

NINETY-NINTH SESSION

Judgment No. 2466

The Administrative Tribunal,

Considering the complaint filed by Mr R.C.B.C. d. S. against the World Intellectual Property Organization (WIPO) on 7 April 2004, WIPO's reply of 14 September, the complainant's rejoinder of 19 October, and the Organization's surrejoinder of 19 November 2004;

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 Brazilian national born in 1954. From September 1985 he held positions in various United Nations specialised agencies, the one immediately preceding his recruitment by WIPO being the Food and Agriculture Organization of the United Nations (FAO); he left the service of the FAO on 31 July 1996. On 10 August 1996 he entered into the service of WIPO under a two-year fixed-term contract as Head of the General Administration Division at grade P.5; on 1 October 1996 he was appointed Director of the same Division at grade D.1. Following approval by the Coordination Committee of WIPO, the Director General appointed the complainant to the post of Deputy Director General for the Cooperation for Development Sector from 7 July 1998 to 30 November 2001 and again from 1 December 2001 to 30 November 2003.

In July 2003 the Director General, the Brazilian Permanent Representative in Geneva and the complainant agreed that at the end of the latter's term as Deputy Director General he would accept a comprehensive separation package to be settled between the parties. Negotiations ensued and on 8 October 2003 the Director of the Office of Strategic Planning and Policy Development presented the complainant with a document signed by him headed "Additional Elements" which set out some of the terms to be included in the agreed separation as well as certain elements that would not be granted. A finalised Agreement was presented to the complainant on 10 November. Deeming this to have excluded some provisions previously discussed, the complainant wrote to the Director General on 11 November asking him to review the administrative decisions related to the written proposal. The Director General replied in a memorandum dated 12 November, reminding the complainant that much of what was being awarded in the Agreement was discretionary and that the complainant had until 30 November to decide whether he wished to accept the terms of the Agreement. The Agreement was signed by the parties on 14 November 2003 and the complainant separated from service effective 30 November 2003. Under Article 5 it was stated that the complainant renounced his "recourse to all present and future claims", except in the case of non-compliance by WIPO with its obligations under either the Agreement or the Staff Regulations.

The complainant sent an appeal to the WIPO Appeal Board on 19 December 2003, arguing that WIPO had not complied with its Staff Regulations as well as with a number of the clauses in the Agreement. In its report dated 23 February 2004 the Appeal Board found no basis or justification for the various claims made by the complainant and it concluded that the appeal failed in all aspects. The complainant challenges the Appeal Board's report.

B. The complainant argues that WIPO has not complied with the Staff Regulations. He maintains that a staff member who has served in the United Nations system for more than 15 years has, under Staff Regulation 9.6(a)(1), the right to receive a termination indemnity equal to 12 months' remuneration, plus an additional 50 per cent agreed upon during negotiations. However, he was awarded 7.31 months of remuneration, based only on his years of service at WIPO, plus an additional 50 per cent agreed upon during negotiations. He considers the assertion by the Director General that payment of this indemnity was entirely within his discretion to be an abuse of authority. The fact that his prior employment had been overlooked is all the more "astonishing" since the Agreement signed by the parties makes specific reference to it, as did the document of 8 October 2003. Thus, to reduce this indemnity was arbitrary and amounts to bad faith. In any event, his movement between various organisations must be treated as "de facto" transfers because at all times he remained a participant in the United Nations Joint Staff Pension Fund (UNJSPF). He also argues that some of the indemnities awarded under the Agreement were not calculated

according to his full salary plus allowances or to his then current grade, and some other indemnities were overlooked, such as an indemnity in lieu of termination notice which he claims he had the right to receive.

He contends that the document of 8 October 2003 excluded various elements which had already been agreed on orally during negotiations. Then, on 10 November he was presented with the so-called “agreed” termination to be signed which contained many errors and did not reflect the agreement that had been made between the parties during negotiations. However, taking into account his financial obligations, he was left with no other option than to sign it on 14 November “under extreme duress”. He finds WIPO’s “strategy” in this regard as unethical and unfair.

The complainant alleges that there has been inequality of treatment, given that three other senior officials in the D.2 category had more favourable “termination agreements”. He asserts that an analysis by the Tribunal of these termination agreements would provide “clear and unquestionable evidence” that the Director General has abused his discretionary power in relation to the complainant. He submits that in order for the principle of equality of treatment to be complied with, the Organization should pay an additional three years and three months of his pension fund contributions as well as premiums for health and accident insurance for himself and his family.

He criticises the appeal process. The Appeal Board is supposed to be advisory in nature, yet it did not make one single recommendation in his case. He considers that it violated its advisory character and “judged” his case in a partial and non-independent way.

He submits that, as a consequence of the Director General’s decisions and abuse of authority, he suffered material and moral injury. On 10 October 2003 he based a decision to purchase an apartment in Brazil on the amounts mentioned in the document of 8 October headed “Additional Elements”. However, because the settlement Agreement signed on 14 November was for a lesser amount he was unable to go through with the purchase and he suffered financial losses. He also suffered “a professional and personal” offence by the Director General’s refusal to see him in the months of October and November 2003 as well as having left the matter to be dealt with by “lower level officials”. Reducing the conditions of the separation agreement package at the last moment – when the Director General was aware that the complainant had a mortgage loan to settle – was a “deplorable” way to force the complainant to accept the terms under duress.

The complainant asks the Tribunal to quash the Director General’s “decision” not to award him certain indemnities and to order that the manner in which other indemnities have been calculated be modified. He requests that the health and accident insurance premiums for him and his dependants, as well as his full pension fund contributions, be paid by WIPO until he reaches the age of 55. He asks to be awarded compensation for financial loss and damages for material and moral injury. He also claims costs.

C. In its reply WIPO argues that the complaint is not receivable on two grounds. First, by signing the Agreement on 14 November 2003 the complainant accepted the administrative decisions contained in the Director General’s memorandum of 12 November 2003 thereby waiving any right to appeal against such decisions. Secondly, under Article 5 of the Agreement he expressly renounced his “recourse to all present and future claims”, except in the case of non-compliance on the part of the Organization. WIPO considers that since it is in full compliance with the Agreement and its Staff Regulations and Rules, the appeal is not receivable.

On the merits, the Organization submits that the complainant is not entitled to the indemnities he is now trying to claim. It points out that the very purpose of the Agreement was to provide him with more favourable terms, on a more comprehensive basis, than he would have received under the Staff Regulations and Rules. He has offered no proof that WIPO has been non-compliant with any of its obligations under the Agreement. Nor has he offered proof that any of the terms of the Agreement he is now trying to claim were “agreed” upon before the version of the Agreement presented to him on 10 November. In any event, he has already accepted payment of the indemnities set out in the Agreement. It is bad faith for him to accept these payments, many of which contained discretionary elements, and then turn around and sue the Organization. It says the Tribunal’s case law has been clear on this point.

WIPO asserts that the complainant’s argument concerning non-compliance with the Staff Regulations is without merit; he can hardly expect to benefit from a mutually agreed separation package and independently benefit from particular provisions of the Staff Regulations and Rules that would apply to any staff member in the absence of such a package. It was the complainant who insisted that the reference to the Staff Regulations be added to the Agreement. If he believed that any provision of the Agreement was not in compliance with the Staff Regulations,

he should have said so at the time and declined to sign it. The Organization explains that the document of 8 October 2003 (headed “Additional Elements”) was offered on a without prejudice basis in the negotiation process; it contained a reference to an indemnity of 12 months’ remuneration. However, the complainant having rejected the other elements, that offer died. It denies it subjected him to duress so that he would sign the Agreement; he had plenty of time to consider his position. Furthermore, he was informed throughout negotiations that if he was unhappy with the terms of the separation agreement he could continue at WIPO under his former grade of D.1.

The Organization points out that prior to joining WIPO, the complainant resigned from the FAO and was paid a repatriation grant and for the commutation of all accrued annual leave. There was no inter-agency transfer agreement concluded between the two Organizations; nor, for that matter, can his continued relationship with the UNJSPF be used as proof that his movement between the Organizations was a transfer.

In the separation Agreement the complainant also waived all requirements of notice in respect of cessation of service. He is therefore estopped from claiming payment in lieu of notice. The Organization likewise rejects his claims for payment of various indemnities.

As regards the separation agreements of other staff members, the Organization says that it is in the nature of mutually agreed separations that they are discretionary and hence confidential. The complainant could not have been aware of certain details of these agreements without obtaining the information illegally. Such agreements are tailored to the individual circumstances of the staff member concerned and the Director General has wide discretion in the matter. WIPO says that his argument with respect to equality of treatment must fail.

WIPO submits that it is not liable for any material damages as it has not breached the Agreement and it contends that the “facts” on which he has based his claim for moral damages are devoid of substance. It makes a counterclaim for costs.

D. In his rejoinder the complainant contends that the references he has made to the separation agreements of other senior staff came from the report of the WIPO Coordination Committee’s Forty-Sixth Session; as this report is public, and not confidential, he did not obtain the information illegally. This information is the essence of his plea concerning equality of treatment and his claim for pension fund contributions and health and accident insurance premiums until retirement age. He submits that under the case law, the Director General is bound to apply a rule which has been previously adopted by the Coordination Committee. Furthermore, he believes that the Tribunal does have the authority to review these other settlement agreements without breaching confidentiality or without information finding its way into the public domain. He submits that he had no choice but to sign the Agreement as presented to him, as it would have been impossible to obtain any legal remedy in the time that remained before his separation from service.

He asserts that he has provided evidence of a causal link between the Director General’s unlawful acts and the material and moral injury that he has suffered. He accuses the Organization of having “deliberately leaked the result of the WIPO Appeal Board” as well as having “spread misleading rumors and wrong and detrimental information regarding his claims”. He presses his other pleas and claims.

E. In its surrejoinder the Organization maintains its position. It points out that the specific criteria used in negotiating settlement agreements such as his were never approved as such by the Coordination Committee. Thus, exactly what is offered is within the Director General’s discretion. Recognising that officials in the same circumstances should be treated the same way, it submits that the complainant has not provided any evidence to show that his circumstances were comparable to the other officials to whom he refers.

It categorically denies that it has deliberately leaked the results of the Appeal Board hearing on his case or that it spread misleading rumours about his claims. It also denies that it has put the complainant in a difficult personal position. It presses its counterclaim.

CONSIDERATIONS

1. The complainant, a former Deputy Director General of WIPO who has challenged the report of the WIPO Appeal Board, is in essence challenging the implied decision of the Director General to accept the finding of the Board that an appeal with respect to a separation agreement between him and the Organization was without merit.

2. The complainant joined WIPO on 10 August 1996, ten days after his resignation from the FAO. Subsequently, he was appointed Deputy Director General for the periods 7 July 1998 to 30 November 2001 and 1 December 2001 to 30 November 2003. He held the various posts to which he was appointed, including that of Deputy Director General, on fixed-term appointments, the last of which came to an end on 30 November 2003.
3. The fact that his appointment as Deputy Director General would not be renewed after November 2003 was known to the complainant as early as July of that year, as was the fact that, if he elected to stay with WIPO, he was entitled to a permanent appointment but in a different post and at grade D.1. It was also known to him in July 2003 that the Director General was prepared to negotiate a separation package with him if he elected not to stay with WIPO.
4. The complainant contends that an agreement was concluded between him and the Director General in September 2003 for a separation package “in compliance with the WIPO Staff Regulations and the procedures and rules applicable to senior officials in the D-2 and above category” and that “the maximum” would be awarded to him. On the other hand, WIPO denies that any agreement was then reached, contending that the contents of the package remained to be negotiated. On 8 October the complainant was informed that certain items would be included in his separation package and that two of his specific requests had not been approved. The first of those requests was for payment of three months’ salary in lieu of notice; the second was for the payment of pension contributions until age 60 as well as medical insurance coverage for him and his family.
5. Following the communication of 8 October, the complainant twice contacted the Director General in writing. In a first memorandum he claimed that a final agreement had been concluded in September. In a second memorandum he referred to an “Agreement” presented to him on 10 November. The Director General replied in a memorandum of 12 November 2003 contending that no “agreement” had been concluded prior to the proposal offered to the complainant on 10 November and informing him that the then current offer which was, in one important respect, less favourable than that which had been indicated on 8 October, would remain open until 30 November. The memorandum also indicated the basis on which the various components of the package had been calculated.
6. Although the offer remained open until 30 November, the complainant signed the “Agreement” on 14 November. The Agreement required the payment of specified amounts by WIPO and recorded the complainant’s agreement to cease service on 30 November 2003. It also recorded:

“All formal requirements of notice of cessation of service under the WIPO Staff Regulations and Rules are hereby acknowledged to have been satisfied.”

Additionally, it specified:

“Provided that the Organization complies with its obligations under this Agreement and the WIPO Staff Regulat[ions] the [complainant] hereby renounces recourse to all present and future claims, on whatsoever grounds related to this Agreement, against the Organization before the WIPO Appeal Board, the Administrative Tribunal of the International Labour Organization or any other national or international jurisdiction.”

The words “and the WIPO Staff Regulat[ions]” were added by the complainant on the signing of the Agreement. It is not disputed that they form part of the Agreement. However, there is a dispute as to their meaning and effect.
7. It is contended in the complaint that the separation Agreement was signed under “extreme duress” resulting from the financial situation in which the complainant then found himself. However, it is expressly stated that the complainant does not seek nullification of the Agreement, only “compliance with the WIPO Staff Regulations, the observance of the contractual clauses of the [...] Agreement, the observance of the established official rules and procedures, and the observance of the precedents in respect to the benefits that have been awarded in [similar] cases”. By reference to “precedents” the complainant seeks to contend that the Agreement which he signed was discriminatory in that other senior officials received more beneficial separation packages. He relies on these contentions to claim a more generous provision in respect of certain items included in the separation package and, also, to obtain payment of six months’ salary and allowances in lieu of termination notice. Additionally, he requests the Tribunal to investigate the separation packages negotiated with other WIPO officials graded D.2 and above between 1 June 2001 and 14 November 2003 which, it is said, will reveal that he was treated unequally and that, on that account, the Director General abused his discretionary power.

8. In addition to the improvements sought in the separation package, the complainant seeks material damages in respect of a contract for the purchase of a dwelling which he was unable to complete because of the alleged inadequacies in the separation package and, also, for the expense associated with renting alternative accommodation. He also seeks moral damages and costs.

The separation agreement

9. The first matter to be determined is the meaning and effect of the additional words “and the WIPO Staff Regulat[ions]” in the Agreement. Only when that has been done is it possible to determine whether WIPO has complied with the separation agreement and the Staff Regulations and, thus, whether or not the complainant has waived his right to recourse to this Tribunal.

10. Clearly, the additional words are not apt to cut down the terms of the Agreement so as to reduce the benefits payable to the complainant. To treat the additional words as having that effect would be destructive to the Agreement. For the same reason, those words are neither apt to restore rights that the complainant has explicitly waived nor to put into contention obligations which he has expressly agreed have been performed. Thus, because the complainant specifically acknowledged that all requirements with respect to notice had been complied with, the additional words do not operate to allow him to claim payment in lieu of notice.

11. The additional words must, however, be given some meaning consistent with the other terms of the Agreement. They are, thus, apt to allow the complainant to claim benefits provided by the Staff Regulations which are superior to those provided in the Agreement unless those benefits have been expressly waived or negated. And because the Staff Regulations are to be construed in accordance with the principle of equality, it may be assumed, for present purposes, although the Tribunal does not so decide, that the additional words are apt to require that, save where rights have been expressly waived or the performance of obligations has been expressly acknowledged, the terms of the separation agreement do not result in the unequal treatment of the complainant.

Benefits under the separation agreement and the Staff Regulations

12. As already indicated the additional words do not allow the complainant to claim payment in lieu of notice, but do allow him to claim in respect of the benefits specified in the separation agreement and which involve no express waiver on his part. In respect of those matters, the complainant is entitled to claim superior benefits, if there be any, under the Staff Regulations. The benefits which may be the subject of such a claim comprise termination indemnity, outplacement assistance, commutation of accrued annual leave, payment in lieu of education grant entitlement, payment in lieu of home leave entitlement, payment of pension contributions and payment of medical and accident insurance.

13. No claim is made in the complaint either with respect to the commutation of accrued annual leave or payment in lieu of education grant entitlement. No provision is made in the WIPO Staff Regulations with respect to outplacement assistance and to home leave for a person who is about to separate from the Organization. Similarly, no provision is made for the payment of pension contributions, medical or accident insurance after a person has left the Organization. Thus, termination indemnity is the only matter that falls for consideration by reference to the terms of the Staff Regulations.

14. The complainant’s contention with respect to the termination indemnity, which was calculated on the basis of his service with WIPO and allowed as 7.31 months’ remuneration plus 50 per cent, is that it should have been calculated on the basis of his total service within the United Nations system and allowed at 12 months’ remuneration plus 50 per cent. In this respect, the complainant relies on Staff Regulation 9.6(a)(1) which allows for an indemnity equivalent to 12 months’ remuneration (not 12 months’ remuneration plus 50 per cent as claimed) for 15 or more years of service. He claims such an indemnity on the basis that he served for 15 years in the United Nations system. However, the complainant’s argument overlooks the fact that he resigned from the FAO and so no indemnity was due to him in respect of his service with that Organization. He subsequently spent a little over seven years with WIPO. Moreover, and more significantly, Staff Regulation 9.6(a)(3) provides that a termination indemnity is not payable when “a staff member holding a fixed-term appointment [...] ceases duty on the expiration date specified in his letter of appointment”.

15. Although the complainant was entitled to a permanent appointment, he was not entitled to such an

appointment as Deputy Director General. Staff Regulation 4.14(b) requires that Deputy Directors General be granted fixed-term appointments. As the complainant ceased duty when his appointment as Deputy Director General came to an end, he was not entitled under the Regulations to the payment of a termination indemnity.

Unequal treatment

16. The main thrust of the complainant's case is that after June 2001, when provision was made for separation packages for persons graded D.2 and above, other officials received more advantageous packages than he did. To this end, the complainant requests the Tribunal to conduct its own investigation and to call for certified copies of the agreements concerned. Given the confidential nature of those agreements, it follows that the complainant is unable to establish that those packages were more beneficial than his. Furthermore, he offers no evidence that any of the officials who received those packages were in the same or, even, in a comparable position to him in terms of employment history or status. As was said in Judgment 2142, without some evidence to this effect, "the Tribunal will not [...] itself undertake [...] a wholesale 'fishing expedition' based on nothing more than the possibility that something may turn up". Accordingly, the complainant's contentions with respect to unequal treatment must be rejected.

Other matters

17. The complainant has failed to establish non-compliance by WIPO either with its obligations under the separation agreement or with the Staff Regulations. Accordingly, he has no right to make any claim with respect to the agreement in this Tribunal or in any other jurisdiction. However, there are three subsidiary matters which should be noted.

18. The first matter that should be noted is the complainant's criticism of the WIPO Appeal Board insofar as he alleges that the Board granted an extension of time for the Organization to file its reply in the proceedings before it. The complainant's criticism makes no allowance for the intervention of the Christmas holiday period. Moreover, it occasioned no detriment to him.

19. The second matter is that there is nothing to suggest that WIPO was in any way responsible for communicating to any person the outcome of the proceedings before the Appeal Board or, indeed, any other information concerning the complainant.

20. The final matter to be noted is that, in its reply, the Organization has asked for costs against the complainant. There are no special circumstances warranting an award of such costs.

DECISION

For the above reasons,

The complaint and the Organization's counterclaim are dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

