

**B.**  
**v.**  
**ICC**

**126th Session**

**Judgment No. 4004**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. E. E. B. against the International Criminal Court (ICC) on 11 May 2016 and corrected on 10 June, the ICC's reply of 13 October 2016, the complainant's rejoinder of 7 February 2017, corrected on 13 and 15 February, the ICC's surrejoinder of 23 May 2017, the ICC's additional submissions of 13 March 2018 and the complainant's final comments thereon of 26 March 2018;

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 rejection of his appeal against the abolition of his post and the termination of his fixed-term appointment, which was filed after he had accepted a mutually agreed separation.

By a letter of 22 June 2015 the complainant was informed that as a result of a reorganization of the Registry known as the *ReVision* Project, his post was abolished and his fixed-term appointment would terminate as of 20 October 2015, in accordance with Staff Regulation 9.1(b)(i), Staff Rule 109.2, and paragraph 9 of the "Principles and Procedures Applicable to Decisions Arising from the *ReVision* Project" contained

in Information Circular ICC/INF/2014/011 of August 2014, as revised in June 2015 (hereinafter “the Principles and Procedures”). He was also 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 apply as an internal candidate with priority consideration for new positions arising as a result of the *ReVision* Project in accordance with the Principles and Procedures.

The complainant filed a request for review of the decision of 22 June, which was rejected by a decision of 21 August 2015. He also filed a request for suspension of action regarding the decision of 22 June, but this was likewise rejected.

On 27 August 2015 the complainant informed the Human Resources Section (HRS) that he intended to accept the enhanced agreed separation package. On 31 August he filed an appeal with the Appeals Board against the decision of 21 August 2015. On 2 September 2015 HRS sent the complainant a draft of the Separation Agreement and asked him to confirm his withdrawal of all legal action against the ICC. The complainant replied by questioning the legal basis for the requirement to withdraw all legal action. The Chief of HRS informed him that the legal basis was Staff Rule 109.1(b) and paragraphs 19 and 20 of the Principles and Procedures. Paragraph 20 of the Principles and Procedures relevantly provides that “[a] staff member who agrees to an enhanced agreed separation package shall be required to sign a waiver of their right to appeal any administrative decision related to any matter contained in the separation package”.

By an email of 8 September 2015 to the Appeals Board the complainant withdrew his appeal and he forwarded a copy of his email message to the Chief of HRS. On 9 September 2015 the Chief of HRS asked the complainant to confirm that he had withdrawn all litigation in connection with his separation from the ICC, including all claims, if any, before the Tribunal. The complainant confirmed that he did not have any complaint before the Tribunal and returned the Separation Agreement with his signature. He separated from the ICC on the same day,

according to the terms of the Separation Agreement. On 16 September 2015 the ICC paid him 139,113.62 euros pursuant to the Separation Agreement.

On 18 September 2015 the complainant refiled with the Appeals Board his previous appeal challenging the decision of 21 August 2015. In its report of 13 January 2016 the Appeals Board unanimously concluded that the appeal was not receivable. By a decision of 12 February 2016 the Registrar of the ICC agreed with the conclusion and findings of the Appeals Board and dismissed the appeal as irreceivable. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order his reinstatement or, alternatively, payment of 15 years of salary at pensionable rate including all allowances and post adjustment, with interest. He claims moral damages under several heads and asks the Tribunal to order the ICC to issue a letter of recommendation reflecting exactly his last performance appraisal. He also claims costs.

The ICC submits that the complaint is manifestly irreceivable and that it constitutes an abuse of process. Subsidiarily, it argues that the complaint is unfounded.

In its additional submissions the ICC submits that the fact that the Principles and Procedures were declared unlawful in Judgment 3907, delivered in public on 24 January 2018, has no bearing on the legality of the Separation Agreement. It maintains that the complaint is irreceivable. It asks the Tribunal to order the disclosure of documents officially indicating the earnings received by the complainant after his separation from the ICC. Should the Tribunal decide to award the complainant material damages, any such earnings should be deducted together with the amount he received pursuant to the Separation Agreement.

In his final comments the complainant submits that the Separation Agreement was based on the Principles and Procedures and that the unlawfulness of those Principles and Procedures extends to the Separation Agreement. In his view, the ICC's claim to deduct any earnings and/or the amount he received pursuant to the Separation Agreement from the material damages he may be awarded is unfounded.

## CONSIDERATIONS

1. The complainant joined the ICC as a staff member of its Registry's Legal Advisory Services Section on 1 June 2006. At the time of his separation in September 2015, he was 47 years of age and held the post of Legal Adviser at grade P-4. He held a five-year contract, which was due to expire on 12 February 2019. His complaint essentially challenges the abolition of his post and the termination of his employment with the ICC, notwithstanding that the latter was by way of the Separation Agreement into which he entered with the ICC in September 2015. He seeks an order to quash the impugned decision; reinstate him in the P-4 post he previously held, or alternatively, to reassign him to any position even at a lower grade; failing which he claims payment of 15 years of salary at pensionable rate, various other payments and allowances, with interest; moral damages for various alleged breaches and failures and costs. He also asks the Tribunal to order the ICC to issue a letter of recommendation reflecting exactly his last performance appraisal, with the ICC being requested to make this letter a reference point for "all intents and purposes regarding [his] service with the [ICC]". The Tribunal will not mandate the ICC to issue a letter in these terms. It notes that the ICC has already issued him a letter in the form required by the ICC's rules.

2. Firm precedent has it that decisions concerning restructuring within an international organization, including the abolition of posts, may be taken at the discretion of the executive head of the organization and are consequently subject to only limited review. Accordingly, the Tribunal will ascertain whether such decisions are taken in accordance with the relevant rules on competence, form or procedure, whether they rest upon a mistake of fact or law, or whether they constituted abuse of authority. The Tribunal will not rule on the appropriateness of the restructuring, as it will not substitute the organization's view with its own (see, for example, Judgments 2742, under 34, and 2933, under 10).

3. It is observed that 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 *ReVision* Project. In August 2014 the Registrar issued Information Circular ICC/INF/2014/011 entitled “Principles and Procedures Applicable to Decisions Arising from the *ReVision* Project”. 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.

4. The Registrar notified the complainant, in a letter dated 22 June 2015, that his post would be abolished pursuant to Staff Regulation 9.1(b)(i), Staff Rule 109.2 and paragraph 9 of the Principles and Procedures. The letter also informed the complainant that his appointment would terminate as of 20 October 2015. The Registrar explained that the decision was made because of the new structure of the Legal Office, which replaced the Legal Advisory Services Section, and the changes in functions arising from the *ReVision* Project. He informed the complainant that HRS would provide a number of support services to him, including counselling. He further informed the complainant of the two options which were open to him. The first option was to elect to take an enhanced agreed separation package by mid-August 2015, which date was subject to change. The enhanced agreed separation package (“the Package”) included a termination indemnity plus 50 per cent, three months’ salary plus post adjustment, and payment in lieu of the notice period provided in his letter of appointment (120 days). The letter further stated that in the event that the complainant opted for the Package, “[his] separation would be by way of mutual agreement pursuant to staff rule 109.1(b)(iii) and paragraph 19 of the *ReVision* Principles”. The complainant was advised that if he opted for the Package, his separation from the ICC would occur as soon as was practicable on a date to be agreed between his manager and HRS to give him sufficient time to arrange his personal affairs.

A second option was that the complainant could apply as an internal candidate, with the priority consideration provided for in the Principles and Procedures, for newly created positions which arose as a

result of the *ReVision* Project. If he did so he would lose the option to accept the Package. In the event that he did not apply as a priority candidate, he could still apply for any position in the Legal Office as an external candidate.

5. The complainant initially challenged the decision to abolish his post and to terminate his appointment. Eventually, however, he withdrew the challenge and opted for the Package and the parties signed the Separation Agreement on 9 September 2015. However, upon receiving payments under the Separation Agreement, he refiled his internal appeal. In the impugned decision, the Registrar, accepting the recommendation of the Appeals Board, dismissed the complainant's internal appeal as irreceivable on the ground that the Separation Agreement superseded the abolition of the post and was a separation by mutual agreement. The ICC contends that for the same reason, the complaint is irreceivable before the Tribunal. However, for reasons that will shortly become evident, a resolution of the receivability issue is unnecessary.

6. Among other issues which he raises, the complainant challenges the legal validity of the Information Circulars, and, by extension, the Principles and Procedures contained therein, under which his post was abolished and he separated from the ICC. He argues that by publishing the Principles and Procedures in the Information Circulars, the Registrar breached the method stipulated for their promulgation as provided in the Presidential Directive ICC/PRES/D/G/2003/001 (the Presidential Directive). The Tribunal considered this very question in a detailed analysis in Judgment 3907 and concluded as follows in consideration 26:

“In conclusion, pursuant to the Presidential Directive, the Principles and Procedures should have been promulgated by an Administrative Instruction or, arguably, by a Presidential Directive. As the promulgation of the Principles and Procedures by Information Circular was in violation of the Presidential Directive, they were without legal foundation and are, therefore, unlawful as are the decisions taken pursuant to the Principles and Procedures. It follows that the decisions to abolish the complainant's position and to terminate the complainant's appointment were also unlawful and will be set aside.”

7. This finding also holds for the present complaint, with the result that the decisions to abolish the complainant's post and to terminate his appointment were unlawful since the Principles and Procedures upon which they were made were promulgated in breach of the process stipulated in the Presidential Directive. The Separation Agreement arose from the implementation of the unlawful Principles and Procedures. The Separation Agreement is therefore unenforceable. In the circumstances, the ICC's contention that the complaint is irreceivable is unsustainable and is rejected. Accordingly, the decisions to abolish the complainant's position and to terminate his appointment will be set aside. However, the complainant has not presented cogent evidence that the decisions were taken in breach of his right to equal treatment or in bad faith.

8. In conclusion, the impugned decision of 12 February 2016 and the decision of 22 June 2015 will be set aside. The complainant seeks reinstatement, compensation for material and moral injury, and legal costs. The Tribunal is satisfied that reinstatement would raise practical difficulties because of the reorganization of the Registry and the time that has elapsed since the termination of his appointment. Therefore, the Tribunal finds it appropriate not to order reinstatement but it will award the complainant material damages in the amount of 180,000 euros, however deducting therefrom the 139,113.62 euros already paid to him. The Tribunal has taken into account all of the circumstances of the case in determining this amount, including the duration of the complainant's contract, the income he would have earned at the ICC, but has also taken into account the income he could have earned in other employment and the possibility that in due course his employment could have been terminated lawfully. The ICC shall also pay the complainant moral damages which, in the particular circumstances of this case, including the fact that the complainant resiled from the Separation Agreement he had voluntarily entered, will be set at 3,000 euros. The complainant is also entitled to costs, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The Registrar's decision, contained in his letter of 12 February 2016, is set aside, as is his decision of 22 June 2015.
2. The ICC shall pay the complainant 180,000 euros in material damages, deducting therefrom the 139,113.62 euros which have already been paid to him.
3. The ICC shall pay interest on the resulting balance at the rate of 5 per cent per annum from 9 September 2015 until the date of payment.
4. The ICC shall pay the complainant moral damages in the amount of 3,000 euros.
5. The ICC shall pay the complainant costs in the amount of 1,000 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, Mr Michael F. Moore, Judge, Sir Hugh A. Rawlins, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

YVES KREINS

DRAŽEN PETROVIĆ