Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

U.

v.

WIPO

134th Session **Judgment No. 4506**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. B. O. U. against the World Intellectual Property Organization (WIPO) on 1 November 2018, WIPO's reply of 12 April 2019, the complainant's rejoinder of 8 August and WIPO's surrejoinder of 25 November 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 challenges the length of the extension of appointment that was offered to him.

In 2011, the complainant joined WIPO under a two-year fixed-term contract for the position of Director of – what was at the material time – the Copyright Infrastructure Division (CID). In 2013, his contract was extended for an additional period of three years. By a letter of 29 February 2016, the complainant was offered a two-year extension of his appointment from 1 April 2016 to 31 March 2018. By e-mail of 2 March 2016, the complainant requested the Organization to consider modifying the length of the contract extension in line with what he had understood as being WIPO's practice to offer a five-year extension of contract to its staff members upon the second extension of appointment.

By e-mail of 7 March 2016, following a meeting with the Human Resources Management Division (HRMD), the complainant transmitted his acceptance of the offer of extension, specifying that he had been reassured during the meeting that the current trend within WIPO was for an employee's "third fixed term" to run for a period of two years rather than five years.

On 29 July 2016 the complainant, who since July 2015 had been the subject of an investigation for potential wrongdoing, received a copy of the draft investigation report prepared by the Internal Oversight Division. According to him, it was then that he learned that the investigation had been initiated by HRMD.

On 26 October 2016, the complainant requested a review of the decision to offer him a two-year extension of contract, alleging that there was a causal link between the investigation process initiated against him and the fact that he was offered an extension of contract for a period shorter than five years.

By a letter of 19 March 2017 addressed to the WIPO Appeal Board (WAB), the complainant notified his intention to appeal the implied rejection of his request for review. In its report dated 1 June 2018, the WAB recommended rejecting the internal appeal. By a letter of 3 August 2018, the complainant was informed of the Director General's decision to endorse the WAB's recommendation and to dismiss his internal appeal. That is the impugned decision. On 1 October 2018, the complainant's appointment was terminated for health reasons.

The complainant asks the Tribunal to set aside the impugned decision of 3 August 2018 as well as the implied rejection of his request for review and the initial decision of 29 February 2016. He seeks an order to be awarded a five-year contract as from 1 April 2016 as well as the payment of full salary, allowances and other benefits including pension and health insurance contributions until the expiration of such contract on 31 March 2021. On a subsidiary basis, the complainant requests the payment of full salary, allowances and other benefits including pension and health insurance contributions that he would have received had his contract been extended from 1 April 2016 to 31 March 2021. He further seeks moral damages in the amount of

50,000 euros as well as punitive and exemplary damages. The complainant seeks an award of costs in the amount of 8,000 euros and the payment of 5 per cent interest per annum as from the due date of each payment.

WIPO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant challenges the decision of the Director General, dated 3 August 2018, that, endorsing the recommendation of the WIPO Appeal Board (WAB) dated 1 June 2018, dismissed his internal appeal. In his appeal to the WAB, the complainant had challenged the Organization's implied rejection of his request for review of the decision to offer him a fixed-term appointment for a period of two years, from 1 April 2016 to 31 March 2018. The complainant alleged that he should instead have been offered an extension of five years, in compliance with a general practice of granting a five-year contract on the occasion of the second extension of the original fixed-term appointment.

2. The WAB's recommendation, underpinning the impugned decision, was based, in brief, on the following reasons:

(a) although, according to the evidence gathered by the WAB, the Organization seemed to recognize the existence of a general practice of granting a duration of five years for the second extension of a fixed-term contract, this five-year extension was not automatic, as it depended on the circumstances of each case;

(b) even if there was evidence that, over a period of four years from 2014 to 2018, 24 staff members had been granted contract extensions of five years, this circumstance did not prove unequal treatment to the detriment of the complainant, as they were mid-level P-4 staff members, whereas the complainant was a high ranking D-grade official;

(c) when the complainant's contract was due for renewal, around February 2016, the post of Head of the Copyright and Creative Industries Sector (DDG) was vacant, and for this reason the Director General decided to renew the complainant's contract for

a period of two years rather than five years, in order to leave it to the incoming DDG, who would take up the post in September 2016, to assess whether a longer extension was needed;

(d) the complainant's high rank, at grade D, justified the option of leaving the decision of a longer extension of the contract to the new DDG, since it would fall within the mandate of the DDG to assess the needs of the Sector under her or his charge; after her arrival, the new DDG operated a restructuring of the Division where the complainant was employed;

(e) the extension of a fixed-term contract fell within the discretion of the Director General, and there is no legal expectancy of automatic extension, as clearly stated in Staff Regulation 4.17(f); in the present case, the exercise of discretion was not tainted with flaws, errors, abuse of authority, or overlooking of essential facts.

3. The complainant's pleas may be summed up as follows:

(a) lack of authority: under Staff Regulation 4.17(c) in force at the relevant time, the length of a contract is fixed by the Director General with the approval of the Coordination Committee; the Organization failed, during the internal proceedings, to provide evidence that the decision on the extension of the contract was taken by the competent authority; in any case there is no evidence that the decision was approved by the Coordination Committee as required by the Rules in force at the relevant time;

(b) the discretionary power was exercised without giving sound, clear, and genuine reasons;

(c) breach of the principle of equal treatment;

(d) procedural flaws relating to the internal means of redress;

(e) breach of due process, since the Administration failed both to keep a "paper-trail" of the procedure, if any, that led to the decision on the second extension of the contract, and to follow its own proper procedure for the extension of the contract;

(f) an essential fact was overlooked, as the decision to extend the contract for two years rather than five years ignored the performance appraisal report regarding the complainant's 2015 performance, which had been assessed as outstanding, that is the highest rating; and

(g) misuse of power, since the decision was based on a hidden reason, that is, the "unlawful initiation of the unlawful investigation process against the [c]omplainant".

4. The first plea summarized in consideration 3, paragraph (a), above, is well founded. This plea is twofold, and reiterates pleas that were first submitted in the internal appeal, but which were not addressed by the WAB.

The first issue raised concerns the lack of authority of the Deputy Director of HRMD to fix the length of the complainant's contract extension. Staff Regulation 4.17(c) states that the length of appointments shall be fixed by the Director General. In the present case, the length of the contract extension was set by a person other than the Director General. Indeed, the 29 February 2016 letter offering a two-year extension of the complainant's appointment was signed by Ms D., Deputy Director of HRMD, who, in the hierarchical structure of WIPO, was placed not only below the Director General (at the relevant time, Mr G.), but also below the Director of HRMD (at the relevant time, Ms M.). The Tribunal's case law states that it is for the Organization to prove that whoever issues a decision is authorised to take that decision, either by virtue of a statutory provision, or by virtue of a lawful delegation by the person in whom such authority is vested under that provision (see Judgment 2028, considerations 8(3) and 11). Furthermore, the Tribunal's case law recognizes that the decision of the executive head of an organization may be communicated to the official concerned, as is common practice, by means of a letter signed by the head of human resources management. However, it must be clear from the terms of that letter, or, at least, from consideration of the documents in the file, that the decision in question was indeed taken by the executive head himself (see Judgment 4291, consideration 17, and the case law cited therein).

In the present case, the 29 February 2016 letter offered no reference to a delegation of authority or that the decision was taken on behalf of the Director General. Moreover, the Organization has not provided any evidence that the Deputy Director of HRMD held a delegation of authority from the Director General, neither in general nor for this specific case. WIPO merely affirms in its reply: "The [c]omplainant argues that there is no evidence that the decision to extend his contract by two years was made by the Director General, as was required by the Staff Regulations and Rules. The Organization is perplexed by this assertion, and questions why the [c]omplainant would believe that the Director General would sign his name to a decision (that being, the impugned decision at issue in this [c]omplaint) that misrepresents his own prior actions (namely, taking the decision to extend the [c]omplainant's contract by two years). Without further evidence, the Organization respectfully requests that the Tribunal disregard this assertion." This argument clearly arises from a confusion between the formal requirements and the substantive requirements of an administrative decision. As the Tribunal said in Judgment 2558, at consideration 4: "Whether a decision is justified or not in substance, whoever takes the decision must in all cases make sure beforehand that he has the power to do so and, if not, refer the matter to the competent authority for a decision. The fact that this requirement was not complied with in the present case is all the more incomprehensible since the decision to be taken concerned the appointment of an official to a managerial post". In the present case, the decision was likely to affect the running of a whole division of the Administration, as the complainant was the Director of the Copyright Infrastructure Division within the Copyright and Creative Industries Sector (CCIS). The Organization has not provided the Tribunal with a formal delegation by the Director General to the Deputy Director of HRMD, which would have entitled her to set the length of the contract extension. Thus, the Tribunal concludes that the 29 February 2016 decision was taken *ultra vires*.

5. The second issue raised by the complainant's first plea is whether the approval of the Coordination Committee was required.

Staff Regulation 4.17(c), in force at the material time, stated:

> "Fixed-term appointments shall be for a period whose length shall be fixed by the Director General with the approval of the Coordination Committee. Any such appointment may be extended for periods whose lengths shall be fixed by the Director General with the approval of the Coordination Committee."

This rule clearly affirms the need for the approval of the Coordination Committee, approval that in the present case was lacking.

The Organization objects that Staff Regulation 4.17(c) was mistakenly drafted in the review of the Staff Regulations and Rules made in 2013. The previous version dated March 2012 read as follows: "Fixed-term appointments under Regulation 4.14(b) shall be for a period whose length shall be fixed by the Director General with the approval of the Coordination Committee. Any such appointment may be extended for periods whose lengths shall be fixed by the Director General with the approval of the Coordination Committee", making a cross-reference to Article 4.14(b), which regarded Deputy Directors General (DDG) and Assistant Directors General (ADG). In the 2013 version, allegedly due to a material error and not to an intentional amendment, the cross-reference to Regulation 4.14(b) was omitted. This cross-reference was again reproduced in the version of the Staff Regulations and Rules in force as of year 2017.

According to the Organization, the rationale of the provision is that the Coordination Committee's approval be requested only for extension of contracts of DDGs and ADGs. It would not be reasonable to expect the Coordination Committee, which meets on an annual basis, to approve each extension. The Organization alleges that no fixed-term contract extensions for staff members of the Professional or Director category were approved by the Committee.

The Tribunal's case law states that, as long as the rules are neither amended nor repealed, the principle *tu patere legem quam ipse fecisti* requires the Organization to apply them (see Judgment 4310, consideration 9).

Therefore, Staff Regulation 4.17(c) had to be applied in the version in force at the material time (2016), version that remained in force for almost four years (from 2013 to 2017), as an international organisation

has a duty to comply with its own internal rules and to conduct its affairs in a way that allows its employees to rely on the fact that these will be followed (see Judgment 3758, consideration 15). As to the interpretation of that Regulation, in its relevant version, it must be recalled that according to the Tribunal's case law the primary rule of interpretation is that words are to be given their obvious and ordinary meaning (see Judgment 1222, consideration 4; see also Judgment 4321, consideration 4). Where the text is clear and unambiguous (as it is in the present case), the Tribunal will apply it without reference to the preparatory work or the supposed intent of the lawmaker. Strict textual interpretation is an essential safeguard of the stability of the position in law and so of the Organisation's efficiency (see Judgment 691, consideration 9).

Consequently, the approval of the Coordination Committee was required.

6. It follows from the foregoing considerations 4 and 5 above, that the 29 February 2016 decision was vitiated, for failure to comply with the above-mentioned rules. As the identified flaws in the 29 February 2016 decision are sufficient to consider it unlawful, there is no need to address the complainant's remaining pleas.

7. Considering the time passed and the change to the approval process made in the interim, the Tribunal does not find it appropriate to order the rescinding of the 29 February 2016 decision. The complainant, in theory, would be entitled to material damages for the loss of opportunity to have his contract extended more than two years. However, considering that on 1 October 2018 the complainant's appointment was terminated for health reasons, the Tribunal finds that the loss of opportunity is not proven, not even for the period from 1 April 2018 to 30 September 2018. Indeed, in this period, the complainant was on sick leave and therefore he received the salary and other benefits which are attached to his post. As a result, the complainant has not suffered any material damage during that period.

8. However, the flaws identified in considerations 4 and 5 above deprived the complainant of his right to have the length of his contract renewal duly considered in accordance with the applicable rules. As the complainant has articulated the injury he has suffered as a result of the identified flaws, he will be awarded moral damages in the amount of 4,000 euros.

9. The complainant is also entitled to costs which the Tribunal sets at 1,000 euros.

10. As to the claim regarding punitive and exemplary damages, the complainant has provided no evidence or analysis to demonstrate that there was bias, ill will, malice, bad faith or other improper purpose on which to base an award of exemplary damages (see, for example, Judgments 3419, consideration 8, and 4286, consideration 19). The claim is therefore unfounded.

DECISION

For the above reasons,

1. WIPO shall pay the complainant moral damages in the amount of 4,000 euros.
2. It shall pay him costs in the amount of 1,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 19 May 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ