

116th Session

Judgment No. 3288

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms K. K. against the International Criminal Court (ICC) on 8 December 2011, the ICC's reply of 3 February 2012, corrected on 6 February, the complainant's rejoinder of 13 March, the ICC's surrejoinder of 17 April, the complainant's additional submissions of 5 June and the ICC's final comments of 11 July 2012;

Considering Article II, paragraph 5, 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 and the pleadings may be summed up as follows:

A. The complainant, a United States citizen born in 1964, joined the ICC in October 2007 as a Senior Programme Officer at grade P-5 in the Secretariat of the Trust Fund for Victims.

On 24 January 2011 the complainant had a discussion with Ms v.d.L., the *Chef de Cabinet* of the Presidency, who informed her that she planned to resign and that the Presidency was initiating a recruitment process to fill her post. Later that same day the complainant sent an e-mail to Ms v.d.L., to which she attached her

curriculum vitae (CV). In a letter of 25 January Ms v.d.L. provided her written notice to the Registrar of the Court.

By an e-mail of 22 February 2011 to the Registrar the complainant explained that, following a conversation with Ms v.d.L., she had forwarded her CV to that individual as part of what she thought was a preliminary stage prior to the ICC conducting an open recruitment process for the post of *Chef de Cabinet*. However, she had subsequently learned that interviews for that position had already taken place, despite the fact that the ICC had not issued a formal vacancy announcement. She asked the Registrar to inform her as to whether any professional-level posts at the ICC were exempt from the ICC Recruitment Guidelines for Established Posts. That same day the complainant sent the Registrar an addendum to her earlier e-mail in which she referred to the Staff Rules and cited paragraph 2 of Resolution ICC-ASP/1/Res.10, which deals with vacancy notifications. In an e-mail of 25 February to the President of the Court and copied to the Registrar, the complainant reiterated what she had stated in her e-mails of 22 February and requested clarification, by March 11, with respect to the recruitment process for the post of *Chef de Cabinet*.

On 10 March the Registrar informed her that the recruitment processes for established posts in the ICC were guided by ICC-ASP/1/Res.10, Staff Regulation 4.3 and the ICC Recruitment Guidelines for Established Posts. She further indicated that as from the time she had assumed the position of Registrar of the Court, she had sought to establish the practice of advertising posts that were to be filled by way of general temporary assistance (GTA) contracts.

On 16 March 2011 the complainant attended a meeting during which time Ms v.d.L. announced her resignation and introduced Mr P. as the incoming *Chef de Cabinet*. Later that same day the complainant sent an e-mail to the President of the Court, copied to the Registrar and Ms v.d.L., in which she expressed concern regarding the recruitment process for the post of *Chef de Cabinet*. Ms v.d.L. replied by e-mail a few hours later. She stated, inter alia, that it had always been made clear to the complainant that the post would not be advertised and that her CV had been directly solicited in lieu of a

publicly advertised vacancy announcement. She further explained that the process had been conducted in full compliance with all relevant rules and regulations as interpreted by the Registry Legal Advisory Services Section and that the Staff Regulations provided for the recruitment for certain posts, particularly those reporting directly to the President, by way of alternative recruitment processes.

In a memorandum of 6 April 2011 to the Secretary of the Appeals Board, the complainant stated, inter alia, that she was filing an appeal against the administrative decision to appoint Mr P. as *Chef de Cabinet*. On 6 May the Registrar denied what she described as the complainant's "request for review" of 6 April. She stated that the contested post was "funded under GTA" and that pursuant to the relevant statutory provisions it was not mandatory for the ICC to issue vacancy announcements and conduct competitions for such posts. In addition, the need to ensure an efficient transition period for the newly appointed *Chef de Cabinet* had precluded the Court from following the recruitment guidelines. The complainant filed an appeal with the Secretary of the Appeals Board on 3 June in which she challenged the Registrar's decision of 6 May and Mr P.'s appointment, claiming inter alia that the appointment was unlawful and that she had been discriminated against on the basis of her nationality, gender and her status as an ICC employee.

On 2 September 2011, the deadline for submission of the Appeals Board's report, the Secretary of the Board sent an e-mail to the Registrar requesting a 30-day extension of that deadline. The Registrar provisionally accepted the request pending agreement by the complainant. Following an exchange of e-mails between the complainant and the Secretary, an extension of 14 calendar days was agreed upon and approved by the Registrar.

The Appeals Board issued its report on 19 September 2011. It noted that the position had been filled under a GTA contract and held that the ICC had used a simplified recruitment process for acceptable reasons and that that process had been fair and sufficiently transparent to the candidates who were considered for the post. The Board concluded that the recruitment process complied with the applicable

rules and regulations and, thus, Mr P.'s appointment was lawful. It further concluded that the complainant had not been discriminated against. Therefore, it could find no basis for awards of material or moral damages, or costs.

By a memorandum of 20 September 2011, which is the impugned decision, the Registrar informed the complainant that, having considered the Board's conclusions and the factual and legal reasons underlying her decision of 6 May 2011, she had decided to affirm that decision.

B. The complainant asserts that the Appeals Board submitted its report to the Registrar after a deadline which had already been extended by agreement, and thus, she questions its admissibility. She contends that the Board operates under the authority of the Registrar pursuant to rules "promulgated by her Office". Also, on the basis of comments contained in its report, she accuses the Board of bias, bad faith and ill will. She further contends that she was not given the opportunity to provide comments regarding evidence that was disclosed by the Registrar during the internal appeal process and consequently she is offering her related observations for the first time in the present case.

She argues that the decision to appoint Mr P. violated her rights as an employee and the terms of her contract. The appointment decision was taken in breach of Article 36 paragraph 8, Article 44, paragraph 2, and Article 50, paragraphs 1 and 2, of the Rome Statute of the International Criminal Court, ICC-ASP/1/Res.10 which deals with selection of the staff of the ICC, Staff Regulations 4.3 and 4.4, Staff Rule 104.18, the ICC Recruitment Guidelines for Established Posts, and Administrative Instruction ICC/AI/2005/006 of 14 July 2005 which deals with equal employment opportunity and treatment.

She contends that the ICC did not conduct a formal recruitment process for the contested post and she challenges the evidence the ICC provided during the internal appeal in this respect. She asserts that she did not submit an application for the position of *Chef de Cabinet* because the ICC failed to issue a vacancy announcement. In this respect she points to the application requirements that are set out on

the ICC's external website. Furthermore, the mere act of forwarding her CV to Ms v.d.L. did not constitute a proper application as provided for by the relevant statutory provisions.

The complainant submits that the decision to appoint Mr P. is tainted with procedural and substantive errors which demonstrate abuse of authority, conflict of interest, bias, ill will and bad faith. She argues that the ICC *ex post facto* designated the position of *Chef de Cabinet* as a GTA post as a means of avoiding accountability for its failure to follow the prescribed recruitment procedures.

Lastly, she asserts that she suffered direct discrimination on the basis of her nationality and her status as staff member.

The complainant asks the Tribunal to order the ICC to set aside, without prejudice to Mr P., his appointment to the post of *Chef de Cabinet* so as "to allow for an open and transparent recruitment process" according to the Staff Rules and Staff Regulations. She seeks material damages "for the loss of a valuable opportunity to be considered; and for the direct discrimination experienced, which may negatively impact [her] good standing within and surrounding the ICC" in an amount equal to "18 months at a P-5 salary, including entitlements and taxes", and 40,000 euros in moral damages. In the event the Tribunal does not agree with the quantum of damages she seeks an award of damages under these heads in amounts it considers appropriate. She also seeks a "guarantee of non-repetition from the Court of such practices and an adherence at all times to the rules and regulations regarding recruitment". Lastly, she claims 3,000 euros in costs.

C. The ICC acknowledges that the relevant statutory provisions do not expressly provide for an extension of the prescribed 90-day time limit within which the Appeals Board is required to issue a recommendation to the Registrar of the Court. It submits that, when faced with the request for an extension, the Registrar chose the best option available. That option gave full control to the complainant to choose the additional period of time which was acceptable to her and she was not deprived of her right to a fair consideration of her appeal.

In addition, the defendant asserts that the Appeals Board is an independent body and the complainant's allegation that the Board or some of its members act under the authority of the Registrar is erroneous.

It denies that the complainant was not given the opportunity to comment on information disclosed during the internal appeal and points out that she has provided evidence to the contrary in the materials annexed to her complaint. Furthermore, under the Appeals Board's rules of procedure she did not have a right to reply to the Registrar's response. She did, however, have the right to seek authorisation from the Board to submit additional information or evidence in support of her case, but she exercised this right only with respect to one document.

The ICC submits that recruitment is essentially governed by Article 44 of the Rome Statute, the Staff Regulations and Staff Rules, Administrative Instruction ICC/AI/2005/006 and the ICC Recruitment Guidelines for Established Posts. The complainant's reliance on ICC-ASP/1/Res.10 is misplaced. Furthermore, information provided on the Court's website is intended to inform potential candidates about the normal procedures and conditions of recruitment, but it is not binding and the complainant's reliance on it is not relevant. The ICC explains that the entire selection process for the disputed post was handled internally by the Office of the President, without the involvement of the Human Resources Section.

The ICC argues that the decision to recruit the *Chef de Cabinet* on the basis of a GTA contract was consistent with the relevant provisions and it denies that the decision was taken to cover up any alleged breach of the recruitment process. It explains that from the outset, all of the candidates it approached, including the complainant, were clearly informed that the position would be filled until the end of the serving President's mandate, i.e. until March 2012. That decision was motivated by the short period of time between the resignation and effective departure of Ms v.d.L. and the completion of the mandate of the then President. The fact that a position is budgeted as a permanent

post does not prevent international organisations from filling positions on a temporary basis.

Regarding the recruitment process, the ICC contends that, as the position was being filled on a temporary basis under a GTA contract, it was not mandatory that the process be conducted in accordance with the Recruitment Guidelines. Therefore, it had no duty to issue a vacancy announcement on the ICC website and the complainant has failed to demonstrate that she suffered any injury in this respect. Under the relevant case law of the Tribunal and the relevant statutory provisions, the ICC was justified in selecting a new *Chef de Cabinet* without resorting to a competition.

The ICC denies the complainant's allegations of bad faith. It further denies that her right to compete for the position of *Chef de Cabinet* was violated. Indeed, on the contrary, she benefited from an advantage as a result of the informal and confidential nature of the recruitment process. The ICC points out that, even if she had been denied the right to compete for the position, which it does not admit, the complainant would have suffered no injury given that that position is at the same grade as the post she holds. Moreover, she is currently appointed under a renewable three-year fixed-term contract on an established post, whereas the contested position was being filled under a GTA contract.

Lastly, the ICC denies that the complainant has suffered discrimination on the basis of her nationality or her status as a staff member.

D. In her rejoinder the complainant reiterates and develops her pleas. With respect to the extension of the deadline for submission of the Appeals Board's report, she contends that, despite her express request, her related e-mail exchange with the Secretary of the Board was not copied in its entirety to the Registrar. She requests an additional 25,000 euros in moral damages and an additional 5,000 euros in costs.

E. In its surrejoinder the ICC provides further evidence in support of its position, which it maintains in full. It notes with concern the complainant's submissions regarding the failure by the Secretary of

the Appeals Board to provide the Registrar of the Court with full disclosure of the e-mail exchange regarding the Board's request for an extension of the deadline to submit its report. However, it states that this is not evidence that the Appeals Board was in some way biased against the complainant or otherwise prejudiced her right to a fair determination of her case.

F. In her additional submissions the complainant challenges the further evidence provided by the defendant characterising it as "new information" and she accuses the ICC of bad faith, ill will and malice.

G. In its final comments the Court addresses the issues raised by the complainant and asks the Tribunal to reject her related arguments.

CONSIDERATIONS

1. In an appeal before the Appeals Board, the complainant challenged the legality of the recruitment process which resulted in the appointment of Mr P. as the *Chef de Cabinet* of the Presidency, stating that it violated her right as an employee due to the non-observance of pertinent rules, regulations and administrative instructions governing the recruitment processes for all staff posts. Specifically, she challenged the legality of defining the post of *Chef de Cabinet* as a GTA post; the failure of the ICC to publish a vacancy notice; and the failure of the organisation to hold a competitive selection process. She also claimed that she was denied the right to apply for the position, that she did not take part in the application process, and that she was discriminated against based on her status as an employee, her gender, and her citizenship.

2. The Appeals Board, in its unanimous report dated 19 September 2011, found that a selection process did take place, that consideration had been given to the complainant, that the process "was fair and sufficiently transparent to the selected potential candidates", that the selection of Mr P. was "valid and in conformity with the applicable law", and that there were "no grounds of direct or

indirect discrimination”. As such, it found that there were “no merits to award material and moral damages” to the complainant, and consequently that there were “no merits to recommend reimbursement of costs”.

3. By a memorandum from the Registrar, dated 20 September 2011 which is the impugned decision, the complainant was informed that the Appeals Board had “unanimously concluded that [the Registrar’s] decision of 6 May 2011 was founded in law and in fact and that [the complainant’s] contentions should not succeed” and that the Registrar’s final decision was to affirm the decision of 6 May 2011 which denied her request for review of the decision to appoint Mr P. as *Chef de Cabinet* of the Presidency. The complainant’s claims for relief are set out in Part B, above.

4. As stated above, in the memorandum dated 6 May 2011 (confirmed by the impugned decision of 20 September 2011) the Registrar informed the complainant of her decision to deny the complainant’s request for review of the decision regarding the recruitment of the *Chef de Cabinet*. She justified that decision, and the decision to convert the post to a temporary GTA position by saying inter alia that “the rule remains that advertising GTA positions and conducting a competitive process for these posts is not mandatory and can be derogated, in particular in cases where such measures are not possible or not appropriate”. She went on to state that “[i]n the present case, the imminent departure of the former Chef de Cabinet, the necessity to ensure a minimal handover to the new appointee and the current workload within the Office of the Presidency concurred to the impossibility of running a long recruitment procedure including the advertisement of the position on the ICC website and the different steps of the competitive selection provided under Recruitment Guidelines. The condition of impossibility being fulfilled, there is no need to address the condition of inappropriateness at this stage to conclude that there were sound reasons for not running through the procedure set in the Recruitment Guidelines, as permitted under their Section 1.” The Registrar also addressed the issues raised by the

complainant regarding her participation and consideration in the informal recruitment process, noting inter alia that the complainant had been “preferentially informed of the vacancy [...] had a preferential opportunity to apply” and that the complainant’s application “was thoroughly considered by the Presidency”. The Registrar found the complainant’s allegations of discrimination to be without merit, and stated that the complainant had suffered no harm as a result of the recruitment process that was followed.

5. The primary questions raised in this complaint are: (a) whether or not the situation leading to the appointment of Mr P. to the position of *Chef de Cabinet* under a GTA contract can be considered exempt from the regular recruitment rules due to the “impracticability” of the competitive selection process in accordance with Tribunal case law; and (b) whether or not the complainant suffered from discrimination based on her gender, her nationality and/or her status as a staff member.

6. The ICC submits that the resignation, with two months’ notice, of the *Chef de Cabinet* and the upcoming election of a new President gave rise to the ICC’s decision to forgo the usual recruitment procedure in favour of an “informal” direct appointment to the post on a temporary basis. The position became listed as a temporary GTA post with a contract for nine months with a maximum possible extension to 14 months so that the new President could be involved in the recruitment process for the new *Chef de Cabinet*. Regulation 4.3, governing appointments, provides: “[t]he selection [of staff members] shall normally be made on a competitive basis”.

7. In Judgment 2959, regarding a similar challenge to a direct appointment, the Tribunal held (under consideration 6) that:

“the impugned decision violated the complainant’s right to compete for a post, as Regulation 4.3 provides no explicit and specific exemption from the requirement that selection be made on a competitive basis for the post of Chief of Cabinet, and the ‘impracticability’ of the competitive selection process cannot be based on the post itself. Furthermore, the Director-General did not provide any reasons why he considered a competition as not practicable in the appointing of Mr E. to the vacant post. This

demonstrates a lack of transparency in the appointment. The decision violated provisions which are designed to ensure a certain level of transparency and competition for all posts.”

It also found (under consideration 7) that:

“the expression ‘so far as practicable’ cannot be interpreted to mean that for certain specific posts a competitive selection process can automatically be considered as not practicable (*ubi lex voluit dixit, ubi noluit tacuit*). In Judgment 2620, referring to the same expression ‘so far as practicable’, the Tribunal held that:

‘those words confer power on the Director-General to determine whether or not a competition is practicable. However, that is not a general or unfettered discretion. There must be something in the circumstances of the vacancy upon the basis of which the Director-General might reasonably conclude that a competition is not practicable.’

Again, the Tribunal notes that the ‘impracticability’ cannot refer to particular posts (as in that case the exception to the general rule should be explicitly expressed), but instead must relate to particular situations such as a ‘need to fill a vacancy quickly to relieve a backlog of work or to satisfy existing or future work commitments’ (see Judgment 2620, under 9).”

8. The Tribunal is of the opinion that, following the guidelines set out in Judgment 2959, the present complaint is unfounded. As Regulation 4.3 uses the term “normally”, the Tribunal finds that the Regulations governing the selection of staff members will be followed as written unless there is an exceptional situation in which it is not practicable to do so for objective reasons. Unlike the situation leading to Judgment 2959, the present complaint stems from a direct appointment that indeed can be considered as having occurred based on the “impracticability” of following the usual competitive selection process. The *Chef de Cabinet* resigned with two months’ notice which left the ICC with the choice of remaining without a *Chef de Cabinet* for the length of time necessary to hold a competitive selection procedure or of making a direct selection. As the then current President’s tenure was coming to an end, the ICC also had to take into consideration the length of the post appointment and the effect it would have on the new President. Not wanting to appoint a new *Chef de Cabinet* to the Presidency without having any input from the new

President, it was decided that as an interim measure, they would convert the post to a GTA post with a nine-month contract, with a possible extension to a maximum of 14 months, allowing time for the new President to be involved in the selection process for the regular position of *Chef de Cabinet* in her/his Presidency. According to the ICC, the general timelines of a competitive selection procedure tend to last around six to eight months in most organisations, with higher level postings taking sometimes over 12 months to be completed. Considering this, the Tribunal accepts the ICC's submission that two months was too short a timeline to hold a proper competitive selection procedure.

9. The Tribunal is of the opinion that there is no evidence of bias or discrimination based on the complainant's gender, nationality or status as a staff member. As the Appeals Board stated "the [complainant] was included in the list of selected people which were contacted to discern their possible interest for the post. She participated in an informal recruitment process by sending her CV although her candidature was not retained. Other ICC staff members were also considered in that list for the position." The Tribunal also finds convincing the ICC's submission that the complainant's candidature was ruled out after submission of her CV as, having reviewed the CV, the ICC noted that "she [did] not fulfil the requirement of having a law degree under the job description of 2005 used for the recruitment".

10. Subsidiarily, the Tribunal considers it useful to note that the complainant's assertion that she was not aware that she had participated in the informal selection process is unconvincing. The complainant was told about the *Chef de Cabinet's* resignation and was encouraged to submit her CV, which she did that same day. It should have been apparent immediately from that exchange that the process was an informal one, not following the usual process of the month-long posting of a vacancy notice and so forth. The complainant could have contested that decision immediately but instead waited until she was sure that her candidature had failed. While the Tribunal

recognises that it was in her own interests not to contest an informal procedure in which she had a chance of succeeding, it considers her current protestations of ignorance of the process to be implausible.

11. The Tribunal is of the opinion that the complainant's repeated claims of malice, ill will, and bad faith are unsubstantiated. Her allegations of bias on the part of the Appeals Board are also unsubstantiated. Allegations of bias must be proven and are never assumed and the complainant's assertion that the Appeals Board was in any way directed or influenced by the Registrar is unconvincing. The Tribunal is of the opinion that the complainant's right to have her appeal considered without delay was fully respected and the 14-day extended deadline was respected in accordance with the standard procedure of the organisation. It is useful to note that even if the Appeals Board had missed the deadline and filed its report late, the report would still be considered admissible before the Tribunal and the issue of the date of filing would only be considered in a decision regarding an award of moral damages for delay.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 8 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Hugh A. Rawlins
Catherine Comtet