Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

115th Session **Judgment No. 3226**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mrs S. N. against the World Intellectual Property Organization (WIPO) on 19 February 2011 and corrected on 29 April, WIPO's reply of 9 August, the complainant's rejoinder of 14 November 2011 and the Organization's surrejoinder of 23 February 2012;

Considering Article II, paragraph 5, 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 concerning the complainant's career at WIPO may be found in Judgments 3185, 3186 and 3187 delivered on her first, second and third complaints respectively, and in Judgment 3225 delivered this day on her fourth complaint. 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 Operations Division. On 15 September 2009 she was placed on sick leave. She resumed work on a part-time basis on 14 December 2009, then on a full-time basis on 4 January 2010.

On 14 January the complainant was offered a renewal of her contract for the period from 15 February until 31 December 2010, which was subsequently extended until 6 February 2011. In accordance with the terms and conditions applicable to short-term employees, which were appended to the contract, the complainant was entitled to two working days of sick leave per month of employment and any absence beyond the days of entitlement to sick leave would give rise to a salary deduction. The complainant was also covered by medical/accident insurance and loss-of-earnings insurance. According to the summary of benefits provided by the insurance brokers responsible for the day-to-day administration of the collective insurance contract for "short-term employees" concluded between WIPO and the insurers, in the event of temporary total disablement on account of illness, the brokers pay the "employee's daily salary per day of disablement for a maximum of 13 weeks from the 5th day of the disablement or the exhaustion of paid sick leave, whichever is the earlier, and then at 50% of daily salary for up to a further 13 weeks".

The complainant was absent on sick leave on 24 February 2010, and she then worked at 80 per cent for most of March. She was hospitalised on 29 May and did not return to work until 14 June. On the morning of 24 June she had to take time off for treatment in hospital. Her regular doctor subsequently prescribed a full day's sick leave on 28 June and then 50 per cent sick leave until 8 August inclusive.

On 31 August the complainant noticed that she had not received her full salary for that month and she asked the Administration whether the "difference" – amounting to some 2,500 Swiss francs – would be covered by the insurance brokers. That same day, it was explained to her that, as she had exhausted her sick-leave entitlement,

a deduction had been made from her salary for the period from 16 July to 8 August, and that her file had been forwarded to the insurance company providing loss-of-earnings coverage.

On 2 September the complainant wrote to the acting Director of the Human Resources Management Department to inform her that she had still not received her full pay and to ask her to look into the matter without delay. She received the answer on the same day that her file had been forwarded to the insurance brokers on 11 August, that a reminder had been sent to them on 31 August and that she would be notified as soon as they replied.

On 14 September the complainant was informed that the insurance brokers' medical adviser had "confirmed" to WIPO that her sick leave "in June and August 2010" was related to that in the period from September 2009 to March 2010 and that, in these circumstances, she would receive 1,233.95 Swiss francs under her loss-of-earnings insurance. This sum was paid on 16 September.

On 13 October the complainant again wrote to the Human Resources Management Department to express her surprise that her pay had increased in September 2010 and she asked for a detailed breakdown of her salary. It transpired that she had been overpaid and the excess sum of 830.20 francs was then deducted from her November salary.

Although in the meantime she had requested and received information regarding the calculation of her August salary, she stated in a memorandum of 27 October, addressed to the acting Director of the above-mentioned department, that she failed to understand why she had not received her full salary for August, and she asked the acting Director to review the situation. By a memorandum of 22 November she was provided with a detailed breakdown of that salary. On 7 December 2010 she wrote to the Director General to dispute the amount at issue. In a memorandum of 31 January 2011 the acting Director again supplied the complainant with a breakdown of her salary and told her that, if she was not satisfied, she could take up the matter with the insurance brokers.

In her complaint form the complainant states that she impugns the memorandum of 22 November 2010, and in her submissions she challenges the "decisions" contained in that memorandum and in that of 31 January 2011.

On 9 March the complainant asked the acting Director of the Human Resources Management Department to take "firm action" with regard to the insurance brokers. On the next day she received the reply that she should contact the brokers directly, which she did on 18 April 2011.

B. The complainant contends that the principle of equal treatment has been breached with regard to sick leave, because short-term employees who have served for more than three years do not receive benefits comparable with those offered to staff members with a fixed-term appointment who have likewise served for more than three years. She considers that the Organization failed in its duty of care by not offering her the possibility to compensate for the reduction in her salary for August 2010 by using up days of annual leave which she had accumulated. She also taxes WIPO with not ensuring that the insurance brokers processed her file in a timely manner, not sending them a reminder until 31 August 2010 and not warning her that she had exhausted her entitlement to sick leave and that a deduction would be made from her salary for August 2010.

She further submits that the decision to recover the sum of 830.20 francs is devoid of any legal basis and that WIPO committed "errors", particularly by not offering to spread the recovery of that amount over several monthly instalments and by not informing her that the deduction would be made from her salary for November 2010.

The complainant seeks the setting aside of the decisions of 22 November 2010 and 31 January 2011, compensation for the injury suffered in the amount of 10,000 euros and 3,500 euros in costs. 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 the Organization contends that the complaint is irreceivable. It emphasises 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 is not competent to hear her complaint. WIPO also holds that the medical certificates relating to the period from 28 June to 8 August 2010, which the complainant has annexed to her complaint, must be ignored because, although they bear the same date, they differ from those which she submitted to the Human Resources Management Department and are therefore "particularly dubious".

On the merits, the Organization submits that, since short-term employees and WIPO staff members are not in identical situations in fact or in law, it is permissible to apply different sick leave rules to them. In addition, it considers that it was under no obligation to propose that the deduction from the complainant's salary for August 2010 be compensated by using up days of annual leave. WIPO states that it acted diligently and promptly "at all times" and that it strictly abided by its contractual obligations towards the complainant as well as the insurance brokers. In its opinion, the complainant could have foreseen the deduction from her salary for August 2010, since she knew that she had exhausted her entitlement to sick leave. It points out that on 9 August 2010 the complainant had submitted a form to the Human Resources Management Department, in which she applied for benefits under her loss-of-earnings insurance, for transmission to the insurance brokers.

With regard to the recovery of the overpayment, WIPO points out that, in accordance with the Tribunal's case law, an international organisation is entitled to recover an undue payment from an employee, provided that it does so within a reasonable period of time, which was the case here. It adds that the complainant did not ask for easier terms of repayment, although she could have done so.

As the Organization considers that the complaint is vexatious, it asks the Tribunal to order the complainant to pay its costs.

D. In her rejoinder the complainant discloses that she provided the insurance brokers, at their request, with a certificate from her regular doctor in which he attested that her illness in the period between 28 June and 8 August 2010 had been unrelated to that which had entailed her sick leave as from 15 September 2009.

She explains that her regular doctor twice supplied her with two separate medical certificates, one of which, unlike the other, did not provide any details of her illness in order to protect her private life. She admits that in her submissions she produced the certificates mentioning her illness, but says that this was a mistake. She asks the Tribunal to delete the sentences of WIPO's reply which suggest that she produced or used forgeries. She now claims costs in the amount of 10,000 euros and argues that her higher claim is warranted in particular by the Organization's "offensive comments" which, in her opinion, amount to an abuse of procedure.

E. In its surrejoinder the Organization informs the Tribunal of the occurrence of a new fact which, in its view, renders the complaint moot, namely that the insurance brokers' medical adviser has advised it that the complainant's sick leave during the period from 28 June to 8 August 2010 and that which began on 15 September 2009 were "different in nature". Accordingly, a sum of 1,232.80 Swiss francs, corresponding to the outstanding amount of salary due for August 2010, was paid to the complainant on 2 February 2012.

In other respects, WIPO maintains its position and denies any abuse of procedure, emphasising that it merely drew the Tribunal's attention to the discrepancies between the various medical certificates produced by the complainant. In its view, her claim for the payment of 10,000 euros in costs is excessive.

CONSIDERATIONS

1. The provisions on sick leave applying to short-term employees of WIPO who are in the General Service category and remunerated at the monthly salary rate, the category to which the complainant belonged until 31 May 2012, read as follows:

> "[entitlement to] two working days per month of employment. Any absences of more than two consecutive working days or of more than three working days in total, within each calendar year, must be supported by a medical certificate. Any absence beyond the days of entitlement to sick leave shall take the form of a deduction from monies (salary) owed to the short-term employee by WIPO".

The complainant, who at the material time was a short-term employee, was thus entitled to no more than 24 days of sick leave per annum. As she was recruited under contracts concluded for a period of 11 months and 3 weeks, in the event of being unfit for work for more than 24 days, she was covered by compulsory loss-of-earnings insurance which entitled her to receive from the insurance brokers her salary for each day of disablement for a maximum of 13 weeks from the fifth day of disablement or the exhaustion of paid sick leave, whichever was the earlier, and then 50 per cent of her daily salary for up to a further 13 weeks.

2. The complainant was on sick leave from 15 September to 13 December 2009. She resumed work on a 50 per cent basis on 14 December and on a full-time basis on 4 January 2010. The medical certificates with which she had been issued showed that these absences were due to "great stress at work". Her regular doctor issued her with another medical certificate authorising her to work at 80 per cent from 1 until 28 March.

On 2 June 2010 the complainant sent the Human Resources Management Department a medical certificate showing that she had been hospitalised since 29 May and was unable to work until 14 June. On 25 June the complainant submitted another certificate attesting that

she had been unfit for work for half a day in the morning of the previous day on account of medical treatment. Her doctor then issued her with three certificates for "illness". These certificates show that the complainant was absent on 28 June and that she worked on a 50 per cent basis as from the next day and until 8 August. Each of these certificates was forwarded to the Administration.

The complainant exhausted the 24 days of sick leave to which she was entitled for 2010 on 16 July. As from that date a deduction therefore had to be made from her salary and compensated by her loss-of-earnings insurance. To that end her file was forwarded to the insurance brokers on 11 August. The following month she was informed that, in the opinion of the insurance brokers' medical adviser, her sick leave "in June and August 2010" had been linked to that which had commenced in September 2009 and which had allegedly ended in March 2010. She therefore received compensation under her loss-of-earnings insurance corresponding to half of her salary for the period from 16 July to 8 August 2010.

As the complainant challenged the deduction made from her salary for August 2010, the Organization sent her a breakdown of her salary in two memorandums of 22 November 2010 and 31 January 2011. In the latter memorandum WIPO also informed the complainant that, if the explanations which she had been given did not satisfy her, she should contact the insurance brokers directly. The complainant says that she is impugning the decisions notified by these two memorandums.

3. On 18 April 2011 the complainant contacted the insurance brokers to contest the decision to link her sick leave beginning on 28 June 2010 to a previous period of sick leave. After obtaining more precise information on the cause of the sick leave starting at the end of June from the complainant's regular doctor, the brokers reviewed their decision and paid the outstanding salary due to the complainant, who thus received her full pay for August 2010. Since this was the main purpose of her complaint, it has become moot in this respect.

4. It remains to be considered whether, in the course of this compensation procedure, WIPO failed in its duty of assistance and care, and in its duty to inform the complainant, and thereby caused her injury for which she may obtain redress.

This is plainly not the case.

The evidence produced by the parties shows that the Organization provided the complainant with clear guidance as to the procedure to be followed in order to obtain the rectification of the erroneous opinion of the insurance brokers' medical adviser and the payment of the compensation due to her under the loss-of-earnings insurance. It contacted the insurance brokers to ensure that the case was settled correctly, although the collective insurance contract merely requires it to forward the file to them "as soon as possible". This dispute was not settled within the normal time frame partly because the imprecise wording of the medical certificates led the brokers to suppose that the sick leave prescribed for the period beginning on 28 June 2010 had the same cause as the sick leave prescribed as from 15 September 2009. WIPO cannot be criticised for not having itself requested that the complainant's new illness be specified in the medical certificates which she supplied, since this information is covered by medical secrecy.

5. The Organization is, however, wrong to tax the complainant with producing imprecise medical certificates in the internal proceedings and with not supplying certificates showing the exact cause of her new sick leave until she filed her complaint, since the complainant was obliged to waive medical secrecy only vis-à-vis the insurance brokers, who had to examine her claim for compensation for loss of earnings.

Nor are there any grounds for censuring the statements made by the parties in their submissions to the Tribunal since, although they are caustic, they remain within the accepted bounds of the freedom of expression enjoyed by the parties to judicial proceedings.

6. The complainant's plea of unequal treatment is based on her challenge to the lawfulness of her status as a short-term employee. The Tribunal has dealt with this issue in Judgment 3225, also delivered this day, in which it was decided that the complainant would receive the financial benefits of all kinds to which she would have been entitled had she been given a fixed-term appointment as from 14 May 1999. The complaint presently before the Tribunal has therefore become moot in this respect.

7. Lastly, the complainant taxes the Organization with having demanded reimbursement of the 830.20 Swiss francs which had been wrongly credited to her salary for September 2010 and, in particular, with not offering to spread the reimbursement in question over several months.

8. In light of the evidence on file, the Tribunal considers that the complainant was entitled to have the repayment of the sum due spread over several months. As she was not given this option, the decision requiring reimbursement of the sum of 830.20 Swiss francs in a single deduction is unlawful. In the particular circumstances of this case, the Tribunal will not, however, set aside this decision but will grant the complainant 200 euros in compensation for the injury which she suffered.

9. The Organization asks that the complainant be ordered to pay costs on the grounds that her complaint is vexatious. Given that the complaint has been allowed, this counterclaim is groundless and must therefore be dismissed.

10. As she succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. WIPO shall pay the complainant 200 euros in compensation for the injury to which reference is made under 8, above.
2. It shall also pay her costs in the amount of 1,000 euros.
3. The complaint is otherwise 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