

SIXTY-THIRD SESSION

In re PILOWSKY (No. 2)

Judgment 849

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Jorin Pilowsky against the World Intellectual Property Organization (WIPO) on 15 April 1987 and corrected on 28 April, WIPO's reply of 25 June, corrected on 7 August, the complainant's rejoinder of 7 September and the Organization's letter of 9 October 1987 stating that it did not wish to file a surrejoinder;

Considering Article II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal and Regulations 4.14, 4.15, 4.16, 6.1, 9.7, 9.9, 10.1 and 11.1 and Rules 10.1.1(a)(7) and 11.1.1(b)(1) of the Staff Regulations and Staff Rules of the International Bureau of WIPO;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. As is recounted in Judgment 848, under A, the complainant was granted an appointment for one year from 1 January 1986 as a grade P.3 translator into Spanish at the International Bureau of WIPO in Geneva. The circumstances of his recruitment and the dispute to which they gave rise are also described in that judgment. He had already held short-term contracts with WIPO in 1975, 1976, 1977, 1978, 1979, 1980 and 1985 for periods ranging from a few days to several months. Before being appointed in 1986 he also passed a test of proficiency. On 10 March 1986 the Director General gave him the written warning that prompted his first complaint. A report dated 21 May described his work as "satisfactory without reservation" but referred to the written warning.

On 30 September the Head of the Personnel Section wrote him an internal memorandum saying that in accordance with Regulation 9.9(a) of the Staff Regulations and the terms of his appointment his contract would expire on 31 December. In a letter of 3 October he invited the Director General in accordance with Regulation 11.1 and Rule 11.1.1(b)(1) to review the matter, but on 13 October the Director General answered that the Head of Personnel had made no decision but had merely reminded him of the expiry of his contract. On 3 December he went to the Appeal Board. In its report of 15 January 1987 the Board held that his appeal was receivable and that, the Director General having declined to state the reasons for the non-renewal, it could only surmise them. Of the four it postulated only one - that he was being punished for having appealed against the written warning - would have been improper, and he had given no evidence on the point. The Board's conclusion was to suggest giving him temporary work. On 13 February the complainant's counsel wrote to ask the Director General whether he intended to take a decision on the Board's report. There was no answer.

B. The complainant submits that since the Director General failed to take a decision on the Board's report there is an implied decision to reject the appeal, and that is what he is impugning in keeping with Article VII(3) of the Tribunal's Statute.

As to the merits he contends that, though discretionary, a decision not to renew an appointment may not be arbitrary or irrational: by a general principle of law the Tribunal has recently reaffirmed a valid reason must be given for it. He was given no explanation. WIPO refused to give one to the Appeal Board on the grounds that fixed-term appointments expire automatically under Regulations 4.15 and 9.9. In fact, says the complainant, there was no good reason not to renew his appointment. His work was consistently good. The post he held still exists; indeed it was put up for competition on 6 February 1987. When he applied he was hastily told that he was over the age limit of 55 in Regulation 4.15(d). Yet an exception to that limit had already been made in appointing him, as indeed 4.15(d) allows, and there was no reason not to make it again. The presumption is that WIPO's aim was to punish him for appealing against the written warning - a matter on which he refers the Tribunal to his first complaint - and there was therefore abuse of authority. He has suffered two penalties for the same alleged offence, the written warning and non-renewal.

WIPO is also in breach of good faith because it failed to keep oral promises of renewal of contract made to him by

Mr. Porzio, a Deputy Director General and the most senior Spanish-speaking official, in December 1985, and by Mr. Dondenne, the Head of the Languages Section, in September 1986. Had the Appeal Board not declined to hear evidence from Mr. Porzio he could have confirmed his promise. The complainant seeks the quashing of the decision and his reinstatement or, failing that, damages for material and moral injury which he sets at 468,734 Swiss francs, a sum reached by reckoning two-thirds of his potential earnings up to the age of retirement and his pension entitlements and repatriation grant. He claims costs.

C. In its reply the Organization gives its own version of the facts.

It contends that it took no administrative decision within the meaning of Regulation 11.1 of the Staff Regulations and no disciplinary action within the meaning of Regulation 10.1. The terms of the complainant's appointment and the Staff Regulations and Rules were fully complied with. His fixed-term appointment expired automatically on 31 December 1986 in accordance with Regulation 4.15(c) ("No initial fixed-term appointment or any extension thereof shall carry with it any expectancy of, nor imply any right to, (further) extension or conversion to a permanent appointment.") and Regulation 9.9(a) ("Fixed-term appointments ... shall expire automatically and without prior notice ..."). WIPO was bound neither to extend his appointment nor to give him notice of non-renewal. Nor were there any special circumstances that gave him reason to expect renewal. Whether the promises he attributes to Mr. Porzio and Mr. Dondenne were made is immaterial since neither of them was competent to commit the Organization. As he well knew, neither was responsible for the recruitment of staff or had had authority delegated to him for the purpose of offering appointments. It is for the Director General to decide at his discretion what the Organization's needs are and whom to appoint to satisfy them. The Tribunal's judgments reflect no general rule that an explanation must be given where the rules do not require it. An explanation may be due only where someone has served for years. Although the Tribunal may review a discretionary decision there was, in WIPO's submission, no flaw in the exercise of its authority in this case.

Even if the decision were set aside the complainant should not get the redress he seeks and in particular not reinstatement since WIPO has no suitable employment to offer him. Any award of damages would have to take account of earnings he has or could have had from other employment since leaving. His allegations of moral injury are unfounded. He is ill placed to bemoan the loss of a career in the international civil service when he worked for years as a free-lance translator without showing much interest in one. He fails to establish emotional distress or loss of reputation.

Since his other claims are unsound his claim to costs, which he does not specify, should fail too.

D. In his rejoinder the complainant enlarges on his pleas and seeks to rebut WIPO's. He rejects the suggestion that there was no challengeable decision: non-renewal is a decision and the Tribunal will consider whether it shows any fatal flaw. Moreover, the non-renewal in this case was a covert disciplinary sanction imposed on the complainant for challenging the written warning, and it may therefore be assimilated to the sanction of dismissal provided for in Rule 10.1.1(a)(7).

As the wording of Regulation 11.1 makes plain, the complainant may plead not just breach of contract or of the rules but also, as he does, breach of good faith and abuse of authority in not renewing his appointment. Considering their seniority, he had good reason to believe Mr. Porzio and Mr. Dondenne to be competent to promise him renewal. The delegation of authority is not as clear-cut as WIPO suggests. It was Mr. Porzio who urged him to take a translation test before appointment and there were other circumstances that led him to believe the promises, which WIPO does not deny were made. As for abuse of authority, the case law is clear: an organisation must give a reason for non-renewal so as to show its good faith. In fact WIPO had no valid or even allowable reason for its decision.

Pressing his claims, he observes that he reckons the amount of damages by the provisions of the Staff Regulations and Rules on earnings (the salary scales), pension rights (Regulation 6.1) and repatriation grant (Regulation 9.7). In his submission the moral injury is self-evident.

CONSIDERATIONS:

1. Under Regulation 4.14(a) of the Staff Regulations of the International Bureau of WIPO, staff members in the category to which the complainant belonged must be granted either fixed-term or permanent appointments.

The scheme for recruitment of staff is set out in Regulation 4.15, the relevant provisions of which are as follows:

"(a) Fixed-term appointments under Regulation 4.14(a) are appointments granted for a period of not less than one year and not more than five years. All initial appointments shall be for a fixed term. Any such appointment may, at the discretion of the Director General, be extended one or several times for periods not exceeding five years.

(b) ...

(c) No initial fixed-term appointment or any extension thereof shall carry with it any expectancy of, nor imply any right to, (further) extension or conversion to a permanent appointment.

(d) Initial fixed-term appointments shall not be granted to persons over 55 years of age, unless, in exceptional cases, the Director General waives this age limit."

Further, Regulation 4.16 provides that a permanent appointment may be granted to a staff member who has completed at least three years of continuous service. Thus the Regulations envisage a scheme of recruitment in which all staff members are appointed initially on fixed-term contracts capable of extension or of replacement, after three years, by a permanent appointment.

The merits

2. The complainant is a highly qualified translator who served the Organization and other agencies in the United Nations system under several short-term engagements between 1975 and 1985. Although over the age of 55 he was given a fixed-term contract for one year starting on 1 January 1986. His work was described by his supervisors as unreservedly satisfactory as regards both quality and quantity. The only adverse comment recorded in the complainant's file is contained in a warning dated 10 March 1986 and initialled by the Director General. It is in these terms:

"The fact that you have stated in your application that you were Chilean but are unable to prove such nationality existing at the time of your application and that you disclosed the fact that you had no Chilean passport but only a Swiss titre de voyage only after your employment are acts or omissions that constitute a case of serious misconduct giving rise to the present written warning that such conduct is unacceptable. Any further such act or omission may entail any of the sanctions under Rule 10.1.1 of the WIPO Staff Regulations and Staff Rules."

On 30 September 1986 the complainant was informed by a memorandum from the Head of Personnel that his contract would come to an end on 31 December 1986. On 13 October 1986 the Director General, replying to the complainant's request that he re-examine the matter, stated that the memorandum of 30 September 1986 did not constitute an administrative decision against which an appeal would lie. The complainant impugns the Director General's reply, and the question arises as to whether the Head of Personnel's "reminder", as the Director General described it, constitutes an administrative decision.

Having regard to the scheme of recruitment set out in Regulation 4.15 and in particular to the discretion conferred on the Director General to extend fixed-term contracts once or several times, the memorandum of 30 September 1986 is not merely a reminder but a clear notification that the Director General had decided not to extend the complainant's contract. Further, the Director General's memorandum of 13 October 1986 indicated that that was his final decision.

3. The case law of the Tribunal supports the principle that when the Director General is granted authority not to renew a fixed-term appointment, and to do so without notice or indemnity, his power is discretionary and is subject to the implied condition that his authority must be exercised only for the good of the service and in the interests of the Organization. The Tribunal has held that a decision not to renew a fixed-term contract taken in the exercise of this discretion is subject to review, but the consistent case law is that the Tribunal will interfere with the decision only if it was taken without authority, or violated a rule of form or of procedure, or was based on a mistake of law or of fact, or if essential facts were overlooked, or if the decision was tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts. Inasmuch as no reasons are required under the Regulations, and since no reasons have been given for the non-extension of the complainant's contract, the Tribunal will examine all the circumstances to determine whether the decision is flawed in any of the ways stated above.

The sole ground put forward by the complainant for quashing the decision is that it is arbitrary and tainted with

abuse of authority. Reference is made to the satisfactory nature of his work, a point which is not disputed, and to promises of extension made by a Deputy Director General and by the Head of the Languages Section, which even if proved would not be binding on the Organization. On the other hand, in his statement to the internal Appeal Board the Director General, referring to the evaluations of the complainant's work, said:

"Whatever regard the appellant may have placed in those merits, or however they were viewed by his supervisor, they are not the only factors that are to be taken into account by the Administration in making decisions in respect of a given staff member or on how the policy of the Organization concerning the recruitment and retention of staff is to be carried out."

He did not indicate what other factors he took into consideration.

It appears from the evidence as a whole that the Director General's decision was not based on any inability of the complainant to carry out his duties, nor on the unsatisfactory performance by him of those duties, nor on any considerations relating to the necessities of the service or the interests of the Organization. It is clear that the Director General's conclusion, evidenced in his written warning of 10 March 1986, that the complainant was guilty of serious misconduct constituted the sole and underlying reason for exercising his discretion as he did. The Tribunal has quashed that decision in Judgment 848 and holds that the impugned decision in the present proceedings, based solely on a conclusion which is wrong in law, constitutes an abuse of authority and cannot be allowed to stand.

Relief

4. The Tribunal does not accept that the instant case falls within the category of cases in which the complainant is deprived of a career as an international civil servant. Here the complainant joined the Organization at an age beyond the limit for normal recruiting, and under the Regulations, because of his age, he could not look forward to a permanent appointment. The most he could hope for was one or more extensions of his fixed-term contract. Any compensation to which he is entitled must therefore be assessed on the basis that he is nearing retirement and will continue to find employment as a free-lance translator.

DECISION:

For the above reasons,

The complaint is allowed.

1. The decision of 13 October 1986 is quashed.
2. The Organization shall pay the complainant a sum equivalent to the net annual salary and allowances he would have received had his contract been extended for one year, together with interest thereon at 8 per cent a year from 15 April 1987 until the date of payment.
3. The Organization shall pay the complainant the sum of 6,000 Swiss francs towards costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux
Mohamed Suffian
William Douglas
A.B. Gardner

