

B.
v.
ICC

126th Session

Judgment No. 4005

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms S. B. against the International Criminal Court (ICC) on 29 June 2015 and corrected on 24 July, the ICC's reply of 25 November 2015, the complainant's rejoinder of 21 January 2016 and the ICC's surrejoinder of 28 April 2016;

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 to dismiss her complaint of harassment.

The complainant joined the ICC in 2011 as Legal Coordinator and Head of the Legal Unit of the Victims Participation and Reparations Section (VPRS). On 19 January 2014 she submitted a formal complaint of harassment against her immediate supervisor, Ms M., Chief of the VPRS. In her complaint, she also made allegations of fraud, involving misrepresentation and false certification, against Ms M. and another staff member of the VPRS who was the complainant's subordinate, Mr R., and claimed that the harassment she had been subjected to was motivated by retaliation for having reported the unsatisfactory conduct.

At the complainant's request, her complaint of harassment was put on hold until completion of the preliminary investigation of the fraud allegations raised in her complaint. The preliminary investigation was initiated on 11 March 2014. Ms M. was informed of the allegations of fraud made against her on the same date and she responded by a letter of 22 May 2014. The Registrar subsequently dismissed the complainant's allegations of fraud and closed the case.

Meanwhile, the Registrar transmitted the harassment complaint to the Disciplinary Advisory Board (DAB) for its advice on 13 May 2014, pursuant to Paragraph 7.3 of the Administrative Instruction on Sexual and Other Forms of Harassment (ICC/AI/2005/005) and Paragraph 2.9(d) of the Administrative Instruction on Disciplinary Procedures (ICC/AI/2008/001).

On 9 June 2014 Ms M. provided her reply to the complainant's allegations of harassment, arguing that they were baseless or malicious within the meaning of Paragraph 7.6 of ICC/AI/2005/005. Ms M. also referred to her response of 22 May 2014. Her reply was transmitted to the complainant on 25 June 2014. On 26 June the complainant requested the Registrar to provide her with Ms M.'s response to the fraud allegations, the preliminary investigation report and the Registrar's decision on whether to refer the matter to the DAB. She also requested that protective measures against retaliation be put in place. The Administration put in place various measures to protect her from retaliation and informed her that her request for disclosure of documents should be addressed to the DAB.

On 3 July 2014 the complainant requested the DAB to order the disclosure of the above-mentioned documents related to the allegations of fraud against Ms M. The DAB asked Ms M. for her comments on the complainant's request. On 10 August 2014 Ms M. replied that she objected to that request on the ground that these documents were not relevant to the complainant's allegations of harassment, but that she could provide them to the DAB in order for it to determine whether disclosure was warranted. She further indicated that all charges against her had been dropped and that the case on the allegations of fraud had now been closed. The DAB rejected the complainant's request as

irrelevant to the merits of the harassment case by an email of 15 October 2014, to which Ms M.'s reply of 10 August 2014 was attached.

In its report of 4 March 2015, the DAB unanimously recommended dismissing the complaint of harassment as unsubstantiated. It also found that the complaint was not baseless or malicious and, therefore, that the question of disciplinary action against the complainant did not arise. Lastly, it recommended that the complainant and her supervisor undergo a mediation process.

By a memorandum of 1 April 2015, the Registrar accepted all of the DAB's recommendations and dismissed the complaint as unsubstantiated. He directed the Chief of the Human Resources Section (HRS) to initiate and facilitate a mediation between the complainant and her supervisor. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to rule on the merits of her complaint of harassment. She claims 100,000 euros in moral damages and 20,000 euros in exemplary damages. She also claims costs. She further asks the Tribunal to order the production of Ms M.'s 22 May 2014 response to the allegations of fraud, the preliminary investigation report and the Registrar's decision concerning the referral of the fraud allegations against Ms M. to the DAB.

The ICC submits that the complaint is irreceivable to the extent that the complainant seeks to rely on events that took place after the impugned decision as evidence of continued harassment, and that her allegations with respect to performance appraisals are both irreceivable and unfounded. It asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant impugns the Registrar's 1 April 2015 decision on a number of grounds. In summary she submits that the decision is procedurally flawed and tainted by errors of law and fact. She also alleges negligence in the drafting and the implementation of the impugned decision.

2. Before dealing with the complainant's submissions, some additional background is required. In her harassment complaint, the complainant submitted that the harassment against her was in retaliation for having reported unsatisfactory conduct, namely, fraud, misrepresentation and false certification in connection with a benefit from the ICC on the part of Ms M., her immediate supervisor, and Mr R., her subordinate. In the harassment complaint, the complainant describes the reporting of the unsatisfactory conduct as the "triggering event".

3. The alleged unsatisfactory conduct concerned the compensatory time off (CTO) accorded to Special Service Agreement (SSA) contractors working in VPRS. The "triggering event" unfolded in June and July 2013. In June, the complainant spoke to her subordinate, Mr R., about the amount of leave he had taken and the amount he requested to take in the future. Mr R. claimed he was entitled to 22 additional days of leave for the CTO he had accumulated as an SSA contractor. The complainant advised Mr R. that SSA contractors were not entitled to CTO and that taking the accumulated CTO leave could amount to unsatisfactory conduct. The complainant then sought to clarify this response with Ms M. Ms M. informed the complainant that Mr R.'s account was correct. The complainant advised Ms M. to verify this with HRS as it could constitute unsatisfactory conduct and expose her to disciplinary action. The complainant added that she would not approve Mr R.'s leave request. Ms M. responded that there was no need to speak to HRS as it was the result of a VPRS policy decision to allow long-term SSA contractors to have the same leave as staff members. The complainant raised the same matter with Ms M. again in mid-July with essentially the same result. Subsequently, the complainant made some inquiries with administrative assistants concerning the recording of Mr R.'s leave and other incidental matters that are not relevant for the purpose of the present discussion.

4. The complainant claims that the "triggering event" resulted in a significant shift in Ms M.'s attitude and behaviour toward her. At paragraph 23 of the harassment complaint, the complainant summarizes the pattern of conduct she alleges constitutes harassment as follows:

“Although this did not become immediately obvious to me, the repetition and consistence of negative feedbacks and reactions and the actions taken to undermine my authority and credibility *vis-à-vis* my subordinates over the last six months clearly demonstrate a deliberate pattern of unwelcome behaviour impacting negatively on my dignity and creating a hostile and humiliating environment.”

At this juncture, it is noted that in the harassment complaint the complainant states that the reporting of the unsatisfactory conduct in relation to the fraud allegations occurred when she drew Ms M.’s attention to the fact that the manner in which she was dealing with the leave amounted to unsatisfactory conduct. It is unnecessary to consider whether or not this amounted to reporting. The fact remains, as noted below, that Ms M. was unaware of the complainant’s formal reporting of the alleged unsatisfactory conduct concerning the fraud allegations to the Administration until 11 March 2014.

5. Returning to the complainant’s submissions, in relation to the alleged procedural flaws she submits that the DAB failed to investigate her harassment complaint thoroughly and promptly and contends that the DAB’s refusal to order the disclosure of relevant documents constitutes a breach of procedural fairness. It is convenient to deal with the latter contention first. On 3 July 2014 the complainant submitted a request to the DAB for the disclosure of three documents: Ms M.’s 22 May 2014 response to the Registrar about the fraud allegations, the preliminary investigation report into the fraud allegations and the Registrar’s final decision concerning the referral of her fraud allegations against Ms M. to the DAB. These requests for disclosure arose from some observations Ms M. made in her 9 June 2014 reply to the DAB in the harassment complaint proceeding.

6. The complainant submits that Ms M., in her reply to the harassment complaint, relied on her 22 May 2014 response to the Registrar and the fact that the Registrar’s decision in relation to the fraud allegations was then still pending to challenge the complainant’s allegations of harassment and to support her submission that the complaint was baseless or malicious. Accordingly, the complainant argues she was entitled to the disclosure of the requested documents. In support of

her position, the complainant relies on the Tribunal's statement that "[a] fundamental principle of the adversarial process is the right to know and have an opportunity to respond to the evidence adduced by the opposing party" (see Judgment 3216, consideration 6), and that the non-disclosure of evidence in the absence of a reason in law "constitutes a serious breach of the complainant's right to procedural fairness" (see Judgment 3264, consideration 16). The Tribunal's case law also relevantly states that "[a] staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against [her or] him" (see Judgment 2700, consideration 6).

7. At this point, it is observed that in her formal harassment complaint the complainant engaged in an extensive analysis in support of her view that the policy implemented by Ms M. for SSA contractors in VPRS amounted to unsatisfactory conduct. In her 9 June 2014 reply, Ms M. noted that whether or not the complainant's allegations of fraud amounted to unsatisfactory conduct is irrelevant in terms of a determination as to whether harassment occurred. However, the fact of reporting unsatisfactory conduct may be relevant in a harassment case alleging retaliation.

8. Ms M. adds that the fact the complainant drew her attention to her views relating to SSA contractors cannot be considered a triggering event, as she was not even aware that the complainant had reported the alleged unsatisfactory conduct until 11 March 2014, and that it was not something which had remained in her mind. Without going into any detail, Ms M. also disputed the complainant's conclusions regarding the alleged unsatisfactory conduct and stated that she had fully developed arguments in her response to the Registrar. Relevantly, she added that "for the purposes of this case, it is sufficient to note that the events in these paragraphs do not constitute harassment, and the Complainant never alleges that they do. They should be discarded entirely." Based on this review, it cannot be said that Ms M.'s references to her 22 May 2014 response to the Registrar amount to a reliance on the contents of that document in the harassment complaint proceeding. Moreover, the DAB found it had not been established that documents

created in other proceedings on a different subject matter were relevant to the harassment complaint. The Tribunal agrees, and the complainant's request in her brief that the Tribunal order the production of the same documents is rejected for the same reason.

9. The complainant also submits that the DAB had the authority to demand the production of the requested "document" pursuant to Rule 6(d) of the Rules of Procedure of the DAB. However, it opted not to do so on the sole ground that the information was irrelevant without having examined the document. This position is rejected. Rule 6(d) has no application in the present case. It deals with the submission of written materials and provides that "[a] copy of each written submission and document furnished to the Panel of the DAB in connection with a case will generally be communicated by the DAB Secretary, upon receipt, to the other party". The rule then provides a mechanism to deal with the refusal by a party or a witness to produce a document on the grounds of confidentiality. In that situation the DAB may demand the production of the document for the sole purpose of determining whether the relevance of the document overrides its confidentiality. However, the circumstances to which this provision applies have not arisen in the present case.

10. The complainant submits that the DAB committed errors of law and fact in its consideration of her harassment complaint. The complainant contends that the DAB's finding that the decisions in relation to the renewal of General Temporary Assistance (GTA) contracts "are within the remit of a Section Head" is not supported by the relevant provisions governing the extension of appointments. In particular, she points out that Paragraph 3.1 of Administrative Instruction ICC/AI/2013/005 of 5 April 2013 on the "Duration and Extension of Fixed-term Appointments Against Established Posts" provides that "prior to the expiry of a staff member's appointment, [HRS] will notify the staff member's immediate supervisor [...] requesting a recommendation as to whether or not an extension should be offered and for how long". The complainant's position, however, fails to have regard to Paragraphs 1.1 and 1.4, which provide that this

Administrative Instruction only applies to appointments on established posts and not to GTA and short-term appointments and is, therefore, rejected. As well, the complainant's attempted reliance on Paragraph 3.2 of the Administrative Instruction as a means of amplifying the applicability of Paragraph 3.1 to GTA appointments is devoid of merit.

11. In summary, in advancing her position that the DAB made errors of fact, the complainant maintains that she "provided plenty of written evidence that her supervisor's overall pattern of undermining and humiliating behaviour created a hostile work environment for [her], thus amounting to harassment, and demonstrates that this evidence was not thoroughly considered by the DAB Panel". She adds that "[t]he documents submitted in support of [her] [g]rievance demonstrate piece by piece a pattern of unwelcome behaviour impacting negatively over months on [her] dignity as [H]ead of Unit and generating a humiliating and hostile work environment". She submits that taken as a whole, Ms M.'s pattern of acts and omissions demonstrates harassment. She also notes that an analytic chart she had prepared to assist the DAB in its consideration of the case was not even considered. It is observed that these general observations do not identify any errors.

12. The alleged specific errors of fact by the DAB identified by the complainant concern what the complainant states was an inaccurate characterization of her submissions in relation to the fact that she was prevented from completing the performance appraisals for two of her subordinates and was not consulted about the extension of their contracts. The so-called "mischaracterization", namely, "a disputed renewal of two GTA contracts" was simply the DAB's label or means of referring to the alleged event and cannot be construed as an inaccurate understanding of the complainant's submissions. The complainant also claims that the DAB's finding that Ms M. repeatedly intervened to address a tense situation between the complainant and one of her subordinates was grounded on several errors of fact. It is observed that the alleged errors are, in essence, disagreements with the findings of fact properly made by the DAB based on the evidence, and the DAB's acceptance of

Ms M.'s explanation in relation to a particular issue raised by the complainant.

13. The complainant also submits that the DAB failed to investigate her harassment complaint thoroughly and promptly. She points out that the DAB limited its examination to the submissions of the parties and failed to use any of its investigative powers provided under Rules 9 to 13 of its Rules of Procedure. In relation to this last point, Rule 6(a) of the Rules of Procedure provides that “[a]s stated in Staff Rule 110.4(c), proceedings before the DAB shall normally be limited to the original presentation of the case together with brief statements and rebuttals, made in writing or orally if so decided by the Panel”. Thus, it is for the DAB to determine whether it requires any additional information or testimony over and above that which is provided in the original presentation, statements and rebuttals to reach an informed recommendation or recommendations for consideration by the Registrar. It cannot be inferred from the fact that the DAB did not request any additional information or witness testimony that, as the complainant asserts, the DAB’s consideration of her complaint was superficial and inaccurate.

14. Contrary to the complainant’s assertions, a reading of the report shows that the DAB engaged in an in-depth consideration of the complainant’s and Ms M.’s submissions, reviewed the relevant case law, specifically considered each of the alleged forms of harassment, the issue of retaliation, and carefully weighed the evidence with which it was provided. It is also observed that the DAB’s conclusions and recommendations were based on a thorough and balanced consideration of all the relevant facts and case law. It is now well established in the case law that such a report warrants considerable deference (see, for example, Judgment 3969, consideration 11).

15. Two matters remain to be considered. First, the complainant contends that her status as a whistleblower as a result of her reporting of the fraud allegations should have prevented a consideration of Ms M.’s counterclaim that her harassment complaint was baseless or

malicious. Regardless of the complainant's status as a whistleblower, the DAB was obliged to consider Ms M.'s submission that the harassment complaint should be found to be baseless or malicious.

16. Second, the complainant points out that pursuant to Staff Rule 110.4(b) the DAB is required to issue its report within 30 calendar days of the referral of the case by the Registrar. And, although the DAB may exceptionally extend the time limit, there is no evidence of any extension. The complainant submits that the inexcusable delay from 13 May 2014 (the date on which the case was referred to the DAB) and 4 March 2015 (the date on which the DAB transmitted its report to the Registrar) is due to the actions of the DAB and Ms M., which caused her to suffer continued harassment during that period. As there is no evidence before the Tribunal concerning the "enduring harassment" it will be disregarded. However, the question remains whether there was unreasonable delay. The Tribunal is not satisfied that there was, in all the circumstances. Based on the above considerations, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 17 May 2018, Mr Giuseppe Barbagallo, 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 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ