

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

112th Session

Judgment No. 3090

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms P. R. against the World Intellectual Property Organization (WIPO) on 13 November 2009 and corrected on 21 January 2010, and WIPO's reply of 19 April 2010;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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. The complainant is a Ghanaian national born in 1974. She joined WIPO in January 2002 as a clerk at grade G3. For the next six years she worked in various services under a series of short-term contracts. On 10 November 2008, while she was employed under her 24th contract, she signed a periodical report in which the quality of her work and her conduct were rated satisfactory without reservation, but the quantity of her work was rated satisfactory with reservations. On 10 November her supervisor forwarded this report to the Human

Resources Management Department and requested that her contract be extended for one year. On 14 November he received the reply that, in view of Office Instruction No. 24/2005 and the reservations contained in the periodical report, the request for an extension had been “corrected” by shortening the extension to six months. In the event, on 19 December 2008 the complainant was offered a non-renewable contract for the period 22 December 2008 to 20 March 2009. She refused to sign it and on 12 January 2009 she asked the Director of the above-mentioned department to reconsider the decision to offer her a contract of this nature. The next day she was told that the length of the contract would not be altered. On 15 January the complainant signed the contract, but added a comment to the effect that she reserved her right to appeal. On the same date she asked the Director General to quash what she considered to be the arbitrary and irregular decision to offer her a three-month non-renewable contract. On 27 January the Director General confirmed that her contract would not be extended beyond 20 March 2009.

On 18 March 2009 the complainant submitted an appeal to the Appeal Board. The latter stated in its report of 10 August 2009 that it had not come to a conclusion on the Organization’s objection to receivability, based on the fact that the complainant was excluded from the scope of the Staff Regulations and Staff Rules, as it considered that the appeal was not well founded. Indeed, the Board concluded that the decision not to renew the complainant’s short-term contract had not infringed her contractual rights or involved any abuse of authority. On 23 September 2009 the Director of the Human Resources Management Department informed the complainant that the Director General had decided to adopt the Board’s conclusions and therefore to dismiss her appeal. That is the impugned decision.

B. The complainant challenges WIPO’s stance during proceedings before the Appeal Board and contends that, even though the introduction to the Staff Regulations and Staff Rules provides that these texts do not apply to short-term employees, the resulting

exclusion of the ordinary internal means of redress does not concern her. Indeed, since she worked for the Organization on a “long-term appointment” which lasted continuously for seven years, she considers that she had *locus standi* before the Appeal Board and that she also has *locus standi* before the Tribunal.

On the merits, the complainant holds that, pursuant to Office Instruction No. 24/2005, she was entitled to a one-year extension of her contract, because the reservations contained in her periodical report concerned only the quantity of her work, not its quality, and the explanations which she supplied in this connection have never been contested. The complainant further states that, since on 14 November 2008 WIPO offered her a six-month renewable extension of her contract, it committed an abuse of authority by subsequently offering her a non-renewable contract for three months. The complainant asks the Tribunal to find that her employment contract is still in force, “in the absence of a valid termination” thereof, and to order the Organization to pay her gross monthly salary – 5,326 Swiss francs – as from April 2009. She also claims moral damages in the amount of 25,000 francs and 10,000 francs in costs.

C. In its reply WIPO submits principally that the complaint is irreceivable. It draws attention to the fact that subparagraph (2) of paragraph (b) of the introduction to the Staff Regulations and Staff Rules explicitly excludes from the scope thereof staff “engaged for short-term service, that is for periods of less than one year”. The complainant, who always had contracts of less than one year with several breaks between 2002 and 2008, belonged to the category of short-term employees. As she was never an official of WIPO within the meaning of Article II, paragraph 5, of the Statute of the Tribunal, the complainant has no *locus standi* before the Tribunal. The Organization adds that the contracts which she accepted and signed never gave her any right to file a complaint with the Tribunal, but this does not mean that she was deprived of all means of redress. Indeed,

she had the possibility to lodge an appeal with the Rebuttal Panel, which was established under Office Instruction No. 19/2006 to hear appeals filed by short-term General Service employees against their periodical reports. Since she did not do so within the prescribed time limit, she has not exhausted internal means of redress.

On the merits, the Organization submits that a short-term employee may not rely on Office Instruction No. 24/2005 unless his or her performance has been adjudged as satisfactory without reservations with regard to quantity of work, quality of work and conduct. This is not true of the complainant since, although her periodical report of 10 November 2008 was satisfactory, it contained reservations about the quantity of her work.

In addition, the defendant comments that the complainant is mistaking a mere “request for a six-month extension” with the confirmation of such a request. Lastly, it denies that the non-renewal of the complainant’s contract was unlawful, since short-term contracts end without notice on their expiry date.

CONSIDERATIONS

1. The complainant joined WIPO in January 2002. She worked there as a clerk at grade G3, under 24 successive short-term contracts, until December 2008.

On 19 December 2008 the Organization offered the complainant a further short-term employment contract for the period 22 December 2008 to 20 March 2009, which stipulated in the “Special Conditions” section: “This contract will not be renewed beyond March 20, 2009.”

Although the complainant signed this contract on 15 January 2009, she first added two handwritten reservations. The first read: “I sign the present contract reserving my right to appeal as I do believe I am entitled to a longer renewable contract and I have requested the Director general to review the [Human Resources Management Department] decision.” The second was worded: “I sign

with reservation of raising the issue in the appropriate forum. I refuse this report.”

2. The complainant relied on Office Instruction No. 24/2005, which increases to 11 months and 3 weeks the maximum permissible duration of short-term contracts concluded with General Service short-term employees who have a minimum of five years continuous service with the Organization and whose performance as indicated in periodical reports has been adjudged as satisfactory without reservations for both the quality and the quantity of work, as well as for conduct. She considered that she satisfied these conditions, despite the fact that in her last periodical report the quantity of her work had been deemed to be satisfactory with reservations, because she had explained the underlying reasons for this situation to her supervisors.

3. The complainant submitted this dispute to the Appeal Board. On 10 August 2009 the Board issued its report in which it concluded inter alia that the decision not to renew the complainant’s contract did not involve any abuse of authority, but it left open the question of the appeal’s receivability. On 23 September 2009 the Director General dismissed this appeal, as he had adopted the Board’s conclusions, but he pointed out that this did not mean that he accepted that the complainant had *locus standi* and hence that the Board was competent to examine her appeal. That is the decision impugned before the Tribunal.

4. The defendant challenges the Tribunal’s competence on the grounds that the complainant is not an official within the meaning of Article II, paragraph 5, of the Statute of the Tribunal.

In this connection it must be recalled that, according to its case law established on the basis of this provision, the Tribunal may rule on any employment relationship arising between an organisation and its staff, whether under the terms of a contract or under Staff Regulations. If a decision to appoint an employee, or to terminate his

or her employment, is challenged on the grounds that it affects the rights of the person concerned which the Tribunal is competent to safeguard, the Tribunal must rule on the lawfulness of the disputed decision. It is immaterial whether the employee in question was recruited under a contract and whether that contract was for a fixed term. (See Judgment 1272, under 9.)

In the instant case, the Tribunal derives its competence from the mere fact that the dispute centres on the legal nature of the contractual relationship between the Organization and the complainant.

Moreover, the Tribunal observes that paragraph (b) of the introduction to the Staff Regulations and Staff Rules, on which the Organization relies in order to dispute the complainant's status as a staff member, in fact refers to persons engaged for short-term service as "staff members".

5. It remains to be determined whether in proceedings before the Tribunal the complainant may rely on a breach of the Staff Regulations and Staff Rules. The Organization contends that she may not, because she belonged to the category of staff covered by subparagraph (2) of paragraph (b) of the introduction to the Staff Regulations and Staff Rules, which reads as follows:

"(b) Except where otherwise stated, the Staff Regulations and Rules shall apply to all staff members of the International Bureau with the exception of:

(1) [...]

(2) staff specifically engaged for short-term service, that is for periods of less than one year, as well as maintenance staff, who shall be subject to particular conditions of service determined by the Director General in the light of the practice of the other intergovernmental organizations of the United Nations common system at the duty station".

6. The complainant does not criticise this provision but denies that it applies to her. She argues that, having been employed under a long succession of short-term contracts, she is in the same situation as staff members appointed for an unlimited duration, because each of these contracts was concluded, not in order to meet "particular, specific needs", but for the performance of "general duties".

7. A document produced by the defendant as an annex to its reply shows that its employment relationship with the complainant always rested on short-term contracts none of which exceeded six months, apart from one contract lasting for just over nine months concluded in 2007. These contracts were systematically renewed without any notable breaks, with the result that, as from the age of 27, the complainant pursued a career in the Organization for more than seven years, i.e. until the expiry of the disputed contract. This long succession of short-term contracts gave rise to a legal relationship between the complainant and WIPO which was equivalent to that on which permanent staff members of an organisation may rely.

In considering that the complainant belonged to the category of short-term employees to whom the Staff Regulations and Staff Rules do not apply and who do not enjoy legal protection comparable to that enjoyed by other staff members, the defendant failed to recognise the real nature of its legal relationship with the complainant. In so doing it committed an error of law and misused the rules governing short-term contracts.

8. The complaint must be allowed for this reason.

The Organization's objection that the complaint is irreceivable because internal means of redress have not been exhausted is devoid of merit. As the complainant should have been treated in the same way as a permanent staff member, contrary to the defendant's submissions, she did not have to contest her periodical report before the Rebuttal Panel, since this remedy is reserved for employees belonging to the category defined in the above-mentioned subparagraph (2) of paragraph (b) of the introduction to WIPO Staff Regulations and Staff Rules.

9. The impugned decision must be set aside.

In view of all the circumstances of the case, the Tribunal will not remit the case to the Organization for an examination of the possibility of restoring the complainant's employment relationship which ended more than two years ago.

10. Damages must, however, be awarded to the complainant.

The Organization's erroneous legal assessment resulted in the complainant being kept in a precarious employment situation throughout her service, although her work was not targeted on any particular, specific needs but consisted in the performance of duties similar to those given in principle to permanent staff members. The complainant has thus been the victim of discriminatory treatment. The formal reservations which she expressed at the bottom of the last contract that she was granted for the period 22 December 2008 to 20 March 2009 were therefore entirely justified.

In view of all these circumstances, the damages due to the complainant under all heads will be set *ex aequo et bono* at 60,000 Swiss francs.

11. Since the complainant largely succeeds, she is entitled to an award of costs, which the Tribunal sets at 5,000 francs.

DECISION

For the above reasons,

1. The decision of the Director General of 23 September 2009 is set aside.
2. WIPO shall pay the complainant damages in the amount of 60,000 Swiss francs.
3. It shall also pay her 5,000 francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2011, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, Mr Claude Rouiller, Judge, Mr Giuseppe Barbagallo, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Mary G. Gaudron
Claude Rouiller
Giuseppe Barbagallo
Patrick Frydman
Catherine Comtet