

**B. H. (No. 2)**

*v.*

**ICC**

**124th Session**

**Judgment No. 3858**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms E. J. B. H. against the International Criminal Court (ICC) on 9 July 2015, the ICC's reply of 28 October 2015 and the letter of 19 January 2016 whereby the complainant informed the Registry that she did not wish to file a rejoinder;

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 decision to terminate her appointment.

The complainant joined the ICC on 1 September 2009 as a Management Accounting Supervisor in the Budget and Finance Section. By a letter of 27 June 2013 she was informed by the Registrar of the Court that allegations had been made against her that she had intentionally sabotaged aspects of the closing work of the previous year's accounts and that she had knowingly or intentionally withheld information from a duly authorised audit. The allegations, if established, would amount to misconduct or serious misconduct and a fact-finding inquiry into those allegations had been authorised. In addition, the complainant was suspended, with pay, with immediate effect, for an initial period of three

months, or, if earlier, until the completion of the fact-finding inquiry. Her suspension was subsequently extended several times.

An independent investigator was assigned to conduct the fact-finding inquiry and he submitted his report to the Registrar on 1 October 2013. The investigator did not find sufficient evidence to substantiate the allegations against the complainant. He concluded, however, that she had had a “corrosive effect” on the Budget and Finance Section and other departments.

By a letter of 15 October 2013 the complainant was notified by the Registrar that he had decided to pursue a case against her. She was provided with a copy of the investigation report and was invited to respond to the allegations set out therein. The complainant submitted her written response in November 2013.

The Registrar referred the matter to the Disciplinary Advisory Board (DAB) in December 2013. On 28 March 2014 the DAB submitted its report in which it concluded that it had not been able to establish beyond a reasonable doubt that the complainant had intentionally sabotaged aspects of the closing work of the 2012 accounts. It recommended in particular that the Registrar close the disciplinary proceedings without imposing a disciplinary sanction, that the complainant be allowed to return to the ICC and that various measures be taken to improve the working relationship between the complainant and her supervisors and other colleagues.

In early May 2014 the complainant met with the Registrar and the Chief of the Human Resources Section (HRS). She received a copy of the DAB report. They discussed issues regarding her working relationships with colleagues that had been identified in the investigator’s report and by the DAB. Following this meeting the Chief of HRS made several attempts to arrange to meet with the complainant in order to discuss the way forward, but she was unsuccessful.

By a letter of 17 July 2014 the complainant was informed that the Registrar had decided to close the disciplinary proceedings against her without imposing a disciplinary measure. Nevertheless, he had decided to terminate her appointment under Staff Rule 109.1(b)(i) in conjunction with Staff Rule 109.2(c). Following requests for review of that decision,

on 30 August 2014 the complainant filed an appeal with the Appeals Board challenging the decision of 17 July. While the internal appeal proceedings were still pending, she filed her first complaint with the Tribunal. That complaint is the subject of Judgment 3857, also delivered in public this day.

The Appeals Board submitted its report to the Registrar on 24 March 2015. It concluded that the complainant had not established that the Registrar had erred in law or procedure when taking the decision of 17 July 2014. In addition, the complainant had not established any error justifying the remedies that she sought. However, the Appeals Board recommended that she be offered a further opportunity to seek reintegration at work and that a performance improvement plan be put in place for this purpose.

In a letter of 22 April 2015 from the Registrar, the complainant was informed that his decision to terminate her appointment was final. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the removal of any prejudicial material from her personal file. She seeks reinstatement, with all entitlements and benefits, as from 18 July 2014. She claims damages under various heads, and costs in the amount of 25,000 euros. In the event that reinstatement is not possible, she seeks compensation and material damages in the sum of 250,000 euros. She requests the Tribunal to order or recommend that a full investigation be undertaken into the actions of various individuals.

In the event that the Tribunal finds the complainant's first complaint to be receivable and decides that complaint on the merits, the ICC asks the Tribunal to find the present complaint *res judicata* and thus, irreceivable. It requests the Tribunal to dismiss the complainant's accusations of misconduct by individuals who are not a party to the present case, together with her claim for an investigation, as irreceivable *ratione materiae*. In the alternative, it asks the Tribunal to reject the complaint, including the aforementioned accusations, as unmeritorious.

## CONSIDERATIONS

1. In June 2013 the ICC was undergoing an audit by an external auditor. At a meeting on 17 June 2013 between the external audit team leader and the Chief of the Budget and Finance Section, the external audit team leader claimed that the complainant had intentionally engaged in conduct that could seriously compromise the audit that year and had done so the previous year. These allegations led to the Registrar suspending the complainant with pay. The Registrar also commissioned an independent investigator to investigate the allegations. The investigator reported to the Registrar on 1 October 2013. The investigator did not find sufficient evidence to substantiate the allegations but he nonetheless pointed to conduct of the complainant which was characterised as inappropriate and as having a corrosive effect in the Budget and Finance Section and other departments within the ICC. Thereupon the Registrar notified the complainant of allegations of unsatisfactory conduct (in relation to the audits conducted in 2012 and 2013) to which the complainant responded.

2. The Registrar decided to refer the matter to the DAB and he did so on 16 December 2013. The DAB reported to the Registrar on 28 March 2014. It found it had not been able to establish beyond a reasonable doubt that the complainant had sabotaged the work of the external auditors. It nonetheless made adverse findings regarding the behaviour and conduct of the complainant in relation to other staff members.

3. On 14 May 2014 the complainant met with the Registrar and the Chief of HRS. In the result, it was proposed that the complainant subsequently meet with the Chief of HRS. Despite attempts on the part of the Chief of HRS to bring about such a meeting, no meeting occurred.

4. By letter dated 17 July 2014 the complainant was informed by the Registrar that her appointment was terminated. The complainant sought an administrative review of that decision and, in due course, filed an appeal on 30 August 2014 with the Appeals Board. The Appeals

Board reported to the Registrar on 24 March 2015. It concluded that the complainant had not established that the Registrar erred in law or procedure when he decided to terminate the complainant's appointment. It expressed the view that, in particular, the complainant had not established any error on the part of the Registrar that would justify the remedies the complainant sought, which included setting aside the termination decision, reinstatement and material and moral damages.

5. Nonetheless the Appeals Board was satisfied that there had been a failure on the part of her immediate supervisors to give the complainant sufficient notice of her shortcomings in her ability to work with others within her unit during prior performance appraisals. The Appeals Board noted that her supervisors consistently gave her positive performance appraisals rather than providing her with notice of her shortcomings. It also noted that the concerns regarding her unsuitability to work only arose during separate investigations regarding her alleged misconduct. Ultimately the Appeals Board recommended that the Registrar "offer [the complainant] a further opportunity to seek to re-integrate into work by creating and implementing a performance improvement plan".

6. In a letter dated 22 April 2015 the Registrar affirmed his decision to terminate the complainant's appointment. He rejected the Appeals Board's recommendation referred to in the preceding consideration and gave reasons for doing so. This is the decision impugned in these proceedings.

7. The complainant's arguments in her brief are detailed though discursive. They traverse some matters which are beyond the competence of the Tribunal which include, in particular, arguments in support of her request that the Tribunal make an order and recommend investigations into the conduct of certain individuals said to have engaged in corrupt conduct. However the Tribunal has endeavoured to glean, from the complainant's pleas, her arguments that are relevant to the question of whether the impugned decision was tainted by error that might warrant orders of the Tribunal in the complainant's favour. She argues

that the termination of her appointment was a disproportionate response, an abuse of authority, constituted a hidden sanction, involved a breach of her right to procedural fairness and, either additionally or as part of that argument, constituted termination for unsatisfactory service based on performance in the absence of appropriate performance appraisals or the development of a performance improvement plan.

8. The report of the Appeals Board of 24 March 2015 manifests a detailed, comprehensive, thoughtful and balanced consideration of both the complainant's arguments, which generally correspond with the arguments raised in these proceedings, and the complainant's circumstances within the ICC. In Judgment 3608, consideration 7, the Tribunal said the following about the status of an internal appeal body's report and the use which might be made of it by the Tribunal:

“The report of the JAB manifests a comprehensive and thoughtful consideration and evaluation of the evidence and whether any of the conduct about which the complainant is aggrieved can be characterised as harassment, a breach of the [organisation]'s duty of care or as otherwise unlawful. It is now settled jurisprudence of the Tribunal that in some circumstances reports of internal appeal bodies warrant ‘considerable deference’ (see, for example, Judgments 2295, consideration 10, and 3400, consideration 6).”

So it is in this case that the report, findings and conclusions of the Appeals Board should be treated with considerable deference. There is no basis apparent to the Tribunal to question the Appeals Board's conclusions about the various arguments advanced before it and which the complainant also advances before the Tribunal in the present complaint.

9. However it remains for consideration, whether the Registrar's rejection of the Appeals Board's recommendation referred to in consideration 5 above, is tainted by error. The first point to make is that the Tribunal's jurisprudence requires that when the ultimate decision-maker rejects, as she or he is entitled to, the conclusions and recommendations of an internal appeal body, the decision-maker is obliged to provide adequate reasons for doing so (see, for example, Judgments 3312, consideration 6, and 3208, consideration 11, and the judgments cited therein). Thus the question arises whether the Registrar provided adequate reasons for rejecting the recommendation of the

Appeals Board. It is to be recalled that the Appeals Board recommended that the Registrar offer the complainant a further opportunity to seek to reintegrate into work by creating and implementing a performance improvement plan. It did so because there had been a failure on the part of her immediate supervisors to give her sufficient notice of her shortcomings in her ability to work with others within her unit during performance appraisals and the concerns regarding her unsuitability to work only arose during separate investigations regarding her alleged misconduct.

10. The reasons given by the Registrar in his letter of 22 April 2015 were:

“I have taken good note of the finding of the [Appeals Board] Panel that there were shortcomings in the performance appraisal process. At the same time, however, I am unable to follow the Panel in its recommendation that I offer you a further opportunity to seek to re-integrate you into work by creating and implementing a performance improvement plan. First, the Panel concluded that you *did* receive adequate notice and opportunity to address your shortcomings, through your dealings with me (report, paragraph 45). Second, the Panel found that your lack of cooperation made the creation and implementation of a performance improvement plan impracticable (report, paragraph 37). This is difficult to reconcile with its recommendation that I once again seek to re-integrate you. The Panel added to its recommendation that you would need to demonstrate a genuine willingness to take up such an opportunity by properly engaging in the process. It is precisely such willingness that you failed to demonstrate when given the opportunity to remedy the serious concerns concerning your work performance and conduct, and which indeed underscored those very concerns. In light of the foregoing, my decision to terminate your appointment is final.”

11. These reasons are credible and of substance and do provide a sufficient answer to the recommendation of the Appeals Board justifying, as the Registrar viewed the matter, its rejection. In addition, the basis on which the Registrar decided to terminate the complainant’s appointment was embodied in Staff Regulation 9.1(b)(vi) as reflected in Staff Rule 109.2(c). Staff Regulation 9.1(b)(vi) authorizes the termination of a staff member’s appointment if, in the opinion of (in this case) the Registrar, such termination would be in the interest of the Court. Staff Rule 109.2(c) identifies, non-exhaustively, when it might

be in the interests of the ICC to terminate a staff member's appointment and includes circumstances where a staff member had failed to establish satisfactory working relationships with other staff members.

12. The Tribunal has accepted that the question of what is in the best interest of an organisation is a matter peculiarly within the knowledge and competence of the executive head (see Judgment 2377, consideration 5). The Tribunal's jurisprudence, as discussed in that judgment, is that the Tribunal will normally defer to the view of the executive head and will only intervene if it is shown that the executive head acted without authority or in breach of a rule of form or procedure, or if a decision was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts or if there was abuse of authority. In the present case, none of these vitiating elements are present. In the result, the Tribunal is satisfied that the impugned decision of the Registrar is one that was open to him and is not tainted by error. Accordingly the complainant's case is unfounded and her complaint should be dismissed.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ