

L. (No. 7)

v.

ICC

131st Session

Judgment No. 4356

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr C. L. against the International Criminal Court (ICC) on 2 May 2017 and corrected on 11 May, the ICC's reply of 28 August, the complainant's rejoinder dated 2 November 2017, the ICC's surrejoinder of 21 February 2018, the additional submissions filed by the complainant on 6 April and the ICC's final comments thereon dated 11 October 2018;

Considering the documents submitted by the ICC on 6 October 2017 pursuant to the request of the President of the Tribunal of 21 September 2017 concerning the selection process for vacancy announcement No. 3761 and vacancy announcement No. 8281;

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 place him on the shortlist for a position for which he had applied as a priority candidate.

Facts related to this case can be found in Judgments 3907 and 3908, delivered in public on 24 January 2018, and in Judgment 4357 also delivered this day. Suffice it to recall that the complainant separated from service in October 2015 following the abolition of his post and the decision to terminate his fixed-term appointment. He was entitled to apply as an

internal candidate for vacant positions for a period of 12 months pursuant to paragraph 46 of Information Circular ICC/INF/2014/011 Rev.1.

Late February 2016 the complainant applied for the P-5 position of Head of Chambers, under a fixed-term appointment (vacancy announcement No. 3761). On 27 July he was informed by the Human Resources Section that he had not been selected. On the same day a new vacancy announcement (No. 8281) was issued for the same position but under a different type of contract (short-term appointment) and some requirements concerning experience and knowledge of languages were modified. The complainant applied for that position a few days later.

In August he filed a request for review of the decision of 27 July. The Registrar rejected it on 1 September on the ground that there was no appealable administrative decision given that no one had been selected for the contested position and the position was going to be re-advertised. Thus the selection process was ongoing and no final decision had been made in that respect. He exceptionally replied also on the merits rejecting the complainant's arguments concerning breach of procedure, errors of fact and law, and misuse of authority, stressing that his application had been fully and fairly considered. He added that if the complainant disagreed with this decision he could appeal it to the Appeals Board in accordance with Staff Rule 111.1(d). The complainant did so late September 2016.

In its report of 3 January 2017, the Appeals Board considered as a preliminary issue whether the contested decision was an appealable decision. In its view, the decision to reject the complainant's application for the contested position was part of the relevant decisions to be taken in the context of a recruitment process and, as such, qualified as an administrative decision under Staff Rule 111.1. However, it recommended dismissing the appeal on the grounds that there was no flaw in the selection process, no error of fact or law, and that the complainant had not established misuse of authority.

On 2 February 2017 the Registrar informed the complainant that he disagreed with the Appeals Board's recommendation on receivability. In his view, the Appeals Board had overlooked the fact that the initial vacancy announcement had been superseded by a re-issued announcement for the fixed-term appointment of Head of Chambers, for which the complainant had again applied. He explained that an appealable administrative decision must be a final decision and not a step in a

continuing process. He added that he had taken note of the Appeals Board's conclusions on the merits and endorsed the recommendation to dismiss the appeal. That is the impugned decision.

The complainant asks the Tribunal to reverse the impugned decision, cancel the appointment of the current incumbent to the contested position and run a new recruitment process for vacancy announcement No. 3761 or any new vacancy announcement listing the same requirements in terms of education, experience, knowledge, skills and for which he has a fair chance to compete, as an internal applicant. Alternatively, he asks the Tribunal to award him compensation in an amount equivalent to two years' salary at the P-5 level for "loss of income opportunity". In addition, he claims moral damages, punitive damages and costs. With respect to costs, he specifies that the amount claimed refers also to the time and resources spent with respect to the internal proceedings.

The ICC asks the Tribunal to reject the complaint as irreceivable on the ground that the impugned decision was not a final administrative decision. Alternatively, it asks the Tribunal to reject it as devoid of merit.

CONSIDERATIONS

1. The complainant has filed three complaints with the Tribunal concerning his unsuccessful attempts to secure appointment to a position of Head of Chambers at the ICC. They are his seventh, eighth and tenth complaints. This judgment concerns the seventh complaint. The Tribunal first addresses the receivability of this complaint, an issue raised by the ICC. For this purpose, it is only necessary to refer in outline to some of the factual background. On 23 December 2015 the ICC published a vacancy announcement (No. 3761) for the position of Head of Chambers (a P-5 level post). The complainant applied for the position on 29 February 2016. On 27 July 2016, he received an email from the Human Resources Section informing him that he "[had] not been selected [for the position]". In fact, that arose because he had not even been shortlisted (or interviewed) for the position as a result of a preliminary assessment of all applications by the Interview Panel comprising the President of the ICC and three of its Judges. Indeed no one was selected and no appointment made. However, on the same day, a new vacancy announcement (No. 8281) was published for the same position though the words "Short Term" were added to the title, reflecting the fact that it would be under a

short-term contract, and a very limited number of changes made to the qualifications and experience. None of the changes fundamentally altered the requirements for the position. The duties and responsibilities of the position did not change. The complainant applied for this second iteration of the position on 29 July 2016.

2. On 1 August 2016 the complainant filed a request for review of an administrative decision he characterised as a rejection of his “application to the position of Head of Chambers”, namely the decision communicated to him on 27 July 2016. On 1 September 2016 the Registrar decided to reject the request for review. The complainant unsuccessfully appealed to the Appeals Board which, while accepting it had jurisdiction to entertain the appeal, recommended in its report dated 3 January 2017 that the appeal be dismissed. The Registrar took issue with the Board about its jurisdiction, but nonetheless endorsed the Appeals Board’s recommendation to dismiss the appeal and did so in a decision dated 2 February 2017. This is the decision impugned in these proceedings.

3. The ICC raises, as a threshold issue, whether the complainant’s seventh complaint is receivable. The Tribunal has accepted that a staff member can challenge a selection process even if the position was ultimately not filled (see Judgment 4033), and that a flawed selection process can result in the loss of a valuable opportunity to be appointed (see Judgment 4098). In the present case, the decision to re-advertise the position flowed from a recommendation to that effect by the Interview Panel, which also recommended some reduction of the requirements (to attract more candidates) coupled with appointment to a short-term assignment “pending recruitment for the fixed term position”. As noted earlier, the complainant was able to apply for the re-advertised position and while he was unsuccessful again, that was because, again, he was assessed as not qualified. The decision not to appoint the complainant in the initial competition was superseded by the implicit cancellation of that competition. The complainant did not challenge the decision to cancel the competition and replace it with a competition with different requirements; he could have done so (see Judgment 4283). This would have been the relevant challengeable decision. The decision not to appoint him in the first instance had, in the face of the new requirements, no consequences. The Tribunal is satisfied the complaint is not receivable.

4. The complainant sought the joinder of his complaints concerning his failed attempts to secure appointment to the position of Head of Chambers. The ICC agreed but only if this complaint is receivable. However while the substratum of facts overlap to an extent, the sole legal issue arising in his seventh complaint does not arise in the other two complaints. Accordingly this complaint will not be joined with either of the others.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 20 October 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ