

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**116th Session**

**Judgment No. 3261**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 3036 filed by Mr M. B. on 29 March 2012 and the reply of the World Intellectual Property Organization (WIPO) of 19 July 2012;

Considering the e-mail of 21 September 2012 in which the complainant requested a stay of proceedings, the letter of 2 October in which WIPO stated that it was not opposed to that request, the e-mails of the Registrar of the Tribunal of 4 October informing the parties that the proceedings had been stayed until 31 December 2012 and the complainant's e-mail of that date in which he requested the resumption of the proceedings;

Considering the complainant's rejoinder of 11 February 2013 and WIPO's surrejoinder of 16 May, as supplemented on 12 July 2013;

Considering the letter of 25 October 2013 in which WIPO invited the Tribunal to examine this application together with the complainant's third complaint filed on 7 May 2012, because they are "connected", and the Registrar's e-mail of 6 November 2013 informing WIPO that the Tribunal had decided not to grant its request;

Considering Article II, paragraph 5, of the Statute of the Tribunal;  
Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

### CONSIDERATIONS

1. In Judgment 3036, delivered on 6 July 2011, the Tribunal ruled on the complainant's first complaint which impugned the decision of the Director General of WIPO of 6 July 2009 that the complainant, who had been suspended from duty, could not return to work "for operational and security reasons".

The Tribunal set aside the decision of 6 July 2009 on the grounds that "in maintaining the complainant's suspension [...], the Director General [had] extended [its] duration [...] beyond the reasonable limit accepted by the case law and [had] thus caused the complainant moral and professional injury". It also ordered WIPO to pay the complainant compensation in the amount of 15,000 United States dollars to redress the injury suffered and 5,000 dollars in costs.

2. On 7 July 2011 the complainant's legal representative sent WIPO's Legal Counsel an e-mail asking him to arrange for the complainant's return to work.

3. The complainant was informed by a registered letter of 25 July 2011, which he received on 29 July, that the Director General was lifting his suspension; that, "[h]owever, the Director General's decision [could] not be accompanied by [his] return to work", because "the duties linked to [his] consultant's contract [had] been outsourced for operational reasons on 1 June 2009"; and that "in [those] circumstances [he would] understand that his return to work [was] not required".

The complainant was informed by the same letter that, for the above-mentioned reasons, it would be impossible to renew his contract when it expired on 31 December 2011, but that WIPO would nevertheless honour the terms of that contract until its expiry.

4. On 8 August 2011 the complainant asked the Director General to review the decision of 25 July 2011 refusing to allow him to resume work for the duration of his contract, to extend that contract and, lastly, to grant him adequate financial compensation for moral and professional injury. He said that, if his request for review was denied, he wished to be authorised to take the case directly to the Tribunal and added that, if he did not receive that authorisation, he would refer the matter to the Appeal Board, on the one hand, and to the Tribunal, on the other, in order to complain of a “partial and biased application of Judgment 3036”.

5. The Director General notified the complainant by a letter of 4 October 2011 that he had decided to reconsider his decision of 25 July 2011 and to “grant [his] main requests”. He stated that, “in the light of information contained in [the] letter of 8 August 2011 and having reviewed all the circumstances of the case, [he had] decided that the Organization would endeavour to find a position which [the complainant] could occupy, in order that he might be able to return to work as soon as possible, despite the outsourcing of his previous duties”. The same letter also indicated that the Organization agreed to renew the complainant’s contract when it expired on 31 December 2011, so that he could participate in competitions for one of the posts which would become available shortly. The complainant was told that the Organization could not grant his request for financial compensation in connection with his suspension, since it had already paid the financial compensation which the Tribunal had deemed adequate.

6. On 31 October 2011 the complainant announced that he accepted the Director General’s change in position, but drew attention to his own reservations regarding certain matters not dealt with in the letter of 4 October 2011.

7. The complainant was informed by a letter of 29 November 2011 that the Director General had decided to maintain the position set forth in his letter of 4 October 2011.

8. On 23 December 2011 the complainant accepted the offer made on 22 December to extend his consultant's contract for the period 1 January to 31 December 2012.

On the same date the Human Resources Management Department told him that a project had been found for him.

9. On 23 February 2012 that same Department notified him that, unfortunately, the solution contemplated in December 2011 had not materialised but that the Organization might be able to second him to the International Computing Centre, to which his former duties had been transferred following the outsourcing of some of the services provided by WIPO's Information and Communication Technology Department, whilst enabling him to keep his job at WIPO.

By a letter of 16 March 2012 the complainant expressed his interest in the proposed secondment but asked for additional clarification of his situation.

Discussions were held, but they failed to produce a solution that satisfied each of the parties.

10. On 29 March 2012 the complainant filed an application for execution of Judgment 3036 asking the Tribunal:

- “1. To find that WIPO has not executed Judgment 3036, of 6 July 2011, with all the legal consequences which it entails, in breach of the principle of *res judicata*, despite numerous requests to that effect [...].
2. To order WIPO to execute Judgment 3036 of 6 July 2011 subject to a penalty for default as from the delivery of the forthcoming judgment.
3. To require that the terms of employment under his contract (level of salary, grade, leave, etc.), ‘which have been suspended for three years’, be reassessed appropriately in keeping with his requests and updated; in particular, the regularisation [of his contract].
4. To order WIPO to pay [him] exemplary damages to redress the moral and professional injury suffered, taking account of the TOTAL length of suspension and non-assignment to a post.
5. To order WIPO to reimburse all the legal costs incurred.”

11. WIPO submits that the third claim is irreceivable and that all the claims are groundless.

12. In accordance with the Tribunal's case law, an application for execution may only address issues covered by the initial judgment (see, in particular, Judgment 1978, under 4).

13. In the instant case, the judgment the execution of which is requested set aside the Director General's decision extending the duration of the complainant's suspension beyond the reasonable limit accepted by the case law.

The Tribunal will therefore dismiss all claims which are unrelated to the purpose of Judgment 3036, in particular the reassessment of the complainant's terms of employment under his contract and the regularisation of the latter. Moreover, the complainant himself states that the regularisation of his contract "[...] forms the subject of a parallel complaint" in a case pending before the Tribunal.

The complainant's third claim will not therefore be examined in the context of this application.

14. The complainant submits in substance that the Organization is displaying bad faith when it says that it has executed Judgment 3036 because, although it has lifted his suspension from duty, it has not allowed him to return to his post. In his opinion, the Tribunal's setting aside of the decision to extend his suspension, on the grounds that the latter was unreasonably long, necessarily implied that he should be reinstated in his post with the same duties, whereas in point of fact this has not been done.

15. WIPO submits that the Director General never refused to cancel the suspension and never ignored the orders contained in the Tribunal's judgment. Indeed, after the delivery of that judgment, it notified the complainant that his suspension had been lifted but that

his return to work was, however, impossible because his former duties had been outsourced. The fact that it was impossible to arrange his immediate return to work was covered by the exception allowed under the Tribunal's case law in such matters.

16. According to the Tribunal's case law, at the stage of execution of a judgment by the parties, the judgment has *res judicata* authority and must be executed as ruled. An exception must, however, be made to this principle when execution proves impossible owing to subsequent facts or facts of which the Tribunal was unaware when it adopted its judgment. (See, in particular, Judgments 1887, under 8, and 2889, under 6 and 7).

17. The Tribunal recalls that the complainant had been suspended from duty, with pay, until the end of the investigation of the charges against him. As suspension is a provisional measure which reserves staff members' rights (see, in particular, Judgment 353), in this case the lifting of the complainant's suspension ought to have made it possible for him immediately to resume his duties and return to a post in the Organization, with all the legal consequences that that entailed. It is, however, not disputed that it was not until 1 October 2012, in other words one year and three months after the delivery of Judgment 3036, that the Organization offered him a specific, real position.

18. The question therefore arises whether, as WIPO submits, it was impossible prior to that date to arrange for the complainant to return to work in his post or with other duties.

19. The Tribunal considers that the reply to this question is in the negative. While the Organization asserts that the duties performed by the complainant before his suspension have been outsourced, this bald statement is by no means sufficient to establish that it was impossible to offer him other duties matching his qualifications and grade.

20. It is therefore to no avail that the Organization relies on the exception to the strict obligation to execute a judgment, which is allowed by the Tribunal's case law.

21. WIPO submits that the complaint has become moot, because the complainant took up new duties on 1 October 2012.

The Tribunal will not accept this argument, since by the date on which the complainant filed his application he had not been assigned any duties or a post, notwithstanding the alleged lifting of his suspension, and this situation lasted until 1 October 2012.

22. The claim for damages to redress the injury suffered is therefore justified owing to WIPO's failure to execute Judgment 3036 in the period between the delivery thereof and 1 October 2012, for which no valid reason has been given.

23. The Tribunal therefore considers that, in the circumstances of this case, the complainant is entitled to damages in the amount of 20,000 Swiss francs, under all heads, to redress the injury suffered.

24. As the complainant has taken up new duties at the Organization, there are no grounds for ordering the execution of Judgment 3036 subject to a penalty for default.

25. The complainant is entitled to costs in the amount of 4,000 francs.

#### DECISION

For the above reasons,

1. The Organization shall pay the complainant damages in the amount of 20,000 Swiss francs.
2. It shall also pay him 4,000 francs in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 7 November 2013, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Claude Rouiller  
Seydou Ba  
Patrick Frydman  
Catherine Comtet