIPO

123rd Session

Judgment No. 3747

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. G.-C. against the World Intellectual Property Organization (WIPO) on 21 January 2014 and corrected on 5 February, WIPO's reply of 19 May, the complainant's rejoinder of 21 July and WIPO's surrejoinder of 22 October 2014;

Considering Article II, paragraph 5, 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 may be summed up as follows:

The complainant challenges the decision not to select him for a post.

On 19 August 2010 WIPO issued vacancy announcement P2064 for the post of Team Coordinator in the Brands and Design Sector (post Y037). The complainant applied for the position before the application deadline of 20 September 2010.

On 2 May 2011 WIPO issued an amended vacancy announcement (WIPO/11/P3/FT020) for post Y037 with an application deadline of 27 May 2011. By an e-mail of 16 May 2011 the complainant was notified by the Administration that competition P2064 had been cancelled and that a new vacancy announcement for post Y037 had been published; in the event that he was still interested in the position, he was invited to submit an application.

Having applied for vacancy WIPO/11/P3/FT020 the complainant was short-listed and interviewed but on 10 April 2012 he learned, by way of an Information Circular, that another candidate, Ms P., had been appointed to post Y037 with effect from 1 March 2012.

On 31 May 2012 the complainant requested the Director General to review the decision to appoint Ms P. He asked to be appointed to the contested post or, alternatively, that another selection procedure be conducted, and he sought material and moral damages. By a letter of 31 July he was informed that the Director General had decided to deny his requests.

The complainant filed an internal appeal with the WIPO Appeal Board on 30 October 2012 in which he challenged the Director General's decision of 31 July. He asked the Board to recommend that the decision to appoint Ms P. to the contested post be annulled; that he be appointed to the post or that the Administration conduct another selection procedure, having first revised the vacancy announcement to remove a statement that had been added to vacancy WIPO/11/P3/FT020 indicating that "experience within a national or regional IP Office would be an advantage". He also sought material and moral damages.

In its conclusions of 28 August 2013 the Appeal Board held, in particular, that a vacancy announcement could not be considered as having been withdrawn until the decision to withdraw it had been formally communicated to staff in more or less the same way as the vacancy announcement itself had been communicated. Even if the e-mail to the complainant of 16 May 2011 could be considered a valid act of withdrawal (of vacancy P2064), vacancy WIPO/11/P3/FT020 should be considered invalid because it was issued two weeks prior to that withdrawal. As Ms P.'s selection was the result of a competition based on an invalid vacancy announcement, her selection was invalid even though the decision to cancel the previous competition had not been the subject of an appeal. In addition, the Appeal Board considered that the report submitted by the Appointment and Promotion Board (APB) to the Director General did not enable him to endorse the recommendation it contained, as it lacked sufficient information with respect to the APB's assessment of the candidates' written knowledge of English. The Appeal Board

recommended that the Director General annul Ms P.'s appointment to the contested post while shielding her from any injury that might flow from the annulment of an appointment that she had accepted in good faith. It further recommended that the complainant be awarded 10,000 Swiss francs as compensation.

By a letter of 25 October 2013 the complainant was notified that the Director General had decided to adopt all of the Appeal Board's recommendations, with one exception related to the amount of compensation to be awarded to him. In particular, he had decided to annul the appointment of Ms P. to the contested post, but he noted that the Appeal Board did not recommend that the competition itself be annulled. The APB would therefore be asked to submit a revised report with a new recommendation, including a reference to its assessment of the short-listed candidates' written English language skills. In order to shield Ms P. from injury, she would remain the *de facto* Team Coordinator until such time as the Director General took a new decision in light of the revised report prepared by the reconvened APB. The Director General did not agree with the Appeal Board's finding that vacancy WIPO/11/P3/FT020 should be considered invalid, and he observed that the complainant had not challenged the decision to cancel the competition based on vacancy announcement P2064. Lastly, he was of the view that the complainant had not suffered any real or substantial loss as a result of having had just less than half of the allotted time available to submit his candidature for vacancy WIPO/11/P3/FT020. Thus, he had decided to award him 500 Swiss francs for the Administration's delay in informing him that the first vacancy announcement had been cancelled. That is the impugned decision.

By a letter of 12 March 2014 the complainant was informed that the APB had reconvened and issued a revised report (dated 21 February 2014) in which it confirmed that the written English skills of all short-listed candidates, including those of Ms P., had been duly assessed during the selection procedure for vacancy WIPO/11/P3/FT020. The APB had unanimously made a new recommendation to appoint Ms P. to the contested post, and this recommendation had been approved by the Director General on 4 March 2014.

The complainant asks the Tribunal to annul the impugned decision and to order that a new competition be conducted for the contested post. In the alternative, he seeks damages in the amount of 27,651.76 Swiss francs, this amount representing the difference between his actual salary and the salary he would have received had he been appointed to the contested post for two years. He claims moral damages in an amount of no less than 20,000 francs and costs of no less than 15,000 francs.

WIPO denies that the complainant is entitled to any of the relief that he seeks and it requests the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant submits that in the decision of 25 October 2013, the Director General pretended to adopt the Appeal Board's recommendations, with the exception of the amount of compensation to be paid to him. He argues that the Appeal Board recommended that not only should the appointment of the successful candidate (Ms P.) be annulled, but also the entire competition which stemmed from an invalid vacancy announcement (WIPO/11/P3/FT020) which was published two weeks before the cancellation of the previous vacancy announcement (P2064) for the same post (Y037). He submits that, as the Director General did not annul vacancy announcement WIPO/11/P3/FT020 or the competition and did not justify this departure from the recommendations of the Appeal Board, the impugned decision is flawed and must be quashed.

2. WIPO contends that the complainant's claims, with the exception of the claim regarding the 500 Swiss francs in compensation paid to him, have been rendered moot by the new decision of 12 March 2014 to appoint Ms P. to post Y037 in light of the revised report of the reconvened APB dated 21 February 2014. On the merits, WIPO submits that the complaint is unfounded as the discretionary authority for appointing staff rests with the Director General as provided for in Staff Regulation 4.8; that the modifications made in vacancy announcement WIPO/11/P3/FT020 were lawful and reflected the genuine needs of WIPO; and that the complainant has not offered any evidence that WIPO acted in bad faith.

With regard to the Appeal Board's finding that the impugned vacancy announcement WIPO/11/P3/FT020 was invalid since the administration had failed to cancel vacancy announcement P2064 prior to the publication of vacancy announcement WIPO/11/P3/FT020, WIPO argues that the Director General's disagreement with that finding was in fact expressed in the decision of 25 October 2013. Specifically, it was stated in that decision that "[t]he [Director General] considers this to be particularly formalistic given that no injury was caused as a result". WIPO notes that both the Appeal Board and the complainant cited Judgment 1223, which specifies that an old vacancy announcement must be cancelled before a new one can be published, but WIPO submits that the situation leading to Judgment 1223 was largely different from that leading to the current complaint.

3. The Tribunal concludes that the complainant's claims are not moot insofar as the Director General, who did not follow the Appeal Board's recommendations, decided not to annul the competition, and to award the complainant 500 Swiss francs in moral damages. This is because these aspects of the Director General's decision of 25 October 2013 would not have been affected by the outcome of the revised report of the APB and the Director General's decision following his receipt of that report.

4. Regarding the Director General's decision to maintain the competition, the Tribunal finds that the complainant's claim is founded. The Director General stated that he disagreed with the Appeal Board's finding that the second vacancy announcement (WIPO/11/P3/FT020) should be considered invalid since the Administration had failed to withdraw vacancy announcement P2064 beforehand. The Director General did not provide adequate reasons for his disagreement with the Appeal Board in this respect, as he limited himself to explaining that "[he] consider[ed] [the Appeal Board's view] to be particularly formalistic given that no injury was caused [to the complainant] as a result". First, his reference to the formalistic nature of the Appeal Board's view is unconvincing, as the law is, by its very nature, formalistic. Second, his statement that the failure to cancel vacancy announcement P2064 did

not cause any injury to the complainant is questionable as the Director General did not expressly consider the complainant's allegations that his chances to succeed had been reduced.

5. In addition, the Director General, by “noting that the Board did not recommend that the competition itself be annulled”, misinterpreted the Appeal Board's opinion. The Appeal Board recommended that he “annul the selection and appointment” of Ms P. Considering that the Appeal Board was of the opinion that the second vacancy announcement should be considered invalid, the Tribunal finds that the competition stemming from that announcement was considered invalid by the Appeal Board. Indeed, the Appeal Board said in its reasons that it “concluded that there were formal and other defects in the selection justifying the annulment of the competition”. Its recommendation to annul the selection was obviously a recommendation to annul the competition. Therefore, its recommendation had to be interpreted as meaning that the competition should be annulled.

6. These identified flaws would ordinarily warrant remitting the matter to WIPO in order for the Director General to take a new decision. In the present case it is unnecessary to make such an order. The competition stemming from the contested vacancy announcement P2064 has been concluded and the decision of 12 March 2014 is now immune from challenge. However, the complainant is entitled to moral damages as a consequence of the aforementioned flaws, which the Tribunal awards in the amount of 20,000 Swiss francs in addition to the 500 Swiss francs that he has already been awarded. WIPO will be further ordered to pay the complainant costs in the amount of 5,000 Swiss francs.

DECISION

For the above reasons,

1. WIPO shall pay the complainant moral damages in the amount of 20,000 Swiss francs.

2. WIPO shall also pay him costs in the amount of 5,000 Swiss francs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 26 October 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 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ