O. (No. 2)

v.

ICC

(Application for review)

133rd Session **Judgment No. 4474**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 4360 filed by Ms F. O. on 24 March 2021, the reply of the International Criminal Court (ICC) of 15 June, Ms O.'s rejoinder of 19 July and the ICC's surrejoinder of 20 August 2021;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. This is an application to review Judgment 4360 in which, by way of ultimate outcome, the complaint was dismissed. The subject matter of the proceedings leading to that judgment was the dismissal of the complainant for alleged gross misconduct. She was successful in establishing that the decision to dismiss her was legally flawed. However, as appears from considerations 21 and 22 of Judgment 4360, fresh evidence was adduced by the ICC in its surrejoinder which proved to have a material bearing on the ultimate outcome. The fresh evidence concerned whether emails purportedly sent by the complainant, to her or about her were authentic. The relevance of the evidence was discussed in those two considerations.

2. In this application the complainant relies on and effectively repeats her written submission of 2 November 2019 responding to the ICC adducing the fresh evidence in its surrejoinder. She advances three

propositions to impugn Judgment 4360. The first is that the Tribunal acted in breach of its own procedural rules. The second is that the Tribunal breached her due process rights and the third is that the Tribunal acted in excess of its proper and lawful role in unfair dismissal cases.

3. The first proposition contains two parts. The first involves an analysis of the Rules governing the Tribunal's procedures and some case law. The essence of the argument is that the admission of the evidence was not authorised. However, the relevant question is whether it was prohibited. A legal aphorism deployed in some domestic legal systems is that rules of procedure should be a servant and not a master. It is apt to apply to this Tribunal. Ordinarily a judicial tribunal ought to be able to adopt procedures in a given case to meet the overriding objective of determining a fair, lawful and just outcome. Unless a particular procedure is prohibited expressly or by necessary implication by a normative legal document binding the judicial tribunal or by entrenched case law, the tribunal can on proper grounds adopt, as a matter of discretionary assessment, procedures to achieve that overriding objective. This Tribunal did so in the present case.

4. The second part of the first proposition is repetitive of the third proposition. It is that the lawfulness of a decision to dismiss a staff member must be assessed by reference to then known facts, that is, known at the time the decision was made. In consideration 21 of Judgment 4360, the force of this contention is acknowledged. But this argument misses the point. The Tribunal determined in consideration 11 there were two vitiating errors in the approach of the Prosecutor when deciding to dismiss the complainant. The subsequent analysis in the judgment from that consideration to consideration 19 concerned the decision to dismiss by reference to then known facts or matters, that is known at the time the decision was made. In consideration 20 of Judgment 4360 the Tribunal observed that ordinarily it would then be appropriate to consider whether the complainant should be reinstated and the financial consequences of the unlawful dismissal. In this respect the approach of the Tribunal was in accordance with its established case law. The fresh evidence adduced in the surrejoinder was thereafter deployed by the Tribunal to assess and decide what relief was appropriate. Necessarily that decision must be made by reference to facts and circumstances known at the time of the assessment, which may include facts and circumstances that were not known when the

decision to dismiss was made. Very commonly this would entail an assessment, in a case of unlawful dismissal, whether an order of reinstatement was appropriate. That, in turn, often raises for consideration the passage of time between the dismissal and when a remedy is being considered, including the possible prejudice to the organisation if reinstatement were ordered. While this case was extremely unusual if not extraordinary, it simply cannot be suggested that the fresh evidence in this case was not relevant to remedy. It was and that was the use made of it by the Tribunal.

5. Obviously, the preceding commentary is subject to the Tribunal's obligation to ensure a fair hearing, which is the gravamen of the complainant's second proposition in this application for review. She now asserts that "the admission of the fresh evidence breached [her] right to test the evidence against her". In her November 2019 written submissions she made the bare assertion that the fresh evidence had been "illegally obtained by cyber criminals to serve their agenda". But the important point is that the complainant did not say in the November 2019 written submissions she wanted an opportunity to test, supplement or counter the evidence in whatever way she believed might forensically advantage her and she needed time to do so. Her submissions were singularly silent on this topic. Doubtlessly the Tribunal would have given any such request earnest consideration and most likely would have granted it, given the significance of the evidence, and reassessed, if requested, time limits then in place for submissions. The complainant elected simply to challenge the evidence by argumentation and not further evidence. That was a choice she made. There was no breach of the complainant's due process rights. Moreover, the complainant, even in the present proceedings, fails to offer the further evidence that she was allegedly prevented from submitting in the previous proceedings.

6. It has been unnecessary, in this judgment, to evaluate the complainant's submissions by reference to well established limitations arising from the admissible grounds of review, a point emphasised by the ICC in its submissions in this application for review.

7. The application for review should be dismissed though no costs order should be made in favour of the ICC as it requests in its submissions.

DECISION

For the above reasons,

The application for review is dismissed.

In witness of this judgment, adopted on 12 November 2021, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ