The Administrative Tribunal,

Considering the complaint filed by Mr S. J. K. against the World Intellectual Property Organization (WIPO) on 22 June 2006, WIPO's reply of 22 September, the complainant's rejoinder of 27 November 2006 and the Organization's surrejoinder of 27 February 2007;

Considering Articles II, paragraph 5, and VII 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, a British national born in 1968, joined WIPO on 1 January 2001 as an Assistant Translator at grade P.2 under a two-year fixed-term contract. He was assigned to PCT Translation Section II in the Office of the PCT.

According to the complainant's first periodical report of 5 June 2001 his performance was unsatisfactory. In September 2001 he was transferred to another department. His performance was rated "satisfactory without reservation" in his two subsequent periodical reports, one dated 14 January 2002 and the other 17 September 2002, but in his periodical report of 24 November 2003 reservations were expressed as to the quality of his work. According to his periodical report of 20 October 2004 the quality of his work was "unsatisfactory" and the quantity of work performed was satisfactory with "reservations".

By a letter of 22 December 2004 the Director of the Human Resources Management Department (HRMD) informed the complainant that his fixed-term appointment, due to end on 31 December 2004, was extended for a period of one year only, from 1 January to 31 December 2005, on the understanding that he should improve the quality of his work. On 14 March 2005 the complainant was transferred to the Communications and Public Outreach Division.

Following the complainant's request for a transfer, first made in August 2005 and reiterated one month later, the Director of HRMD informed him in writing on 29 September 2005 that for the time being the Organization was unable to consider his transfer in the light of "the conditions accompanying [his] last extension of appointment" of 22 December 2004. Noting that the extension of the complainant's appointment beyond its current term was subject to a satisfactory appraisal, which was due in October 2005, the Director stated that his request would be considered once that appraisal had been issued. The quality and quantity of the complainant's work as well as his conduct were rated "unsatisfactory" in his final periodical report of 17 October 2005.

The complainant wrote to the Director General on 20 October 2005 requesting a review of the memorandum of 29 September 2005, the "rebuttal" of his final periodical report and the extension of his fixed-term appointment for at least two years. In a letter of 31 October 2005 the Director of HRMD informed him that, since his performance remained unsatisfactory, it had been decided that his appointment would be allowed to expire on 31 December 2005. By a letter of 8 November 2005 addressed to the Director General, the complainant sought a review of that decision. He was informed by a letter of 14 December 2005 that the Director General had decided to reject his requests of October and November 2005.

He lodged an appeal with the Appeal Board on 15 December 2005 challenging various decisions taken by the Administration with regard to the non-extension of his fixed-term appointment. In its report of 24 January 2006 the Board held that the appeal was without merit. The complainantchallenges the non-extension of his appointment, which expired on 31 December 2005.

B. The complainant contends that he did not receive, within the "permissible time limits", a final decision from the Director General. He asserts that the memorandum of 29 September 2005, indicating that the extension of his

appointment was subject to satisfactory performance, constituted an administrative decision. On 25 October 2005 he submitted a request for review of that decision, to which the Director General did not reply.In his view the decision was flawed because it was based on “most unfair and exploitative accompanying terms of an extension of appointment”. Moreover, it was taken in light of the “flawed, unjust, unfair and non-equitable periodical report” of 20 October 2004, according to which the quality of his work was unsatisfactory.

The complainant also alleges that his final periodical report is flawed because it was not signed by all his superiors as required under Staff Regulation 4.18 and was not drafted within the time limit prescribed by Office Instruction No. 7/1982, that is to say three to four months prior to the expiration date of his appointment. He contends that the report was “unjust, unfair and non-equitable”, which has caused him “much suffering, pain, anguish and damage”. He points out that he received his completed job description only in October 2005 for the post he had occupied since March 2005 and that his supervisors’ instructions had often been confusing. Moreover, he did not receive sufficient on-the-job training and was deterred from seeking guidance from colleagues. Since his final periodical report does not fairly assess his performance, he asserts that it is “null and void”and requests that his performance and conduct be assessed by an independent panel.

The complainant contests the statement of the Director of HRMD, in his letter of 31 October 2005, that his performance remained unsatisfactory. He draws attention to the fact that he received that letter – which contained the decision to allow his appointment to expire on 31 December 2005 – after the beginning of the internal appeal proceedings set up to deal with his claim against his final periodical report and the decision of 22 December 2004. He contends that the decision of 31 October was taken in breach of his “right to internal justice” and involved an abuse of authority. Moreover, the fact that he was granted a within-grade step increase in April 2005 shows that his periodical report for 2004, on which the decision of 22 December 2004 was based, was “invalid and quashed de facto by the Administration”.

The complainant alleges that he has suffered “grave damage” as a result of WIPO’s failure to affiliate him to the Swiss unemployment insurance scheme, in breach of Article 19 of the Headquarters Agreement of 1970 and of an agreement concluded between the European Community, its MemberStates and the Swiss Confederation. He also submits that the Organization has violated the Universal Declaration of Human Rights and the Charter of the United Nations by not assessing his performance fairly.

The complainant asks the Tribunal to quash the decision of the Director of HRMD dated 31 October 2005 and to extend his fixed-term appointment. He also asks that the memorandum of 29 September 2005 and his final periodical report be “reviewed, quashed and declared null and void”. He seeks an order that WIPO affiliate him to “Swiss insurance schemes concerning unemployment benefits funds or any equivalent fund”, with retroactive effect from the date on which he ceased to be covered by the German social security system. In addition, he claims damages for material and moral injury as well as costs. Subsidiarily, he asks that his periodical report for 2004 be declared null and void and be removed from his personal file. He puts forward a similar request regarding his periodical report for 2001, which he describes as “unjust [and] unfair”.

C. In its reply WIPO indicates that the complainant was informed by a letter dated 1 March 2006 that the Director General had decided to dismiss his appeal in accordance with the Appeal Board’s recommendation of 24 January. The letter was sent to the address given to the Administration by the complainant in November 2005. It contends that since the complainant failed to appeal this decision within ninety days, his complaint is time-barred and therefore irreceivable. The decisions challenged by the complainant, that is to say the notification of 31 October 2005, his final periodical report and the memorandum of 29 September 2005, are also “time-barred”.

The Organization denies that the afore-mentioned memorandum was a new administrative decision, since the terms on which the complainant’s one-year extension had been approved were in fact laid down in the letter of 22 December 2004 and accepted by him at the time. In its view, the complainant’s claim concerning procedural and substantive defects in his periodical report for 2004 must fail as he did not pursue the matter within the prescribed time limit. His claim for the quashing of his periodical report for 2001 is also time-barred.

The defendant rejects the complainant’s allegation that his final periodical report was tainted with procedural flaws. It indicates that his supervisor for the period from 1 January to 13 March 2005, and his supervisor from 14 March 2005 onwards, both signed his report together with the Deputy Director General of the Copyright and Related Rights and Industry Relations Sector, who was the hierarchical superior of the complainant’s supervisors. It acknowledges that the report was not submitted three to four months prior to the expiration date of the

complainant's appointment, as provided under Office Instruction No. 7/1982, but asserts that this did not adversely affect him since he retained his "full rights of appeal". Referring to the Tribunal's case law, it states that failure to meet a deadline cannot on its own justify the setting aside of a periodical report.

With regard to the substance of the complainant's final periodical report, it points out that, according to the Tribunal's case law, it is not for the Tribunal to substitute its own judgement for that of the supervisor of the staff member in question. It contends that following his transfer in March 2005 the complainant received instructions and feedback from his supervisor on the tasks he carried out. The complainant's conduct towards his supervisors and the Administration as well as his performance had been problematic from his entry into service in 2001. Concerning the alleged lack of training, it states that staff members are recruited to positions for which they are not expected to have to undergo additional training, particularly within the first few months of their appointment.

Regarding the step increase granted to the complainant in 2005, the defendant submits that it was awarded on an exceptional basis to encourage him to improve. For the same reasons his appointment was extended for one year by the letter of 22 December 2004, which indicated that his past unsatisfactory performance was not condoned by the fact that he was given an opportunity to improve his performance.

The Organization explains that the content of the complainant's draft job description following his transfer in March 2005 was approved by his supervisor and the Director of HRMD before being discussed at length with the complainant during a meeting held on 29 June 2005. The latter declined to sign it at that time. Another draft job description, which was "virtually identical" to the previous one, was therefore handed to him in August 2005; he did not sign it until 15 October 2005. WIPO concludes that it cannot be blamed for the delay in completing the job description.

The Organization indicates that WIPO staff members are not covered by unemployment insurance and that it is not entitled to affiliate non-Swiss staff members to Swiss insurance schemes. Moreover, the relevant instruction from the *Office fédéral des assurances sociales*, applicable as from 1 January 1997, makes it clear that foreign international civil servants are not covered by Swiss social insurance and cannot take it out on a voluntary basis. Regarding the alleged breach of the Universal Declaration of Human Rights, it contends that the complainant's case concerns performance and not human rights. It further explains that it is not bound by agreements concluded between the European Community, its MemberStates and the Swiss Confederation.

Lastly, the defendant points out that the complainant requested on 29 December 2005the payment of a relocation grant, which is only payable to staff members upon separation, in application of Staff Rule 9.7.1; he is consequently not entitled to claim an extension of his appointment.

D. In his rejoinder the complainant presses his pleas. He reiterates that he did not receive a final administrative decision. He explains that he agreed to the extension of his appointment, as stated in the letter of 22 December 2004, but not to the accompanying terms. He stresses that the right to enjoy the "privileges of salaried employment" and social security or unemployment benefits constitutes a fundamental human right, which WIPO should observe.

In addition, he alleges that his transfer in March 2005 was a "trap" since he was transferred to the "wrong position" and was supervised by the "wrong superiors". He further accuses the Organization of racial discrimination and discrimination on the grounds of sex, particularly because a Deputy Director General "brutally shouted at the top of her voice" at him in a meeting held in November 2004, and stated that she did not want him to join her team.

E. In its surrejoinder WIPO maintains its position. It emphasises that the complainant was transferred to an appropriate position with appropriate supervisors and was given support both by his supervisors and by colleagues. In its view, the complainant's working relations with his supervisors were strained because of the complainant's "tense and often outwardly hostile attitude" towards them. It denies that the complainant was discriminated against.

CONSIDERATIONS

1. In a complaint filed with the Tribunal on 22 June 2006 the complainant contests the fact that his appointment was not extended beyond the expiry of his fixed-term contract on 31 December 2005.

2. The Organization submits that the complaint is irreceivable because it was filed beyond the ninety-day time

limit stipulated in the Statute of the Tribunal.

3. Throughout his brief, the complainant maintains that a final decision was never made. In his complaint form he does not indicate an express final decision. Instead, he identifies three claims upon which no final decision has been taken within the time limit provided for in Article VII(3) of the Statute. According to the form, the dates on which the complainant notified the Organization of the claims are: 31 October 2005, 11 November 2005 and 12 December 2005.

4. In the introduction of his brief, the complainant states that the complaint was "filed with the Registrar of the [Administrative Tribunal of the International Labour Organization] before the elapse of 150 days i.e. 90 + 60 days after the 25th January 2006". In making this statement, the complainant appears to rely on Article VII(3) to show that he has filed his complaint within the prescribed time limits.

5. Article VII of the Statute reads, in part, as follows:

"1. A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.

2. To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published.

3. Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. The period of ninety days provided for by the last preceding paragraph shall run from the expiration of the sixty days allowed for the taking of the decision by the Administration."

6. Before turning to an analysis of the receivability question, a matter raised in the complainant's brief requires comment. The complainant submits that the Director General made his last decision regarding his appeal on 12 January 2006 and that he did so before the Appeal Board issued its report on 24 January 2006, thereby breaching the appeal procedure. The complainant's view that the decision was made on 12 January 2006 is incorrect. The document of 12 January 2006 was the Director General's reply to the appeal, not a decision, and was considered by the Appeal Board together with the complainant's claims to make its conclusion.

7. The complainant's statement that his complaint was filed within the 150 days provided in the Tribunal's Statute cannot be sustained. First, where a final decision has not been taken, the initial sixty-day period starts to run from the date of notification of the claim to the Organization. In this case, the date of 25 January 2006 adopted by the complainant appears to be the date after the report of the Appeal Board was issued on 24 January 2006 and not the date he notified his most recent claim to the Organization, namely, 12 December 2005. If the 150 days are calculated from this last date, the time for filing the complaint would have expired on 11 May 2006. It follows that the time for filing the complaint in connection with the earlier claims noted above would equally have expired some time before the date the complainant filed his complaint.

8. Second, contrary to the complainant's assertions, the Director General did render on 1 March 2006 a decision, which was challengeable before the Tribunal. Despite this fact having been pointed out by the Organization in its reply, to which it appended the decision, the complainant nonetheless maintains the position that a final decision was never rendered. This may well be attributed to his view that a decision was made before the Appeal Board issued its report.

9. The Organization states that the Director General's decision contained in the letter dated 1 March 2006 was sent to the complainant at the address he formally provided to WIPO. However, the complainant maintains that he never received a "final" decision which "the Director General could have but did not make". Without denying that he received the letter dated 1 March 2006, the complainant states that even if it was sent and he opened the letter, it was not a "final" decision.

The Tribunal notes that although he had the opportunity to do so, the complainant did not deny having received the letter dated 1 March 2006; instead, he denies having received a final decision.

10. The onus is on the complainant to establish the receivability of his complaint. To establish receivability, the

complainant has opted to rely on the provision of the Tribunal's Statute that applies to those situations where a final decision has not been taken. In doing so, the complainant has relied on a date which by his own statement is not the date at which he notified his claim to the Organization. Further it is clear that a final decision was rendered after the Appeal Board issued its report; however, he did not challenge it before the Tribunal. As the complainant has failed to establish the receivability of his complaint and that he had a final decision within the meaning of Article VII(1) of the Statute, the complaint is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2007, Mr Michel Gentot, President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Agustín Gordillo

Dolores M. Hansen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2007.