

SEVENTY-SECOND SESSION

In re BLUSKE

Judgment 1154

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Guillermo Carlos Bluske against the World Intellectual Property Organization (WIPO) on 16 August 1991, WIPO's reply of 30 September, the complainant's rejoinder of 7 October and the Organization's surrejoinder of 25 October 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulations 4.3, 4.8, 4.15, 9.1, 9.2, 9.9 and Rule 11.1.1 of the Staff Regulations and Staff Rules of the International Bureau of WIPO;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant, a citizen of the Argentine born in 1952, was employed from 1975 to 1986 by the United Nations Development Programme (UNDP) and from 1986 to 1989 in the public service of his own country. He joined WIPO under a two-year fixed-term appointment on 16 June 1989. He was a senior programme officer in the Development Cooperation and External Relations Bureau for Latin America and the Caribbean (LAC) and held grade P.4.

By a memorandum of 30 August 1990 to the Director General he asked for promotion to grade P.5 on the grounds that his responsibilities and grade did not match his experience and qualifications and that several senior officers of the Organization had expressed support. He got no written answer.

By letter of 1 October 1990 the Director General informed the complainant of his transfer to the Support Unit of the Development and Cooperation Program (DCP) with the same title and grade. He learned on receiving a copy of a memorandum of 11 October from the Director General to a Deputy Director General that he was to carry out part of the head of Unit's duties until the Organization appointed a new head. By a memorandum of 12 October to the Deputy Director General he asked to be kept on in LAC, but the Director General refused on 10 December 1990.

The Organization issued on 16 November 1990 a notice of vacancy, No. P889, for the post of head of the Unit. On 22 November the complainant applied for the post and on 23 November the Administration acknowledged receipt of his application.

On 8 March 1991 the Director of the Personnel Division informed him that in accordance with Regulation 9.9(a) and under the terms of his letter of appointment his fixed-term appointment would expire, and he would leave, at 15 June 1991.

In a conversation with the Director on 14 March he asked and was told why his contract was not to be renewed. By a memorandum of 21 March he asked the Director to confirm the reasons in writing. In his reply of 2 April the Director cited Regulation 4.15(c), which says that a fixed-term appointment carries no expectancy of extension or conversion to a permanent one, and further observed that his application for the post of head of the DCP Unit had not been successful.

In a memorandum of 5 April 1991 to the Director he pointed out that the Director had failed to confirm in writing a further reason he had given in their conversation of 14 March, namely that the post the complainant had held in LAC until his transfer of 1 October 1990 was no longer vacant; he assumed that he had no post at all but if he was wrong he wanted to have his appointment extended beyond the date of expiry on the post he was holding. Failing that, he applied for transfer back to the post which he had held before and which in the meantime had been put up for competition by another notice of vacancy, No. P899.

By a memorandum of 17 April the Director answered that his application for vacancy P899 would be duly

considered but that he had no right to keep his old post and had been moved to the Unit in keeping with Regulation 4.3(d).

By letter of 18 April 1991 he applied under Rule 11.1.1(b)(1) for review of the decision not to renew his appointment and for leave to go straight to the Tribunal if the Director General did not reverse the decision. On 9 May the Director General confirmed the ending of his appointment at 15 June 1991 and told him that he could not skirt the internal appeal procedure. On 21 May he appealed to the Appeal Board. In its report of 19 June to the Director General the Board unanimously recommended either extending his appointment or awarding him proper compensation, and granting his costs.

By telex of 17 July his counsel urged the Director General to take a decision as early as possible because he was in dire straits. By a communication of 31 July 1991, the decision he impugns, the Organization's Legal Counsel offered the complainant's counsel 7,665 United States dollars in settlement.

B. The complainant objects to the refusal to renew his appointment beyond 15 June 1991 and to the offer of \$7,665 in compensation. He has three pleas.

The first is breach of WIPO's duty to substantiate the non-renewal. An organisation is under a duty to state its reasons for taking a decision of that kind so as to enable the employee to defend his rights and the Tribunal to exercise its power of review. The grounds must be stated fully and in writing and may not be altered. WIPO gave no reasons at all for its decision at first, and then the reasons it did give were not the same as those it had given the complainant orally.

His second plea is that there were no valid grounds for the non-renewal. It will not do just to say, as the Director of Personnel did in his memorandum of 2 April 1990, that the rules give the holder of a fixed-term appointment no right to renewal. To accept that sort of reason would make nonsense of the Tribunal's review of non-renewal. WIPO may not set the non-renewal down to the Appointment and Promotion Board's choosing someone else as head of the Unit since the decision not to renew came before the Board made its choice and so independently of the outcome of competition P889. Nor does he accept as valid the reason he was given orally, namely that his old post in LAC was no longer free because it was up for competition. The Administration could not properly transfer him against his wishes and then tell him that he could not be renewed because of that competition. Besides, personnel circular 22/1991 said that competition P899 might lead to two appointments, and WIPO could have set things right by giving him one of them. His performance and behaviour were beyond reproach and his post has not been abolished.

His third plea is subsidiary: if WIPO sought to plead that there were other reasons for the decision, the presumption would be that they had been extraneous to the Organization's interests.

He invites the Tribunal to set aside the decision of 31 July 1991 and to order his reinstatement and restoration of his status as from the date of separation or, failing that, to award him full redress for material injury and damages for moral injury. He seeks 41,640 French francs in costs.

C. In its reply the Organization observes that, though the complainant suggests that the real reasons for the decision were "extraneous" to its interests he does not say what they might have been but leaves it the impossible task of answering obscure innuendo.

WIPO points out that the complainant held a fixed-term appointment within the meaning of Regulation 4.15(a), i.e. one that "may, at the discretion of the Director General, be extended one or several times for periods not exceeding five years". The Administration gave the legal basis of the decision in its minute of 8 March 1991 as Regulation 9.9, which reads:

"(a) Fixed-term appointments (within the meaning of Regulation 4.15) shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

(b) Separation from service as a result of the expiration of a fixed-term appointment shall not be regarded as termination within the meaning of Regulations 9.1 and 9.2."

The minute of 2 April 1991 broadened the legal basis for the decision by citing Regulation 4.15(c):

"No initial fixed-term appointment or any extension thereof shall carry with it any expectancy of, nor imply any right to, (further) extension or conversion to a permanent appointment."

Although the rules do not require notice of non-renewal, and even say so, WIPO gave the complainant over three months' warning.

Regulations 9.1 and 9.2, to which 9.9 refers, are about termination of a permanent or fixed-term appointment, not about expiry. Though 9.1 requires the Director General to state the reasons for terminating permanent appointments, there is no requirement in the Staff Regulations or Staff Rules that reasons be given to a staff member for letting a fixed-term appointment expire.

Nor was the Director General under any duty to promote the complainant or appoint him head of the DCP Unit, however high an opinion he might have of himself and whatever support others might have given him. Whatever their rank, they had no authority to take decisions of that kind.

The Director General was not bound to transfer the complainant to any of the vacant posts in LAC. The complainant had his chance to apply and there is no evidence to suggest that the Appointment and Promotion Board ignored his application. The fact that it failed does not mean he was discriminated against. In fact the Director General plainly acted in the Organization's best interests.

D. In his rejoinder the complainant submits that WIPO's reply contains no new fact or argument on which his position has not already been stated in his original brief or may not be readily inferred from it. Its preliminary remark calls for no answer because he referred in that brief to the minutes of its Coordination Committee's debates (September-October 1990) on the Director General's re-election, and that makes his point explicit enough.

E. WIPO confines its surrejoinder to the complainant's apparent insinuation that the impugned decision was attributable to the position taken by his country's Government in those debates. He is relying on the mere coincidence whereby the debates took place late in September 1990 and he was moved to the Support Unit of DCP on 1 October. In fact his transfer had been mooted even before 21 September 1990, when it was announced that the head of the Unit was in line for another post, so that there would be a vacancy and something would have to be done urgently to keep the work going. Besides, of the other eight officials in the Professional category from the two countries - Argentina and Italy - that had had reservations about re-electing the Director General not one has suffered any prejudice since. Indeed their careers have all continued quite normally.

CONSIDERATIONS:

1. On joining the Organization on 16 June 1989 the complainant was granted a fixed-term appointment at grade P.4, step 5, for two years to end at 15 June 1991. His initial assignment was to a post as a senior programme officer in the Development Cooperation and External Relations Bureau for Latin America and the Caribbean, which is known as LAC.

On 1 October 1990 he was informed that he was transferred to the Support Unit of the Development and Cooperation Program (DCP). The head of the Unit, who held grade P.5, having been promoted to Director of the Personnel Division, the Director General decided on 11 October that his duties should be split between the complainant and a grade P.3 officer.

The complainant said in a minute of 12 October that he wished to remain in LAC, but the Director General answered the same day that the Support Unit needed him at once: "I hope", he wrote, "that you will cooperate".

On 16 November the Organization published an announcement that the post of Head of the Support Unit was open for competition under number P889. On 22 November the complainant applied for it.

By a memorandum of 8 March 1991 the Director of the Personnel Division told him that in keeping with Regulation 9.9(a) his fixed-term appointment would "expire on June 15, 1991, which will thus be your last day of service". The Regulation provides that fixed-term appointments expire automatically and without prior notice at the date of expiry set in the letter of appointment.

The complainant thereupon asked for a meeting with the Director of the Personnel Division and saw him on 14 March 1991. The Director then explained that he had not been included in the list of three candidates picked by the

Appointment and Promotion Board and that his old post in LAC was no longer available for him because it was up for competition under number P899: the notice of vacancy had gone out on 21 December 1990.

Since another staff member in LAC was to leave the Organization on 31 May 1991 an announcement - No. 22/1991 - was made on 25 March that two appointments might be made in the context of competition P899.

On 21 March the complainant had asked the Director to confirm in writing the reasons given to him orally on 14 March for the refusal to renew his appointment. The Director answered him on 2 April, referring again to Regulation 9.9(a), citing Regulation 4.15(c) - "No initial fixed-term appointment ... shall carry with it any expectancy of, nor imply any right to, ... extension or conversion to a permanent appointment" - and adding that the memorandum of 8 March 1991 "was without prejudice to the outcome of Competition No. P889", which "was not in your favor".

Also on 2 April the complainant had a meeting with the Director General, who, he says, declared that he was not bound in law to state any reasons for the decision not to renew the appointment.

The complainant replied on 5 April to the Director of the Personnel Division's memorandum of 2 April. He noted the confirmation of his failure to get the post in the Support Unit but observed that the Director's memorandum did not confirm that his previous post in LAC was no longer free; he assumed that he was no longer on a post but asked, if that assumption was mistaken, that he be put on the LAC one; while reserving his position, he also wished to enter competition P899.

The Director replied on 17 April that his candidacy would be considered but that appointment to the Organization's staff carried no right to keep the post assigned at recruitment.

On 18 April the complainant submitted to the Director General a request for review of the decision not to renew his appointment. The Director General replied on 9 May that his appointment would end at 15 June. On 21 May he appealed to the Appeal Board. In its report the Board held that "the reasons given to the appellant were not enough to justify the discretionary decision not to renew his contract". It recommended offering him an extension of appointment or paying him proper compensation.

The Organization informed the complainant's counsel on 31 July that according to the Staff Regulations it was "only able to offer the amount of 7,665 [United States dollars] as part of an agreement to be concluded between the International Bureau of WIPO and Mr. Bluske which would state that his fixed-term appointment is regarded as having been terminated with effect from the date (March 8, 1991) when he was informed by the Personnel Division, or from the date (May 9, 1991) that it was confirmed by the Director General that his appointment would expire on June 15, 1991 and in which agreement Mr. Bluske would agree not to contest the said termination and not to proceed with any appeal to the ILO Administrative Tribunal". If he turned down the offer "no other satisfaction can be given". That is the decision he is impugning.

2. Though the complainant acknowledges the Organization's discretionary authority not to renew a fixed-term appointment, he argues that its exercise of that authority is not immune to review by the Tribunal and that indeed, in keeping with precedent, the Tribunal will consider whether the decision under challenge shows any of the flaws it ordinarily treats as fatal.

The complainant puts forward three pleas, and they are set out in B above.

3. The Tribunal will take up only the first two pleas, the third being subsidiary. His first plea is that the Organization was in breach of its duty to state the reasons for its decision; his second that there were no valid grounds for refusing to renew his appointment.

Consistent precedent has it that a decision of the kind impugned in this case, though at the discretion of the executive head of the Organization, is subject to limited review.

4. As to the complainant's first plea, it is a general principle of international civil service that there must be a valid reason for any decision not to renew a fixed-term appointment and that the reason must be given to the staff member. That principle was set out, for example, in Judgment 675 (in re Pérez del Castillo) in 10 and 11.

It is therefore at issue whether the complainant has been given a reason for the decision he is objecting to and, if

so, whether it was a valid one in law.

5. The Director of the Personnel Division's memoranda of 8 March and 2 April 1991 and the Director General's one of 9 May 1991 merely cited provisions of the Staff Regulations and said that fixed-term appointments of the kind the complainant held carried no expectancy of renewal. But that is a reason rather of form than of substance, and indeed, according to the complainant's account, the Director General said at his meeting with him on 2 April 1991 that the Organization was not bound in law to give any reason for the decision.

When he saw the Director of the Personnel Division on 14 March and asked for the reasons for non-renewal the Director told him orally, as was said above, that his candidacy for the post of head of the Support Unit was unsuccessful and that his old post in LAC was no longer available and was up for competition. The Director also mentioned in his memorandum of 2 April the rejection of the complainant's application for the post of head of the Unit.

6. The reasons given by the Director in his memorandum of 2 April 1991 may be treated as the substantive reasons for non-renewal, no other having been given to him in writing.

7. Were those reasons valid?

The Tribunal is satisfied that they were not. The complainant plainly found himself in a dead-end, through no fault of his own and solely because of the Organization's handling of his case. It transferred him against his will from LAC to the Support Unit; then, when he said he wanted to go back to LAC because his application for the post in the Unit had failed, it retorted that his old post was up for competition (P899). As was said above, since another official in LAC was to leave the Organization, staff announcement No. 22/1991 said that competition P899 might lead to two appointments. It is understandable that the first was advertised for competition on 21 December 1990, when he had already been transferred, because there was work to be done and the post had to be filled. But staff announcement No. 22/1991 did not go out until 25 March 1991, seventeen days after he had been told of the non-renewal. Someone like him with a good record of service could have been reinstated in LAC under the second appointment mentioned in the staff announcement. After all no competition had been held when he himself had been appointed to LAC on 16 June 1989.

8. The conclusion is that the Organization must do its utmost to reinstate the complainant by granting him an extension of appointment as from 16 June 1991. Only if that proved impossible should the Organization pay him damages equivalent to one year's salary and allowances to cover all forms of injury. He is awarded 20,000 French francs in costs.

DECISION:

For the above reasons,

1. The Director General's decision of 31 July 1991 is quashed.
2. The Organization shall reinstate the complainant by extending his appointment as from 16 June 1991.
3. If it cannot do so it shall pay him the equivalent of one year's salary and allowances in damages for all forms of injury he has sustained.
4. It shall pay him 20,000 French francs in costs.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux
Mohamed Suffian
José Maria Ruda
A.B. Gardner

