Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

Y.

v.

WIPO

128th Session **Judgment No. 4161**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. Y. against the World Intellectual Property Organization (WIPO) on 14 December 2015, WIPO's reply of 21 March 2016, the complainant's rejoinder of 22 June, WIPO's surrejoinder of 3 October, the additional document submitted by the complainant on 1 December 2016 and WIPO's observations of 16 March 2017 thereon;

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

Having examined the written submissions;

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

The complainant challenges the validity of a settlement agreement.

At the material time, the complainant held a permanent appointment at grade P-5 at WIPO's Headquarters in Geneva.

When in June 2009 the complainant was accused of fraud in connection with applications to have the costs of private tuition for some of his children reimbursed, the Internal Audit and Oversight Division conducted a preliminary evaluation. In its report dated 20 September 2010, it recommended to the Director General that he refer the case to the *Procureur général de la République et Canton de Genève* (the Principal State Prosecutor for the Canton of Geneva), which he did by filing a criminal complaint against the complainant.

On 22 January 2013 the Director General decided to lift the complainant's immunity from suit so that he could be heard in connection with that complaint.

The complainant filed a first harassment grievance in March 2013 and a second one in February 2014, both of which were dismissed.

After the complainant was declared unfit for work, he was informed on 11 July 2014 that he was to be granted a disability benefit from 19 July and that his services would be terminated for health reasons with effect from 18 July 2014, the date on which his sick leave entitlements would be exhausted.

On 6 October 2014 the complainant filed two appeals with the Appeal Board. In the first, he accused the Organization of having, in particular, provided the Swiss authorities with erroneous information in the complaint that it had submitted to the *Procureur général*. In the second, he challenged the decision to dismiss his second harassment grievance. On 9 January 2015 he filed a third appeal with the Appeal Board, directed against the decision to terminate his services for health reasons.

In the meantime, negotiations had commenced at the complainant's initiative with a view to arriving at a settlement agreement, and on 28 January 2015 he signed a settlement agreement which provided, inter alia, that he agreed to withdraw all his claims, that he would receive a lump sum of 155,000 Swiss francs and that he renounced all right of appeal, while WIPO abandoned all claims against him, save in respect of the matter still pending before the Swiss authorities. The lump sum was paid the next day. On 13 February 2015 the complainant declared that he considered the agreement to be void since essential provisions had not, in his view, been implemented and he had signed it under duress. He stated that he was maintaining his three appeals as a result.

The Appeal Board, which decided to join the three appeals, delivered its conclusions on 10 July 2015. It held that the complainant had not been pressured and that the settlement agreement had been validly concluded by the parties. It further noted that the complainant had succeeded in negotiating favourable terms. As the agreement

provided that the appeals had to be considered as withdrawn, the Board recommended that they be dismissed.

By an email and a registered letter, both dated 9 September 2015, the Deputy Director General, acting by delegation of the Director General's authority, advised the complainant that he had decided to adopt the Board's recommendation and that his appeals were hence dismissed. That is the impugned decision.

The complainant requests that the Tribunal set aside the impugned decision and order WIPO to pay him compensation, with interest thereon, of 1,000,000 Swiss francs in redress for the indirect material injury that he considers that he has suffered as well as compensation, likewise with interest thereon, of 500,000 francs in redress for the moral injury that he considers he has suffered, less the sum of 155,000 francs which WIPO has already paid to him. He also asks the Tribunal to order WIPO to pay each of his adult children compensation for the moral injury they have suffered, to produce his personnel file and to proceed with the examination of all the internal proceedings he had initiated. Lastly, he claims 75,000 francs in costs.

WIPO submits that the complaint is irreceivable because the complainant did not file his complaint within the 90-day limit prescribed by the Statute of the Tribunal. It also submits that the complaint is irreceivable because the complainant waived his right of appeal under the agreement, which is, in the Organization's view, unquestionably valid.

CONSIDERATIONS

1. The complaint is directed against the decision of 9 September 2015 in which the Deputy Director General, acting by delegation of the Director General's authority, adopted the recommendation delivered by the Appeal Board on 10 July 2015 to dismiss the complainant's three appeals and to consider as invalid the latter's declaration that the settlement agreement signed by him on 28 January 2015 was void.

2. WIPO challenges the complaint's receivability firstly on the grounds that it breaches Article VII of the Statute of the Tribunal. It submits that the complaint was filed with the Tribunal more than 90 days after the complainant was notified of the impugned decision. It argues that since the impugned decision was notified to the complainant and his counsel by email on 9 September 2015, the time limit for filing the complaint expired on 8 December, whereas the complainant filed his complaint on 14 December 2015.

The impugned decision was notified by email to the complainant – using his private email address – and his counsel on 9 September 2015. In his submissions counsel does not dispute that he received that email, and the complainant indicated to the Deputy Director General on 12 October 2015 that he too had received it.

The decision was also notified by registered letter, likewise dated 9 September 2015, to both the complainant and his counsel. Counsel, whose office address the complainant had provided for notification purposes, received it on 14 September 2015. Counsel also indicates on the complaint form that he was notified of the decision on that date. A first registered letter did not reach, or was not collected by, the complainant; a second was delivered to him by private courier on 24 October.

3. The complainant submits that the email of 9 September 2015 could not constitute valid notification for the purposes of Article VII of the Statute of the Tribunal since he was no longer in WIPO's employ. In his view, notification to a private email address is not valid. He further maintains that the choice of his counsel's office as his address for notification purposes did not extend to decisions notified by email. Lastly, he points out that the text of the email stated that an "advance copy" of the decision was attached and that the paper copy would be sent to him by registered post. In his view, this wording must be considered as indicating that he would be formally notified subsequently. He therefore considers that the time limit for filing his complaint began to run on the day when the paper copy of the impugned decision was notified to his counsel, that is on 14 September 2015.

4. Contrary to the complainant's arguments, the Tribunal's case law in principle accepts notification by email (see Judgment 2966, consideration 8, and the case law cited therein). There is no reason to distinguish between emails sent to the staff member's work address when he is employed and those sent to his private address once he has left the organisation. The Tribunal further considers that since the complainant had chosen his counsel's office as his address for notification purposes, which the parties do not dispute, any notification made to that address is valid.

The decision's notification to both the complainant and his counsel by both email and registered letter, and also the wording of the email, confused the complainant and led to an exchange of emails with the Deputy Director General concerning the start of the time limit for filing a complaint with the Tribunal. It is true that the Deputy Director General alerted the complainant to the terms of Article VII of the Statute of the Tribunal and advised him to consult his counsel about how to calculate the time limit. However, he did not inform him clearly of the date to take into account. The fact that the email stated that it contained only an advance copy of the decision and that the paper copy would be sent by registered post, and the failure of the email to indicate that the time limit would start to run on the date on which the email was received, could have misled the complainant and caused him to believe that the time limit only started to run on the date when the paper copy of the decision was received (for a similar case, see Judgment 3704, considerations 7 and 8). In this case, it is hence the later date that must be considered as the date on which the time limit for filing a complaint to the Tribunal started to run.

The complainant's counsel – whose office the complainant had chosen as his address for notification purposes, as stated above – was notified of the paper copy of the decision on 14 September 2015. The time limit for filing the complaint hence expired on 13 December 2015. However, as that was a Sunday, the complaint could still be filed the next day (see Judgments 517, 2250, consideration 8, and 3034, consideration 14), as indeed occurred.

It follows that in this respect the complaint is receivable.

5. WIPO challenges the complaint's receivability secondly on the grounds that, by signing the settlement agreement, the complainant waived any right to challenge it.

However, since the complainant submits that he entered into that agreement under pressure which invalidated his consent, this question of receivability is, in this case, inseparable from the merits of the case (see Judgments 3424, consideration 12, and 4072, consideration 4). Indeed, the decision on the objection to receivability depends on the legal validity of the settlement agreement, which makes it necessary to consider the complainant's pleas on the merits (for a similar approach, see Judgments 3610, consideration 6, and 3750, consideration 5).

6. Before the Tribunal, the complainant levels a number of criticisms at the Organization, which he accuses of having breached his right to be heard and having committed numerous hostile acts and abuses of authority in his regard, mainly concerning the criminal complaint that the Organization filed against him with the Swiss authorities. He submits that WIPO seriously breached his fundamental rights "by preventing him from presenting his explanations, vindicating himself and proving the worthless nature of the charges against him", thereby exerting unlawful pressure on him and leaving him no choice but to sign the settlement agreement.

The complainant had the opportunity to file the internal appeals that he wished and to follow up those that he had initiated, in particular the appeal concerning the criminal complaint filed with the Swiss authorities. He could have thereby presented all his arguments substantiating the alleged breach of his fundamental rights and claimed the compensation that seemed more fair to him. When those internal appeals were exhausted, he could have decided to file a complaint with this Tribunal if he considered that a decision taken by the Director General on an opinion of the Appeal Board was open to criticism from a legal standpoint.

Rather than so doing, the complainant sought to enter into an amicable settlement. This was his initiative, and every time WIPO rejected his suggestions, he insisted on re-starting and eventually

concluding discussions. Once he signed the agreement, he requested that the lump sum specified be paid immediately because he urgently needed to return to his home country. WIPO promptly paid the agreed amount. Only when he had received it did the complainant, who had remained in Switzerland, declare the agreement void and state, through his counsel, that "[t]he amount received w[ould] be deducted from the compensation that [he] w[ould] receive from the courts". The complainant hence wrongly alleges that WIPO forced him to sign an agreement which he himself initiated and whose pecuniary advantages he wishes to retain.

7. The complainant submits that he was financially ruined and psychologically destroyed by WIPO's allegedly unlawful filing of a criminal complaint against him with the Swiss authorities. He accuses WIPO of having used the situation to force him into signing an agreement.

The Tribunal must therefore determine whether the complainant's alleged financial and psychological vulnerability was such as to render his consent invalid.

8. With regard to the complainant's allegedly "catastrophic" financial situation, he states that he was forced to sign the agreement "in order to avoid bankruptcy" and to provide for his family.

The evidence before the Tribunal shows that the complainant drew a monthly disability benefit of around 6,500 Swiss francs and that he was paid a termination indemnity of 41,598.99 Swiss francs at the end of July 2014 and the sum of 30,134 Swiss francs in reimbursement for the educational fees of several of his children in October 2014. In addition, his counsel was advised by a letter of 10 June 2014 that the complainant was entitled to a repatriation grant of over 50,000 francs.

The argument that the complainant needed to provide for his family must be rejected since he cannot be considered to have been in such dire necessity that his consent was not valid (see Judgment 3091, consideration 15).

With regard to the complainant's psychological state, it is not disputed that he was declared unfit for work and granted a disability benefit. Moreover, in the present proceedings the complainant has

submitted several medical documents showing that he suffered from depression. However, that circumstance is not sufficient on its own to warrant a finding of a total lack of judgement (see Judgment 856, consideration 6). In this case, several factors refute this contention.

First, the plethora of evidence attesting to the requests submitted and the action taken by the complainant with a view to obtaining an amicable settlement shows clearly that he did not lack judgement. Next, it should be noted that although the complainant put forward a proposal for a settlement on 18 April 2013 and re-submitted it on 27 August 2013 and 28 October 2014, the discussions started in earnest on 7 November 2014 when the complainant's counsel asked the Organization to tell him what conditions it would accept. These negotiations lasted nearly three months, giving the complainant ample time for reflection in which he could have retracted his requests for a settlement. Lastly, from the start of these discussions until the signing of the agreement, the complainant was represented by a lawyer, whose role was to inform and assist him.

The evidence provided by the complainant is not sufficient to cast doubt on his mental faculties given that, following negotiations which he himself initiated with the assistance of his counsel, he eventually accepted an offer that was distinctly advantageous from a financial point of view (for a similar case, see Judgment 2049, considerations 2 to 5).

In conclusion, the complainant's contention that he was financially and psychologically vulnerable cannot be accepted.

9. The complainant considers that the agreement aimed to harm his honour, reputation and health and is therefore unlawful and immoral. He asks the Tribunal to put an end to the Organization's unlawful abuse of authority.

It is well established in the case law that "bad faith cannot be presumed, it must be proven. Additionally, bad faith requires an element of malice, ill will, improper motive, fraud or similar dishonest purpose" (see Judgment 2800, consideration 21, cited in Judgment 3154, consideration 7; see also Judgment 3902, consideration 11). What is more, "misuse of authority may not be presumed and the burden of proof is on the party that pleads it" (see Judgment 3939, consideration 10).

The complainant has not proved that WIPO deliberately wished to harm him or that it was guilty of abusing its authority by acting for reasons that were extraneous to the Organization's best interests and seeking some objective other than those which the authority vested in it was intended to serve (see Judgments 1129, consideration 8, and 4081, consideration 19).

The plea is unfounded.

10. Lastly, the complainant contends that the agreement is unconscionable and unfair. He alleges that it is totally disproportionate since the "derisory" lump sum equates to only 10 per cent of the material injury that he allegedly sustained and fails to redress the harm to his reputation and image caused by WIPO filing a criminal complaint against him with the Swiss authorities.

The Tribunal observes in this regard that although in his complaint to the Tribunal the complainant claims 1,000,000 Swiss francs in material damages and 500,000 Swiss francs in moral damages, during negotiations with the Organization he himself proposed the lump sum of 300,000 francs for the all the injury he allegedly suffered.

There cannot be a question of unfairness in this case by any means. Indeed, the Organization undertook to pay the complainant 155,000 Swiss francs in return for his renouncing all claims against it. Contrary to the complainant's assertions, that sum cannot, given the circumstances of the case, be considered blatantly inadequate or disproportionate in view of the undertaking that he provided in return.

The plea is unfounded.

11. In signing the agreement that was offered to him, the complainant waived his right to file new internal appeals, to pursue the appeals that he had initiated and to file complaints with the Tribunal. The case law acknowledges the validity and legitimacy of such agreements and considers that the resulting infringement of a complainant's right to appeal is not unlawful (see Judgment 3867, consideration 5).

Since the settlement agreement signed by the complainant on 28 January 2015 is lawful, the present complaint is irreceivable pursuant to the very terms of that agreement (see Judgments 1934, consideration 7, 2368, consideration 7, and 3486, consideration 5). In addition, and for the same reasons, no criticism can be made of the decision of the Deputy Director General of 9 September 2015 in which he refused to consider the agreement as void. It is hence unnecessary to set aside that decision or to examine the other pleas (for similar reasoning, see Judgments 3091, considerations 15 to 18, and 3867, considerations 15 to 17).

12. The complaint must hence be dismissed in its entirety, without there being any need to grant the complainant's requests for witnesses to be heard.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 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