B.

v.

ICC

125th Session **Judgment No. 3905**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. B. against the International Criminal Court (ICC) on 20 June 2016 and corrected on 29 July, the ICC's reply of 14 November, the complainant's rejoinder of 19 December 2016 and the ICC's surrejoinder of 27 March 2017;

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 fixed-term appointment.

At the material time the complainant was employed with the ICC as a Security Support Assistant at grade G-2 in the Security and Safety Section of the Registry under a fixed-term appointment which was due to expire on 31 December 2016.

In 2013 the Assembly of States Parties to the Rome Statute of the International Criminal Court authorized the Registrar of the Court to reorganise the Registry. This reorganisation became known as the *Re*Vision Project. In January 2014 the Registrar formed a *Re*Vision team to review the Registry's organizational structure and functioning and to make recommendations. He also established a Project Board to

oversee the implementation of the *Re*Vision Project. In August 2014 the Registrar issued Information Circular ICC/INF/2014/011 entitled "Principles and Procedures Applicable to Decisions Arising from the *Re*Vision Project" (Principles and Procedures). On 13 June 2015 Information Circular ICC/INF/2014/011 Rev.1 was issued, which revised the Principles and Procedures; the revised version was in force at the material time.

By a letter of 16 June 2015 from the Registrar of the Court the complainant was notified of the decision to abolish his post and he was informed that his fixed-term appointment would terminate as of 14 October 2015. It was explained that the Registry needed a pool of security officers at the G-3 level who could carry out a broader range of functions and who, among other things, would be able to carry a firearm. He was informed that two options were open to him. The first option was to accept an "enhanced agreed separation package", in which case his departure from the ICC would take the form of a separation by mutual agreement with enhanced separation entitlements. Alternatively, he could avail himself of the opportunity to apply as an internal candidate for newly created positions arising as a result of the *Re*Vision Project, in which case his applications would receive priority consideration as provided for in the Principles and Procedures. In addition, a training program had been devised to assist staff members to meet the requirements of the new G-3 level positions. In the event that his applications for the new positions proved unsuccessful, his separation from the ICC would take the form of a termination of contract and he would receive the standard termination indemnity.

The complainant attended the aforementioned training but he did not pass the required firearms test. In an email of 26 August 2015 he was informed by the Chief of the Human Resources Section (HRS) that he had not passed the required training modules, that he did not meet the requirements for the position of Security Officer at the G-3 level and that the deadline for accepting the enhanced agreed separation package had been changed to 28 August.

On 7 September 2015 the complainant requested a review of the decision of 26 August and he also requested a suspension of action regarding the decision to terminate his appointment. On 9 October the Registrar maintained the decision of 26 August. He stated that the complainant's request, insofar as it challenged the termination of his appointment, was irreceivable *ratione temporis*.

In a report of 14 October 2015 the Appeals Board recommended against suspension of action on the decision to terminate the complainant's appointment on the ground that, as that decision had been notified to him on 16 June, the complainant's application for review was not made within the applicable time limit and thus the case was irreceivable. On 15 October the Registrar denied the complainant's request for suspension of action.

On 6 November 2015 the complainant filed an appeal with the Appeals Board in which he challenged the decision of 26 August 2015. In its report of 22 February 2016 the Appeals Board concluded that the appealable administrative decision regarding the abolition of the complainant's post and the termination of his appointment was the decision of 16 June 2015. As the complainant had not filed a request for review of that decision within the prescribed time limit, his appeal was irreceivable. The Appeals Board recommended that the appeal be dismissed. By a letter of 23 March 2016 the Registrar informed the complainant that he accepted the recommendation of the Appeals Board and rejected the appeal as irreceivable. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. He seeks reinstatement in his former post for a period of 14 and one half months, representing the period of time that remained under his contract at the time of his separation from service. He requests that during the period of reinstatement the ICC provide him with continuous firearms training under specified conditions and the opportunity to take additional attempts at the firearms test. In the event that he passes the firearms test, he seeks promotion to the position of Security Officer at grade G-3 and the renewal of his appointment for three years. In the alternative, he claims damages for economic loss, including the loss of salary (with post adjustment), medical insurance

subsidy and long-term care subsidy, for the period from 16 October 2015 to 31 December 2016, with interest. In addition to the above claims, he seeks moral and exemplary damages, and costs.

The ICC asks the Tribunal to dismiss the complaint as irreceivable. If the Tribunal finds the complaint receivable, the ICC asks the Tribunal to find that it is without merit and to deny the complainant's requests for relief. In the event that the Tribunal awards compensation for economic loss, the ICC asks that the sum of the termination indemnity paid to the complainant, together with any occupational earnings by the complainant for the period from 16 October 2015 to 31 December 2016, be deducted from such compensation.

CONSIDERATIONS

1. The present complaint is one of four complaints currently before the Tribunal (the other complaints were filed by Mr A., Mr G. and Ms S.A., respectively) where there is a request for joinder of the complaints and where the complainants each challenge the ICC's decision to terminate her or his appointment. These decisions all stem from the restructuring of the ICC's Registry. On the basis that the material facts and the issues raised in the complaints are essentially the same, the complainant requests and the ICC agrees that the complaints should be joined. However, it is noted that the internal appeals (challenging the termination decisions) in these cases were considered by four differently constituted Appeals Board Panels and resulted in four final decisions. As it is preferable in the circumstances to deal with the complaints individually, the request for joinder is not granted.

2. On 16 June 2015 the Registrar informed the complainant of the decision to abolish his position. In the same letter the complainant was also informed about the termination of his appointment. The notification of the decision to terminate the complainant's appointment in the letter of 16 June is central to the issue of receivability before the Tribunal. At this point, it is only necessary to add that the letter described the options available to the complainant including the offer of a training program

to assist the complainant in meeting the requirements of the G-3 level Security Officer positions. The complainant attended the training offered in the letter. In an email of 26 August 2015 the Chief of HRS informed the complainant that he had not passed the training modules and, therefore, he did not meet the requirements of a G-3 level Security Officer position.

3. On 7 September 2015 the complainant filed a request for review of the decision of 26 August 2015 and he sought a suspension of action with respect to the termination of his appointment. The Registrar rejected the request for review as irreceivable for failure to file the request within thirty days of the 16 June 2015 notification of the decision to terminate his appointment and dismissed the suspension of action request. The complainant filed an internal appeal in which he maintained that the challenge to the termination of his appointment was receivable and the decision to terminate his appointment was unlawful. In the internal appeal, on the question of receivability, the complainant took the position, among other things, that having regard to the conditional language in the letter of 16 June together with the offer of the training and the fact that the only notification he received was in the email of 26 August, the email therefore confirmed the termination of his appointment and the time limit started to run from that date.

4. In accordance with Staff Rule 111.3(a) the Appeals Board must first determine whether it is competent to hear the appeal. Staff Rule 111.3(b) provides that "[a]n appeal may not be heard by the Appeals Board until all of the time limits established by staff rule 111.1 have been met or have been waived by the Appeals Board by reason of exceptional circumstances beyond the control of the staff member". In its report of 22 February 2016 the Appeals Board found that the complainant had not filed a request for review within thirty days of the 16 June 2015 notification of the decision as required in Staff Rule 111.1(b); therefore, it could not consider the merits of the appeal and recommended the dismissal of the appeal as irreceivable. On 23 March 2016 the Registrar endorsed the findings and recommendation of the Appeals Board and dismissed the appeal as irreceivable.

5. Pursuant to Article VII, paragraph 1, of the Tribunal's Statute, a complaint is not receivable unless the complainant has exhausted the internal means of redress. This means that a complaint will not be receivable if the underlying internal appeal was irreceivable (see Judgment 3758, under 10). As the Registrar's decision is grounded on the recommendation of the Appeals Board, a consideration of the Appeals Board's findings and conclusions is necessary. Before doing so, given that the question of receivability rests on the Registrar's 16 June letter, it is useful to set out its contents in some detail. In relevant part, it states:

> "Pursuant to Staff Regulation 9.1(b)(i), Staff Rule 109.2 relating to abolition of post, and paragraph 9 of the Principles and Procedures Applicable to Decisions Arising from the *Re*Vision Project ICC/INF/2014/001 [sic] ('Principles'), I hereby notify you of my decision as Registrar to abolish your position as Security Support Assistant with the Court. In accordance with paragraph 13 of the Principles a notice period of 120 days is applicable. As such your post will be abolished and your appointment would terminate as of **14 October 2015**." (Original emphasis.)

6. The second paragraph of the letter sets out the reasons for the abolition of the G-2 positions stemming from the restructuring of the Registry. In particular, the letter notes that the existing G-2 role did not have a sufficiently broad range of functions and that a pool of G-3 security officers able to carry out each other's functions was required. This, in turn, required these officers to have a broader range of functions and, in particular, the ability to carry a firearm. At the end of the same paragraph, the letter states:

> "As a result of these considerations my decision is that the G-2 role is no longer required, but what is required is a greater number of G-3 positions. As your functions are no longer required, and taking into account the provisions of paragraph 30 of the Principles, your position is abolished. **Please read the passages below carefully so that you are fully aware of your options. If you have any doubts please consult with a member of the HRS taskforce.**" (Original emphasis.)

7. The letter describes the two options available to the complainant: an "enhanced agreed separation package" or priority consideration as an internal candidate for newly created positions arising directly from the *Re*Vision Project. The letter also informed the complainant about a

training program aimed at assisting the complainant in meeting the requirements of the G-3 level positions. The letter sets out the deadline to take the package; the details of the package itself; and states that should the staff member opt to take the package, the notice period of 120 days would be waived and the separation would be by way of mutual agreement pursuant to Staff Rule 109.1(b)(iii) and paragraph 19 of the Principles and Procedures, as opposed to a termination of contract. The letter explains the process surrounding the application for a position as an internal candidate with priority consideration and the duration of this option and potential consequences. The letter lists the available administrative support including advice on counselling services, visa issues, CV writing and career transition workshops. Lastly, the letter also invited the complainant to contact a representative of HRS to further discuss his options.

8. Returning to the report of 22 February 2016, the Appeals Board found that the "administrative decision the [complainant] ought to have appealed respecting the decision to abolish his position and terminate his appointment as G-2 Security Support Assistant [was] that contained in the notification [l]etter of 16 June 2015". As set out above, the Appeals Board concluded that as a request for review of this decision was not filed within the requisite time limit, the appeal was irreceivable. The Appeals Board observed:

> "The [l]etter of 16 June 2015 expressly notified the [complainant] of the Respondent's 'decision as Registrar to abolish [his] position as Security Support Assistant with the Court' pursuant to Staff Regulation 9.1(b)(i), Staff Rule 109.2 and paragraph 9 of the Principles [and Procedures]. In the same [l]etter, the Respondent provided the reasons for the abolition of the [complainant's] position, his options and HRS's assistance at his disposal. A proper reading of the [l]etter shows no condition attached to the decision to abolish the [complainant's] G-2 position and the termination of his appointment as Security Support Assistant. Neither the words 'would terminate' nor the reference to the training set to assess the eligibility of the [complainant] for a different position at a higher level, support the contention that the decision to terminate his appointment was conditional."

9. The Appeals Board also found that the purpose of the 26 August email was to inform the complainant about the outcome of the training and did not in any way deal with the termination of his

appointment and, therefore, it was not an administrative decision that could be appealed. The Appeals Board commented that it would have been preferable to expressly inform the complainant of his right to challenge the "decision" to abolish his position and terminate his appointment in the 16 June letter. The Appeals Board noted, however, that the Registrar's letter referred the complainant to the Principles and Procedures which contained information about the right of appeal, and invited the complainant to arrange a meeting with HRS to discuss any questions and the available options. Additionally, the Appeals Board pointed out that staff members also have a duty to avail themselves of any information provided and to seek out any clarification that may be required.

10. The complainant submits that the complaint is receivable. He reiterates the position he adopted in the internal appeal regarding the conditional nature of the notification of the termination of his appointment in the 16 June letter. He argues that, according to the Tribunal's case law, it is only the acts by officers of an organisation having a legal effect on a staff member's rights and conditions of employment that are challengeable decisions. That is, the legal effect must be actual and not conditional.

11. The complainant also relies on the findings of the Appeals Board Panels in the cases of Mr A. and Mr G., in which the Panels rejected the ICC's submission that the appeals were irreceivable.

12. Referring, for example, to Judgment 1393, under 6, the complainant submits that, as the Tribunal has repeatedly confirmed, the rules of internal appeals "are not supposed to be a trap or a means of catching out a staff member who acts in good faith". He also contends that the 16 June letter was intentionally vague and incomplete to prevent him from exercising his rights. He claims that the Registrar's failure to provide him with clear, unambiguous and complete notification of the termination of his appointment and of his right to challenge it coupled with the Registrar's submission that his internal appeal was time-barred, evidences bad faith on the part of the ICC and constitutes a valid ground for making an exception to the strict application of the time

limit. Additionally, in circumstances where a staff member is not given sufficient guidance by the organisation regarding his appeal rights and the staff member then fails to act in a timely manner, a ruling that the appeal is irreceivable is incompatible with the ICC's duty to act in good faith. Lastly, the complainant submits that the ICC's submissions on receivability confuse the decision to abolish his position, which he did not challenge, with the decision to terminate his appointment.

13. The ICC submits that the Registrar exercised his authority to terminate the complainant's appointment and notified the complainant of this decision in his letter of 16 June 2015, at which time the internal appeal process time limits were triggered. As the complainant submitted his request for review of the decision to terminate his appointment 53 days beyond the time limit stipulated in Staff Rule 111.1(b), he did not exhaust the internal means of redress and his complaint is irreceivable. The ICC disputes the complainant's assertion that the actual termination of his appointment was notified in the email of 26 August and argues that this is a mischaracterization of that email. The ICC maintains that the decision to terminate his appointment was not conditional on his failure to pass the firearms test. Rather, his appointment as a Security Support Assistant was terminated as a result of the restructuring of the Registry. The ICC also submits that the 26 August email from the Chief of HRS was not an administrative decision affecting the complainant's rights. Further, the authority to terminate a staff member's appointment due to the abolition of her or his position under Staff Regulation 9.1(b)(i) relevantly rests with the Registrar. Therefore, it cannot be said that the email of 26 August from the Chief of HRS was an administrative decision. In the ICC's view, a reading of the letter of 16 June and the email of 26 August clearly shows that the complainant was informed of the administrative decision to terminate his appointment in the 16 June letter.

14. The ICC acknowledges that the letter of 16 June did not inform the complainant of the right to challenge the decision to terminate his appointment but points out that the letter referred the complainant to the Principles and Procedures, paragraph 16 of which deals with the appeals procedure, and an updated online set of FAQs also dealing with the

appeal procedure. The letter of 16 June invited the complainant to meet with HRS to address any additional questions. The ICC maintains that it made reasonable efforts to inform the complainant of his right of appeal and met its duty of care. It is convenient to deal with this observation here. The reliance on paragraph 16 is misplaced as it only deals with the internal appeal of a decision to abolish a post. As well, as a copy of the FAQs was not submitted with the ICC's Reply in these proceedings, references to this document amount to no more than an assertion and will be disregarded.

15. It is evident that, in its report of 22 February 2016, the Appeals Board viewed the notification of the abolition of the complainant's position and the termination of his appointment in the letter of 16 June as the communication of a single decision. This was a fundamental error of law. Decisions to abolish a post and terminate an appointment are separate and distinct decisions. This conflating of the two decisions led to further error. In its consideration of the complainant's submission that the termination of his appointment was conditional, the Appeals Board took into account the express notification to abolish the position, the reasons given for the abolition of the position and the available options and administrative assistance in the letter of 16 June and found that there was nothing in the letter that showed a condition attached to the "decision" to abolish the position and terminate the appointment. The Appeals Board also observed that neither the words "would terminate" nor the reference to the training available to meet the G-3 level requirements supported the contention that the decision to terminate the appointment was conditional.

16. It is observed that the fact the letter of 16 June expressly notified the complainant of the decision to abolish the position, gave reasons for the same decision and set out the available options and assistance arising from the abolition of his position are irrelevant considerations with respect to the decision regarding the termination of his appointment. In a similar vein, the Appeals Board's observation that the letter of 16 June referred the complainant to the Principles and Procedures for information concerning his right to appeal the "decision"

to abolish his position and terminate his appointment is not only irrelevant, as noted above, it is also erroneous. As to the offer of training, it is true that it cannot be inferred from the offer of training that the decision to terminate the appointment was conditional on the complainant's failure to pass the training modules. According to the letter of 16 June, the offer of the training was to assist the complainant in meeting the requirements of the new G-3 level Security Officer positions in the event he decided to apply for the position as a priority candidate. It is also convenient to add that the email of 26 August cannot be construed as communicating anything regarding the termination of the complainant's appointment. The email simply communicated the result of the testing and that, consequently, the complainant did not meet the requirements of a G-3 level Security Officer position. However, the words "would terminate" in the letter of 16 June cannot be viewed in isolation. The key question the Appeals Board failed to address was how the letter of 16 June, construed objectively, could be understood.

17. In the letter of 16 June the decision to abolish the complainant's position was stated definitively, in clear and unambiguous language. As stated in the first sentence, the purpose of the letter was to notify the complainant of the decision to abolish his position. The statement in the antepenultimate sentence of the second paragraph that "your position is abolished" is equally clear. Given this, together with an organisation's obligation to communicate an administrative decision in clear and unambiguous language, it would be expected that the communication of the decision to terminate the complainant's appointment in the same letter would be expressed in similarly definitive, clear and unambiguous language. Instead, there is only one statement in the letter concerning the termination of the appointment. After setting out the notice period of 120 days applicable to the abolition of a staff member's position as provided in paragraph 13 of the Principles and Procedures, the letter states: "[a]s such your post will be abolished and your appointment would terminate as of 14 October 2015." Grammatically, the language "would terminate" could be understood as expressing an action that is conditional upon the occurrence of an event in the future. Read in the context of the entire letter and, in particular, the definitive language

used to communicate the abolition of the position, the statement that the "appointment would terminate" could have been understood by the complainant as being conditional in nature. Regardless, at best, the communication of the decision to terminate the complainant's appointment was vague and confusing.

18. The Appeals Board's premise that the abolition of the position and the termination of the appointment were a single decision also led it to ascribe erroneously the clarity of the communication of the decision to abolish the position to the separate and distinct decision to terminate the complainant's appointment. Given the perceived clarity of the communication of the "decision", the Appeals Board did not 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) and concluded that the appeal was irreceivable. As the Registrar in making his decision adopted the Appeals Board's findings and conclusions and accepted its recommendation, that decision is tainted by the Appeals Board's errors of fact and law and will be set aside.

Indeed, for the foregoing reasons, 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. The complainant is also entitled to moral damages which the Tribunal assesses in the sum of 20,000 euros. The complainant will be awarded costs in the amount of 4,000 euros.

DECISION

For the above reasons,

1. The Registrar's decision of 23 March 2016 is set aside.
2. The case is remitted to the ICC for consideration in accordance with consideration 18, above.

3. The ICC shall pay the complainant moral damages in the sum of 20,000 euros.

4. The ICC shall pay the complainant costs in the amount of 4,000 euros.

5. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ