

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

115th Session

Judgment No. 3225

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mrs S. N. against the World Intellectual Property Organization (WIPO) on 19 February 2011 and corrected on 30 March;

Considering the letter of 3 June 2011 in which the Organization requested a stay of proceedings on the grounds that the complainant had also filed an internal appeal, which was still pending, against the decision impugned in the complaint, the complainant's comments on this request, which she submitted on 21 June and the Registrar's e-mails to the parties of 28 July informing them that the President of the Tribunal had decided to stay the proceedings before the Tribunal pending the outcome of the internal appeal proceedings;

Considering WIPO's reply of 25 November 2011, the complainant's rejoinder of 2 March 2012 and the Organization's surrejoinder of 13 June 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 6 of its Rules;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Information regarding the complainant's career at WIPO may be found in Judgments 3185, 3186 and 3187, delivered on her first, second and third complaints respectively. It should be recalled that, at the material time, the complainant, who had been recruited on a short-term contract which was renewed several times, held a grade G4 post in the Processing Service of the Patent Cooperation Treaty (PCT) Operations Division. On 17 August 2010 she wrote to the Director General to protest against her status as a short-term employee, which she regarded as unlawful because "the intention was plainly not to employ her for short-term service". She asked that all her contracts, at least from the second one, should be converted into fixed-term contracts. As she did not receive a reply, on 27 October she asked for a review of the implied rejection of her request. On 25 November 2010 the acting Director of the Human Resources Management Department explained that the fact that her contract had been renewed on numerous occasions could not *per se* lead to a conversion of her appointment.

On 21 January 2011 the complainant referred the matter to the Appeal Board. On 18 February the Board's Chairman informed her that paragraph (b)(2) of the introduction to the Staff Regulations and Staff Rules excluded staff "engaged for short-term service, that is for periods of less than one year", from the scope of those texts. He suggested that she should file a complaint with the Tribunal in order to protect her rights in the event that the Board found that it had no jurisdiction to examine her appeal. On 19 February 2011 the complainant filed her complaint impugning the decision of 25 November 2010.

The Appeal Board issued its conclusions on 9 August 2011. It considered that the appeal was time-barred and recommended that it be dismissed. By a letter of 10 October 2011 the Director of the Human Resources Management Department advised the complainant that the Director General had adopted that recommendation.

B. The complainant submits that, since she has always held short-term contracts, under the Tribunal's case law she may challenge "the

classification of her entire employment relationship” with WIPO. She adds that the last contract she signed before filing her complaint forms part of that complaint.

On the merits, the complainant relies on the introduction to the Staff Regulations and Staff Rules in order to argue that the Organization may not recruit personnel on short-term contracts for a period of more than one year, “let alone continually”. Moreover, she contends that the breaks between some of her contracts were artificial and did not meet any need of the service. She infers from this that her service was unbroken and that she must be deemed to have been appointed for a fixed period of time.

She also argues that the Director General committed an error of law in that he gave her short-term contracts in an arbitrary and unjustified manner, whereas he should have awarded her such contracts only if the needs of the service had required it, which was not the case here. In her view, the misuse of short-term contracts is contrary to the principle of equal treatment.

She submits that the fact that she was kept in an extremely precarious and uncertain situation for a long time undermined her dignity and harmed her legitimate interests.

The complainant’s main claim is that the impugned decision should be set aside and her short-term contracts converted into fixed-term contracts. She also asks the Tribunal to order WIPO to reconstruct her career and to draw all the legal consequences therefrom, in particular by giving her a G5 grade. In addition, she claims compensation for material injury equivalent to the salary which she would have received if she had worked throughout the breaks between some of her contracts, plus interest at a rate of 8 per cent per annum. She also claims 10,000 euros per annum as from April 1999 in compensation for the moral injury she has suffered.

Subsidiarily, should the Tribunal not order the conversion of her contracts, she asks it to set aside the impugned decision and to order WIPO to give her a G5 grade and to apply the Staff Regulations and Staff Rules to her “by analogy”. To compensate for the “obvious” material injury which she considers she has suffered owing to the fact

that her terms of employment were less favourable than they would have been had those texts applied to her, she requests a sum equivalent to the difference between the salary she would have received had she been appointed for a fixed term and that which she actually received. She also requests compensation for moral injury in the amount of 10,000 euros per annum as from April 1999.

At all events she claims 12,000 euros in costs. She taxes the Director General with not establishing a “comprehensible, intelligible” regulatory framework laying down the terms of employment of employees recruited for short-term service and she requests compensation of 30,000 euros for injury to her dignity. Lastly, she asks the Tribunal to rule that, should these various sums be subject to national taxation, she would be entitled to a refund of the tax paid from WIPO.

C. In its reply WIPO raises several objections to the receivability of the complaint. First, it contends that paragraph (b)(2) of the introduction to the Staff Regulations and Staff Rules explicitly excludes staff “engaged for short-term service, that is for periods of less than one year”, from the scope of those texts. The complainant, who has always held contracts of less than one year, belongs to this category of short-term employees. As she has never had the status of an official within the meaning of Article II, paragraph 5, of the Statute of the Tribunal, the latter has no competence to hear her complaint. In addition, the Organization maintains that the Tribunal lacks competence because the complaint does not concern non-observance of the terms of the complainant’s contracts, but calls into question WIPO’s policy regarding short-term employees. It considers that the ninety-day time limit for filing a complaint with the Tribunal ran as from the date on which the complainant was notified of her contract for the period from 15 February to 31 December 2010, and that the complaint, which was lodged “more than one year later”, is therefore time-barred. The Organization also states that the complainant breached Article 6, paragraph 1, of the Rules of the Tribunal, because she did not file her submissions at the same time as she lodged her complaint. In its opinion, the fact that she did not correct her

complaint until 30 March 2011 constitutes unacceptable abuse of the time limit stipulated in Article VII, paragraph 2, of the Statute of the Tribunal. Lastly, WIPO informs the Tribunal that the complainant's grade has been G5 since 1 June 2011. Her request to be awarded this grade is therefore "redundant".

On the merits, the Organization points out that the complainant freely accepted and signed all the short-term contracts which she was offered, which in fact contained her terms of employment. Precedent has it that the Tribunal does not have the power to amend valid and enforceable contracts or to remake the bargain which the parties themselves have decided to accept. In addition, WIPO emphasises that the Staff Regulations and Staff Rules authorise it to conclude short-term contracts without any restriction on their number or total duration.

D. In her rejoinder the complainant observes that in Judgment 3090 the Tribunal recalled that it had competence to rule on any employment relationship arising between an organisation and its staff, whether under the terms of a contract or under Staff Regulations. In that judgment the Tribunal further considered that WIPO had misused the rules governing short-term contracts by giving the complainant a succession of short-term contracts for more than seven years. In her opinion, there is therefore no need for any further discussion on the Tribunal's competence, or on the abusive and unlawful nature of her short-term contracts.

Citing the case law, she asserts that filing a summary complaint and then correcting it within a period of thirty days, which may be extended, is consistent with the Statute of the Tribunal and with the right to due process.

E. In its surrejoinder the Organization maintains its position. It contends that, insofar as the complaint seeks the reclassification of its working relationship with the complainant, it has become moot, because she was appointed for a fixed term to an Assistant Examiner post with effect from 1 June 2012.

CONSIDERATIONS

1. The complainant entered the service of WIPO in 1999 at grade G2. She was recruited on a short-term contract which was renewed several times. She was subsequently promoted to grade G3, then to grade G4.

On 17 August 2010 she sent the Director General a request for the retroactive conversion of her contracts into fixed-term contracts as from the date of her first contract or, at all events, of her second contract. She argued in substance that, in the absence of any provisions governing the terms of employment of short-term employees, she had found herself in a precarious situation and she claimed compensation for moral injury. As she took the view that the short periods of inactivity between her various contracts were “unjustified and injurious”, she requested financial compensation on those grounds.

2. Her request having been rejected by a decision of 25 November 2010, the complainant challenged that decision before the Appeal Board on 21 January 2011 and then impugned it before the Tribunal on 19 February 2011. On 25 March the Legal Counsel of WIPO, acting on behalf of the Director General, informed her that, as a short-term employee, she did not have the right to contest the decision before either of those bodies. In his opinion, the only means of appeal available to her were the Rebuttal Panel, which is competent to examine performance appraisals, and the Joint Grievance Panel, which is competent to deal with cases of harassment.

On 4 February 2011, i.e. before filing her complaint, the complainant signed another short-term contract which she asked to have converted a few days later.

3. The complainant principally asks the Tribunal to set aside the impugned decision, to “convert [her] employment contracts”, to order WIPO to reconstruct her career and to draw all the legal consequences therefrom, in particular by awarding her grade G5 and

paying her salary and “ancillary benefits” with interest, and to grant her compensation for the material and moral injury she had suffered. She also requests compensation for the “injury caused by legal uncertainty” and an award of costs. Lastly, she asks the Tribunal to find that, should the sums awarded be subject to national taxation, she would be entitled to a refund of the tax paid from WIPO. However, in the absence of any present cause of action, the latter claim must be dismissed.

4. On 16 May 2011, i.e. after the complaint was filed, the Director General informed the complainant that her grade, like that of some 50 other short-term employees, had been reviewed and brought into line with that of staff members performing duties similar to hers and that she would therefore be placed in grade G5 as from 1 June 2011.

She took part in a competition at the end of which she was appointed to an Assistant Examiner post with a fixed-term contract from 1 June 2012 to 31 May 2013, thus acquiring the status of a staff member.

It must therefore be noted that, insofar as it seeks the award of a G5 grade, the complaint has become moot as far as the period beginning on 1 June 2011 is concerned. The same applies, as from 1 June 2012, to the complainant’s request for the reclassification of her employment relationship. It is, however, still necessary to determine whether the measures taken should not have been adopted earlier and, if so, whether the failure to do so has caused the complainant any injury warranting redress.

5. As a short-term employee of WIPO, the complainant undeniably has the right to impugn before the Tribunal the decision at issue, which concerns the lawfulness of the employment contracts underpinning her employment relationship at the time when she filed her complaint. Judgment 3185 already recognised this right in pursuance of the recent case law cited in consideration 4 of that judgment.

The complaint form was filed within the time limit specified in Article VII, paragraph 2, of the Statute of the Tribunal, albeit without the brief and supporting evidence which, according to Article 6, paragraph 1(b) and (c) of the Rules of the Tribunal, had to be appended to it. Contrary to WIPO's submissions, this does not signify that the complaint was submitted out of time, since paragraph 2 of the above-mentioned article affords the complainant the possibility of correcting a complaint that does not meet the requirements of the Rules. In the instant case, the complaint was corrected on 30 March 2011, within the time limit set by the Registrar of the Tribunal.

6. In accordance with Article II, paragraph 5, of its Statute, the Tribunal is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the provisions of the Staff Regulations of the international organisations which have recognised its jurisdiction. It is well settled that, on the contrary, the Tribunal is not competent either to review an international organisation's general policy on staff, in particular the choice between various contractual arrangements or staff rules for the recruitment of personnel, or to make recommendations on that subject (see Judgment 2061, under 5).

7. In a similar case involving WIPO, an enlarged panel of judges found that a long succession of short-term contracts had given rise to a legal relationship between the complainant and the Organization which was equivalent to that on which permanent staff members may rely and that, in considering that the complaint belonged to the category of short-term employees, the defendant had failed to recognise the real nature of its legal relationship with her. The Tribunal held that, in so doing, the Organization had committed an error of law and had misused the rules governing short-term contracts. The Tribunal has no reason to depart from that precedent in this case. (See Judgment 3090, under 7.)

8. In the instant case, the complainant was given short-term contracts, without any significant break, for a period of 13 years. The

impugned decision must therefore be set aside and the complainant's employment relationship must be reclassified as if she had received a fixed-term contract as from the date on which her second contract took effect, i.e. 14 May 1999.

9. Although, during those 13 years, the complainant regularly obtained promotion and at the end of that period was given a fixed-term contract, she nonetheless suffered material injury, the amount of which must be determined. It will be incumbent upon the Organization to pay the complainant any additional salary and the financial benefits of all kinds to which she would have been entitled had she received a fixed-term appointment as from 14 May 1999. Any sums due shall bear interest at the rate of 5 per cent per annum from their due dates until their date of payment.

10. By keeping the complainant in a precarious situation for no valid reason, WIPO caused her moral injury which must be redressed by granting her compensation in the amount of 3,000 euros.

11. As she partly succeeds, the complainant is entitled to costs which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. WIPO shall examine the complainant's rights as indicated under 9, above.
3. It shall pay the complainant compensation in the amount of 3,000 euros for moral injury.
4. It shall also pay her 3,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 2 May 2013, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet