

**B. H. (No. 13), M. (No. 3), M. (No. 5)  
and S. (No. 3)**

*v.*

**WIPO**

**135th Session**

**Judgment No. 4605**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr N. B. H. (his thirteenth), Mr F. M. (his third), Mr C. M. (his fifth) and Mr O. S. (his third) against the World Intellectual Property Organization (WIPO) on 24 July 2020 and corrected on 4 September, WIPO's single reply of 16 December 2020, the complainants' single rejoinder of 17 March 2021, the supplemental rejoinder of 16 July 2021 concerning the disclosure of documents requested by the complainants and ordered by the Tribunal, WIPO's surrejoinder of 27 October 2021, the complainants' additional submissions of 12 April 2022, corrected on 19 April 2022, and WIPO's final comments of 20 July 2022;

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 and the results of the election for members of the new Staff Council.

Facts relevant to this case are to be found in Judgment 4155, delivered in public on 3 July 2019. Suffice it to recall that the complainants were, at the material time, elected members of the Staff Council of the WIPO Staff Association. The election of the new Staff Council was held in March 2017 with all staff members being entitled to vote and

eligible to stand for election, whereas previously only dues-paying members of the Staff Association were allowed to vote for their elected representatives on the Staff Council. The four complainants stood for election but were not elected.

On 23 March 2017 the complainants filed a petition with the polling officers contesting the election and the results. They indicated that they were registered candidates and registered voters in the contested election. They alleged in particular non-observance of an established practice of WIPO under Staff Regulation 8.1 together with procedural irregularities. Their petition was rejected and they asked the Director General, in November 2017, to review the polling officers' decision. They asked, in their capacity as individual staff members and as staff representatives, that the election be declared null and void, that a new election be conducted in line with the Tribunal's case law and that Ms D., who received the highest number of votes in the election, be "disqualified from the impugned election and be prohibited from participating in any newly constituted elections".

By a letter of 9 January 2018 they were informed that their request was rejected as clearly irreceivable. Indeed, the Director General considered that the contested decision was not an administrative decision, as it was taken by the polling officers who were responsible for organising the election. He added that, according to the Tribunal's case law, the Tribunal has no jurisdiction to adjudicate on electoral processes relating to staff associations and staff councils, as these processes do not create enforceable rights against the organisation. The complainants filed an appeal with the Appeal Board in early April 2018 against that decision.

In its report of 26 February 2020 the Appeal Board found that the complainants had standing as they were registered voters and candidates in the contested election. The Appeal Board indicated that the proper conduct of the election, which was open to all staff members, was in the interest of the staff as a whole. Thus, the polling officers' decisions were a "key component" in ensuring the proper conduct of the election and therefore affected important rights of all staff, including the complainants. The Appeal Board noted some irregularities in the contested election but concluded that none of them was of such a nature or gravity as to

nullify the election. Consequently, the decision of the polling officers on the complainants' petition was not unlawful. The Appeal Board therefore recommended rejecting the appeal but nevertheless recommended that moral damages be granted to the complainants, "for the benefit of the SASC [Staff Association Staff Council]", for the delay in issuing its report. It also made recommendations concerning future elections.

By a letter of 27 April 2020 the Director of the Human Resources Management Department (HRMD) informed the complainants that the Director General had decided to reject their appeal as irreceivable. He relied on the Tribunal's case law, in particular Judgments 2636 and 3526, according to which the Tribunal has no jurisdiction to adjudicate on electoral processes relating to staff associations and staff councils, which do not create enforceable rights against employing organisations. In Judgment 3526, the Tribunal indicated that its lack of jurisdiction was further demonstrated by the very nature of the relief claimed, namely a declaration that the elections were null and void. The Director General stressed that the complainants were claiming exactly the same relief in their appeal. He added that, in any event, he would have dismissed their appeal on the merits as he agreed with the Appeal Board's finding that the decision taken by the polling officers on their petition was not unlawful. He nevertheless granted them 1,500 Swiss francs in total for the delay in the internal appeal proceedings, indicating that, unless they objected, it would be paid to the Staff Association's bank account as they had claimed compensation "for the benefit of the SASC". That is the decision each complainant impugns before the Tribunal.

Each complainant asks the Tribunal to quash the impugned decision with "all legal effects flowing therefrom", to order the Director General to "withdraw" the impugned decision forthwith, and to "cancel and invalidate the impugned election [and] any and all subsequent Staff Council (SASC) elections, or any results flowing therefrom, through the present date". They also ask the Tribunal to order WIPO to "cease and desist forthwith from interfering in the electoral process" of the "WIPO Staff Council and Staff Association (SASC)" and revert to its established practice, in line with the jurisprudence set out in

Judgment 4155. The SASC should be allowed to conduct new elections addressing and curing all the irregularities noted in the present “appeal”, in particular by conducting an IT audit of the electronic voting, and by conducting new elections using a paper ballot system with independent election observers. The complainants further ask the Tribunal to reimburse their legal costs and to order WIPO to pay the SASC all “administrative support for its official operations” it should have been paid from March 2017 through the date of the final decision. They also seek an award, in their representative capacity, of moral and exemplary damages (not less than 250,000 Swiss francs) as a deterrent to the “gross and irregular interference with the [staff’s] fundamental right [...] to be free to associate”, and for undue delay in the internal appeal proceedings. The amount awarded is “to be applied to the benefit of all WIPO Staff Association members”. In addition, they ask to be granted interest on all amounts awarded, at the rate of 5 per cent per annum, from March 2017 through the date all redress so awarded is fully satisfied. Lastly, they ask the Tribunal to order that Ms D. be disqualified from participating in any newly constituted elections, and to order such other relief as the Tribunal deems equitable, necessary, and just.

WIPO asks the Tribunal to reject the complaints as irreceivable, in particular *ratione materiae*, and for lack of a cause of action. It submits they are otherwise devoid of merit.

#### CONSIDERATIONS

1. In March 2017, an election was held to fill positions on the WIPO Staff Council. Four members of the staff of WIPO, who were unsuccessful candidates in the election, have filed complaints dated 24 July 2020 impugning a decision of the Director General conveyed to them by letter of 27 April 2020 from the Director of HRMD. The Director General decided, amongst other things, to dismiss an internal appeal they had brought against what was initially a “decision on [the complainants’] petition [of 23 March 2017]” made by the polling officers who had conducted the election. The four complaints are joined so that one judgment can be rendered.

2. The complainants seek an oral hearing but the Tribunal is satisfied it can reasonably and fairly determine the issues by reference to the written submissions of the parties. Accordingly, the request for an oral hearing is rejected.

3. The complainants' petition of 23 March 2017 raised a range of procedural and other grievances about the conduct of the election and the result. It is unnecessary to detail the issues raised. However, what is important, for present purposes, is what was sought in the petition by way of outcome. There were two elements. The first was that the polling officers "immediately declare the subject election null and void, without any legal effect". The second was that the polling officers "move to conduct new elections in line with the applicable and cited [Tribunal] jurisprudence, addressing and curing all of the irregularities pointed out above, in particular [...]".

4. The substance of these two elements informs the principal relief sought from the Tribunal in the 24 July 2020 complaints. The first order seeks the quashing and withdrawal of the impugned decision and that the Director General be ordered to "cancel and invalidate the impugned election [and] any and all subsequent Staff Council [...] elections [...]". The second order sought is in the following terms:

"That the Administration be ordered to cease and desist forthwith from interfering in the electoral process of the duly established and elected WIPO Staff Council and Staff Association (SASC) and revert to its established practice, in line with the clear and consistent [Tribunal] jurisprudence set out in [...] Judgment N<sup>o</sup>. 4155, and that the said WIPO Staff Council and Staff Association be allowed [to] conduct new elections in line with applicable [Tribunal] jurisprudence, addressing and curing all of the irregularities noted in the present appeal, in particular conducting an IT audit of the electronic voting, and conducting new elections using a paper ballot system with independent election observers[.]"

5. It is convenient to consider initially the first order referred to in the preceding consideration. By an order made by the Tribunal on 3 July 2019 in Judgment 4155, the “results of the elections of March 2017 of members to constitute the ‘Staff Council’ are set aside”. As a matter of fact, each of the complainants in these proceedings was a complainant in the proceedings leading to that judgment. An application for the execution of that judgment was unsuccessful (see Judgment 4387) as the Tribunal noted *inter alia* that the orders made to this effect “were self-executing at least in the sense that the orders of the Tribunal themselves nullified [...] the results of the elections”. In the result and by operation of this order there had been, legally, no March 2017 elections. The legal foundation for the order made in Judgment 4155 is, in the main, substantially different to the legal foundation sought to be created by the arguments advanced by the complainants in these proceedings for an order to the same effect. But even if the Tribunal were to accept the legal arguments advanced by the complainants (and to reject the multiplicity of arguments advanced by WIPO – including jurisdictional and receivability arguments – as to why the relief sought cannot or should not be granted), the end result would be an order setting aside the results of the March 2017 elections. But whether such an order should be made is now moot given that the order made on 3 July 2019 achieved that very result. For this reason, the proceedings in this respect should be dismissed. Insofar as the first order sought concerns not the March 2017 elections but indeterminate future elections, it is plainly hypothetical and should not be countenanced.

6. It can be seen that the second order is, in substance, an injunction restraining the future conduct of WIPO which is couched in the most general and imprecise terms with a consequential interdependent effect on the future conduct of the Staff Council and Staff Association. The Tribunal’s case law clearly establishes it cannot grant relief of this nature against an organisation (see Judgments 3835, consideration 6, 3506, consideration 18, and 2370, consideration 19). Accordingly, in this respect, the complaints should also be dismissed.

7. The remaining relief sought in the complaints is consequential relief. There is no discernible reason why that consequential relief in its entirety could not have been sought by the complainants in the proceedings leading to Judgment 4155 in which they also sought that the March 2017 elections be set aside alleging, amongst other things, an impermissible interference by the Administration in the staff's exercise of the right to freedom of association. As noted earlier, the four complainants in these proceedings were also complainants in those proceedings. Indeed, in the earlier proceedings a claim for moral and exemplary damages (also made in these proceedings for "the Administration's gross and knowing interference with rights of association") was expressly refused and an order was made that all other claims were dismissed. Through the operation of the principle of *res judicata*, the consequential relief would not be granted. Insofar as damages are claimed for the delay in the internal appeal, the complainants have already been adequately compensated by WIPO. Accordingly, in these respects, the complaints should also be dismissed.

8. In the result, the complaints should be dismissed in their entirety.

#### DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 25 October 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ