Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

P. L. (No. 2)

v.

ICC

133rd Session **Judgment No. 4476**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr E. P. L. against the International Criminal Court (ICC) on 6 June 2017, containing an application for the fast-track procedure, and the ICC's letter of 21 July 2017 informing the Registrar of the Tribunal that it declined the complainant's application;

Considering the complainant's complaint corrected on 14 September 2017, the ICC's reply of 16 January 2018, the complainant's rejoinder of 18 May and the ICC's surrejoinder of 21 August 2018;

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, who claims to be entitled to whistleblower status and requests the protection afforded thereby, challenges the failure to respond to his letter reporting what he considers to be unlawful behaviour by particular Court officials.

At the material time the complainant was Chief of the Counsel Support Section in the Registry of the Court. On 8 September 2015 he submitted to the Presidency an internal complaint seeking the removal of the Registrar from office for behaviour towards him that allegedly

constituted harassment and unequal treatment. Following the rejection of his internal complaint by decision of 22 January 2016, he filed his first complaint with the Tribunal on 20 April 2016, which was dismissed by Judgment 4006.

On 28 June 2016 the Court received a letter containing allegations against its President and related documents. At the request of the President and the Prosecutor, the Registrar referred the matter to the Independent Oversight Mechanism (IOM) and requested it to investigate the aforementioned allegations pursuant to paragraph 28 of the Operational Mandate of the IOM, as annexed to Resolution ICC-ASP/12/Res.6 adopted by the Assembly of States Parties to the ICC on 27 November 2013. The Registry's financial investigator was seconded to the IOM for the purposes of the investigation.

On 3 August 2016, after conducting a preliminary review, the IOM sent an interim report to the Registrar in which it concluded that the formal allegations against the President of the Court were untrue and that there was insufficient evidence to warrant further investigation. By letter of 22 August the Registrar informed the President of the Assembly of States Parties of the findings of the interim report. On 20 October 2016 the IOM submitted its final report, in which it confirmed its findings and notified the Registrar of the closure of the case.

In November 2016 the complainant, on the basis of Presidential Directive ICC/PRESD/G/2014/003 of 8 October 2014 entitled "ICC Whistleblowing and Whistleblower Protection Policy", made a first attempt – in an anonymous confidential note – to report to the President of the Assembly of States Parties suspected misconduct by the Registrar and the Head of the IOM in relation to the investigation against the President of the Court. The alleged misconduct consisted of the following: (1) the Registrar's referral of the matter to the IOM, even though he worked under the direct authority of the person against whom the allegations were made, was tainted by a conflict of interest and posed a problem in terms of impartiality; (2) the Head of the IOM had failed in his duty to be independent and breached ethical requirements by accepting the services of the Registry's financial investigator, who worked under the Registrar's direct authority; (3) by failing to "classify"

the letter of 22 August 2016, the Registrar had breached the duty to keep reports sent to the IOM confidential. In his confidential note, the complainant requested to be granted preventive and protective measures against the retaliation he might face as a whistleblower. As he was unable to meet with the President of the Assembly of States Parties and was concerned about the possible consequences of his report being disclosed, he decided to postpone the formal denunciation of the suspected misconduct until a later date.

On 16 March 2017 the complainant sent a letter signed by name to the President of the Assembly of States Parties, through its Secretariat, repeating the report he had attempted to bring to the President's attention in November 2016 and requesting that he urgently intervene by ordering protective measures to be taken in respect of the complainant and his family. As the complainant did not receive a reply, on 21 March and 9 May 2017 he sent the President of the Assembly of States Parties reminders and directed his attention to the fact that the 60-day time limit from the date of submission of his signed letter would expire on 15 May and that he reserved the right to file a complaint with the Tribunal as of that date.

On 6 June 2017 the complainant filed his second complaint with the Tribunal, impugning the implied decision to reject his request for protection arising, pursuant to Article VII, paragraph 3, of the Statute of the Tribunal, from the failure to reply to his letter of 16 March. He asks the Tribunal to set aside the impugned decision, to recognise him as a whistleblower and to order that the measures requested in the letter, as well as any other measures deemed appropriate, be taken without delay. He also seeks moral damages in the amount of 2,000 euros per month from the date of his request of 16 March 2017 until the judgment on this complaint is executed and an award of 3,000 euros in costs.

In its reply, the ICC refers to a letter dated 16 June 2017 in which the President of the Assembly of States Parties acknowledged receipt of the report of 16 March 2017 and responded to the complainant's various requests and observations. With regard to those concerning the Registrar, the President stated that neither they nor the request for protective measures fell within the legal framework of the provisions of

Presidential Directive ICC/PRESD/G/2014/003 granting authority to the President of the Assembly of States Parties in this area. Regarding concerns in respect of the Head of the IOM, the complainant was told that he could submit a formal internal complaint pursuant to the provisions on the IOM's Operational Mandate. The President also noted that some of the issues raised were covered in the complainant's first complaint to the Tribunal – which was pending – and that, out of respect for the principle of independence, he did not wish to say anything about them. On 21 June 2017 the complainant acknowledged receipt of this letter, which he described as a "new decision" outside the scope of his second complaint.

The ICC submits that there is an overlap between the arguments raised in this case and those already presented by the complainant in his first complaint. It requests the Tribunal to dismiss the complaint as irreceivable under the *lis pendens* rule and, subsidiarily, as unfounded, to find it to be an abuse of process and to issue appropriate orders to compensate for the time and resources lost in dealing with this case.

In his rejoinder, the complainant directs the Tribunal's attention to a number of purportedly false or biased statements in the reply and asks the Tribunal either to take these into account when assessing moral injury or to order punitive damages.

In its surrejoinder, the ICC acknowledges that it made a factual error in its reply and states that it is prepared to pay the complainant the sum of 2,000 euros by way of compensation for this error and, also and especially, for the time taken by the President of the Assembly of States Parties to reply to the letter of 16 March 2017. In addition, it asks the Tribunal to dismiss as irreceivable what it considers to be new "claims" in the rejoinder.

CONSIDERATIONS

1. On 16 March 2017 the complainant sent a letter to the President of the Assembly of States Parties to the ICC, identifying himself as a whistleblower and reporting what he considered to be unlawful conduct by the Registrar and the Head of the IOM in

connection with the investigation into the merits of allegations against the President of the Court made in June 2016 by a Ugandan national.

In this letter, the complainant requested, in particular, various measures of protection against the retaliation to which he considered himself vulnerable on account of this whistleblowing. As he did not receive a reply to that letter within the 60-day period provided for in Article VII, paragraph 3, of the Statute of the Tribunal – given that the President of the Assembly of States Parties did not send him such a reply until 16 June 2017 – he impugns the decision which thus implicitly dismissed that request at the end of this period.

2. The ICC submits that the complainant's request was rightly rejected since, in view of the nature of the conduct referred to in the letter of 16 March 2017, which was not actually wrongful, he "[was] not a whistleblower" and was not, therefore, entitled to the protective measures sought.

The question whether the complainant fulfilled the conditions required to be recognised as a whistleblower is thus central to this dispute.

3. Under paragraph 2.1 of Presidential Directive ICC/PRESD/G/2014/003 of 8 October 2014 on ICC Whistleblowing and Whistleblower Protection Policy:

> "Whistleblowers are individuals who for the benefit of the ICC fulfil their responsibility by **reporting, in good faith, suspected misconduct, as defined in the Operational Mandate of the Independent Oversight Mechanism**, either on their own initiative or when cooperating with duly authorised fact finding activities, such as audits, investigations, evaluations, inspections and inquiries." (Emphasis added.)

It is apparent from the provisions of the Operational Mandate of the IOM, to which the above paragraph refers, in the version adopted by the Assembly of States Parties on 27 November 2013 which was then in force, and specifically from Article 28 thereof as well as an accompanying note, that "misconduct" within the meaning of the aforementioned provisions is to be understood as "any act or omission by elected officials, staff members or contractors in violation of their obligations

to the Court pursuant to the Rome Statute and its implementing instruments, Staff and Financial Regulations and Rules, relevant administrative issuances and contractual agreements, as appropriate".

4. These various provisions make plain that, contrary to the complainant's argument that whistleblower status should be granted to any official who reports any acts provided that she or he has done so in good faith, entitlement to that status is also subject to the condition that the acts reported potentially constitute misconduct as defined above. While it is clearly not for the authority that will take a decision on a request for protection made by an official who presents her- or himself as a whistleblower to determine, at this stage, whether that official's report of potential misconduct is well founded, it cannot grant such a request if it appears that, by their very nature, the acts in question could not be characterised as misconduct.

5. In this case, the Tribunal considers that none of the three acts referred to in the complainant's aforementioned letter of 16 March 2017, which are again set out in the complaint, can be regarded as misconduct on the part of the ICC Registrar or the Head of the IOM.

6. First, the complainant believes that there is an anomaly in the fact that it was the Registrar of the Court who referred the allegations against the President of the Court to the IOM for investigation, whereas the Registrar is under the President's authority.

However, such a referral, which in no way prejudges the outcome of future investigations, is an inherently neutral act, which cannot in itself constitute a breach of its author's duty to be impartial or create a conflict of interest. Moreover, given that the ICC had received a letter containing allegations against its President, the Tribunal finds it difficult to see what more appropriate action the Registrar, who is responsible for the administration of the Court, could have taken than to refer the allegations to the IOM for investigation. Clearly, therefore, he cannot be criticised for having done so.

7. Second, the complainant challenges the lawfulness of the Registry's financial investigator – who happened to be assigned to the administrative unit of which the complainant was in charge – being made available to the Head of the IOM for the purposes of the investigation into the allegations against the President of the Court, even though he was a staff member under the Registrar's authority.

The evidence does in fact show that, since the allegations in question related in part to covert financial transactions, it was deemed helpful to second this investigator temporarily to the IOM, in line with a procedure used occasionally to compensate for the IOM's lack of resources.

However, it was clearly agreed that the investigator would be solely accountable to the Head of the IOM when carrying out his duties in connection with the investigation, meaning that the safeguard of the independent conduct of that investigation was not compromised in any way.

As the complainant appears to suggest, it would certainly also have been conceivable for the Court to engage an external investigator in the circumstances. However, that solution, which would probably not have allowed the investigation to be carried out with the same speed and would have been more expensive, would have had its drawbacks. Since, as has just been stated, the option selected observed the requirement of independence in the IOM's investigative work, the Court's authorities cannot be criticised for having made that choice.

It follows that, contrary to what the complainant submits, the fact that the Registrar and the Head of the IOM considered it necessary, respectively, to offer and to accept the secondment of the official concerned for the purposes of the investigation in question cannot be regarded as a failure by those authorities to fulfil their respective obligations.

8. Lastly, the complainant contends that the Registrar committed an irregularity in failing to classify as confidential a letter the Registrar sent to the President of the Assembly of States Parties on 22 August 2016, informing him that the IOM's interim report had found the allegations against the President of the Court to be entirely groundless.

Once more, the conduct complained of by the complainant cannot be considered as improper. In addition to the fact that, from a strictly legal point of view, the obligation to observe the confidentiality of investigations conducted by the IOM applies, according to the provisions of its Operational Mandate, only to members of the IOM itself, the Registrar's letter of 22 August 2016 cannot be considered to have breached that confidentiality. It was sent only to the President of the Assembly of States Parties and, in copy, to the President of the Court, the Prosecutor and the Head of the IOM, who are highly-placed officials bound to perceive such a letter as confidential. Moreover, the Administrative Instruction of 19 June 2007 on the ICC Information Protection Policy – on which the complainant bases his contention that it was imperative for the letter in question to have been marked with its classification – cannot be interpreted as requiring such a marking to be systematically applied to letters issued in the course of the Court's activities. Moreover, the Tribunal notes that, as its terms state, this administrative instruction applies only to ICC staff and not to its elected officials such as the Registrar, so his failure to observe a rule specified therein cannot, in any event, be regarded as misconduct.

9. In all, the Tribunal thus finds that, even assuming the complainant could have believed in good faith that the acts he intended to report to the President of the Assembly of States Parties were likely to constitute misconduct within the meaning of the aforementioned provisions, it is plain that they did not.

It should also be borne in mind that the purpose of the aforementioned letter of 16 March 2017 was not to allege manipulation of the investigation into the allegations against the President of the Court, but only to report minor – indeed harmless – acts in connection with that investigation, which is a somewhat unusual use of the whistleblowing procedure.

The fact that the persons referred to in these reports were the Registrar and the Head of the IOM who were in office at the time and with whom the complainant was openly in conflict inevitably leads the Tribunal to question the underlying motivation for the complainant's supposed whistleblowing against them.

10. It follows from the foregoing that the complainant has no grounds to argue that the implied decision rejecting his request of 16 March 2017 was based on an error of law as to the application of the conditions for recognition of whistleblower status.

11. As he was thus correctly refused the protection afforded by this status, the complainant is also not justified in alleging, as he is attempting to do, that this refusal involved a misuse of authority.

12. Lastly, in these circumstances, the complainant's reliance on the fact that no administrative instructions have been issued for applying the aforementioned Presidential Directive of 8 October 2014 concerning the ICC Whistleblowing and Whistleblower Protection Policy and no procedures have been promulgated by presidential directive concerning the implementation of the IOM's Operational Mandate is misplaced. Since the acts which the complainant considered himself compelled to report in this case were not such as to warrant whistleblowing, the lack of administrative instructions concerning the implementation of the Presidential Directive of 8 October 2014 did not, in any event, harm his interests and does not affect the lawfulness of the impugned decision. The same is even truer of the failure to promulgate procedures relating to the IOM, given that such procedures could only have had an indirect bearing on the recognition of whistleblower status. This argument will therefore be dismissed.

13. It follows from these findings that the complainant's claims seeking the setting aside of the impugned implicit decision and an order that the ICC take protective measures in his respect must be dismissed.

14. In consequence, the same applies to the claim for compensation for the ongoing moral injury that the complainant contends resulted from the "uncertainty" and "feeling of abandonment" caused by the rejection of his request to be recognised as a whistleblower.

On this point, the Tribunal notes that, given the lack of any other initial claim for compensation, this complaint does not seek, as the complainant himself states in his submissions, to obtain compensation

for the harassment and retaliation to which he alleges he was subjected. It follows, in particular, that the complainant's request seeking redress for the moral injury arising from the unlawfulness of his performance appraisal for 2016-2017, established by the Rebuttal Panel (which hears appeals in this area) during the proceedings before the Tribunal must, in any event, be dismissed.

15. The ICC states in its surrejoinder that it intends to accept responsibility for two "procedural errors", one relating to the delay in providing an explicit response to the complainant's request to be granted whistleblower status and the other to a factual error in the reply to the complaint. The Court itself therefore proposes to pay the complainant the sum of 2,000 euros, but makes plain that, in its view, the second of these errors is only of symbolic importance in assessing that amount.

16. In this regard, the Tribunal considers that the Court's factual error in its reply to the complaint does not in fact warrant any redress. The error consists in the incorrect statement in the reply that the Registrar of the Court only became aware of the complainant's request to the President of the Assembly of States Parties on receiving the complaint, whereas, as the complainant states, that request was in fact mentioned in his appeal to the Rebuttal Panel against his performance appraisal, which had been previously submitted. However, this error, which is evidently attributable simply to the fact that the two procedures in question were not dealt with by the same members of Registry staff and which relates to a question of fact irrelevant to the outcome of this dispute, clearly did not involve bad faith on the part of the ICC. In these circumstances, it cannot justify an award of compensation for moral injury, still less the payment of punitive damages which the complainant believes he can claim on this ground.

17. Moreover, the Tribunal notes that there is no reason to award the compensation which the complainant seeks in respect of the other information contained in the Court's reply. Contrary to what the complainant contends, the information in question does not exceed the

limits of the freedom enjoyed by the parties when drafting their submissions in a legal dispute.

18. In contrast, the Tribunal finds that the ICC was negligent in failing to provide an explicit response to the complainant's request to the President of the Assembly of States Parties on 16 March 2017 until a letter was sent to him on 16 June 2017, three months later.

Such a delay cannot, of course, be regarded as unreasonable in absolute terms in respect of the processing of ordinary administrative requests, and it is important to point out that, contrary to what both parties to the dispute appear to consider, exceeding the 60-day period following the notification of a claim to which Article VII, paragraph 3, of the Statute of the Tribunal refers is not in itself unlawful, but merely gives rise to an implied decision rejecting the claim.

However, the Tribunal considers that a request to be granted whistleblower status is inherently urgent and must be examined with particular speed, regardless of its merits, so that the official concerned can receive the protection afforded thereby as quickly as possible should the request prove warranted, or, at the very least, be informed of the decision taken on the matter.

The Tribunal finds that this requirement has not been met in this case. The period of three months that was taken to reply to the complainant's aforementioned letter of 16 March 2017 appears excessive. Furthermore, it should be noted that, in his letter of 16 June 2017, the President of the Assembly of States Parties, in essence, stated that he did not have the authority to consider the complainant's request to the extent that it related to the Registrar's conduct. He therefore did not actually rule on the request, although, if he considered that he did not have the authority to examine that aspect of the request, he ought to have sent it to the authority competent to deal with it (see, for example, Judgment 3423, consideration 9(b), and the case law cited therein).

Therefore, even though the complainant was not actually entitled to claim whistleblower status, the ICC, by failing to take a decision on his request within a reasonable time, acted wrongfully towards him, which warrants relief.

19. In the Tribunal's view, the resulting moral injury will be fairly redressed by awarding the complainant compensation in the amount of 2,000 euros which, as was stated above, corresponds to the sum that the ICC itself considers that it should pay him.

20. As he succeeds to that extent, the complainant is entitled to costs, which, in view of the fact that he did not engage a lawyer, the Tribunal sets at 400 euros.

21. By contrast, it follows from the foregoing that the complainant's other claims must be dismissed, without there being any need to rule on the ICC's objections to their receivability.

22. The ICC contends that the complaint is an abuse of process and therefore invites the Tribunal to "make such orders as it considers appropriate to compensate for the time and resources lost" in dealing with the case. That claim must be regarded as a counterclaim seeking an order for the complainant to pay costs. However, the mere fact that the complaint has been partially upheld prevents it from being regarded as abusive, with the result that the counterclaim cannot, in any event, be granted.

DECISION

For the above reasons,

1. The ICC shall pay the complainant moral damages in the amount of 2,000 euros.
2. It shall also pay him 400 euros in costs.
3. All other claims are dismissed, as is the ICC's counterclaim.

In witness of this judgment, adopted on 11 November 2021, 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 27 January 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ