Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session **Judgment No. 3141**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr I. T. against the World Health Organization (WHO) on 5 July 2010, WHO's reply of 9 November 2010, the complainant's rejoinder of 28 January 2011 and the Organization's surrejoinder of 2 May 2011, the documents supplied by the latter on 23 April 2012 at the Tribunal's request, the complainant's comments thereon of 25 April and WHO's final observations of 26 April 2012;

Considering Articles II, paragraph 5, VII and VIII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, an Ivorian national born in 1968, began to work for WHO in December 2006, on a short-term appointment, as a guard at grade G.2. He was subsequently given two further appointments of this kind from 5 February to 30 March 2007 and from 16 April to 7 September 2007. On 1 July the latter was converted into a temporary appointment which expired on 30 December 2007. On 3 January 2008 the complainant was offered another temporary appointment covering

the period from 1 January to 30 June 2008, which he accepted the next day.

On 13 March 2007 the Organization published a vacancy notice for several positions as a guard at grade G.3. The complainant applied and was interviewed, but he did not obtain any of the posts.

In June 2007 the complainant filled out an application for a legitimation card of the Federal Department of Foreign Affairs, in which he stated that he did not hold a Swiss residence permit. This application was forwarded to the Permanent Mission of Switzerland to the United Nations Office and other international organizations in Geneva. Pending the receipt of this card, on 13 June and 28 September 2007 the Administration of WHO issued him with attestations that he "w[ould] be in possession of" such a document "in the very near future". A third attestation, dated 11 February 2008, stated that the complainant had "submitted an application for a legitimation card".

On 10 April 2008 the *Office cantonal de la population* of the Republic and Canton of Geneva summoned the complainant to an interview which took place on 29 April, at which he was informed that no legitimation card could be issued to a person unlawfully present in Switzerland. He therefore had to leave Swiss territory by 15 May 2008 at the latest and submit a visa request, accompanied by his WHO contract, to the Swiss Embassy in Côte d'Ivoire. On 28 April the Permanent Mission of Switzerland informed the WHO Administration that it would not issue a legitimation card to the complainant because of his unlawful status. During a meeting on 9 May he informed his supervisors that he wished to return to his country of origin in order to regularise his situation in accordance with the instructions of the *Office cantonal*. On 14 May he signed a Clearance Certificate and on the same or the following day, having been informed by the Swiss Embassy in Côte d'Ivoire as to what documentation he should supply – this included a copy of his employment contract – he asked Ms Q., an officer of the WHO Staff Orientation Service, for a certificate of employment. She refused to issue him with this document. The complainant then turned to his second-level supervisor

who, on 15 May, handed him a document entitled "Certificate of service". He finally left work on 16 May, the date on which he had said that he would return to Côte d'Ivoire. He then received his salary and allowances for May and June 2008 and a sum corresponding to his credit balance of annual leave up until 30 June 2008.

On 8 July the complainant sent the Headquarters Board of Appeal a statement of his intention to appeal against the decision to terminate his temporary appointment which, he said, had been communicated to him orally by Ms Q. As he believed that without an employment contract he no longer had any reason for his visa application, he explained that he had not returned to Côte d'Ivoire as planned and asked for the "continuation" of his temporary appointment in order that he might regularise his situation with the Swiss authorities. On 16 July the Organization objected to the receivability of this appeal, arguing that the complainant had not complied with Staff Rule 1230.8.1, since he was not challenging a final decision, i.e. a decision taken by a duly authorised official and of which he had received written notification. This objection was dismissed by the Board on 24 October 2008 on the grounds that the "oral notification of 15 May 2008" could be legitimately regarded as a final decision within the meaning of Staff Rule 1230.8.1. In its report of 25 August 2009 the Board recommended inter alia that the complainant should be offered a six-month temporary appointment in compensation. It considered that he had received "vague and contradictory snippets of information" which had led him to believe that his temporary appointment had been terminated on 15 May 2008 and that was why he had not proceeded with the necessary steps to obtain a visa for Switzerland in his own country.

After his counsel had complained to WHO on 3 February 2010 that no final decision had been delivered, a conciliation procedure was opened, but on 3 March the complainant declined the monetary settlement proposed to him. On 7 April 2010 the Director-General informed him that she endorsed neither the analysis nor the findings of the Board, since she considered that his appeal was irreceivable and

unfounded. However, she did grant him 3,000 Swiss francs in compensation for the delay in reaching a decision on his appeal. That is the impugned decision.

B. The complainant submits that a "series of conclusive acts" led him to believe that his appointment had been terminated as of 15 May 2008. He states that on 7 May his supervisors asked him to hand back his uniform and to stop work at the end of the week, that Ms Q. informed him orally of the termination of his appointment, that he had to sign a Clearance Certificate which, in his opinion, served as a "discharge from service" and that on 15 May 2008 he had received a certificate of service notifying him of and confirming the completion of his period of service with immediate effect.

He considers that, since all this information was given to him by officials who had "the power to take a decision" concerning him and since the Tribunal has accepted that a written or oral, explicit or implied decision may form the subject of a complaint, his appeal was therefore receivable, because it was challenging a final decision within the meaning of Staff Rule 1230.8.1.

On the merits, he asserts that, when he was recruited, the Organization did not check his status on Swiss territory with due diligence, although he had been "quite open about his situation". He accuses it of not having kept its promise to obtain a legitimation card for him and of having created and maintained the illusion that his situation would be regularised by supplying the attestations of 13 June and 28 September 2007. He also takes WHO to task for having prevented him from putting his situation in order, once he had learned that the Permanent Mission of Switzerland would not grant him a legitimation card, by deciding to terminate his temporary appointment on what were unlawful grounds, because no provision is made for them in Staff Rule 1045.1. He adds that as he no longer has an employment contract, he is in an awkward position because, his complaint having no suspensory effect, he could be expelled from Swiss territory "at any moment".

Relying on the testimony of a former colleague that, on the strength of his good results in the selection tests forming part of the competition opened on 13 March 2007, his supervisors had given him a promise at a section meeting on 15 November 2007, he contends that his last appointment was "supposed" to have been converted into a "two-year fixed employment contract as soon as the requisite funding was available".

As a preliminary request, he asks the Tribunal to confer a suspensory effect upon his complaint and to order the holding of oral proceedings and the hearing of two witnesses in particular. He also requests the Tribunal to consult the Permanent Mission of Switzerland in order to "determine the conditions on which a special procedure may be followed in order to obtain a legitimation card on behalf of an employee of WHO". His principal request is that the Tribunal set aside the impugned decision and the "premature, snap" decision to terminate his temporary appointment, and order WHO to give him "a new fixed employment contract" as a guard at grade G.3 for at least two years and to submit a special request for a legitimation card on his behalf. Subsidiarily, he asks the Tribunal, to order the Organization to defray the costs of his return journey to Côte d'Ivoire. Very subsidiarily, he asks the Tribunal, as an alternative to setting aside the impugned decision, to order the payment of 123,214.10 Swiss francs, this being the equivalent of the total salary which he would have received had the Organization kept its promise to give him a "fixed contract" for two years. At all events, he claims costs.

C. In its reply the Organization objects to the receivability of the complaint on the grounds that the complainant's appeal against the so-called decision to terminate his temporary appointment, of which Ms Q. allegedly informed him in May 2008, was irreceivable. Indeed, none of the conditions laid down in Staff Rules 1230.1 and 1230.8.1 were met, because Ms Q. was not a duly authorised official and the complainant was not appealing against a decision affecting his appointment status, or a decision taken after the exhaustion of all existing administrative channels, or a decision notified in writing. It

emphasises that it was during proceedings before the Board of Appeal that the complainant introduced pleas relating to the promise of a "fixed contract". WHO considers that these pleas were irreceivable, because they lay outside the scope of the appeal and were out of time. It also states that, since the complainant failed to submit "most" of his claims to the Board of Appeal, they are irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal, because not all internal remedies have been exhausted. Lastly, since the measures that he is asking the Tribunal to order do not fall within its jurisdiction, they are also irreceivable.

On the merits, the Organization denies that the complainant's temporary appointment was terminated and it submits that, on the contrary, there is ample evidence demonstrating that the Administration wished to honour it until it expired. For example, at the meeting on 9 May 2008 the complainant received oral confirmation that his appointment would be maintained until 30 June 2008, and Ms Q. has attested that she merely gave him some advice when he asked for a certificate of employment. In addition, the certificate of service which he received and the Clearance Certificate which he signed both showed 30 June 2008 as the date of expiry of his appointment. Lastly, the Organization draws attention to the fact that the complainant was paid his salary for May and June 2008 together with a sum equivalent to his credit balance of annual leave up until 30 June 2008. It considers that if he had had any doubts about his appointment status, he ought to have sought clarification from his supervisors.

The defendant contends that by maintaining the complainant's appointment until its expiry date and at the same time supporting his decision to return to Côte d'Ivoire in order that he might regularise his situation, his supervisors reconciled WHO's duties to both the host State, Switzerland, and the complainant. It holds that it cannot be held responsible for his unlawful status on Swiss territory, or for the consequences thereof. It emphasises that the Swiss authorities alone have the power to issue legitimation cards and that the complainant was aware that the attestations issued on 13 June and 28 September 2007 were not valid residence permits. It adds that, under Article 1.9

of the Staff Regulations, the complainant had a duty to respect the host State's laws and regulations and, in particular, to ensure that when he was recruited he was not unlawfully resident there.

The Organization says that in the competition opened on 13 March 2007 four candidates were finally selected on the basis of a Selection Panel report and, relying on the testimony of two staff members, it denies that at the end of that process any promise of a "fixed contract" was made to the complainant. With regard to the complainant's other claims, WHO argues inter alia that Staff Rule 1245 specifies that appeals have no suspensory effect. It appends to its reply an e-mail from the Permanent Mission of Switzerland regarding the procedure for submitting a "special" application for a legitimation card. As for the request to convene a hearing of witnesses, the Organization emphasises that one person has already furnished written testimony, which is annexed to the complaint, and that the other person would be pleased to supply any information that the Tribunal might require.

D. In his rejoinder the complainant points out that he already mentioned the promise of a "fixed contract" in his statement of intention to appeal of 8 July 2008. In addition, he holds that the Rules of Procedure of the Headquarters Board of Appeal do not rule out the possibility of submitting additional claims, or amending claims, in the course of proceedings. On the merits, he observes that WHO has produced two items of testimony obtained more than six months after the Director-General adopted the impugned decision. He hopes that they will be disregarded because, in his opinion, they were not subject to due process or submitted for examination before the Board of Appeal.

E. In its surrejoinder the Organization reiterates its arguments that the complaint is irreceivable, as are the new claims which were submitted out of time before the Board of Appeal, or have been presented for the first time before the Tribunal. On the merits, it maintains that the complainant's pleas and criticism are unfounded.

F. At the request of the Tribunal, the Organization has produced two documents: the first is the Selection Panel's report on the competition opened on 13 March 2007 and the second is the minutes of the meeting on 15 November 2007.

G. In his comments the complainant questions the veracity of the report in some respects and states that the minutes of the meeting have been forged.

H. In its final observations, WHO rejects as groundless the complainant's allegations regarding the documents which it has produced.

CONSIDERATIONS

1. The complainant, an Ivorian national, was first employed by WHO on 4 December 2006, on a short-term appointment, as a security guard at grade G.2. He received two further appointments of the same kind, the second of which was converted into a temporary appointment. At the material time he was employed, at grade G.3, on another temporary appointment covering the period from 1 January to 30 June 2008.

2. When he was recruited by the Organization the complainant, who had arrived in Switzerland in February 2001 on a tourist visa which had plainly long since expired, did not hold a residence permit from the Swiss authorities.

3. In June 2007, while he was on his third contract, the complainant submitted his first application for a legitimation card to the WHO Administration. In support of this application, instead of the residence permit which is normally required, he produced a power of attorney with the letterhead of the trade union organisation UNIA which, in essence, said that it was authorised to act on his behalf "for any matters in connection with a residence permit and gainful

occupation". WHO then forwarded the file to the Permanent Mission of Switzerland which delivers the legitimation cards issued by the Federal Department of Foreign Affairs.

4. While this application was being examined, a process which was repeated twice, the Organization gave the complainant three attestations dated 13 June 2007, 28 September 2007 and 11 February 2008 respectively. The first two stated that the complainant "w[ould] be in possession of a legitimation card in the very near future", while the third, which was formulated more circumspectly, merely said that he had "submitted an application for a legitimation card". In fact, this card was never issued.

5. On 10 April 2008 the complainant was summoned to the *Office cantonal de la population* in Geneva for an interview to clarify his status under the laws governing the right to residence in Switzerland. At this interview, which took place on 29 April, he was informed that no legitimation card could be issued to a person who was unlawfully present in Switzerland and he was therefore ordered to leave the national territory by 15 May at the latest. At that juncture he was informed that his only means of regularising his stay was to return to Côte d'Ivoire in order to apply for an entry visa from the Swiss Embassy in that country. The application had to be accompanied by a copy of his WHO contract.

6. As the Organization had received the same information from the Permanent Mission of Switzerland on 28 April, two successive meetings were held between the complainant and his supervisors on 7 and 9 May 2008 with a view to deciding what was to be done in the circumstances. At the second of these meetings, after the complainant had announced that he had decided to comply with the Swiss authorities' order by returning to Côte d'Ivoire on 16 May – the date finally agreed with these authorities – his supervisors assured him that his contract would be honoured until its normal expiry date, that is 30 June 2008. The Organization says that, at the complainant's

request, steps were also taken to expedite the payment of the salary and allowances due to him up until that date. At the same time, he was asked to hand back his uniform in view of his imminent departure.

7. On 14 May 2008, at the behest of Human Resources Services, the complainant signed the form entitled "Clearance Certificate for Temporary Staff" which staff in that category are usually required to complete at the end of their contract. WHO explains that, in this case, that document had to be signed before the normal expiry date of the complainant's contract in order to speed up the payment of his remuneration.

8. On 14 or 15 May – the conflicting information in the file makes it impossible to determine the date with any certainty – the complainant asked Ms Q., an officer in the Staff Orientation Service, for a certificate of employment. According to the information which he had received from the Swiss Embassy in Côte d'Ivoire, he had to produce such a document, together with a copy of his contract, in support of his visa application. As this contract had already begun, the complainant actually had to prove that it had not been terminated before the initially agreed expiry date. Ms Q. refused to issue this certificate for reasons of which the parties give differing accounts. WHO maintains that she gave this negative response mainly because the complainant had not followed the normal procedure for applying for a certificate of employment. The complainant contends that Ms Q. told him that the fact that his contract had been terminated by the Organization as of 15 May prevented her from issuing a certificate of employment for a period after that date.

9. The complainant then turned to his second-level supervisor with a view to obtaining the document in question. On 15 May the latter issued a certificate of service using a standard model which suggested that the complainant's employment with WHO had already ended, since it stated that "the quality of his work ha[d] been entirely satisfactory" and that the Organization "wish[ed] him well in his career in the future and c[ould] only recommend him to his future

employers" and that he was "leaving [it] free from any obligations apart from that to respect professional secrecy".

10. The complainant says that on account of these developments in the situation just before his departure, which convinced him that his appointment had been suddenly terminated without his being informed, with the result that he could not produce a certificate of employment in order to obtain his entry visa to Switzerland, he finally decided to cancel his journey to Côte d'Ivoire, which had been scheduled for 16 May. He therefore chose to remain in Switzerland where, it would appear from the evidence in the file, he is still unlawfully present.

11. On 8 July, a few days after the normal date of expiry of his appointment, the complainant lodged an appeal with the Headquarters Board of Appeal against what he considers to be the Organization's decision of 15 May on the early termination of that appointment. The Board accepted that this appeal was receivable at a preliminary hearing. In its final report, which it submitted to the Director-General on 24 September 2009, the Board considered that the appeal was largely well founded and recommended inter alia that a temporary six-month appointment should be offered to the complainant in compensation.

12. The Director-General departed from this recommendation by a decision of 7 April 2010 rejecting the complainant's appeal, but granting him 3,000 Swiss francs in compensation for the delay in processing his case after the Board of Appeal had delivered its report.

13. That is the decision impugned before the Tribunal. The complainant asks that it be set aside and that he be awarded various forms of redress for the injury which he considers he has suffered.

14. As a preliminary request, the complainant has asked that a suspensory effect be conferred upon his complaint as protection against possible expulsion by the Swiss authorities. However, the

wording of Article VII, paragraph 4, of the Statute of the Tribunal specifies that "[t]he filing of a complaint shall not involve suspension of the execution of the decision impugned" and no other provision of the Statute authorises the Tribunal to order such suspension. This claim is therefore irreceivable (see Judgment 1584, under 6).

15. The complainant has requested the convening of a hearing and, in particular, the hearing of witnesses. In view of the abundant and sufficiently clear submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the case and does not therefore deem it necessary to grant this request.

16. The complainant has also asked the Tribunal to consult the Permanent Mission of Switzerland in order to "determine the conditions on which a special procedure may be followed in order to obtain a legitimation card on behalf of an employee of WHO". However, the Organization annexed to its reply a message from the Head of the Office of Privileges and Immunities of this Mission, dated 8 November 2010, which provides all the necessary details in this connection. The Tribunal considers that, in these circumstances, this request has become moot.

17. The Organization's principal submission is that the complainant's appointment was not in fact terminated on 15 May 2008 and that his appeal to the Headquarters Board of Appeal and therefore his complaint before the Tribunal are both irreceivable, because they are not directed against a decision taken by a duly authorised official of the Organization. In this connection, it relies on Staff Rule 1230.1 stipulating that a staff member may bring an appeal before the Board of Appeal only against an "administrative action or decision affecting his appointment status". It also relies more particularly on Staff Rule 1230.8.1, to which Staff Rule 1230.1 indirectly refers, which lays down that an appeal is receivable only when "the action complained of has become final" and explains that "[a]n action is to be considered as final when it has been taken by a

duly authorized official and the staff member has received written notification of the action".

18. The Tribunal will not accept the Organization's arguments regarding the application of Staff Rule 1230.8.1.

19. The argument that Ms Q. was not an official duly authorised to terminate a staff member's appointment is completely irrelevant, because the complainant has never held that it was she who took the disputed decision, but only that she orally informed him of it.

20. The Organization's objection that this decision was never notified in writing might appear to be sounder, since it has been established that the alleged termination of the complainant's contract did not give rise to any such notification and, something which is of more fundamental importance, that it was never formally put in writing.

21. However, such anomalies cannot prevent a decision from being challenged, because international organisations would otherwise be able to avoid any appeal against a decision by not adopting it in writing, or by not notifying it in the prescribed manner, which would have harmful effects. Furthermore, the case law of the Tribunal has it that an administrative decision may take any form and that, even if it is not put in writing, its existence may be inferred from a factual context demonstrating that it was indeed taken by an officer of the organisation (see, in particular, Judgments 2573, under 8, or 2629, under 6). It is well established that any act by an officer of an organisation which has a legal effect constitutes a challengeable decision (see, for example, Judgments 532, under 3, and 1674, under 6(a), or the aforementioned Judgment 2573, under 10).

22. The Tribunal therefore considers that the above-mentioned provisions of Staff Rule 1230.8.1, the implementation of which

presupposes that the Organization follows the administrative procedures normally required, will not be construed as excluding the possibility of appealing against a decision when it has not been put or notified in writing. The sole effect of an interpretation to the contrary would be to prevent the official concerned from availing himself or herself of an internal appeal procedure, but it would not deprive him or her of the right to impugn the decision in question before the Tribunal, with which he or she could directly file a complaint.

23. The only key issue when determining the receivability of the internal appeal under Staff Rule 1230.1, or the receivability of the instant complaint under Article VII, paragraph 1, of the Statute of the Tribunal, is whether the Organization had really decided to terminate the complainant's contract on 15 May 2008.

24. WHO tries to convince the Tribunal that this was not the case by submitting that this contract was fully honoured until its expiry, in keeping with the information which the complainant had received from his direct supervisors. It asserts that the salary and allowances due to the complainant were paid to him in full until 30 June 2008 and that the period after 15 May 2008 was treated as a period of service in all respects, including for the accrual of annual leave. It also comments that, although for practical reasons due to the circumstances, the above-mentioned "Clearance Certificate for Temporary Staff" and the certificate of service given to the complainant had been drawn up just before his departure, these documents expressly stated that the complainant's contract expired on 30 June 2008. All these facts are true.

25. The Tribunal notes, however, that in its first memorandum to the Headquarters Board of Appeal of 16 July 2008, WHO had explained in very great detail that, on learning from the Permanent Mission of Switzerland that the complainant would be ordered to leave Swiss territory, it had decided to terminate his contract on 15 May 2008 in order to "regularize the matter with the Swiss authorities". This memorandum shows that it was only when the Organization realised

that it had itself committed a fault, by not properly checking whether the complainant had a right of residence when he was recruited, that the decision was taken after all to honour the contract until 30 June 2008, but solely to allow for the payment of the complainant's remuneration. It is therefore clear from this detailed account of the facts that initially a decision to terminate the complainant's contract had indeed been taken just before his scheduled departure on 16 May, even though it may be argued that this decision was almost immediately cancelled.

26. At a later stage the Organization did go back on this presentation of the facts of the case by stating in its submissions to the Headquarters Board of Appeal and to the Tribunal that it was wrong. But apart from the fact that this contention basically lacks credibility, unless WHO prepared its written submissions to the Board in an extremely casual manner, two items of information have finally convinced the Tribunal that the initial version of the facts was true.

27. Firstly, it is clear from the file that two payslips bearing the complainant's name and explicitly stating "change in end of contract date", were successively issued on 15 May 2008. The first showed that this date had been brought forward to 15 May, while the second reinstated the date of 30 June. The sequence of events set out under 25 above provides a more convincing explanation of this anomaly than the reasons offered by the Organization in its submissions before the Tribunal, namely that it was due to a pure misunderstanding on the part of the service concerned.

28. Secondly and above all, Ms Q.'s testimony, which is to be found in the file, shows that while she offered some additional reasons for refusing to give the complainant the certificate of employment which he had requested – in particular, according to WHO, that she did not know what the normal procedure was – the real reason for this refusal was that "[she] thought (at that time) that although [the complainant] was being paid until 30 June 2008, his contract end date had been modified to read 15 May 2008". This statement would be

inexplicable if the person concerned had not previously received information regarding a decision to that effect.

29. It is true that, to the extent that the initial decision to terminate the appointment was then very quickly cancelled and in the end the complainant's contract was indeed honoured by the Organization, there might be a temptation to consider that the complainant's challenge had become groundless. However, this would ignore the fact that the initial decision had at least one fundamental practical consequence, namely the refusal to give the complainant the certificate of employment which, from the information he had received, he needed in order to obtain an entry visa to Switzerland in his country of origin. More generally speaking, his awareness of the disputed termination of his appointment and the failure to inform him immediately of the decision to rescind it certainly played a role in his decision to cancel his journey to Côte d'Ivoire which had been scheduled for 16 May 2008. The complainant had good reason to fear, at that point, that if the Swiss Embassy in Côte d'Ivoire were to consult the Organization about the expiry date of his appointment, WHO would say that it had been terminated on 15 May, in which case he would certainly have been refused an entry visa. He therefore has genuine cause to challenge this ephermeral termination of his contract.

30. It follows from the foregoing that the complaint is receivable in all respects.

31. On the merits, the decision to terminate the complainant's contract was plainly unlawful.

32. Staff Rules 1045.1, 1045.1.1 and 1045.1.2 on the termination of temporary appointments state that "[i]n addition to the grounds for termination set out in Rules 1030, 1075 and 1080" such an appointment may be terminated prior to its expiration date only if "the function the staff member performs is discontinued, or […] the staff member's performance is deemed to be unsatisfactory, or if the staff member proves unsuited to his work or to international

service". Staff Rule 1045.1.2 further clarifies these last two grounds for termination by stating that "[i]t shall be considered unsatisfactory performance if the staff member does not or cannot perform the temporary functions to which he is assigned, and unsuitability for international service if he fails to establish satisfactory working relationships with other staff members or with nationals of other nations with whom he is working".

33. Staff Rules 1030, 1075 and 1080, concerning termination for reasons of health, misconduct or abandonment of post respectively, do not apply to this case. Above all, it is clear that, as the complainant asserts, his appointment was not terminated for any of the reasons exhaustively listed in the above-quoted provisions of Staff Rules 1045.1 to 1045.1.2 and precisely defined therein. The Tribunal notes that in its submissions the defendant does not enter any arguments to the contrary.

34. For these reasons, the decision of the Director-General of 7 April 2010 and the disputed termination of the complainant's appointment are both unlawful and must therefore be set aside.

35. In these circumstances, although there is no need to examine all of the complainant's arguments against these decisions, the Tribunal must emphasise that the manner in which WHO handled this case amounted to serious wrongdoing. The abrupt termination of the complainant's appointment after the measures adopted by the Swiss authorities was prompted by an anomalous situation which, although it was primarily due to the complainant's unlawful presence in Switzerland dating back several years, was also the result of grave malfunctioning within the Organization.

36. Indeed, when recruiting its officials an international organisation must ensure that their status complies with the laws of the host State governing the residence of aliens, failing which it may be held to have abused the privileges and immunities conferred upon it and upon its staff members.

37. In the instant case WHO acted with great negligence from this point of view since, as is plain from the file, it failed to carry out any checks to ascertain the complainant's status in this respect when he was recruited and when his appointment was extended on the first two occasions. This negligence was aggravated when the complainant then submitted an application for a legitimation card, because the Organization mechanically forwarded this application to the Permanent Mission of Switzerland, although the complainant merely produced the above-mentioned power of attorney with the letterhead of the UNIA trade union as proof that he was lawfully present in Switzerland. Clearly this document could not be deemed in any way to be the equivalent of a residence permit issued by the Swiss authorities, or even as a guarantee that the complainant's status would be regularised in the near future.

38. It is obviously not incumbent upon the Tribunal to express an opinion as to whether, in so doing, WHO breached its obligations towards the host State under the headquarters agreement signed on 21 August 1948, and in particular Article 22 thereof on the prevention of abuses of the privileges, immunities and facilities provided for in that agreement.

39. The Tribunal notes however that, by proceeding in this manner, the Organization indisputably acted wrongfully towards the complainant himself. By agreeing to employ him, although the submissions do not suggest that he made any attempt to conceal his status when he was recruited, then by forwarding his application for a legitimation card, WHO necessarily gave him reason to believe that his presence in Switzerland would be regularised by virtue of his employment in the service of the Organization. However, according to the 1987 directives of the Permanent Mission of Switzerland, with which international organisations headquartered in Geneva are deemed to be familiar, no legitimation card may ever be issued to a person who is unlawfully present in the country at the time of his or her recruitment by one of these organisations.

40. In the instant case, the information given to the complainant was all the more confusing in that WHO's attestations of 13 June and 28 September 2007 stating that "he w[ould] be in possession of a legitimation card in the very near future" were likely to foster the illusion that regularisation of his status was imminent. Moreover, the Tribunal notes that the Organization itself realised that this wording was inherently flawed, because it has since amended the wording of attestations of this kind, as can be seen from that given to the complainant on 11 February 2008.

41. It was indeed the remedial action taken by the Swiss authorities with regard to the situation brought about by these mistakes on the part of the Organization which compelled the latter, as a matter of urgency, briefly to terminate the complainant's appointment just before he was required to leave Switzerland.

42. It is obviously not incumbent upon the Tribunal to express an opinion as to whether the actions of the authorities of the host State of an international organisation are lawful, particularly with respect to the stipulations of the headquarters agreement between them, as such actions may ordinarily be challenged only in the courts of that State.

43. The Tribunal observes that, although this issue is not raised anywhere in the submissions, it is a moot point whether, in the circumstances of this case, it was not up to WHO to grant the complainant the benefit of the duty of protection and assistance which every international organisation owes to its officials under a general principle of international civil service law, which was established by the International Court of Justice in an advisory opinion of 11 April 1949 and confirmed by the Tribunal in its earliest case law in Judgment 70. Since the file contains no submissions on this matter, the Tribunal will not determine this issue.

44. The Tribunal will not, of course, condone the complainant's remaining in Switzerland up until now, given that, as he did not

challenge the decision of the *Office cantonal de la population* by the appropriate legal procedures, he was bound to comply with it, as he had planned to do, on 16 May 2008 and that, after the expiry of his appointment on 30 June 2008, he could no longer rely on the immunity bestowed on an international civil servant. As the Organization rightly emphasises, once the complainant had cancelled his departure, he ought immediately to have contacted its services to clarify his employment relationship.

45. However, in the very special circumstances of this case, WHO must be held responsible for the fact that – even if, in cancelling his journey to Côte d'Ivoire, the complainant's reaction to the situation at that time was inappropriate – he was objectively deprived by the unlawful termination of his appointment of a possibility of regularising his stay in Switzerland and thereafter possibly continuing in service in the Organization. The injury thus suffered calls for redress the terms of which will be determined by the Tribunal.

46. The complainant submits that he is entitled, as part of this redress, to the award of a "fixed employment contract", that is to say a fixed-term appointment, of at least two years. He asserts that, because he had applied for a position as a guard at grade G.3, which was advertised on 13 March 2007 and because he had obtained good results in the selection tests, at a section meeting in the autumn of 2007 his supervisors promised him that he would be given the next job of that kind when it was created.

47. It has, however, been established that, even if the Organization considered it right to employ the complainant at grade G.3 and not G.2 when it drew up the temporary contract of 3 January 2008, he had not been among the priority candidates whom the Selection Panel had recommended for appointment to one of the four fixed-term positions. The Selection Panel report, which has been forwarded to the Tribunal, shows that the complainant was only

on a supplementary list of two candidates who might be selected for one of these vacancies if any of those chosen declined the position.

48. Moreover, there is no proof of the existence of the verbal promise to which the complainant alludes, apart from one piece of written testimony in the file. In this connection, the Tribunal finds that there is no reason to grant the complainant's request to disregard the testimony to the contrary produced by the Organization. The complainant's contention that these documents were not examined in hearings during the internal appeal proceedings will be dismissed, because he was able to criticise their relevance and probative value in his rejoinder. Above all, the minutes of the section meeting on 15 November 2007 to which the complainant refers – which have also been forwarded to the Tribunal – show that his supervisors' statements did not have the meaning which he ascribes to them. They merely said that "in the future, other posts w[ould] become vacant and it would be possible to try again (being better prepared)". In particular, the complainant was told that though "he had not received a [fixed-term] contract […] he had a chance of one in the future". Obviously these words – which the complainant in his final observations has not established to have been incorrectly reported in the minutes of the meeting – cannot be construed as a real promise that a fixed-term appointment would actually be granted.

49. Moreover, the complainant himself acknowledges in his written submissions that honouring the promise which he mentions was conditional on the creation of an additional G.3 post. Such a measure depends, by definition, on choices made by the Organization in the light of its available budget resources, and is therefore purely hypothetical. Furthermore, it is not disputed that, in reality, no post of this kind has been created in the Premises Security Section since 2008.

50. Consistent precedent first established in Judgment 782 has it that the first condition governing an official's right to the fulfilment of

a promise made by an international organisation is that the "promise should be substantive". It may be concluded from the above that this condition is not met in the instant case.

51. The complainant's claim that he should be granted a fixed-term appointment must therefore be dismissed, without there being any need to examine the Organization's objection that this claim was submitted out of time in the internal appeal proceedings. For the same reasons, there is no merit to the complainant's very subsidiary claim that WHO should be ordered to pay him compensation equivalent to the total salary which he would have received if he had been given a two-year appointment.

52. On the other hand, the Tribunal considers that there are grounds for giving the complainant a new six-month temporary appointment, as was recommended by the Headquarters Board of Appeal. The award of such an appointment constitutes the most appropriate means of redressing the injury suffered by the complainant, since it will offer him a fresh opportunity to regularise his stay in Switzerland on the same conditions as those which obtained in May 2008, when he was deprived of that possibility by the effects of the termination of his appointment.

53. Within one month of the delivery of this judgment WHO must therefore offer the complainant a six-month temporary appointment on the same terms of employment in all respects as that of 3 January 2008. The performance of this contract will, however, be subject to the prior regularisation of the complainant's situation in respect of the right to temporary residence in Switzerland, either through the granting of an entry visa by the Swiss Embassy in his country of origin or, if appropriate, through the issue of a residence permit by the *Office cantonal de la population*. It is of course out of the question that the Tribunal would require an international organisation to employ a person unlawfully present in the host State.

54. It would be equally out of the question to order the Organization to submit a special application for a legitimation card on the complainant's behalf, as he requests. Apart from the fact that the above-mentioned message of 8 November 2010 from the Permanent Mission of Switzerland explains that such an application would be rejected if the complainant had not regularised his residence status beforehand, it does not behove the Tribunal to order an international organisation to take any steps towards seeking an exception from the normal application of existing legal rules.

55. However, provided that the complainant regularises his stay in Switzerland beforehand by one of the procedures referred to above, there are grounds for ordering the Organization to request that he be issued a legitimation card according to the normal procedure. Contrary to WHO's submissions, it does lie within the Tribunal's powers to demand that it take such action, since under Article VIII of the Statute of the Tribunal, when the latter finds that an international organisation has not fulfilled one of its obligations, it may order any requisite measure to ensure the performance of that obligation (see Judgment 2720, under 17).

56. The complainant asks subsidiarily that the Organization should be ordered to defray the costs of the journey to Côte d'Ivoire which he would have to undertake if the Swiss authorities required him to obtain an entry visa in his country of origin in order to regularise his stay in Switzerland. The Tribunal finds however that, as WHO rightly points out, this claim was not submitted to the Headquarters Board of Appeal. It is therefore irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal, because the complainant has not exhausted all internal means of redress available to him.

57. As the complainant succeeds in part, he is entitled to costs, which the Tribunal sets at 5,000 Swiss francs.

DECISION

For the above reasons,

1. The decision of the Director-General of WHO of 7 April 2010 and the decision terminating the complainant's appointment of 3 January 2008 are set aside.

2. WHO shall grant the complainant a temporary six-month appointment in accordance with the terms and conditions indicated under 53 above.

3. Provided that the complainant regularises his stay in Switzerland beforehand, the Organization shall ask the Permanent Mission of Switzerland to the United Nations Office and other international organizations in Geneva to issue him with a legitimation card.

4. The Organization shall pay the complainant costs in the amount of 5,000 Swiss francs.

5. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2012, 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 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet