Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S. A.
v.
ICC

125th Session **Judgment No. 3906**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A. S. A. 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 her 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 ICC 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 her post and she was informed that her 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. She was informed that two options were open to her. The first option was to accept an "enhanced agreed separation package", in which case her departure from the ICC would take the form of a separation by mutual agreement with enhanced separation entitlements. Alternatively, she could avail herself 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 her 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 her applications for the new positions proved unsuccessful, her separation from the ICC would take the form of a termination of contract and she would receive the standard termination indemnity.

The complainant attended the aforementioned training but she did not pass the required firearms test. In an email of 26 August 2015 she was informed by the Chief of the Human Resources Section (HRS) that as she had not passed the required training modules, she 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 she also requested a suspension of action

regarding the decision to terminate her 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 her 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 her 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 she 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 her appointment was the decision of 16 June 2015. The complainant had not claimed exceptional circumstances justifying a late request for review and appeal against that decision. As the request for review had not been made within the applicable time limits, the Appeals Board could not consider the appeal. The Appeals Board recommended that the appeal be dismissed as irreceivable. 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. She seeks reinstatement in her former post for a period of 14 and one half months, representing the period of time that remained under her contract at the time of her separation from service. She requests that during the period of reinstatement the ICC provide her with continuous firearms training under specified conditions and the opportunity to take additional attempts at the firearms test. In the event that she passes the firearms test, she seeks promotion to the position of Security Officer at grade G-3 and the renewal of her appointment for three years. In the alternative, she 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, she 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 B. and Mr G., 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 her position. In the same letter the complainant was also informed about the termination of her 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 she had not passed the training modules and, therefore, she 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 she sought a suspension of action with respect to the decision to terminate her 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 her appointment and dismissed the suspension of action request. The complainant filed an internal appeal in which she maintained that the challenge to the termination of her appointment was receivable and the decision to terminate her 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 she received was in the email of 26 August, the email therefore confirmed the termination of her 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 letter of 16 June, 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 arrange a meeting with a representative of HRS to further discuss her options.

8. In its report of 22 February 2016 the Appeals Board found that the complainant should have appealed the administrative decision to abolish her position and terminate her appointment contained in the notification letter of 16 June 2015. The Appeals Board observed that the complainant did not identify grounds for making an exception to the application of the time limits in relation to the 16 June decision. The Appeals Board also pointed out that even if the complainant was confused by the surrounding circumstances and was not informed about her right to challenge "the administrative decision of 16 June", she did not claim this as an exceptional circumstance justifying a delayed request for review and appeal of the decision. The Appeals Board concluded that as there had not been a request for review of the appealable decision within the thirty-day time limit provided for in Staff Rule 111.1(b), the appeal against that decision could not be considered and the appeal should be deemed irreceivable and dismissed on this basis.

9. The Appeals Board noted that the email of 26 August did not constitute a decision affecting the terms of her appointment; and it did not notify her that her appointment was terminated as a consequence of her failure to pass the training modules. Rather, it was limited to informing

her that she had not passed the training modules organised to determine her eligibility for the newly created G-3 level Security Officer positions. The Appeals Board also observed:

> "In contrast, the [l]etter of 16 June 2015 expressly notified the [complainant] of the Respondent's 'decision as Registrar to abolish [her] 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]. The [l]etter also informed the [complainant] that: '[in] accordance with paragraph 13 of the Principles [and Procedures], a notice period of 120 days [was] applicable [prior to termination of appointment]. As such [her] post w[ould] be abolished and [her] appointment would terminate as of 14 October 2015.' In the same [l]etter, the Respondent provided the reasons for the abolition of the [complainant's] position, her options and HRS's assistance at her 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 her 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 her contention that the decision to terminate her appointment was conditional and 'became actual as a consequence of the Impugned Decision of 26 August 2015'. The [complainant's] appointment as [a] G-2 Security Support Assistant was due to terminate on a date calculated based on the required 120-day notice."

10. The Appeals Board found that there was no evidence of any "malicious or deliberate intent" to mislead the complainant about her rights in the letter of 16 June. Nonetheless, it indicated it would have been preferable to expressly notify the complainant of her right to appeal pursuant to Staff Rule 111.1 "the decision to abolish her position and terminate her appointment in the [l]etter of 16 June, as [the Registrar] did in other notification letters". The Appeals Board also noted, however, that the 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. In this regard, 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.

11. The complainant submits that the complaint is receivable. She reiterates the position she adopted in the internal appeal regarding the conditional nature of the notification of the termination of her appointment in the letter of 16 June. She 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.

12. 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.

13. 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". She also contends that the letter of 16 June was intentionally vague and incomplete to prevent her from exercising her rights. She claims that the Registrar's failure to provide her with clear, unambiguous and complete notification of the termination of her appointment and of her right to challenge it coupled with the Registrar's submission that her 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 her 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 her position, which she did not challenge, with the decision to terminate her appointment.

14. 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

her request for review of the decision to terminate her appointment 53 days beyond the time limit stipulated in Staff Rule 111.1(b), she did not exhaust the internal means of redress and her complaint is irreceivable. The ICC disputes the complainant's assertion that the actual termination of her 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 her appointment was not conditional on her failure to pass the firearms test. Rather, her appointment as a Security Support Assistant was terminated as a result of the restructuring of the Registry. The ICC also submits that the email of 26 August 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 her appointment in the letter of 16 June.

15. The ICC acknowledges that the letter of 16 June did not inform the complainant of the right to challenge the decision to terminate her appointment but points out that the letter referred the complainant the Principles and Procedures, paragraph 16 of which deals with the appeal 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 her 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.

16. It is evident that, in its report of 22 February 2016, the Appeals Board considered the abolition of the complainant's position and the termination of her appointment in the letter of 16 June as being a single decision. This was a fundamental error of law. Decisions to abolish a post and terminate an appointment are separate and distinct decisions. The conflating of the two decisions led to further error. In the context of its statement that the letter of 16 June letter expressly notified the complainant of the decision to abolish her position, the Appeals Board also stated:

> "The [l]etter also informed the [complainant] that: '[in] accordance with paragraph 13 of the Principles [and Procedures], a notice period of 120 days [was] applicable [prior to termination of appointment]. As such [her] post w[ould] be abolished and [her] appointment would terminate as of 14 October 2015'."

17. While it is not entirely clear, it appears that the Appeals Board was of the view that the letter of 16 June also expressly notified the complainant of the decision to terminate her appointment. However, the above interpretation is problematic for two reasons. First, it does not accurately reflect what was stated in the letter. 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". Contrary to the Appeals Board's interpretation, the letter does not state that in accordance with paragraph 13 of the Principles and Procedures the complainant was also informed of the 120-day notice period applicable prior to the termination of the appointment. Second, paragraph 13 of the Principles and Procedures only deals with the required notice period in the case of the abolition of a position, namely, 120 days, and not the notice period with respect to the termination of an appointment.

18. After noting that the letter of 16 June provided reasons for the abolition of the complainant's appointment, her options and the available assistance from HRS, the Appeals Board found that based on a proper reading of the letter, it "show[ed] no condition attached to the decision to abolish the [complainant's] G-2 position and the termination of her appointment as [a] Security Support Assistant". The Appeals Board also observed that neither the words "would terminate" nor the reference to the training available to meet the G-3 requirements supported the contention that the decision to terminate the appointment was conditional. At this point, it is convenient to observe 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. As well, it cannot be inferred from the offer of training that the decision to terminate the complainant's 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 she decided to apply for one of those positions as a priority candidate. 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.

19. 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 her 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.

Lastly, the Appeals Board's finding that because the complainant did not claim exceptional circumstances in relation to the decision of 16 June the possibility of a waiver did not arise is also problematic. Staff Rule 111.1(a) establishes a staff member's right to appeal against an administrative decision. As set out above, pursuant to Staff Rule 111.3(a), the Appeals Board must first determine whether it is competent to hear an appeal. Its competence is contingent on the appellant having complied with the time limits applicable to the internal appeal process specified in the Staff Rules. However, the Appeals Board also has the discretionary authority to waive the application of the time limits. In this case, the complainant challenged the administrative decision to terminate her appointment. It was the appeal from this decision that the Appeals Board had to determine if it was competent to hear. Under Staff Rule 111.3(b), just as it had to determine whether the applicable time limits had been met, it also had to consider whether there were "exceptional circumstances beyond the control of the staff member" warranting a waiver of the time limits. The fact that in challenging the decision the complainant erroneously referred to it as a decision of 26 August does not change the fact that she challenged the decision to terminate her appointment. The erroneous date was only material to the issue of compliance with the time limit. Moreover, there is nothing in Staff Rule 111.3(b) that confines the Appeals Board's consideration of exceptional circumstances to instances where a specific

claim to that effect has been made. In the present case, the Appeals Board was cognisant of the complainant's possible confusion stemming from the surrounding circumstances and that she was not informed of her appeal rights. In the circumstances, it was incumbent on the Appeals Board to consider whether there were exceptional circumstances warranting the exercise of its discretionary authority to waive the time limits. As the Appeals Board's recommendation is tainted by errors of fact and law, the Registrar's decision based on that recommendation is also tainted by those errors 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 considered waiving 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 19, 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