

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**F.**  
**v.**  
**WIPO**

**133rd Session**

**Judgment No. 4477**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. F. against the World Intellectual Property Organization (WIPO) on 2 July 2018, WIPO's reply of 16 October, the complainant's rejoinder of 20 November 2018 and WIPO's surrejoinder of 4 March 2019;

Considering Articles II, paragraph 5, and VII 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 may be summed up as follows:

The complainant claims compensation in lieu of notice of termination of appointment for reasons of health and the reimbursement of the days of annual leave he alleges that he had accrued before that termination.

By letter of the Director General dated 22 November 2016, the complainant – who had held a permanent appointment since 2003 – was informed that the WIPO Pensions Committee had decided to grant him a disability benefit as of 29 November 2016 and that, consequently, his services were being terminated for reasons of health on 28 November, the date on which his sick leave entitlements would be exhausted, in accordance with Staff Regulation 9.4. Under Staff Regulation 9.8, he would be paid a termination indemnity amounting to 12 months' salary, reduced by an amount equivalent to 12 months' disability benefit.

On 12 December 2016 the complainant requested clarification as to the failure to give him notice of termination as provided for in Staff Regulation 9.7(a) and (b), and requested compensation in lieu of notice under Staff Regulation 9.7(d).

On 14 December 2016 the United Nations Joint Staff Pension Fund confirmed that his appointment had been terminated on grounds of disability.

On 7 February 2017 the Director of the Human Resources Management Department, who had noticed that the complainant had, wrongly, not been given notice of termination, apologised and informed him of the Director General's decision to rectify this error by granting him three months' notice. His termination of appointment would therefore take effect on 22 February 2017. However, the complainant was informed that he was not entitled to any salary or allowances for the period from 29 November 2016 to 22 February 2017 as he had exhausted his entitlements to leave with pay on 28 November 2016. This period was therefore a period of special leave without pay. The Director of the Human Resources Management Department also notified him that his request for payment of compensation in lieu of notice could not be granted because, under Staff Regulation 9.7, such compensation was calculated on the basis of the salary and allowances which the staff member would have received had the termination taken effect at the end of the notice period; the complainant was not entitled to any salary or allowances during that period, so no compensation was payable.

On 15 February 2017 the complainant submitted a request for review of the decisions of 22 November 2016 and 7 February 2017, seeking, *inter alia*, compensation for the annual leave he had allegedly accrued prior to his termination and compensation corresponding to three months' notice. His request was rejected on 18 April. On 11 June 2017 he filed an appeal with the Appeal Board, reiterating his claims and requesting an award of 3,000 Swiss francs in costs.

The Appeal Board issued its conclusions on 2 February 2018 and recommended that the appeal be dismissed as unfounded. By a letter of 3 April 2018, which constitutes the impugned decision, the complainant

was informed that the Director General had decided to follow that recommendation.

The complainant asks the Tribunal to order WIPO to pay him compensation corresponding to at least three months' notice, as well as compensation for the 17 days of annual leave accrued before the termination of his appointment, to "condemn the attitude" of the Appeal Board and to set aside its conclusions on the grounds of a formal flaw. He also seeks the setting aside of the impugned decision and the decision of 7 February 2017. In his rejoinder, he claims 5,000 Swiss francs in costs.

WIPO asks the Tribunal to dismiss the complaint as unfounded.

#### CONSIDERATIONS

1. With regard to the complainant's claim for compensation in lieu of the minimum of three months' notice required under Staff Regulation 9.7(b), the submissions show the following.

2. First, the complainant does not contest the principle of the termination of his services for reasons of health of which he was notified by the decision of the Director General of 22 November 2016. Following that decision, the complainant received a termination indemnity amounting to 12 months' salary, reduced by an amount equivalent to 12 months' disability benefit. He was also granted a disability benefit from 29 November 2016 by the WIPO Pensions Committee.

3. Second, while it is true that the Director of the Human Resources Management Department acknowledged on 7 February 2017 that it had been wrong not to give the complainant three months' notice of termination, for which she apologised, the change in the effective date of the complainant's termination from 28 November 2016 to 22 February 2017 did not have any financial implications for him owing to the wording of the relevant provisions of the Staff Regulations.

4. In Judgment 4145, the Tribunal states as follows in respect of the principles of statutory interpretation:

“4. [...] The principles of statutory interpretation are well settled in the case law. The primary rule is that words are to be given their obvious and ordinary meaning (see, for example, Judgments 3310, consideration 7, and 2276, consideration 4). Additionally, as the Tribunal stated in Judgment 3734, consideration 4, ‘[i]t is the obvious and ordinary meaning of the words in the provision that must be discerned and not just a phrase taken in isolation’.”

5. Staff Regulation 9.7(d) provides that in lieu of notice, the Director General may authorise payment to a staff member whose appointment is terminated of compensation calculated on the basis of the salary and allowances which the staff member **would have received** had the termination taken effect at the end of the notice period. The use of the words “on the basis of the salary and allowances which the staff member **would have received**” (emphasis added) is significant. Their obvious and ordinary meaning is clear. In the complainant’s case, even taking into account the fact that he was to be given notice of termination so that his termination of appointment should have taken effect on 22 February 2017 and not on 28 November 2016, no compensation was payable in lieu of notice because he had exhausted his entitlements to leave with pay by 28 November 2016 and was therefore not entitled to any other salary or allowances for the period between 29 November 2016 and 22 February 2017.

6. In addition to the explicit wording of this provision, Office Instruction No. 46/2015, which prescribes the conditions and procedure for termination of appointment for reasons of health pursuant to Staff Regulation 9.4, specifically deals with the situation concerning the complainant in this case. In this regard, paragraph 29 of the Office Instruction states:

“Staff Regulation 9.7(d) and Staff Rule 9.7.1(a) provide that in lieu of notice, the Director General may authorize payment to a staff member whose appointment is terminated of compensation calculated on the basis of the salary and allowances which the staff member *would have received* had the termination taken effect at the end of the notice period. Compensation in lieu of notice would be null in the case of a staff member who has exhausted all

entitlements to paid leave. In such a case, therefore, the Director General shall not normally waive the notice period, unless so requested by the staff member.” (Original emphasis.)

7. As noted by the Director of the Human Resources Management Department in her letter of 7 February 2017, taking into account the fact that the complainant was not entitled to any salary or allowances from WIPO for the period from 29 November 2016 to 22 February 2017, this period was therefore considered as a period of special leave without pay. Although the letter of 7 February 2017 did not expressly state so, it is evident from the submissions that this decision was taken pursuant to paragraph 22 of Office Instruction No. 46/2015 under which:

“A staff member who has exhausted all entitlements to paid sick leave, as well as accrued annual leave entitlements, and is unable to resume work as a result of his or her medical condition shall normally be considered on special leave without pay pending termination of appointment or resumption of work.”

The Tribunal notes that the legal basis of this provision is Staff Regulation 5.2(f), which provides that:

“In exceptional cases, the Director General may, at his or her initiative, place a staff member on special leave with full or partial pay or without pay if he or she considers such leave to be in the interest of the Organization.”

In view of the above, the complainant’s plea referring to Staff Regulation 5.2(a)(1) and Staff Rule 6.2.2 is of no avail.

8. The complainant’s claim for compensation in lieu of the three months’ notice required under Staff Regulation 9.7(b) is hence unfounded.

9. With regard to the complainant’s claim for compensation for the 17 days of annual leave accrued before the termination of his appointment under Staff Regulation 9.14(a), he submits that “intentionally or unintentionally” WIPO provided contradictory information regarding the number of days of sick leave that he had remaining on 1 January 2016, which he alleges skewed the Organization’s calculations concerning his claim for compensation for days of annual leave. In his submissions, the complainant contends that WIPO invented a “providential error”

in correcting the explanation provided in respect of this matter in the decision of 18 April 2017 rejecting his request for review.

As WIPO maintains in its reply and surrejoinder, the letter of 18 April 2017 contained a clerical error concerning the number of days of sick leave with full pay used on 1 January 2016, which was not 156 but 173. The Organization made this correction in its submissions to the Appeal Board, which referred to it in its recommendation that the complainant's appeal be dismissed. Against this background, the complainant does not establish that he is entitled to compensation for those 17 days of annual leave.

10. This second claim of the complainant is also unfounded.

11. Furthermore, with regard to the complainant's claim that the Appeal Board report of 2 February 2018, on which the impugned decision of 3 April 2018 is based, be set aside on account of a formal flaw, the complainant points to what he describes as "new facts" that were provided by WIPO in its surrejoinder to the Appeal Board and underpin the explanation of the clerical error concerning the number of days of sick leave with full pay which he had used on 1 January 2016. According to the complainant, he was not heard on this point, which should lead to the Appeal Board report being set aside on the grounds that it contains a formal flaw.

However, the Tribunal observes that an opinion issued by an appeal body is merely a preparatory step in the process of reaching a decision on the appeal which does not itself cause injury to the complainant. Claims against it are therefore irreceivable (see, for example, Judgments 4392, consideration 5, and 2113, consideration 6).

12. Even assuming that the complainant in fact intended to argue that the impugned decision itself was affected by a procedural flaw, this plea is unfounded. The submissions show that a copy of WIPO's surrejoinder to the Appeal Board, dated 17 November 2017, was sent to the complainant on 22 November 2017, while the Appeal Board's recommendation was issued on 2 February 2018. The complainant

therefore had the opportunity to seek leave to file a final brief in response to the surrejoinder, pursuant to Staff Rule 11.5.3(h). In addition, it appears that WIPO had stated in its previous submissions to the Appeal Board, namely in its reply, that the complainant had used 173 days of sick leave with full pay on 1 January 2016. The Appeal Board's conclusions were therefore not based, in any event, on a fact that had not been brought to the complainant's attention.

13. This third claim of the complainant is therefore unfounded.

14. In the foregoing premises, the complainant's claims must be dismissed in their entirety.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 2021, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

*(Signed)*

PATRICK FRYDMAN      JACQUES JAUMOTTE      CLÉMENT GASCON

DRAŽEN PETROVIĆ