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

SIXTIETH ORDINARY SESSION

In re REPOND

Judgment No. 790

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Josefina Rodriguez y Aguado Repond against the World Intellectual Property Organization (WIPO) on 2 May 1986, WIPO's reply of 4 July, the complainant's rejoinder of 26 August and WIPO's letter of 26 September l986 to the Registrar stating that it did not wish to file a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations 5.1, 5.2, 6.2 and 12.3 and Rules 5.1.1, 6.2.2(a) (3) and 11.1.1(b) (1) and (2) of the Staff Regulations and Staff Rules of the International Bureau of WIPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant has been with the International Bureau of WIPO since 1969. She was injured in a motor accident in Geneva on 14 October 1982. From October 1982 to October l983 she was often on sick leave. Rule 6.2.2(a) (3) of the Staff Regulations and Staff Rules entitled her to "sick leave up to 18 months, of which nine months at full salary and nine months at half salary in any period of four consecutive years". By 26 April 1983 she had used up her nine months (189 working days) at full salary. Though her full salary went on thereafter half a day was docked from her annual leave for every further day of sick leave she took. Her work was done by short-term staff on contracts of a week or two at a time. In November 1983 WIPO asked the insurer of the driver of the motor car that had injured her -- the Bâloise -- to refund her pay for the period during which she had been off work. On 3 September l984 she signed a paper ceding to WIPO the right to claim from the Bâloise. The Bâloise paid WIPO. The complainant thereupon asked the Head of Personnel orally to restore to her annual leave the 21 ½ days that had been docked in order to keep her at full pay after 26 April 1983 and that her injuries had obliged her to take. The Head of Personnel refused, she wrote on 8 March 1985 to the Director-General seeking review under Rule 11.1.1(b) (1), and he confirmed the refusal on 14 March. On 11 June she lodged an appeal with the Appeals Board under 11.1.1(b) (2). In its report of 3 December 1985 the Board recommended restoring her annual and sick leave or granting her compensatory special leave on full pay. In a minute of 21 February 1986, the decision impugned, the Director-General informed her that he confirmed his decision.

B. The complainant argues that the rules on sick leave do not apply where a third party refunds to the Organization the cost to it of the staff member's invalidity. Until the Bâloise settled WIPO was right to apply Rule 6.2.2 on sick leave; after it did so WIPO was bound to restore her sick leave entitlements. The purpose of 6.2.2 is to pay the invalid staff member's income against those entitlements. Since the insurer paid the cost of maintaining her income, to reduce her sick leave is to ignore the ratio legis. Having been able to pay the replacement staff out of the sums made over by the insurer WIPO has been unjustly enriched at the complainant's cost. If it may dock her sick leave then that is what her loss is, not any loss of earnings, and WIPO had no right to claim from the insurer "any sum due by way of salary, allowances and benefits", to quote the terms of the cession. It has misapplied the principle of subrogation. The terms of the cession have not been respected: she signed it only on the oral understanding that her leave would be restored. WIPO's books are wrong because it has reckoned two amounts under the same head: payment by the insurer, and the reduction in sick leave. The accident occurred between her home and her place of work and therefore in "the performance of official duties" within the meaning of Regulation 6.2. It is wrong to reduce her sick leave entitlements on that account. Because they should be restored so should her annual leave because there is no need to draw on them. That is the practice in other organisations. She wants her annual and sick leave to be made up and seeks 3,000 Swiss francs towards costs.

C. WIPO gives a full account of the facts. It submits that there is no doubt about how to construe the material rules, Rule 6.2.2 on sick leave and Regulation 5.1 on annual leave, and that it applied them correctly in this case. The

keeping of sick leave entitlements does not depend on recovery of the cost from a third party and their restitution was not made a condition of such recovery. Her plea of unjust enrichment is mistaken. She affords no evidence of an oral understanding that the cession was conditional on restitution. The practice in other organisations is immaterial and not binding on WIPO anyway. The Organization may recover from a third party, where it can, any amounts paid to a staff member for a period of absence due to an accident for which the third party is liable, and it may treat the amounts as its own costs refunded. But such recovery confers on the staff member no right to restitution of sick or annual leave. The complainant's annual leave was docked for the sake of administrative convenience and, the purpose being to maintain her income, to her own immediate benefit. In any event at an interview with the acting Head of Personnel on 23 September 1983 she consented to the expedient and she may not now go back on her consent. She herself would be unjustly enriched by restitution of sick leave entitlements for a period in which she was off work.

D. In her rejoinder the complainant enlarges on her arguments, presses her claims and seeks to refute the Organization's pleas. In her submission compensation for her injury is governed by Swiss law and the liability lies mainly with the insurer, whereas the submissions in the reply would mean that the liability lay with the Organization. The reply ignores the rules of construction of texts by attributing obviously absurd consequences to the material rules. That is why practice in other organisations is relevant, and it shows that there is one essential, namely that a staff member should not suffer loss of sick leave entitlements because of service-incurred accident. The Organization has committed mistakes of law by misconstruing those rules. It has committed further mistakes of law and of fact by docking her sick and annual leave without taking account of the exceptional nature of the repayment by the insurer. She never consented to the reduction of her annual leave on the terms the Organization alleges.

CONSIDERATIONS:

1. The complainant was injured in a motor accident on her way home from work on 14 October l982, and -- the point is not in dispute -- a third party was liable.

2. WIPO Regulation 6.2 prescribes "reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the International Bureau". Rule 6.2.2(a) reads: "Staff members who are unable to perform their duties owing to illness or accident ... shall be entitled to sick leave". And 6.2.2(a) (3) says that a staff member "who has completed at least five years of continuous service" -- as has the complainant -- "shall be entitled to sick leave up to l8 months, of which nine months at full salary and nine months at half salary in any period of four consecutive years".

3. The complainant was off work after the accident and was granted sick leave under 6.2.2(a) (3).

As a matter of fact while off work she had another accident, and her leave was consequently protracted. But the parties have agreed on the period of leave attributable to each of the two accidents, and the second one is not a material issue in this case.

4. In the first nine months the complainant was paid full salary in keeping with the rules. But instead of putting her on leave at half salary at the end of the nine months the Organization, probably out of consideration for her, continued to pay her in full.

The amount of her salary that was neither payment for services rendered nor covered by her sick leave on half pay, viz. the other half of her salary, was to be made good out of the annual leave standing to her credit.

The decision was that of the Organization alone and was taken in April 1983. Only several months later, on 23 September 1983, did the acting Head of Personnel explain it to her in the circumstances set out below.

5. The third party being fully liable for the accident, WIPO claimed the cost of her being off work from the third party's insurance company, the Bâloise. Once the amount of the claim to compensation had been worked out it decided to claim from the Bâloise, not in its own right, but by subrogation: it got the complainant to cede to it "the right to payment of any sum due to [her] from the Bâloise on account of the motor accident of 14 October 1982 and claimed on her behalf by the Organization in compensation for the sums it had paid [her] in salary, allowances and benefits". The Organization was paid some time thereafter.

6. The complainant thereupon asked the Director-General to restore her rights to annual and sick leave. The

Director-General refused and the case went to the Appeals Board. The Board held that although the Staff Regulations and Staff Rules had been applied stricto sensu the outcome was unsatisfactory. In a lengthy and carefully reasoned report the Board went into the whole case and recommended two or perhaps three solutions, leaving it to the Director-General to choose the one he thought the fairest.

By the impugned decision of 21 February 1986 the Director-General upheld his original decision "notwithstanding the Board's recommendation".

7. One part of the case is about sick leave.

Rule 6.2.2 says plainly enough that over any period of four consecutive years sick leave may not exceed 18 months, and neither Regulations nor Rules draw any distinction on the grounds of the cause of the accident or illness. It was strictly in keeping with 6.2.2 to count the leave granted to the complainant because of the accident of 14 October 1982 in reckoning what her rights would be should she contract another illness in the four-year period.

As the Appeals Board said, the outcome does seem unsatisfactory. The accident was "service-incurred", and the Organization has been refunded in full the sums it paid her while she was off work, receiving in the form of compensation from the Bâloise the extra cost of taking on temporary replacement staff.

Yet the Tribunal rules purely on issues of law, whereas the Appeals Board, an internal body, has much wider competence. There was nothing unlawful about applying the rules, and the Tribunal passes on to the complainant's other objections to the decision.

8. The rules do empower the Director-General to take less drastic action as to sick leave. Regulation 5.2 authorises the grant of "special leave with full or partial pay, or without pay, ... in cases of prolonged illness or for any other exceptional and important reason". One of the Board's proposals was to treat the sick leave as special leave instead.

The Organization's answer to that is that the complainant never asked for special leave or made a formal claim to it, but consistently spoke in terms of sick leave; that the matter first cropped up in the Board proceedings; and that in any event the Director-General has discretion in the grant of special leave.

Actually the Director-General's authority under 5.2 is not as untrammelled as the Organization makes out, and the Tribunal will determine whether there was any abuse of discretion. But there is no evidence to suggest there was: the complainant was not off work for long and the accident did not amount to an "exceptional and important reason".

9. A further objection by the complainant is that the Organization's refusal to restore her sick leave rights unjustly enriched it.

The notion of unjust enrichment does not apply here: although the impugned decision reduces her rights to sick leave it does not enrich the Organization, and resting as it does on a provision of the Regulations it is not unjustified.

10. The plea about the complainant's cession of her rights and her allegation that the rules on subrogation were misapplied would succeed only if the Organization had committed an abuse of authority by availing itself of its position of dominance to harm the complainant. The Tribunal holds that it did not.

11. As was said in 7 above, the rules are clear and the Organization applied them correctly. The plea that there was breach of the spirit of the rules therefore fails.

So does the plea that the complainant would have fared better at the hands of another international organisation with headquarters in Geneva. Here she is relying on Regulation 12.3, but it applies only "in case of doubt as to the interpretation of the modalities of application of the Staff Regulations and Staff Rules".

The Tribunal concludes that her claims relating to sick leave must fail.

12. The other part of the case is about the complainant's annual leave, which she wants to have restored.

The rule the Organization has applied is 5.1.1(a): "Entitlement to annual leave shall accrue during the entire period

for which a staff member receives full pay, subject to the provisions concerning special leave; however, no leave shall accrue while a staff member is receiving compensation equal to his salary and allowances as a result of injury or other disability attributable to his duties..."

For the first nine months the complainant got full salary under Rule 6.2.2. Thereafter, under the same rule, for any working day on which she was off work she was paid half her salary, the other half being made up out of her annual leave credit.

There is no basis in the rules for that expedient. When the first nine months were over all she was entitled to was half salary. Rule 5.1.1 is immaterial because it applies only to a period for which a staff member has been receiving full pay: under the rules the complainant was entitled only to half pay and so does not qualify.

The Organization's original purpose was to spare the complainant a severe drop in income since the insurance company would not be paying up at once. But that is not enough to make what was done lawful. If the Organization wanted to serve administrative convenience it was free to do so, but only ex gratia and without demanding anything of the complainant in return. The rules and regulations alone govern relations between an international organisation and its staff. It was unlawful to withhold any annual leave unilaterally.

13. The Organization pleads, first, that the complainant did not demur when she continued to be paid her full salary after the first nine months had expired, and, secondly, that indeed on 23 September l983 she consented to the reduction in annual leave after getting an explanation from the acting Head of Personnel.

First, there is no evidence to suggest that when she continued to receive her full salary when the nine months were over she was warned of the effect on her annual leave.

In answer to the second point she says that when she saw the acting Head of Personnel on 23 September 1983 he told her her annual leave would be made good once the Bâloise settled. So the two sides are saying contradictory things. The burden of proof is on the party that pleads estoppel, and the Organization's mere assertion will not suffice. Besides, it did not warn her for a long time and, had she refused the proposal, to pay back the sum due would have left her in sore straits.

The complainant is therefore right in maintaining that it was unlawful to refuse to restore her annual leave entitlements.

14. She is awarded 3,000 Swiss francs in costs.

DECISION:

For the above reasons,

1. The impugned decision is set aside insofar as it reduces the complainant's annual leave.

2. The Organization shall pay her 3,000 Swiss francs in costs.

3. Her other claims are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner.

Delivered in public sitting in Geneva on 12 December 1986.

André Grisel

Jacques Ducoux

Mohamed Suffian

A.B. Gardner