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

U.-H. (No. 9)

v.

WIPO

128th Session **Judgment No. 4160**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr F. U.-H. against the World Intellectual Property Organization (WIPO) on 17 September 2015, containing an application for the fast-track procedure, and WIPO's letter of 5 November 2015 informing the Registrar of the Tribunal that it rejected the complainant's application;

Considering the complainant's complaint corrected on 7 December 2015, WIPO's reply of 22 September 2016, the complainant's rejoinder of 28 February 2017 and WIPO's surrejoinder of 22 August 2017;

Considering the documents submitted by the complainant on 29 April 2019;

Considering the applications to intervene filed on 19 February 2019 by Mr A. A., Mr P. A., Ms V. B., Mr M. N. B. M., Mr N.-E. B., Ms C. B., Ms L. B., Ms S. C., Ms I. C., Mr M. C., Mr A. D., Mr D. G., Mr A. H., Mr R. H. J., Mr A. L., Mr S. L., Mr D. L., Ms M. M., Ms A. O. M., Mr L. A. P. R., Ms N. S., Mr A. S., Ms S. S., Mr M. T., Mr P. T. S., Mr A. T. and Mr N. W., on 20 February by Ms M. I., Ms S. N. G. and Ms G. P., and on 21 February by Ms W. A., and also WIPO's comments of 2 April 2019 thereon;

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 seeks a redefinition of his employment relationship.

The complainant joined WIPO in 2002 on a short-term contract, which was renewed several times. In November 2012 he was granted a temporary appointment*, which was extended until 31 March 2014.

In the meantime, on 25 November 2013, relying in particular on Judgments 3090 and 3225 delivered in public on 8 February 2012 and 4 July 2013 respectively, in which the Tribunal held that WIPO had misused short-term contracts and ordered it to redress the injury suffered by the complainants in those cases, the complainant in the present case and 36 other individuals employed under precarious contracts requested the Director General, through their representative, to redefine their employment relationships, to draw all legal consequences therefrom and to award them moral damages. These requests were rejected on 24 January 2014. On 21 March the complainant and most of the above-mentioned persons submitted requests for review of this decision, which were rejected on 21 May.

Having been selected further to a competition, the complainant was given a one-year fixed-term contract from 1 April 2014, which was subsequently renewed. Since the complainant considered that the award of this contract only partially regularized his contractual situation, he signed his appointment letter (dated 26 March) on 28 March, "reserving all [his] rights in relation to the proceedings under way concerning the implications of Judgment 3225 [...] and the subsequent reconstitution of [his] career"*. He was exempted from the requirement to file a request for review of the decision of 26 March.

On 19 August the complainant lodged an appeal with the Appeal Board to seek the setting aside of the decisions of 26 March and 21 May,

* The category of temporary appointments, which are concluded for a period of one to 12 months with the possibility of extension, was created in January 2012.

* Registry's translation.

the redefinition of his employment relationship, the reconstitution of his career, compensation for moral and material injury, and an award of costs. In its conclusions dated 10 July 2015, the Appeal Board considered that since the complainant, like the complainant in the case leading to Judgment 3225, had not yet been granted a fixed-term contract when he had first requested the redefinition of his employment relationship, his appeal was not out of time with respect to his claim for the reconstitution of his career on the basis of Judgment 3225. However, considering that the complainant, after obtaining such a contract, was no longer in the same situation as the complainant in the above-mentioned case at the time of filing his internal appeal, the Appeal Board unanimously recommended that the appeal be dismissed. By a letter of 8 September 2015, which constitutes the impugned decision, the complainant was informed that the Director General had decided to adopt this recommendation.

The complainant requests the Tribunal to set aside the impugned decision and to order WIPO to redefine his employment relationship and draw all legal consequences therefrom. In addition, he claims compensation for all material and moral injury suffered and an award of costs for the internal appeal proceedings and the proceedings before the Tribunal. In his rejoinder, he requests the Tribunal to order the deduction from the various monetary awards made to him of an amount corresponding to the fees and taxes which he has undertaken to pay to his counsel, and to order that this amount be paid directly to his counsel.

WIPO submits that the complaint is irreceivable *ratione temporis*, *ratione materiae* and for failure to exhaust internal means of redress. It adds that certain claims are also irreceivable because they were submitted out of time. Subsidiarily, WIPO requests the Tribunal to dismiss the complaint as unfounded. In its comments concerning the applications to intervene, WIPO requests the Tribunal to order the interveners to pay it damages for “clear abuse of procedure”[*].

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[*] Registry’s translation.

CONSIDERATIONS

1. The complainant, who was employed by WIPO from July 2002 to November 2012 – in other words, for more than ten years – under a short-term contract which was renewed several times, was granted a temporary appointment from 16 November 2012 and then a fixed-term contract from 1 April 2014.

Having requested a redefinition of the employment relationship which he had had with the Organization since he was recruited, he impugns before the Tribunal the decision of 8 September 2015 whereby the Director General dismissed his appeal against the decision of 21 May 2014 confirming, upon review, the rejection of this request and against the decision of 26 March 2014 awarding him the above-mentioned fixed-term contract, inasmuch as the latter decision did not grant him the requested redefinition.

2. Thirty-one applications to intervene were submitted by WIPO employees or former employees who, having themselves filed appeals requesting the redefinition of their employment relationship (which were remitted to the Appeal Board by Judgment 3943, delivered in public on 24 January 2018), consider themselves to be in a similar situation in fact and in law as the complainant.

3. The origin of this complaint lies in the practice which became widespread at WIPO – and indeed in other international organizations, in similar forms – during the 1990s and early 2000s, consisting of employing some of the staff under short-term contracts which were renewed several times. One of the consequences of this practice, which was boosted by the large expansion in WIPO's activities at a time when the Organization was not in a position to incorporate all the posts corresponding to its needs in its ordinary budget, was that the employees concerned, commonly referred to as "long-serving temporary employees", often pursued a career within the Organization for many years without acquiring the status of staff members or enjoying the related benefits.

4. In Judgment 3090, delivered in public on 8 February 2012, an enlarged panel of judges found that the long succession of short-term contracts given to the complainant in that case had given rise to a legal relationship between the complainant and WIPO which was equivalent to that on which permanent officials of an international organization may rely. It therefore held that WIPO, in considering that the complainant belonged to the category of temporary employees, had failed to recognize the real nature of its legal relationship with her and that, in so doing, WIPO had committed an error of law and had misused the rules governing short-term contracts.

In Judgment 3225, delivered in public on 4 July 2013, which dealt with a similar case, the Tribunal confirmed this precedent by taking to its logical conclusion, as far as compensation for material injury was concerned, the notion of redefinition of the contractual relationship underlying such injury. On this basis it ordered WIPO to pay damages to the complainant in this second case corresponding to the loss of remuneration and other financial benefits resulting from the fact that the complainant had not been regarded, during her career, as holding a fixed-term appointment.

It is the claim to have this case law applied to his own situation which forms the primary basis for the complainant's claims in the present case.

5. However, the file shows that, prior to those judgments, WIPO had already initiated a process to regularize the contractual situation of long-serving temporary employees. In creating many additional budget posts for this purpose, the Organization thus adopted a reform enabling the recruitment of staff members on temporary appointments, in accordance with a recommendation of the International Civil Service Commission (ICSC).

Pursuant to a revision of the Staff Regulations which came into force on 1 January 2012, amending Regulation 4.14 (on types of appointment) in this regard, a Regulation 4.14*bis* (subsequently Regulation 4.16) was incorporated into the Staff Regulations in order to establish legal provisions governing the above-mentioned temporary

appointments, which were for a maximum period of 12 months but could be extended several times up to a limit originally set at five years.

Pursuant to Regulation 4.14*bis*, the rules governing this new type of appointment were set forth in Office Instruction No. 53/2012 (Corr.) of 5 November 2012 and its related annexes.

6. Under this reform, the holders of temporary appointments were given the status of WIPO staff members, which had not been the case previously for persons on short-term contracts. Thus, although they were entitled to only some of the allowances and benefits granted to other staff members, they otherwise enjoyed the rights recognized by the WIPO Staff Regulations and Rules, which enabled them, for example, to make use of the ordinary internal means of redress provided therein.

Pursuant to Regulation 4.14*bis*(f), "special transitional measures", defined in Annex II to the Office Instruction of 5 November 2012, were established for persons previously holding short-term contracts with five or more years of continuous service on 1 January 2012 (as was the case for the complainant). In particular, it was stipulated in this respect that the above-mentioned five-year maximum period fixed for temporary appointments would not be applicable to them.

In view of the regularization of the complainant's contractual situation resulting from this new legal framework, the present complaint must be regarded as being essentially concerned with the possible redefinition of the complainant's employment relationship with WIPO during the period when he was previously employed under short-term contracts.

7. WIPO contends that the Tribunal has no jurisdiction to hear this case, since the complaint seeks to challenge WIPO's general policy in the past regarding the employment of its staff. In this regard, it relies in particular on Judgment 3345, in which the Tribunal had for this reason dismissed complaints filed by members of the Staff Council (including the complainant himself) in order to challenge the Organization's use, prior to the above-mentioned reform, of inappropriately extended short-

term contracts and to demand an improvement in the rights granted to long-serving temporary employees.

This challenge to the Tribunal's jurisdiction is irrelevant. Indeed, in the present case, the complaint does not seek to challenge WIPO's general policy in the matter but the application of this policy to the complainant's particular case and, since it is based on the terms of the complainant's employment contract or the rules and regulations governing the staff of the Organization, it clearly comes within the Tribunal's jurisdiction, as defined in Article II, paragraph 5, of its Statute. Moreover, the Tribunal observes that it considered itself competent to rule on the cases which resulted in above-mentioned Judgments 3090 and 3225, which, from this point of view, were presented in an identical manner.

8. However, WIPO is right in contending – contrary to the view of the Appeal Board – that the complaint is irreceivable because the internal appeal filed by the complainant was time-barred.

Indeed, it is clear that the complainant did not challenge, within the eight-week period available to him for this purpose under Staff Rule 11.1.1(b)(1), in the version applicable at the time, the decision of 16 November 2012 whereby he was granted the temporary appointment which he held from that date. Moreover, examination of that contract shows that the complainant signed it on 22 November 2012, explicitly stating that he "accept[ed] without reservation the temporary appointment offered to [him]"[*]. Although he has submitted to the Tribunal a memorandum dated 28 November 2012 and another dated 6 December 2012, cancelling the previous one, in which he formulated reservations regarding this contract, these reservations cannot be recognized as having any legal effect since they contradicted the undertaking given by the complainant, when signing the above-mentioned contract, not to formulate such reservations.

In view of the modification of the legal relationship between the parties resulting from the grant of this contract, which was of a fundamentally different nature from the short-term contracts which had preceded it, and given that the conclusion of this contract also

[*] Registry's translation.

regularized the complainant's contractual situation, the absence of any challenge to the above-mentioned decision of 16 November 2012 within the time limit for filing an appeal necessarily bars the complainant from requesting the redefinition of his previous employment relationship (see, in particular, Judgment 2415, consideration 4, for a comparable situation).

In this regard, the complainant's situation in law and in fact differs radically from that of the complainants in the cases leading to Judgments 3090 and 3225, since they were still employees under short-term contracts at the time that they requested the redefinition of their employment relationships.

Moreover, the challenge to the above-mentioned decision of 26 March 2014, whereby the complainant was subsequently granted a fixed-term contract, clearly could not have the effect of reopening the time limit for appealing against the decision of 16 November 2012.

9. As the Tribunal has repeatedly stated, time limits are an objective matter of fact and it should not rule on the lawfulness of a decision which has become final, because any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties' legal relations, which is the very justification for a time bar (see, for example, Judgment 3406, consideration 12, and the case law cited therein).

10. In an attempt to show that his claim is receivable, the complainant submits that he was misled by WIPO regarding the nature of his previous employment relationship and, subsequently, regarding the possibility of using ordinary internal means of redress, to which employees on short-term contracts did not have access.

It is true that the Tribunal's case law shows that where an organization engages in conduct of this sort, a challenge may not be time-barred (see, for example, Judgments 2821, consideration 9, or 3002, consideration 16). However, although the finding that WIPO misused short-term contracts in the past might have resulted in this case law being applied to the award of such contracts, this argument is of no avail here since it is the fact that the appeal against the decision of

16 November 2012 granting the complainant a temporary appointment is time-barred which obstructs the complainant's claims and since the latter clearly cannot be considered to have been unduly deprived of the possibility of challenging this decision in due time.

11. Nor does the complainant have grounds for submitting that "the gravity of the irregularity which is the subject of the complaint"* and "WIPO's deceitful attitude"* preclude the application in this case of the time limit for filing an appeal.

Under the Tribunal's case law, it is true that a decision or a contract can be regarded as legally non-existent and hence open to appeal without any time limit in certain extreme cases where such a decision or contract contains particularly serious flaws (see in particular Judgments 676, consideration 6, and 1757, consideration 3(d)). But this case law, which, moreover, cannot be applied to the short-term contracts at issue in the present case, cannot a fortiori reasonably be relied on with respect to the challenge to the decision of 16 November 2012.

12. Lastly, the complainant contends that the above-mentioned Judgments 3090 and 3225 constitute a new fact such as to reopen the applicable time limit for filing an appeal.

It is true that the Tribunal's case law allows a staff member concerned by an administrative decision which has become final to ask the administration for review either when some new and unforeseeable fact of decisive importance has occurred since the decision was taken, or else when the staff member is relying on facts or evidence of decisive importance of which she or he was not and could not have been aware before the decision was taken (see above-mentioned Judgment 676, consideration 1, Judgment 2203, consideration 7, or Judgment 2722, consideration 4). However, according to the Tribunal's established case law, the fact that, after the expiry of the time limit for appealing against a decision, the Tribunal has rendered a judgment on the lawfulness of a

* Registry's translation.

similar decision in another case, does not come within the scope of these exceptions (see, for example, Judgment 3002, consideration 14).

In particular, it cannot be considered in the present case that the delivery of Judgments 3090 and 3225 constitutes a new and unforeseeable fact of decisive importance within the meaning of this case law. The Tribunal may well have allowed, in the above-mentioned Judgment 676, relied on by the complainant, that the delivery of one of its judgments could be described in this way and hence have the effect of reopening the time limit for the filing of an appeal to the Tribunal by a staff member. But this concerned a very specific situation in which the Tribunal had, through the previous judgments to which it referred in the case concerned, formulated a rule which substantially affected the situation of certain staff members of an organization and which, although it was already applied by the latter, had not yet been published or communicated to the complainants. No exceptional particular feature of this kind is to be found in the present case, where the censure by Judgments 3090 and 3225 of WIPO's misuse of short-term contracts – which, incidentally, corroborates the complainant's own criticisms regarding this matter – cannot be regarded as being unforeseeable in nature.

In addition, the Tribunal observes that Judgment 3090 predates the decision of 16 November 2012 and that, as stated above, Judgment 3225 merely applies that case law, so the delivery of these judgments cannot be considered to constitute a new circumstance with respect to the right of appeal against this decision.

13. In accordance with the Tribunal's case law and pursuant to the provisions of Article VII, paragraph 1, of its Statute, the fact that the appeal lodged by the complainant was out of time renders his complaint irreceivable for failure to exhaust the internal means of redress offered to staff members of the Organization, which cannot be deemed to have been exhausted unless recourse has been had to them in compliance with the formal requirements and within the prescribed time limit (see, for example, Judgment 2888, consideration 9, and Judgments 2010, 2326 and 2708 referred to therein).

14. It follows from the foregoing that the complaint must be dismissed in its entirety, without there being any need to rule on the other objections to receivability raised by WIPO.

15. As a result of the dismissal of the complaint, the applications to intervene – which, moreover, face other legal obstacles – must also be dismissed.

In this regard, the Tribunal notes in particular that, since, as stated above, the interveners availed themselves of the internal remedies at their disposal against decisions concerning their own situation, they are not entitled to intervene in the present case (see, for example, Judgment 2236, consideration 13).

16. On the basis of this last consideration, WIPO requests, as a counterclaim, that the interveners be ordered to pay it damages for "clear abuse of procedure"*.

Without excluding on principle the possibility of issuing an order of this type against interveners in proceedings, the Tribunal will not accept WIPO's claim in this case. While the filing of these applications to intervene, which were bound to be dismissed, just before the case was included on the list for the session is surprising, this unfortunate procedural initiative cannot nevertheless be regarded as constituting a clear abuse of procedure.

DECISION

For the above reasons,

The complaint, the applications to intervene and WIPO's counterclaim against the interveners are dismissed.

* Registry's translation.

In witness of this judgment, adopted on 10 May 2019, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ