Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

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

**107th Session** **Judgment No. 2831**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr S. G. G. against the World Intellectual Property Organization (WIPO) on 21 January 2008 and corrected on 5 March, the Organization's reply of 13 June, the complainant's rejoinder of 23 September and WIPO's surrejoinder of 20 November 2008;

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. Facts relevant to this case are given in Judgments 2698, 2829 and 2830 concerning the complainant's seventh, eighth and tenth complaints respectively. The complainant, who was born on 24 April 1948, joined WIPO in 1974. Staff Regulation 9.8(d) stipulates that "[s]taff members whose appointment took effect prior to November 1, 1977, shall not be retained in service beyond the age of 65 years".

Suffice it to recall that the Director of the Human Resources Management Department informed the complainant by a letter of

28 February 2007 that a decision had been taken to terminate his appointment with immediate effect in consequence of a "reorganisation of security functions within the International Bureau and hence in the interests of the good administration of the Organization". The complainant would receive a termination indemnity, compensation in lieu of notice, commutation of accrued annual leave and a repatriation grant, amounting to 191,625.65 Swiss francs in total. He was offered special leave without pay from 1 March 2007 until 30 April 2008 in order that he might continue to accumulate pension rights up to the age of 60. In a letter of 12 April the complainant challenged the method of calculating this sum and he asked the Director General to review the final figure bearing in mind the "indemnities [which were] really due [to him] in view of his age and his entitlement to retire at the age of 65, the indemnities for which provision is made in the Staff Regulations and Staff Rules and the terms normally granted to a staff member whose appointment is terminated on account of […] reorganisation in the interests of the Organization". The Director of the Human Resources Management Department provided a detailed breakdown of the calculations in a letter of 23 May in which he endeavoured to show that the complainant's request was unfounded. He pointed out that the sum due as commutation of the annual leave accrued by the complainant had inadvertently been paid twice and should be refunded. As for the calculation of the termination indemnity, the scale applicable as from 1 September 2006 was attached to this letter, but in a letter of 4 June the Director sent the complainant the scale applicable as from 1 January 2007, which was the one which the Organization claimed to have used.

The complainant lodged an appeal with the Appeal Board on 27 August, asking it to quash the decision of 28 February with regard to the calculation of the amount due to him upon separation from service and to order the Administration to recalculate this sum. He also claimed 40,000 Swiss francs in compensation for moral injury and costs in the amount of 20,000 francs. The complainant was informed by letter of 17 September that the Board would not examine the merits of his appeal, because it had not been submitted within

the three-month time limit laid down in Staff Rule 11.1.1(b)(2). On 25 September the complainant asked the Board to reconsider its position. He explained that the three-month period should run as from the date on which he had received the decision of 23 May 2007, "in other words from 25 May 2007, since he was notified of the decision on 24 May 2007". As that period ended on 25 August, which fell during a weekend, the deadline should be extended until the next working day, i.e. 27 August 2007. Moreover, he contended that the period should in fact run as from the date on which he had received the corrective letter of 4 June 2007. However, the Appeal Board maintained its decision not to examine the merits of the complainant's appeal, because it considered that, since it had been established that the complainant had received the decision of 23 May on 24 May, his appeal ought to have been submitted by 24 August at the latest. It added that the nature of the corrective letter of 4 June was not such as to set off a new time limit. The Director of the Human Resources Management Department, acting on behalf of the Director General, advised the complainant by letter of 18 October 2007 that his appeal had been dismissed as irreceivable. That is the impugned decision.

B. The complainant submits that the Director General committed a misuse of authority by deeming his appeal to be irreceivable. He emphasises that the sole reason given for the Appeal Board's decision was that his appeal had been submitted out of time. In his opinion, the three-month period ran as from 25 May 2007, in other words as from the day after that on which he had received notification of the decision of 23 May and, since it expired during a weekend, the deadline should have been extended until Monday, 27 August 2007. He further submits that, by supplementing the decision of 23 May with a corrective letter of 4 June, the Organization prolonged the period in question accordingly.

On the merits the complainant contends that the Organization's calculations are wrong. He alleges that WIPO refused to admit that, having been recruited before 1 November 1977, he was entitled to retire at the age of 65, by which time he would have been able to gain additional salary steps. He considers that the termination of his

appointment constitutes early retirement without compensation, which has resulted in a loss of earnings of some 300,000 francs. He further submits that he has suffered losses in terms of his pension.

Moreover, the complainant holds that it is "usual practice" for a permanent staff member whose appointment has been terminated as a result of restructuring to receive a termination indemnity equivalent to 24 months' salary. He also considers that he is entitled to commutation of at least 60 days of leave pursuant to Staff Regulation 9.12(a) and (c) and to payment of his travel and removal expenses under Staff Regulation 7.1 and Staff Rule 7.1.25.

The complainant asks the Tribunal to set aside the decision of 18 October 2007. He also requests an award of at least 809,718 francs for wrongful termination or, alternatively, referral of the case back to the Director General. Lastly he claims costs in the amount of 40,000 francs.

C. In its reply WIPO asks the Tribunal to order the joinder of the instant complaint with the complainant's tenth complaint – in which he challenges the termination of his appointment – in view of the direct link between them.

It submits that since the complainant was notified of the decision of 23 May 2007 on 24 May, a fact which he himself admitted in his internal appeal, the three-month period for lodging that appeal expired on Friday, 24 August. The Appeal Board therefore rightly held that the complainant's appeal lodged on 27 August was irreceivable. WIPO infers from this that the present complaint must likewise be deemed irreceivable inasmuch as the complainant has failed to exhaust the internal remedies. It emphasises that the letter of 4 June 2007 was a mere formality in that it corrected an attachment containing information which was common knowledge and which had no bearing on the merits of the case. It observes that if this kind of letter were to be taken as a starting point for calculating the time limit for submitting an appeal, organisations would be reluctant to contact a staff member after the transmission of a decision.

WIPO replies subsidiarily on the merits. It contends that the complainant has produced no evidence whatsoever as to the existence of a "usual practice" of granting 24 months' salary in the event of termination of an appointment and adds that no such practice exists. It states that it calculated the amount of the termination indemnity by applying the relevant provisions of the Staff Regulations, more specifically Staff Regulation 9.6. It explains that this indemnity is calculated on the basis of a staff member's salary on his/her last day of work and that the Staff Regulations and Staff Rules make no provision for any increase in this amount to take account of step increments which might have been granted had the person concerned remained in the Organization's service.

WIPO points out that under Rule 9 of the WIPO (Closed) Pension Fund a staff member must have reached the age of 60 before he/she stops working in order to be eligible for a retirement pension. It says that it offered the complainant the option of taking special leave without pay until he reached the age of 60 in order that he might preserve his pension rights, but emphasises that he expressly declined this offer. WIPO considers that the issue of paying the difference between the pension drawn by the complainant and the full salary he would have received had he continued to work until the age of 65 should be examined in the context of his tenth complaint.

The Organization is of the opinion that the complainant's request that he be granted commutation of 60 days' accrued annual leave must be rejected for two reasons. First, the Staff Regulations provide that, in lieu thereof, staff members receive an amount equal to their salary for the period of accrued annual leave, up to a maximum of 60 working days; the complainant had accrued only 13.5 days of annual leave. Secondly, it draws attention to the fact that under Staff Regulation 9.12(c) the complainant would be entitled to a more generous payment in lieu of leave if the provisions in force on 31 October 1977 were more favourable than those which are currently applicable. However, it asserts that the provisions applicable in 1977, which it annexes to its reply, were not more favourable.

With regard to the payment of travel and removal expenses, WIPO underlines that the complainant has not submitted any request for payment or produced any evidence that expenses have actually been incurred, as required by the Staff Regulations.

D. In his rejoinder the complainant maintains his claims and his position on receivability. He says that he sees no point in a joinder of his ninth and tenth complaints.

E. In its surrejoinder WIPO reiterates its position.

## CONSIDERATIONS

1. In Judgment 2830, also delivered this day, the Tribunal set aside the decision of 22 October 2007 confirming the termination of the complainant's appointment and referred the case back to WIPO in order that the Organization may take a fresh decision after having examined the various conceivable redeployment possibilities with the complainant. The Tribunal added that if redeployment of the complainant proved to be objectively impracticable owing to a lack of available posts matching his abilities, the Organization should determine with him the definitive amount to which he was entitled upon separation from service.

2. The method of calculating this amount, a breakdown of which is contained in the termination decision of 28 February 2007, was challenged by the complainant, who requested on 12 April that it be reviewed. This request did not meet with a favourable response; the complainant was informed of this by a letter of 23 May, which was supplemented by a corrective letter sent on 4 June. The internal appeal which the complainant lodged on 27 August was rejected on 18 October 2007 on the grounds that it was time-barred.

3. In reality the internal appeal was filed within the three-month period laid down by the Staff Regulations. The complainant received the decision of 23 May 2007 on 24 May 2007. The period for lodging

an appeal began to run on the next day, i.e. 25 May 2007. It expired on 25 August 2007 which, being a Saturday, was not a working day at WIPO. The time limit for submitting an appeal was therefore extended until the next working day, in other words Monday, 27 August 2007, the date on which the internal appeal was filed.

It follows that the decision of 18 October 2007 that the internal appeal lodged by the complainant was irreceivable must be set aside.

4. Since the complainant succeeds, he shall be awarded 5,000 Swiss francs in compensation for the injury which he has suffered, as well as costs in the amount of 3,000 francs.

5. In view of the nature of the issues raised by the complainant's ninth and tenth complaints, the Tribunal has considered that there was no reason to grant the Organization's request for joinder.

## DECISION

For the above reasons,

1. The decision of 18 October 2007 that the complainant's internal appeal was irreceivable is set aside.
2. WIPO shall pay the complainant 5,000 Swiss francs in compensation for the injury which he has suffered.
3. It shall also pay him costs in the amount of 3,000 francs.
4. All other claims are dismissed.

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