

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

107th Session

Judgment No. 2830

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr S. G. G. against the World Intellectual Property Organization (WIPO) on 23 January 2008, then corrected and supplemented by a memorandum on 5 March, the Organization's reply of 26 June, the complainant's rejoinder of 8 October 2008 and WIPO's surrejoinder of 13 January 2009;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. WIPO Staff Regulation 9.1 is entitled "Termination". It reads in pertinent part:

- "(a) (1) The Director General, giving his reasons therefor, may terminate the appointment of a staff member who holds a permanent appointment, if the exigencies of the service require abolition of the post or a reduction in staff [...].
[...]

(4) The Director General may also terminate the appointment of a staff member who holds a permanent [...] appointment, if such action is in the interests of the good administration of the Organization, and provided the action is not contested by the staff member concerned.

[...]

(b) If the exigencies of the service require the abolition of posts or a reduction in staff, and if suitable posts are available in which their services can be effectively used, staff members holding permanent appointments shall be retained in preference to those holding fixed-term appointments.

[...]”

Facts relevant to this case are to be found in Judgments 2698 and 2829 concerning the complainant’s seventh and eighth complaints respectively. Suffice it to recall that, by a decision of 7 March 2006, the complainant was temporarily suspended from duty, with pay, pending the investigation of eight charges of serious misconduct on his part. On 12 October 2006 he was temporarily transferred from the Security Coordination Section to the Conference, Communications and Records Management Division.

The Organization’s lawyer informed the complainant’s lawyer by a letter of 23 February 2007 of the decision to terminate the complainant’s appointment as of 28 February. He explained that this decision had been taken in the wake of a reorganisation of the security services at WIPO and in the interests of the good administration of the Organization, in accordance with Staff Regulation 9.1(a)(1) and (4). He added that “[the complainant’s] position and skills” rendered redeployment in any other post impossible.

The Director of the Human Resources Management Department notified the complainant by a letter of 28 February that his appointment was terminated with immediate effect pursuant to the above-mentioned Staff Regulation 9.1(a)(1), in consequence of the “reorganisation of security functions within the International Bureau and hence in the interests of the good administration of the Organization”. He itemised the sums of money which the complainant would receive on separation from service.

On 19 March the complainant sent a letter to the Director General in which he requested the annulment of the decision to terminate his appointment and reinstatement in his former position, or redeployment in accordance with Staff Regulation 9.1(b). Having received no reply within the following six weeks, the complainant lodged an appeal with the Appeal Board on 4 June. The Board issued its conclusions on 8 October. It recommended that the Director General maintain his decision to terminate the complainant's appointment, since it considered that the Administration had submitted convincing arguments as to why he could no longer be employed in the security services and that he clearly did not have the competence, experience or ability to discharge functions at grade P-3. The Director of the Human Resources Management Department, acting on behalf of the Director General, informed the complainant by a letter of 22 October 2007 that the Director General had decided to adopt the Board's recommendation. He explained that the decision to terminate his appointment was based "solely and exclusively on the exigencies of service" pursuant to Staff Regulation 9.1(a)(1). He added that due consideration had been given to the provisions of paragraph (b) of that regulation and that the Director General was satisfied that no other post was available for which the complainant's services could be effectively used. That is the impugned decision.

B. The complainant submits that the termination of his appointment is wrongful, that it appears to be an "act of pure revenge" and that it springs from a misuse of authority. He adds that this termination, which is ostensibly based on a restructuring/reorganisation of the security services at WIPO, is in fact no more than the culmination of the "rigmarole and harassment" inflicted on him by the Administration since May 2005. He contends that the situation became progressively worse as he tried to assert his rights. In this connection he refers the Tribunal to his written submissions in some of his earlier complaints, mentioning in particular the sole unsatisfactory periodical report on his performance which was drawn up in 2005, as well as his suspension and transfer. He also denounces the fact that in the letter of 23 February 2007 notifying him of the termination of his appointment,

WIPO's lawyer clearly referred to the letter which he, the complainant, had sent to the Director General on 19 February 2007 to request that his suspension, which had begun on 7 March 2006, be annulled in view of its duration.

He submits that WIPO breached Staff Regulation 9.1(b) by not giving consideration to his redeployment and that it flouted the Tribunal's case law by not offering him any post matching his skills, experience and seniority.

The complainant takes the Appeal Board to task for "neglecting its duty of objectivity and impartiality" in that it merely echoed the Administration's submissions. In his opinion, the same argument applies *mutatis mutandis* to the decision of 22 October 2007, since the Director General simply endorsed the main thrust of the Appeal Board's report.

The complainant asks the Tribunal to set aside the decision of 22 October 2007 confirming the termination of his appointment and to order his reinstatement in his former position, or his redeployment. In view of his entitlement to retire at the age of 65 and the step increments he might have received had he been employed until that age, he claims 839,312 Swiss francs in compensation for the injury which he suffered as a result of the wrongful termination of his appointment, from which the sum of 191,625.65 francs, which he has already received, should be deducted. Lastly, he claims 400,000 francs in compensation for the moral injury suffered and he requests that WIPO defray all his procedural costs, including 20,000 francs for his lawyer's fees.

In a supplementary memorandum, the complainant explains that having read Judgments 2697 and 2698 concerning his sixth and seventh complaints respectively, he thought it necessary to clarify certain facts "in accordance with Article 9(6) of the Rules of the Tribunal".

In particular he takes the Appeal Board to task for predicating its recommendation on Staff Regulation 9.1(a)(1) alone, whereas his appointment was terminated under paragraph (a)(4) of that regulation.

He emphasises that the Board ignored the fact that, according to the letter of 23 February 2007, the decision to terminate his appointment was prompted by an alleged reorganisation of the security services which, in his view, constitutes a misuse of authority. He states that a dialogue with all the staff members concerned must be held prior to any reorganisation and that, by excluding him from the reorganisation exercise, WIPO denied him the possibility of defending his interests.

The complainant submits that it is “inadmissible” that the Board chose not to mention his transfer, for it thus gave the Administration licence to terminate his appointment solely on the basis that he was assigned to the security services.

He notes that the Board stated that he did not have the competence or experience to discharge functions at the P-3 level and that he had not provided any evidence to suggest otherwise. He points out that the Director General promoted him to grade P-3 by the “normal” procedure, which takes account of the merits and performance record of the person concerned, and that the only reason given for the termination of his appointment was the alleged reorganisation of the security services.

He considers that the Board, in concluding that termination was the only possible outcome in light of the circumstances of the case, his history and his attitude and that reinstatement would be inappropriate, made its recommendation solely on the basis of a plainly mistaken assessment of his file. He submits that he has always been an “exemplary staff member”, that he was regularly promoted and that his periodical reports were satisfactory.

C. In its reply WIPO draws attention to the fact that issues related to the periodical report of 2005 and the temporary suspension beginning in March 2006 formed the subject of Judgments 2697 and 2698 respectively and should not therefore be raised again. It adds that, in any case, this report and suspension are unconnected with the sweeping changes which were introduced in order to meet WIPO’s rapidly evolving security requirements. Moreover it contends that any

claim concerning the complainant's transfer is irreceivable, for he did not file a complaint with the Tribunal after the internal appeal which he had submitted on this matter had been rejected by the Director General in July 2007.

The Organization asserts that the abolition of the complainant's post, which led to the termination of his appointment, was decided after much careful thought; it took place in the context of a complete review in 2005 and 2006 of security coordination arrangements, in the course of which the Director General set up a Security Coordination Committee and these arrangements were reshaped and professionalised in the Organization's interests. The complainant received a number of documents and took part in a security survey. In accordance with the recommendations made by the Security Coordination Committee, three vacancy announcements were published in July 2006, but the posts in question had to be filled by confirmed specialists.

WIPO was fully aware of its obligations under Staff Regulation 9.1 and tried to find a post matching the complainant's profile. It states that the complainant did not have the qualifications required for any of the three posts advertised and that it was "exceptionally difficult" to redeploy him within the Organization. In this connection it recalls that he had been a driver at WIPO for 23 years and had attended only a few short training courses on security. When he was appointed Head of the Security Coordination Section in 2002 it was unnecessary to have specialist skills, but since then the security profession has become much more demanding. Moreover it emphasises that the complainant did not apply for any of the vacancies announced after October 2006. It adds that the Appeal Board arrived at the "firm and unambiguous" conclusion that the complainant's appointment had been terminated "in full conformity with the applicable procedures" and on appropriate grounds and that it was "fully justified in light of the corresponding evidence".

The Organization notes that the complainant submits that he ought to have been employed until the age of 65. While it acknowledges that this is the age limit applicable to him, it states that this limit does not,

however, apply if a staff member's appointment is terminated owing to the abolition of his/her post, and it stresses that the complainant was not entitled to continue working until the age of 65 once his services were no longer required.

Although WIPO points out that the calculation of the sums due to the complainant upon separation forms the subject of a separate complaint, it explains in detail how it computed them. It considers that the complainant has received proper, full compensation in accordance with the rules in force at the time of the termination of his appointment.

D. In his rejoinder the complainant presses his pleas. He comments that WIPO has not indicated whether the termination of his appointment was based on Staff Regulation 9.1(a)(1) or (4), yet the differences that this choice entails in terms of the grounds for termination and the procedure to be followed are considerable. He maintains that the Administration cannot claim, without committing an abuse of authority, that his termination was justified by the report of the Security Coordination Committee. He notes that on 4 May 2006 the Committee recommended the creation of six posts, three of which would require special skills. He submits that in publishing only three vacancy announcements for specialist posts for which he was not qualified, the Organization used a "cunning manoeuvre" in order to justify the termination of his appointment.

Since the Organization has not disputed the comments and allegations contained in his supplementary memorandum of 5 March 2008, the complainant considers that these must be deemed to have been accepted.

E. In its surrejoinder the Organization argues that the memorandum of 5 March 2008 is irreceivable as it contains no proof that the complainant asked the President of the Tribunal for authorisation to produce a further written statement or document, or that the President ordered the submission thereof. This memorandum is also irreceivable because it deals with the complainant's transfer, and he may not revisit

his refusal to accept this transfer and the validity of this measure through his complaint regarding the termination of his appointment.

WIPO reiterates its arguments. It explains that the letter of 28 February 2007, which constitutes the official notification of the termination of the complainant's appointment, clearly established that this termination rested on Staff Regulation 9.1(a)(1).

It terms as "totally unfounded" the complainant's allegation that it advertised only three posts for which he was not qualified in order to justify the termination of his appointment. WIPO adds that the Security Coordination Committee was not competent to give advice on whether to terminate a staff member's appointment and that it did not therefore recommend termination in the complainant's case.

WIPO denies that it was obliged to enter into a "dialogue" with the complainant about the reorganisation of the security services and it maintains that this reorganisation was carried out in the Organization's interests. It states that, contrary to his submissions, the complainant exercised his right of appeal against the decisions concerning the reorganisation before the Appeal Board and then before the Tribunal.

As for the complainant's assertion that his performance record had been satisfactory, the Organization maintains that this was not always true. It emphasises that during the year in which he carried out duties at P-3 level, it became obvious that he did not have the qualifications or the skills needed for such duties.

CONSIDERATIONS

1. The complainant, who joined WIPO in 1974 as a messenger-chauffeur at grade G3, was appointed Head of the Security Coordination Section on 22 July 2002. He was promoted to grade P-3 on 1 January 2005.

On 12 October 2006 the Director of the Human Resources Management Department informed him in writing of recent developments with regard to security coordination within WIPO. He drew his attention to the fact that the Security Coordination

Committee, which had been established to consolidate the security coordination mechanism and maintain an effective security management system, had recommended a review of the structure and staff of the Security Coordination Section. This review, which had taken place in December 2005, had resulted in the reinforcement and reorganisation of the security functions within the Organization. The complainant was consequently being transferred with immediate effect to the Conference, Communications and Records Management Division.

At the time when he was notified of this decision, the complainant had been suspended from duty, with pay, since 7 March 2006 pending the investigation of charges against him (see Judgments 2698 and 2829, the latter being also delivered this day).

2. On 19 February 2007 the complainant sent a letter to the Director General in which he complained of the duration of this suspension. In response to this letter, the Organization's lawyer informed the complainant's lawyer on 23 February that a decision had been taken to terminate the complainant's appointment as of 28 February. The complainant was notified of this termination by a letter of 28 February 2007, which explained that the decision had been taken "pursuant to Staff Regulation 9.1(a)(1) in consequence of the review and reorganisation of security functions within the International Bureau and hence in the interests of the good administration of the Organization".

3. Having vainly requested a review of this decision, the complainant lodged an appeal against it with the Appeal Board. In its conclusions dated 8 October the Board recommended that the Director General maintain his decision to terminate the complainant's appointment.

The Director of the Human Resources Management Department informed the complainant by letter of 22 October 2007 that the Director General had decided to adopt the Appeal Board's recommendation and to confirm the termination of his appointment.

That letter, which constitutes the decision impugned before the Tribunal, referred to Staff Regulation 9.1(a)(1) and (b).

4. In Judgment 2831, also delivered this day on the complainant's ninth complaint, the Tribunal rejected the Organization's request for joinder of that complaint with his tenth complaint, which forms the subject of the present judgment.

5. The provisions of Staff Regulation 9.1(a)(1) and (b) are reproduced under A, above.

6. The decision to terminate the complainant's appointment rests on Staff Regulation 9.1(a)(1), because the reason proffered by the Organization was the need for a "reorganisation of security functions". However, the complainant submits that this termination was no more than the culmination of the "rigmarole and harassment" inflicted on him by the Administration since May 2005.

(a) An international organisation may find that it has to reorganise some or all of its departments or units. Reorganisation measures may naturally entail the abolition of posts, the creation of new posts or the redeployment of staff (see Judgments 269, 1614, 2510 and 2742). The steps to be taken in this respect are a matter for the Organization's discretion and are subject to only limited review by the Tribunal (see Judgments 1131, under 5, and 2510, under 10).

(b) The Tribunal has consistently held that "there must be objective grounds" for the abolition of any post. It must not serve as a pretext for removing staff regarded as unwanted, since this would constitute an abuse of authority (see Judgment 1231, under 26, and the case law cited therein).

(c) At the beginning of its letter of 12 October 2006 in which it announced the complainant's transfer from the Security Coordination Section, of which he was the Head, the Organization referred to current restructuring operations. Moreover the complainant was not unaware of them, since he had himself participated in some of the groundwork. The Organization's submissions in the current

proceedings and the documentation produced leave no doubt as to the need for the reorganisation measures which were adopted, or as to the complainant's lack of appropriate training for the continued exercise in the Organization's new security system of duties similar to those which he had previously performed.

Thus, it cannot be disputed that the complainant's transfer to another service was justified.

7. Although the complainant was temporarily transferred to the Conference, Communications and Records Management Division, in reality he never occupied the post assigned to him, because he was suspended from duty at the time of the transfer and his suspension ended only upon the termination of his appointment.

From the available evidence, it is not clear to the Tribunal that the reorganisation of the security services implied that the complainant also had to be removed from the post temporarily assigned to him. However, this question need not be settled, since the complaint must be allowed for another reason.

8. (a) When the Organization adopts reorganisation measures entailing the abolition of posts or a reduction in staff, Staff Regulation 9.1(b) requires it to make an objective effort to redeploy staff members holding permanent appointments who are affected by these measures in suitable posts in which their services can be effectively used. Only if this proves impracticable may it have recourse to the *ultima ratio* measure of terminating their appointment (see Judgments 1487, under 8, and 2090, under 7).

(b) The complainant was informed of the termination of his appointment by a letter from the Organization's lawyer. This letter was sent to his lawyer on 23 February 2007, that is four days after he had complained to the Director General about the duration of his suspension. The Tribunal will refrain from commenting on this manner of proceeding.

(c) Nevertheless, it notes that the letter of 28 February 2007 merely indicates that the termination of the complainant's

appointment “[was] in consequence of the review and reorganisation of security functions within the International Bureau” and had therefore been decided “in the interests of the good administration of the Organization”. The letter of 23 February 2007 merely stated that redeployment in another post within WIPO was impossible “in light of the [complainant’s] position and skills”.

The Organization does not provide any specific reason in either of these documents as to why the complainant could not be retained in the post temporarily assigned to him on 12 October 2006, or redeployed. None of the documents in the file pre-dating the complainant’s termination supplies convincing evidence that serious attempts were made to find a job matching his abilities.

(d) It was not until the proceedings before the Appeal Board that the Organization expanded on the reasons why it was impossible to redeploy the complainant. The Appeal Board stated that the complainant did not possess the competence, experience or ability to discharge functions at the P-3 level and that he had not provided any evidence to suggest otherwise. It added that termination was the only possible outcome in light of the particular circumstances of the case and the complainant’s attitude, *inter alia*.

9. This leads the Tribunal to conclude that the rights and guarantees which staff members must enjoy were not respected during attempts to find a possible new job for the complainant. The Tribunal finds that the Organization has not shown that it actually did its utmost to find a post matching the complainant’s qualifications. Furthermore, before simply terminating his appointment, the Organization ought to have ascertained whether he was prepared to accept a post at a lower grade to that which he had previously held (see Judgment 1782, under 11). It was not up to the complainant to prove that he was able to remain in the Organization’s service in some capacity; it was up to the Organization to prove the contrary.

10. In these circumstances, and without there being any need to rule on the receivability of the memorandum of 5 March 2008, the decision of 22 October 2007 confirming the termination of the

complainant's appointment must be set aside and the case must be referred back to WIPO in order that it may take a fresh decision after having examined the various conceivable redeployment possibilities with the complainant. If the complainant's redeployment proves to be objectively impracticable owing to a lack of available posts matching his abilities, the Organization shall determine with him the definitive amount to which he is entitled upon separation from service.

11. Since the complainant succeeds, he shall be awarded 12,000 Swiss francs in compensation under all heads, as well as costs in the amount of 5,000 francs.

DECISION

For the above reasons,

1. The decision of 22 October 2007 confirming the termination of the complainant's appointment is set aside.
2. WIPO shall proceed as indicated under 10, above.
3. It shall pay the complainant 12,000 Swiss francs in compensation under all heads.
4. It shall also pay him costs in the amount of 5,000 francs.

In witness of this judgment, adopted on 7 May 2009, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet