Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

**R. and others**

***v.***

**ICC**

**131st Session** **Judgment No. 4374**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. R. against the International Criminal Court (ICC) on 22 February 2019 and corrected on 5 March 2019;

Considering the complaint filed by Ms E. N. against the ICC on 1 March 2019 and corrected on 13 March 2019;

Considering the complaint filed by Mr G. B. against the ICC on 4 March 2019 and corrected on 26 March 2019;

Considering the complaints filed by Mr L. K. C., Ms M. D. and Mr C. O. M. F. against the ICC on 6 March 2019 and corrected on 23, 19 and 22 March 2019 respectively;

Considering the second complaint filed by Ms F. B. against the ICC on 7 March 2019 and corrected on 21 March 2019;

Considering the complaint filed by Mr I. B. against the ICC on 11 March 2019 and corrected on 28 March 2019;

Considering the complaint filed by Mr A. K. against the ICC on 12 March 2019;

Considering the complaint filed by Mr R. H. against the ICC on 12 March 2019 and corrected on 27 March 2019;

Considering the second complaint filed by Ms K. K. against the ICC on 16 April 2019;

Considering the complaint filed by Mr T. H. against the ICC on 20 April 2019;

Considering the complaint filed by Ms I. G. B. R. against the ICC on 22 April 2019;

Considering the complaints filed by Ms S. E. M. d. P. H. N., Ms M. A. P. and Mr S. Y. against the ICC on 29 April 2019;

Considering the complaint filed by Ms C. A. against the ICC on 30 April 2019 and corrected on 8 May 2019;

Considering the complaint filed by Ms A. S. against the ICC on 2 May 2019 and corrected on 15 May 2019;

Considering the complaints filed by Ms F. K. A. and Mr T. W. M.K. against the ICC on 3 May 2019 and corrected on 17 and 14 May 2019 respectively;

Considering the complaint filed by Mr A. R. against the ICC on 4 May 2019 and corrected on 17 May 2019;

Considering the complaint filed by Ms H. O. A. against the ICC on 7 May 2019 and corrected on 7 June 2019;

Considering the ICC's single reply of 31 July 2019 confined to the issue of receivability, the complainants' rejoinders filed between 6 and 27 September and the ICC's surrejoinder of 5 December 2019;

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 none of the parties has applied;

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

The complainants challenge the decisions to abolish their posts and terminate their appointments.

In 2013 the Assembly of States Parties to the Rome Statute of the ICC authorized the Registrar of the Court to reorganize the Registry. This reorganization became known as the *Re*Vision Project. In August 2014 the Registrar issued Information Circular ICC/INF/2014/011 entitled "Principles and Procedures Applicable to Decisions Arising from the *Re*Vision Project" (Principles and Procedures). On 13 June 2015 Information Circular ICC/INF/2014/011 Rev.1 was issued, revising the Principles and Procedures. This revised version was in force at the material time.

Between September 2014 and April 2016, the complainants were notified of the decisions to abolish their posts and terminate their appointments as part of the organizational restructuring of the Registry. As an alternative to the termination of their appointments, two options were open to them: accept an enhanced agreed separation package or apply as an internal candidate for newly created positions arising from the restructuring with priority consideration. The complainants variously chose either the first or second option and, in the result, all but one of them eventually separated from the ICC.

On 24 January 2018 the Tribunal delivered in public Judgment 3907, in which it held that the Principles and Procedures were without legal foundation and were therefore unlawful, as were the decisions taken pursuant to Information Circular ICC/INF/2014/011 Rev.1.

In February 2018, pursuant to Staff Rules 111.1(b) and 111.3(b), the complainants requested a review of the decisions abolishing their posts and terminating their appointments, based on the information revealed in Judgment 3907, which they considered as a new fact of decisive importance which was unknown to them at the time they could have sought a review of the contested decisions within the prescribed time limit. They sought, inter alia, compensation for the moral and material harm supposedly incurred. Concerning more specifically moral harm, the complainants, except Ms A., raised objections as to a plausible conflict of interest and requested the resignation of the Legal Office's Chief and the resignation, or withdrawal of the application for re-election, of the Registrar. Their requests for review were all rejected in March 2018 as irreceivable *ratione temporis*.

Between 23 March and 24 April 2018, the complainants lodged appeals with the Appeals Board. Simultaneously, they entered into negotiations with the Registrar in view of an amicable settlement of their cases, which was unsuccessful.

Two separate Appeals Board panels submitted their reports to the Registrar on 26 and 27 November 2018 and on 31 January 2019, unanimously recommending to dismiss the appeals as time-barred. On 14 December 2018 and 6 February 2019 the Registrar informed the complainants that there was no exceptional circumstance on which the time limits for lodging an appeal could have been waived and that their appeals were dismissed as irreceivable *ratione temporis*. These are the impugned decisions in the present proceedings.

The complainants ask the Tribunal essentially to set aside the contested and the impugned decisions, to award them various forms of compensation for the moral and material injury they claim to have incurred, as well as punitive damages for the delay in dealing internally with their cases, and costs for the internal appeal procedure and the proceedings before the Tribunal.

The ICC asks the Tribunal to dismiss the complaints as irreceivable *ratione temporis*.

## CONSIDERATIONS

1. Between September 2014 and April 2016, the complainants were notified of the decisions to abolish their posts and terminate their appointments in the context of the 2014 *Re*Vision Project restructuring the Registry of the ICC. They were given the option to accept enhanced agreed separation packages or to apply as internal candidates with priority consideration for newly created positions, which arose from the restructuring project. The complainants variously chose one of the two options and all but one of them eventually separated from the ICC. None of the complainants challenged these decisions through internal appeals at the relevant time.

2. In the complaint leading to Judgment 3907, delivered in public on 24 January 2018, the complainant impugned the ICC Registrar's decisions to abolish her position and terminate her appointment in view of the 2014 *Re*Vision Project on the grounds that "the Principles and Procedures on which the decision[s] w[ere] based were unlawfully promulgated; the decision to abolish her position was tainted by procedural error as the classification process was not conducted in compliance with the Principles and Procedures; the conditions precedent for the abolition of her position were not met; the ICC failed to make reasonable efforts to redeploy the complainant; and the decision[s] [to abolish her position and terminate her appointment] w[ere] tainted by improper motive and abuse of process" (see Judgment 3907, consideration 4). In that judgment, the Tribunal found, in consideration 26, that "pursuant to the Presidential Directive, the Principles and Procedures should have been promulgated by an Administrative Instruction or, arguably, by a Presidential Directive. As the promulgation of the Principles and Procedures by Information Circular was in violation of the Presidential Directive, they were without

legal foundation and are, therefore, unlawful as are the decisions taken pursuant to the Principles and Procedures. It follows that the decisions to abolish the complainant's position and to terminate the complainant's appointment were also unlawful and will be set aside." Consequently, the challenged decisions were set aside and the ICC was ordered to pay the complainant damages and costs.

3. In the present complaints, the complainants assert that they became aware of the unlawfulness of the abolition of their posts and the consequent termination of their appointments only with the delivery of Judgment 3907. In February 2018, pursuant to Staff Rules 111.1(b) and 111.3(b), they requested a review of these decisions, which was rejected. Between 23 March and 24 April 2018, they lodged appeals with the Appeals Board. They argued that exceptional circumstances, in accordance with the provisions of Staff Rule 111.3(b), justified a waiver of the thirty-day time limit running from the notification of the administrative decisions being challenged. Specifically, they asserted that the information revealed in Judgment 3907 – which held, inter alia, that the *Re*Vision Principles and Procedures were without legal foundation and hence the decisions based on those Principles and Procedures were unlawful – amounted to a new fact of decisive importance of which they were not and could not have been aware at the time of the challenged decisions, thus justifying a waiver of the time limit for their appeals. They also submitted that Judgment 3907 revealed that the ICC had tried to conceal evidence of the unlawfulness of all these decisions.

4. Staff Rule 111.1(b) provides that "[a] staff member who wishes to exercise his or her right to appeal against an administrative decision shall first submit a request in writing to the Secretary of the [Appeals] Board, within thirty days of notification of the decision, for a review of the decision by the Registrar or the Prosecutor, as appropriate".

Staff Rule 111.3(b) provides that "[a]n appeal may not be heard by the Appeals Board until all of the time limits established by [S]taff [R]ule 111.1 have been met or have been waived by the Appeals Board by reason of exceptional circumstances beyond the control of the staff member".

Additionally, Rule 5(b) of the Appeals Board's Rules of Procedure provides that "[t]he Panel shall decide, at its own discretion, whether to consider admissibility as a preliminary issue or in conjunction with the

whole appeal. In either situation the Panel may request statements, supporting evidence and comments relating specifically to this issue and shall decide, on the basis thereof, if exceptional circumstances justify a waiver of the time-limits or format of the appeal, bearing in mind that the onus of proving exceptional circumstances lies with the appellant."

5. Two separate Appeals Board panels dealt with the internal appeals lodged by the complainants and submitted their reports to the Registrar on 26 and 27 November 2018 and on 31 January 2019. The panels were unable to find any exceptional reason upon which the time limit could have been waived pursuant to Staff Rule 111.3(b) and Rule 5(b) of the Appeals Board's Rules of Procedure. Both panels unanimously recommended that the appeals be dismissed as irreceivable for reasons of time bar. The Registrar issued final decisions on 14 December 2018 and 6 February 2019 endorsing the Appeals Board's reports and dismissing the appeals.

6. The complainants filed their complaints before the Tribunal between 22 February and 7 May 2019. As they address the same basic facts and turn on the same questions of law, including the threshold issue of receivability regarding the question of time bar, the Tribunal finds it convenient to join them and render one judgment.

The ICC requested, and was authorized by the President of the Tribunal, to file a single reply and surrejoinder in relation to all complaints, and to confine its written submissions to the issue of receivability. The complainants assert that "[b]y limiting its submissions to receivability aspects, the Defendant Organisation elected not to defend itself on the merits" and that "[t]he direct and unavoidable consequence of the Defendant Organisation's line of argumentation in the present case[s] is that, once satisfied that the present case[s] [are] receivable, the Tribunal shall determine on the merits of the present case[s] in light of the sole submissions made by the [c]omplainant[s], without need to reopen the written submissions". The Tribunal notes that "[e]ven when the President has granted permission to reply only on receivability the Tribunal may still declare a complaint receivable and order further pleadings on the merits, as indeed it did in Judgment 852" (see Judgment 935, consideration 4). As the Tribunal has authorized the pleadings to be confined to the issue of receivability, this is the only issue that will be determined in the present judgment.

7. The question of whether a judgment of the Tribunal may be considered as a new fact providing an exception to the time limits for lodging an appeal was dealt with in Judgment 3002. In particular, the Tribunal found in considerations 13 to 15 of that judgment that:

> "13. [...] time limits are an objective matter of fact and it should not entertain a complaint filed out of time, 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. In particular, the fact that a complainant may have discovered a new fact showing that the impugned decision is unlawful only after the expiry of the time limit for submitting an appeal is not in principle a reason to deem his or her complaint receivable (see, for example, Judgments 602, under 3, 1466, under 5 and 6, or 2821, under 8).
>
> 14. It is true that, notwithstanding these rules, the Tribunal's case law allows an employee 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 employee is relying on facts or evidence of decisive importance of which he/she was not and could not have been aware before the decision was taken (see Judgments 676, under 1, 2203, under 7, or 2722, under 4). However, 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 similar decision in another case, does not come within the scope of these exceptions.
>
> 15. In particular, in the instant case, the complainant's argument that the delivery of Judgment 2359 constitutes a new and unforeseeable fact of decisive importance, within the meaning of the above-cited case law, is to no avail. In Judgment 676 the Tribunal did accept that the delivery of one of its judgments could be described in these terms and could therefore have the effect of reopening the time limit within which a complainant could lodge an appeal. But the circumstances of the case were very special in that the Tribunal, in previous judgments which it cited in that case, had formulated a rule which had greatly altered the position of certain staff members of an organisation and which, although already applied by the organisation, had until then not been published or communicated to the staff members concerned. No exceptional circumstances of this nature exist in the instant case where the criticism expressed in Judgment 2359 of the conditions set by the Office for the recognition of a dependent child – which moreover confirmed the soundness of the complainant's own criticism in this respect – cannot be regarded as unforeseeable."

8. The Tribunal underlines that established time limits, which render a decision immune from challenge if they are not observed, are fundamental to the stability of the legal relations between the parties and, accordingly, to the entire legal system of international organizations.

Without time limits, there can be no stability, thus undermining the principle of legal certainty of the entire system (see, for example, Judgments 3704, consideration 3, 3795, consideration 4, and 4184, consideration 4).

9. In the present cases, no exceptional circumstances exist which would permit the re-opening of the time limit to submit a request for review. The lack of a step in the proceeding leading to the promulgation of the Principles and Procedures, such as the non-issuance of the clearance by the Legal Advisory Services Section prior to the adoption of a decision by the Registrar, cannot, in these cases, be considered as an unforeseeable fact of decisive importance, as the complainants argue.

10. In their requests for review, all the complainants, except Ms A., sought, as one of their claims for relief, the resignation of the Legal Office's Chief and the resignation, or withdrawal of the application for re-election, of the Registrar. As the decisions responding to these requests were taken by the Registrar and transmitted to the complainants by the Legal Office under the authority of the Legal Office's Chief, the complainants submit that it created a conflict of interest as "[t]he personal interests of the ICC Registrar and [of the] Chief of [the] Legal Office were thus directly at stake in the [requests] for [r]eview". They assert that the Registrar and the Legal Office's Chief were required "[to] disclose in advance any potential conflict of interest that, to the best of their knowledge, may arise in the course of their duties" in accordance with the provisions of Section 4 of Administrative Instruction ICC/AI/2011/002 of 4 April 2011 entitled "Code of Conduct for Staff Members". The Tribunal observes that requests for review must be addressed to and responded to by the authority who took the decision being challenged and a conflict of interest cannot be invented just by including a *prima facie* abnormal claim for relief (such as the request for the Registrar's resignation). The Registrar correctly considered that no conflict of interest arose from the unreasonable claims for relief.

11. The complainants claim that the ICC had caused an undue delay in the internal proceedings. Specifically, they state that the Registrar's declared intention to enter into negotiations for a possible amicable settlement with them led to a four-month delay in the internal appeal proceedings. They claim that, "[b]y entering [into] negotiation[s] without

identified basis of possible settlement and by delaying the negotiation[s] under various purposes – like the identification of a negotiator [and] the alleged premature nature of the [complainants'] collective offer of 15 June 2018 – without making any offer, the [...] Registrar abused the trust of the [c]omplainant[s] and demonstrated bad faith". This claim must be rejected. First, the complainants have not provided convincing evidence of bad faith as required by the case law (see, for example, Judgment 3902, consideration 11, and the case law cited therein). Second, the entire period between the lodging of their appeals and the final decisions from the Registrar lasted less than a year, which, in the Tribunal's view, and despite the delay created, is not an egregious delay in the present circumstances. Finally, the complainants have not provided any evidence of damages caused by the length of the proceedings.

12. In conclusion, as the internal appeals were out of time, the complainants have failed to exhaust all the internal means of redress as required by Article VII, paragraph 1, of the Tribunal's Statute. It follows from the foregoing that the complaints are irreceivable and must be dismissed in their entirety.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 9 December 2020, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President of the Tribunal, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 18 February 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

DRAŽEN PETROVIĆ