

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**P. L.**

**v.**

**ICC**

**126th Session**

**Judgment No. 4006**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. P. L. against the International Criminal Court (ICC) on 20 April 2016 and corrected on 7 June, the ICC's reply of 3 November 2016, the complainant's rejoinder of 14 March 2017 and the ICC's surrejoinder of 21 June 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 contests the decision of the Presidency of the Court to set aside his Complaint for the removal from office of the Registrar of the Court.

On 8 September 2015 the complainant, who was at the time Chief of the Counsel Support Section in the Registry of the Court, submitted to the Presidency a Complaint for the removal of the Registrar from office (hereinafter "the Complaint"), pursuant to Article 46 of the Rome Statute of the ICC (hereinafter "the Rome Statute") and rule 24 of the Rules of Procedure and Evidence. The complainant alleged that the Registrar's behaviour towards him constituted harassment and unequal treatment, and that the Registrar was unable to exercise his functions because he lacked the integrity and moral qualities required under

Article 43(3) of the Rome Statute. The complainant requested that the Presidency initiate the appropriate procedure in conformity with Regulation 121 of the Regulations of the Court and by way of relief he asked: (a) that the Registrar be ordered to grant him an indeterminate period of special leave with pay so as to enable him to recover from all the hardships he had suffered since 2012; (b) that the Court remedy its failure to fulfil its duty of care towards the complainant and to protect his reputation by carrying out a full investigation into the allegations made by Ms G. and the Court's handling of these allegations (Ms G. was a former ICC staff member against whom the complainant had initiated defamation proceedings before the Spanish courts), and by paying him 100,000 euros as compensation, *inter alia*, for the cost of his representation in the latter proceedings; (c) that the Registrar be ordered to reinstate the complainant's flexible working arrangements approved by the former Registrar, to grant him 40 days of special leave with pay in compensation for the leave days he had been compelled to take to visit his family on weekends, and to award him 80,000 euros in compensation for discriminatory treatment; (d) that the Court pay him 250,000 euros in compensation for the harassment he had suffered; and (e) that the Registrar be found unfit to perform his functions and that all appropriate consequences be drawn from that finding.

In a memorandum of 30 September 2015, the Presidency acknowledged receipt of the Complaint. Noting that the procedure for the removal from office envisaged in Article 46 of the Rome Statute required behaviour amounting to "serious misconduct" or "serious breach of duty", the Presidency asked the complainant to supplement his Complaint for the purpose of explaining how it fell within the scope of that procedure. By an email of 29 October 2015 the complainant provided additional submissions. Pursuant to rule 26 of the Rules of Procedure and Evidence and regulation 120 of the Regulations of the Court, the Presidency appointed a Panel of three judges to assist it in assessing whether the Complaint was manifestly unfounded.

In its report submitted to the Presidency on 15 January 2016, the Panel found that the complainant's harassment claim could exceptionally be made under Articles 46 and/or 47 of the Rome Statute, since the ordinary procedure for harassment claims contained in Administrative Instruction ICC/AI/2005/005 might not have been available in that case. On the merits, the Panel found that the Complaint was manifestly unfounded. By a memorandum of 22 January 2016, the Presidency informed the complainant that it fully concurred with the findings of the Panel and had thus decided to set aside his Complaint. That is the impugned decision.

The complainant asks the Tribunal to declare the impugned decision null and void and, if appropriate, to order the Presidency of the Court to initiate the process for the removal from office of the Registrar of the Court. He also asks the Tribunal, in the event that it considers it inappropriate to remit the matter to the ICC, to determine itself his claim of harassment. He claims 50,000 euros as compensation for the cost of the proceedings he had to initiate against Ms G. before the Spanish courts, and moral damages in the amount of 20,000 euros for every year that he has suffered harassment and until the resolution of the matter. He also claims 25,000 euros as compensation for the loss of annual leave days due to the ICC's discriminatory treatment and its lack of flexibility in enabling him to reconcile his professional and personal obligations, and 20,000 euros in moral damages under the same head. He seeks 25,000 euros as compensation for a reduction of his sick leave entitlements due to harassment and 10,000 euros in moral damages under the same head. The complainant further seeks 300,000 euros in moral damages for the lack of consultation, the public criticisms, the concealment of documents and the Registrar's disregard of his tasks, and 200,000 euros for the ICC's violation of its duty of care towards him. He claims 5,000 euros in costs.

The ICC asks the Tribunal to dismiss the complaint as irreceivable for lack of competence and, alternatively, for failure to exhaust the internal remedies. In the event that the Tribunal considers the complaint receivable, the ICC invites it to dismiss it on the merits.

## CONSIDERATIONS

1. On 8 September 2015 the complainant, a staff member of the Registry of the Court, wrote to the President of the ICC. The written communication took the form of a covering letter of approximately half a page in length and an accompanying document of 17 pages containing 68 numbered paragraphs. Both the letter and the accompanying document contained a heading “Complaint submitted by [the complainant]”. The first two sentences of the letter read:

“I hereby present, on the basis of article 46 and rule 24, a complaint against the Registrar of the Court, [Mr V.H.] on the basis of the harassment and unequal treatment I am suffering.

I trust that the factual elements I provide, which are supported by the relevant documentation, and the succinct legal considerations offered are enough for the Presidency to make an informed decision in conformity to the applicable legal texts or, at least, open a thorough investigation of the relevant facts.”

2. The accompanying document of 17 pages set out the facts the complainant believed supported his Complaint and why the conduct complained of constituted harassment and unequal treatment. In so doing, the complainant referred to the “applicable law” and in this section of the document, he said (in paragraph 61): “While the Statute, the Rules or Administrative Instruction [ICC/AI/2005/005] does not establish an obligation for the complainant to contribute any legal analysis to a complaint for harassment, I feel that it is my duty to provide even a succinct legal commentary in order to justify the step I am hereby taking.” Thereafter he referred (in paragraph 63) to Section 2.1 of Administrative Instruction ICC/AI/2005/005 and the definition it contained of harassment.

The last four numbered paragraphs (65 to 68), under a heading “Conclusion”, addressed the relief the complainant sought. In this section the complainant requested, at least implicitly, the removal of Mr V.H. from the office of Registrar but, in addition, sought a range of remedies personal to him, including being granted a period of indeterminate leave and compensation in various forms totalling in excess of 350,000 euros. In this section on remedies the complainant requested that “the appropriate

procedure [be] put in place in conformity with regulation 121 of the [Regulations] of the Court”.

3. On 30 September 2015 the Presidency wrote to the complainant in a confidential internal memorandum effectively seeking further particulars of the conduct complained of and why it constituted “serious misconduct” or “serious breach of duty”. In that memorandum it was noted that the Complaint of 8 September 2015 referred to Article 46 of the Rome Statute, which raised for consideration conduct of the type referred to in the preceding sentence. The penultimate sentence of the memorandum said: “Accordingly, you are requested to supplement your complaint with this information, explaining how it falls within the scope of the procedure for removal from office under Section IV(1) of the Rules [of Procedure and Evidence].”

4. In an email dated 29 October 2015, the complainant provided a response. In that response, the complainant elaborated on the conduct about which he complained. Importantly, for present purposes, the complainant said, after some introductory comments about the questionable foundation, as he saw it, for the Presidency’s request, that:

“The procedure of articles 46 and 47 is the only way to protect me from the harassment suffered.

The regime in force to defend staff members from behaviours constituting harassment limits its grievance procedure, according to Section 7 of [Administrative Instruction ICC/IA/2005/005] to complaints filed before the Registrar or the Prosecutor.

This system leaves indeed undefended any staff member who suffers such behaviour from any of the aforementioned officials, should it not be for the avenue provided by articles 46 and 47.”

5. In due course, the complainant’s Complaint for the removal of the Registrar from office was considered by a Panel of three Judges who, on 15 January 2016, reported to the Presidency, which, in turn, rendered a decision dated 22 January 2016. Both the Panel of Judges and the Presidency concluded that the Complaint was manifestly unfounded.

6. For present purposes, the Presidency made three relevant findings or observations. The first was that the issues raised by the complainant, whether assessed individually or cumulatively, were either “unsupported by the evidence” or “did not reach the threshold of gravity required for a finding against the Registrar under either rules 24 or 25 of the Rules”.

The second was that “the ordinary procedure in harassment claims, which applies when an alleged harasser is a staff member, may not be available where the alleged harasser is the Registrar. A claim could, therefore, be exceptionally made under article 46 and/or 47 of the Statute”.

The third was that “the Complaint [was] misguided on remedies. The only remedial outcomes of successful claims under articles 46 and 47 of the Statute are, respectively, removal from office and the imposition of the disciplinary measures specified at rule 32 of the Rules. Given the seriousness of proceedings under these provisions, it is inappropriate to use them to pursue a range of unrelated remedies such as special leave with pay, the review of an administrative decision of the previous Registrar, permission to work remotely and compensation, for which formal or informal procedures for requesting such measures were available to the Complainant.”

7. It is convenient to set out Articles 46 and 47 which provide:

**“Article 46**

**Removal from office**

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:
  - (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or
  - (b) Is unable to exercise the functions required by this Statute.
2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

- (a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;
  - (b) In the case of the Prosecutor, by an absolute majority of the States Parties;
  - (c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.
3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.
4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

**Article 47**

**Disciplinary measures**

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.”

It is unnecessary to set out the terms of Administrative Instruction ICC/AI/2005/005. Suffice it to note that the Instruction establishes a procedure for the investigation and assessment of claims of harassment which, in the ordinary course, would result, following a grievance procedure established by the Administrative Instruction, in a determination by the Registrar or Prosecutor about whether there has been harassment.

8. It is desirable to address two related issues that arise at the threshold. The first is whether, as the ICC contends, the complaint is irreceivable. The second is whether, as the complainant contends, the ICC’s contention about receivability is itself irreceivable.

9. At the forefront of the ICC’s contention about receivability are the provisions of Article II of the Tribunal’s Statute. Those provisions define, establish and limit the Tribunal’s jurisdiction. The ICC’s contention is receivable, notwithstanding that no point has been raised before and within the internal consideration of the complainant’s

Complaint about the receivability of the complaint. Plainly enough, the issue of the jurisdiction of the Tribunal, as established by Article II of its Statute, can only arise at a point when a complainant seeks to invoke that jurisdiction.

10. Article II is concerned with the vindication and enforcement of individual rights or privileges of staff members of international organisations, conferred either by normative legal documents regulating or governing their employment, or conferred by the terms of their appointment. Similarly, the Article is concerned with the enforcement of obligations or duties of international organisations towards their staff. An overlay on these rights, privileges, duties and obligations is the Tribunal's case law. These rights or privileges and duties or obligations may attach to individual staff members or a particular class of staff members which, obviously enough, can, and often does, include all staff members. This description of the scope of Article II can be expressed in a variety of ways. But this description captures the nature of the jurisdiction conferred on the Tribunal by Article II. There are many judgments of the Tribunal that address this question including, recently, Judgments 3526, consideration 5, 3642, consideration 11, and 3760, consideration 6.

11. Articles 46 and 47 of the Rome Statute together with the implementing Rules in the ICC's Rules of Procedure and Evidence, are not intended to confer on members of staff, and do not do so, a particular right or privilege for the benefit of staff; nor are they intended to impose, and do not do so, a particular duty or obligation directed to members of staff. Rather, those provisions are intended to benefit the world at large. That is to say, they are provisions intended to preserve the integrity of the ICC as an international court by imposing a standard of conduct on the judges and senior officials of the Court, creating a mechanism for the enforcement of those standards and, additionally, affording anyone with an interest the opportunity to enforce those standards. They are not provisions of a character comprehended by Article II of the Tribunal's Statute insofar as they are invoked by staff members other than, potentially, the officials directly affected, such

as the Registrar, the Prosecutor or an individual judge. Accordingly, proceedings invoking Articles 46 and 47 alone and seeking their enforcement are not within the Tribunal's competence.

12. Accordingly, the complaint is irreceivable and should be dismissed.

13. However this conclusion is not the end of the matter. It is quite clear that the complainant's letter of 8 September 2015 might have been viewed as a complaint of harassment capable of being dealt with under Administrative Instruction ICC/AI/2005/005, notwithstanding what the complainant said in that letter about Article 46. However, the complainant believed this option was not available and thus pursued a case under Articles 46 and 47. Nothing was said by the Administration that disabused him of that belief and, indeed, that belief was fortified by the subsequent conduct of the Administration, though the Tribunal does not suggest, on the material presently available to it, that this was done for an ulterior purpose or even maliciously. Nonetheless, if a member of staff pursues a grievance by an incorrect procedure, but there is another procedure which would be appropriate, the organisation is under a duty to advise the staff member to follow the appropriate procedure (see, for example, Judgment 2345, consideration 1(c)).

14. Whether the complainant's belief was correct or not is not raised directly for consideration in these proceedings. But it is almost certainly correct that either by operation of the doctrine of necessity, or because the Registrar could have delegated the power to deal with a formal complaint of harassment against himself under Administrative Instruction ICC/AI/2005/005, a complaint under the Administrative Instruction was capable of being processed (see the commentary in Judgment 2757, consideration 19) and, if made out, remedies of the type sought by the complainant (including compensation) could have been awarded. If this is correct, then the complainant was denied an opportunity to pursue his claim of harassment on its merits, which did not involve establishing conduct of a particularly egregious type and which would have made available many of the remedies he sought, if

harassment could, as a matter of fact, be established without crossing the “threshold of gravity” thought to be established by Article 46 of the Rome Statute. If the complainant now elects to pursue a formal harassment complaint under Administrative Instruction ICC/AI/2005/005, then it would be desirable for these matters to be taken into account by the Administration in assessing whether it should raise barriers, such as time limits, in order to prevent this course being pursued.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ