P.

v.

ICC

122nd Session **Judgment No. 3673**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms L. P. against the International Criminal Court (ICC) on 31 March 2014, the ICC's reply of 25 August, the complainant's rejoinder of 30 November 2014 and the ICC's surrejoinder of 9 March 2015;

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 decision not to renew her fixed-term contract and the subsequent notification that her contract would not be extended to allow her to use her entitlements to certified sick leave.

The complainant, who joined the ICC in August 2008, worked under a series of fixed-term contracts which were continuously extended or renewed. Her last fixed-term contract was due to expire on 31 December 2013.

On 9 October 2013 the complainant went on sick leave. She sent a medical certificate covering the period from 9 to 25 October 2013.

By a memorandum of 14 October 2013, which was sent to the complainant that same day by email (to her professional and private email addresses) as well as by internal mail to her office, she was informed that as the General Temporary Assistance (GTA)-funded post that she occupied was to be converted into a permanent position and a competitive recruitment process had commenced to fill the position, her contract would not be renewed beyond its expiration date of 31 December 2013. As the applicable notice period (90 days) had not been respected, she would receive partial payment in lieu of notice, and she would be contacted shortly regarding the separation procedure.

On 23 October the complainant's doctor recommended extending the sick leave period from 26 October to 23 November. It was extended again until 21 December 2013.

On 26 November the complainant sent an email to the Administration asking how she should proceed with her medical certificates. The Medical Officer, Head of the Health and Welfare Unit of the Human Resources Section (HRS) replied that she should send it her medical certificates, as well as any medical reports from her doctor(s). Since she had been on certified sick leave for a period that exceeded twenty consecutive working days, a medical report from her doctor was required pursuant to paragraph 4.3 of the Administrative Instruction on Certified Sick Leave and Emergency Leave dated 25 July 2011 (ICC/AI/2011/005) (hereinafter "the Administrative Instruction").

On 20 December 2013 the complainant's doctor recommended extending her sick leave period from 21 December 2013 to 31 January 2014. Her doctor subsequently issued several certificates recommending the extension of the complainant's sick leave period until 25 April 2014. The complainant continued to submit medical certificates to HRS after the expiry of her contract on 31 December 2013. On 5 February 2014 the Administration acknowledged receipt of a medical certificate and informed her that, since her contract had expired on 31 December 2013 and had not been extended, her medical certificate would be placed in her file and no further action would be taken.

On 3 March 2014 the Administration sent an email to the complainant advising her that, since she was no longer a staff member, she should

stop sending her medical certificates. The complainant reacted by stating that she had been a staff member under a fixed-term contract since August 2008 and she enquired why paragraph 5.17 of the Administrative Instruction was not applied in her case. The Administration replied on 24 March 2014 that, in order for that provision to be applicable, the Medical Officer would need to confirm that for medical reasons, a staff member's contract should be extended to allow him or her to exhaust his or her entitlements to certified sick leave. In the complainant's case, the Medical Officer had been consulted and had confirmed that there was no medical reason to extend her contract beyond 31 December 2013.

On 31 March 2014 the complainant filed a complaint with the Tribunal, impugning the decision of 14 October 2013 not to extend her fixed-term GTA-funded contract. She asks the Tribunal to order her reinstatement as of 1 January 2014 until the end of her sick leave, in accordance with paragraph 5.17 of the Administrative Instruction. She claims 50,000 euros for the failure to provide her with a safe working environment, damages in an equal amount for "loss of moral" and 30,000 euros for the failure to comply with the established administrative procedures of the ICC. She also claims "psychological damages" in an amount equal to three years' net salary and moral damages in the amount of 30,000 euros.

The ICC, which was authorised by the President of the Tribunal to confine its reply to the issue of receivability, submits that the complaint is irreceivable both *ratione materiae* and *ratione temporis*.

CONSIDERATIONS

1. In the present complaint, filed on 31 March 2014, the complainant challenges the decision dated 14 October 2013 not to renew her fixed-term contract beyond its 31 December 2013 expiration date. She also contests what was notified to her in the email dated 24 March 2014, namely that the provision of paragraph 5.17 of the above-mentioned Administrative Instruction, which allows for the "[e]xtension of fixed-term appointments for utilization of sick leave entitlement", had not been applied in her case.

Paragraph 5.17 provides that:

> "When a staff member on a fixed-term appointment is incapacitated for service by reason of illness or injury that continues beyond the date of expiration of the appointment that would otherwise not be extended, he or she shall be granted an extension of the appointment, after consultation with the Medical Officer, for the continuous period of certified sick leave up to the maximum entitlement to certified sick leave at full pay and half pay under staff rule 106.4 and section 3 of this Administrative Instruction."

The complainant submits that she was unable to contest the decision not to renew her contract as she was on sick leave when she was notified of it and that, in light of paragraph 5.17 quoted above, her contract should have been extended beyond its expiry on 31 December 2013 until the end of her certified sick leave. She only became aware that paragraph 5.17 of the Administrative Instruction had not been applied to her case when she received an email dated 24 March 2014, which informed her that, in the ICC's opinion, in order for the provision to be applicable, the Medical Officer must confirm that for medical reasons the staff member's contract should be extended to allow him or her to utilise his or her sick leave entitlements. The email stated that in the complainant's case, the Medical Officer had been consulted, that she had confirmed that there was no medical reason to extend the complainant's contract beyond 31 December 2013 and that the provision had been duly taken into consideration before the Administration had proceeded with her separation from service. The complainant submits that as she was a former employee when she received that email, she was unable to access the internal appeal procedure. She seeks reinstatement as of 1 January 2014 until the end of her sick leave in accordance with paragraph 5.17 of the Administrative Instruction, with all relevant payments and contributions. She also claims moral damages under several heads, and costs.

2. The President of the Tribunal has allowed the ICC to limit its reply to the question of receivability. The ICC contests the receivability of the complaint on the ground that the complainant does not impugn a final decision and, therefore, that she has failed to exhaust all internal means of redress. It submits that the internal means of redress are open to both serving and former staff members, provided that the procedure and time limits are otherwise observed and cites Judgment 2111 to

support its argument that former officials who consider that the terms of their contracts of employment or staff regulations have been disregarded may avail themselves of the means of recourse available for the recognition of their rights, and therefore seek redress under the Staff Regulations (see Judgment 2111, under 6).

3. Rule 111.1 of the Staff Rules of the ICC, which concerns appeals against administrative decisions, provides in paragraph (b) that:

> "A staff member who wishes to exercise his or her right to appeal against an administrative decision shall first submit a request in writing to the Secretary of the Board, within thirty days of notification of the decision, for a review of the decision by the Registrar or the Prosecutor, as appropriate."

Paragraph (d) provides that:

> "After the review, the Registrar or the Prosecutor, as appropriate, shall inform the staff member in writing of his or her decision. A staff member who wishes to appeal against the decision resulting from the review shall do so in writing to the Secretary of the Board within thirty days of notification of the decision. The Registrar or the Prosecutor, as appropriate, shall forward this request to the Appeals Board."

4. The preliminary issue is to identify the impugned decision. Article VII, paragraph 1, of the Statute of the Tribunal provides that "[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". The complainant did not avail herself of the internal appeal procedure as provided for under the Staff Rules of the ICC with regard to the decision dated 14 October 2013, nor has she provided any evidence of extenuating circumstances which would allow for an exception to be made. The Tribunal notes that as the complainant was writing emails to the Administration while on sick leave, she could have submitted her request to review the decision not to renew her contract within the applicable deadline. The communication of 24 March 2014 was merely a reconfirmation of the decision of 14 October 2013 which was taken prior to her separation from service; it did not contain any new elements, nor did it alter the previous decision. As the complainant was separated from service on 31 December 2013, it was apparent at that time

that paragraph 5.17 of the above-mentioned Administrative Instruction had not been applied. The complainant did not request a review of that decision within the 30 days provided by Rule 111.1(a), therefore the decision not to apply paragraph 5.17 remained uncontested and cannot be impugned before the Tribunal. The Tribunal notes that the complainant submits that she did not file the internal appeal against the non-application of paragraph 5.17 as she doubted the impartiality of the Appeals Board. Considering that bad faith must be proven and cannot be assumed, and that the Appeals Board allows for alternate members in cases of conflict of interest, the Tribunal finds this submission to be unfounded. Thus, in light of the above, the present complaint is irreceivable as the complainant failed to exhaust all internal means of redress. The complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ