Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

A. (No. 2) and others
v.
WIPO

136th Session **Judgment No. 4655**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr A. A. (his second), Ms V. B. (her second), Mr M. N. B. M. (his second), Ms L. B. (her third), Mr D. G. (his second), Mr A. H. (his second), Mr R. H. J. (his second), Mr A. L. (his second), Mr S. L. (his third), Ms A. O. M. (her second) and Mr L. A. P. R. (his second) against the World Intellectual Property Organization (WIPO) on 12 July 2021 and corrected on 18 August, WIPO's replies of 8 February 2022, the complaints' rejoinders of 18 May 2022 and WIPO's surrejoinders of 16 September 2022;

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 rejecting their requests for redefinition of their employment relationships.

Facts relevant to the present cases are to be found in Judgment 3943, delivered in public on 24 January 2018, concerning the complainants' first complaints. Suffice it to recall that, in the proceedings that led to that judgment, the complainants impugned the decisions of 8 September 2015, 3 May 2016 and 6 May 2016 whereby the Director General decided to reject their appeals as irreceivable because they lacked sufficient detail to allow the internal appeals body to consider them properly. In Judgment 3943 the Tribunal set aside

those decisions on the grounds that this objection to receivability could not be raised against the complainants without their having been granted an appropriate opportunity to correct their appeals on that point. It remitted the cases to WIPO for the Appeal Board to consider the appeals after asking the complainants to make the necessary corrections.

Pursuant to Judgment 3943, on 18 April 2018 the Appeal Board invited the complainants to correct their appeals and provide further information concerning their contractual situation, including the type, length and effective dates of the contracts held and the nature of the work performed during their employment by WIPO. The complainants each sent a supplementary brief to the Appeal Board on 18 June 2018. On 29 August 2018 the Appeal Board requested them to expand on the information contained in their supplementary briefs regarding the type of work performed for the Organization. The complainants replied that, in their view, the information they had provided was sufficient. At the Appeal Board's request, on 27 September 2019 they subsequently submitted comments concerning Judgments 4159 and 4160, delivered in public on 3 July 2019, whereby the Tribunal dismissed the complaints of other WIPO staff members in a similar situation to the complainants who had also requested that their employment relationships be redefined.

On 11 February 2021 the Appeal Board, referring in particular to Judgments 4159 and 4160, delivered a report in which it recommended that the Director General reject the complainants' appeals as irreceivable on the grounds that they had not challenged their short-term contracts within the applicable time limit and had not asked for their employment relationships to be redefined while they were employed under these contracts. The Appeal Board nevertheless recommended that the complainants be awarded appropriate compensation for the delay in the internal proceedings.

By a letter of 12 April 2021 the complainants were informed that the Director General had decided to adopt the Appeal Board's recommendations, that their appeals had been rejected as irreceivable, and that each of them would be awarded 300 Swiss francs owing to the Appeal Board's delay in considering their appeals. That is the impugned decision.

The complainants ask the Tribunal to set aside the impugned decision, to order WIPO to redefine their employment relationships as if they had been employed under fixed-term contracts as from their second short-term contract or the contract that was to extend their length of service beyond one year and to draw all the legal consequences therefrom. They also seek compensation of at least 150,000 euros each for having been denied the opportunity to receive compensation. In addition, the complainants claim compensation for moral injury – including WIPO's refusal to grant them permanent appointments – interest on the sums due and costs.

WIPO asks the Tribunal to find the complaints irreceivable because the internal appeals were time-barred. The Organization contends that the complainants' claims for compensation are irreceivable as they were not submitted in the internal appeal proceedings or the proceedings leading to Judgment 3943. In any event, it requests the Tribunal to declare the complaints unfounded.

CONSIDERATIONS

1. The eleven complainants were all employed by WIPO for many years, commencing on dates ranging between 1999 and 2002, under short-term contracts that were renewed several times. Eight of them were subsequently awarded temporary contracts in 2012 then fixed-term contracts as from 2013 or 2014, while the other three were directly awarded fixed-term contracts – in 2009 or 2012 depending on the individual case – on the expiry of renewals of their short-term contracts.

Having sought the redefinition of the employment relationships that they had had with the Organization since their recruitment, the complainants – eight of whom now hold a continuing appointment and one a permanent appointment – impugn before the Tribunal the decision of 12 April 2021 whereby the Director General rejected their appeals, as well as those of other staff members, against the decisions that confirmed upon review the rejection of their requests for redefinition.

2. It should be noted that the decision of 12 April 2021 – which is based, in keeping with the Appeal Board's conclusions in its report of 11 February 2021, on the finding that the appeals in question were time-barred – follows the setting aside by Judgment 3943, delivered in public on 24 January 2018, of the decisions which initially rejected the appeals as irreceivable on the grounds that they did not contain sufficient detail for the Appeal Board to consider them properly. In that judgment, the Tribunal, considering that the appeals were indeed, at that point, affected by that defect but that this objection to receivability could not be lawfully raised against the complainants without their first having been given the opportunity to correct their appeals, remitted the cases to WIPO to be examined afresh by the Appeal Board after such corrections had been made. It should also be noted in this context that the initial decisions were set aside, as Judgment 3943 put it, "without there being any need for the Tribunal to rule on the other issues raised by the complaints, including that of the receivability of the internal appeals on which the Appeal Board did not give an opinion", leaving open the possibility that the appeals could be rejected as time-barred.

3. The eleven complaints essentially seek the same redress, rest on broadly similar submissions and, for the most part, raise the same legal issues. They will therefore be joined to form the subject of a single judgment.

4. The origin of the present complaints 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 staff under short-term contracts which

were renewed many times. One consequence 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.

5. In Judgment 3090, delivered in public on 8 February 2012, an enlarged panel of judges found that the long succession of short-term contracts awarded 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 their own situation which forms the main basis for the complainants' claims in the present case.

6. However, the files show that, prior to these judgments, WIPO had already initiated a process to regularise the contractual situation of long-serving temporary employees. In particular, the Organization

adopted a reform enabling staff members to be recruited on temporary appointments, in line 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 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 out in Office Instruction No. 53/2012 (Corr.) of 5 November 2012 and its annexes.

7. 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 recognised 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 paragraph (f) of aforementioned Regulation 4.14*bis*, "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 all the complainants in the present cases). In particular, it was stipulated in this respect that the above-mentioned five-year maximum period set for temporary appointments would not be applicable to them.

8. At the same time, WIPO endeavoured to enable staff who had until then been continuously employed under short-term contracts, as well as holders of temporary contracts awarded in the context of this reform, to obtain fixed-term appointments. To this end, during the

2008-2009 to 2014-2015 biennia the Organization created a large number of posts to be filled using fixed-term contracts and also encouraged the appointment of former long-term temporary staff to posts of this sort, in particular by earmarking a large number of the posts advertised at that time for internal candidates. Under this policy, all of the complainants in the present cases were awarded fixed-term contracts between 2009 and 2014, either at the end of their temporary appointments or directly on the expiry of periods during which they were employed under short-term contracts.

9. In Judgments 4159 and 4160, delivered in public on 3 July 2019, the Tribunal ruled on complaints seeking redefinition of the employment relationships of two WIPO staff members who had been employed from 2002 to 2012 under short-term contracts renewed several times before being awarded temporary contracts and then, in the case of one of them, a fixed-term contract.

In these judgments, the Tribunal dismissed the complaints on the grounds that the complainants' internal appeals in both cases were time-barred since they had not challenged the decisions to appoint them under temporary contracts within the applicable time limit. The Tribunal held that, in view of the modification of the legal relationships between the parties resulting from the grant of these contracts, which were of a fundamentally different nature from the short-term contracts which had preceded them, and given that the conclusion of these contracts also regularised the complainants' contractual situation, the absence of any challenge to these decisions within the time limit for filing appeals necessarily barred the complainants from requesting the redefinition of their previous employment relationships. The Tribunal also found that the complainants' situation in law and in fact differed radically from that of the complainants in the cases leading to Judgments 3090 and 3225, since the latter were still employed under short-term contracts at the time that they requested the redefinition of their employment relationships (see Judgments 4160, consideration 8, and 4159, consideration 8).

10. As the Appeal Board rightly considered in its report of 11 February 2021, followed by the Director General in the impugned decision, the case law thus established by Judgments 4159 and 4160 is fully applicable to the cases of the complainants in the present proceedings, and accordingly the Organization's objection to the receivability of all the complaints, based on the fact that the complainants' internal appeals were time-barred, is well founded.

With regard to the eight complainants who were granted temporary contracts at the end of periods when they were employed under short-term contracts, it is clear that they did not challenge the decisions whereby they were granted these temporary contracts within the eight-week period available to them for this purpose under Staff Rule 11.1.1(b)(1), in the version applicable at the time. Moreover, examination of these contracts shows that the complainants explicitly stated when signing them that they "accept[ed] without reservation the temporary appointment[s] offered to [them]". The requests for redefinition of their employment relationships that they subsequently submitted were therefore time-barred.

Moreover, the Tribunal notes that the approach adopted in Judgments 4159 and 4160, concerning the consequences of a failure to challenge within the applicable time limit a decision awarding a temporary employment contract at the end of a period of employment under short-term contracts, must apply *a fortiori* to a decision awarding a fixed-term contract at that point. The grant to some staff members, at the end of a such a period of employment, of this type of contract, which is still more fundamentally different in nature from a short-term contract, constituted *a fortiori* a modification of the legal relationships between the parties as well as regularising the contractual situation of the staff members in question.

However, the three complainants who were directly awarded fixed-term contracts on the expiry of renewals of their short-term contracts failed to challenge the decisions granting them these contracts within the applicable time limit for appeal and also accepted their new contracts without reservation. Consequently, they were not entitled to seek a redefinition of their employment relationships at a later date.

Lastly, the Tribunal observes that, while the various complainants requested that the contractual redefinition apply not only to the period during which they were employed under short-term contracts but also, subsidiarily, to the subsequent period, their claims on this point are also barred by this case law. Firstly, the periods during which the complainants were employed under temporary appointments or fixed-term contracts did not in themselves necessitate a redefinition, since the complainants were lawfully employed during those periods. Secondly, since the requests for redefinition of their initial employment relationships in the form of short-term contracts are irreceivable, those requests, even if well-founded, could not in any event give rise to an entitlement to redefinition concerning the subsequent period.

11. Moreover, the Tribunal observes that the complainants were themselves plainly aware that they were in a similar situation to that of the staff members involved in the cases leading to Judgments 4159 and 4160 and that they sensed that the resulting case law would therefore be applicable to their own cases, since the evidence in the files shows that on 3 May 2019 they asked the Appeal Board for a stay of the internal appeal proceedings – which was granted – pending the delivery of those judgments.

12. In an attempt to avoid their claims being found irreceivable, the complainants nevertheless put forward various arguments which it is appropriate to examine here.

13. Firstly, the complainants do not accept that the fact that they were granted, upon the expiry of the renewals of their short-term contracts, a temporary appointment (which, according to the complainants who received such an appointment, was merely a "new form of precarious and derogatory employment put in place by [WIPO]") or a fixed-term contract has a bearing on the receivability of the requests for redefinition of their employment relationships. However, that line of argument, which seeks to challenge head-on the approach adopted in aforementioned Judgments 4159 and 4160, cannot be accepted since the Tribunal finds no reason in the submissions to depart from the case

law recently adopted in full knowledge of the facts on the grounds set out above.

14. Secondly, the complainants point out that one of the aims of their requests for redefinition was to receive permanent appointments, to which they believed they were entitled, and they did not obtain satisfaction on that point; indeed, most of them were later granted only a continuing appointment, which is not quite the same thing, and although one of the complainants eventually obtained a permanent appointment, this was not granted until later. However, these considerations, which relate to the aims pursued by the complainants in the proceedings that they initiated and not to the receivability *ratione temporis* of their appeals, do not in any event have any bearing on the consequences of their failure to challenge within the prescribed period the decisions awarding them temporary or fixed-term contracts as the case may be.

15. Thirdly, the complainants maintain – and particularly elaborate on this argument – that the requests for redefinition of their employment relationships cannot be considered as time-barred because they are "actions involving compensation", their sole purpose being "to obtain redress for the injury caused by the misuse of precarious contracts", and that actions of this type are not, as such, subject to a time limit specified in WIPO's rules. However, the Tribunal considers this manner of presenting the cases contrived, because in a dispute involving a challenge to individual decisions, as here, compensation for injury arising from the alleged unlawfulness of those decisions could only be granted as a consequence of their being set aside, which presupposes by definition that they have been challenged within the applicable time limit. The complainants' reference to the case law on which they consider they can base this argument, which relates to different situations, is irrelevant in the present case. Furthermore, endorsing this argument – which would, once again, involve departing from the approach taken in aforementioned Judgments 4159 and 4160 – would have the effect of authorising the Organization's staff members in practice to evade the effects of the rules on time limits for filing appeals by allowing them to seek compensation at any time for injury caused to them by an individual decision, even

though they did not challenge that decision in time. Such a situation would scarcely be permissible having regard to the requirement of stability of legal relations which, as the Tribunal regularly points out in its case law, is the very justification for time bars (see, for example, Judgment 3406, consideration 12, and the other judgments cited therein).

16. Fourthly, some of the complainants submit – in the same vein as the previous argument – that their claims are receivable because their requests for redefinition were submitted less than two years after the last renewals of their short-term contracts expired, which would thus, in their view, satisfy the time limit requirement laid down in Staff Regulation 3.22(a), under which "[e]xcept where otherwise provided for, any entitlement to an allowance, grant, or other payment arising from the Staff Regulations and Rules shall lapse two years after the date on which the staff member would have been entitled to the payment". However, the provisions of that paragraph, which expressly provide for the possibility that a time limit resulting from other provisions may apply, do not in any event alter the fact that the internal appeals in the present case were time-barred because the complainants did not challenge the decisions to grant them temporary or fixed-term appointments within the aforementioned time limit laid down in Staff Rule 11.1.1(b)(1).

17. Fifthly, the complainants seek to rely on the fact that their requests for redefinition referred to Staff Regulation 12.5 (setting out, in the revised version of those regulations applicable from 1 January 2013, "[t]ransitional [m]easures" following the above-mentioned reform), which provides in paragraph (e) that "[t]he International Bureau [of WIPO] may offer a cash payment to settle any claims relating to benefits, entitlements, and allowances that may have accrued during a staff member's employment with the International Bureau prior to the entry into force of the present Staff Regulations and Rules" and that "[w]hen agreed, such payments shall extinguish the related claims". The complainants submit that these provisions, which allow for settlements to be reached between the Organization and the staff members concerned, do not establish a specific time limit for requests based on this paragraph.

However, the Tribunal points out that, although these provisions do not set a time limit for filing such a request, this circumstance does not in itself preclude the legal effects of the time-bar rules applicable to claims that staff members wish to make on that basis. Moreover, while it is true that these provisions would allow WIPO, where appropriate, to depart from these rules when granting financial benefits to a staff member as part of a settlement, they do not entitle staff members to disregard the rules where the Organization has not waived their application. This argument, which appears to ignore the fact that any attempt to reach a settlement pursuant to the paragraph in question is in any event merely a discretionary power afforded to WIPO, is therefore unfounded.

18. Sixthly and lastly, the complainants maintain that their appeals cannot be considered time-barred since they could not be lodged within the applicable time limit owing to unlawful conduct by WIPO. In this regard, they refer to the Tribunal's case law, laid down in, for example, Judgments 1734, consideration 3, and 3405, consideration 17, under which an exception may be made to time-bar rules where, because there is an obscurity in an organisation's rules or dealings or because an organisation has generally misled a staff member, she or he has been denied the opportunity to exercise the right of appeal, in breach of the principle of good faith.

However, none of the reasons given by the complainants for that case law to apply, which will be examined below, appear well-founded to the Tribunal.

(a) The complainants firstly contend that they were misled by WIPO as to the substance of their rights on account of the very nature and content of the short-term contracts under which they were initially employed. However, while the finding that WIPO misused such contracts in the past might have resulted in this case law being applied to the award of such contracts, that argument is irrelevant here. As stated above, it is the complainants' failure to challenge the decisions that subsequently granted them temporary or fixed-term appointments that precludes their claims. The reasons put forward do not support a finding that the complainants were unduly

deprived of the opportunity to file appeals against those decisions within the applicable time limit (see on this point Judgments 4160, consideration 10, and 4159, consideration 10).

(b) The complainants also submit that they were prevented from effectively exercising their right to appeal because they had not received information from WIPO concerning a rule in force at the International Labour Office, the secretariat of the International Labour Organization (ILO), according to which, where the appointment of a staff member recruited under a short-term contract is extended beyond one year, she or he is automatically entitled to the conditions of employment pertaining to fixed-term contracts. This argument is based on the provisions of paragraph b(2) of the introduction to the WIPO Staff Regulations and Rules in the version of that introduction prior to 1 January 2012, which stated that "particular conditions of service [for staff specifically engaged for short-term service] [are] determined by the Director General in the light of the practice of the other intergovernmental organizations of the United Nations common system at the duty station". The complainants contend that, under these provisions, for them to be fully informed of their rights they should have been made aware of the practice adopted by the International Labour Office pursuant to the above-mentioned rule to protect staff members' interests and the manner in which that practice had been taken into consideration by WIPO when determining the employment conditions of its own staff employed under short-term contracts. However, besides the fact that the Director General was not obliged to refer particularly to the ILO's rules on this matter, the Tribunal does not consider that it is at all apparent from the aforementioned provisions of the introduction to the Staff Regulations and Rules that WIPO was required to specifically provide its staff with information on this issue such as that in question. This argument, whose link with the alleged violation of the right of appeal appears rather contrived, must therefore be dismissed.

(c) Finally, some of the complainants submit that they were misled as to the exercise of their right of appeal by internal memoranda sent to them by the Human Resources Management Department on 27 March 2012, which announced the launch of a campaign to regularise the contractual situation of long-term temporary staff from which they were likely to benefit. They argue that these memoranda gave them the impression that they might eventually be awarded fixed-term contracts. As a result, when they were notified in the meantime of decisions granting them temporary contracts, they could, in their view, reasonably think that the question of how to regularise their situation was still under consideration. They infer that, in these circumstances, their challenges to those decisions cannot be dismissed as time-barred as that would be tantamount to leading them into a "procedural trap". However, the Tribunal finds that while it is true that the memoranda envisaged that the complainants concerned could subsequently be assigned to newly created posts that would be advertised, which implicitly involved the award of fixed-term contracts, the complainants could not reasonably fail to understand that the temporary contracts offered to them in the meantime were another means of regularising their contractual situation, irrespective of the opportunity that remained open to them to obtain fixed-term contracts subsequently through competitive recruitment procedures. They cannot therefore be considered to have been misled as to the need to exercise their right of appeal at that point if they felt it necessary to challenge the terms on which that regularisation took place.

19. Accordingly, none of the complainants' arguments contesting the time-bar on their internal appeals pursuant to the case law arising from aforementioned Judgments 4159 and 4160 can be accepted.

20. According to the Tribunal's firm precedent based on the provisions of Article VII, paragraph 1, of its Statute, the fact that the appeals lodged by the complainants were out of time renders their complaints irreceivable for failure to exhaust the internal means of redress available 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 Judgments 4160, consideration 13, and 4159, consideration 11, as well as, for example, Judgments 2888, consideration 9, 2326, consideration 6, and 2010, consideration 8).

21. The complainants request that WIPO be ordered to pay them moral damages for the excessive delay in the internal appeal procedure.

In this respect, it should be recalled that international civil servants are entitled to expect that their cases will be considered by internal appeal bodies within a reasonable timeframe and that failure to comply with this requirement of expeditious proceedings constitutes a failing on the part of the employer organisation (see, for example, Judgment 3510, consideration 24, or Judgment 2116, consideration 11). Under the Tribunal's case law, the amount of compensation that may be granted under this head ordinarily depends on two essential considerations, namely the length of the delay and the effect of the delay on the employee concerned (see, for example, Judgments 4635, consideration 8, 4178, consideration 15, 4100, consideration 7, or 3160, consideration 17).

In the present case, a period of approximately three years and three months elapsed between the public delivery on 24 January 2018 of aforementioned Judgment 3943, whereby the cases were remitted to WIPO for the complainants' appeals to be considered, after correction, by the Appeal Board, and the notification of the decision of 12 April 2021 determining those appeals. It should be borne in mind that the Organization's liability in this regard should be assessed by reference to this period alone, since the Tribunal found in Judgment 3943 that, in view of the flaw that affected the appeals, there was no reason to redress the injury caused by the delay in processing them that resulted from the setting aside of the initial decisions.

Such a delay is, of itself, undeniably excessive. However, apart from the fact that, to a small extent, the slowness can be explained by the stay of proceedings granted at the complainants' own request pending Judgments 4159 and 4160, the Tribunal considers that, as from the public delivery of those judgments on 3 July 2019, the complainants

could not, in the light of those precedents, reasonably continue to be uncertain as to what the outcome of their own appeals would be. The adverse effects usually inherent in a delay of that kind were therefore significantly diminished in the present case.

In these circumstances, the Tribunal considers that the complainants, who have already each been awarded compensation of 300 Swiss francs under this head pursuant to the impugned decision itself, have not established that they have suffered injury warranting greater redress on account of the delay complained of.

22. It follows from the foregoing that the complaints must be dismissed in their entirety, without there being any need to rule on WIPO's objections to receivability, apart from the one upheld above.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 5 May 2023, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ