Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

119th Session **Judgment No. 3420**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr M. B. against the World Intellectual Property Organization (WIPO) on 7 May 2012 and corrected on 14 August 2012;

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

Considering WIPO's reply of 11 April 2013, the complainant's rejoinder of 26 June and WIPO's surrejoinder of 9 September 2013;

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;

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

A. Information regarding the complainant's career at WIPO is to be found in Judgment 3036 delivered on his first complaint. It is sufficient to recall that in 1999 he was recruited by WIPO as a consultant and that his contract was extended several times. On 16 September 2010 he asked the Director ad interim of the Bureau of Human Resources Management to "convert [his] consultant's contract into a fixed-term appointment". This request was rejected on 12 October. On receipt of a further offer to extend his contract, the complainant again wrote

to the above-mentioned director to express his surprise that his remuneration had not been increased. He therefore requested that the situation regarding his grade and step be regularised and that a final decision be taken on his request concerning the conversion of his contract. The director informed him in a letter dated 20 January 2011 that these requests could not be granted. She explained that his consultant status meant that he was not entitled to the conversion of his contract, and that his remuneration was not established on the basis of a grade and step, but in accordance with the terms of his contract.

The request for a review of the decision of 20 January which he submitted to the Director General on 15 March was rejected on 4 May, and the complainant then referred the matter to the Appeal Board. In its conclusions, dated 15 December 2011, the Board recommended that the appeal should be dismissed. On 1 February 2012 the complainant was informed that the Director General had decided to follow the Board's recommendation. That is the impugned decision.

On 3 December 2012 WIPO offered the complainant a temporary appointment which he accepted in January 2013. This appointment was extended twice thereafter.

B. The complainant states that under Staff Regulation 4.8(b) he should have been given a fixed-term appointment, either following a competition or by direct appointment. He therefore takes WIPO to task for never holding a competition to fill posts for which he could have applied and for never offering him a "direct recruitment". He explains that the request for the regularisation of his contract is prompted by the fact that "WIPO frequently regarded him as a staff member in respect of the essential terms of [his] contract" and that, from the moment he joined WIPO, his duties had a permanent and perennial nature. He also considers that WIPO breached its duty of information and its duty of care in that, prior to 2011, he was never informed of the conditions for obtaining "a staff member's contract". Lastly, he contends that no effect has yet been given to an announcement of the Director General which, he says, was contained in an e-mail of September 2011, to the effect that the situation of

26 employees, including his own, would be regularised. He also asserts that, during a meeting on 5 October 2011, it was agreed that WIPO would offer him a post "through a competition".

The complainant requests the setting aside of the impugned decision, the regularisation of his contract and "the immediate application" of the Director General's announcement of September 2011. He draws attention to the fact that he was suspended from duty between 4 September 2008 and 25 July 2011 and that, although that measure has been lifted, he had not started work again by the date on which his complaint was filed. Therefore he asks the Tribunal to order his return to work in a post for which a competition is to be held and that he be given a grade and a salary commensurate with his seniority, backdated to the time when "this rise should have been applied". He claims "appropriate" damages for moral and professional injury and reimbursement of "legal and medical expenses".

C. In its reply, relying on the Tribunal's case law, WIPO submits that the Tribunal is not competent *ratione materiae*, since the complaint is not related to the non-observance of the terms of the complainant's appointment or of the provisions of the WIPO Staff Regulations and Staff Rules. It also considers that the plea regarding the regularisation of the complainant's contract is irreceivable, since the case law shows that the Tribunal has always refused to convert contracts into which the parties have freely entered.

On the merits WIPO submits that the complaint is moot, since in December 2012 the complainant was offered a temporary appointment which he accepted in January 2013 and that he has thus acquired the status of a WIPO staff member. Moreover, it insists that it was not obliged to offer the complainant a fixed-term appointment. It explains that he could obtain such an appointment only by means of a competition but he has not applied for any post since September 2010, when he first requested the conversion of his contract, although 50 vacancy notices were published in 2012 and 2013.

D. In his rejoinder the complainant enlarges on his pleas. In particular, he states that on several occasions he requested the creation of a permanent post to which he could have been appointed or the holding of competition, but there was no response to these requests. He also considers that the Organization breached the principle of equal treatment by regularising several other consultants but taking no action on his own request for regularisation.

The complainant asks for the conversion of the temporary appointment which he obtained in December 2012 into a fixed-term appointment. He explains that he did not receive a pay rise between 2009 and 2011 and asks that he be given a grade and a salary commensurate with his seniority, backdated to the time "when this conversion should have taken place and, at all events, to 2008". He also asks for the "neutralisation" of his assessment reports which were drawn up during his suspension in order that "they may not be used against him".

E. In its surrejoinder WIPO maintains its position.

CONSIDERATIONS

1. The complainant entered the service of WIPO on 12 July 1999 as a consultant in the Network Services Section. His consultant's contract was extended several times.

2. On 4 September 2008 the complainant was suspended from duty, with immediate effect, on the grounds that he had committed serious misconduct.

3. On 16 September 2010, while he was still suspended, the complainant requested the "conversion" of his consultant's contract into a "fixed-term appointment". On 12 October 2010 he received a negative reply on the grounds that his consultant's contract did not confer "an automatic right to a fixed-term appointment".

4. In a letter which was received by the Administration on 23 December 2010 the complainant, whose consultant's contract had just been renewed for the period 1 January to 31 December 2011, noting that he had not received a pay rise, asked for the regularisation of the situation regarding his grade and step. In the same letter he also asked for the adoption of a final decision on his request for the conversion of his contract. In a letter of 20 January 2011, the Administration replied that all his requests, in other words the conversion of his contract, an increase in his salary and the regularisation of his grade and step, had been refused as unfounded.

5. As the request for a review of that decision which he submitted on 15 March 2011 was rejected, he referred the matter to the Appeal Board which, in its conclusions of 15 December 2011, recommended that the Director General should dismiss the appeal.

6. On 10 February 2012 the complainant was notified by a letter dated 1 February 2012 that the Director General had decided to follow the Appeal Board's recommendation.

7. On 7 May 2012 he filed a complaint with the Tribunal in which he requests the setting aside of the decision of 1 February 2012, the "conversion of his contract", the "granting of a grade and salary commensurate with his seniority backdated to the time when this rise should have been applied", damages and the "reimbursement of [his] legal and medical expenses".

In his rejoinder he also requests "the conversion of his temporary appointment into a fixed-term appointment", the "neutralisation of his assessment reports [which were drawn up] during the suspension period" and "appropriate damages for regularisation promises which were not kept and for the loss of benefits since 2006 due to the failure to regularise his post".

8. The complainant submits that his request for the "conversion" of his consultant's contract into a fixed-term appointment is based on "Article 4.8 of the Staff Regulations […] and the Organization's

practice"; that his duties were permanent and perennial and, lastly, that an examination of his case had led to the inclusion of his post in the list of those to be regularised in 2012.

9. The Tribunal has examined its competence *ratione personae* of its own motion since, when the complaint was filed on 7 May 2012, the complainant was formally described in his employment contract as a "consultant", a term often used for external collaborators. In the complaint form, the complainant calls himself a staff member. The Tribunal notes that the Staff Regulations and Staff Rules applicable since 1 January 2012 use the terms "staff members" and "staff" indiscriminately and that WIPO describes the complainant as a temporary employee on a short-term contract. The Tribunal finds that WIPO has consistently treated the complainant as a staff member. It is clear from the evidence that his contract provided for the payment of a salary, that he was subject to the disciplinary procedure – which was actually applied to him – and that he had access to internal appeal bodies. Moreover, WIPO admits that it has outsourced duties previously exercised by the complainant, which clearly shows that they were previously regarded as being performed internally. The Tribunal is therefore competent *ratione personae* to hear this case. Indeed, it had already implicitly accepted that it was competent to hear the complainant's previous complaints.

10. Precedent has it that a complainant may enlarge on the arguments presented before internal appeal bodies, but may not submit new claims to the Tribunal (see, in particular, Judgment 2837, under 3, and the case law cited therein).

11. In the instant case the Tribunal will therefore rule only on the claims which the complainant submitted to the Appeal Board in the appeal lodged on 27 June 2011, to the exclusion of all other claims. Similarly it will not rule on any matters relating to events occurring after the decision of 4 May 2011 which was contested before the Appeal Board.

12. WIPO submits that the complaint is moot, since in December 2012 the complainant was offered a temporary appointment which he accepted in January 2013.

Furthermore, it points out that the Staff Regulations and Staff Rules make no provision for converting a consultant's contract and that, in order to qualify for a conversion of his contract, the complainant should have participated in a competition, which he has not done since September 2010. While it acknowledges the perennial nature of the duties performed by the complainant until 2008, it explains that this was no longer the case after the outsourcing of his duties and that it was no longer possible to create a regular budget post for the performance of these duties.

WIPO states that the complainant did not take part in any competitions in 2012 and 2013 for possible assignment to another post.

13. At the material time, Article 4.8(b) of the Staff Regulations read:

> "As a general rule, recruitment for posts in the Professional and higher categories shall be made on the basis of a competition. Vacancies shall be brought to the attention of the staff of the International Bureau and the Administrations of Member States, with details as to the nature of the posts to be filled, the qualifications required and the conditions of employment."

14. The complainant relies on the provisions of that article to justify his request for the conversion of his consultant's contract into a fixed-term appointment. However, he admits that the "conventional route" to a fixed-term appointment is via a competition. That is why he contends, subsidiarily, that he could have been appointed directly. In his opinion, the phrase "as a general rule" employed in the aforementioned text "does not completely rule out the possibility of departing from the principle of holding a competition beforehand".

15. As the Appeal Board rightly found, the Staff Regulations and Staff Rules made no provision at the material time for "converting a consultant's contract into a fixed-term appointment". As a general

rule, access to a fixed-term appointment was through a competition, in accordance with Staff Regulation 4.8(b).

16. The complainant submits that "the permanent and perennial nature" of his duties should have led the Organization to heed his numerous requests for regularisation. However, the file shows that the first time he asked for the conversion of his contract was in 2010. The documents produced in support of his pleas concern the extension rather than the conversion of his contract. The Tribunal cannot take into consideration contracts existing prior to the date of the request for conversion in order to assess the permanent nature of the complainant's duties. Moreover, those which he had performed before his suspension had been entrusted to another consultant as from July 2009.

17. The complainant contends that the principle of equal treatment has been breached. He states that "several consultants […] were regularised during the period in which [he] submitted [his] requests for regularisation" and that persons "working for an outside company were regularised". In support of this contention he produces two lists of persons.

18. According to the Tribunal's case law, the principle of equal treatment requires that staff members in an identical or comparable position in fact and in law be treated in the same manner by the employer organisation (see Judgment 2198, under 14).

19. The plea that the principle of equal treatment has been breached must be dismissed, since the complainant supplies no proof that a person in the same situation in fact and in law as him obtained the "regularisation of his or her situation" during the period in question.

20. The complainant takes the Organization to task for failing to keep its promise to him to offer him a post through the holding of a competition in 2012. He maintains that, in an e-mail of September 2011,

the Director General had announced that the situation of 26 employees, including the complainant, would be regularised in 2012 and that it had been agreed, during a meeting on 5 October 2011, that "the Organization [should] offer [him] a post […] in the very near future through a competition", that he "should apply and that, generally speaking, preference was given to the current post-holder".

21. In keeping with what was stated in consideration 11, above, the Tribunal will not rule on this plea as it refers to an e-mail sent after the decision contested before the Appeal Board.

22. The complainant submits that WIPO did not respect its obligation to inform its employees in good time of all measures which might affect their rights and legitimate interests. He states that prior to 2011 he never received any information or explanations pertaining to a consultant's possibilities and means of obtaining a staff member's contract.

23. The Tribunal notes, however, that it is clear from the file, in particular from the letter of 20 January 2011, that the complainant had in fact been advised that if he wished to receive a fixed-term appointment, he should apply for a post for which a competition was being held.

24. The complainant asks to be given a grade and a salary commensurate with his seniority, backdated to the time when the pay rise which he claims should have been applied.

25. The Tribunal concurs with the Appeal Board that, as long as the complainant had a consultant status, his remuneration was essentially based on the terms of his contract and was therefore subject to negotiation.

26. Since none of the complainant's pleas can be allowed, the complaint must be dismissed, without there being any need to rule on the objections to receivability raised by WIPO.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 November 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

(Signed)

CLAUDE ROUILLER SEYDOU BA PATRICK FRYDMAN

DRAŽEN PETROVIĆ