Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

112th Session **Judgment No. 3091**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R.K. S. against the World Intellectual Property Organization (WIPO) on 11 December 2009 and corrected on 8 January 2010, the Organization's reply of 13 April, the complainant's rejoinder of 17 May and WIPO's surrejoinder dated 13 August 2010;

Considering the *amicus curiae* brief submitted by the WIPO Staff Association on 28 February 2011 and the Organization's comments thereon of 12 April 2011;

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, an Indian national born in 1959, joined WIPO in February 1999 as a clerk at grade G2 on a one-month short-term contract. For the following nine years he was employed on a series of short-term contracts. He was promoted to grade G3 in 2001 and to grade G4 in 2003.

On 23 April 2008 the complainant's supervisors drew up a periodical report in which the quality of his work was assessed as satisfactory with reservations and his conduct unsatisfactory. The complainant challenged this report before the Rebuttal Panel, but the latter upheld the assessment. Another periodical report was established in which the complainant's conduct as well as the quality and the quantity of his work were assessed as satisfactory with reservations. The complainant signed the report on 9 December 2008 – but added a comment stating that he disagreed with the rating therein – at a meeting with his supervisors. During the meeting they informed him that they would not recommend an extension of his contract beyond its expiry on 4 January 2009. In an e-mail to the Director General of 11 December 2008 the complainant asked to be transferred to another sector and to have his contract renewed on the ground that the new periodical report was "false and fabricated". By a letter of 16 December the Head of the Human Resources Administrative Section notified him that his transfer was not feasible owing to his poor performance but that he was granted a three-month "administrative extension" on account of his length of service, and that on separation he would receive an *ex gratia* lump-sum payment equivalent to six months' salary. The complainant accepted "both offers" in a letter of 22 December 2008, but again expressed his disagreement with his periodical reports. He added that he would like "to appeal to the Director General" to reconsider the decision not to renew his contract.

On 22 May 2009 the Organization sent the complainant a separation agreement in which a clause specified that, by accepting the lump-sum payment, he would renounce any right of appeal. On 5 June the complainant returned a signed copy of this agreement to WIPO together with a letter in which he said that he disagreed with several clauses of the agreement and reserved the possibility to exercise his rights. In a letter of 9 June the Organization explained to the complainant that he had to withdraw explicitly his reservations before the lump sum could be paid to him. On 9 September the

Director of the Human Resources Management Department (HRMD) gave him one last opportunity to accept the above-mentioned agreement without qualification, which the complainant did by a letter of 21 September. After the lump sum had been paid, the complainant sent a letter to the Director General on 29 October, accusing the Organization of having "bullied" him, challenging the legal validity of the agreement and seeking "the resumption and […] continuation of the appeals" which he had lodged against his last two periodical reports and against the decision not to renew his contract. By a letter of 5 November 2009 the Director of HRMD informed the complainant that his requests were denied, because in accepting the agreement he had renounced all right of appeal. That is the impugned decision.

B. The complainant contests the validity of the impugned decision on the grounds that it is based on a separation agreement that is unlawful because it "lacks any reciprocal concessions". In particular, he contends that the agreement is void and inoperative because it contains no concessions on the part of the Organization. Under the terms of this agreement, WIPO undertook only to pay a lump sum which in December 2008 it had already unconditionally committed itself to pay. According to the complainant, he should have received this sum on the day of his separation from service, i.e. on 10 April 2009.

The complainant further contests the process used by the Organization to persuade him to renounce all right of appeal, since he believes that it is contrary to the Tribunal's case law and constitutes "extortion" and "taking undue advantage of a weakness" arising from "the very difficult circumstances" in which he found himself as a result of the "unlawful termination of his employment". In his opinion WIPO did not act in good faith and breached its duty to respect his dignity.

He asks the Tribunal to find that the separation agreement and the impugned decision are unlawful and that he is entitled to retain the

lump sum paid to him. He asks it to set aside the said agreement and decision, to order the Organization "promptly to examine the claims which [he has] submitted", to order the payment of 40,000 Swiss francs in compensation for the injuries suffered and to award him costs in the amount of 7,000 euros. Lastly, he asks the Tribunal to find that, if these sums are subject to national taxation, he will be entitled to obtain reimbursement of the tax in question from WIPO.

C. In its reply the Organization submits principally that the complaint is irreceivable. It points out that subparagraph (2) of paragraph (b) of the introduction to the Staff Regulations and Staff Rules explicitly excludes from the scope thereof staff "engaged for short-term service, that is for periods of less than one year". The complainant, who always held contracts of less than one year, belonged to the category of short-term employees. As he was never a staff member of WIPO, the complainant has no *locus standi* before the Tribunal, in accordance with Article II, paragraph 5, of its Statute. The defendant adds that the contracts which he accepted and signed never gave him any right to file a complaint with the Tribunal, but this does not mean that he was deprived of all means of redress. Indeed, he had the possibility to lodge an appeal with the Rebuttal Panel, which was established under Office Instruction No. 19/2006 to hear appeals filed by short-term General Service employees against their periodical reports.

The Organization, relying on Judgment 2376, also submits that the Tribunal is not competent *ratione materiae*, since the complaint does not relate to non-observance of the complainant's terms of appointment or of provisions of the Staff Regulations and Staff Rules. It emphasises that the complaint merely challenges the validity of the separation agreement. However, that agreement was concluded after the employment relationship had ended and it concerns arrangements for the complainant's separation.

Further, WIPO says that the complaint is also irreceivable on account of the terms of the above-mentioned agreement according to which the complainant renounced any right of appeal.

Lastly, in the event that the Tribunal finds that it is competent to rule on the case, the defendant argues subsidiarily that the complaint is irreceivable because internal means of redress have not been exhausted and because the time limit laid down in Article VII, paragraph 2, of the Statute of the Tribunal has not been observed.

On the merits, the Organization asserts that the separation agreement is lawful and that in fact it does contain reciprocal concessions, since WIPO undertook to pay the complainant, as an exceptional measure, a lump sum equivalent to six months' salary in return for the fact that he renounced all right of appeal. Since the complainant accepted the agreement, he is not entitled to contest its validity. The defendant rejects the complainant's allegation that his consent was extorted from him and it comments that this argument is predicated on the erroneous assumption that the lump sum was due to him even before he accepted the above-mentioned agreement. It considers that it acted in good faith and it emphasises that the complainant was not entitled to any payment on the expiry of his short-term contract. Relying on the case law, it contends that the Tribunal has recognised the validity of agreements under which a staff member renounces all right of appeal in exchange for a benefit granted by the organisation.

D. In his rejoinder the complainant expresses the opinion that since the competence of the Tribunal *ratione personae* is determined exclusively by its Statute, the provisions of the Staff Regulations and Staff Rules cannot prevent the filing of a complaint with the Tribunal. He adds that the Organization cannot deny all right of appeal to short-term employees. He also asserts that, on the basis of the rights deriving from his employment relationship with WIPO, the Tribunal is competent *ratione materiae* in the instant case. In his opinion, the objection that a settlement was reached does not render his complaint irreceivable, since the purpose of his complaint is precisely to have the disputed separation agreement declared unlawful. Lastly, he considers that the objection that he has not exhausted internal means of redress is likewise irrelevant because the submission of any internal grievance or request for review would have been pointless.

On the merits, the complainant asserts that the offer to pay him an *ex gratia* lump sum could not be withdrawn, rescinded or amended by the addition of a condition.

He reiterates his claims, but asks the Tribunal to award him 10,000 euros in costs on account of the extra work generated by the need to respond in his rejoinder to the objections to receivability.

E. In its surrejoinder the Organization reiterates its objections to the receivability of the complaint. It also opposes the increase in the amount of costs claimed by the complainant and says that its procedural objections were quite legitimate.

On the merits, the defendant maintains that the separation agreement was valid and it points out that, if it were cancelled, the complainant would be obliged to reimburse the lump sum which he was paid. It emphasises that the clause whereby all right of appeal is renounced is commonly used and has in fact been included in many agreements with staff members in the context of the voluntary separation programme introduced in 2009.

F. In its *amicus curiae* brief the WIPO Staff Association asks the Tribunal to declare the complaint receivable. It considers that recognition of the complainant's *locus standi* before the Tribunal would imply judicial recognition of a right of appeal of which short-term employees are unfairly deprived. It disputes the difference in treatment between employees who are granted several short-term contracts for a total duration going beyond one year, on the one hand, and staff members appointed for no less than one year, on the other. In its view, this gives rise to discrimination based on the artificial short breaks between short-term employees' successive contracts. Referring to Judgments 363 and 2715, the Staff Association asserts that the clause in the separation agreement under which all right of appeal is renounced was improper.

G. In its comments on the *amicus curiae* brief, WIPO maintains its position. Relying on the Tribunal's case law, it submits that the difference in status between short-term employees and staff members

is in no sense discriminatory. It asks the Tribunal to dismiss the Staff Association's arguments concerning the validity of the above-mentioned clause on the grounds that this issue does not affect the Organization's staff in general, or even a particular category of staff. The Organization takes the Staff Association to task for raising policy considerations in an endeavour to bring about a reform of the Staff Rules.

CONSIDERATIONS

1. The complainant was recruited by WIPO under a short-term contract covering the period 4 February to 5 March 1999. He subsequently received several other short-term contracts.

2. The periodical reports drawn up in April and in December 2008 appraising his work and conduct were not satisfactory. He contested these appraisals. The Rebuttal Panel to which the contestation of the first appraisal had been referred decided to confirm it. On 9 December, during a meeting with his supervisors, the complainant was informed that an extension of his short-term contract would not be recommended owing to his poor performance.

On 11 December he sent an e-mail to the Director General asking, inter alia, to be given another opportunity "to prove [his] worth", which might be achieved by transferring him to another sector and renewing his contract.

3. By a letter of 16 December 2008 the Head of the Human Resources Administrative Section advised the complainant that his transfer was not feasible, that on the expiry of his contract on 4 January 2009 the Organization would grant him a three-month "administrative extension" as an exceptional measure, that no further extension of his contract would be granted to him thereafter and that on separation he would receive an *ex gratia* lump sum equivalent to six months' salary.

By a letter of 22 December 2008 the complainant announced that he would accept the defendant's offers, but that he disagreed with his

periodical reports. On the same date he signed the contract granting him an "administrative extension" until 10 April 2009.

On 6 January 2009, in response to the complainant's e-mail of 11 December 2008, the Director General confirmed that his transfer was not feasible. On 23 February the complainant was invited to contact the Administration to finalise the separation formalities.

4. The contractual relationship between the Organization and the complainant ended effectively on 10 April 2009 with the expiry of the "administrative extension" which he had been granted. That same day the Acting Director of HRMD signed a separation agreement under which the Organization offered to pay the complainant the above-mentioned lump sum, the acceptance of which entailed the complainant's renunciation of any and all appeals against the Organization to the Appeal Board, the Tribunal or any other board, court or tribunal.

On 5 June the complainant signed and returned the copy of the agreement which had been sent to him, but he took care to indicate that he "totally disagree[d] with the unfair conditions imposed" by certain clauses and that he reserved the possibility to exercise "all legal and other rights of whatsoever nature".

He was advised by a letter of 9 June that the defendant was unable to process the payment of the lump sum owing to the reservations which he had expressed, but that it was prepared to offer him "one final opportunity to accept, without qualification, the terms and conditions of the Separation Agreement" if he withdrew his reservations in writing by 15 June at the latest.

The complainant replied that the deadline he had been given did not afford him sufficient time for "consultations". He added that he had reasons for questioning the "sudden adverse [periodical] reports" from his supervisors. On 9 September the Director of HRMD informed him that the deadline for withdrawing his reservations was extended until 30 September, but that any challenge to the content of his periodical reports should have been raised "in accordance with the established procedure (including the time-frame)".

The complainant withdrew his reservations in a letter of 21 September 2009. On 8 October the lump sum was paid into his bank account.

5. On 29 October the complainant wrote to the Director General in order to challenge the legal validity of the separation agreement which, he alleged, he had been forced to sign. He wished to resume and pursue "the appeals lodged" against his last two periodical reports and the decision not to extend his short-term contract. If his requests were not granted, he sought leave to file a complaint directly with the Tribunal.

By a letter of 5 November 2009, which constitutes the impugned decision, he was informed that the Director General was unable to respond favourably to his requests on account of the separation agreement between the parties.

6. The complainant contends that the impugned decision "refusing inter alia to pursue the examination of the internal appeals […] against his periodical reports and the non-renewal of his contract is unlawful in that it rests on the unlawful separation agreement signed on 21 September 2009". In substance he asks the Tribunal to set aside this agreement and the impugned decision, to order the Organization "promptly to examine the claims [which he has] submitted" and to order redress for the injuries suffered.

7. The WIPO Staff Association supported the complainant in the *amicus* curiae brief which it filed with the Tribunal. The President of the Staff Association asks the Tribunal, on the basis of the arguments set out in the brief, to declare the complaint receivable, to allow the complainant's claims and to find that the clause "by which the Organization made the payment of the sums to which the complainant was entitled" subject to the signature of a clause renouncing all right of appeal was improper.

8. The defendant first raises a number of objections to receivability, in particular that the Tribunal is not competent to hear the complaint.

It also considers that the complaint should be dismissed, "since any order to remit the case to the Organization for an examination of the complainant's situation is of no avail, because all his claims are time-barred".

9. WIPO challenges the Tribunal's competence on the grounds that, since the complainant was employed under a series of short-term contracts, he could not be regarded as an official within the meaning of the Staff Regulations and Staff Rules and therefore has no *locus standi* to file a complaint under Article II, paragraph 5, of the Statute of the Tribunal.

10. In this connection it must be recalled that, according to its case law established on the basis of this provision, the Tribunal may rule on any employment relationship arising between an organisation and its staff, whether under the terms of a contract or under Staff Regulations. If a decision to appoint an employee, or to terminate his or her employment, is challenged on the grounds that it affects the rights of the person concerned which the Tribunal is competent to safeguard, the Tribunal must rule on the lawfulness of the disputed decision. It is immaterial whether the employee in question was recruited under a contract and whether that contract was for a fixed term. (See, in particular, Judgment 3090, adopted on 10 November 2011 by an enlarged panel of judges, under consideration 4, and Judgment 1272, under 9.)

In the instant case, the Tribunal derives its competence from the mere fact that the dispute centres on the legal nature of the contractual relationship between the Organization and the complainant.

Moreover, the Tribunal observes that paragraph (b) of the introduction to the Staff Regulations and Staff Rules, on which the Organization relies in order to dispute the complainant's status as a

staff member, in fact refers to persons engaged for short-term service as "staff members".

11. It follows from the foregoing that the Tribunal is competent to hear the complaint.

12. However, the instant case differs from that which led to the above-mentioned Judgment 3090 in that, although the complainant was likewise employed under short-term contracts, he had signed a separation agreement whereby he renounced all appeals to a judicial authority. The question which must be addressed is therefore whether, as the complainant submits, the agreement in question is tainted with flaws of a kind that render it unlawful or even non-existent.

13. The complainant asserts that this agreement "lacks any reciprocal concessions".

The Tribunal, however, finds that this statement is untrue. A perusal of the agreement reveals that the Organization undertook to pay the complainant a lump sum as an exceptional measure provided that he renounced any action against it. The complainant's argument that this lump sum was due to him before the signature of the agreement does not withstand critical examination. Indeed, there is no apparent reason why WIPO would undertake to pay this sum without any *quid pro quo*.

14. The complainant contends that the separation agreement was obtained through "extortion", but the Tribunal will not accept that it was signed under duress in view of the circumstances preceding its signature by the complainant. In fact he was allowed a substantial period of reflection, which was extended for "consultations", and it was only after this period that he withdrew his reservations to the terms of the agreement.

15. Contrary to the complainant's allegations, the Tribunal finds that, as far as the signing of the agreement is concerned, the

Organization did not in any way breach its duty to act in good faith and to respect the dignity of its staff.

The complainant could have refused to sign the agreement and could have exercised his rights by other means if he thought that they were being breached. The argument that he was obliged to withdraw his reservations because he needed to support his family will not be accepted, as the complainant has not shown that he found himself in a situation of such dire necessity that when he signed the agreement his consent was not valid.

16. It follows from the foregoing that the separation agreement is not unlawful in any way and that the impugned decision, which is criticised only insofar as it rests on this agreement, therefore cannot be set aside.

17. The complainant's other claims fail because the agreement in question, by which he renounced any action against the Organization, is, as stated above, not unlawful in any way.

18. The complaint must therefore be dismissed without there being any need to rule on the objections to receivability raised by the defendant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 2011, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet