

118th Session

Judgment No. 3339

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S.D.S. against the International Criminal Court (ICC) on 5 March 2012, the ICC's reply of 27 June, the complainant's rejoinder of 28 August and the ICC's surrejoinder of 5 December 2012;

Considering Article II, paragraph 5, 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 and the pleadings may be summed up as follows:

A. The complainant is a serving official of the ICC. At the material time he was a Legal Officer in the Trial Division, Chambers. On 31 March 2010 he requested authorisation to work part time in order to finish his PhD degree. His request was approved and he was placed on 50 per cent part-time employment from 1 May 2010 until 31 January 2011. In a letter to the Registrar of the ICC supporting the complainant's request, Judge A.F., the President of the Trial Division, enquired whether the complainant would be eligible to

receive remuneration for any additional hours he was required to work beyond his 50 per cent work schedule. The Chief of Human Resources responded in a memorandum of 9 June 2010 that financial compensation for overtime was not available for staff in the Professional and higher categories, regardless of their employment schedule.

On 7 October 2010 the complainant wrote to the Registrar requesting, in accordance with Section 9.2 of Administrative Instruction ICC/AI/2008/006 on Part-Time Employment of Staff Members (hereinafter ICC/AI/2008/006), remuneration for the hours that he had worked overtime. On 26 January 2011 he again wrote to the Registrar, reiterating this request. He indicated that in the nine months of his part-time employment he had worked a total of 370 hours' overtime for reasons beyond his control. In particular, the workload of Trial Chamber II, to which he was assigned, was such that the Judges had asked him to carry out a number of tasks that required him to work overtime, a fact of which they were fully aware. In the ensuing exchanges between the Registrar, Judge A.F. and the Chief of Human Resources there was agreement that the complainant was not entitled to financial compensation for overtime. By a memorandum of 4 April 2011, the Registrar informed the complainant that his request could not be granted because, pursuant to Staff Rule 103.15(b), which was the applicable rule and which was not overridden by ICC/AI/2008/006, the Court did not provide financial compensation for overtime work to staff in the Professional and higher categories. The complainant requested a review of that decision. His request for review was rejected and on 24 June 2011 he filed an appeal against the Registrar's decision not to grant him financial compensation for his overtime work.

In its report of 31 October 2011, the Appeals Board found that Staff Rule 103.15 and Section 9.2 of ICC/AI/2008/006 did not entitle the complainant to monetary compensation for the additional hours worked in excess of his normal work schedule, but that he should be given compensatory time off for those additional hours. However, it

recommended that in this case the Registrar should instead consider paying him for the additional hours under Staff Rule 112.2, which allows the Registrar or the Prosecutor to make an exception to the Staff Rules in specific cases, particularly because the complainant had been assured by his supervisors that he would be financially compensated for his additional hours of work. By a letter of 22 November 2011, the Registrar informed the complainant of her decision not to accept the Board's recommendations. That is the impugned decision.

B. The complainant asserts that Section 9.2 of ICC/AI/2008/006 entitles him to remuneration for the additional hours he worked in excess of his normal working schedule during the period of his part-time employment. He argues, in particular, that the legal position of part-time staff members working additional hours is regulated by Section 9.2 of ICC/AI/2008/006, not by Staff Rule 103.15(b). Indeed, not only does Section 9.2 deal with a situation not regulated in the Staff Rules – in fact the latter do not even mention the possibility of part-time work – but it also protects staff members on part-time employment by providing for their pro-rata remuneration for additional hours worked up to the normal full-time schedule. In effect, one regime applies to “additional hours” of work up to the full-time schedule and another to “overtime” work beyond the full-time schedule.

He explains that, if Staff Rule 103.15(b) were also applicable to staff members working part time, then the second sentence of Section 9.2 would not be necessary, which would be contrary to the principle that rules cannot be presumed to be meaningless. Contrary to the ICC's contention, Section 9.2 contains an obligation to remunerate – not a description of the method for calculating overtime compensation – and must be given priority over Staff Rule 103.15(b) on the basis of the *lex specialis derogat generali* principle. In addition, Section 9.2 does not differentiate between staff categories – a plain reading indicates that it regulates all part-time staff members required

to work in excess of their normal schedule – and there is nothing in ICC/AI/2008/006 suggesting that it does not apply to staff members in the Professional and higher categories. A different interpretation of the provision would, in any case, be discriminatory.

The complainant also asserts that the additional hours that he worked in excess of his normal working schedule were “exceptional” within the meaning of Section 9.2 of ICC/AI/2008/006. He denies having forfeited his right to remuneration under Section 9.2 simply because he systematically worked beyond his normal working schedule. In fact, Section 9.2 refers to the “normal schedule”, which in his case was the 50 per cent employment schedule, and the Registrar has failed to demonstrate that the additional hours worked by him fell within the “normalised” category of overtime. In his view, the Registrar’s interpretation of Staff Rule 103.15(b) is flawed, because it implies that a part-time staff member could systematically be required to work as many hours as a full-time staff member without compensation and effectively have the same working schedule as a full-time staff member for half the pay. He submits that the clear wording of Section 9.2 of ICC/AI/2008/006, coupled with his supervisors’ support, created in him a legitimate expectation that he would be financially compensated for his additional hours.

The complainant asks that the ICC be ordered to pay him remuneration on a pro-rata basis for the 370 hours of work performed in addition to his regular part-time working schedule, together with monthly compound interest at the rate of 5 per cent per annum from due dates. He seeks payment of a proportional amount in contributions to his United Nations Joint Staff Pension Fund (UNJSPF) account. He also claims remuneration for the 35 hours of work spent by him in private time on pursuing his claim.

C. In its reply the ICC submits that remuneration for overtime work was never a term or condition of the complainant’s appointment and therefore the complainant cannot retroactively claim such remuneration.

It maintains that, as a Professional staff member, the complainant is required under Staff Rule 103.15(b) to perform his duties in line with his responsibilities “outside [his] working schedule to the extent required by service”. Thus, he is not entitled to monetary compensation for overtime, irrespective of his part-time work schedule. It explains that the rule according to which staff in the Professional and higher categories do not receive monetary compensation for overtime is derived from the ICC legal framework and from the distinction in Staff Rule 103.15 between Professional and General Service staff, which shows that it was never the intention of the drafters of said rule to award such compensation; had this been the case, a specific provision to that effect would have been included in Staff Rule 103.15. This position, it argues, is fully supported by the Tribunal’s case law.

According to the ICC, Staff Rule 103.15 is the primary rule regulating overtime work and ICC/AI/2008/006 must be interpreted in the light of that rule. In effect, Staff Rule 103.15 is higher in the hierarchy of norms and must thus prevail in case of conflict. Moreover, Section 9.2 of ICC/AI/2008/006 simply prescribes procedures for the implementation of Staff Rule 103.15 and cannot modify it, extend its reach or impose conditions not foreseen in said Rule. As Section 9.2 is subordinate to Staff Rule 103.15, the *lex specialis derogat generali* principle cannot apply in the present case.

The ICC asserts that Staff Rule 103.15 is applicable to all staff, irrespective of whether they are in full-time or part-time employment. In support of its assertion, it points to the absence of any indication in ICC/AI/2008/006 that the intention of the drafters was for Section 9.2 to apply to staff in the Professional and higher categories and to the fact that Staff Rule 103.15 makes no distinction between full-time and part-time staff, but only between Professional and General Service staff. It adds that, even assuming that Section 9.2 applies to staff in the Professional and higher categories, it cannot in any event apply to the complainant, because he has not established that he was

“exceptionally” required to work in excess of his normal working schedule. Referring to the stipulation in Staff Rule 103.15(a) that Professional staff shall “endeavour to perform their regular duties within their working schedule”, it contends that the complainant has not shown that the duties which he performed during overtime were not his regular duties or that he could not have performed them within his working schedule.

The ICC denies that its interpretation of the applicable provisions is discriminatory, pointing out that the position of Professional staff members is relevantly and objectively different from that of staff members in the General Service category and that the distinction made in the applicable rules is therefore justified. It contends that, as the complainant was notified by his supervisors of the Presidency’s advice that he should not work additional hours, he cannot claim to have had a legitimate expectation to be remunerated for his overtime.

D. In his rejoinder the complainant rejects the ICC’s contention that overtime remuneration was never a term or a condition of his appointment. He points out in this regard that the Tribunal has treated the expression “non-observance [...] of the terms of appointment of officials” in Article II, paragraph 5, of its Statute as being sufficiently wide to cover obligations arising from the relationship created by the appointment. As Section 9.2 of ICC/AI/2008/006 falls within the scope of his relationship with the ICC, which was created by his appointment, the complaint is fully receivable.

He takes issue with the ICC’s implicit assertion that the duties assigned to him could have been performed within his part-time working schedule, which he considers a slander to his professional reputation. Moreover, he questions the relevance of its distinction between “regular” and “non-regular” duties and affirms that the work performed by him during overtime was entirely and directly related to his regular duties. He refers in this regard to the affidavits from Judge V.d.W., his immediate supervisor, and Judge B.C., the Presiding Judge of Trial Chamber II, as well as to his Overtime

Records, signed by the latter, all of which he appends to his complaint brief. He explains that he never received a formal instruction to stop working overtime and he argues that, even if this had been the case, he could not have refused assignments given to him by his supervisors, in light of his obligation under Staff Rule 103.15.

The complainant requests, alternatively to his claim for 5 per cent compound interest on the amount due to him for the 370 hours of work performed in addition to his regular part-time working schedule, such other compensation, as the Tribunal may consider fair for the belated payment of a clear entitlement. He increases to 48 the hours of work spent by him in private time on pursuing his claim and for which he requests remuneration. He seeks a formal apology from the ICC and an order that it retract the defamatory statements made against him and that it pay the ICC Staff Council 500 euros for assisting him with his complaint.

E. In its surrejoinder the ICC maintains its position in full. It submits that the affidavits relied upon by the complainant do not establish that the duties which he performed during overtime were not his regular duties within the meaning of Staff Rule 103.15(a), or that it was not possible for him to carry them out within his regular working schedule. It denies having in any way slandered the complainant's professional reputation and it invites the Tribunal to reject as irreceivable the additional claims put forward by him in his rejoinder.

CONSIDERATIONS

1. In the period from 1 May 2010 until 31 January 2011 the complainant worked on a 50 per cent part-time basis. During this period he accrued 370 hours of overtime. Following the rejection of his request for remuneration for the additional hours he had worked (Registrar's decision dated 4 April 2011), he appealed to the Appeals Board which, based on the interpretation of Staff Rule 103.15 and Section 9.2 of ICC/AI/2008/006, recommended in its 31 October 2011

report that the complainant was not entitled to “monetary compensation for additional hours worked in excess of his normal working schedule” and that he should be given “compensatory time off for the additional hours”. The Board also recommended that “the Registrar consider making an exception in this case under Staff Rule 112.2 to pay for the additional hours of overtime the [complainant] worked”, especially because the complainant had been “assured by his supervisors that he would be financially compensated for the extra hours he [had] worked for the Trial Chamber”. In her final decision dated 22 November 2011, the Registrar rejected the recommendations of the Appeals Board, stating that the complainant had not established that he had been “exceptionally required to work in excess of [his] normal working schedule”, and that she found “no exceptional circumstances to make an exception to Staff Rule 103.15 to pay for additional hours of overtime work to [him] as a staff member in the Professional category”. The complainant impugns this decision in the present complaint.

2. The complainant bases his complaint on the plain reading and interpretation of two provisions, namely Staff Rule 103.15 and Section 9 of ICC/AI/2008/006.

Staff Rule 103.15, entitled “Overtime and compensatory time off”, provides:

- “(a) Staff members shall endeavour to perform their regular duties within their working schedule.
- (b) Staff members in the Professional or higher categories shall be required to perform their duties in line with the responsibilities outside their working schedule to the extent required by service. The Registrar and the Prosecutor, as appropriate, may exceptionally grant compensatory time off for overtime work.
- (c) Staff members in the General Service category who are requested by their supervisor to perform duties in addition to their working schedule shall be entitled to compensation for their overtime work. Subject to the exigencies of service, overtime shall normally be compensated by way of granting compensatory time off. If compensatory time off cannot be granted due to operational needs of the Court, overtime may exceptionally be compensated by payment.”

Section 9 of ICC/AI/2008/006, entitled “Overtime”, provides:

“9.1. Part-time staff members are not expected to work overtime at weekends or on official holidays, and they are not entitled to night differential in cases of shift work.

9.2. Part-time staff members who are exceptionally required to work in excess of their normal schedule shall be remunerated at the straight time rate for additional hours worked up to the normal scheduled working week of full-time staff members. Thereafter, they shall be compensated according to the conditions governing compensation for overtime work.”

3. The Tribunal notes that the principle of *lex specialis derogat generali* is not applicable in the present case, as there is no conflict of norms. In any event, this principle cannot be applied to laws which, as in the present case, are not at the same level of hierarchy. With regard to the ICC’s objection to receivability, the Tribunal considers that it is unfounded. As the main issue raised in the complaint is one of non-observance of the complainant’s terms of appointment, the complaint falls squarely within the Tribunal’s competence and is thus receivable. The Tribunal notes, without commenting on the merits of the claim, that the complainant’s request for a formal apology is not within its remit to order.

4. Contrary to the ICC’s assertions, the Tribunal holds that Section 9 of ICC/AI/2008/006 applies to all staff members, including those in the Professional category, which is specifically referred to in Section 7.3. By this administrative instruction, the ICC adopted a regime specifically adapted to part-time employment, both in the Professional and General Staff categories. Section 9 stipulates that all part-time staff members shall be remunerated for the additional hours worked up to the full-time working schedule and shall only thereafter be compensated for any overtime work in accordance with Staff Rule 103.15.

5. Section 9.2 of ICC/AI/2008/006 also provides that “[p]art-time staff members **who are exceptionally required** to work in excess of their normal schedule shall be remunerated [...]” (emphasis added). The Tribunal is of the opinion that the fact that the

complainant's supervisors asked him to work beyond his regular working hours (50 per cent employment) is enough to fulfil the requirement of "exceptionality", as his supervisors' requests have to be attributed to the ICC. The opinions of the Chief of Human Resources and Judge A.F., the President of the Trial Division, are therefore irrelevant. Contrary to the ICC's assertion, the affidavits from Judge V.d.W., the complainant's immediate supervisor, and Judge B.C., the Presiding Judge of Trial Chamber II, as well as the complainant's Overtime Records, which are signed by Judge B.C., sufficiently prove that the complainant was required to fulfil duties outside his regular working schedule. As far as the label "regular duties" is concerned, the Tribunal considers that the term refers simply to duties which are assigned in line with the employee's job description and which can be fulfilled within the regular working schedule. Any additional work requested and/or required outside that schedule is to be considered "exceptional".

6. In light of the above considerations, the impugned decision (22 November 2011) as well as the decision to deny the complainant's request for remuneration for the 370 additional hours worked (4 April 2011) must be set aside. The ICC shall pay the complainant on a pro-rata basis for the 370 hours of additional work which he performed outside his regular working schedule (50 per cent part-time employment), together with interest at the rate of 5 per cent per annum from due dates to the date of final payment. It shall also pay a proportional contribution to his UNJSPF account, as provided for in the UNJSPF rules. As the complaint succeeds, the ICC shall pay him costs in the amount of 1,200 euros. All issues not directly referred to in this decision are either irrelevant or have been absorbed under a larger topic.

DECISION

For the above reasons,

1. The Registrar's decisions of 4 April 2011 and 22 November 2011 are set aside.
2. The ICC shall pay the complainant on a pro-rata basis for the 370 hours of additional work which was done outside his regular 50 per cent working schedule, together with interest at the rate of 5 per cent per annum from due dates to the date of final payment.
3. It shall pay a proportional contribution to the complainant's UNJSPF account, as provided for in the UNJSPF rules.
4. It shall also pay him costs in the amount of 1,200 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO
DOLORES M. HANSEN
HUGH A. RAWLINS
DRAŽEN PETROVIĆ