

P. (No. 2)

v.

ICC

134th Session

Judgment No. 4512

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J. P. against the International Criminal Court (ICC) on 18 June 2019 and corrected on 22 June, the ICC's reply of 8 October, the complainant's rejoinder of 28 November 2019 and the ICC's surrejoinder of 5 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 contests the decision of the ICC Registrar to reject his grievance complaint against Mr H. and to close the case.

The complainant is a Senior Security Officer in the ICC's Safety and Security Section. He joined the ICC in August 2003.

On 20 October 2015 he filed a complaint with the Tribunal against the Administration's decision to temporarily withdraw his authorisation to carry a firearm (first complaint). On 4 June 2018, following the completion of the written proceedings in his first complaint and in view of the Tribunal's intention to enter that complaint on the list of cases to be examined at its 127th Session, the Tribunal sent a letter to the ICC asking whether the case had been settled or whether there was any prospect that it might be settled. Mr H., the ICC's Legal Counsel and

Chief of the Legal Office, responded on 3 July 2018 informing the Tribunal that the Administration would reach out to the complainant to enter into settlement negotiations and asking the Tribunal to adjourn the matter. In exchanges that ensued between the ICC Human Resources Section (HRS) and the complainant regarding the possibility of an amicable settlement, HRS undertook to present him with a settlement offer by 27 July, while the complainant confirmed that he was open to receiving an out-of-court settlement offer but that he would not accept a stay of proceedings in his first complaint.

On 4 and 31 July 2018 the Tribunal requested an update from the ICC as to whether the case had been settled out of court. Mr H. replied by letters of 30 July and 15 August respectively, indicating that settlement efforts were ongoing but had not yet concluded and that the ICC would inform the Tribunal as soon as an agreement had been reached or it became clear that a settlement would not be possible.

On 20 August the complainant's counsel wrote to the Tribunal to ask that the complainant's first complaint be included in the list of cases for the Tribunal's 127th Session. The complainant's counsel indicated that the complainant had not yet received a written settlement offer from the ICC and conveyed to the Tribunal the complainant's view that the ICC was trying "to stall for time". On 27 August 2018 the complainant informed HRS that, further to receiving knowledge of Mr H.'s attempt in early July to adjourn the consideration of his first complaint by the Tribunal, he was no longer interested in an amicable settlement. Subsequent calls by the ICC for negotiations towards an amicable settlement were rejected by the complainant on the ground that he had lost trust in the integrity of the ICC's Legal Office. On 10 October 2018 the Registrar of the Tribunal informed the complainant that his first complaint had been included in the list of cases for the Tribunal's 127th Session. That complaint gave rise to Judgment 4060, which was delivered in public on 6 February 2019.

Meanwhile, on 9 October 2018, the complainant filed, through his representative, a formal grievance complaint against Mr H. pursuant to Section 7 of Administrative Instruction ICC/AI/2005/005 on "Sexual and Other Forms of Harassment". The complainant asked that Mr H. be

held accountable for (i) harassment, as per the definition contained in Article 2.1 of Administrative Instruction ICC/AI/2005/005; (ii) a breach of the duty to perform his functions honourably and conscientiously, as required by Staff Regulation 1.1(b); and (iii) the reporting of intentionally false or misleading information to the Tribunal. The complainant specifically requested that his grievance complaint be referred to the Disciplinary Advisory Board (DAB), and not the Independent Oversight Mechanism (IOM), as per Chapter X of the Staff Rules and Article 7.3 of Administrative Instruction ICC/AI/2005/005. He based this request on the fact that the IOM's Operational Mandate, adopted by the Assembly of States Parties to the Rome Statute (Assembly of States Parties) in Resolution ICC-ASP/12/Res.6, had not been implemented by Presidential Directive in the ICC's internal legal framework, as required by Presidential Directive ICC/PRES/D/G/2003/001 "Procedures for the Promulgation of Administrative Issuances". The complainant also requested Mr H.'s suspension from duty, under Staff Rule 110.5(a), in order to prevent any interference with the proper investigation, as well as his summary dismissal, under Staff Rule 110.7, for serious failure to observe the expected standards of conduct. On 12 October the complainant corrected his 9 October grievance complaint.

Under cover of a memorandum dated 8 November 2018, the ICC Registrar transmitted the complainant's grievance complaint to the DAB pursuant to Article 7.3 of Administrative Instruction ICC/AI/2005/005. In that same memorandum, the ICC Registrar informed the DAB that he had also transmitted the grievance complaint to the IOM pursuant to paragraph 33 of the Annex to Resolution ICC-ASP/12/Res.6.

In a memorandum of 5 December 2018, entitled "Summary of Preliminary Review", the IOM did not find *prima facie* evidence of misconduct and concluded that the complainant's allegations "lack[ed] the credibility and materiality" to warrant the initiation of a formal investigation. The IOM recommended that the Registry consider the possibility of copying complainants in cases before the Tribunal (or their counsel) when communicating directly with the Tribunal to ensure transparency and to avoid any misinterpretation of the ICC Registry's motives.

The DAB submitted its report on 4 March 2019. Having taken note of the IOM's Preliminary Review and its assessment of the facts, the DAB stated that it had not found any objective proof that harassment had occurred in the complainant's case. It therefore did not see any legal basis for disciplinary measures and recommended that the case against Mr H. be closed. The DAB further found that the complainant had used the grievance complaint to report other alleged misconduct and not harassment on the part of Mr H. It therefore also recommended that the complaint be considered "base-less" within the meaning of Article 7.6 of Administrative Instruction ICC/AI/2005/005. By a memorandum of 22 March 2019, the ICC Registrar informed the complainant of his decision to endorse the DAB's recommendations. That is the decision impugned in this second complaint before the Tribunal.

The complainant asks the Tribunal to award him 50,000 euros in moral damages for harassment by Mr H. and to determine which disciplinary measure, such as summary dismissal and/or other, is deemed appropriate to apply to Mr H. Alternatively, he asks the Tribunal to refer the matter back to the ICC for its determination of the appropriate disciplinary measure based on the finding that Mr H. committed harassment and unsatisfactory conduct. He seeks 5,000 euros for the costs he incurred in the course of the internal appeal and before the Tribunal.

The ICC asks the Tribunal to deny all of the complainant's prayers for relief to the extent that it finds them receivable.

CONSIDERATIONS

1. The complainant, an ICC Senior Security Officer, lodged a formal grievance complaint against Mr H. pursuant to Section 7 of Administrative Instruction ICC/AI/2005/005. He alleged therein that Mr H. had engaged in "unwelcome behaviour" against him by continually requesting an adjournment and attempting to delay his pending case before the Tribunal, and by misrepresenting that settlement negotiations were ongoing, which caused an "intimidating, hostile and offensive work environment" for the complainant. In his grievance complaint, the

complainant also reported other unsatisfactory conduct by Mr H., namely a breach of his duty to perform his functions honourably and conscientiously, and the reporting of intentionally false or misleading information. He specifically requested that his grievance complaint be referred to the DAB and not the IOM. He also requested, under title “Relief sought”, Mr H.’s suspension from duty as well as his summary dismissal.

2. The grievance complaint was referred to the DAB by a memorandum of 8 November 2018 from the ICC Registrar.

3. In that same memorandum, the Registrar informed the DAB that he had also transmitted the grievance complaint to the IOM pursuant to paragraph 33 of the Annex to Resolution ICC-ASP/12/Res.6. As it did not find *prima facie* evidence of misconduct, the IOM concluded in a memorandum of 5 December 2018, entitled “Summary of Preliminary Review”, that the complainant’s allegations “lack[ed] the credibility and materiality” to warrant the initiation of a formal investigation.

4. On 4 March 2019 the DAB, after assessing the complainant’s grievance complaint, submitted its report to the ICC Registrar, stating that it found no objective proof that might substantiate that the conduct of harassment had occurred and recommending that the case against Mr H. be closed. The DAB also found that the complainant had used a grievance complaint to report other alleged misconduct on the part of Mr H., and it therefore recommended that the complaint be considered “base-less” within the meaning of Article 7.6 of Administrative Instruction ICC/AI/2005/005. With regard to the IOM’s memorandum entitled “Summary of Preliminary Review”, the DAB said it was satisfied that the Assembly of States Parties’ resolutions and the ICC Statute had a direct application on the internal governance framework of the ICC, it thus took due note of the IOM’s memorandum. The DAB further stated that, as the grievance complaint was referred to it pursuant to Article 7.3 of Administrative Instruction ICC/AI/2005/005, it would address the relevant allegations based on that Administrative Instruction only. By a memorandum of 22 March 2019, the ICC Registrar informed the

complainant of his decision to endorse the DAB's recommendations. This is the impugned decision.

5. The ICC raises receivability as a threshold issue. It contends that the complainant's arguments and claims regarding the ICC's alleged failure to impose disciplinary measures against Mr H. are irreceivable, because the decision not to order Mr H.'s suspension or summary dismissal does not concern the complainant and does not affect the complainant's position in law as a staff member of the ICC. Accordingly, the complainant lacks a cause of action to challenge the decision. Moreover, the ICC submits that in light of Article VIII of its Statute, the Tribunal lacks competence to order disciplinary measures against a staff member.

6. The Tribunal notes that the complainant challenges the ICC Registrar's decision to close the case against Mr H. and requests the Tribunal to order that Mr H. be subjected to disciplinary measures for misconduct. As the Tribunal stated in Judgment 1899, in consideration 3, "[d]isciplinary relations between an organisation and a staff member do not directly concern other members of staff or affect their position in law. Consequently, a decision regarding a disciplinary inquiry or a disciplinary measure relating to one staff member will not adversely affect other staff, so the latter will have no cause of action for challenging a disciplinary sanction or a refusal to impose one." Furthermore, it is worth noting that the Tribunal's consistent case law has it that ordering that disciplinary action be taken against an alleged harasser is, in any event, outside its jurisdiction (see, for example, Judgments 4313, consideration 11, 4241, consideration 4, 3318, consideration 12, and 2811, consideration 15). The Tribunal finds that the complainant's allegations and claims based on the ICC's failure to impose disciplinary measures against Mr H. are irreceivable.

7. On the facts of this case, the complainant was quite clearly making the grievance complaint exclusively for the purpose of securing a disciplinary sanction against the alleged perpetrator. Indeed, in his grievance complaint submitted on 9 October 2019, under the heading “Conclusion on Harassment”, the complainant requested that the alleged perpetrator be summarily dismissed. This conclusion provides a context for considering whether the various procedural and other defects identified by the complainant are matters in respect of which he has standing to challenge them in the Tribunal. Having regard to the discussion in consideration 6 above, the answer is no.

However, there remain for consideration the complainant’s pleas about the DAB’s conclusion, adopted by the ICC Registrar, that the grievance complaint was baseless. The Tribunal accepts that this conclusion was not warranted, at least not for the reasons given by the DAB and adopted by the ICC Registrar. However, the ICC Registrar’s decision was, in this respect, not a final decision challengeable by the complainant before the Tribunal, within the meaning of Article VII, paragraph 1, of the Tribunal’s Statute. In the event that disciplinary proceedings were commenced based in whole or in part on the characterisation of the complainant’s grievance complaint as “base-less”, the complainant could challenge this characterisation as part of a challenge to any disciplinary measure which may ultimately be imposed.

8. There are no grounds for awarding the complainant costs in these proceedings, nor for the internal appeal proceedings. Under the Tribunal’s case law, costs in the internal appeal may be awarded only in exceptional circumstances (see Judgment 4217, consideration 12).

DECISION

For the above reasons,

The complaint is 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