L. (No. 3)

v.

ICC

125th Session **Judgment No. 3908**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr C. L. against the International Criminal Court (ICC) on 16 February 2016 and corrected on 21 April, the ICC's reply of 5 September, the complainant's rejoinder of 5 November 2016, the ICC's surrejoinder of 15 February 2017, the complainant's additional submissions of 27 February and the ICC's final comments of 1 June 2017;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 13 of its Rules;

Considering the application to intervene filed by Ms E. B. N. on 6 May 2016 and the ICC's comments of 5 September, corrected on 7 September 2016;

Considering the application to intervene filed by Mr A. K. on 8 June 2016 and the ICC's comments of 19 October 2016;

Considering the application to intervene filed by Ms L. G. on 23 December 2016, the ICC's comments of 7 April 2017, the intervener's comments of 26 May and the ICC's final comments of 30 August 2017;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant contests the decision to abolish his post and terminate his appointment.

Facts relevant to this case may be found in Judgment 3860, delivered in public on 28 June 2017. In 2014 the *Re*Vision Project, which aimed at reorganizing the ICC's Registry, was implemented. An Information Circular entitled "Principles and Procedures Applicable to Decisions Arising from the *Re*Vision Project" (hereinafter "the Principles"), which was issued in August 2014 and modified in June 2015, established a framework for the implementation of decisions arising from the restructuring process.

When the complainant was notified by a letter of 22 June 2015 of the ICC Registrar's decision to abolish his post and to terminate his fixed-term contract as from 20 October 2015, he held the P-4 position of Legal Officer in the Legal Office of the ICC's Registry. His contract was due to expire in March 2017. He was informed by the same letter that he could elect to take an enhanced agreed separation package or to apply for positions arising as a direct result of the *Re*Vision Project as a priority candidate. At the end of June 2015 he submitted a request for review of the decision of 22 June. His request was rejected on 3 August and, on 11 August, he filed an appeal with the Appeals Board challenging the rejection of his request.

In the meantime the complainant had applied as a priority candidate for new positions to be created in the Registry. On 20 October he was informed by the Registrar that in light of the outcome of the recruitment processes in which he had participated, his appointment would be terminated on 27 October.

In its report of 17 November the Appeals Board found that while the conditions foreseen under Staff Regulation 9.1(b)(i) were met for the abolition of the complainant's post, the ICC had acted unfairly in not reassigning him to a newly created post within the Legal Office. Given the inconsistency in the finding of the classifier of a "substantial change" between the newly created positions when compared with the complainant's existing position and the fact that his functions were effectively redistributed and not abolished, the ICC had failed to justify why the complainant was not reassigned. The Appeals Board considered

that this action amounted to unequal treatment in light of the fact that a staff member in a similar predicament to that of the complainant was reassigned. It therefore recommended that the ICC consider reinstating the complainant in a suitable position within the Legal Office, failing which the ICC could consider compensating him.

By a letter of 17 December 2015 the complainant was notified of the Registrar's decision to reject his appeal on the ground that he could not accept the Appeals Board's recommendation, which contained fundamental errors. The Appeals Board mistakenly considered that there was a general duty to reassign, whereas the duty to reassign under the *Re*Vision project applied only to staff whose post had not been abolished. The Appeals Board also failed to consider that he was given the chance to apply for new positions as a priority candidate and hence that the ICC had explored possible options with him. Moreover, the Appeals Board's conclusion that another member of the Legal Office had been reassigned to a position within the Legal Office was not supported by evidence. The complainant impugns that decision before the Tribunal.

The complainant asks the Tribunal to set aside the impugned decision. He seeks reinstatement in his former position and financial compensation for the economic loss suffered between the date of separation from service (27 October 2015) and the date of his reinstatement, together with interest. If the Tribunal finds that reinstatement is not possible, he asks to be awarded compensation for the economic loss suffered since his separation from service until the date of expiration of his appointment, that is to say until 13 March 2017, and compensation in an amount equivalent to 5 years' salary at the level and grade he held before being separated for loss of the opportunity to have his appointment extended. In any event, he also claims 100,000 euros in moral damages, 50,000 euros in reputational damages, 100,000 euros in exemplary damages and 10,000 euros in costs.

The ICC asks the Tribunal to dismiss the complaint as being without merit, and to dismiss the applications to intervene as manifestly irreceivable on the ground that the interveners are not in the same situation in fact and in law as the complainant.

CONSIDERATIONS

1. The complainant was employed as a Legal Officer, P-4, in the Registry Legal Office of the ICC. By letter dated 22 June 2015, the complainant was advised by the Registrar of the ICC that his post would be abolished and his appointment would be terminated effective 20 October 2015. The stated reason that his position was to be abolished was the restructuring of the Registry. On 29 June 2015 the complainant unsuccessfully applied for administrative review of the decision of 22 June 2015. On 11 August 2015 the complainant filed an appeal against that decision resulting in a report of the Appeals Board dated 17 November 2015.

2. The Appeals Board recommended that the Registrar consider reinstating the complainant to a suitable position within the Legal Office, though if this did not happen, the Registrar should consider compensating the complainant for the loss of income occasioned by errors identified in its report. While, as discussed shortly, the Registrar adopted a number of the conclusions of the Appeals Board (mostly though not exclusively, conclusions favouring the case the Registrar had advanced in the internal appeal), he rejected the recommendations of the Appeals Board and contested the analysis and conclusions on which they were based. The Registrar informed the complainant of his decision on 18 December 2015, the day after it was made. In that decision, he adhered to his decision communicated on 22 June 2015 that the complainant's employment be terminated, which had occurred on 27 October 2015. The decision of 17 December 2015 is the decision impugned in these proceedings.

3. The Tribunal notes, at the outset, that the Appeals Board's report is a balanced and thoughtful analysis of the issues raised in the internal appeal and, on its analysis, the conclusions and recommendations were justified and rational and the recommendations made respectfully. It is a report of a character which engages the principle recently discussed by the Tribunal in Judgment 3608, consideration 7, that the report warrants "considerable deference" (see also, for example,

Judgments 2295, consideration 10, and 3400, consideration 6). However the Tribunal has repeatedly observed, and recently done so in Judgment 3862, consideration 20, that: "[t]he executive head of an international organisation is not bound to follow a recommendation of any internal appeal body nor bound to adopt the reasoning of that body. However an executive head who departs from a recommendation of such a body must state the reasons for disregarding it and must motivate the decision actually reached."

4. The pleas of the complainant and the ICC traverse a multitude of issues of fact and of law. It is convenient to commence with a consideration of the two matters on which the Appeals Board based its recommendations of reinstatement or financial compensation and the Registrar's response. The Appeals Board accepted that, in the circumstances, the Registrar was entitled to abolish the complainant's position. However it concluded that the Registrar had not been justified in not reassigning the complainant to one of the newly established posts. It also concluded that the complainant had been subjected to unequal treatment. The findings of fact and reasoning on which the Appeals Board based its conclusion concerning reassignment can be summarised as follows.

5. The abolition of the complainant's post, a P-4 Legal Officer position, arose in circumstances where there was to be a restructuring of the Legal Office of the Registry. The restructuring contemplated the creation of a Deputy Legal Counsel position at the P-4 level, three P-3 Legal Officer positions that were to be supported by two P-2 Associate Legal Officer positions and a paralegal position. The Appeals Board observed that "[g]iven the envisaged new structure, upon comparing the [complainant's] current functions with those of the new Deputy Legal Counsel (P-4) position, 'a *prima facie* substantial change in functions was identified'". Of some significance is that, as the Appeals Board noted, "[t]his substantial change in function was later confirmed by an external classifier". It later concluded, in the context of indicating the abolition of the complainant's post was justified, that the complainant's functions in the abolished position

would be redistributed amongst more than one of the new positions and, specifically, "[p]arts of his function were found to require a higher level of expertise and to be mostly carried out by more than one person".

6. In the context of discussing whether the complainant should have been reassigned, the Appeals Board concluded that given that the complainant's existing functions would be redistributed and the new P-3 functions were "more limited in scope" (as concluded by the independent external classifier), "the functions assigned to the new positions were not beyond the abilities or functions of the [complainant] in his current capacity". The Appeals Board questioned an approach advanced by the Registrar in the internal appeal that there was to be a "substantial change" in the functions of the complainant's existing job and that would have a bearing on whether he could be reassigned. Because, as the Appeals Board reasoned, there was not to be an abolition of the functions of the complainant's existing post but a redistribution of them, "the [complainant] should at the very least, have been offered the possibility of reassignment to one of the new positions created within the unit without having to compete for the position". The Appeals Board alluded to the possibility of the complainant being reassigned to one of the P-3 positions. The concluding observation of the Appeals Board on this question of reassignment was: "to merely disregard the possibility of reassignment to the new positions because of an unsubstantiated and potentially inconsistent finding of 'significant change', is grossly inadequate to sustain a finding that the [Registrar] was justified in his decision not to reassign the [complainant] to one of the newly created posts".

7. The Registrar's response in the impugned decision to this analysis and conclusion involved four propositions. The first was that the Appeals Board misunderstood the nature of the "reassignment" that occurred in the *Re*Vision process (the restructuring process), which applied only to staff whose posts had not been abolished, and applied a duty of reassignment which did not exist under the Principles. The second was that the Appeals Board did not consider the provisions of the Principles, including the system of priority consideration and the

possibility of benefiting from the enhanced agreed separation package. The third was that the Appeals Board's conclusion that substantial change is a "criteria" for reassignment is misconceived and the fourth was that the Appeals Board erred in calling into question the classifier's conclusion, thereby contradicting its previous endorsement of the abolition of the complainant's position.

8. It is necessary to elaborate on some of the Registrar's reasoning to demonstrate that it is flawed. The Registrar promulgated, on 19 August 2014, an Information Circular entitled "Principles and Procedures Applicable to Decisions Arising from the *Re*Vision Project" (the Principles).

9. In another proceeding before the Tribunal in this session, the Tribunal has concluded that the Principles were without legal foundation and are unlawful. This was an argument advanced in the present proceedings by the complainant in his pleas. Nonetheless and notwithstanding, in the circumstances of this case, it is preferable to focus on the substance of the decision of the Registrar in the impugned decision given his clear disagreement with the conclusions of the Appeals Board. Thus the following analysis proceeds on an assumption that, at the time the impugned decision to terminate was made, the Principles had an operative effect. This assumption underpinned both the reasoning of the Appeals Board and of the Registrar. The Principles addressed a number of matters under a series of headings. Under the first heading, "Introduction", it was noted that the Principles had been adopted by the Registrar and under the next heading, "Scope and Purpose", it is declared that they applied to positions affected by the *Re*Vision project. One later heading was the "Abolition of Positions". Firstly it provided the abolition of positions in three circumstances, the second of which was where "[s]tructural changes [resulted] in substantial changes to the functions, duties and responsibilities of a position, or redeployment of functions to another position whereby the existing position [was] no longer required". Under this heading, the Principles identified a condition precedent to the termination of the appointment which had resulted from a decision to abolish the position.

The Principles provided that termination "[should] take place only after reasonable efforts ha[d] been made to assist staff members in finding alternative employment within the Court, as well as providing them with support, in accordance with paragraphs 33-39 and 47 below, respectively". Paragraphs 33 to 39 identified a procedure whereby staff whose positions had been abolished would be treated as "Priority Candidates" who would have to apply for newly created positions. If there were priority candidates who satisfied the requirements of the position, they would be short-listed and interviewed and, potentially, would undergo an examination. What happened thereafter depended on the outcome of this process but one outcome was that a priority candidate would be appointed to the position.

10. The Registrar's answer to the Appeals Board's conclusion that the complainant should have been offered the possibility of reassignment is found in the following passage of the impugned decision:

> "17. The crux of the matter is the [Appeals Board]'s misunderstanding as to the meaning of my use of the term 'reassignment' in the Reply. You, on the one hand, had argued that there is a duty to reassign staff *whose posts had already been abolished* without competitive process. [...] In my view, as set out in the Principles which were prepared in close consultation with the [Staff Union Council (SUC)], priority consideration is an equally valid means of taking suitable steps to assist staff in finding new jobs and that no general duty of reassignment exists under ILOAT jurisprudence, save for those organisations who have such a provision in their regulatory framework. Indeed, in the Reply I highlighted that this system of priority recruitments is 'an appropriate method of meeting the Defendant Organisation's obligations under ILOAT jurisprudence'. The option of reassignment, in the sense advocated by you (i.e. reassignment for staff whose positions had been abolished), was considered by my office in consultation with the SUC when developing the Principles and was discounted.
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> 18. My reference in the Reply to 'reassignment' was not reassignment in the sense advocated by you, in that it is *not an option for staff members whose posts have been abolished*. 'Reassignment' in the sense that I used the term is only possible if no substantial change (and consequently no abolition of position) is recorded. It therefore only applies as a possible option where a relevant staff member's position is not abolished. Rather, such staff remain in their post albeit with updated duties and, often, a new job title. In the context of the *Re*Vision process, this has also been referred to as 'mapping' such staff members into the new position."

11. In some senses, the Registrar and the Appeals Board were talking at cross purposes. Under the Principles, a position would be abolished if there had been a substantial change to the functions, duties and responsibilities of a position and the occupant of the position would then enter, if the individual elected to do so, the priority recruitment process, provided by paragraphs 33 to 39 of the Principles. If there was a change but it was not a substantial change in an existing position, then the occupant of the position could be re-deployed without competitive recruitment. This was contemplated by paragraph 8 of the Principles. So the answer to the question of whether there had been a substantial change to the functions, duties and responsibilities of the position influenced, indeed determined, the path the occupant of the position would take in order to secure ongoing employment with the ICC. The Registrar's approach mirrored that of the Principles. That is to say, if there had been a substantial change in the relevant sense, the occupant of the abolished position would become a priority candidate in a competitive recruitment process. If it had not been a substantial change in the relevant sense, the occupant of the position could be reassigned. What the Appeals Board was, in substance, saying was that the assessment on whether or not there had been a substantial change should not conclusively determine in any particular case whether reassignment should take place, without the individual participating in a competitive recruitment process.

12. The Registrar criticises the reasoning of the Appeals Board, which had said it was unclear why a substantial change in the functions of the existing post would disqualify the complainant from performing those same functions (to the extent intended by the redistribution) in any of the new posts and also the reasoning that it was unclear why the "substantial change" standard would be applied to an assessment of whether a staff member could be reassigned to a post within his section that was created to carry out his functions, albeit at a lower grade and a more limited scope. The Registrar said these conclusions were in error "because they entirely misunderst[oo]d the use of 'substantial change', which was employed by an expert classifier in determining whether a post ought to be abolished or not. It was not a 'criteria for reassignment'

nor did a finding of substantial change 'disqualify [the complainant]' from performing certain functions". But what the Registrar was saying was, in substance, what the Appeals Board said but it thought an assessment of whether there had been substantial change was an inappropriate mechanism to preclude direct reassignment, at least in the circumstances of the complainant.

13. It is tolerably clear that the approach of the Registrar was based on the view that the Principles identified and circumscribed the mechanisms to be applied in the event that a position was abolished. It was also based on a belief that those mechanisms satisfied the principles emerging from the Tribunal's case law and that it was unnecessary to look beyond the mechanisms in the Principles. However this is not correct and that is apparent from Judgment 3159. The case concerned a World Health Organization staff member who had been employed for 15 periods between 1993 and December 2008 on short-term appointments though not for the last period of his employment. In September 2008 he was informed his position would be abolished. There was a provision in the Staff Rules, Rule 1050.2, which addressed the reassignment of staff whose position was abolished and who had a continuing appointment or who had served on a fixed-term appointment for a continuous uninterrupted period of five years or more. In relation to such staff, the Staff Rule required the organisation to make reasonable efforts to reassign the staff member. The complainant in that case did not satisfy the criteria which engaged Rule 1050.2. Notwithstanding, the Tribunal observed in consideration 19 that staff rule cast in terms of Rule 1050.2 "[did] not preclude the possibility that the Organization [was] under a duty requiring proactive conduct in circumstances not comprehended by the Rule itself". The Tribunal concluded that notwithstanding that the Rule did not apply to the complainant (and the obligation of the organisation imposed by the rule was not, by the rule, enlivened), the organisation was nonetheless "obliged to explore with the complainant other employment options prior to his separation".

14. In the present case, the Principles could not have circumscribed the obligation of the ICC to explore other employment options that may not have involved the application of the express and prescriptive provisions of the Principles (on the assumption they were lawful). This is particular so having regard to the status of the Principles. They are in a circular promulgated by the Registrar notwithstanding that they were formulated in consultation with staff. Nonetheless the Principles are an instrument of the Registrar. The executive head of an organisation cannot, by edict, absolve the organisation from complying with principles of law applying to international civil servants. If it were otherwise, those principles of law would be at material risk of erosion over time.

15. The Principles provided an advantage, that was procedural in nature, to staff whose positions had been abolished. That is to say, they were to be considered first for positions but in a process that had the hallmarks of a competition typically used by international organisations to fill positions either by internal candidates only or external candidates as well. However in the context of the abolition of a position, the organisation's duty to explore reassignment transcends simply providing a procedural advantage and requires the application of process biased in favour of the staff member whose position has been abolished and which is likely to promote appointment to another position. The rationale is obvious. A person who has secured appointment or reappointment to a position within an international organisation can ordinarily expect to maintain the position on the agreed terms of the appointment or reappointment putting aside, for example, illness or incapacity, non-performance or misconduct. In practical terms, staff may make adjustments to their circumstances including financial and family arrangements based on the assumption that they will maintain the position on the agreed terms.

16. Nonetheless, the Tribunal has long recognised the right of an international organisation to restructure and abolish positions (see, for example, Judgment 2742, consideration 34). This will imperil the continuing employment of the occupants of those abolished positions. However a concomitant of that right to abolish positions is an obligation

to deal fairly with the staff who occupy those abolished positions. That extends to finding, if they exist, other positions within the organisation for which those staff have the experience and qualifications. The Tribunal accepts that there may be other disqualifying criteria. One might be, in a particular set of circumstances, that the number of staff whose positions have been abolished exceeds the number of available positions. However the imprecise concept of "unsuitability" as assessed by a selection committee as if it were a competition for initial appointment, might not be enough to disqualify a staff member unless it can be demonstrated that there is a real and substantial reason why a staff member in an abolished position will not be able to perform the duties of the available position satisfactorily notwithstanding they have the required qualifications and experience. This would be all the more so, as is the case in these proceedings, where the functions of the new position reflect some of the functions of the position which is being abolished and there has been no material adverse assessment of the performance of the staff member in the performance of those functions in the abolished position.

17. In his brief, the complainant identified what he said were a number of errors of fact. He argued that had the ICC "applied the right test, it would have found that [he] fulfilled all the relevant requirements under the position to which his functions ha[d] allegedly been redistributed, namely the Legal Counsel (P5) position, the Deputy Legal Counsel (P4) position and the two Legal Officer (P3) positions". The complainant then set out, in a little detail, why he was equipped to perform the duties of these various positions. The ICC does not, in its reply, engage directly nor specifically with this argument but notes that the complainant had applied with priority consideration for the three new positions in the Legal Office but he was not found suitable for these positions. It does not elaborate in its pleas on why he was not suitable.

18. There is material before the Tribunal which reveals that in relation to at least one of the new Legal Officer P-3 positions, the complainant was told (on 25 August 2015) that: "after careful review and evaluation, you have been shortlisted for interview". The complainant

was also told that more than three candidates had been shortlisted for interview and that there were two positions available. He was later told (on 15 October 2015) and after the interview that: "after a careful review and evaluation, you are unfortunately not found suitable". No reasons were given. Under the Principles it must have been the case that the complainant was perceived as having the minimum educational requirements and relevant work experience otherwise he would not have been shortlisted nor interviewed. It is conceivable that because there were, it seems, at least three priority candidates for these positions, only two could be appointed. However this argument is not advanced by the ICC, which simply relies on the assessment, without amplification, that the complainant was not suitable. Also there is material before the Tribunal which reveals that in relation to the Deputy Legal Counsel (P-4) position, the complainant was told on 25 August 2015 that "after careful review and evaluation" the complainant was shortlisted for interview and that, significantly, he was the only candidate shortlisted for interview for this vacancy. It can be inferred the complainant was the only priority candidate. As just discussed, under the Principles it must have been the case that the complainant was perceived as having the minimum educational requirements and relevant work experience otherwise he would have been neither shortlisted nor interviewed.

19. The Tribunal is satisfied that the ICC did not take adequate steps to reassign the complainant after the abolition of his post. To reject his candidature for a number of available positions on the basis that he was not suitable as part of an assessment in a competitive selection process, falls short of what was required. There is no reason, discernible from the pleas, why the complainant could not have been reassigned or redeployed to one of the new positions to which some of the functions were assigned from his abolished position and in particular the Deputy Legal Counsel position discussed in the preceding consideration.

20. The conclusion in the preceding consideration is supportive of the Appeals Board's conclusion that the complainant had been the subject of unequal treatment. However it is not necessary to descend into detail nor is it necessary to deal with the multiplicity of arguments in the pleas directed toward the same conclusion, namely that the termination

of the complainant's employment was unlawful. Nonetheless, the Tribunal accepts that the findings and conclusions of the Appeals Board on a number of these other issues is persuasive.

21. The complainant's appointment, but for the abolition of his post, was due to expire on 13 March 2017. In those circumstances it is inappropriate to order the complainant's reinstatement. Nonetheless he is entitled to moral and material damages for the ICC's failure in its duty of care towards him to take adequate steps to find him a new position on the abolition of his existing position and unlawfully terminating his employment. The Tribunal will award the complainant 40,000 euros moral damages and 180,000 euros as material damages for income lost as a result of the unlawful termination of his employment and the lost opportunity to remain in employment at the ICC after the expiration of his contractual term. The Tribunal notes that the Appeals Board observed in its report concerning the complainant's application for suspension (see generally Judgment 3860), relied on by the complainant in his pleas in this matter in support of damages for lost opportunity, that it would have not been unreasonable for the complainant to have expected a further five-year contract renewal after the expiration of his contract in March 2017. The ICC does not challenge this in its reply beyond pointing to a Staff Regulation that says an appointment does not carry any expectation of or right to extension or renewal. While the regulation states the legal position, the Appeals Board appears to have been addressing the practicalities and the Tribunal is entitled to act on what could have occurred, as a matter of fact. No adequate basis has been established by the complainant for the award of reputational and exemplary damages that he seeks in his pleas. He is entitled to costs assessed in the sum of 2,000 euros.

22. There are three applications to intervene. Two of the applicants signed separation agreements agreeing not to contest the terms of the agreement. This is a material factual and, potentially, legal difference which justifies refusal of the applications to intervene. The third applicant has separate proceedings ongoing before the Tribunal challenging the termination of employment. Intervention in the present proceedings is

not, in those circumstances, warranted. The applications to intervene are dismissed.

DECISION

For the above reasons,

1. The ICC shall pay the complainant material damages in the sum of 180,000 euros.
2. The ICC shall pay the complainant moral damages in the sum of 40,000 euros.
3. The ICC shall pay the complainant costs in the amount of 2,000 euros.
4. All other claims are dismissed.
5. The applications to intervene are dismissed.

In witness of this judgment, adopted on 30 October 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