

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**R.**  
**v.**  
**WIPO**

**134th Session**

**Judgment No. 4505**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. R. against the World Intellectual Property Organization (WIPO) on 6 September 2018 and corrected on 12 October 2018, WIPO's reply of 21 January 2019, the complainant's rejoinder of 26 April and WIPO's surrejoinder of 6 August 2019;

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 Director General's decision to terminate his appointment at the end of his probationary period.

On 1 January 2016 the complainant was hired under a two-year appointment subject to a one-year probationary period. In an email of 12 February 2016 the Human Resources Management Department drew the attention of the complainant's supervisor to the fact that the initial planning, the purpose of which was to define the complainant's tasks and objectives with a view to his performance evaluation, should have taken place before 31 January 2016, that is, within one month of his entry on duty. The discussion concerning the initial planning took

place on 18 February and the tasks and objectives were recorded in the report on 22 February.

After discussions on 1 and 8 June, the mid-term review was finalised on 29 June 2016. Following the final evaluation, the complainant's supervisor recommended that his appointment be terminated. The complainant expressed his disagreement and submitted his comments. On 9 December the reviewing officer indicated that he agreed with the recommendation not to confirm the complainant's appointment.

By a letter of 20 December the complainant was notified of the Director General's decision to terminate his appointment with effect from 31 December 2016. He was also told that he would receive compensation equivalent to one month's salary in lieu of notice.

On 20 March 2017 the complainant lodged a request for review of that decision. By a letter of 19 May he was informed of the Director General's decision to maintain his decision. On 17 September 2017 the complainant lodged an internal appeal against that decision. In its opinion dated 9 April 2018 the Appeal Board recommended that the internal appeal be rejected in its entirety.

In a letter of 8 June 2018 the complainant was informed of the Director General's decision to follow the Appeal Board's recommendation and to maintain the decision to terminate his appointment. That is the impugned decision.

The complainant asks the Tribunal to set aside the challenged decision. He seeks compensation for the material injury he considers he has suffered, in an amount equal to all the salary and allowances that would have been paid to him until his contract ended on 31 December 2017 and contributions to the social protection schemes. He also claims moral damages in the amount of 30,000 euros and 8,000 euros in costs for the internal appeal proceedings and the proceedings before the Tribunal.

WIPO invites the Tribunal to dismiss the complaint and all of the complainant's claims.

## CONSIDERATIONS

1. The complainant impugns the decision of the Director General of WIPO of which he was notified on 8 June 2018 and by which the Director General informed him that he had decided to follow the Appeal Board's unanimous recommendation, issued on 9 April 2018, to reject his internal appeal in its entirety and to maintain his previous decision not to confirm the complainant's appointment at the end of his probationary period.

The complainant enters six pleas in support of his complaint. Those pleas concern non-compliance with the duration of the probationary period, a delay in drawing up the initial planning, a lack of prior warning, a lack of adequate support, a breach of the right to be heard and a breach of good faith. The complainant therefore claims full compensation for the material and moral injury that he has allegedly suffered and costs for the internal appeal proceedings and the proceedings before the Tribunal.

2. Concerning staff members who, like the complainant, must undergo a probationary period, Staff Regulation 4.17(b) of the Staff Regulations and Rules of the International Bureau of WIPO provides that:

**“Regulation 4.17**  
**Fixed-term appointments**

[...]

(b) Any initial fixed-term appointment of one year or more shall be subject to a period of probation, which shall be at least of one year and may be extended up to two years, when necessary, for adequate evaluation of the staff member's suitability as an international civil servant with respect to his or her qualifications, performance and conduct.”

Furthermore, WIPO's Office Instruction No. 12-2015 prescribes the conditions and procedures applicable to the probationary period to which Staff Regulation 4.17(b) refers. The Office Instruction relevantly states as follows:

“Duration

4. The probation shall be for a period of twelve (12) months from the date on which the staff member was granted the initial fixed-term appointment. It may be extended up to a maximum of twelve (12) months, depending on the outcome of the initial probationary period (i.e. the total probationary period shall not exceed twenty four (24) months).

Evaluation Process

[...]

6. Throughout the probationary period, the supervisor must ensure that the staff member receives adequate supervision and support, and must bring any shortcomings and/or areas for improvement to his or her attention in good time.

[...]

9. The evaluation process shall include an initial planning stage, a mid-term review and a final evaluation. The purpose of the initial planning stage is to establish the tasks and/or objectives which will be evaluated during the probationary period. The purpose of the mid-term review is to indicate to the staff member whether he or she is meeting the required standards and to highlight any shortcomings and/or areas for improvement. The purpose of the final evaluation is to give a justified recommendation on whether or not the appointment should be confirmed.

[...]

Initial planning

13. Within one (1) month from the date of the staff member’s entry on duty, the supervisor shall meet with the staff member to define the tasks and/or objectives that the staff member is expected to perform during the probationary period, which shall be recorded in the [Probation Evaluation Report].

Mid-term review

14. The supervisor shall initiate the mid-term review five (5) months after the date of the staff member’s entry on duty.

[...]

Final evaluation

22. The supervisor shall initiate the final evaluation eleven (11) months after the date of the staff member’s entry on duty.

[...]

27. The final evaluation shall normally be completed no later than twelve (12) months after the date of the staff member’s entry on duty.

[...]

Outcome of probation

29. The supervisor's recommendation (and where applicable, the recommendation of the reviewing officer) regarding the outcome of the probationary period shall be based on the indicator ratings (see paragraphs 10 and 11 above). The recommendation shall be one of the following:

(a) *Confirmation of appointment*

[...]

(b) *Extension of probationary period*

If one indicator is rated as 'partly demonstrated' during the initial probationary period, the recommendation shall be to extend the probationary period.

[...]

(c) *Separation from service*

The recommendation shall be to separate the staff member if:

- i) at the end of the initial probationary period, two or more indicators are rated as 'partly demonstrated', or any indicator is rated as 'not demonstrated'.
- ii) [...]

30. The Director General shall give due consideration to the recommendation(s) of the supervisor and the reviewing officer before deciding whether to confirm an appointment, extend the probationary period or separate a staff member from service."

3. In its case law, the Tribunal has held that "the purpose of probation is to permit an organization to assess the probationer's suitability for a position" (see Judgment 4212, consideration 4). The Tribunal has also pointed out that an organisation enjoys wide discretion with regard to probation and that, for this reason, decisions taken in this context are subject to only limited review (see, for example, Judgment 4481, consideration 3). Thus, under the Tribunal's settled case law, a decision of this kind will only be set aside if it is taken without authority or in breach of a rule of form or of procedure, or if it is based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was an abuse of authority. Moreover, where the reason given for refusal of confirmation is unsatisfactory performance, the Tribunal will not replace the organisation's assessment with its own (see, in particular, Judgments 1418, consideration 6, 2646, consideration 5,

3913, consideration 2, and aforementioned 4212, consideration 4). In its case law, the Tribunal has also determined the principles applicable to an organisation's obligations in respect of the probationary period. In particular, "an organisation must establish clear objectives against which performance will be assessed, provide the necessary guidance for the performance of the duties, identify in a timely fashion the unsatisfactory aspects of the performance so that remedial steps may be taken, and give a specific warning that the continued employment is in jeopardy" (see Judgments 2788, consideration 1, and aforementioned 4212, consideration 5).

4. Regarding the complainant's first plea that the duration of the probationary period was not observed, he submits that the rule in Staff Regulation 4.17(b) was not complied with because the final evaluation of his performance took place in December 2016, that is, one month before the end of the minimum period of employment allowing it to be properly evaluated.

However, in this case, contrary to what the complainant argues, Staff Regulation 4.17(b) was observed. The probationary period was to last at least a year. That period started on 1 January 2016 and ended on 31 December 2016.

The Tribunal observes that in undertaking the complainant's final evaluation at the end of the eleventh month of the probationary period, thereby allowing the Director General to take his decision with effect from 31 December 2016, the Organization merely complied with the provisions of paragraphs 22, 27 and 30 of Office Instruction No. 12-2015. Despite what the complainant submits, those provisions, and in particular those of paragraph 22, are not contrary to Staff Regulation 4.17 in that they provide for the final evaluation to take place before the end of the probationary period. The complainant's reasoning is incorrect because it is based on a confusion between the duration of the probationary period and the staff member's evaluation during that period.

The first plea is unfounded.

5. Concerning the second plea, regarding the delay in drawing up the initial planning, the complainant submits that the Director General's decision is unlawful because the one-month time limit laid down in paragraph 13 of Office Instruction No. 12-2015 for the initial planning was not observed and, in fact, was exceeded by around 22 days. The complainant's supervisor was to define his tasks and objectives before 31 January, whereas they were not recorded in a report until 22 February.

WIPO has acknowledged the delay in its submissions. However, as the Appeal Board noted in the conclusions of its report, that delay was not significant, and the Appeal Board's finding that it did not have a bearing on the complainant's performance, quality of work or conduct is not seriously in dispute. In Judgment 890, consideration 3, the Tribunal found, in a case concerning the failure to observe a time limit for evaluating a staff member, that "[l]ate communication [of an evaluation report] therefore will not make the decision unlawful unless the probationer suffers injury". In Judgment 3440, consideration 8, the Tribunal further considered that a delay of a few weeks to a month in setting the work objectives that ordinarily should have been determined in the month following the staff member's appointment was not significant in the circumstances. In the present case, the submissions and the evidence do not establish that the delay of just over two weeks in the initial planning phase caused the complainant any injury. This is not a substantial flaw that could lead the Tribunal to find the impugned decision unlawful. The complainant's work objectives were set and he was duly informed of the tasks to perform.

The second plea must also be dismissed.

6. Concerning the third plea that the complainant was not given prior warning, the complainant submits that he was not warned "in the prescribed manner" or "in specific terms" of the risk that his appointment would not be confirmed at the end of his probationary period owing to unsatisfactory performance. The complainant argues that the decision is unlawful owing to the lack of such warning.

It is true that the Tribunal's case law states that a probationer must be given a timely warning if her or his employment is in jeopardy and a specific warning that continued employment is in jeopardy (see Judgments 3240, consideration 21, and 3866, consideration 10). However, in this case, as the Appeal Board found in its report, the evidence shows that the complainant's attention was indeed directed to his unsatisfactory performance and the need to improve his competencies. As the Tribunal observed in Judgment 3440, consideration 16, "[a] probationer is quite aware that unsatisfactory performance would occasion the termination of her or his appointment". In this case, the complainant could not have failed to be aware that he was on probation and that under paragraph 29 of Office Instruction No. 12-2015, separation from service was possible at the end of the probationary period. Moreover, the complainant was alerted to the need to improve his technical competencies during his mid-term review. Lastly, the statement provided by the complainant's former direct supervisor, which is part of the evidence submitted both to the Appeal Board and the Tribunal, shows that the complainant was specifically warned that his professional shortcomings could lead to his separation from service. In those circumstances, the Tribunal considers that the complainant has not established that he did not receive prior warning "in the prescribed manner" or "in specific terms" that his appointment was liable not to be confirmed at the end of his probationary period. The evidence does not support a finding that the decision is unlawful on that ground.

The third plea is unfounded.

7. In respect of the fourth plea concerning a lack of adequate support, once again the evidence on the file does not establish that the impugned decision is unlawful owing to a failure by WIPO to provide the complainant with proper support during his probationary period. During the internal procedure, the Organization submitted in evidence a list of the efforts made by the complainant's supervisors which, in the Tribunal's view, show that, on the contrary, he received adequate supervision and support.

The fourth plea must be dismissed.



8. Regarding the fifth plea alleging a breach of the right to be heard, the Tribunal finds that the procedure followed by WIPO that led to the decision not to confirm the complainant's appointment at the end of his probationary period in fact observed that right. The various procedures for evaluating a staff member's performance during her or his probationary period that are set out in Office Instruction No. 12-2015 offered the complainant several opportunities to be heard. That was the case during his mid-term review and his final evaluation. The evidence also establishes, as stated above, that he received warnings during his meetings with his direct supervisor. Lastly, before the Director General took the decision notified in the letter of 20 December 2016 according to which his appointment would end on the expiry of his probationary period, the complainant met his direct supervisor as part of the evaluation procedure and was able to submit written comments on his final evaluation report. In any event, the complainant was thus able to provide his comments in good time (see Judgment 4185, consideration 9). In the Tribunal's view, the due process requirement for the complainant to be heard before a decision not to confirm his appointment was therefore met.

Accordingly, the fifth plea must also be dismissed.

9. Lastly, regarding the final plea alleging a breach of good faith on the part of the Organization, the complainant submits that he was treated unfairly and inequitably. According to him, there was a discrepancy between the requirements of the post set out in the vacancy notice, on the one hand, and the work that he was expected to perform and the aptitudes needed to perform it, on the other. He submits that he feels as if he has fallen into a trap and in consequence accuses the Organization of lacking good faith. However, the Tribunal has pointed out many times that bad faith may not be presumed and must be proved (see Judgments 4451, consideration 16, and 4345, consideration 6). The burden of proof is on the complainant, and to support his allegation he must demonstrate that there was malice, ill-will, improper motive, fraud or similar dishonest purpose (see Judgment 3902, consideration 11). Similarly, the complainant bears the burden of proof in establishing any bias or inequitable treatment (see Judgment 4097, consideration 14).

In this case, the discrepancy alleged by the complainant between the vacancy notice and the work expected is not established. The complainant's shortcomings identified in his evaluation report concern duties and responsibilities listed in the vacancy notice. Technical knowledge and competencies in the area of systems management were required. Essentially, the complainant's plea is in effect a request for the Tribunal to substitute its assessment of the complainant's performance for that of the Organization. However, as stated in consideration 3, above, the Tribunal will not do so. Furthermore, as regards the complainant's submission that the impugned decision is contrary to good faith because he could have had his probationary period extended since he performed some tasks satisfactorily, the Tribunal considers that this argument does not establish that the Organization breached its duty of good faith. In fact, the aforementioned paragraph 29 of Office Instruction No. 12-2015 provides that, where the staff member's aptitude is rated as "partly demonstrated" for at least two indicators, as was the case for the complainant, the direct supervisor's recommendation must be for the staff member to be separated from service. Under that paragraph, a recommendation for the probationary period to be extended requires that aptitude be rated as "partly demonstrated" for only one indicator.

The sixth plea is therefore unfounded.

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

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 28 April 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

*(Signed)*

PATRICK FRYDMAN    JACQUES JAUMOTTE    CLÉMENT GASCON

DRAŽEN PETROVIĆ