U. (No. 4)

v.

WIPO

138th Session **Judgment No. 4850**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr D. B. O. U. against the World Intellectual Property Organization (WIPO) on 19 November 2021 and corrected on 25 February 2022, WIPO's reply of 12 April 2022, the complainant's rejoinder of 19 July 2022 and WIPO's surrejoinder of 19 October 2022;

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 to terminate his fixed-term appointment for reasons of health.

Facts relevant to the present case 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), under a fixed-term appointment which was subsequently extended for periods of varying durations until 30 September 2018.

On 1 February 2017, the complainant commenced a period of certified sick leave, which was subsequently extended. On 8 February 2018, his treating physician informed Dr M., UNOG Medical Service,

then WIPO's Medical Adviser, that the complainant might be able to return to work around June 2018, as his health was improving, and he sought Dr M.'s collaboration to put in place a support system enabling the complainant direct access to a physician after his return to work.

On 26 June 2018, the Deputy Director, Human Resources Management Department (HRMD), wrote to the complainant to inform him that, unless he was medically cleared to return to work, his sick leave entitlement would be exhausted in the course of August 2018, following which his appointment might be terminated for reasons of health subject to the provisions of WIPO Staff Regulation 9.4. The Deputy Director, HRMD, added that a request might be submitted to the WIPO Staff Pension Committee for a determination, under Article 33(a) of the Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund (UNJSPF), of whether he was incapacitated for further service and should therefore be awarded a disability benefit.

On 23 July 2018, Dr M. addressed a memorandum to the Secretary of the WIPO Staff Pension Committee, in which she indicated that the complainant's incapacity to work was complete and of long duration. Noting that the complainant would soon exhaust his sick leave entitlement and that it was thus medically justified to present his case to the WIPO Staff Pension Committee for the award of a disability benefit, Dr M. expressed the view that the complainant was totally incapacitated for work. The next day, on 24 July 2018, the Secretary of the WIPO Staff Pension Committee wrote an email to Dr M. seeking confirmation that the complainant had actually been informed of the fact that Dr M. had issued a memorandum recommending *"sa mise en invalidité"*. The UNOG Medical Service responded by an email of 26 July 2018 confirming that the complainant had indeed been informed of the decision.

In a letter of 28 August 2018, the Director General informed the complainant that, pursuant to Staff Regulation 9.4, he had decided to terminate his appointment for health reasons as of 1 October 2018. The Director General confirmed that the complainant had exhausted his sick leave entitlement on 17 August 2018 and noted that, as he had been found incapacitated for further service, the WIPO Staff Pension Committee

had decided to grant him a disability benefit which, according to Article 33 of the Regulations, Rules and Pension Adjustment System of the UNJSPF, would commence either on 1 October 2018 or at an earlier date chosen by the complainant, if he decided to waive the 30-day notice period for termination. In the event, the complainant separated from WIPO on 30 September 2018.

On 16 October 2018, the complainant submitted a claim for a service-incurred illness that had purportedly commenced on 1 February 2017 but, by a letter of 15 January 2019, Cigna, WIPO's collective medical insurer, notified him that his illness could not be recognized as service-incurred, because he had not notified WIPO thereof within one month of its occurrence. Prior to that, on 21 October 2018, the complainant had received a copy of Dr M.'s memorandum of 23 July 2018 in response to a request he had submitted on 12 September 2018.

On 26 November 2018, the complainant filed a request for review of the 28 August 2018 decision but, on 11 March 2019, he was informed that the Director General had decided to maintain it and to reject his requests for relief. On 9 June 2019, the complainant lodged an appeal with the WIPO Appeal Board (WAB) against the 11 March 2019 decision to reject his request for review.

In its report, transmitted to the Director General on 22 June 2021, the WAB found that the Administration had failed to notify the complainant of the outcome of the medical assessment and, by so doing, it had violated the principle *tu patere legem quam ipse fecisti* and had deprived the complainant of his right to be heard before taking the decision to terminate his appointment for reasons of health (contrary to paragraphs 7 and 10 of Office Instruction No. 46/2015). It therefore recommended that the decision to terminate the complainant's appointment be set aside. Considering, however, that his reinstatement would be impracticable, in view of the administrative difficulties and the time that had elapsed since his termination, the WAB recommended that WIPO award him: (i) material damages for the loss of salary and emoluments up until 31 December 2018, deducting any disability benefit that he was paid during the relevant period; (ii) material damages for the loss of a valuable opportunity to be considered for an

extension of his fixed-term appointment; and (iii) moral damages in the amount of 7,500 Swiss francs for the injury he suffered due to the unlawfulness of the contested decision. It strongly encouraged the parties to negotiate an all-encompassing settlement agreement covering all appeals filed by the complainant (it noted that pending the outcome of the negotiations, it would put on hold the review of the complainant's other six pending appeals) and it suggested that the Administration consider amending paragraph 7 of Office Instruction No. 46/2015 to provide for the requirement of a written notification of the outcome of a medical assessment.

By a letter of 23 August 2021, the Acting Director, HRMD, informed the complainant that the Director General had decided to maintain the 28 August 2018 decision to terminate his appointment for reasons of health and to award him compensation for the WAB's delay in issuing its report. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to restore him to the administrative employment status which he held at the time his appointment was terminated, with all legal consequences that this restoration entails. He also asks the Tribunal to order WIPO to perform an assessment to ascertain whether he is able to perform his former duties, or other duties that might reasonably be assigned to him, and to serve a notification on him in respect of such assessment. He claims compensation for all injuries he suffered, including, but not limited to: (i) material loss (such as, for example, loss of salary, allowances and other benefits such as pension/health insurance contributions) but excluding any monies he has already received; and (ii) moral injury (such as, pain, suffering, loss of amenity, loss of enjoyment of life and affront to dignity). He also claims punitive and exemplary damages, interest on any amounts due and costs. Subsidiarily, he asks that WIPO classify his illness as service-incurred, given the link made by WIPO's own Medical Advisers between his work environment and his illness and that it grant him special sick leave credit equal, in whole or in part, to the sick leave previously utilised under the provisions of paragraph 13 of Office Instruction No. 11/2016, in force at the material time.

WIPO asks the Tribunal to dismiss the complaint in its entirety, as the complainant has failed to prove that the decision to terminate his fixed-term appointment for reasons of health was unlawful or otherwise improper.

CONSIDERATIONS

1. As is apparent from the preceding account of the facts, the Director General, in the impugned decision of 23 August 2021, did not accept the recommendations of the WIPO Appeal Board (WAB) in its report of 22 June 2021 and some of the factual findings upon which those recommendations were based. A pivotal factual question was whether the complainant had been notified of the outcome of a medical assessment made by Dr M., WIPO's Medical Adviser. In that medical assessment, which was communicated to the Secretary of the WIPO Staff Pension Committee by a memorandum of 23 July 2018, Dr M. expressed the view that the complainant was "incapacitated for work" and that his incapacity was total and of long duration.

2. This factual issue was relevant to the implementation of WIPO Staff Regulation 9.4, which authorised the termination of the services of a staff member (as happened in the present case) when they were unable to perform their duties as a result of infirmity, illness or the weakening of their physical or mental faculties, after they had exhausted any sick leave entitlement. The conditions and procedures for implementing this provision were prescribed in a normative legal document, Office Instruction No. 46/2015. Paragraph 7 (applicable in a case such as the present) provided for the assessment by WIPO's Medical Adviser of whether a staff member was able to perform his or her duties, and required that the staff member be notified of the outcome of such an assessment. This was an important element in the scheme of Office Instruction No. 46/2015, as the affected staff member could, within 30 calendar days of the notification from WIPO's Medical Adviser, seek a review of the assessment by an independent medical practitioner (paragraph 10 of Office Instruction No. 46/2015). It was

not in issue that the complainant did not seek such a review. The critical issue was whether the event triggering that time limit of 30 days had occurred. That is to say, whether the complainant had been notified of the assessment by Dr M., then WIPO's Medical Adviser.

3. The role, factual findings and conclusions of an appeal body can assume some significance in proceedings in the Tribunal, particularly in relation to findings of fact. This issue was discussed in Judgment 4488, consideration 7:

> "The Tribunal's case law establishes in, for example, Judgment 4407, at consideration 3, that an internal appeal body's report warrants considerable deference in circumstances where its report involves a balanced and thoughtful analysis of the issues raised in the internal appeal, as it does in this case, and on its analysis its conclusions and recommendations were justified and rational, as again they are in this case (see also Judgments 3608, consideration 7, 3400, consideration 6, and 2295, consideration 10)."

It was also discussed in Judgment 3422, consideration 3:

> "At this point, it is appropriate to note the observations of the Tribunal in Judgment 2295, consideration 10, that it is not the role of the Tribunal to reweigh the evidence before an internal appeals board and the conclusions of the board are entitled to considerable deference. While the case leading to Judgment 2295 involved the evaluation of evidence from witnesses about allegations of unsatisfactory behaviour in the workplace, the evaluation by any internal appeal body of matters with which they are likely to be familiar, must be given significant weight as long as the Tribunal is satisfied the appeal body has undertaken a comprehensive and thoughtful consideration of the evidence and the applicable principles and its conclusions are rational and balanced."

4. In the present case, the WAB carefully analysed, in detail and over several pages, the evidence concerning the factual question of whether there had been notification to the complainant. It observed, correctly, that the burden of proof that notification had been given fell on the person who sent the document, in this case the Organization, citing Judgment 3871, consideration 9. Its analysis and conclusion that the Organization had not proved that notification had been given is unexceptionable and certainly does not reveal a manifest error. In the impugned decision of 23 August 2021, the Director General accepted

the pivotal significance of the factual question about notification. He responded in two ways, though they plainly overlap. The first is he challenged the reasoning of the WAB. But, in the face of that reasoning, his analysis is unpersuasive.

5. The second way was to adduce evidence from Dr M. which led her to conclude there was "no doubt in [her] mind" that she informed the complainant of the outcome of her assessment. But this is a conclusion based on facts mostly known to the WAB. The only additional fact relied on by Dr M. was the practise of notifying the staff member of the outcome of the assessment before notifying the employer. But the existence of this practise is of little weight having regard to the absence of persuasive evidence, in the circumstances of this case, that notification actually occurred. Moreover, it was a number of months after the assessment should have been notified in July 2018 that the complainant was sent by the Organization a copy of Dr M.'s memorandum containing the assessment. If Dr M. had "no doubt" the complainant had been notified at the relevant time of the assessment (ultimately, on the Organization's account, orally notified), then it was scarcely necessary to notify the complainant again. It might be thought, this was simply out of an abundance of caution. But, equally, it is consistent with there having been some real doubt in the Organization's view that notification had occurred in July 2018. In the result, the WAB was correct in concluding notification had not been proved and the Director General was wrong in rejecting this conclusion.

6. Two further uncontroverted and relevant facts should be mentioned. As recounted by the WAB in its report, in February 2018, the complainant's treating physician sent a detailed letter to Dr M. indicating that the complainant's health was improving slightly and that he envisaged the possible return to work by the complainant around June 2018, on the condition that his medical condition would allow for it. In this correspondence to Dr M., the complainant's treating physician indicated he hoped for a successful return to work process as equally desired by the complainant. He requested that Dr M. collaborate with him in order to put a support system in place, which could anticipate

the medical needs of the complainant, if he returned to work. There was no response from the Organization expressly addressing this proposal, though it must be accepted that from early January to October 2018 the complainant's treating physician issued ten medical certificates, the import of which was that the complainant would be absent from work for another month because of ill health.

7. In its report, the WAB made several recommendations, all rejected by the Director General. One was that the decision to terminate the complainant's appointment be set aside. A second was that the complainant be awarded material damages for the loss of salary and emoluments relating to his contract until 31 December 2018, deducting any disability benefit that he was paid for the corresponding period. A third was that he be awarded material damages for the loss of a valuable opportunity to be considered for an extension of his fixed-term appointment, taking into account the principles and precedents established by the Tribunal (referring to Judgment 4177). The last was that the complainant be paid an indemnity of 7,500 Swiss francs for the moral damage suffered owing to the unlawfulness of the decision taken concerning him (referring to Judgment 3124).

8. In the Tribunal's view, a preferable course is to award the complainant material damages for the loss of opportunity to have his appointment continue beyond 1 October 2018. In the circumstances, this loss of opportunity is assessed in a global sum, taking into account both the unlawfulness of the termination of his contract but also taking into account two additional matters. Firstly, that had the complainant been able to seek a review of the medical assessment of Dr M., that review may have resulted in a similar assessment with similar results. Secondly, that, as discussed in considerations 9 to 12 of Judgment 4848, the Tribunal's judgment on the complainant's second complaint, also delivered in public this day, the position he then occupied was being lawfully superseded and replaced by another position, for which he initially applied but later abandoned, because of his health. The material damages are therefore assessed in the sum of 20,000 Swiss francs.

9. The Tribunal is satisfied the complainant suffered a moral injury as a result of being denied the right of review of the medical assessment leading directly to the termination of his employment, effective 1 October 2018. He is entitled to moral damages which are assessed in the sum of 10,000 Swiss francs.

10. No basis has been established by the complainant for exemplary or punitive damages.

11. The complainant is entitled to costs which are assessed in the sum of 1,000 Swiss francs. All other claims will be dismissed.

DECISION

For the above reasons,

1. WIPO shall pay the complainant 20,000 Swiss francs material damages.
2. WIPO shall pay the complainant 10,000 Swiss francs moral damages.
3. WIPO shall pay the complainant 1,000 Swiss francs costs.
4. All other claims are 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