U. (No. 3)
v.
WIPO

138th Session **Judgment No. 4849**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr D. B. O. U. against the World Intellectual Property Organization (WIPO) on 7 March 2020 and corrected on 8 April, WIPO's reply of 16 July 2020, the complainant's rejoinder of 19 October 2020 and WIPO's surrejoinder of 25 January 2021;

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 contests the decision not to convert his fixed-term appointment into a continuing or permanent appointment.

Facts relevant to the present complaint are to be found in Judgment 4848, also delivered in public this day. Suffice it to recall that the complainant joined WIPO on 1 April 2011 as Director of the Copyright Infrastructure Division (CID) in the Copyright and Creative Industries Sector (CCIS), and was granted a two-year fixed-term appointment, which was subsequently extended for three years, from 1 April 2013 to 31 March 2016.

By a letter of 29 February 2016, the complainant was granted a two-year extension of his fixed-term appointment, from 1 April 2016 to 31 March 2018. He accepted this offer on 7 March 2016. On 18 September 2016, a new Deputy Director General was appointed in charge of the CCIS.

On 26 October 2016, the complainant submitted a request for review of the decision to extend his appointment for two years instead of five. Having received no response, on 19 March 2017, he notified the WIPO Appeal Board (WAB) of his intention to appeal the implied rejection of his request for review. On 9 January 2018, he wrote to the Director of the Human Resources Management Department (HRMD), to voice his concern he had not yet received any news regarding his appointment and to express his expectation to be granted permanent or, at least, continuing status with WIPO.

On 6 June 2018, the complainant wrote to the Director General to request a review of what he considered to be a “negative decision” to his 9 January 2018 request, as well as a review of whether he could be granted a permanent or a continuing appointment, and he sought moral damages. The complainant explained that he was shocked to discover that, while WIPO staff members were normally granted permanent or continuing appointments only after five years of service with the Organization, he had not been offered such an appointment despite his loyal service and outstanding performance over many years. He asserted that there was a practice in WIPO to grant permanent or continuing appointments after five years of service, which was not written down as a right in an Office Instruction. He reproached WIPO for failing in its duty to disclose to him this practice, for a lack of transparency and for treating him differently than other staff members.

By a letter of 6 August 2018, the Director of HRMD informed the complainant of the Director General’s decision to reject his request for review noting, inter alia, that the complainant was in fact contesting the express decision, taken on 29 February 2016, to grant him a two-year extension of his fixed-term appointment, from 1 April 2016 to 31 March 2018. The Director of HRMD added that the granting of a

two-year extension logically meant that he would not be granted a continuing appointment in 2016.

On 30 September 2018, the complainant separated from WIPO for health reasons and, on 1 November 2018, he filed a complaint with the Tribunal (his first) against the implied rejection of his 19 March 2017 appeal. This complaint culminated in Judgment 4506, delivered in public on 19 May 2022.

On 5 November 2018, the complainant lodged an appeal with the WAB against the decision not to convert his fixed-term appointment into a continuing or a permanent appointment, contained in the 6 August 2018 letter.

The WAB submitted its report on 10 October 2019, recommending by a majority of its members that the appeal be rejected as irreceivable. One member of the WAB submitted a dissenting opinion.

By a letter of 9 December 2019, the Director of HRMD informed the complainant of the Director General’s decision to reject his appeal as irreceivable, in line with the majority recommendation of the WAB’s members. The Director of HRMD noted that the express decision, taken on 29 February 2016, to grant him a two-year extension of his fixed-term appointment pertained to both the duration of the extension, namely two years, as well as the type of appointment that was being offered, namely not a continuing appointment but an extension of his fixed-term appointment, and that in his first complaint to the Tribunal (leading to Judgment 4506, delivered in public on 19 May 2022), the complainant had challenged only the first element, the duration of the extension, but not the second, the type of appointment being offered. As the complainant had failed to challenge the decision not to grant him a continuing appointment (the type of appointment offered) within 90 days from the 29 February 2016 decision, his appeal was out of time. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order WIPO to convert his then fixed-term contract into a continuing or a permanent contract as from the date all conditions for such conversion were met or, alternatively, as from the date of the decision. He claims compensation for all the injuries he suffered, the

loss of amenity, and the loss of enjoyment of life. He claims material damages for the loss of salary, allowances and other benefits, such as pension and health insurance, excluding any monies he has already received. He also claims moral, exemplary, and punitive damages, as well as costs. He seeks interest on all amounts awarded.

WIPO asks the Tribunal to dismiss the complaint, primarily because it is irreceivable and, moreover, because the complainant has failed to prove that the impugned decision was unlawful or otherwise improper.

CONSIDERATIONS

1. The complainant joined the staff of WIPO in April 2011. He did so as the Director of the Copyright Infrastructure Division (CID) in the Copyright and Creative Industries Sector (CCIS). His initial appointment was under a fixed-term contract commencing on 1 April 2011 and concluding on 31 March 2013. It was then extended for a period of three years expiring 31 March 2016, and then extended again for a further period of two years concluding on 31 March 2018. However, the complainant had been absent from work on certified sick leave from 1 February 2017 until his separation from the Organization on 30 September 2018.

2. This is the complainant's third complaint. There is an issue about the receivability of the complaint. It concerns the question of whether, in substance, he was challenging the decision of February 2016 to renew his fixed-term contract commencing on 1 April 2016 for a term of two years, or a later decision, in response to his request in early 2018, impliedly rejecting his request for permanent status and the conversion of his fixed-term contract to a continuing contract. If the former, the internal pursuit of the grievance was plainly out of time, and thus the complaint is irreceivable, as the complainant had not exhausted internal means of redress. A majority of the WIPO Appeal Board (two members, though the third member disagreed) took the view that the appeal was irreceivable as being out of time. This has been and remains

the position of the defendant organisation. However, it is unnecessary to resolve this question as the complaint fails on the merits even assuming his grievance concerns an implied decision in early 2018.

3. On 9 January 2018, the complainant sent an email to the Director of the Human Resources Management Department (HMRD). It was headed “Request for conversion”. The relevant part of the email read:

> “As you [...] know, staff members can become continuing or permanent employees. I am anxious that I have not received any news from HRMD on this issue. I should be pleased to be given permanent status and, if not, continuing status within WIPO.”

The complainant received no reply to this email, at least directly.

4. On 6 June 2018, the complainant sent an email to the Director General. In substance, he sought a review of an implied decision to reject the request in his email of 9 January 2018. This request for review was rejected in a letter dated 6 August 2018 from the Director of HRMD, sent on behalf of the Director General. While the letter adhered to the position that the request for review was irreceivable, it nonetheless addressed the question of whether the complainant’s contract should have been converted when extended in February 2016. Three relevant points were made. The first was that contrary to an assertion of the complainant, there was no right to have a contract converted. The second and related point was that a decision to convert a contract to create a continuing or a permanent appointment involved the exercise of a power conferred, expressly as a discretionary power, on the Director General by WIPO Staff Regulations 4.18 and 4.19, respectively. The third point involved a rejection of the suggestion by the complainant that he was being treated differently to other staff members.

5. The Organization is correct in taking the position that there was no right to have a fixed-term appointment as a WIPO staff member converted to either a continuing or permanent appointment. Staff Regulation 4.17, which concerns the grant of a fixed-term appointment,

provides in paragraph (f) that: “A fixed term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service.” This is fortified by the provisions of paragraph (b) of Staff Regulation 4.18, which provides that a continuing appointment “shall be granted at the discretion of the Director General”. Paragraph (b) of Staff Regulation 4.19 is to the same effect in relation to permanent appointments. The following comments of the Tribunal in Judgment 4008, consideration 11, are apt to apply in the present case:

> “There is plainly nothing in these provisions which would entitle the complainant to have her fixed-term contract redefined. Nor is there anything in the Tribunal’s case law establishing such a right. The complainant is therefore wrong to submit that her fixed-term contract should have been redefined [...].”

6. This leads to a consideration of the scope of review by the Tribunal of a discretionary decision whether to convert a fixed-term appointment into an indefinite one. In Judgment 3772, consideration 5, the Tribunal said:

> “The Tribunal recognises the wide discretion enjoyed by an organisation in deciding whether or not to convert a fixed-term appointment into an indefinite one (see Judgment 1349, under 11). Such a decision is subject to limited review and will be set aside only ‘if it is taken without authority or in breach of a rule of form or of procedure, or if it is based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was an abuse of authority’ (see Judgments 2694, under 4, and 3005, under 10).”

7. There are two contentions in the complainant’s pleas (though articulated in a variety of ways), which may conceivably fall within the limited grounds of review just discussed. However, it should first be noted there is some inexactitude in the complainant’s pleas. He eschews the suggestion that the grievance being ventilated in these proceedings is the decision to offer him a fixed-term contract of two years in February 2016, unlike WIPO which contends it is. Yet, much of the complainant’s argumentation in his pleas involves challenging the reasons given by WIPO (in the 6 August 2018 rejection of the complainant’s request for review) for offering the two-year fixed-term

contract in 2016. If the Tribunal proceeds on the basis, as it presently does, that the subject matter of the present complaint is the implied decision to reject his request in the email of 9 January 2018, then the reasons for only offering him a fixed-term contract in February 2016 are substantially irrelevant.

8. The two contentions in the complainant's pleas, which may conceivably fall within the limited grounds of review just discussed, may be summarised as follows. One is that the implied decision not to convert the complainant's contract involved an abuse of power, and the other is that it breached the principle of equal treatment.

9. Fundamental to the first contention is the fact that the decision, as explained by the complainant in his pleas, "was based on the personal prejudice which perniciously lay hidden behind the unlawful initiation of the unlawful investigation process against [him]". This is a reference to the investigation leading to the laying of charges of misconduct against the complainant on 14 December 2016. This is tantamount to a claim of bad faith which must be proven and cannot be presumed (see, for example, Judgment 4753, consideration 13). But beyond generalised assertions, the complainant provides no persuasive evidence which directly, or inferentially, establishes personal prejudice of the type relied on. This contention is unfounded and should be rejected.

10. The second contention is based on a premise that there was a practice that a staff member on a fixed-term contract would, at the end of their fifth year of appointment, be offered the choice of having their contract converted into a continuing appointment at that point, or wait a further two years before having their contract converted into a permanent appointment. The complainant contends his treatment did not accord with this practice and involved unequal treatment. But again, in the main, the complainant supports the existence of this practice, and its breach, by generalised assertions, though he does descend into some specifics. However, the Tribunal's case law requires that "allegations of discrimination and unequal treatment can lead to redress on condition

that they are based on precise and proven facts" (see, for example, Judgment 4238, consideration 5). The concept of "precise and proven facts" entails sufficiently detailed and persuasive evidence to establish that there had been unequal treatment.

11. Cases can arise where an inference can be drawn that an alleged practice does exist, largely because of the refusal or failure of the organisation to provide documents requested by a complainant intended to prove the existence of that practice. One example, relied on by the complainant, was Judgment 3415, particularly considerations 6 to 9. In the present case, the complainant recounts his unsuccessful attempts to obtain, during the processes internal to the organisation, documentation intended to prove the existence of the practice. However, what he has failed to do in these proceedings before the Tribunal is exercise, if necessary, his ability under the Tribunal's Rules, specifically under Article 9, paragraph 6, to secure documents from WIPO which would prove, in an evidentiary sense, the existence of the practice he asserts. The inference drawn in Judgment 3415 was substantially based on the refusal of the defendant organisation to produce the discovery documents requested by the complainant in the proceedings before the Tribunal. In that matter, the Tribunal made it clear that the defendant organisation should have, in the face of the discovery request, produced the documents. In the present case, the absence of a request or, ultimately if necessary, procuring an order under Article 9, paragraph 6, militates against drawing an inference that the asserted practice existed.

12. In the absence of proof of the practice, an essential underpinning of the allegation of unequal treatment is missing. Accordingly, this contention is unfounded and should be rejected.

13. In the result, the complainant has not established the implied rejection of his request on 9 January 2018 for the conversion of his fixed-term contract into a continuing or permanent contract was unlawful. It is unnecessary to address the question of whether such a

request can legitimately be made during the currency of a fixed-term contract.

14. The complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER