

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

U. (No. 2)

v.

WIPO

138th Session

Judgment No. 4848

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr D. B. O. U. against the World Intellectual Property Organization (WIPO) on 5 March 2020, WIPO's reply of 16 July 2020, the complainant's rejoinder of 19 October 2020 and WIPO's surrejoinder of 1 February 2021;

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 contests WIPO's decisions (i) to advertise his post; (ii) to organise a selection process to fill his post; (iii) not to appoint him to the post without competition; (iv) to renew his fixed-term appointment for three months only; (v) to restructure his division; and (vi) to modify/redefine his post.

The complainant joined WIPO on 1 April 2011 as Director of the Copyright Infrastructure Division (CID) in the Copyright and Creative Industries Sector (CCIS). He was granted a two-year fixed-term appointment, which was extended initially for three years, from 1 April 2013 to 31 March 2016, and then for two years, from 1 April 2016 to 31 March 2018.

On 1 February 2017, the complainant commenced a period of certified sick leave, which culminated in his separation from WIPO for health reasons on 30 September 2018.

Prior to that, in an email of 18 December 2017, entitled “CCIS proposed new structure”, the Deputy Director General advised CCIS staff members that the evolution in the mission of “Program 3” necessitated a realignment of the CCIS organizational structure to enable it to “successfully carry out its mission while fully embracing the transformative power of technology and innovation”. The Deputy Director General went on to present the proposed new organizational structure which entailed: (i) a formal change in the mandate of CID and, consequently, a change of its name to Copyright Management Division (CMD) with a focus on activities related to the management of rights and all business/standards-related issues in the digital era, including those related to the “Accessible Book Consortium”; and (ii) the creation of the Copyright Information Technology (IT) Infrastructure Division (CIID) with a focus on digital IT solutions, including the deployment of tools such as “WIPO Connect”. She invited CCIS staff members to share their comments by 22 December 2017.

The complainant, who was on sick leave at the time, was not copied in this email. However, by a separate email of 18 December 2017, the Deputy Director General shared with him her email to CCIS staff earlier that day and invited him to also send his comments by 22 December 2017. She noted that she recognised he was on sick leave but did not want to deprive him of the opportunity to comment on the proposed plan. On 22 December 2017, the complainant replied that he was sick, and it was thus difficult for him to respond within such short notice, and he requested more details on the change in the mandate of CID and the full reason behind it. The Deputy Director General wrote back on 4 January 2018, offering to answer the complainant’s questions regarding her proposal over the phone the next day, an offer the complainant declined, purportedly because he was still not well enough. On 10 January 2018, the complainant wrote again to the Deputy Director General to reiterate his request for information on her proposal. The Deputy Director General wrote back the next day, advising him that she

would proceed with the submission of her proposal to the Director General but would keep him informed of any developments in that regard and would also share with him any documents issued to staff members. She reiterated her readiness to speak with him over the phone.

By a letter of 31 January 2018, the Deputy Director of the Human Resources Management Department (HRMD) informed the complainant that the Director General had approved the proposed restructuring, including the change of the CID's name to CMD and the change in its mandate. Noting that the complainant's appointment was due to expire on 31 March 2018, the Deputy Director, HRMD, advised him that, in view of the new focus of CMD and the resulting revised scope and responsibilities of the position of Director of CMD, the Director General had decided to advertise that position. The Deputy Director, HRMD, offered the complainant a three-month extension of his appointment from 1 April to 30 June 2018, noting that this extension was granted pending the selection process for the position of Director of CMD, and that any subsequent extension of his appointment would depend on the outcome of that selection process. The complainant accepted the three-month appointment extension on 7 February 2018 with a reservation of his right to challenge it.

By an email of 15 March 2018, entitled "CCIS proposed new structure", the Deputy Director General advised CCIS staff members that, following discussions with the Director General and other senior managers, it was decided to proceed with the formal changes in the mandate of CID, as these were outlined in the 18 December 2017 email. She added that an Office Instruction reflecting the changes would soon be issued. On 19 March 2018, this email was forwarded to the complainant, who was still on sick leave and not copied when it was first sent out on 15 March.

On 29 March 2018, WIPO advertised the position of Director of CMD. The complainant applied for this position and he was shortlisted, but he did not participate in the recruitment process due to health reasons. The recruitment process was temporarily suspended because of the complainant's health condition but resumed in July 2018.

By a letter of 30 April 2018 to the Director General, the complainant requested a review of the decisions contained in the 31 January 2018 letter. In that letter, the complainant wrote: “[I] request you to review all of the decisions, including the decision to advertise the position and organise a selection process and the decision not to keep me or appoint me in the position automatically, the decision to renew my contract for only three months and not to convert my contract into a permanent/continuing one, and the decision to allegedly restructure the [CCIS] and allegedly modify my position. Lack of detailed information in [the 31 January] letter about the alleged restructuring and alleged changes (except with regards to the name of [CID]) as well as lack of specific and thorough documentation about them show that these changes are not real and genuine.”

The Director General’s decision to reject the complainant’s request for review was communicated to the complainant by a letter of 29 June 2018, which stated that the 31 January 2018 letter contained only two decisions, namely (i) to advertise the position of Director of CMD; and (ii) to offer the complainant a three-month extension of his fixed-term appointment.

Shortly before that, on 26 June 2018, the complainant was offered a six-month extension of his appointment, from 1 July to 31 December 2018, which he accepted but which did not run its course, as he separated from WIPO upon the termination of his appointment for health reasons on 30 September 2018.

On 27 September 2018, the complainant lodged an appeal with the WIPO Appeal Board (WAB) against the Director General’s 29 June 2018 letter. In his appeal, he identified six decisions, to which the 29 June 2018 letter expressly or implicitly referred, namely: (i) to advertise his post; (ii) to organise a selection process to fill his post; (iii) not to appoint him to the post without a competition; (iv) to renew his fixed-term contract only for three months (from 1 April to 30 June 2018); (v) allegedly to restructure his division; and (vi) allegedly to modify/ redefine his post. By way of relief, the complainant asked that these six decisions be set aside; that his three-month contract be replaced with a permanent or continuing contract; that the Administration

provide him with the reasons and evidence for discriminating against him; and he sought material, moral and exemplary damages, and costs.

Having requested additional information from the Administration, and having reviewed that information, the WAB submitted its report on 4 October 2019, recommending that the appeal be rejected in its entirety.

By a letter of 6 December 2019, the Director of HRM communicated to the complainant the WAB's report and informed him that the Director General had decided to accept its recommendation to reject his appeal. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order WIPO to convert his last fixed-term contract into a continuing or a permanent contract as from the date all conditions for such conversion were met or, alternatively, from the date of the Director General's decision. He claims compensation for all the injuries he suffered, the loss of amenity, and the loss of enjoyment of life. He claims material damages for the loss of salary, allowances and other benefits, such as pension and health insurance, excluding any monies he has already received. He also claims moral, exemplary, and punitive damages, as well as costs. He seeks interest on all amounts awarded.

WIPO submits that the complaint is receivable only insofar as it concerns: (i) the decision to advertise the position of Director of the new CMD; and (ii) the decision to offer the complainant a three-month extension of his fixed-term appointment (from 1 April to 30 June 2018). It therefore asks the Tribunal to dismiss it as partly irreceivable and devoid of merit in its entirety.

CONSIDERATIONS

1. The complainant joined the staff of WIPO in April 2011. He did so as the Director of the Copyright Infrastructure Division (CID) in the Copyright and Creative Industries Sector (CCIS). His initial appointment was under a fixed-term contract commencing on 1 April 2011 and concluding on 31 March 2013. It was then extended for a

period of three years expiring on 31 March 2016, and then extended again for a further period of two years concluding on 31 March 2018. However, the complainant had been absent from work on certified sick leave from 1 February 2017 until his separation from the Organization on 30 September 2018.

2. On 18 December 2017, the Deputy Director General announced, in an email to all staff of CCIS, a proposed restructuring of the Sector. The complainant was informed of this proposal by an email of the same date directed to him personally, given he was on sick leave, and inviting him to comment by 22 December 2017. He did not do so, though he engaged in a discussion about him commenting but ultimately this did not occur.

3. The genesis of this complaint, the complainant's second, is a letter of 31 January 2018 he received from the Deputy Director of the Human Resources Management Department (HRMD). Relevantly, the complainant was, in that letter, informed of three things. The first was that the Director General had approved the proposed restructuring. The second was that the position of Director of the newly named Copyright Management Division (CMD) replacing the CID would be advertised. The letter invited the complainant to apply. The third thing was that he was being offered a three-month extension of his fixed-term contract from 1 April to 30 June 2018. On 30 April 2018, the complainant unsuccessfully sought a review of the decision, or decisions, in the letter of 31 January 2018. He then appealed to the WIPO Appeal Board (WAB) which, in its report of 4 October 2019, unanimously recommended the appeal be rejected. It was rejected in a decision of the Director General communicated to the complainant by letter dated 6 December 2019. This is the decision impugned in these proceedings.

4. There is an issue in these proceedings about the receivability of the complaint and, even if receivable, the legitimate scope of the complaint. It is unnecessary to enter this debate. That is for two reasons. First, it is tolerably clear that the letter of 31 January 2018 contained decisions relevant to the circumstances of the complainant involving,

potentially, matters of the type comprehended by Article II of the Tribunal's Statute. The second is that his case fails on the merits.

5. Accepting, for present purposes, that the letter of 31 January 2018 reflected a decision to undertake the reorganisation adverted to in late 2017, the issue which then arises is whether WIPO, in deciding to undertake the reorganisation, acted unlawfully in relation to the complainant. It might have done so in two respects, though they are related. In his pleas, the complainant makes two relevant points. The first is that, as he argues, there was no effective consultation with him about the reorganisation and that, secondly, it would have an effect on him, described in his pleas as "his vital interests [being] imperilled". At this time, the complainant was nominally the Director of CID, in the sense that he had been absent from work on certified sick leave since 1 February 2017, a period of almost a year, and thus not substantially performing the duties of that position.

6. Quite apart from any effect on the personal circumstances of a chief of a section or department, the Tribunal's case law endorses the practice of requiring consultation with such a person in relation to plans for the reorganisation of the relevant section or department, and to not consult would ordinarily constitute a serious failure to respect the dignity of that person (see, for example, Judgments 3353, consideration 30, 3071, consideration 30, and 2861, consideration 27). In this limited context, this would be particularly so if the reorganisation had an adverse effect on the personal circumstances of the individual section or departmental chief, though this is not to suggest any member of staff adversely affected by a reorganisation must be consulted before the reorganisation occurs.

7. However, in this case, the rather unusual circumstances inform the content of WIPO's duty to consult. As just noted, it is reasonable to characterise the position of the complainant as having only been nominally the Director of CID in late 2017 and early 2018. However, and notwithstanding, an attempt was made to engage with him about the proposed reorganisation, though this was resisted by the

complainant, on the basis being suggested, because of his ill health. In the Tribunal's view, the basis being suggested by WIPO was, overall, reasonable. The complainant took the position, probably legitimately, that in the circumstances, him replying in writing within four days of the email of 18 December 2017 was too burdensome given his state of health. However, he also rejected the suggestion that he take the opportunity of discussing the matter by phone with the Deputy Director General. Again, he did so because, as he put it, of the state of his health. It was not at all obvious that, at this point in very late 2017, any effective consultation could take place and it was, therefore, open to the Deputy Director General to pursue the proposed reorganisation without input from the complainant.

There is nothing in the material before the Tribunal which would warrant a conclusion that WIPO should have proceeded, in relation to its obligation to consult, on the basis that the complainant would imminently return from sick leave and actively manage the CID or, potentially, whatever organisational division might replace it. Indeed, all the signs at that time were, including the approach adopted by the complainant to the invitation to discuss the proposed reorganisation by phone, that this would not occur.

8. The other and related decisions apparent from the letter of 31 January 2018 were the decisions to offer the complainant a three-month extension of his fixed-term appointment and to advertise the position of Director of the (about to be created) CMD. In his pleas, the complainant challenges the creation of this position contending, amongst other things, it was not materially different to the position he then formally occupied and was the product of a reorganisation which was illusory rather than substantial. It is unnecessary to repeat the various ways this is put by the complainant. However, mention should be made of a submission, which is tantamount to an allegation that the reorganisation was not a *bona fide* exercise of an undoubtedly wide discretionary power the executive head of an international organisation has to institute administrative and other structural changes within the organisation with consequential effects on existing posts, including their redefinition or abolition (see, for example, Judgments 4599,

considerations 11 and 12, 4353, consideration 7, 3238, consideration 7, and 3169, consideration 7). This is, in substance, an allegation of bad faith. However, bad faith may not be presumed, and the burden of proof is on the party that pleads it (see Judgments 4682, consideration 3, 4353, consideration 12, and 2800, consideration 21). In the present case, there is not a scintilla of evidence that the reorganisation decision did not involve a *bona fide* exercise of the wide discretionary power of the executive head. This plea is unfounded.

9. This leads to a consideration of whether the decision to advertise the position of Director of CMD was flawed. It arguably would have been, if there had been no material difference between the position nominally occupied by the complainant, namely Director of CID, and this new position of Director of CMD. While it is presently of no legal consequence, the Tribunal notes that the complainant applied for the advertised position of Director of CMD and was shortlisted, but declined to continue with his application on medical advice that he should not.

10. At this point, the role and significance of an Appeals Board opinion should be noted. It was discussed in Judgment 4488, consideration 7:

“The Tribunal’s case law establishes in, for example, Judgment 4407, at consideration 3, that an internal appeal body’s report warrants considerable deference in circumstances where its report involves a balanced and thoughtful analysis of the issues raised in the internal appeal, as it does in this case, and on its analysis its conclusions and recommendations were justified and rational, as again they are in this case (see also Judgments 3608, consideration 7, 3400, consideration 6, and 2295, consideration 10).”

It was also discussed in Judgment 3422, consideration 3:

“At this point, it is appropriate to note the observations of the Tribunal in Judgment 2295, consideration 10, that it is not the role of the Tribunal to reweigh the evidence before an internal appeals board and the conclusions of the board are entitled to considerable deference. While the case leading to Judgment 2295 involved the evaluation of evidence from witnesses about allegations of unsatisfactory behaviour in the workplace, the evaluation by any internal appeal body of matters with which they are likely to be familiar, must be given significant weight as long as the Tribunal is satisfied the

appeal body has undertaken a comprehensive and thoughtful consideration of the evidence and the applicable principles and its conclusions are rational and balanced.”

11. In the present case, the WAB undertook a fairly detailed comparison and analysis of the two positions and the decision to advertise the (newly created) position of Director of CMD. It said:

“56. In light of the information collected by the [WAB], it appeared that the Director General decided to advertise the new post with the aim to fill it with a person who possessed the best combination of skills for the new post. In the [WAB’s] view, this was done in the exercise of his discretionary authority and taking into account the overall interests of the Organization, in particular the fact that the functions of the post of Director of the CMD had evolved to reflect the evolution in the mission of Program 3. The [WAB] concluded that the new recruitment was correctly planned to be done through a competition, in accordance with Staff Regulation 4.9(a), which reads: ‘As a general rule, recruitment shall be made on the basis of a competition.’

57. The [WAB] was of the view that the Director General was entitled to adapt to changes and to revise the scope and responsibilities of the post of Director of CMD in view of the new needs of the Organization. In considering the [complainant’s] claim that the new post did not differ from his own, the [WAB] analysed both the [complainant’s] job description and the vacancy announcement for the new post (which listed, inter alia, the duties and responsibilities of the Director of CMD, as a job description would do). It was of the view that, although some of the functions were comparable, the majority of new duties and responsibilities differed from the original ones (indicated in the [complainant’s] job description), as a result of the redefined organizational context. The need to address the development of copyright management systems in the digital era, including using digital technology and for cross-border access to digital markets, clearly emerged from a comparison of the original and the new ‘job descriptions’. The evolution of the post’s functions were also indicated by the responsibilities with regard to public-private partnerships in the relevant sector.

58. The [WAB], however, recalled that the Tribunal, when dealing with a similar claim (i.e., the new post was no different from the [complainant’s] own), held that ‘this involves an appraisal of the needs of the Organisation, which is the prerogative of the Director-General. It is within his discretionary authority to take decisions accordingly’ (Judgment No. 2080, cons. 17).

59. In light of the above, the [WAB] considered that the decision to advertise the post of Director of CMD was lawful and based on reasonable grounds.”

12. There is nothing in the pleas of the complainant and the material he provides in support, to gainsay this conclusion of the WAB. It should be accepted.

The Tribunal is satisfied that there is no manifest error in the WAB’s finding and conclusion that there was a material difference between the duties and responsibilities of the newly created position (Director of CMD) and those of the original position (Director of CID) as a result of the redefined organizational context, warranting advertising for the post of Director of CMD. Therefore, the Director General’s decision to extend the complainant’s contract by three months only in the soon to be abolished position of Director of CID was taken in proper exercise of his discretion.

13. In the result, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER