

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**S.**  
**v.**  
**ICC**

**124th Session**

**Judgment No. 3863**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. S. against the International Criminal Court (ICC) on 23 February 2015, the ICC's reply of 22 June, the complainant's rejoinder of 14 August and the ICC's surrejoinder of 26 November 2015;

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 may be summed up as follows:

The complainant challenges the termination of his appointment on disciplinary grounds.

Facts related to this case can be found in Judgment 3862, also delivered this day, concerning a complaint filed by the complainant's spouse.

By a letter of 25 November 2013 the Registrar of the Court informed the complainant that it was alleged that he had breached confidentiality by disclosing sealed information to members of the defence team in a case which had been brought before the Court. If those allegations were true, his actions would amount to serious misconduct which could lead to the imposition of disciplinary measures. Thus, the Registrar had decided to authorize a preliminary investigation into the matter and to suspend the complainant for an initial period three months (as from the date of his receipt of the letter), with pay, in accordance with Staff

Rule 110.5(a), in order to ensure the integrity of the investigation. If necessary the suspension would be shortened or extended, depending on the length of the preliminary investigation and any possible disciplinary proceedings. The complainant's suspension was subsequently extended numerous times.

On 17 February 2014 the Security and Safety Section (SSS), which had been tasked with conducting the preliminary investigation, submitted its report to the Registrar in which it was stated that the investigating officer had been unable to confirm any breach of confidentiality or leak of under-seal information by the complainant.

By a letter of 3 March 2014 the complainant was notified of the allegations against him and provided with a copy of the documentary evidence of his alleged misconduct. Later that month the Registrar referred the case to the Disciplinary Advisory Board (DAB) for advice and the complainant was so informed.

On 17 April 2014 the DAB provided the complainant with a redacted version of the case dossier submitted to the DAB by the Registrar. On 1 May the complainant made a detailed request for the disclosure of further evidence related to the matter. In the absence of a decision on that request, he reiterated it on 17 June. On 18 July 2014 he was notified that the DAB had submitted its report and recommendations to the Registrar. On 24 July, in light of the Administration's failure to disclose the requested evidence, the complainant objected to the filing of the DAB's report.

In its report dated 17 July 2014 the DAB concluded that it had no evidence enabling it to establish beyond any possible doubt that the complainant had intended to divulge sensitive information or that he had, in fact, revealed sensitive information to Mr M., a member of the defence team in a case before the ICC. The DAB stated that it could not recommend the imposition of disciplinary measures under Staff Rule 110.6, but it nevertheless recommended that the complainant receive a written reprimand pursuant to Staff Rule 110.6(b)(i).

By a letter of 25 November 2014 the Registrar notified the complainant that, after reviewing the DAB report, the preliminary investigation report and the report of the DAB in a case concerning the

complainant's spouse (the latter case being the subject of Judgment 3862, also delivered in public this day), he had concluded that it was proven beyond a reasonable doubt that the complainant had disclosed under-seal information to Mr M. This action amounted to unsatisfactory conduct and the Registrar had thus decided to impose a disciplinary measure in the form of termination of his appointment, with immediate effect, pursuant to Staff Rule 110.6(vii) (*recte* 110.6(a)(vii)). That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order his reinstatement to his former post. He seeks an award of all salaries, pension contributions and other allowances which would have been owed to him up until the date of his reinstatement. In the alternative, he requests the Tribunal to award him damages in an amount equal to his salary, pension contributions and allowances up until 14 June 2020. He further asks the Tribunal to order the removal of the Registrar's decision of 25 November 2014 from his official status file. He claims reimbursement of the expenses he incurred to repatriate his family to the Democratic Republic of the Congo, moral damages and costs.

The ICC asks the Tribunal to dismiss the complaint in its entirety and to deny the complainant the relief he seeks.

#### CONSIDERATIONS

1. By letter dated 25 November 2014, the Registrar of the Court terminated the complainant's appointment with immediate effect. This is the decision impugned in these proceedings.

2. In another complaint dealt with by the Tribunal which is the subject of Judgment 3862, also delivered in public this day, the complainant's spouse impugns a decision of the Registrar also dated 25 November 2014 terminating her appointment. The substratum of facts in each case is substantially the same and the same or similar legal issues are raised. However for reasons which emerge in this judgment as well as Judgment 3862, it is important for the Tribunal to consider separately each complaint. This is particularly so given the quite

different use that can appropriately be made in the present case (as compared to the case involving the complainant's spouse) of the report of the DAB (discussed later) concerning the complainant in the present case. Nonetheless there is some repetition in the present judgment of observations or analysis made in Judgment 3862.

3. At the material time the complainant was employed with the ICC as a Logistic Support Assistant, in the Field Operations Section of the Registry at ICC Headquarters. The complainant's spouse was employed as a Court Clerk in the Court Management Section at ICC Headquarters. On 25 September 2013 she attended, in that capacity, an *ex parte* hearing concerning the prosecution of Mr B. and others. During that hearing "she was informed about an investigation against [Mr B.'s] Defence team" (as described in a report by the SSS referred to shortly). One of the members of that defence team was Mr M., another was Mr K. The genesis of the decision to terminate the complainant's appointment was an intercepted telephone conversation between Mr M. and Mr K. which took place in the evening of 11 October 2013 at approximately 10:00 p.m. Shortly before this intercepted conversation, Mr M. had been talking with the complainant as Mr M. walked to his car following a dinner at the home of the complainant and his spouse, who were both friends (at least in the sense they had an amicable relationship) with Mr M. Central to the Registrar's decision to terminate the complainant's appointment was that he had relayed confidential information to Mr M.

4. Before the final consideration of the material by the Registrar leading to his conclusion that the complainant had engaged in misconduct, the facts and evidence had been assessed twice. The first occasion was in an internal investigation undertaken by the SSS culminating in a report dated 17 February 2014. The second occasion was the consideration of the matter as it concerned the complainant by the DAB, which reported on 17 July 2014.

5. On the question of breach of confidentiality, the SSS report recounted, in relation to the complainant's spouse:

"The investigating officer was unable to confirm any '*breach of confidentiality*' by [the complainant's spouse] and/or a leak of under seal information in relation to the Prosecutor vs [Mr B.] [...] after her attendance [at] the ex parte hearing [...] on 25.09.2013 and after she was informed during the hearing that an investigation against Mr [B.'s] Defence team had been initiated."

And in relation to the complainant:

"The investigating officer was unable to confirm any '*breach of confidentiality*' by [the complainant] and/or a leak of under seal information in relation to the Prosecutor vs [Mr B.] [...]. Within his functions in FOS [the complainant] has no access to 'under seal information' or any other information related to Court cases in the situation countries and the judicial proceedings. According to the findings in the current preliminary investigation, the information related to the Kenya case and related to the arrest warrant for [a person involved in the Kenya case] [...] was made public on 02.10.2013 and discussed by the complainant and Mr M. on 11.10.2013."

6. The DAB report concerning the complainant reached broadly similar conclusions. On the breach of confidentiality the DAB Panel said:

"The Panel has no conclusive evidence that would enable it to establish without any possible doubt that [the complainant] intended to divulge sensitive information, or that [the complainant] revealed sensitive information about an investigation of certain members of [Mr B.'s] defence team and Mr [B.] himself to [Mr M.]"

7. The complainant advances five arguments in support of the relief sought in his complaint. The first argument is that the impugned decision of the Registrar was not adequately motivated. The letter of 25 November 2014 was, as to much of it, in the same terms as the letter to the complainant's spouse who raised a similar argument about lack of motivation. Accordingly, it is possible to repeat some of what is said in Judgment 3862 about the adequacy of the Registrar's reasons. It has to be borne in mind that the Registrar reached a conclusion that it was proved beyond a reasonable doubt that the complainant disclosed under-seal information to Mr M. notwithstanding the contrary view of the DAB Panel set out in the preceding consideration. It is necessary to consider the Registrar's assessment of the evidence on which he

founded his decision and the applicable legal principles that operate in circumstances such as the present.

8. The applicable legal principles can be stated briefly. The executive head of an international organisation is not bound to follow a recommendation of any internal appeal body nor bound to adopt the reasoning of that body. However an executive head who departs from a recommendation of such a body must state the reasons for disregarding it and must motivate the decision actually reached. In addition, according to the well-settled case law of the Tribunal, the burden of proof rests on an organisation to prove allegations of misconduct beyond a reasonable doubt before a disciplinary sanction can be imposed (see, for example, Judgment 3649, consideration 14). It is equally well settled that the “Tribunal will not engage in a determination as to whether the burden of proof has been met, instead, the Tribunal will review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made by the primary trier of fact” (see Judgment 2699, consideration 9).

9. The Registrar concluded the complainant had disclosed “under-seal information” to Mr M. Several subsidiary conclusions led to that ultimate conclusion. The first was that the complainant had told Mr M. that there were rumours that Mr M. and Mr K. were paying witnesses and that an investigation had been initiated. This involved a repetition of a finding in the SSS report. Another conclusion was that the complainant told Mr M. to be careful, which was again based on a finding in the SSS report. Having regard to the translation of the transcript of the intercepted telephone conversation, these findings were clearly open to the Registrar, even applying the “beyond a reasonable doubt” test. While what Mr M. said in the conversation with Mr K. about the identity of the person who told him these things might be viewed as hearsay, such evidence may nonetheless be admissible and it is simply a question of evaluating its probative value (see Judgment 2771, consideration 17). It was clearly open to the Registrar, in the absence of any other plausible explanation, to conclude that, in circumstances where Mr M. had just had a conversation with the complainant and the

subject matter of that conversation, as described in the intercepted telephone conversation, was seen by Mr M. as sufficiently important to discuss with Mr K. late in the evening, the matters discussed in the intercepted telephone conversation were a product of the discussion with the complainant. For similar reasons, it was clearly open to the Registrar to reject the account the complainant had given to the investigator that what he discussed with Mr M. was generally a public warning by the ICC Prosecutor about witness interference contained in a video, and a press release concerning bribery in a case concerning circumstances in Kenya. The complainant's account is entirely at odds with the actual conversation revealed in the translation of the transcript of the intercepted telephone conversation. In rejecting the complainant's account of what he discussed with Mr M., the Registrar referred to observations and conclusions of the DAB Panel about the subject matter of the conversation between them.

10. The Tribunal notes that, in the reasons provided by the Registrar, there are repeated references to "under-seal information" and it was information of this character that was alleged to have been disclosed by the complainant to Mr M. What the Registrar does not expressly do is explain why the information he concluded had been imparted to Mr M. by the complainant was of this character. Having regard to other documents, and the SSS report in particular, the information was of this character because it was information that the complainant's spouse had obtained in an ICC hearing she attended on 25 September 2013 in her capacity as a Court Clerk. However it is tolerably clear from the Registrar's reasons, and in particular the quotation of a specific paragraph (47) of the DAB report concerning the complainant set out in the letter, that this was why the information was "under-seal information".

11. The question is not whether the Tribunal is satisfied beyond a reasonable doubt that the complainant revealed confidential information to Mr M. Rather it is whether the Tribunal is satisfied that it was open to the Registrar to reach that conclusion by reference to that standard of proof. The Tribunal is satisfied that it was. In evaluating evidence, minds can reasonably differ about the probative value of that

evidence. In the present case, the SSS report and DAB report manifest an unwillingness by the authors of those reports to treat the evidence as proving the alleged misconduct beyond a reasonable doubt (involving the revelation of confidential information). However it does not follow that the contrary view is inherently or necessarily wrong.

12. The Registrar's reasons were, in the circumstances, adequate notwithstanding that his conclusion involved a rejection of the recommendation of the DAB. This is particularly so given that the DAB did little more than recite the evidence, express conclusions about specific matters and then express its final conclusion about whether the complainant had engaged in misconduct (in the passage quoted in consideration 6, above). It did not provide any substantial reasoning for reaching that final conclusion.

13. The complainant's second argument concerns one of several allegations that there were violations of his due process rights. He submits that he was suspended before investigation of the allegations against him. This, he argues, was contrary to the provisions of Administrative Instruction ICC/AI/2008/001 concerning disciplinary procedures. The Tribunal accepts that on one reading of Section 2.4 of Administrative Instruction ICC/AI/2008/001, any suspension decision ought to follow a preliminary investigation pointing to unsatisfactory conduct. However, it is tolerably clear that this provision is intended to operate in conjunction with Staff Rule 110.5(a) that, itself, clearly contemplates suspension at the outset and during the fact-finding process. The Tribunal rejects this argument of the complainant. In addition, it may be doubted that the question of whether the suspension decision was lawful can be properly raised in proceedings impugning the much later decision to terminate the complainant's appointment. They are discrete and separate administrative decisions.

14. The complainant's third argument also concerns an alleged violation of his due process rights. The ICC, so the complainant argues, failed to meet the time limits applicable to the preliminary investigation and subsequently. Three express specific time limits provided for



in Administrative Instruction ICC/AI/2008/001 are relied on by the complainant as concerns preliminary steps. The first relates to the notification of the preliminary outcome of the investigation within five working days from the date when the preliminary investigation was instructed (Section 2.3). The second concerns when, relevantly, the Registrar decides whether the matter should be pursued (Section 2.5 – within 10 working days from the date of submission of the preliminary investigation report). The third concerns any decision to refer the matter to a DAB (Section 2.9 – within 10 working days from the date of the receipt of the staff member’s reply). As a matter of fact, the second and third time limits appear to have been met.

15. The first time limit may not have been met. However, there is an obvious tension between Section 2.3 and other provisions in Administrative Instruction ICC/AI/2008/001. This is exemplified by Section 2.1, which authorises the investigating staff member (or members) to give the staff member under investigation 10 working days to provide her or his version of the facts and evidence. A five-day time limit to provide a preliminary outcome of the investigation does not sit comfortably with the time limit afforded to the staff member under investigation. Moreover and in any event, five days, in any case of any complexity, is an extremely short, if not impossibly short, period of time within which to submit, as Section 2.3 appears to provide, “[a] preliminary outcome of the investigation consisting of a full account of the facts that are known together with documentary evidence [...] signed written statements by witnesses or any other document or record relevant to the alleged misconduct”. If the aforementioned provision is to be construed literally and it does create a five-day time limit, it should not be construed as creating a mandated time limit incapable of being varied to meet the circumstances of a particular case. In the present case, having regard to the subject matter of the investigation, the time taken for these preliminary steps was not excessive.

16. In relation to the deliberations of the DAB, Section 4.1 of Administrative Instruction ICC/AI/2008/001 requires the DAB to “act with maximum dispatch” and, “normally within thirty calendar days of

the case being referred”, provide advice to, relevantly, the Registrar. Thereafter, as provided for in Section 6.1, the Registrar is to take a final decision within one month of the date of the submission of the DAB report. These time limits were not met, though there is obviously some latitude intended to be created by Section 4.1 by the use of the word “normally”. In the circumstances of this case, the Tribunal is not satisfied that the time taken by the DAB Panel was excessive, particularly having regard to the subject matter of its deliberations. Also, it was necessary to deal with an issue raised by the complainant about the composition of the Panel, an issue arose about what the Panel could see of the documents in the SSS investigation file, and the Panel sought additional evidence from Mr M.

17. However the time taken by the Registrar to take a final decision (as he did on 25 November 2014) was, indeed, lengthy and certainly beyond the one month provided for in Section 6.1 of Administrative Instruction ICC/AI/2008/001. Nevertheless, the Tribunal notes that shortly after the DAB finalised its report on 17 July 2014 and submitted it to the Registrar the following day, the complainant objected to the “filing” of the report on the basis that he had not been afforded due process because he had not been provided with the full evidence against him. It was necessary for the Registrar to deal with this contention. How long that took is not clear on the material before the Tribunal. In addition, the Registrar was obviously not prepared to accept the conclusions and recommendation of the DAB (that the complainant receive a written reprimand) and some allowance should be made for the time necessary to articulate the reasons for adopting this approach and also to decide on an appropriate disciplinary measure. Notwithstanding these considerations, a little over four months elapsed between the provision of the DAB report and the final decision of the Registrar. That does, in the circumstances, constitute an excessive period and the complainant is entitled to modest moral damages for the delay. Having regard to the nature of the allegations against him, the conclusions in the SSS report and the decision of the Registrar to pursue the matter, it is probable the complainant was aware that one option that might emerge from the process was the termination of his appointment.

Given the gravity of that outcome, the complainant was entitled to know the Registrar's final decision sooner than he ultimately did. The Tribunal assesses those damages in the amount of 5,000 euros.

18. The complainant's fourth and fifth arguments, which can be dealt with together, also concern an alleged violation of his due process rights. The ICC, so the complainant argues, failed to disclose to him all relevant evidence and failed to provide him with an opportunity to answer that evidence. The case law of the Tribunal establishes that, as a general rule, a staff member must have access to all evidence on which the authority bases (or intends to base) its decision against her or him. Under normal circumstances, such evidence cannot be withheld on grounds of confidentiality (see Judgment 2700, consideration 6, cited recently in Judgments 3688, 3613, 3586, 3490, 3380, 3347, 3290, 3285, 3272 and 3264, for example). The complainant is also entitled to have an opportunity to test the evidence and produce evidence to the contrary (see, for example, Judgment 2786, consideration 13). The complainant also relies on Section 2.6 of Administrative Instruction ICC/AI/2008/001 that requires, relevantly, the Registrar to provide the staff member with a copy of the documentary evidence of the alleged misconduct.

19. The complainant's argument is based, in part, on one general assertion and on one specific assertion concerning the material considered by the DAB. The general assertion is that the DAB was not correct when it said (in correspondence in August 2014) that it based its recommendations exclusively on the documents that had been forwarded to the complainant in April 2014 and, in particular, on a redacted version of the investigation report. The only possible basis for questioning this proposition advanced by the complainant was that it was apparent from the DAB report that the investigating officer had interviewed Mr M. and that record of interview was considered by the DAB but not provided to the complainant. However the passage relied on in the DAB report refers, not to an interview with Mr M., but rather to an interview with the complainant himself. The Tribunal accepts the evidence that the DAB provided the complainant with the material it relied upon in considering the case against him.

20. Potentially of greater relevance is that in the impugned decision the Registrar indicated that he had “carefully reviewed” not only the DAB Report concerning the complainant but also the DAB report concerning the complainant’s spouse. The complainant relies on the use of that latter report in support of his argument that he was denied due process. In a letter to the complainant of 26 February 2015 referred to by the ICC in its reply, the ICC adopted the position that the complainant could readily obtain a copy of the DAB report concerning his spouse from her. To presume she would provide it involves assumptions about the nature of the specific relationship, as a matter of fact, between the complainant and his spouse.

21. Nothing is said in the impugned decision which indicates specific reliance on the DAB report concerning the complainant’s spouse. However, the Tribunal cannot discount the possibility that the Registrar’s ultimate decision was influenced by what was said in that report. It is to be recalled from what is said in consideration 10, above, that one potential problem with the Registrar’s reasons was his conclusion that the content of the discussion between the complainant and Mr M. after the dinner on 11 October 2013, was “under-seal information”. It is quite conceivable, indeed likely, that this conclusion was based not only on what was said in the DAB Report concerning the complainant but also the DAB report concerning the complainant’s spouse.

22. The Registrar’s conclusion that the complainant had engaged in misconduct warranting the termination of his appointment was open to him. However the complainant is entitled to moral damages for the failure to afford him due process which the Tribunal assesses in the amount of 20,000 euros. In all, the amount to be paid to the complainant by way of moral damages is 25,000 euros. He is entitled to costs, which the Tribunal assesses in the amount of 5,000 euros.

23. At this point it is convenient to discuss a procedural issue that has arisen in the present case. The ICC has made additional submissions with respect to the confidentiality of some of the pleadings and evidence that have been submitted to the Tribunal. The Tribunal has taken note

of these submissions and has referred to the evidence that it considers necessary in order to achieve justice between the parties.

### DECISION

For the above reasons,

1. The ICC shall pay the complainant moral damages in the sum of 25,000 euros.
2. It shall also pay the complainant 5,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 10 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ