Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M. E. F. (No. 2)
v.
ICC

120th Session **Judgment No. 3485**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. M. E. F. against the International Criminal Court (ICC) on 14 September 2012, the ICC's reply dated 18 December 2012, the complainant's rejoinder dated 23 March 2013 and supplemented on 26 March, and the ICC's surrejoinder dated 8 July 2013;

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 may be summed up as follows:

Facts relevant to this case may be found in Judgment 3444 delivered on 11 February 2015, concerning the complainant's first complaint. Suffice it to recall that the complainant joined the ICC in March 2007 as a Data Entry Clerk/Transcriber at grade G-3. He was then reclassified to the G-4 position of Data Processing Assistant in a unit of the Investigation Division within the Office of the Prosecutor. His contract was not renewed beyond the end of February 2012.

On 13 February 2012 he filed an internal complaint with the Prosecutor, alleging harassment on the part of his direct supervisor and three other supervisors. He alleged that he had been subjected to a campaign of harassment, manipulation, bullying and mobbing. He

indicated for instance that his direct supervisor and the manager of the Data Processing Unit sent him a number of e-mails, the only purpose of which was to put him under stress; in that respect he referred to specific e-mails sent in 2010 or 2011. He added that false accusations were made against him in April 2010, in particular that he had threatened his direct supervisor, which he asserted he never did. He also contended that aggressive and racist language was used by some of his supervisors. His direct supervisor and the manager of the Unit deliberately complicated the performance of his tasks by assigning him documents in languages that he did not understand, some of the tasks he had performed were not recorded, and his performance appraisals were often incorrect, vague and did not reflect his work. Upon his return from holidays in October 2011, his computer and his personal belongings were no longer in his office, and the Administration was unable to locate his computer for two weeks. According to the complainant, all his personal files had been deleted from his computer and his direct supervisor appeared to be the last person who had logged onto his computer, though he was not authorised to do so. He explained that all these events aimed at “degrading the working conditions” and creating a “hostile work environment”, which undermined his professional reputation and dignity. He added that he had informed the Administration about the situation and that on 23 November 2010 the head of the Investigation Division informed him that he had asked the head of the Operations and Planning Unit to investigate the matter, but no investigation was conducted.

On 20 February 2012 the Prosecutor forwarded to the Disciplinary Advisory Board (hereinafter the Board) the internal complaint filed by the complainant. The Board issued its report on 30 May 2012. It found no evidence of the alleged aggressive, hostile, humiliating behaviour to which the complainant claimed to have been subjected. With respect to the allegation that the complainant’s computer had been removed from his office, the Board indicated that this was the only act that could constitute harassment. In that respect, it observed that the staff members of the Unit to which the complainant belonged were informed in August 2011 that computers would be changed, that the complainant’s computer was removed in October when he was on annual leave, and

that the computer could not be located for two weeks. However, it found no evidence of any intent to humiliate or hurt the complainant, nor any evidence of bad faith on the part of his direct supervisor; in its view, the removal of the computer was more an example of poor management and a lack of care for the complainant's feelings. It therefore recommended rejecting the harassment complaint. However, it subsidiarily recommended that an official investigation be conducted with respect to the removal of the complainant's computer and the fact that it was not possible to locate it for two weeks and the fact that non-authorised persons had logged onto his computer. It also recommended that measures be taken to improve communication in the Unit where the complainant worked, and that the terms and conditions of fixed-term contracts funded by general temporary assistance funds be re-examined so as to limit the duration for which that type of contract may be granted.

The Prosecutor wrote to the complainant on 19 June 2012 to inform him that he had decided to endorse the Board's recommendation to dismiss his internal complaint of harassment. He added that the three other recommendations of the Board were based on an erroneous interpretation of the Board's tasks and must therefore be rejected. He indicated that his decision constituted a final decision that the complainant could appeal before the Tribunal. The complainant impugns that decision before the Tribunal.

He asks the Tribunal to award him 420,000 euros in moral damages and 1,000 euros in costs. The ICC asks the Tribunal to dismiss the complaint in its entirety as unfounded.

CONSIDERATIONS

1. In the impugned decision dated 19 June 2012, the Prosecutor accepted that aspect of the recommendations of the Board to dismiss the complainant's harassment complaint against the Heads of the Investigation Division and of the Operations and Planning Unit, as well as the Manager of the Data Processing Unit and his direct supervisor. This recommendation was made on the ground that the

allegations of harassment were not supported by the evidence. The other three subsidiary recommendations which the Board made were tangential to the harassment complaint. The Prosecutor did not accept them because they fell outside of the remit conferred upon the Board pursuant to Article 5.1 of Administrative Instruction ICC/AI/2008/001 on Disciplinary Procedures. None of those three recommendations are among the disciplinary measures provided for in Staff Rule 110.6. The relevant issue for determination in this case is therefore whether the Board erred by recommending the dismissal of the complainant's harassment claim, which was accepted in the impugned decision.

2. The ICC has made a commitment to recognize the right of a staff member to be treated with dignity and respect, as well as to prevent all forms of harassment in the workplace. It accordingly promulgated Administrative Instruction ICC/AI/2005/005 pursuant to Staff Regulation 4.3 and Staff Rule 101.2. This prohibits harassment of any kind and requires all staff members to show sensitivity and respect for diversity. It defines harassment as any unwelcome behaviour that reasonably has the effect of violating a person's dignity or creating an intimidating, degrading, hostile, humiliating or offensive work environment. Section 3 of Administrative Instruction ICC/AI/2005/005 outlines the scope of harassment. Under Article 3.2, harassment may include verbal conduct, such as epithets, derogatory comments, slurs, as well as visual conduct such as derogatory or offensive e-mails. Article 3.3 states that harassing behaviour may be an isolated occurrence. Article 3.5 states that it is not the intention of the harasser that defines whether a particular type of conduct is harassment. Sections 6 and 7 provide for internal complaint and grievance procedures, while Administrative Instruction ICC/AI/2008/001 sets out the rules applicable for disciplinary procedures. The latter outlines, among other things, the basic requirements of due process in disciplinary proceedings concerning unsatisfactory conduct.

3. In summary, the complainant alleges that between 2007, when he joined the Data Processing Unit of the ICC, and when he left in February 2012, he was subjected to systematic workplace harassment

that was orchestrated by his direct supervisor and the manager of the Data Processing Unit, which the Heads of the Investigation Division and the Operations and Planning Unit failed to curb. According to the complainant, he was subjected to discriminatory denial of equal treatment, humiliation, manipulation, targeting, bullying, victimization, racist insults, false accusation and other offensive, aggressive and intimidating behaviour and threats to his job security, which undermined him in the workplace and violated his dignity.

4. The complainant seeks to set aside the impugned decision on two grounds. One ground is that he was denied due process before the Board because the proceedings before the Board were flawed. He insists that this tainted the impugned decision by which the Prosecutor adopted the recommendation to dismiss his internal complaint.

5. The complainant alleges that the Board failed to consider some matters on the ground that they had occurred more than six months before the filing of the internal complaint. In its report, although the Board noted that the complainant referred to events that had occurred between January 2010 and November 2011, it stated that it could only have considered three elements in his internal complaint as relevant matters that fell within the six-month period between mid-August 2011 and 13 February 2012 when the internal complaint was filed. This, according to the Board, was because Article 6.6 of Administrative Instruction ICC/AI/2005/005 provides that an internal appeal alleging harassment should be submitted within six months of the first instance of the alleged conduct and because the evidence did not show a harassment pattern. This finding was in error.

6. Article 6.6 is a procedural rule that requires current staff members to submit a complaint of harassment “within six (6) months of the first instance of the alleged [harassing] conduct”, according to the English version of Administrative Instruction ICC/AI/2005/005. Thus it is intended to promote the timely lodging of complaints of harassment. This is both sensible and desirable. However, it does not follow that once such a complaint has been lodged the complainant is

precluded from requesting or requiring examination of events which predated the period of six months immediately preceding the filing of the complaint. Harassment and discrimination can be the manifestation of conduct over a long period. Conduct may take place which, in isolation, appears innocent. However, repeated occurrences of the same or similar conduct may reveal, over time, the harassment of the complainant. In such a case there could be no "first instance" that could reasonably trigger the time limit in Article 6.6 with the effect of precluding consideration of events which occurred sometime before. Moreover, the Tribunal notes that the French version of Article 6.6 merely requires that the complaint of harassment be submitted within six months of the harassing conduct ("*dans les six (6) mois suivant la conduite en question"*), without reference to a "first instance" thereof. The Tribunal's jurisprudence is that harassing conduct over a long period is evidence which can be relied upon to prove the existence of more recent harassing conduct, and also that harassment can be the cumulative effect of conduct which, in isolation, might not be viewed as harassment (see Judgments 2100, under 13, 2553, under 6, 3318, under 7, 3233, under 6, and 3347, under 8).

7. The complainant alleged continuing harassment over a period of years down to the alleged incidents concerning his computer in October 2011. The Tribunal notes that, in his "Observations" document of 24 April 2012, in his internal complaint, the complainant also referred to a later incident. He alleges that it occurred on the first day after the announcement of the non-extension of his contract when he was verbally harassed (mocked and provoked) by the Head of the Investigation Division. Given this, as well as the fact that these allegations mirror the complainant's prior allegations of harassment, the case that he sought to make was that there was harassment of a continuing nature over a period of years until he left the ICC. The documentary evidence supports this. The allegations of harassment over the whole period were therefore all receivable and the Board erred when it did not consider them. This ground of the complaint is well founded.

8. The complainant asserts that the Board violated his right to due process when, in effect, it did not hear the witnesses whose names he had mentioned in his internal complaint brief and did not hear him (the complainant). The Tribunal observes that the Board determined the internal complaint only on the written statements, submissions and documents before it. The ICC submits that the Board did not err by not calling any witness because Staff Rule 110.4(d) puts that decision within the sole discretion of the Board and that, additionally, the complainant neither requested an oral hearing nor listed the witnesses, contrary to what he asserts before the Tribunal. The Tribunal observes that the complainant did not list any witness in his internal complaint brief. He merely named persons who, according to him, witnessed a few of the alleged harassment incidents.

9. Staff Rule 110.4(d) outlines the manner in which the Board may obtain witness testimony. Whether to require a witness to appear for oral hearing is within the sole discretion of the Board. It states as follows:

> "(d) If the Disciplinary Advisory Board considers that it requires the testimony of the staff member concerned or of other witnesses, it may, at its sole discretion, obtain such testimony by written deposition, by personal appearance before the Board, or by telephone or other means of communication."

10. Notwithstanding the width of the discretion that this confers, it must be exercised in a way that provides due process. There are cases in which the evidence is such that fairness and transparency require the testing of it particularly by way of questioning of witnesses. The Tribunal views this as such a case given the nature of the allegations of harassment which the complainant proffered. The complainant and the four persons whom he named as his harassers in the internal proceedings made serious allegations and counter-allegations against each other. The Tribunal has already observed that the complainant named persons who, according to him, witnessed some alleged harassing incidents. These are circumstances in which the appropriate exercise of the discretion, which Staff Rule 110.4(d) confers, required an objective determination of the facts in their overall context. This could have been done at least

by the questioning of witnesses, as well as by oral or written testimony by the persons whom the complainant named as witnesses to the alleged oral harassing incidents. The failure by the Board to do this, coupled with its decision to consider only the alleged harassing incidents that occurred within the six-month period before the internal complaint was filed, violated due process. These were serious breaches which require the impugned decision that adopted the recommendation to be set aside.

11. The complainant also requests that the impugned decision should be set aside because in the recommendation to dismiss his harassment claim, which the Prosecutor accepted, the Board erred when it found that there was no evidence of harassment. The Tribunal has stated, in Judgment 2295, under 10, for example, that it is not the role of the Tribunal to reweigh the evidence and reverse a decision on harassment in an internal appeal unless it finds that there was a manifest error in the decision of an internal disciplinary body. Error may occur where the disciplinary body breached a rule of form or procedure, or failed to take essential facts into account.

12. The ICC submits that there is no reasonable justification for rejecting the Board's conclusion on the evidence and its finding that the complainant was not harassed. The Tribunal does not accept this submission on the very admission by the Board that the allegations concerning the incidents involving the complainant's computer in October 2011 could constitute harassment. The Board erred because having so concluded it recommended the dismissal of the harassment complaint on the grounds that there was no evidence of intention to humiliate the complainant. It stated that the incidents were rather due to poor management and lack of consideration for the complainant. It additionally found that the complainant's evidence did not show any bad faith on the part of his supervisor. This reasoning is particularly in error because Article 3.5 of Administrative Instruction ICC/AI/2005/005 states that it is not the intention of the harasser which defines whether a particular type of conduct is harassment. Lack of intention and lack of bad faith are not defences to a charge of harassment.

13. The admission by the Board that the computer incidents showed lack of consideration for the complainant rather confirms that those incidents and their effects on the complainant constituted harassment. Under Article 3.3 of Administrative Instruction ICC/AI/2005/005 an isolated incident may constitute harassing behaviour. In these premises, the impugned decision will also be set aside because the Board erred when it recommended the dismissal of the harassment complaint.

14. Normally the Tribunal would have returned this matter to the ICC, directing that the harassment complaint be properly heard. However, considering the time that has elapsed since the period of the alleged harassment and the nature of the evidence that is available, the Tribunal can determine the issue of harassment.

15. The complainant has not asked for oral proceedings before the Tribunal. However, since the complainant's plea that he was harassed has been substantiated by the ICC's admission in relation to his computer incidents, the complainant has discharged his burden of proof that he suffered harassment. The Tribunal notes that the complainant's written complaints, mainly by way of e-mails, began in 2009. There were many during 2010. Some complaints were also made during 2011. The Tribunal notes, for example, his e-mail dated 4 April 2011 in which he stated that he and other colleagues had been suffering from harassment. He had alerted the Staff Council, the Prosecutor and his Deputy and others by copy. He authored another e-mail, dated 6 May 2011, in which he indicated that he wished to file an official internal complaint of harassment and discrimination against his direct supervisor and the manager of the Data Processing Unit. The Tribunal also takes note of the medical report, dated 31 January 2011, established by two medical practitioners who indicated that he sought medical attention because he felt harassed and discriminated against by his supervisor and manager.

16. The Tribunal notes the complainant's statement that he had made verbal complaints to senior officials, for which Article 7.2 of Administrative Instruction ICC/AI/2005/005 provides, but received no

responses. It is not controverted that some of his complaints went unanswered. This shows that there was a degree of indifference regarding his express concerns. This was not only another aspect of harassment but also a breach of the ICC's duty of care towards the complainant which, in addition to the breach of due process, entitles him to moral damages, for which he is awarded 30,000 euros. He is also entitled to 1,000 euros in costs.

DECISION

For the above reasons,

1. The impugned decision contained in the Prosecutor's letter dated 19 June 2012 is set aside.
2. The ICC shall pay the complainant 30,000 euros in moral damages.
3. The ICC shall pay the complainant 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 21 May 2015, 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 30 June 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ