Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

G.

v.

WIPO

128th Session **Judgment No. 4159**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. G. against the World Intellectual Property Organization (WIPO) on 30 September 2015, containing an application for the fast-track procedure, and WIPO's letter of 5 November 2015 informing the Registrar of the Tribunal that it rejected the complainant's application;

Considering the complainant's complaint corrected on 7 December 2015, WIPO's reply of 14 April 2016, the complainant's rejoinder of 1 August and WIPO's surrejoinder of 7 November 2016;

Considering the document submitted by WIPO on 26 April 2019 at the Tribunal's request and the document submitted by the complainant on 29 April 2019;

Considering the applications to intervene filed on 19 February 2019 by Mr A. A., Mr P. A., Ms V. B., Mr M. N. B. M., Mr N.-E. B., Ms C. B., Ms L. B., Ms S. C., Ms I. C., Mr M. C., Mr A. D., Mr D. G., Mr A. H., Mr R. H. J., Mr A. L., Mr S. L., Mr D. L., Ms M. M., Ms A. O. M., Mr L. A. P. R., Ms N. S., Mr A. S., Ms S. S., Mr M. T., Mr P. T. S., Mr A. T. and Mr N. W., on 20 February by Ms M. I., Ms S. N. G. and Ms G. P., and on 21 February by Ms W. A., and also WIPO's comments of 2 April 2019 thereon;

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 seeks a redefinition of his employment relationship and the setting aside of the decision not to renew his last contract of employment.

The complainant joined WIPO in 2002 on a short-term contract, which was renewed several times. In November 2012 he was granted a temporary appointment*, which was extended from 3 June to 2 December 2013. The letter of 10 June 2013 offering him this extension drew his attention to the fact that technological advances in the field of publishing and the reduction in terms of the distribution of paper copy publications had led to a decrease in the needs of the Organization with regard to the clerical duties performed by him and that, if he was not selected for the one clerk's post which had been advertised, his appointment would not be renewed when it expired. The complainant accepted this extension of his appointment. On 31 July, he was informed that his application for the post of clerk had not been successful.

By a memorandum of 13 September 2013, the complainant drew the Director General's attention to the fact that since 2002 he had "acquired the status of long-serving temporary employee"* and emphasized that, according to the Tribunal's case law, in particular Judgment 3090, he should have "rights and obligations [...] equivalent to those of holders of permanent contracts"*. As part of the process which was under way to "regularize" the contractual situation of long-serving temporary employees, the complainant asked to be directed towards a sector in which the "regularization" of his employment relationship would be feasible. He also requested a review of the decision not to extend his appointment beyond its expiry date. This request was rejected on 7 November on the grounds that it was out of time. The same day, the Staff Council sent the Director General a memorandum

* The category of temporary appointments, which are concluded for a period of one to 12 months with the possibility of extension, was created in January 2012.

* Registry's translation.

asking him, among other things, to "reclassify" (redefine) the complainant's employment relationship, with all the legal consequences that this entailed. This request was rejected on 3 January 2014.

In the meantime, the Human Resources Management Department (HRMD) having managed to identify a possibility for temporary redeployment, the complainant was informed, by a letter of 25 November 2013, that he had been given an extension to his appointment until 1 March 2014; his duties would consist of "absorbing an increase in workload" in the Special Projects Division of the Department for Africa and Special Projects and updating a database in a staff member's absence. He was informed that from 1 March onwards WIPO would be unable to renew his appointment "under the current terms and conditions"*. Although the complainant accepted this extension, he nevertheless reserved "all [his] rights as a long-serving temporary employee eligible for the regularization process"*. Also on 25 November 2013, relying in particular on Judgments 3090 and 3225 – delivered in public on 8 February 2012 and 4 July 2013 respectively – in which the Tribunal held that WIPO had misused short-term contracts and ordered it to pay damages to the persons concerned, the complainant and 36 other persons employed under precarious contracts requested the Director General, through their representative, to redefine their employment relationships, to draw all the legal consequences therefrom and to award them compensation for moral injury. These requests were rejected on 24 January 2014.

On 10 February the complainant was offered an extension to his appointment until 2 June 2014, beyond which date WIPO would not be in a position to renew his appointment "under the current terms and conditions"*. His employment contract indicated that no extension "[could] be envisaged without a competition"*. The complainant accepted this extension – the last one – but stated that he "reserve[d] all [his] rights in the context of the procedure under way concerning the implications"* of Judgment 3225.

* Registry's translation.

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On 21 March 2014 the complainant submitted a request for review of the decision of 24 January, of the decision not to select him for the post of clerk, and of the decision of 10 February 2014 concerning the non-renewal of his appointment. This request was rejected by a letter of 21 May in which the Director of HRMD indicated that, with regard to the last two decisions, the Director General considered that the request was time-barred. Regarding the decision to reject the request for redefinition, the HRMD Director pointed out in particular that this had already been the subject of two rejection decisions – namely, of 7 November 2013 and 3 January 2014 – which had become final since they had not been challenged before the Appeal Board.

On 18 August 2014 the complainant lodged an appeal with the Appeal Board seeking the setting aside of the challenged decisions (but without reproducing his criticisms of the decision not to select him for the clerk's post), the redefinition of his employment relationship, reinstatement, material and moral damages, and costs. In its conclusions, which it delivered on 30 June 2015, the Appeal Board considered that, concerning the non-renewal of contract, the appeal was out of time. It also considered that the decision of 21 May 2014 merely served to confirm the decisions of 7 November 2013 and 3 January 2014 but that, since the Director General had not raised, in the decision of 21 May 2014, the argument that the request for redefinition was time-barred, the appeal was not out of time with respect to the claim for a career reconstitution on the basis of Judgment 3225. However, the Appeal Board unanimously recommended the Director General to dismiss the appeal on the grounds that the complainant was not in the same situation in law as the complainant in the case leading to Judgment 3225. By a letter of 31 August 2015, which constitutes the impugned decision, the complainant was informed that, with regard to the redefinition of his employment relationship, the Director General considered that his appeal was irreceivable and that, with regard to the non-renewal of his contract, he considered that the appeal was not only time-barred but also devoid of merit.

The complainant requests the Tribunal to set aside the impugned decision, and to order WIPO to redefine his employment relationship

and draw all legal consequences therefrom. He also asks to be reinstated. In addition, the complainant claims compensation for all material and moral injury suffered, and an award of costs for the internal appeal proceedings and the proceedings before the Tribunal. In his rejoinder, he requests the Tribunal to order the deduction from the various monetary awards made to him of an amount corresponding to the fees and taxes which he has undertaken to pay to his counsel, and to order that this amount be paid directly to his counsel.

WIPO contends that the complaint is time-barred and irreceivable on other grounds. Subsidiarily, WIPO requests the Tribunal to dismiss the complaint as unfounded. In its comments concerning the applications to intervene, WIPO requests the Tribunal to order the interveners to pay it damages for "clear abuse of procedure"*.

CONSIDERATIONS

1. The complainant, who was employed by WIPO from July 2002 to November 2012 – in other words, for more than ten years – under a short-term contract which was renewed several times, was granted a temporary appointment from 19 November 2012, which was subsequently extended three times. Not having been selected for a post in a competition, he was given a new temporary assignment in the Organization but his service at WIPO was finally terminated on 2 June 2014.

Having requested a redefinition of the employment relationship which he had had with WIPO since he was recruited, he impugns before the Tribunal the decision of 31 August 2015 whereby the Director General dismissed his appeal against the decision of 21 May 2014 confirming, upon review, the rejection of this request and upheld the decision of 10 February 2014 awarding him his last contract extension, a decision which he challenged inasmuch as it did not grant him any further renewal of his appointment.

* Registry's translation.

2. Thirty-one applications to intervene were submitted by WIPO employees or former employees who, having themselves filed appeals requesting the redefinition of their employment relationships (which were remitted to the Appeal Board by Judgment 3943, delivered in public on 24 January 2018), consider themselves to be in a similar situation in fact and in law to that of the complainant.

3. The origin of this complaint lies in the practice which became widespread at WIPO – and indeed in other international organizations, in similar forms – during the 1990s and early 2000s, consisting of employing some of the staff under short-term contracts which were renewed several times. One of the consequences of this practice, which was boosted by the large expansion in WIPO's activities at a time when the Organization was not in a position to incorporate all the posts corresponding to its needs in its ordinary budget, was that the employees concerned, commonly referred to as "long-serving temporary employees", often pursued a career within the Organization for many years without acquiring the status of staff members or enjoying the related benefits.

4. In Judgment 3090, delivered in public on 8 February 2012, an enlarged panel of judges found that the long succession of short-term contracts given to the complainant in that case had given rise to a legal relationship between the complainant and WIPO which was equivalent to that on which permanent officials of an international organization may rely. It therefore held that WIPO, in considering that the complainant belonged to the category of temporary employees, had failed to recognize the real nature of its legal relationship with her and that, in so doing, WIPO had committed an error of law and had misused the rules governing short-term contracts.

In Judgment 3225, delivered in public on 4 July 2013, which dealt with a similar case, the Tribunal confirmed this precedent by taking to its logical conclusion, as far as compensation for material injury was concerned, the notion of redefinition of the contractual relationship underlying such injury. On this basis it ordered WIPO to pay damages to the complainant in this second case corresponding to the loss of remuneration and other financial benefits resulting from the fact that

the complainant had not been regarded, during her career, as holding a fixed-term appointment.

It is the claim to have this case law applied to his own situation which forms the primary basis for the complainant's claims regarding the redefinition of his employment relationship.

5. However, the file shows that, prior to the judgments, WIPO had already initiated a process to regularize the contractual situation of long-serving temporary employees. In creating many additional budget posts for this purpose, the Organization thus adopted a reform enabling the recruitment of staff members on temporary appointments, in accordance with a recommendation of the International Civil Service Commission (ICSC).

Pursuant to a revision of the Staff Regulations which came into force on 1 January 2012, amending Regulation 4.14 (on types of appointment) in this regard, a Regulation 4.14*bis* (subsequently Regulation 4.16) was incorporated into the Staff Regulations in order to establish legal provisions governing the above-mentioned temporary appointments, which were for a maximum period of 12 months but could be extended several times up to a limit originally set at five years.

Pursuant to Regulation 4.14*bis*, the rules governing this new type of appointment were set forth in Office Instruction No. 53/2012 (Corr.) of 5 November 2012 and its related annexes.

6. Under this reform, the holders of temporary appointments were given the status of WIPO staff members, which had not been the case previously for persons on short-term contracts. Thus, although they were entitled to only some of the allowances and benefits granted to other staff members, they otherwise enjoyed the rights recognized by the WIPO Staff Regulations and Rules, which enabled them, for example, to make use of the ordinary internal means of redress provided therein.

Pursuant to Regulation 4.14*bis*(f), "special transitional measures", defined in Annex II to the Office Instruction of 5 November 2012, were established for persons previously holding short-term contracts with

five or more years of continuous service on 1 January 2012 (as was the case for the complainant). In particular, it was stipulated in this respect that the above-mentioned five-year maximum period fixed for temporary appointments would not be applicable to them.

In view of the regularization of the complainant's contractual situation resulting from this new legal framework, the complainant's claims regarding the redefinition of his employment relationship must be regarded as being essentially concerned with the period when he was previously employed under short-term contracts.

7. WIPO contends that the Tribunal has no jurisdiction to hear these claims, since they in fact seek to challenge WIPO's general policy in the past regarding the employment of its staff. In this regard, it relies in particular on Judgment 3345, in which the Tribunal had for this reason dismissed complaints filed by members of the Staff Council (including the complainant himself) in order to challenge the Organization's use, prior to the above-mentioned reform, of inappropriately extended short-term contracts and to demand an improvement in the rights granted to long-serving temporary employees.

This challenge to the Tribunal's jurisdiction is irrelevant. Indeed, in the present case, the complainant's claims regarding the redefinition of his employment relationship do not seek to challenge WIPO's general policy in the matter but the application of this policy to the complainant's particular case and, since they are based on the terms of the complainant's employment contract or the rules and regulations governing the staff of the Organization, they clearly come within the Tribunal's jurisdiction, as defined in Article II, paragraph 5, of its Statute. Moreover, the Tribunal observes that it considered itself competent to rule on the cases which resulted in above-mentioned Judgments 3090 and 3225, which, from this point of view, were presented in an identical manner.

8. However, WIPO is right in contending that the claims in question are irreceivable because the internal appeal filed by the complainant was time-barred.

Indeed, it is clear that the complainant did not challenge, within the eight-week period available to him for this purpose under Staff Rule 11.1.1(b)(1), in the version applicable at the time, the decision of 19 November 2012 whereby he was granted the temporary appointment which he held from that date. Moreover, examination of this contract shows that the complainant signed it on 23 November 2012, explicitly stating that he "accept[ed] without reservation the temporary appointment offered to [him]"*.

In view of the modification of the legal relationship between the parties resulting from the grant of this contract, which was of a fundamentally different nature from the short-term contracts which had preceded it, and given that the conclusion of this contract also regularized the complainant's contractual situation, the absence of any challenge to the above-mentioned decision of 19 November 2012 within the time limit for filing an appeal necessarily bars the complainant from requesting the redefinition of his previous employment relationship (see, in particular, Judgment 2415, consideration 4, for a comparable situation).

In this regard, the complainant's situation in law and in fact differs radically from that of the complainants in the cases leading to Judgments 3090 and 3225, since they were still employees under short-term contracts at the time that they requested the redefinition of their employment relationships.

Moreover, neither the challenge to the above-mentioned decision of 10 February 2014, whereby the complainant was subsequently granted a final extension of his temporary appointment, nor the fact that the complainant included reservations in his acceptance of this extension and of the one immediately preceding it, could have the effect of reopening the time limit for appealing against the decision of 19 November 2012.

9. As the Tribunal has repeatedly stated, time limits are an objective matter of fact and it should not rule on the lawfulness of a

* Registry's translation.

decision which has become final, because any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties' legal relations, which is the very justification for a time bar (see, for example, Judgment 3406, consideration 12, and the case law cited therein).

10. In an attempt to show that his claim is receivable, the complainant submits that he was misled by WIPO regarding the nature of his previous employment relationship and, subsequently, regarding the possibility of using ordinary internal means of redress, to which employees on short-term contracts did not have access.

It is true that the Tribunal's case law shows that where an organization engages in conduct of this sort, a challenge may not be time-barred (see, for example, Judgments 2821, consideration 9, or 3002, consideration 16). However, although the finding that WIPO misused short-term contracts in the past might have resulted in this case law being applied to the award of such contracts, this argument is of no avail here since it is the fact that the appeal against the decision of 19 November 2012 granting the complainant a temporary appointment is time-barred which obstructs the complainant's claims and since the latter clearly cannot be considered to have been unduly deprived of the possibility of challenging this decision in due time.

11. In accordance with the Tribunal's case law and pursuant to the provisions of Article VII, paragraph 1, of its Statute, the fact that the appeal lodged by the complainant was out of time renders the claims in question irreceivable for failure to exhaust the internal means of redress offered to staff members of the Organization, which cannot be deemed to have been exhausted unless recourse has been had to them in compliance with the formal requirements and within the prescribed time limit (see, for example, Judgment 2888, consideration 9, and Judgments 2010, 2326 and 2708 referred to therein).

12. It follows from the foregoing that the complainant's claims regarding the redefinition of his employment relationship must be

rejected, without there being any need to rule on the other objections to their receivability raised by WIPO.

In this regard, it should be noted that the Appeal Board was wrong in considering that the Director General could not argue before the Board that the complainant's claims on this point were out of time because this argument had not been raised in the decision of 21 May 2014. Indeed, apart from the fact that this last statement is factually inaccurate, since an examination of this decision shows that a time bar was actually relied upon, the fact that the Director General's decision on a request for review is not based on the irreceivability of the request in no way precludes the subsequent raising of this issue before the Appeal Board.

13. However, regarding the complainant's claims against the decision of 10 February 2014 extending his temporary appointment, which, as stated above, the complainant challenges to the extent that it did not provide for any renewal of the appointment on the expiry of this last extension, the Tribunal considers that these claims cannot be regarded as irreceivable.

It is true that, as argued by WIPO, the decisions of 10 June and 25 November 2013, whereby the complainant was granted the first two extensions of his temporary appointment, were not challenged in due time and that these stated clearly that this appointment would not be renewed on expiry. But it cannot be inferred from this that the decision of 10 February 2014 merely confirmed the previous ones, in also stating that this appointment would not be renewed on expiry, because, in view of the fact that it ultimately granted the complainant a further extension of appointment, it implicitly but also necessarily rescinded that of 25 November 2013 insofar as the latter excluded such an extension, and this last decision must, for the same reason, be deemed to have rescinded that of 10 June 2013 to the same extent.

14. However, the claims submitted against this decision of 10 February 2014 must be rejected as unfounded.

(a) In support of his claims, the complainant firstly argues that, in view of the redefinition of his employment relationship which he requests, this decision is unlawful on the grounds that he should have been considered, on account of the length of his service at WIPO, as holding a permanent appointment or, at the very least, a fixed-term contract, and that the provisions governing staff members on temporary appointments could not therefore be applied to him. But in view of the findings made above statements regarding the complainant's claims seeking this redefinition, these arguments must be rejected.

(b) The complainant then submits that the Organization was wrong to make the extension of his appointment for occupying his last post dependent on a competitive selection process, as prescribed by Article 5 of Annex III to the Staff Regulations and Rules with respect to temporary positions of over six months' duration. Indeed, the complainant contends that the said annex, which defines selection procedures for temporary appointments, is not applicable to long-serving temporary employees. In this regard, he relies on Staff Regulation 12.5(b), which, at the material time, provided that the time limit for temporary appointments, namely two years under the terms of Regulation 4.16 applicable at the time, did not apply to individuals holding temporary appointments who had served five years or longer as of 1 January 2012 under short-term contracts and that no time limit could be applied to the service of such staff members.

But there is nothing to suggest that the above-mentioned Annex III is not intended to apply to all staff members holding temporary appointments and, although it is correct that the complainant benefited from the above-mentioned provisions of Staff Regulation 12.5(b), these provisions nevertheless did not preclude the application of the rule, which, incidentally, is established by Article 5 of this Annex, that temporary posts of more than six months must be filled by competition.

(c) Lastly, in his rejoinder, the complainant emphasizes that Article 5(b) of the above-mentioned Annex III provides as follows: "The Director General may authorize an exception to this Article if he or she considers it in the best interests of the International Bureau [of WIPO]". He therefore submits that the Director General, in not making

such an exception in his case, "made a clear error in the assessment of his situation in view of his seniority and his dedication to his career"*.

However, as rightly observed by WIPO, these considerations regarding the complainant's individual situation are not sufficient *per se* to establish, as required by this provision, that the requested exception would have been in the Organization's interests. Lastly, although the complainant also claims in his complaint that the increase in workload which had been the reason for his temporary appointment to the service where he had last worked had not ceased to exist at the time of his departure, such a brief argument is clearly insufficient to demonstrate the clear error of assessment which he alleges.

15. It follows from the foregoing that the complaint must be dismissed in its entirety.

16. As a result of the dismissal of the complaint, the applications to intervene – which, moreover, face other legal obstacles – must also be dismissed.

In this regard, the Tribunal notes in particular that since, as stated above, the interveners availed themselves of the internal remedies at their disposal against decisions concerning their own situation, they are not entitled to intervene in the present case (see, for example, Judgment 2236, consideration 13).

17. On the basis of this last consideration, WIPO requests, as a counterclaim, that the interveners be ordered to pay it damages for "clear abuse of procedure"*.

Without excluding on principle the possibility of issuing an order of this type against interveners in proceedings, the Tribunal will not accept WIPO's claim in this case. While the filing of these applications to intervene, which were bound to be dismissed, just before the case was included on the list for the session is surprising, this unfortunate

* Registry's translation.

procedural initiative cannot nevertheless be regarded as constituting a clear abuse of procedure.

DECISION

For the above reasons,

The complaint, the applications to intervene and WIPO's counterclaim against the interveners are dismissed.

In witness of this judgment, adopted on 10 May 2019, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ