

B. (No. 2)

v.

ICC

134th Session

Judgment No. 4511

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr M. B. against the International Criminal Court (ICC) on 11 June 2019 and corrected on 18 September, the ICC's reply of 13 December 2019, the complainant's rejoinder of 13 January 2020 and the ICC's surrejoinder of 27 March 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 the new final decision made pursuant to the Tribunal's order in Judgment 3905 concerning the decision to terminate his fixed-term contract.

Much of the relevant history leading to these proceedings is to be found in Judgments 3905 and 4294. Suffice it to recall that the complainant's G-2 position was abolished mid-2015 and his fixed-term contract was terminated mid-October 2015. In Judgment 3905, delivered in public on 24 January 2018, the Tribunal considered that the decision of the Registrar of the Court endorsing the Appeals Board's findings that the appeal was irreceivable, was flawed. Indeed, the Appeals Board had failed to consider whether there were exceptional circumstances

beyond the complainant's control warranting a waiver of the thirty-day time limit as it was mandated to do by Staff Rule 111.3(b). The Tribunal considered that "there were clearly grounds on which a conclusion could be reached that there were exceptional circumstances and the Appeals Board should have waived compliance with the time limits and considered the appeal on the merits. The case will be remitted to the ICC for that purpose."

On 21 February 2018 the Registrar remitted the complainant's case to the Appeals Board to "hear the merits of the [Appeal]".

On 15 February 2019 the Appeals Board issued a new report concluding that the complainant's separation from service was unlawful and that the ICC had acted in breach of its duty of care. It recommended that genuine, good faith efforts be made by the ICC to explore all other employment options at the Court suited to his experience and qualifications. If no such option existed, the ICC should pay him compensatory damages. In addition, the Board recommended that the complainant be compensated for the economic loss resulting from the termination of his fixed-term contract, in an amount equivalent to the salary and entitlements due for the entire duration of his contract, that is to say until 31 December 2016.

On 18 March 2019 the Registrar informed the complainant that he would compensate him for the ICC's failure to explore other possible employment options prior to terminating his appointment. Taking into account the Tribunal's findings in Judgments 3903 and 3904, he awarded him 57,000 euros in material and moral damages as well as 500 euros in costs. But he considered that the Appeals Board's recommendation that possible employment options be explored went beyond the limits of the Tribunal's order in similar cases and therefore rejected it. That is the decision the complainant impugns in the present complaint.

The complainant asks the Tribunal to "reverse" the impugned decision and find that the ICC has not properly executed Judgment 3905. He also asks the Tribunal to order the ICC to comply without delay with its obligation to "reappoint" him, under a fixed-term contract, to a position fitting his qualifications and experience. He further seeks an award of material damages in an amount equivalent to all the "salaries" he should

have received since his separation from service “in September 2015” until his eventual reappointment. In addition, he claims 50,000 euros in moral damages, as well as punitive damages in an amount of 1,000 euros per month of delay since the date on which Judgment 3905 should have normally been executed, that is to say 23 February 2018, until the date of execution, as well as costs.

The ICC asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. In his application for the execution of Judgment 3905, as well as in this complaint which was filed at the same time, the complainant applied to join that application with this complaint. In Judgment 4294, in which the Tribunal considered the application for execution, it rejected the application for joinder, which is therefore moot. The Tribunal also rejects as *res judicata* the complainant’s request to find that the ICC has not properly executed Judgment 3905, as in Judgment 4294 the Tribunal held that Judgment 3905 was properly executed on the referral of the case to the Appeals Board on 21 February 2018. The Registrar noted in the decision of 18 March 2019, impugned in the present complaint, that the ICC paid the complainant 20,000 euros in moral damages and 4,000 in costs in the execution of Judgment 3905. Accordingly, the Tribunal rejects the complainant’s claim to award him punitive damages in the amount of 1,000 euros per month of delay from the date on which Judgment 3905 should have normally been executed until the date it is really executed.

2. The complainant produces documents concerning settlement discussions with the ICC which he states show that the ICC used dilatory tactics to delay the execution of Judgment 3905. He claims that he should be awarded punitive damages as the ICC acted in bad faith and never intended to reinstate him. On the basis of rule 15(d) of its procedures, the Appeals Board had correctly refused to admit those documents in its proceedings. The rule relevantly states that “[a]s settlement efforts are deemed to be without prejudice, such efforts or the terms considered are inadmissible as evidence and may not be referred

to in the course of the Panel's consideration of the appeal, unless otherwise agreed by the parties in writing". The ICC did not agree to have them admitted. Moreover, the Tribunal's case law states that documents from informal settlement processes are not admissible in the Tribunal as they should not be disclosed in the more formal process (see Judgment 3586, under 5, recently confirmed in Judgment 4457, under 2).

3. Having concluded that the complainant was unlawfully separated from the ICC's service, the Appeals Board recommended that the ICC make genuine and good faith efforts to explore all other employment options suiting the complainant's experience and qualifications and if no such option existed at the ICC, to pay him compensatory damages. In the impugned decision, the Registrar opted to pay the complainant compensation for the ICC's failure to discharge its duty to explore other possible employment. He observed, among other things, (citing Judgments 3903, 3904 and 3908) that in cases involving ICC staff members whose fixed-term contracts were terminated in similar circumstances, the Tribunal awarded only monetary compensation. He further noted statements in considerations 23 of Judgments 3903 and 3904, as well as in consideration 13 of Judgment 3908, and concluded that the precise duty contemplated under the case law was "to explore [...] possible options [for re-employment] 'prior to [the staff member's] separation'" from service.

4. In Judgments 3903 and 3904, the Tribunal awarded each of the respective complainants a total of 37,000 euros in material damages for loss of the opportunity for further and future employment with the ICC on account of the termination of their employment. It also awarded them 20,000 euros moral damages, among other things, for its failure to meet its obligation to explore other employment options with the complainants. It also awarded each of them 4,000 euros in costs. In those cases the ICC terminated the complainants' employment in circumstances identical to those in which it terminated the complainant's employment in the present case. In Judgments 3903 and 3904, as in this case, the complainants held grade G-2 posts at the material time and the ICC

unlawfully terminated their employment with effect from 14 October 2015. Their contracts were similarly due to expire on 31 December 2016.

5. In the present case, the Registrar awarded the complainant 57,000 euros as material and moral damages expressly on the bases of Judgments 3903 and 3904. Having made that award, there is no basis on which to order the ICC to comply without delay with its obligation to “reappoint” the complainant, under a fixed-term contract, to a position fitting his qualifications and experience. Moreover, as the complainant’s employment, but for the abolition of his post, was due to expire on 31 December 2016, it would be inappropriate to order the complainant’s reinstatement (see Judgment 3908, consideration 21). Accordingly, the complainant’s request for an order to reinstate him is rejected.

6. However, in light of the complainant’s claims for additional material and moral damages, the Tribunal observes that, contrary to the cases leading to Judgments 3903 and 3904, this case was remitted to the Registrar to take a new decision. It is comparatively clear from the approach adopted by the Registrar that, at the very least implicitly, he was accepting that the complainant’s termination was unlawful. This leads to a consideration of whether his approach to the assessment of material damages was flawed. His approach mimicked the approach of the Tribunal in Judgments 3903 and 3904, and the Tribunal sees no reason to depart from that approach. However, the complainant has received the damages many years after the unlawful termination of his employment, and several years after the other two employees to whom Judgments 3903 and 3904 applied received their damages. Accordingly, a further sum of 10,000 euros should be awarded to the complainant in recognition of this delay.

7. His claim for further moral damages in the sum of 50,000 euros is unfounded. However, as the complainant partly succeeds, he will also be awarded 1,000 euros in costs.

8. To the extent that the complainant seeks moral damages for delay in the resolution of his case or for delay in the internal appeal proceedings, these claims are rejected, particularly as any delay did not result solely from actions or omissions of the ICC.

DECISION

For the above reasons,

1. The ICC shall pay the complainant material damages in the sum of 47,000 euros less any material damages already paid.
2. The ICC shall pay the complainant 1,000 euros costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 25 May 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ