Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

B.

v.

WIPO

123rd Session **Judgment No. 3746**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. B. against the World Intellectual Property Organization (WIPO) on 2 May 2014, corrected on 4 July, and WIPO's reply of 23 October 2014, the complainant having not filed a rejoinder;

Considering the documents supplied by WIPO at the Tribunal's request;

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

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

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

The complainant challenges the decision not to renew his fixed-term appointment.

The complainant entered the service of WIPO in 1999. He was recruited under a short-term contract, which was renewed several times. In 2009, he was given a one-year fixed-term appointment, which was extended for two years until 30 June 2012.

In March 2011 the complainant was placed on sick leave, initially for a two-month period. As his state of health did not improve, he was

prescribed further sick leave. When he had exhausted all his entitlements to paid sick leave, he was placed on special leave for prolonged illness on half pay as from January 2012, initially for a two-month period. This special leave was subsequently extended until 30 June 2012.

On 30 May 2012 the Administration advised the complainant that it had been informed that his name had been removed from the register of the Consulate General of Algeria on the grounds that he had settled permanently in Algeria, his home country. He was asked to clarify this matter. In addition, as his appointment and his special leave were about to expire and the "procedure for disability benefit" had failed, he was asked whether he intended to resume his duties. On 27 June the complainant replied that he would resume his duties and regularise his situation on 1 September 2012. He therefore requested a two-month extension of his special leave.

The Director General, referring to Staff Regulation 4.15(d), informed the complainant in a letter of 28 June 2012 that his appointment would not be renewed when it expired on 30 June. He advised him, however, that he would receive a sum equivalent to three months' salary "to assist [him] during the transitional period which [was] unrelated to the non-renewal of [his] appointment".

As the complainant's request for a review of the decision of 28 June 2012, which he had submitted to the Director General on 24 August, was rejected on 17 October 2012, he referred the matter to the Appeal Board. He took issue with the "wrongful termination" of his appointment and he taxed the Organization with giving him insufficient warning of its intention not to renew it. He requested the cancellation of the decision of 28 June 2012, his reinstatement, the payment with interest of his full salary and allowances, and redress for the injury which he considered he had suffered. In his rejoinder, he asked for his employment relationship to be redefined as a permanent appointment.

In its conclusions of 4 December 2013, the Appeal Board stated that the complainant's request to have his employment relationship redefined was irreceivable, because it was time-barred. It considered that his appointment had not been wrongfully terminated, that two days' notice of non-renewal was plainly insufficient, but that the sum equivalent

to three months' salary which had been paid to the complainant was "adequate compensation". However, it took the Director General to task for not trying to ascertain whether the complainant could have resumed his duties on 1 September 2012 or "to obtain medical and other opinions in order to assess whether this was really possible". It also stated that, before taking the decision of 28 June 2012, the Director General ought to have looked into the matter of whether the complainant's separation from service resulted from the expiry of his appointment, or from his state of health, in which case the provisions concerning termination for reasons of health should have been applied. The Board recommended that the Director General should cancel the decision in question, because it had been taken "without regard to all the essential factors".

The complainant was informed by a letter of 3 February 2014 that the Director General had decided not to follow the Appeal Board's recommendation since, in his opinion, the Board's conclusions were based on "an incomplete grasp of several factual and legal issues". The Director General pointed out that the complainant had submitted his request for an extension of his special leave three days before the expiry of his appointment and that he had not enclosed any medical certificate attesting to an improvement in his state of health. He therefore considered that the Appeal Board had not "appreciated how extremely late [and] unwarranted" that request had been. Moreover, in the opinion of the Director General, the Appeal Board had failed to take account of the fact that the complainant had left Switzerland in order to settle permanently in Algeria. That is the impugned decision.

The complainant requests the setting aside of this decision and that of 28 June 2012, his reinstatement as from 1 July 2012 and the payment of the salary and allowances which he believes are due to him, the redefinition of his employment relationship as a permanent appointment, the "determination of his medical status" as at 29 June 2012, an award of moral damages in the amount of 10,000 Swiss francs, plus interest, and an award of costs.

WIPO asks the Tribunal to dismiss all the complainant's claims. It contends that the claim for the redefinition of the complainant's

employment relationship is irreceivable, because internal means of redress have not been exhausted and because it is time-barred.

CONSIDERATIONS

1. The complainant, who joined WIPO in 1999, was placed on sick leave as from March 2011. He was unable to work until at least 30 June 2012, the date on which his two-year fixed-term appointment was due to expire. As he had exhausted all his entitlements to paid sick leave at the end of 2011, he was twice granted special leave for prolonged illness on half pay, covering the entire first half of 2012.

On 30 May 2012 the Organization drew the complainant's attention to the fact that his appointment and his special leave were about to expire and asked him if he intended to return to his duties. As WIPO had learnt that the complainant had informed the Consulate General of Algeria in Geneva that he had settled permanently in Algeria, which is his home country, the Organization asked him to clarify the situation in that respect. On 27 June the complainant replied that, although his state of health had improved and he had decided to resume his duties, this would not be possible before 1 September, at which juncture he would regularise his situation. He requested a further two months' special leave. On 28 June 2012 the Director General informed the complainant that his appointment would not be renewed upon its expiry on 30 June, but that he had decided to make him an *ex gratia* payment equivalent to three months' salary by way of temporary assistance.

2. On 3 February 2014 the Director General confirmed the decision not to renew the complainant's appointment, contrary to the Appeal Board's recommendation. Having dismissed the complainant's allegations of injury to his dignity, wrongful termination of his appointment and irregularities in the processing of his medical file, the Appeal Board considered that the Administration should have arranged for a more thorough examination of the complainant's state of health in order to ascertain whether his return to work on 1 September, the date which he had given, would have been possible.

3. The complainant submits that the decision not to renew his appointment is arbitrary and tainted with two errors of law, because his contractual status and his medical condition were overlooked.

4. At the material time, WIPO Staff Regulations 4.15(d) and 9.9 read as follows:

"**Regulation 4.15**

Fixed-Term Appointments

[...]

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

"**Regulation 9.9**

Expiration of Fixed-Term Appointments

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

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

5. In the instant case the Director General, referring in particular to Staff Regulation 4.15(d), informed the complainant in a letter of 28 June 2012 that his appointment would not be renewed upon its expiry. Hence it was not "terminated for reasons of health", within the meaning of Staff Regulation 9.2, and, contrary to the opinion of the Appeal Board, it was unnecessary to assess the complainant's state of health before deciding whether or not to renew his appointment.

6. The complainant's submissions make it necessary to examine whether, on the expiry of his appointment, he was entitled to a further extension thereof.

There is nothing in the complaint which would lead the Tribunal to call into question its case law in this area, according to which an official holding a fixed-term appointment does not have a right to the renewal of that appointment on its expiry or to its conversion into a permanent

appointment (see Judgment 1349, under 11). International organisations must, however, provide reasons for the decision not to renew a fixed-term contract (see, for example, Judgment 675, under 10 and 11, and more recently Judgment 3353, under 23).

In this case, the decision of 28 June 2012 not to renew the complainant's appointment was based on the fact that he himself had stated that he could not resume his duties until 1 September 2012. The reference to this situation, albeit succinct, was sufficient to enable the complainant to challenge this decision in full knowledge of the facts, which is one of the essential reasons why an authority which takes a decision having an adverse effect on the person concerned must state the reasons for it (see Judgment 3290, under 15).

7. By basing his decision on this reason, did the Director General abuse the broad discretion that he necessarily enjoys with respect to the non-renewal of an appointment?

This would be the case if the decision had rested on an error of fact or of law, had overlooked a material fact, or if there had been abuse of authority, or if a plainly wrong conclusion had been drawn from the evidence (see, for example, Judgment 3443, under 3, and the case law cited therein).

It is true that the decision of 28 June 2012, which is not alleged to have been *ultra vires* or to have shown any formal or procedural flaw, was not prompted by the abolition of a post or by unsatisfactory performance, which the complainant wrongly assumes to be the only reasons that could have justified not extending his appointment. Indeed, as is plain from consideration 6, above, the non-renewal of his appointment was based on an entirely different reason, namely the great uncertainty created by the complainant as to the date when he would resume his duties.

It is necessary to consider whether that reason constituted an abuse of discretionary authority within the meaning of the above-mentioned case law.

8. WIPO twice granted the complainant special leave for prolonged illness, for a total period of six months – an exceptional measure provided

for in Staff Rule 6.2.2(a)(9) and (10), which clearly aim to deal with cases of especial hardship. It then contacted him by e-mail on 30 May 2012 and asked him to inform it not only of any changes in his fitness for work, but also whether he intended to resume his duties, after it had learnt that several months earlier he had left the area of his duty station, in breach of Staff Rule 6.2.2(a)(13). It did so one month before the expiry of his appointment, which it was under no obligation to renew, as stated under 6, above. Its e-mail of 30 May 2012 constituted a warning and, in keeping with the requirement of good faith, should have been regarded as such by the complainant. He could not have been in any doubt that WIPO firmly intended not to renew his appointment if he did not return to the area of his duty station, unless he gave precise reasons for his conduct which were connected with changes in his fitness for work. Instead of supplying such information backed up by medical certificates, the complainant waited for almost a month before giving the Organization vague information, not supported by any such certificates, and asking for further special leave for prolonged illness. Moreover, there is no evidence in the file that he took any steps to return to the area of his duty station. This could suggest that he was settling into a situation to which he thought he was entitled on the basis of the two successive measures of assistance from which he had benefited.

In view of these circumstances, the uncertainty in which the complainant left the Organization with regard to the date of the resumption of his duties was an objective reason not to renew his appointment on its expiry. It follows that the Director General may not be taxed with having abused his discretionary authority.

9. Regardless of the foregoing, the complainant submits that he was notified of the decision of 28 June 2012 less than 24 hours before the expiry of his appointment, which made this decision "abrupt and immediate".

The Tribunal notes that Staff Regulation 9.9(a) did not entitle WIPO staff members to notice in the event of the non-extension of their fixed-term appointment. The case law of the Tribunal does, however, give them this right (see, for example, Judgments 1544, under 11, and 3353, under 24).

While it is true that, in the instant case, the complainant was informed of the non-renewal of his appointment only just before its expiry, the issue of whether his right to reasonable notice was breached can remain undecided for the reasons set forth in the Appeal Board's conclusions of 4 December 2013.

10. Lastly, the complainant objects to the fact that the decision of 3 February 2014 did not refute one by one each of the "arguments" put forward by the Appeal Board. In his opinion, this decision is biased, since the Director General departed from the Appeal Board's recommendation by disregarding certain facts.

This criticism is groundless, as the Director General explained the reasons why he departed from the Appeal Board's recommendation in sufficient detail having regard to the requirements of the case law established in Judgments 3208, under 11, and 3695, under 9.

11. It ensures from the foregoing that the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 November 2016, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ