P.

v.

WTO

126th Session **Judgment No. 4022**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. P. against the World Trade Organization (WTO) on 22 December 2015 and corrected on 30 March 2016, the WTO's reply of 25 July, the complainant's rejoinder of 31 October, the WTO's surrejoinder of 5 December 2016, the complainant's additional submissions of 28 August 2017, the WTO's comments thereon of 18 and 26 September 2017 and the complainant's final submissions of 12 January 2018;

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

Having examined the written submissions;

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

The complainant challenges the WTO's decision to grant him local recruitment status upon joining the Organization.

The complainant, a national of the United States of America, joined the WTO in May 2014 under a fixed-term contract which designated him as locally recruited. At the time of his recruitment, he held a Swiss residence permit (C permit) and was living with his family in Geneva where he worked as a Geneva-based foreign correspondent of a news agency with headquarters in the United States. In that capacity, he was an accredited journalist to the United Nations Office in Geneva.

Upon receiving the offer of appointment, the complainant expressed his disagreement with the designation of his recruitment status as local, but he nevertheless signed it after being assured that he could appeal the relevant decision. On 20 June 2014 he submitted a request for review of his recruitment status and asked to be treated as internationally recruited. That request was rejected by a memorandum of 8 July 2014 and on 1 August 2014 he filed an appeal with the Joint Appeals Board (JAB) against the decision contained in that memorandum. Between September 2014 and January 2015 the proceedings before the JAB were suspended while the parties engaged in a mediation process which, nevertheless, did not have a positive outcome.

The JAB submitted its report to the Director-General on 19 June 2015. It considered that the decision contained in the 8 July memorandum reflected an overly narrow interpretation of Staff Rule 103.1(a), which stipulates that "[s]taff members shall be considered as locally recruited if at the time of recruitment they are resident within a radius of 75 km from the Pont du Mont-Blanc in Geneva regardless of the duration of that residence, except that staff members who are transferred, seconded or loaned from an intergovernmental organization in Geneva and who had been internationally recruited to that organization shall retain that status". The JAB recommended that the Administration review the complainant's recruitment status using an interpretation that focused on whether the area specified in Staff Rule 103.1(a), i.e. "a radius of 75 km from the Pont du Mont-Blanc in Geneva", was the complainant's "effective or intended home".

On 23 July 2015 the complainant was informed of the Director-General's final decision to endorse the JAB's recommendation and to instruct the Human Resources Division (HRD) to review anew his recruitment status. By a memorandum of 25 September 2015, the Director of HRD informed the complainant that pursuant to HRD's new determination, which formed part of the Director-General's final decision on his recruitment status, he was resident within a radius of 75 km from the *Pont du Mont-Blanc* in Geneva at the time of his

recruitment and had therefore properly been designated as locally recruited. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision designating him as locally recruited and to make a new determination of his recruitment status, so as to recognise him as internationally recruited with full retroactive effect from the date of his recruitment in May 2014. He also asks the Tribunal to consider the "precariousness test" applied by the WTO in determining recruitment status invalid, and to conclude that his status was erroneously determined as local on the basis of that test and that his factual and legal situation is similar to that of staff members whose status has been considered international. He claims compensation for all home leave and education grants that he would have received had he been considered internationally recruited in May 2014, as well as interest on all amounts awarded to him at the rate of 5 per cent per annum from May 2014 through the date that all such amounts are paid in full. He also claims costs and such other relief as the Tribunal deems equitable, fair and necessary.

The WTO asks the Tribunal to dismiss all of the complainant's claims as unfounded.

CONSIDERATIONS

1. The complainant applies for an oral hearing under Article 12, paragraph 1, of the Rules of the Tribunal. The Tribunal notes, however, that the JAB elicited relevant evidence from the parties, by way of specific questions, to which they responded. They were also given an opportunity to comment on each other's response. Moreover, in view of the abundant and sufficiently clear submissions and evidence which the parties have provided, the Tribunal considers that it is fully informed about the case and does not deem it necessary to hold an oral hearing. The application for a hearing is therefore dismissed.

2. The complainant, who was employed with a foreign news agency and was based in Geneva from 1998, was designated as a locally recruited staff member when he was recruited by the WTO in 2014 on

a fixed-term contract. He objected to that designation from the outset insisting that he should have been designated as internationally recruited. He challenges the impugned decision, dated 25 September 2015, which informed him that pursuant to HRD's new determination, which formed part of the Director-General's final decision on his recruitment status, he was at the time of his recruitment "resident within a radius of 75 km from the Pont du Mont-Blanc in Geneva" and had thus properly been designated as locally recruited pursuant to Staff Rule 103.1(a). He complains that that decision is unlawful on two main grounds. One is that it was based on a wrong interpretation of Staff Rule 103.1(a). The second ground is that the decision violated the principle of equality of treatment and constituted an abuse of authority, subjecting him to unequal treatment compared to five other persons who were designated as internationally recruited.

3. The question whether the decision to designate the complainant as locally recruited was wrong and he should have been designated as internationally recruited is to be determined by reference to Staff Rule 103.1, which states as follows:

> "*Recruitment*
>
> *Local recruitment*
>
> (a) Staff members shall be considered as locally recruited if at the time of recruitment they are resident within a radius of 75 km from the Pont du Mont-Blanc in Geneva regardless of the duration of that residence, except that staff members who are transferred, seconded or loaned from an intergovernmental organization in Geneva and who had been internationally recruited to that organization shall retain that status.
>
> *International recruitment*
>
> (b) Staff members who are resident outside a radius of 75 km from the Pont du Mont-Blanc in Geneva at the time of recruitment shall be considered as internationally recruited."

It is noteworthy that although Staff Rule 104.7(a) states that, unless there are compelling reasons to make an exception, a staff member's home shall be deemed to be in the country of which she or he is a national at the time of appointment, and that the location of the home within the staff member's home country shall be the place with which the staff member has the closest residential or family ties, Staff Rule 104.7(b)

states that notwithstanding that rule, the home of locally recruited staff members, as defined in Staff Rule 103.1(a), shall be deemed to be Geneva.

4. The complainant contends that the decision to designate him as locally recruited was unlawful, as it violated the applicable rules and general principles of law. His submissions may be summarized as follows: Staff Rule 103.1(a) is ambiguous and there is no established practice concerning its application. There is no clear definition of the term "resident" in the rule, nor are there any criteria established for interpreting it. The WTO should not only rely on objective criteria to determine whether a new staff member is locally recruited. It should also rely on subjective criteria, such as whether the staff member considers herself or himself integrated locally or would immediately leave Switzerland on separation from the office to which recruited. "Residence" should be understood as "domicile" or "permanent abode". In any of these cases, he would not be considered a resident, as his circumstances would show that at the time of his appointment he was only present in Geneva for his work and he had no intention of making Geneva his permanent home: he always intended to return to the United States. The WTO was wrong to apply the so-called "precariousness test" to determine the status of newly recruited staff, as this was not a condition specified in Staff Rule 103.1. He was not aware of the existence of that test before he signed his contract. The Administration's claim to the contrary is untrue. When his status was determined he was not provided with any information on the "established practice" of applying the "precariousness test" or how he should have understood it. Even his supervisors were not aware of its existence. In any event, the test is unlawful; was applied arbitrarily; imposes conditions not stipulated in Staff Rule 103.1; and was rejected by the JAB as the sole methodology for determining residence. The JAB proposed the "effective home" test, but the WTO has used the "precariousness test" to support its own interpretation of Staff Rule 103.1, contrary to the plain meaning of that provision.

5. The complainant is mistaken. "[R]esident" in Staff Rule 103.1(a) means simple residence. There is nothing in the provision

which shows that this is to be equated with "domicile", "permanent abode", whether the staff member considers herself or himself integrated locally, or would immediately leave Switzerland on leaving the employment to which recruited. A staff member is "resident", and thus "locally recruited" under Staff Rule 103.1(a), if at the time of recruitment she or he is actually resident, or effectively lives, at an address within the stated distance. Staff Rule 103.1(a) is clear and unambiguous and therefore its terms are to be given their obvious and ordinary meaning (see Judgment 3742, consideration 4). These terms provide that a person is locally recruited, if at the time of recruitment she or he resided at a place within 75 km from the *Pont du Mont-Blanc* in Geneva, regardless of the duration of that residence, unless she or he fell into the stated exceptions. The complainant did not fall within any of the stated exceptions and had resided and worked in Geneva for some sixteen years prior to being recruited. While in his Personal History Form he gave a United States address as his permanent address, he also gave his home address in Geneva as his present address. This signified that at the time of his recruitment he resided within the area identified in Staff Rule 103.1(a), which rendered him locally recruited.

It did not matter, as the complainant suggests, that although he "lived in Geneva for some time, he never applied for Swiss nationality". This is in fact an admission that he was resident within the given area that rendered him locally recruited under Staff Rule 103.1(a). Neither did it matter, as the complainant further suggests, that he did not request the C permit which he held; owned no property in Switzerland; had worked with a company which was not subject to Swiss law; had always been paid by that company through his bank account in the United States (US), which he continued to maintain; possessed US credit cards; contributed to a pension account only in the US and participated in its social security scheme for retirement there only; continued to vote in US elections and to file US income tax declarations, which US law obliges him to do as a citizen; sends his children to summer school in the US and spends his annual summer holidays there with his family. Consequently, the first ground of the complaint is unfounded.

6. With respect to the second ground, namely that the decision subjected him to unequal treatment and was therefore an abuse of authority, the Tribunal notes that in Judgment 2313, consideration 5, it is stated as follows:

> "The principle of equality requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently. In most cases involving allegations of unequal treatment, the critical question is whether there is a relevant difference warranting the different treatment involved. Even where there is a relevant difference, different treatment may breach the principle of equality if the different treatment is not appropriate and adapted to that difference."

7. The complainant asserts that there were five other staff members who, despite being in the same situation that he was in when he was recruited, received a different determination of their recruitment status in 2013: they were designated as internationally recruited. However, the complainant himself indicates that these five persons were foreign diplomats who were working in Geneva when they were recruited by the WTO. He was not. He held a Swiss residence permit (C permit) when he was recruited, while they did not. The WTO submits that the five persons were not in the same situation as the complainant. According to the WTO, the five persons were appointed directly by the Director-General. They held documents issued by the Swiss Federal Department of Foreign Affairs related to their status as diplomats posted by their countries to Switzerland, which are normally issued for the duration of a diplomatic posting, and such documents had to be returned to the Swiss authorities at the end of their postings. In that event, they had either to return to their own countries or to apply for a residence permit to remain in Switzerland. The complainant's C permit allowed him to reside, work, find new employment and receive social security benefits in Switzerland. The WTO states that, moreover, two of the five persons had already returned to their home countries when they were recruited by the WTO, as their posting had ended, and the other three were about to leave Switzerland.

8. The five persons were not in the same situation in fact and in law as the complainant. It is therefore determined that the complainant's

contention that the decision to designate him as locally recruited was unlawful because it subjected him to unequal treatment is unfounded. Accordingly, the second ground of the complaint is also unfounded. Inasmuch as it has been determined that the complainant was correctly designated as locally recruited under Staff Rule 103.1(a) and there was no violation of the principle of equal treatment, the complaint is unfounded and will be dismissed.

9. In the premises, the complainant's request that the WTO disclose the report on the internal study showing that the financial impact of granting international status to all non-Swiss professionals was insignificant for the WTO will not be granted. The complainant has neither established an arguable case of discrimination (see Judgment 2637, consideration 17) nor has he shown the relevance of that report for the issues which arise in the present complaint. For the same reasons, his further request that the WTO provide a complete list of all staff members whose status upon recruitment has been determined as international since 2010 will also not be granted.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ