

SEVENTY-SECOND SESSION

In re JONES

Judgment 1143

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Arlette Henriette Jones against the World Intellectual Property Organization (WIPO) on 17 December 1990, WIPO's reply of 20 March 1991, the complainant's rejoinder of 12 April and the Organization's letter of 15 May 1991 informing the Registrar that it did not wish to file a surrejoinder;

Considering Article II, paragraphs 5 and 6(a), of the Statute of the Tribunal and Regulations 9.8 and 12.1(b) and Rule 11.1.1 of the Staff Regulations and Staff Rules of the International Bureau of WIPO;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. At the material time Regulation 9.8(a) of the Staff Regulations and Staff Rules of the International Bureau of WIPO provided that a staff member might not be kept on "beyond the age of 60 years", save that the Director General might extend the limit "up to the age of 65 years if he considers it to be in the interest of the Organization".

The complainant, a citizen both of France and of the United States, was born on 14 October 1930. She joined WIPO on 25 May 1981 after serving in the French civil service and with United Nations bodies.

After several short-term appointments she took up a two-year fixed-term one on 1 March 1982 as a secretary at grade G.3 in the Finance Section of the Budget and Finance Division and became a member of the United Nations Joint

Staff Pension Fund.

She was promoted to G.4 in 1983 and had her appointment extended in the first instance by three years, from 1 March 1984 to 28 February 1987, and then by three years and eight months, to the end of October 1990, the month in which she was to reach the then age limit of 60. She had her fixed-term appointment converted into a permanent one on 28 March 1989.

By a letter of 25 October 1989 to the Director General she applied for grant of a five-year extension of appointment under Regulation 9.8(a) on the grounds that the pension which service at WIPO entitled her to was too small. The head of Personnel informed her by a memorandum of 21 November 1989 that the Organization was not in a position to grant her request. By a letter of 6 April 1990 she again applied to the Director General citing arrangements that the United Nations General Assembly had recently approved for raising the age limit to 62, though she acknowledged that they would not be applicable to her anyway.

On the Director General's behalf the head of Personnel confirmed the refusal in a memorandum of 31 May 1990. By letter of 11 July 1990 she asked the Director General to review the decision of 31 May under Rule 11.1.1(b)(1). By a memorandum dated 13 July he confirmed the terms of that decision.

On 21 August she appealed to the WIPO Appeal Board. In its report of 4 September 1990 the Board recommended reconsidering her case "with a view to granting an extension" beyond 31 October 1990. But by a memorandum of 9 October 1990, the decision impugned, the Director General informed her that he could not reverse the decision because Regulation 9.8(a) did not allow him to waive the age limit "to take account of a staff member's financial situation".

B. The complainant submits that the decision refusing to extend her extension beyond the age limit of 60 shows

several flaws.

She alleges breach of the principle of equal treatment

in that the Director General extended other staff members' appointments beyond the limit by taking into account both the interests of the Organization and their own circumstances. She refers to the cases of four officials whose appointments were extended, two of them in the Organization's and their own interests alike. Since her own position is like theirs and, to judge from her supervisors' appraisals, the "interest of the Organization" is as much at stake in her case as in theirs, she was entitled to like treatment.

She submits that the reason the Director General gave for his decision rests on misinterpretation of Regulation 9.8 and of the Tribunal's case law, as stated for example in Judg-

ment 358 (in re Landi). The Director General has taken too narrow a view of the Organization's interests by basing his decision wholly on work-related aspects of her relations with her employer. By failing to take her financial situation into account he has improperly limited the exercise of his discretion and so committed a mistake of law.

WIPO is in breach of its duty to attend to the welfare of its staff by failing to ensure that an official it recruited late in her career can retire on an adequate pension.

The Director General overlooked essential facts. He took into consideration neither the strong recommendation by the complainant's supervisor nor the one by the Appeal Board for extending her contract. By granting other officials extensions he set precedents at odds with the narrow construction he has put on 9.8 in her case. He took no notice of the new situation that the amendment of 9.8 raising the age limit to 62 would create. It would have been proper to apply the amendment retroactively to her case.

She invites the Tribunal to reinstate her as an official from 1 November 1990 to 31 October 1992 or later, or failing that, to award her material damages in a sum she puts provisionally at 90,000 Swiss francs for loss of salary and 50,000 United States dollars for loss of pension rights. She seeks an award of 3,000 Swiss francs in costs.

C. In its reply WIPO submits that the Director General's decision not to extend her appointment beyond the age of 60

is in line with the material rules and is not tainted with any procedural flaw, mistake of law or neglect of any essential fact.

The amendment to Regulation 9.8 is immaterial: the complainant's case falls under the general rule that staff shall not be retained in service beyond the age of 60. Though the Regulations allow for exceptions to that rule, her case does not qualify as one.

Joining WIPO late in an official's career is no cause

for special treatment and had nothing to do with the decisions to extend the contracts of the four staff members the complainant mentions.

The exercise of discretion is subject to "the interest of the Organization", not merely the official's. In extending the four other appointments the Director General acted entirely in the Organization's interests, without regard for their personal interests or financial worries, much less the value of their pensions. Instead of seeking the extension in the Organization's interests she pleaded merely her own financial plight. Her case being unlike the others, the Director General had a duty to apply the general rule.

Everyone must prepare for retirement as he sees fit.

The Organization does not determine what pension benefits may accrue from any prior employment and such considerations play no part in its recruitment policy. Though the complainant worked for over 22 years before joining WIPO, seven of them with the United Nations, it has no information on any entitlements she may have from other sources. As early as 20 July 1982 she was invited to validate her nine months' service under short-term contracts by means of a lump-sum payment. Yet she chose not to do so.

D. In her rejoinder the complainant submits that before the amendment of Regulation 9.8 it was the rule, not the exception, to extend appointments beyond the age of 60. Whether the Director General took his decision solely in the Organization's interests is open to question. In any event he took no account in her case of the Organization's interests as her supervisors saw them in recommending extension. Besides, the confirmation of her appointment gave her a legitimate expectation of extension.

She could not afford to accept the offer to validate for the purpose of her pension entitlements her period of service in WIPO under short-term contracts: the breakdown of her marriage had exhausted her savings and left her unable to pay the amount due. As for her entitlements from prior employment with the United Nations she drew her contributions to the pension fund in lump-sum form on resigning from the UN.

She presses her other pleas.

CONSIDERATIONS:

1. The complainant joined WIPO on 25 May 1981. Her appointment was due to end at 31 October 1990, the month in which she reached her 60th birthday. On 25 October 1989 and again on 6 April 1990 she applied unsuccessfully to the Director General for an extension of her appointment.

2. At the material time Regulation 9.8 of the Staff Regulations and Staff Rules of the International Bureau of

WIPO provided:

"(a) Staff members whose appointment took effect on or after November 1, 1977, shall not be retained in service beyond the age of 60 years, provided that the Director General may authorize, in specific cases, extension of this limit up to the age of 65 years if he considers it to be in the interest of the Organization."

Until that provision came into force, on 1 November 1977, the age limit was 65, and the age of retirement for staff appointed on or after 1 November 1990 is 62.

3. Regulation 9.8 confers on the Director General discretion to extend the age limit in individual cases if he considers that to be in the Organization's interests. The determination of what the Organization's interests are being peculiarly within the Director General's discretion, the Tribunal has a limited power of review and will interfere

with his decision only if it was taken without authority or

in breach of a rule of form or of procedure, or was 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 abuse of authority.

4. On the rejection of her request for an extension of the age limit in her case, the complainant filed an internal appeal with the Appeal Board. In his reply to that appeal the Director General cited a passage in Judgment 358 (in re Landi) as supporting the view that he might not exercise his authority "in the exclusive interests of the staff member". In its report the Board said that though it was for the Director General to judge the interests of the Organization it recommended re-examining the case in the light of all the circumstances. After examining the Board's report the Director General wrote to the complainant on 9 October 1990 saying that he regretted not being able to accede to her request, the reason being that Regulation 9.8 did not permit the Director General to extend the age limit for the purpose of taking account of a staff member's financial situation.

5. In stating his decision in those terms the Director General mistook the scope of his discretion and the *ratio* of Judgment 358: he may not refuse to exercise his discretion just because he is being asked to take a staff member's financial situation into account. The full passage in Judg-

ment 358 reads:

"Although the Director General is empowered to extend a staff member's appointment to the age of 65, he is in no case bound to do so. He may exercise that authority to allow an exception only in the interests of the Centre, not in

the exclusive interests of the staff member. In deciding on the complainant's case he would have to bear in mind the possibility that the complainant might obtain a pension, but that was only one fact to be taken into account among others."

Whereas in that case the question of the defendant organisation's interests did not arise, in this one the Appeal Board referred not only to the inadequacy of the pension the complainant would get and to her having to look after an aged mother, but also to the fact that her performance reports were good and her supervisors had always expressed satisfaction

with her work. The head of the Finance Section had strongly supported extension not only because, as he said, she was an outstanding secretary but because the section had lost two of its three accounting assistants and two of its three Professional category staff members were about to retire. He went

on to explain that the workload had increased, that it was important to keep his section as stable as possible, and that the complainant was reliable and knowledgeable about its activities and always produced excellent work. These facts are unchallenged and are cogent in considering whether it is in the Organization's interests to keep the complainant's services.

6. The Director General erred in law because his decision was not in accordance with Regulation 9.8(a). He could have taken into account the complainant's financial situation provided that that was not the exclusive factor and that the interests of the Organization were also taken into account. There is therefore a mistake of law apparent on

the face of the decision and for that reason it cannot stand. Since it is a discretionary one, the case must be sent back to the Organization for a new decision to be taken in the light of this judgment.

DECISION:

For the above reasons,

1. The decision of 9 October 1990 is quashed.
2. The Organization shall pay the complainant the equivalent of her salary and allowances as from 1 November 1990 up to the date at which the Director General takes a new decision whether or not to extend her appointment.
3. The Organization shall pay the complainant 3,000 Swiss francs in costs.

In witness of this judgment Tun Mohamed Suffian, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Mohamed Suffian
Mella Carroll
William Douglas
A.B. Gardner