

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

E.
v.
ICC

137th Session

Judgment No. 4749

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F. L. E. against the International Criminal Court (ICC) on 13 January 2022, the ICC's reply of 9 May 2022, the complainant's rejoinder of 3 October 2022 and the ICC's surrejoinder of 17 January 2023;

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 termination of his appointment with compensation in lieu of notice.

The complainant joined the ICC in September 2017. At the material time, he was employed as a Field Case Management Assistant, at grade G-5, in the Victims and Witnesses Section of the ICC Registry, based in Abidjan (Côte d'Ivoire).

On 24 February 2021 the Registrar of the Court received a report of unsatisfactory conduct by the complainant, according to which he had submitted fraudulent invoices to his supervisor as proof of official expenditure and misused an ICC vehicle while performing his duties. On 26 February 2021 the Registrar asked the Independent Oversight Mechanism (IOM) to investigate these allegations.

The IOM issued its investigation report on 12 July 2021. It concluded that it transpired that the complainant had asked a tradesman to submit two falsified invoices totalling 182,000 CFA francs (approximately 277 euros), which had then been submitted as proof of official expenditure, but that there was insufficient evidence to establish whether he had done so on his own initiative or at his supervisor's request. With regard to the alleged misuse of an official ICC vehicle, the IOM found that the complainant had lacked judgement in using a diplomatic vehicle instead of a vehicle with ordinary registration plates while performing his duties. It recommended that administrative or disciplinary action be taken against him.

On 26 July 2021 the Registrar of the Court informed the complainant that he had decided to pursue the matter pursuant to Sections 2.5 and 2.6 of the Administrative Instruction on Disciplinary Procedures (ICC/AI/2008/001). He notified him of the allegations against him, provided him with a copy of the IOM's investigation report and annexes thereto and invited him to respond within ten working days. The complainant submitted his comments on 4 August 2021. Having considered the complainant's response, the Registrar decided to refer the matter to the Disciplinary Advisory Board (DAB) for its opinion, in accordance with Section 2.9(b) of the above-mentioned Administrative Instruction.

The DAB issued its report on 1 October 2021. It found that misuse of an ICC official vehicle had not been proven beyond reasonable doubt. With regard to the charge of fraud, the DAB observed that it was not disputed that the complainant had submitted two fraudulent invoices to his supervisor and that, although it was not possible to determine with certainty whether the complainant had submitted these invoices on his own initiative or at his supervisor's request, "the submission of fraudulent bills with the intention of accounting for expenditures of ICC funds for a fictitious service establishes unsatisfactory conduct which, pursuant to Regulation 10.2 of the Staff Regulations, can be sanctioned with disciplinary measures". The DAB emphasised the "gravity" of the fraud perpetrated by the complainant but did not recommend the disciplinary measure of summary dismissal,

having noted that it was the first incident in which he had been involved, that it was possible that his supervisor had placed him under pressure and that the sum in question was too small to have had any impact on the ICC's operations. In the light of these elements, the DAB considered that a written censure accompanied by the loss of five within-grade increments was an appropriate disciplinary measure.

By letter of 1 November 2021, the Registrar of the Court informed the complainant that, having carefully considered all the evidence and the circumstances of the case, he had concluded that the complainant had committed fraud within the meaning of Section 2 of Directive ICC/PRESG/G/2014/002 and that he had therefore decided to impose on him the disciplinary measure of termination of appointment with compensation in lieu of notice, pursuant to Staff Rule 110.6(a)(vii). That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order his reinstatement. As an alternative to reinstatement, in his rejoinder he claims compensation of 20,000 euros, corresponding to the material injury caused by the loss of his job and the moral injury he considers he has suffered.

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

CONSIDERATIONS

1. The complainant, a former ICC staff member in the Victims and Witnesses Section of the Court's Registry based in Abidjan (Côte d'Ivoire), impugns before the Tribunal the decision of the Registrar of the Court of 1 November 2021 imposing on him the disciplinary measure of termination of appointment with compensation in lieu of notice. This disciplinary measure was adopted after the complainant submitted two falsified invoices totalling the equivalent of around 277 euros to his supervisor in February 2021 as proof of official expenditure.

In the impugned decision, the Registrar of the Court did not follow the opinion delivered by the Disciplinary Advisory Board (DAB) in its report of 1 October 2021. In respect of the falsified invoices in question, the DAB had found that it was undisputed that the complainant had submitted them to his supervisor but, in view of the circumstances surrounding this conduct, described as “grave”, including the difficulty to determine with certainty whether the fraudulent invoices had been obtained in collusion with the complainant’s supervisor or at his own initiative, a written censure and the loss of five within-grade increments constituted an appropriate sanction in this case.

Before the DAB delivered its opinion, the ICC Independent Oversight Mechanism (IOM) had, in its investigation report of 12 July 2021, found that that it was established that the complainant had produced these fictitious invoices and that they were falsified, observing that the sole discrepancy in accounts of the events laid in whether the invoices had been produced at the request of the complainant’s supervisor or at his own initiative. The IOM therefore recommended that appropriate administrative or disciplinary measures be taken against the complainant.

2. Before the Tribunal, the complainant does not dispute that he obtained, and subsequently submitted to his supervisor, two fictitious invoices as proof of official expenditure, but he submits that the impugned decision should be set aside and that he should be reinstated in his post in the ICC country office in Côte d’Ivoire or, alternatively, if such reinstatement were to be refused, that he should be awarded financial compensation of 20,000 euros for the material injury caused by his loss of employment and the related moral injury suffered.

3. The complainant puts forward four objections to the lawfulness of the impugned decision. Firstly, he submits that the constituent elements of fraud as referred to in the applicable internal provisions are not present in this case. Secondly, he argues that the impugned decision is unlawful owing to the lack of proof beyond reasonable doubt that he submitted the falsified invoices of his own accord. Thirdly, he criticises the Registrar of the Court for failing in the

impugned decision to reply to the DAB's arguments concerning the mitigating circumstances that warranted a lesser disciplinary measure than the one imposed on him. Fourthly, he contends that the sanction imposed breaches the principle of proportionality applicable in this area.

For the main part, the complainant's pleas hinge on the fact that the falsified invoices, which he acknowledges were fictitious and fraudulent, were submitted not on his initiative but on his supervisor's. He adds that, apart from this isolated incident, his record with the ICC was impeccable, that the sums involved were insignificant and that the organisation had ultimately not suffered any financial loss. In his view, the penalty applied was therefore disproportionate.

4. The Registrar of the Court imposed on the complainant the disciplinary measure of termination of appointment with compensation in lieu of notice under ICC Staff Rule 110.6(a)(vii), which provides as follows:

“Rule 110.6: Disciplinary measures

- (a) Disciplinary measures may be imposed by the Registrar or the Prosecutor, as appropriate, and may take one or more of the following forms:
 - (i) Written censure;
 - (ii) Deferment for a specified period or withholding of within-grade increment;
 - (iii) Loss of one or more within-grade increments;
 - (iv) Suspension without pay;
 - (v) Fine;
 - (vi) Demotion;
 - (vii) Termination of appointment, with or without notice, or compensation in lieu thereof, notwithstanding staff rule 109.2; or
 - (viii) Summary dismissal for serious misconduct pursuant to staff rule 110.7.”

With regard to disciplinary measures, Staff Rule 110.1 concerning unsatisfactory conduct further provides as follows:

“Rule 110.1: Unsatisfactory conduct

Failure by a staff member to act in accordance with any official document of the Court governing rights and obligations of staff members, such as the Staff Regulations and Rules and the Financial Regulations and Rules, or any relevant resolutions and decisions of the Assembly of States Parties, or failure to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2(a), leading to the institution of disciplinary proceedings and the imposition of disciplinary measures.”

Under Staff Regulation 10.2(a), the Registrar of the Court may impose disciplinary measures on staff members whose conduct is unsatisfactory.

Staff Regulation 1.2(b) states that “[s]taff members of the Court shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, compliance with the relevant standards on confidentiality established by the Court, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.” Similarly, Staff Rule 101.9 stipulates that ICC staff members “shall be required to uphold the highest standards of efficiency, competence and integrity in the discharge of their functions”.

Moreover, the ICC adopted a zero-tolerance anti-fraud policy in May 2014 pursuant to Presidential Directive ICC/PRES/D/G/2014/002 (“Directive 2014/002”). Section 2.1 defines “fraud” as follows:

“2.1 Fraud is any act or omission, including any misrepresentation that knowingly misleads, or attempts to mislead, a party in order to obtain any financial or other benefit, to cause a loss or to avoid any obligation.”

5. In disciplinary matters, the Tribunal has consistently found that the burden of proof rests on an organisation to prove the allegations of misconduct beyond reasonable doubt before a disciplinary sanction can be imposed. In respect of the standard of proof, the Tribunal relevantly stated the following in Judgment 4362, considerations 7, 8 and 10:

“7. [...] The relevant legal standard is beyond reasonable doubt. The role of the Tribunal in a case such as the present is not to assess the evidence itself and determine whether the charge of misconduct has been established beyond reasonable doubt but rather to assess whether there was evidence available to the relevant decision-maker to reach that conclusion (see, for example, Judgment 3863, consideration 11). Part of the Tribunal’s role is to assess whether the decision-maker properly applied the standard when evaluating the evidence (see Judgment 3863, consideration 8).

8. 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.

[...]

10. [...] 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.”

6. In his first plea, the complainant submits that in this case the constituent elements of fraud referred to in Section 2.1 of Directive 2014/002 were not present because he demonstrated transparency and informed his supervisor that the two invoices were falsified when he submitted them. He therefore never intended to mislead anyone. However, the Tribunal notes that Section 2.1 of the ICC Anti-fraud

Policy states that the term “fraud” means any act that knowingly attempts to mislead a party in order to obtain a financial benefit or to avoid an obligation. First of all, according to the submissions and the evidence, and as both the IOM and the DAB noted, the falsified invoices obtained by the complainant that he gave to his supervisor were in fact fraudulent, as the complainant himself acknowledged. Secondly, it is just as clearly established that the complainant knew perfectly well that these invoices were fictitious and fraudulent, a fact which he does not dispute in his submissions.

In the circumstances, the Tribunal cannot agree with the complainant’s argument that he did not intend to mislead the ICC just because he had behaved transparently with his supervisor and had informed him that the invoices were fictitious. On the one hand, in its investigation report, the IOM concluded that the complainant had requested and obtained the two falsified invoices in order to provide proof of expenditure and so account for the use of funds allocated to him in respect of which his supervisor had noted an unexplained discrepancy. On the other hand, the DAB similarly concluded that submitting fraudulent invoices reflected an intention to charge expenditure on a fictitious service to ICC funds. On this point, the Tribunal recalls that, under its settled case law, it will not interfere with the findings of an investigative body unless there is manifest error (see, for example, Judgment 4065, consideration 5) and that an opinion of a disciplinary committee that rests on a balanced and thoughtful analysis and contains justified and rational conclusions and recommendations warrants considerable deference (see Judgment 3969, consideration 11). Furthermore, the Tribunal notes that the complainant knew that the aim of obtaining the falsified invoices was to remedy the lack of proof of expenditure for which there was otherwise none and therefore to avoid the obligation of providing real supporting documents for that expenditure.

Insofar as the complainant admitted to having obtained the fictitious invoices and being aware that they were intended to justify the amount missing from the relevant financial account, the Tribunal is not persuaded by the complainant’s explanation that he solely intended to assist his supervisor and not to mislead the organisation. The Registrar

of the Court was undoubtedly entitled to conclude beyond a reasonable doubt that the complainant intended to mislead the organisation in circumstances where the ultimate aim of the falsified invoices was precisely to justify an amount missing from the ICC financial account.

The Tribunal considers that, in this context, the complainant is wrong to argue that the Registrar of the Court could not conclude that there was proof beyond a reasonable doubt of fraud for the purposes of Section 2.1 of Directive 2014/002. Moreover, the complainant's conduct also breached the fundamental duty and principle of integrity and probity laid down in Staff Regulation 1.2(b) and Staff Rule 101.9. Clearly, obtaining and submitting fraudulent invoices contravened the requirement that staff members demonstrate integrity and probity in the discharge of their functions. In this respect, it is clear from the file that the complainant took steps to obtain and obtained the fraudulent invoices with the aim, which he must have known to be unlawful, of justifying fictitious services. The fact that the request to do so may have originated from his supervisor, as the complainant alleges, or that he may have stated to his supervisor that the invoices were falsified in no way alters the fact that the act constituted fraud as defined in Section 2.1 and breached the complainant's duty to act with honesty and probity in the discharge of his functions.

It follows that, pursuant to the Tribunal's aforementioned settled case law, an examination of the evidence clearly shows that the Registrar of the Court could conclude beyond a reasonable doubt that the complainant had committed the misconduct of which he was accused, allowing a disciplinary sanction to be imposed, as the IOM and the DAB both found (see, for example, Judgment 4227, consideration 6).

This first plea must therefore be dismissed as unfounded.

7. In his second plea, the complainant argues that the impugned decision is unlawful given the lack of proof beyond a reasonable doubt that he submitted the falsified invoices of his own accord. However, the Tribunal considers that the fact that the complainant's supervisor may have requested him to obtain the falsified invoices does not, in any event, allow the complainant to derogate from the obligations of

honesty and probity to which he was subject pursuant to the aforementioned provisions. This is especially so since, as the organisation correctly observes in its submissions, the complainant could have reported requests made by his supervisor that he considered unlawful to the Registrar of the Court, the IOM or his other supervisors. What is more, the complainant acknowledges in his complaint that he probably lacked judgement on this point. As stated in consideration 6, above, the charge – that is fraud – was proven beyond a reasonable doubt and the insufficient standard of proof that he submitted the falsified invoices on his own initiative is irrelevant.

This second plea is unfounded.

8. In his third plea, the complainant criticises the Registrar of the Court for having dismissed “in an overly perfunctory manner the balanced assessment and justified and reasonable [...] findings”^{*} of the DAB concerning the sanction that ought to be imposed on him and for having failed to sufficiently justify his findings and decision to disregard the DAB’s opinion, particularly considering the three mitigating circumstances identified by that body, namely the fact that it was the first incident in which the complainant had been involved, that the sum in question was too small to have had an impact on the Court’s operations, and that the complainant’s supervisor had possibly exerted pressure on him.

However, the Tribunal observes that it is plain from the impugned decision that the Registrar of the Court duly, albeit briefly, considered the various factors submitted by the DAB as mitigating circumstances. Having done so, he decided to disregard the DAB’s recommended sanction and instead concluded that termination of appointment with compensation in lieu of notice was the proper sanction in this case, as was permissible for him to do in the exercise of his discretion to freely assess the appropriate sanction to be imposed on the complainant.

This third plea will therefore be dismissed.

9. In his fourth plea that the sanction imposed was disproportionate, the complainant draws attention to the mitigating circumstances noted by the DAB. He argues that it is unfair for him to be the only one to take the blame while he submits that he acted at his supervisor's behest, making it difficult for him to object. He explains that he felt at a loss when confronted with a situation that he faced for the first time. The complainant adds that the small sum in question did not entail any negative consequences for the organisation's operations. He further observes in that regard that, after his supervisor had retired, a sum equivalent to the amount considered missing by the latter was found by the organisation.

10. In Judgment 4478, considerations 11 and 12, the Tribunal recalled that "[t]he case law confirms that the decision on the type of disciplinary action taken remains in the discretion of the disciplinary authority, as long as the measure is not disproportionate" (see also Judgment 3640, consideration 29), and that "the Tribunal cannot substitute its evaluation for that of the disciplinary authority, [as] the Tribunal limits itself to assessing whether the decision falls within the range of acceptability" (see also on this point Judgment 3971, consideration 17). In Judgment 4478, the Tribunal further observed that, although a lack of proportionality must be seen as an error of law warranting the setting aside of a disciplinary measure, "[i]n determining whether disciplinary action is disproportionate to the offence, both objective and subjective features are to be taken into account and, in the case of dismissal, the closest scrutiny is necessary". However, in Judgment 2699, consideration 15, the Tribunal emphasized that it will accord a high degree of deference to decisions concerning sanctions where the misconduct relates to issues of dishonesty, misrepresentation and a lack of integrity (see also on this point Judgment 4308, consideration 18).

11. In the present case, the Tribunal notes that the sanction imposed on the complainant, although severe, was not the most serious disciplinary measure provided for in the ICC Staff Rules, which is summary dismissal for serious misconduct. Moreover, the aforementioned provisions specifically placed the complainant under duties of probity

and honesty, and it is plain from the submissions and the evidence that his role in the Victims and Witnesses Section of the Registry of the Court in Côte d'Ivoire entailed the obligation to demonstrate irreproachable integrity and to conduct himself with the highest probity when, *inter alia*, providing proof of expenditure chargeable to the organisation. However, the complainant's submission of falsified invoices that he himself had acquired for the purpose of providing proof of official expenditure directly undermined the trust essential to his continued relationship with the Organisation. The Tribunal therefore finds that, despite its severity, the sanction imposed was not disproportionate in view of the misconduct committed, bearing in mind that the ICC had adopted a "zero tolerance" policy towards fraud.

12. As regards the fact that the complainant had not been involved in any other incident since he joined the ICC, which could usually constitute a mitigating circumstance, it is clear from the impugned decision that the Registrar of the Court did take this into account. Similarly, the Registrar did consider the complainant's argument that the sums involved were relatively small and that the offending conduct had not resulted in the organisation incurring any financial loss. However, these mitigating circumstances in fact carried little weight in view of the gravity of the misconduct. Moreover, even if the fact that the complainant had acted, as he submits, at his supervisor's instigation were to be regarded as a mitigating circumstance, this would not lead to the misconduct being considered less serious.

13. Accordingly, the Tribunal concludes that the Registrar of the Court, in ordering that the complainant's appointment be terminated with compensation in lieu of notice, did not impose on him a disproportionate sanction. It follows that this last plea must also be dismissed as unfounded.

14. It follows from all the foregoing considerations that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 14 November 2023, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER