

L. (No. 2)

v.

ICC

133rd Session

Judgment No. 4475

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms E. L. against the International Criminal Court (ICC) on 18 May 2019, the ICC's reply of 26 August, the complainant's rejoinder of 28 September and the ICC's surrejoinder of 23 December 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant challenges the handling of her grievance complaint.

On 24 October 2016 the complainant, who was working under a temporary contract, submitted a grievance complaint for "harassment and unequal treatment" against the Chief of her Section, Ms G. The Registrar of the ICC informed the complainant on 30 January 2017 that he had decided not to take further action as there was no *prima facie* evidence to substantiate her allegations. Instead of submitting a report for misconduct to the Independent Oversight Mechanism (IOM), as suggested by the Registrar, the complainant filed on 27 April 2017 a first complaint with the Tribunal challenging that decision on the ground that it had been taken without prior referral of her case to the Disciplinary Advisory Board (DAB).

On 28 February 2018, upon a recommendation of the Appeals Board on a related case lodged by the complainant, the Registrar decided to review his previous decision and to submit the complainant's grievance

to the DAB and the IOM. Simultaneously, he applied for a stay of proceedings before the Tribunal, to which the complainant strongly objected as she considered that the referral of her case to the DAB was illegal and amounted to further harassment. On 9 March 2018 the Tribunal granted a stay of proceedings in order to encourage an amicable settlement of the dispute. On 13 March, as part of the amicable settlement process, the complainant requested an extension of her appointment, which was about to expire. Her request was granted and her appointment was extended until 30 June 2018.

On 21 March 2018 the Registrar was informed by the DAB's Secretary that, following the complainant's objections on the DAB's competence, the latter was unable to carry out its mandate. The complainant was invited to reconsider her position and cooperate with the DAB in order to enable the Registrar to take an informed decision. She refused to cooperate but mentioned that she remained open to negotiation with a view to reaching an amicable settlement of her case. On 25 May 2018, following a meeting which was attended by members of the Legal Office and of the DAB, the complainant was informed that her case would be examined. On 31 May she applied for disqualification of the DAB panel. A new *ad hoc* Chair was appointed to consider the request for disqualification and the way to deal with the case. On 21 June, in view of the complainant's continued refusal to cooperate and Ms G.'s challenge of the DAB's decision to reopen the case, the *ad hoc* Chair found that the Board was unable to carry out its mandate.

On 6 July 2018 the complainant submitted a second "grievance complaint and request for summary dismissal" of Mr H., the ICC's Legal Counsel and Chief of the Legal Office and, potentially, other staff members to the then Registrar. She denounced the "maladministration" in handling her first grievance. In August the complainant withdrew her first complaint with the Tribunal after she entered into a settlement agreement with the ICC. According to the agreement, she accepted not to take any action or institute proceedings against the ICC and its officials regarding claims, obligations and causes of action arising from her first complaint with the Tribunal. Nonetheless, she refused to withdraw her second grievance, which was referred to the DAB and the IOM on 4 October 2018. She objected to the transmission of her case to the IOM and requested the latter to refrain from taking any action. On 30 October 2018 she was invited to participate in an interview regarding the IOM's preliminary review of her grievance. She declined

the invitation. On 5 December 2018 the IOM directly requested her to confirm whether she still wanted to pursue her case. She replied that she was still unwilling to assist the IOM until the matter of its competence was resolved.

On 14 December 2018 the IOM issued a first report entitled “Outcome of Preliminary Review”. Referring to the settlement agreement of August 2018 and the complainant’s lack of cooperation, it determined that her case was to be considered as closed. On 22 January 2019 the DAB issued its report in which it concluded that it was not in a position to fairly and objectively consider the matter and suggested that further investigation by the IOM be required. On 20 February 2019 the Registrar agreed with these conclusions and decided to send the grievance back to the IOM upon the complainant’s confirmation that she wished to pursue her case and that she would collaborate with the IOM. This is the impugned decision.

By reply of 4 March 2019, the complainant acknowledged receipt of the Registrar’s “final decision” rejecting her claims of harassment and confirmed her willingness to cooperate with the IOM’s investigation regarding her allegations of acts of unsatisfactory conduct by Mr H. warranting disciplinary action. She specifically asserted that she was opposed to the IOM being seized with the harassment component of her 6 July 2018 grievance complaint as such proceedings had been closed by the 20 February 2019 decision. On 29 March 2019 the Registrar confirmed the referral of the grievance to the IOM.

The complainant filed her second complaint with the Tribunal on 18 May 2019 asking it to set aside the impugned decision and to examine the merits of her grievance complaint against Mr H. Should the Tribunal find that the allegations have been proved beyond reasonable doubt, the complainant requests it to order the summary dismissal of Mr H. and/or any other disciplinary measure that it may deem appropriate under Staff Rule 110.6(a). Alternatively, she requests that the case be referred back to the ICC. She further claims an award of 50,000 euros in compensation for moral damages and 5,000 euros in costs for the internal appeal proceedings and the proceedings before the Tribunal.

The ICC asks the Tribunal to declare the complaint irreceivable on the grounds that it is not directed against a final decision, that it shows no cause of action, and that it is moot given the settlement agreement of

August 2018. Alternatively, it requests that the complaint be dismissed as unfounded in its entirety.

CONSIDERATIONS

1. The complainant impugns the 20 February 2019 decision whereby the Registrar, endorsing the 22 January 2019 conclusions of the Disciplinary Advisory Board (DAB), sent the harassment aspect of the complainant's grievance back to the Independent Oversight Mechanism (IOM) for further investigation.

The complainant's claims before the Tribunal can be summed up as follows:

- (i) to set aside the impugned decision;
- (ii) to consider the case in full and issue a decision on the merits, or alternatively to refer the case back to the ICC;
- (iii) to award her 50,000 euros in moral damages; and
- (iv) to award her 5,000 euros in costs for the internal proceedings and for the proceedings before the Tribunal.

2. The ICC requests that the complaint be dismissed as irreceivable and in any case unfounded.

The ICC contends the complaint is irreceivable under four heads:

- (a) the impugned decision is only an internal step of the disciplinary proceedings, and thus is not a final one within the meaning of Article VII, paragraph 1, of the Tribunal's Statute. In particular, it does not adjudicate on the issue of whether Mr H.'s conduct amounted to either harassment or unsatisfactory conduct and on the consequent disciplinary measures and it does not close any part of the investigative procedure;
- (b) there is no cause of action within the meaning of Article II, paragraph 5, of the Tribunal's Statute;
- (c) the Tribunal lacks the competence to order disciplinary measures against Mr H., pursuant to Article VIII of the Tribunal's Statute; and
- (d) the complaint is moot in light of the settlement agreement of August 2018.

3. In her rejoinder, the complainant replies that:

- (a) the settlement agreement was stipulated “without prejudice”, thus it has no impact on other pending cases and issues between the parties, that fall outside those specifically settled therein;
- (b) the issue of the competence of the Tribunal to order disciplinary measures is a matter of merits and not of receivability;
- (c) the three other challenges to receivability raised by the defendant were not raised in the internal proceedings, thus they are irreceivable as new claims submitted for the first time before the Tribunal; and
- (d) the impugned decision of 20 February 2019 was a final one and it is immaterial that the Registrar, instead of closing the case, decided to re-refer it to the IOM. After having followed the whole internal disciplinary proceedings on the grievance complaint for harassment, its re-referral for preliminary investigation was no longer an option.

4. On 23 October 2019 (namely, in the period following the filing of the rejoinder and prior to the submission of the surrejoinder), the IOM issued its new report, by which it decided to close its investigation. This report was forwarded to the DAB on 24 October 2019. According to the ICC, the new facts alleged in the surrejoinder confirm that the impugned decision is not final. The complainant did not apply, under Article 9, paragraph 6, of the Tribunal’s Rules, for further written submissions in order to reply to the new facts alleged in the surrejoinder.

5. The Tribunal shall first address the issues of receivability raised by the ICC. The complainant objects that these issues were not raised by the defendant in the internal appeal proceedings, thus they fall outside the competence of the Tribunal. This objection is correct only with regard to the fourth head of the receivability challenge, related to the settlement agreement. Indeed the ICC had the possibility to raise that issue during the internal proceedings, and did not, therefore it cannot raise it now before the Tribunal (see, for example, Judgments 3160, consideration 14, and 3729, consideration 6). With regard to the other three heads, the issues raised by the ICC pertain either to the receivability of claims before the Tribunal or to the competence of the Tribunal, thus they could not have been raised by the ICC before the filing of the complaint.

6. The Tribunal holds that the complaint is irreceivable, as the impugned decision is not a final one. Pursuant to Article VII, paragraph 1, of the Statute of the Tribunal, “[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations”. The Tribunal’s case law distinguishes between final decisions and other procedural steps leading to a final decision. Ordinarily, the process of decision-making involves a series of steps or findings which lead to a final decision. Those steps or findings do not constitute a decision, much less a final one. They may not be attacked directly before the Tribunal, but they may be impugned as part of a challenge to the final decision (see, for example, Judgments 2366, consideration 16, 3433, consideration 9, 3512, consideration 3, 3860, considerations 5 and 6, 3958, consideration 15, and 3961, consideration 4).

7. In light of the above-cited case law, the Tribunal has to establish whether the 20 February 2019 decision is a final one, within the meaning of Article VII, paragraph 1, or a mere step in the internal proceedings. For this purpose, it is convenient to summarize the relevant rules governing the proceedings which led to the impugned decision. The complainant initiated the proceedings by submitting a “grievance complaint and request for summary dismissal” of Mr H., in accordance with section 7 of Administrative Instruction ICC/AI/2005/005. This Administrative Instruction deals with “sexual and other forms of harassment”, and its section 7 sets out the grievance procedures. Where an individual submits a formal complaint, the competent authority (in this case the Registrar) “[i]n accordance with Chapter X of the Staff Rules [...] shall transmit the complaint to the [DAB], which shall advise the Registrar [...] as to whether harassing behaviour has taken place and recommend what, if any, measures should be taken” (paragraph 7.3). The Registrar delivers the final decision upon the recommendation of the DAB. The final decision should be either to close the case or to adopt disciplinary measures. In the second event, proven cases of harassment shall be subject to the disciplinary measures set forth in Article 110.6 of the Staff Rules (paragraphs 7.3, 7.4 and 7.5 of Administrative Instruction ICC/AI/2005/005). The disciplinary proceedings based on charges of harassment follow the rules enshrined in Chapter X of the Staff Rules, expressly referred to under paragraph 7.3. In particular, Staff Rule 110.4 *sub* (c), (d) and (e) stipulates the investigative powers

of the DAB and the content of its report. The DAB may, at its sole discretion, require the testimony of the staff member concerned or of other witnesses, in addition to the oral or written submissions and to the original presentation of the case (Staff Rule 110.4(c) and (d)). The DAB adopts and submits a report to the Registrar, that shall include a summary of the case together with the Board's advice as to what disciplinary measures, if any, should be taken (Staff Rule 110.4(e)). According to Staff Rule 110.8, "[a] final disciplinary decision by the Registrar [...], reached at the conclusion of disciplinary proceedings in which the advice of the [DAB] is sought, may be appealed to the [...] Tribunal [...]". Further rules on disciplinary proceedings are established by the Registrar's Information Circular ICC/INF/2007/003 of 7 May 2007 containing "Rules of Procedure of the [DAB]", and by the Registrar's 5 February 2008 Administrative Instruction ICC/AI/2008/001 entitled "Disciplinary Procedures" (the Registrar being entitled thereto by Staff Rule 110.4(f)). However, neither the said Circular nor the Administrative Instruction enlarge the investigative powers of the DAB. Paragraphs 2.1 and 2.3 of Administrative Instruction ICC/AI/2008/001 deal with preliminary investigations for allegations of unsatisfactory conduct, and specifically provide for a preliminary investigation, initiated by the Registrar, prior to the referral of the case to the DAB. It is stated that the Registrar may request a full account of the facts which may be investigated from the relevant supervisors, Heads of Section and/or Division Directors. The Registrar may also "instruct appropriate and experienced staff to conduct such preliminary investigation". The investigation terminates with a preliminary outcome, whereby the Registrar shall decide either to close the case, or refer it to the DAB. However, where a formal complaint for unsatisfactory conduct, including harassment, is submitted, the Registrar shall transmit it to the DAB without a preliminary investigation being conducted (paragraph 2.9(d) of Administrative Instruction ICC/AI/2008/001).

8. The aforementioned rules on disciplinary proceedings and pertinent investigative powers need to be coordinated with the rules governing the competence of the IOM. The annex to the 27 November 2013 Resolution ICC-ASP/12/Res.6 states that:

- "[t]he IOM may receive and investigate reports of misconduct [...] by [...] all staff subject to the Staff and Financial Regulations and Rules of the Court [...]" (paragraph 28);

- “[a]ll reports of misconduct [...] made against [...] [a] staff member [...] shall, if received by the Court, be submitted to the IOM. [...] [S]taff members submitting a report against other staff members may elect to submit a copy of their report to the [...] Registrar [...]” (paragraph 33);
- the “misconduct” subject to an IOM investigation is equivalent to the “unsatisfactory conduct” described in the Staff Rules (footnote 4 to paragraph 28);
- “[t]he IOM shall duly consider all reported misconduct claims submitted to it, however, the mechanism retains discretionary authority to decide which matters to investigate. Those matters which the IOM does not intend to investigate will be referred to the relevant entity for their appropriate action” (footnote 8 to paragraph 33);
- paragraphs 42 to 45 vest the IOM with wide investigative powers and operational independence; and
- “[t]he results of investigations conducted by the IOM shall be transmitted to the [...] Registrar [...], together with recommendations, including those for consideration of possible disciplinary [...] action” (paragraph 40).

9. Irrespective of whether the decision to send back the case to the IOM was lawful or not, it is only an internal step in the procedure regarding the complainant’s harassment grievance and not a final one. In fact, the Registrar took a final decision after the filing of the present complaint based on the recommendations of the IOM. Accordingly, the complaint is irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal. As a consequence, it is unnecessary to address the further issues of receivability, certain procedural matters and the merits.

This conclusion is not intended to suggest that the complainant would have a justiciable interest in challenging the final decision.

10. Considering the irreceivability of the complaint, the complainant’s request that the Tribunal allow additional written submissions from Mr H. and/or oral hearings in order to rule on the merits of the allegations of harassment, must be dismissed.

11. As the complaint is irreceivable, it will be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2021, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ