

**117th Session**

**Judgment No. 3312**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. D. J. against the International Criminal Court (ICC) on 27 January 2012 and corrected on 12 June, the ICC's reply of 17 September, corrected on 8 November 2012, the complainant's rejoinder of 3 January 2013 and the ICC's surrejoinder of 16 April 2013;

Considering Article II, paragraph 5, of the Statute of the Tribunal;  
Having examined the written submissions;

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

A. The complainant joined the ICC in June 2005. On 1 November 2010 he attended two ad hoc meetings with, *inter alios*, Mr B. By a memorandum of 18 February 2011 to the Chief of the Victims and Witnesses Unit (VWU), Mr B. filed a complaint in which he alleged that he had been harassed by the complainant on 1 November 2010 and he requested that the matter be brought to the attention of the Registrar of the Court. By a memorandum of 29 March 2011, the date of which was amended by hand to read 3 June 2011, the Chief of the VWU forwarded Mr B.'s complaint to the Registrar.

On 3 June 2011 the Registrar transmitted Mr B.'s complaint to the Disciplinary Advisory Board (DAB). By a letter of 7 June from the DAB the complainant was notified that the DAB had received the complaint. He was provided with the proposed DAB Panel's composition, and he was referred to the procedures applicable in the event that he wished to make written submissions. Appended to the letter was a copy of the file submitted to the DAB by the Registrar and a copy of the DAB Rules of Procedure.

In an e-mail of 9 June the complainant expressed concerns regarding the composition of the DAB Panel and the delay in the ICC's handling of the harassment complaint. He requested that the DAB obtain evidence from another staff member who was planning to leave the ICC at the end of the month and he asked to be given an opportunity to cross-examine that staff member if he deemed such an examination necessary. On 16 June he asked the DAB to provide him with a list of the witnesses that Mr B. intended to call.

By a letter of 22 June 2011 the complainant was again notified of the proposed DAB Panel's composition. The letter also set out the forthcoming steps in the DAB procedure. Following an exchange of e-mails, on 13 July he was asked to provide his written submissions to the DAB by 30 August 2011. He was further informed that according to Staff Rule 110.4(d), in the event the DAB considered that it required the testimony of witnesses, at its sole discretion it could obtain such testimony.

In his reply of 13 July the complainant reiterated his request to be provided with a list of Mr B.'s witnesses. Referring to Staff Rule 110.2 and Section 4.2 of Administrative Instruction ICC/AI/2008/001 of 5 February 2008 regarding disciplinary procedures he stated that he had not been notified of the allegations or charges against him, nor had he been provided with Mr B.'s statement. By a letter of 14 July from the DAB the complainant was informed that his request for a list of witnesses was moot. Furthermore, as he had been provided with the entire case file as submitted to the DAB by the Registrar, which included the memorandum of 18 February 2011, he had thus been

informed of the allegations against him. On 30 August the complainant provided his written submissions to the DAB.

In its report of 29 September 2011 the DAB indicated that it had decided not to call witnesses because, even if Mr B.'s allegations were true they concerned a single argument between two staff members and they would not constitute harassment pursuant to Section 2.1 of Administrative Instruction ICC/AI/2005/005 regarding sexual and other forms of harassment. It considered the issue of the truthfulness of the allegations to be unresolved. The DAB unanimously recommended that no disciplinary sanction should be imposed on the complainant and that the case against him should be closed in accordance with Section 7.5 of Administrative Instruction ICC/AI/2005/005.

By a letter of 31 October 2011 the Registrar informed the complainant that she did not accept the recommendation of the DAB. Furthermore, pursuant to Staff Rule 110.6(b)(i), she had decided to impose upon him a written reprimand in order to bring the case to a closure. That is the impugned decision. By a memorandum of 1 December from the Secretary of the DAB the Registrar was informed that the complainant's written submissions of 30 August 2011 had not been forwarded to her before she had taken her decision of 31 October. In a memorandum of 11 January 2012 the Registrar informed the Secretary of the DAB that she maintained her decision of 31 October 2011 for the reasons stated therein.

B. The complainant submits that, if Mr B.'s harassment complaint was filed with the Registrar by the Chief of the VWU on 29 March 2011, the Registrar failed to forward the complaint to the DAB in a timely manner. In addition, she violated Section 3.1 of Administrative Instruction ICC/AI/2008/001 by failing to inform him of her decision to forward the complaint to the DAB within three working days from the date when it was so referred. If, however, the complaint was filed with the Registrar on 3 June 2011, it was filed beyond the six-month deadline provided in Section 6.6 of Administrative Instruction ICC/AI/2005/05 and it was therefore time-barred. In the complainant's view, irrespective of the actual date upon which the complaint was

filed, he suffered prejudice as a result of flaws and delays in the procedure. He contends that, in the circumstances, the complaint was irreceivable and should have been rejected by the DAB.

Referring to the Tribunal's case law, the complainant argues that the charges in disciplinary proceedings must be precisely worded and notified sufficiently early to enable the staff member concerned to defend his case, particularly by establishing evidence and gathering testimonies which he believes are likely to refute the charges. Referring to Sections 4.2 and 5.1 of Administrative Instruction ICC/AI/2008/001, Rules 11(c)(ii) and 14(b)(i) of the Rules of Procedure of the Disciplinary Advisory Board of the ICC and Staff Rule 110.2 he contends that he was not properly informed of the allegations and charges against him and he asserts that he suffered prejudice as a consequence. In addition, he contends that the DAB's refusal to supply him with a list of the witnesses Mr B. intended to call prejudiced his own right to call witnesses to provide evidence important to his defence.

The complainant asserts that, in breach of Section 5.3 of Administrative Instruction ICC/AI/2008/001, the Secretary of the DAB failed to notify him of the date when the DAB's report was forwarded to the Registrar for a final decision.

Lastly, the complainant argues that the Registrar's final decision was flawed as there was no legal basis for imposing upon him the disciplinary sanction of a written reprimand. In this respect, he points to the DAB's report and the DAB's failure to provide the Registrar with his written submissions of 30 August 2011, and he argues that the ICC violated his right to a fair hearing.

The complainant asks the Tribunal to quash the impugned decision and to order that all records related to that decision be removed from his official status file. He also claims costs.

C. In its reply the ICC contends that the complainant's complaint is frivolous, vexatious and an abuse of process.

On the merits, it submits that the complainant's due process rights were fully respected in accordance with the applicable legal provisions. Mr B.'s harassment complaint was submitted, in accordance with Section 7.2 of Administrative Instruction ICC/AI/2005/005, to his supervisor, the Chief of the VWU, on 18 February 2011, well within the six-month time limit provided in Section 6.6 of the aforementioned Administrative Instruction. The ICC points out that there is no provision that stipulates a time limit within which a third party must then file the formal complaint with the Registrar. The ICC challenges the complainant's reliance on Section 3.1 of Administrative Instruction ICC/AI/2008/001 and argues that the Registrar had no duty to inform him of her decision to forward the complaint to the DAB. Indeed, even if she had such a duty, the complaint was referred to the DAB on 3 June and the complainant was so informed four days later by the DAB. Thus, he did not suffer any prejudice. With respect to the time taken by the DAB to deliver its report, the ICC contends that any delays were necessary in order to guarantee the complainant's due process rights.

The ICC asserts that, by way of the letter of 7 June 2011 from the DAB and the documents attached thereto, the complainant was fully informed of the allegations and charges against him and it points to the report of the DAB in this respect.

Regarding the complainant's assertion that the Secretary of the DAB failed to notify him as to when the report of the DAB had been forwarded to the Registrar, the ICC submits that, even if this were true, such a failure would not vitiate the Registrar's final decision.

The ICC contends that the Registrar's decision of 31 October 2011 to issue the complainant with a written reprimand pursuant to Staff Rule 110.6(b)(i) does not constitute a disciplinary measure within the meaning of the Staff Rules. Moreover, the complainant has failed to prove that that decision was arbitrary or a misuse of authority. The Registrar's final decision was based solely on the DAB report and she rejected the DAB's recommendation for clear reasons which were communicated to the complainant. The ICC reiterates those reasons and, in particular, asserts that the DAB improperly exercised its

discretion not to call witnesses and erred in its finding that the incident in question did not reach the threshold required to qualify as harassment.

D. In his rejoinder the complainant presses his pleas. Referring to previous communications with the Tribunal's Registry, he requests oral proceedings, to be held *in camera*.

E. In its surrejoinder the ICC maintains its position in full.

#### CONSIDERATIONS

1. The complainant has requested oral proceedings to be held *in camera*. The parties' submissions are sufficient to enable the Tribunal to reach an informed decision. Accordingly, the complainant's application for oral proceedings is rejected.

2. This complaint raises the question whether the Registrar of the ICC erred by rejecting the recommendation of the DAB to discontinue proceedings against the complainant for harassment. The DAB called no witnesses, although staff members of the ICC were present at the two meetings on 1 November 2010 when the events that led to the harassment proceedings occurred. The DAB stated that, if true, the allegations of harassment did not reach the threshold required to qualify as harassment because it was a case of a one-off argument about a problematic work situation. The DAB expressly made no finding as to whether the allegations were true and considered that question unresolved without seeking written submissions on the issue. The DAB unanimously recommended that the case be closed pursuant to Section 7.5 of Administrative Instruction ICC/AI/2005/005. This section provides that where the Registrar does not find harassment proved, upon the recommendation of the DAB, the case shall be closed.

3. The complainant impugns the decision that the Registrar issued on 31 October 2011. In that decision, the Registrar disagreed with the DAB's decision not to call any witness. This was because she thought that in the exercise of its discretion the DAB should have called the staff members who were present at the 1 November 2010 meetings to testify as to what transpired. The Registrar rejected the DAB's finding that the case did not reach the threshold required to qualify as harassment. In so doing, she cited the Tribunal's jurisprudence which states that a single injurious action may constitute harassment. These aspects of the impugned decision are unimpeachable. Section 3.3 of Administrative Instruction ICC/AI/2005/005 provides that harassing behaviour may be an isolated occurrence. Additionally, the Tribunal has consistently held that even where there is a single injurious action, an allegation of harassment is a serious matter which must be investigated thoroughly in order to determine whether the words may reasonably be true on the facts as found from the surrounding circumstances. (See Judgment 2553, under 6, and Judgment 2771, under 15.) The Tribunal finds that the DAB should have called the available witnesses to assist it to carry out a thorough investigation in the case, particularly given that the facts were contested on the disparate versions given by the parties.

4. However, the Registrar purported to act pursuant to Staff Rule 110.6(b)(i), when she imposed a written reprimand on the complainant "to bring th[e] case to a closure". The Tribunal is satisfied that the Registrar could not have acted pursuant to Staff Rule 110.6(b)(i) because this Rule specifically enables a supervisor to issue a reprimand to a staff member as a non-disciplinary measure. On the other hand, this was a disciplinary matter for unsatisfactory conduct under Staff Rule 110.1. The case fell within the purview of the DAB under Staff Rule 110.4, and, accordingly, was referred to that body as such by the Registrar. In such proceedings, the Registrar may impose one of the disciplinary measures provided for in Staff Rule 110.6(a) if the DAB finds the allegations founded. Even where the DAB recommends that the allegations are not founded, the Registrar may reject the recommendation and impose one of the measures provided in Staff

Rule 110.6(a). It is Staff Rule 110.6(a)(i) that enables the Registrar to impose a written reprimand or a “written censure” as a disciplinary measure. In effect, the Registrar’s warning to the complainant to refrain from such conduct as the Court would not hesitate to impose disciplinary measures for any future conduct that amounted to harassment, was redundant.

5. It was therefore a disciplinary measure that the Registrar sent to be recorded in the complainant’s file expressly pursuant to Section 2.2 of Administrative Instruction ICC/AI/2008/002. This Administrative Instruction deals with official status files. Section 2.1 provides that the official status file is the record of a staff member’s service with the ICC. Section 2.2 provides that the file is to contain materials regarding disciplinary proceedings, among other things. Under Sections 3.1 and 5.1, a staff member must first be given an opportunity to comment upon any “adverse material” before it is placed on her or his file. The comment must also be included in the same file. “Adverse material” is defined in Section 3.2 as any document which reflects adversely on the conduct of a staff member. The impugned letter was “adverse material”, which was placed on the complainant’s file, without soliciting his comments as Sections 3.1 and 5.1 of Administrative Instruction ICC/AI/2008/002 require.

6. The fundamental difficulty is that, in the absence of facts that were proven (as the Registrar acknowledged) there was no basis on which to issue a reprimand, which was really a written censure under Staff Rule 110.6(a)(i). The decision cannot therefore stand. In Judgment 2495, under 9(b), the Tribunal held that in taking a decision at the outcome of disciplinary proceedings, an Executive Head, such as the Registrar, is not bound by the recommendations of a disciplinary board. The Registrar may depart from them if another solution is considered to be more appropriate to ensure the satisfactory running of the Organization. The Tribunal will not substitute its assessment for that of the Registrar, unless it notes a clear disproportion between the gravity of the offence committed and the severity of the



penalty imposed by the Registrar. However, a Registrar who departs from a recommendation of a board, as in this case, must state the reasons for disregarding it. One purpose which is served by this requirement to give reasons is to enable the Tribunal to evaluate whether the decision is proportionate in the event that the decision is challenged in the Tribunal (see, for example, Judgment 2391, under 8). In this case, the Registrar motivated her decision for departing from the recommendation of the DAB, but gave insufficiently cogent reasons for issuing the reprimand and warnings to the complainant.

7. In the foregoing premises, the impugned decision contained in the letter of the Registrar dated 31 October 2011 as well as the consequent decision of 11 January 2012 are set aside and the copy of the letter of 31 October 2011 that was placed on the complainant's file shall be removed therefrom. The complainant is entitled to costs in the amount of 6,000 United States dollars.

#### DECISION

For the above reasons,

1. The decision contained in the Registrar's letters dated 31 October 2011 and 11 January 2012 is set aside.
2. The ICC shall remove the copy of the said letter of 31 October 2011 from the complainant's official status file.
3. The ICC shall pay the complainant 6,000 United States dollars in costs.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 20 February 2014, 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 28 April 2014.

GIUSEPPE BARBAGALLO  
MICHAEL F. MOORE  
HUGH A. RAWLINS  
DRAŽEN PETROVIĆ