O. (No. 2)

v.

ICC

131st Session **Judgment No. 4360**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms F. O. against the International Criminal Court (ICC) on 7 November 2018 and corrected on 16 November 2018, the ICC's reply of 27 February 2019, the complainant's rejoinder of 7 April, the ICC's surrejoinder of 30 July, the complainant's further submissions of 2 November 2019 and the ICC's final comments of 12 February 2020;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges her summary dismissal for serious misconduct.

The complainant joined the ICC in 2008. At the material time, she was serving as a Public Information Officer, at grade P-2, in the Office of the Prosecutor. On 25 September 2017 she received an email from a journalist who said she was writing an article about the former ICC Prosecutor (Mr O.) and his relations with a Libyan businessman (Mr T.) who, according to the journalist, had close links with persons who were under investigation by the Office of the Prosecutor. The journalist alleged, amongst other things, that in June 2015 the complainant had met with Mr O. and Mr T. in The Hague and had agreed to develop public relations materials as part of a strategy, devised by Mr O., to protect Mr T. from

prosecution by the ICC. She invited the complainant to answer a series of questions concerning these allegations. That same day, the complainant forwarded the journalist's email to her supervisors seeking guidance as to how to respond. Two days later, she received a second email from the same journalist, who alleged that in September 2015, using a pseudonym in order to conceal her involvement, and without authorisation from the Office of the Prosecutor, the complainant had organised a press conference in The Hague on behalf of representatives of the Yezidi population of Northern Iraq, and had been paid for this work. The complainant was again invited to answer several questions on this and other matters.

Shortly afterwards, a series of articles appeared in the press containing various allegations of inappropriate conduct on the part of Mr O. Some articles specifically mentioned the complainant, alleging that, at the request of Mr O., she had produced public relations materials for Mr T. and had organised the above-mentioned press conference. The articles were said to be based on some 40,000 documents obtained by a French online journal and shared with other members of the European Investigative Collaborations network. Internet links to some of these documents were provided. They included screenshots of what appeared to be email exchanges between Mr O. and the complainant, or a person named "Oliver Tuscany", a pseudonym allegedly used by the complainant.

On 3 October 2017 the Prosecutor requested a preliminary review of the allegations against the complainant by the Independent Oversight Mechanism (hereinafter "the IOM")in order to determine whether they should be the subject of a full investigation. On 5 October 2017, having been informed by the Head of the IOM that a full investigation by his service was warranted, the Prosecutor formally notified the complainant of the opening of the investigation. The complainant was suspended with full pay pending completion of the investigation.

In her submissions to the IOM, the complainant asserted that the allegations were untrue and based on falsified information. She denied having organised the press conference and stated that she had not worked for Mr O. after he left the ICC, nor for Mr T., nor for representatives of the Yezidi population. The complainant pointed out that none of the information disclosed in the media articles had been authenticated, and she argued that to rely on illegally obtained, unauthenticated material as the basis for findings against a staff member would amount to a

violation of due process. She also provided what she described as an "independent expert report" showing that two of her personal electronic devices had been "compromised". She described how she had attempted in vain to meet with the Prosecutor in order to discuss the allegations, and stated that the internal process had been "flawed and very unfair right from the beginning", as she had not been heard before any decisions were taken.

The IOM submitted its investigation report to the Prosecutor on 8 December 2017, indicating that signed copies of certain witness statements referred to in the report would follow shortly. These were submitted on 23 January and 5 February 2018. The IOM concluded that there was "a very high probability, certainly reaching more than a simple 'on a balance of probabilities' standard of evidence, that the allegations made against [the complainant] [we]re correct". It considered that the complainant had committed misconduct, and recommended that disciplinary action be initiated against her and that summary dismissal be considered in view of the seriousness of the misconduct.

On 6 February 2018 the Prosecutor notified the complainant that she had decided to pursue the case in accordance with Section 2.6 of Administrative Instruction ICC/AI/2008/001 on disciplinary procedures. She informed the complainant of the allegations against her, provided her with a copy of the IOM's investigation report and invited her to respond. The complainant submitted her response on 1 May 2018. She reiterated that the screenshots of emails on which the allegations were based had not been authenticated and argued that the allegations were false and had not been proved beyond reasonable doubt, as required. Having considered the complainant's response, the Prosecutor informed her that she had decided to refer the matter to the Disciplinary Advisory Board in accordance with Section 2.9(b) of the above-mentioned Administrative Instruction, as "the facts appear[ed] to indicate that misconduct/unsatisfactory conduct ha[d] occurred".

After several exchanges of submissions between the parties, the Disciplinary Advisory Board sent its report to the Prosecutor on 13 July 2018. It found that there were "strong presumptions" that the complainant had met with Mr O. on 13 June 2015, as alleged; that she had performed work for Mr T.; and that, at the behest of Mr O., she had developed a publicity strategy and organised a press conference for representatives of the Yezidi population. However, in relation to each of these allegations,

the Board found that the evidence did not meet the standard of "beyond reasonable doubt". It therefore concluded that the complainant should be given the benefit of the doubt and that no disciplinary measures should be taken against her. It also recommended that the complainant's suspension be reconsidered.

By a letter of 10 August 2018, the Prosecutor informed the complainant that she rejected the conclusions of the Disciplinary Advisory Board. She observed that, although the Board had correctly determined that the required standard of proof was that of "beyond reasonable doubt", it had committed an error of law in applying that standard. According to the Prosecutor, the evidence as a whole pointed convincingly to the complainant's guilt, and the complainant had offered no "credible innocent explanation" in response to the allegations against her. The Prosecutor was satisfied that it had been proved beyond reasonable doubt that the complainant had attended an unauthorised meeting with Mr O., developed and supplied publicity material for Mr T. without the Prosecutor's approval, and been involved in the unauthorised development of a publicity strategy, including the organisation of a press conference, "likely at the behest of [Mr O.]", for representatives of the Yezidi population, for which she had received payment. The Prosecutor concluded that the complainant was guilty of a serious failure to observe the standards of conduct set out in Staff Rule 110.1, and that her misconduct could constitute a violation of several provisions of the Staff Regulations and Rules, which were listed. She therefore decided to summarily dismiss the complainant for serious misconduct, with immediate effect. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award her material damages calculated on the basis that her contract, which was terminated on 10 August 2018, was due to end on 31 March 2020, as well as moral damages and costs.

The ICC submits that the complaint should be dismissed as unfounded in its entirety.

CONSIDERATIONS

1. The complainant is a former member of the staff of the ICC who, at the time she was summarily dismissed, was working in the Office of the Prosecutor. She impugns in these proceedings the decision of the

Prosecutor of 10 August 2018 to summarily dismiss her notwithstanding a recommendation from the Disciplinary Advisory Board that no disciplinary measures should be taken against the complainant.

2. The factual background leading to the dismissal of the complainant can, at this point, be set out comparatively briefly. On and from 29 September 2017, articles appeared in European media making serious and adverse allegations against the former ICC Prosecutor, Mr O. The articles also made specific adverse allegations against the complainant concerning her conduct. After the allegations concerning the complainant (and another staff member) came to the attention of the Office of the Prosecutor, the Deputy Prosecutor, Mr S., wrote on behalf of the Prosecutor to Mr F., the Head of the IOM, by letter dated 3 October 2017. The letter set out the allegations, in a summary way, against the complainant and the other staff member.

3. The purpose of the letter was described in the first and fourth paragraphs. In the first paragraph the identified purpose was to submit material to the IOM "to gauge whether, following a preliminary review, the matter ought to proceed to a full investigation pursuant to Resolution ICC-ASP/12/Res.6 of the Assembly of States Parties, para. 28, Section C of Annex, 'Operational mandate of the Independent Oversight Mechanism'". In the fourth paragraph the identified purpose was "to refer the matter to the IOM so that the allegations can, in the first instance, be looked at by a body independent of the Office to determine whether a full investigation, or 'preliminary investigation and fact-finding' within the meaning of AI (ICC/AI/2008/001, dated 5 Feb. 2008), is warranted, first, and if so, to conduct such an investigation".

4. Mr F. wrote to the Prosecutor by internal memorandum dated 5 October 2017 responding to the "report" of 3 October 2017. Mr F. said the IOM had undertaken a preliminary review and its purpose was "to determine whether there [were] reasonable grounds to pursue the report as received to investigation by the IOM". He went on to say that the IOM's preliminary review had determined that in its opinion, the allegations in the report did come within the legal mandate of the IOM and the criteria to pursue an investigation had been met. He confirmed that the IOM would conduct an investigation and set out the administrative

arrangements for it. That day the complainant was given written notice of the allegations and that the IOM would conduct a full investigation.

5. The IOM released a report on its investigation on 8 December 2017 concluding, amongst other things, that there was "a very high probability [...] that the allegations made against [the complainant] [we]re correct". The matter was referred by the Prosecutor, on 4 April 2018, to the Disciplinary Advisory Board requesting the Board to provide its advice within 30 days. After significant delays, the Board sent a report to the Prosecutor on 13 July 2018. As noted earlier, the Prosecutor decided on 10 August 2018 to summarily dismiss the complainant notwithstanding a recommendation from the Board that no disciplinary measures should be taken against her. This is the decision impugned in these proceedings.

6. In her brief, the complainant advances five grounds for impugning the decision to summarily dismiss her. The first ground is that the IOM investigation was procedurally, factually and legally flawed. This ground contains two elements. The first is that there had been a breach of due process and the second is that the IOM erred legally and factually. The second ground is that there had been an improper and unlawful finding of guilt beyond reasonable doubt without giving the complainant the benefit of the doubt. The third ground is that the Prosecutor failed to take into account essential facts. The fourth ground is that there had been an unequal treatment of the complainant. The fifth and final ground is that there had been unfair treatment in the disciplinary proceedings.

7. It is convenient to address first the centrally important second ground, namely that there had been an improper and unlawful finding of guilt beyond reasonable doubt without giving the complainant the benefit of the doubt. This issue arises in the following way. Of fundamental significance in the case against the complainant were emails purportedly sent by her, to her or about her. The record of the emails, initially used by the media as discussed in consideration 2 above, and subsequently considered by the IOM, the Disciplinary Advisory Board and the Prosecutor, took the form of screenshots. The emails, if authentic, were very much supportive of the three allegations made against the complainant. One allegation was that she met with Mr O. on 13 June 2015 and at the meeting discussed the complainant

working for him in circumstances that would have been entirely inappropriate. The second allegation was that the complainant undertook paid work for Mr O. preparing publicity material for a client of Mr O., which, again, would have been entirely inappropriate in the circumstances. The third allegation was that the complainant developed a publicity strategy and organised a press conference for a group that, again, would have been entirely inappropriate in the circumstances.

8. As it transpired, the authenticity of the emails was very important because the emails themselves were a critical evidentiary key in the case against the complainant. At all relevant times, the complainant disputed their authenticity. It is unnecessary to detail the approach of the Disciplinary Advisory Board save to note that it was not satisfied the evidence established the complainant had engaged in the conduct the subject of the allegations. The members of the Board said they were not in a position to recommend disciplinary measures against the complainant in the absence of sufficient proof of misconduct and recommended no disciplinary measures be instituted against her. Plainly the Board was highly sceptical of the complainant's defence but believed she should be given the benefit of the doubt.

9. In the impugned decision the Prosecutor critiqued and was critical of the Board's approach to the evaluation of the evidence and its application of the applicable test, namely the conduct founding a disciplinary sanction must be proved beyond reasonable doubt. But the relevant question is whether the Prosecutor herself correctly applied the standard she criticised the Board for failing to apply.

10. It is convenient to make some general observations before considering the Prosecutor's reasoning. The standard of proof of beyond reasonable doubt does not exist to create an insuperable barrier for organisations to successfully prosecute disciplinary proceedings against staff members. Indeed it should not have that effect. What is required is discussed in many judgments of the Tribunal. Rather the standard involves the recognition that often disciplinary proceedings can have severe consequences for the affected staff member, including dismissal and potentially serious adverse consequences on the reputation of the staff member and her or his career as an international civil servant, and in these circumstances it is appropriate to require a high level of satisfaction

on the part of the organisation that the disciplinary measure is justified because the misconduct has been proved. The likelihood of misconduct having occurred is insufficient and does not afford appropriate protection to international civil servants. It is fundamentally unproductive to say, critically, this standard is the "criminal" standard in some domestic legal systems and a more appropriate standard is the "civil" standard in the same systems involving the assessment of evidence and proof on the balance of probabilities. The standard of beyond reasonable doubt derived from the Tribunal's case law as it has evolved over the decades, serves a purpose peculiar to the law of the international civil service.

11. The Prosecutor's analysis of the law as it relates to the burden of proof was unexceptionable. Nonetheless there are two vitiating errors in the approach of the Prosecutor. At two points in her letter of 10 August 2018, the Prosecutor lists, in all, ten matters which support the conclusion that the emails were authentic and could be relied upon rather than the complainant's version of events. The second list is said to contain "indicia of authenticity". The Prosecutor then said:

> "*All* the indicia of reliability considered holistically with all the other evidence, leads the conclusion that, taken together, they provide sufficient evidence that the emails are what they purport to be."

The reference to "purport to be" is an expression in the Prosecutor's submissions to the Disciplinary Advisory Board and is a reference to the contentious emails being authentic and reliable. The standard of beyond reasonable doubt concerns both the finding of specific facts and the overall level of satisfaction that the case against the staff member has been made out. In relation to the proof of any essential relevant fact the person or body charged with the task of assessing the evidence and making a decision in the context of determining disciplinary proceedings must be satisfied beyond reasonable doubt that a particular fact exists.

12. In the present case, a relevant fact was whether the complainant mainly wrote or received the contentious emails. It was open to the Prosecutor to rely, in making this assessment, on any other evidence that had been proved beyond reasonable doubt. She did so. But what she failed to do was to express a conclusion that she was satisfied beyond reasonable doubt that the contentious emails were authentic and reliable. She simply spoke in terms of there being "sufficient evidence" that this was so. There is a material difference between being satisfied

there was sufficient evidence establishing a fact and being satisfied beyond reasonable doubt that the fact existed. The formulation in the passage quoted in the preceding consideration cannot be overlooked as simply looseness of language. The Prosecutor had gone to great lengths in her letter to identify and explain the contents of the applicable standard of proof, beyond reasonable doubt. Yet at the very point when she makes a determination about critical evidence, she makes no reference to it and only refers to the sufficiency of the evidence.

13. The second error concerns the Prosecutor's consideration of the allegation that the complainant met with Mr O. on 13 June 2015. The complainant presented three witnesses to the Disciplinary Advisory Board, an old friend, the complainant's nephew and her mechanic. They each gave evidence to establish that the complainant could not have met with Mr O. on 13 June 2015 because she was elsewhere. It was alibi evidence. The Disciplinary Advisory Board was fairly dismissive of this evidence, adding that "none of them convincingly validate[d] [the complainant's] alibi". The Board's reasoning was not particularly compelling, involving mainly the acceptance of hypotheses that the witnesses were lying. Even if the ultimate conclusion rejecting the alibi was open to the Board, it was part of the complainant's evidentiary case that she did not attend the 13 June 2015 meeting.

14. In her decision of 10 August 2018, the Prosecutor makes no mention of this alibi evidence let alone makes findings about it. The Prosecutor was highly critical of the Disciplinary Advisory Board's approach to the consideration of the evidence and rejected its conclusions. In the circumstances, it can scarcely be thought that the Prosecutor embraced, implicitly, the Board's finding on the alibi evidence. She simply did not deal with it but was nonetheless prepared to find that it had been proved beyond reasonable doubt that the complainant attended the meeting. Because the Prosecutor rejected the findings and recommendations of the Board, she was obliged to motivate her conclusion and address not only the relevant inculpatory evidence pointing to guilt but also the relevant exculpatory evidence pointing to innocence, including the alibi evidence. She failed to do so in this respect.

15. Notwithstanding these conclusions, having regard to the matters discussed shortly in consideration 21, the impugned decision should not be set aside, even though the decision was unlawful. It is unnecessary to address other grounds advanced by the complainant in support of the proposition that the decision was unlawful.

16. But it is nonetheless desirable to consider an aspect of the first ground, namely the contention that the IOM investigation involved a breach of due process. Disciplinary proceedings and also the role of the IOM are governed by a number of normative legal documents. First there are the Staff Rules. Chapter X of the Rules concerns disciplinary measures and establishes the Disciplinary Advisory Board. The Board acts on requests by, relevantly, the Prosecutor and its role is to advise her or him. Rule 110.2 provides that, in the ordinary course, a staff member cannot be the subject of disciplinary measures without the provision of advice by the Board, though this precondition is not mandatory for summary dismissal in cases of serious misconduct. Rule 110.4 deals with procedure and provides that normally the case is limited to the original presentation together with brief statements and rebuttals by the staff member. There is also Administrative Instruction ICC/AI/2008/001 (the 2008 Instruction) dealing with disciplinary procedures. Rule 110.4(f) contemplates the making of such an Instruction.

17. The 2008 Instruction provides in Section 2 for a process of preliminary investigation and fact-finding. This section does not say who undertakes the preliminary investigation beyond saying they must be "appropriate and experienced". There is no reason to doubt this could include staff of the IOM.

18. The staff undertaking the investigation are obliged by Section 2.1 to respect the due process rights of the staff member under investigation and to give her or him a reasonable time to provide her or his version of the facts and evidence, if any. The written procedure is unclear about whether the staff member under investigation is entitled, at this point, to be provided with the evidence against her or him. The staff member obviously has to understand the factual underpinning of the allegations against her or him in order to exercise the right to provide her or his version of the facts and evidence. But that would not require being provided with the primary evidence itself. The better

view is that at this stage of process, the primary evidence need not be provided. That is because after the preliminary investigation a decision has to be made by, in this case, the Prosecutor, who decides whether the matter should be pursued. If it is, Sections 2.6 and 2.7 of the 2008 Instruction require the Prosecutor to do several things. One is to inform the staff member in writing of the allegations and her or his right to respond. Another is to provide the staff member with a copy of the documentary evidence of the alleged conduct. Fairly clearly this would include records of interview with witnesses. This is consistent with the duty to disclose evidence derived from the Tribunal's case law (see, for example, Judgment 3863, consideration 18). So by this mechanism, the affected staff member will see the evidence against her or him. Yet another step that must be undertaken is giving the staff member ten working days (or an extended period in appropriate cases) to answer the allegations and produce countervailing evidence. In the result, before any decision is made to pursue the matter (or effectively discontinue the matter), the staff member will have had the opportunity to answer the case in an evidentiary and also an argumentative sense.

19. In the present case the preliminary investigation contemplated by Section 2 was undertaken by staff of the IOM. They were thus obliged to comply with the requirements of the 2008 Instruction irrespective of the terms of their mandate under the IOM Manual. Indeed the Manual declares it does not "obstruct" or "prevent" the requirements of the 2008 Instruction. If there is a prescribed procedure, it must be observed (see, for example, Judgments 2771, consideration 15, and 3872, consideration 6). In the present case, the complainant was given the opportunity to provide her version of the facts and evidence as provided in Section 2.1, before the IOM reported to the Prosecutor. The IOM followed the prescribed procedure and the complainant's pleas on this point about due process should be rejected.

20. Ordinarily, when a decision to dismiss a staff member is legally flawed, it is set aside and the Tribunal considers, in appropriate circumstances, whether the complainant should be reinstated and the financial consequences on the complainant of the unlawful decision.

21. In these proceedings an extraordinary and entirely unusual factor arises in the consideration of these issues. In its surrejoinder the ICC furnished what is described as "new evidence". It took the form of emails from the Gmail account of Mr O. They were not screenshots as had been considered in the disciplinary proceedings. The emails themselves were supplemented by a statement from an investigator from the Office of the Prosecutor and an expert report from that Office's Cyber Unit. The ICC said it had come into the possession of the emails on 20 January 2019. The ICC sought to rely on the emails in defending the Prosecutor's decision to summarily dismiss the complainant. In her further submissions, the complainant argues, with considerable force, that the lawfulness of the decision to dismiss her must be assessed by reference to then known facts, referring to Judgments 986, 2635, 2879 and 3037. The ICC contests this proposition in its final comments and argues the fresh evidence is admissible, relying, incidentally, on the "Practical guide to the procedure" which appears on the Tribunal's website, as well as Article 9, paragraph 6, of the Tribunal's Rules and referring to Judgments 140, 1141, 1186, 1226 and 3695. It is not necessary to resolve this issue because the flaws in the Prosecutor's decision did not depend on the correctness of her factual findings.

22. However what is clear from this new evidence is that the complainant's contention that the emails in the screenshots were not authentic, was false in a material respect. It is equally clear that she dissembled and lied about the authenticity of the emails throughout both the preliminary investigation and the disciplinary proceedings. At the very latest by the time the ICC received the emails in January 2019, it would have been open to the organisation to summarily dismiss the complainant for her dishonesty. Without expressing a concluded view, the Tribunal is satisfied that the fresh evidence supports a compelling case that the original allegations against the complainant were well founded. Had she admitted to the true position about the emails, her position in the disciplinary proceedings would have been untenable. In these extremely unusual circumstances, the impugned decision is not set aside and no material or moral damages should be awarded nor should a costs order be made in favour of the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 23 October 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ