

L. (Nos. 8 and 10)

v.

ICC

131st Session

Judgment No. 4357

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr C. L. against the International Criminal Court (ICC) on 28 June 2017, the ICC's reply of 9 October, the complainant's rejoinder of 14 December 2017, the ICC's surrejoinder of 20 March 2018, the additional submissions filed by the complainant on 24 October and the ICC's final comments thereon of 21 November 2018;

Considering the tenth complaint filed by Mr C. L. against the ICC on 14 December 2017 and corrected on 31 January 2018, the ICC's reply of 26 October (following a stay of proceedings granted by the President of the Tribunal upon the ICC's request), the complainant's rejoinder of 18 December 2018, the ICC's surrejoinder of 28 March 2019, the additional submissions filed by the complainant on 26 April and the ICC's final comments thereon of 31 July 2019;

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 cases may be summed up as follows:

The complainant challenges the decisions not to place him on the shortlist for positions 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. In 2013 the Assembly of States Parties to the Rome Statute of the International Criminal Court authorized

the Registrar of the Court to reorganize the Registry. This reorganization became known as the *ReVision* Project, which was implemented in 2014. An Information Circular entitled “Principles and Procedures Applicable to Decisions Arising from the *ReVision* Project”, which was issued in August 2014 and modified in June 2015 by Information Circular ICC/INF/2014/011 Rev.1 (hereinafter “the Principles and Procedures”), established a framework for the implementation of decisions arising from the restructuring process, and provided, in particular, that termination “shall take place only after reasonable efforts have been made to assist staff members in finding alternative employment within the Court, as well as providing them with support, in accordance with paragraphs 33-39 and 47 below, respectively”. Paragraphs 33 to 39 identified a procedure whereby staff whose positions had been abolished would be treated as “Priority Candidates” who would have to apply for newly created positions.

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 the Principles and Procedures.

Late February 2016 the complainant applied for the P-5 level position of Head of Chambers (vacancy announcement No. 3761). He was not shortlisted for that position and no candidate was appointed. Late July 2016, a new vacancy announcement (No. 8281) was issued for the same position but under a different type of contract (short-term appointment). The complainant applied for the position a few days later and was informed, on 26 September 2016, that he had not been selected. In October 2016 he filed a request for review, which was rejected on 14 November 2016. The Registrar rejected the complainant’s arguments concerning breach of procedure, errors of fact and law, and misuse of authority on the ground that his application was fully and fairly considered. The complainant filed an appeal on 12 December 2016 asking the Appeals Board to recommend that the contested decision be reversed. He asked to be given a fair chance of competing and of having his application fully considered. He added that if he was successful the appointment of the selected candidate whose appointment was contested should be cancelled. In the alternative, he sought material damages for the “loss of income opportunity”, moral and punitive damages. In addition, he asked the Appeals Board to request disclosure of the “recruitment reports” concerning vacancy announcement No. 3761 – for which no

candidate was appointed – and vacancy announcement No. 8281, together with information concerning the selected candidate.

In its report of 13 March 2017, the Appeals Board noted with great concern that the complainant claimed to have obtained and actually referred in his appeal to the content of confidential selection reports, and produced a screenshot of an email exchange involving the ICC Registrar that was given to him to support his views that the decision not to shortlist him was taken by the hiring manager. The Appeals Board recommended dismissing the appeal on the ground that the complainant had failed to show any fundamental defect in the selection process in the form of a breach of procedure, an error of fact or law, or a misuse of authority. It rejected his argument that the contested decision was motivated by considerations alien to the best interest of the ICC and formed part of a general pattern of personal bias and continuing retaliation against him.

On 7 April 2017 the Registrar informed the complainant that he had taken note of the Appeals Board's conclusions and agreed with its recommendation to dismiss the appeal. He also cautioned him to cease engaging in practices that were inappropriate in relation to his use of documents and information to which he was well aware that he was not entitled and that may be confidential. That is the decision the complainant impugns in his eighth complaint.

In the meantime, on 20 October 2016, the ICC published vacancy announcement No. 10001 for the P-5 position of Head of Chambers. The complainant, who had applied for that position, was informed on 5 May 2017 that he had not been shortlisted. On that same day, he filed a request for review against that decision, which was rejected on 23 May 2017. The complainant filed an appeal on 13 June 2017, and the Appeals Board issued its report on 19 September. It recommended dismissing the appeal on the ground that the complainant had failed to show any fundamental defect in the form of a breach of procedure, an error of fact or law, or a misuse of authority. It found no support for the allegation that he was discriminated against as a whistle-blower in retaliation for having reported various misconduct and irregularities. He was not shortlisted because he lacked the significant managerial experience required for the position.

On 17 October 2017, the Registrar informed the complainant that he had decided to endorse the Appeals Board's recommendations and thus rejected his appeal. That is the decision the complainant impugns in his tenth complaint.

In his eighth complaint, the complainant asks the Tribunal to reverse the impugned decision, cancel the appointment of the current incumbent to the position of Head of Chambers, and run a new recruitment process for vacancy announcement No. 8281 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 candidate. Alternatively, he asks the Tribunal to award him compensation in an amount equivalent to one year's 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 he spent with respect to the internal proceedings.

The ICC asks the Tribunal to reject the complaint as devoid of merit. In its surrejoinder, it submits, following the Tribunal's order to produce the selection report for the contested position, that it is irrefutable that the "selection panel" considered the complainant's application and not the hiring manager. It therefore requests the Tribunal to carefully consider that issue as a preliminary matter and summarily dismiss the complaint, pursuant to Article 7, paragraph 2, of the Tribunal's Rules, as baseless and devoid of merit.

In his tenth complaint, the complainant asks the Tribunal to reverse the impugned decision or, in the alternative 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 he spent with respect to the internal proceedings. In the complaint brief, he also asks the Tribunal to cancel the appointment of the current incumbent to the position of Head of Chambers and run a new recruitment process for 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 candidate. In his additional submissions, the complainant indicates that the incumbent of the contested position had

resigned and that the position was advertised once again in March 2019 under vacancy announcement No. 18792.

The ICC asks the Tribunal to reject the complaint 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. The complainant requested the joinder of the three complaints. The ICC agreed. For reasons explained in Judgment 4356 concerning the seventh complaint, there should be no joinder of that complaint with the other two. However the eighth and tenth complaints are joined and this judgment addresses both of them. Because the Tribunal has acceded to the complainant's request for joinder, facts and arguments can be recounted and addressed with greater economy, particularly in relation to the tenth complaint.

Eighth complaint

2. 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 (HRS) informing him that he “[had] not been selected [for the position]”. In fact, that arose because he had not been shortlisted (or interviewed) for the position as a result of a preliminary assessment of all applications by the Panel assessing this first application and comprising the President of the ICC and three of its Judges. 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 were made to the essential qualifications. None of the changes fundamentally altered the requirements for the position. The duties and responsibilities of the position did not change. The Tribunal notes that in his pleas in his eighth complaint, the complainant says “the only substantive difference” in the requirements for the position as first advertised and as second advertised was that an excellent working knowledge of the second working language of the Court was no longer

required. It was simply viewed, for the position as second advertised, as an asset. The complainant applied for this second iteration of the position on 29 July 2016. On 26 September 2016, the complainant was informed he had not been selected. Again, that arose because he had not been shortlisted (or interviewed) for the position as a result of a preliminary assessment of all applications by the Panel assessing this second application (the Second Panel) and comprising the President of the ICC, two of its Judges and the *Chef de Cabinet* of the Presidency.

3. On 14 October 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 26 September 2016. On 14 November 2016 the Registrar decided to reject the request for review. The complainant unsuccessfully appealed to the Appeals Board, which recommended in a report dated 13 March 2017 that the appeal be dismissed. The Registrar endorsed the Board’s recommendation to dismiss the appeal by decision dated 7 April 2017. This is the decision impugned in these proceedings. The complainant seeks to characterise in some of his pleas the decision he challenges in these proceedings as the decision not to shortlist him rather than the decision not to appoint him involving, necessarily in this case, the decision to appoint the successful candidate. He focuses on the shortlist “decision” seemingly to gain a forensic advantage of not having to confront the Tribunal’s case law concerning its limited role in decisions to appoint a person to a post. This characterisation should be rejected.

4. The complainant’s pleas in his brief are divided into six sections under the general heading “MERITS” and, additionally, a seventh section entitled “[c]onclusion on merits”. The first section concerns alleged procedural flaws in connection with the proceedings before the Appeals Board. That section is, in turn, comprised of two sub-sections, one concerning the alleged delay in dealing with the appeal and the composition of the Appeals Board and the other concerning an alleged denial of the disclosure of documents. The second section relates to an alleged lack of authority concerning the decision not to shortlist his application. The third section deals with an alleged violation of the applicable rules of form and procedure concerning the recruitment process and the fourth section addresses alleged errors of fact. The fifth

section addresses alleged errors of law and the sixth section concerns an alleged misuse of authority.

5. It is convenient to consider later in this judgment the alleged flaws in the internal appeal process. The issue raised by the complainant in the second section of his brief relates to an alleged lack of authority concerning the decision not to shortlist his application. It is a plea without merit. It is based on a false factual premise, namely the decision not to shortlist the complainant was made by HRS and it had no authority to do so. It is clear from its report (which is now before the Tribunal in a redacted form) that the Second Panel itself agreed on the composition of the shortlist by assessing all 22 applications (necessarily including the complainant's application) and shortlisting five. This argument is unfounded and should be rejected.

6. The pleas advanced by the complainant in the third section of his brief involve an alleged violation of the applicable rules of form and procedure governing the recruitment process, in particular Staff Rule 104.18 and Administrative Instruction ICC/AI/2016/01. The effect of the former was to require that "the fullest regard be paid, in filling vacancies, to the requisite qualifications and experience of staff members already in the service of the Court". The effect of the latter was that a position of the type the complainant was applying for was to be filled by competitive process involving assessment of qualification and experience. Even if these provisions were applicable, these pleas proceed on the assumption that the complainant's assessment of his experience is correct and, in effect, should also be accepted by the Tribunal as correct and foundational to this plea. It is to be recalled that the Second Panel comprised the President of the ICC, two of its Judges and the *Chef de Cabinet*. There is no evidence before the Tribunal that would suggest that the Panel did not undertake a *bona fide* assessment of the qualifications of all applicants including the complainant. In addition, it is not for the Tribunal to undertake its own assessment (see, for example, Judgment 3669, considerations 4 and 6), other than to consider whether some essential fact was overlooked or clearly mistaken conclusions were drawn from the evidence. Neither circumstance appears from the record.

7. Moreover the Appeals Board addressed the complainant's experience by reference to the requirements of the position. Its report is balanced and considered. It concluded it had been open to the Second Panel to find, based on the requirements and expectations set for the post, that the complainant's previous work experience did not satisfy the required managerial experience. While the complainant challenges the Board's conclusions including, as discussed shortly, on an unsubstantiated allegation of bias, deference should be given to the Appeals Board's conclusions (see, for example, Judgment 4180, consideration 7). Accordingly this plea is unfounded and should be rejected. On this general topic, the complainant also criticises the use of the concept by HRS, repeated by the Board, of the qualifying managerial and coordination experience having to be "fundamentally the same" as that of the position. This was said to be an unlawful alteration of the qualifications in the vacancy announcement. It was not. Plainly enough any assessment of qualifying experience should be made by reference to the likely needs and demands of the position. Such an approach was unexceptionable.

8. The complainant argues in the fourth section of his brief there had been errors of fact made in the consideration of his application and in the fifth section, errors of law made as well. But the gravamen of both arguments is that the complainant was qualified and any decision based on a conclusion he was not, involved an error of fact and the failure to process his application for the same reason involved an error of law. But as discussed in the preceding considerations, the Tribunal will not proceed on the basis that his premise is correct, namely that he was qualified. These pleas are unfounded and should be rejected.

9. In the sixth section of his brief the complainant alleges misuse of authority. Pivotal to this argument is that he was a whistle-blower and, for that reason, had been retaliated against by not being shortlisted and selected. Also pivotal to this argument was a change made to the qualifications concerning language (discussed in consideration 2 above) designed, so the complainant contends, to facilitate the appointment of what proved to be the successful candidate and who the complainant contends was not, in any event, qualified to be appointed. The complainant bears the burden of establishing retaliation (see Judgment 4261, consideration 10), and he has not done so. His candidature failed because

he was assessed as not having the requisite managerial experience. It cannot be inferred from all the material before the Tribunal that the Second Panel comprising the President of the ICC, two of its Judges and the *Chef de Cabinet* undertook the assessment of all candidates and the complainant in particular having regard to the complainant's role in the organization which he characterises as that of whistle-blower.

10. The complainant argues that he was subject to unequal treatment and discrimination and a misuse of authority because, unlike him, candidates were shortlisted for the position even though it was later revealed in the first evaluation round that they did not satisfy the language qualifications. But this relates to the first competition, which was implicitly cancelled. Accordingly this argument is irrelevant to the second competition. These arguments in section six are unfounded and should be rejected.

11. This leads to a consideration of arguments advanced in the first section of the complainant's brief concerning alleged procedural flaws in connection with the proceedings before the Appeals Board. It is to be recalled that this section is, in turn, comprised of two sub-sections, one concerning the alleged delay in dealing with the appeal and the composition of the Board and the other concerning an alleged denial of the disclosure of documents. Insofar as the complainant challenges the composition of the Board and the delay in composing it, he does not point to any adverse legal consequences and, indeed, he accepted the composition at the time, while noting the alleged irregularity. This is not a point of substance and should be rejected.

12. However the complainant's pleas in relation to the production of documents are of substance. It is sufficient to refer only to the request of the complainant in his statement of appeal dated 12 December 2016. Quite explicitly he sought, inter alia, the selection reports for vacancy announcements Nos. 3761 and 8281. In its report of 13 March 2017 the Appeals Board explained why it rejected this request. It said that "[n]one of the confidential selection report constitutes an essential document upon which the Impugned Decision not to shortlist the [complainant] for the position was based". It also characterised other aspects of the request for the production of documents as a fishing expedition. This approach is plainly at odds with the Tribunal's case law.

What the complainant was seeking was evidence to which he was entitled, even if in a redacted form (see Judgment 4293, consideration 4, citing Judgment 4023, consideration 5). While these reports, as completed, are entirely unresponsive to one of his central arguments in these proceedings (who did the shortlisting), they could have been to the opposite effect. Moreover if they had been provided, the complainant may have abandoned this argument and concentrated on others. The Tribunal notes that these reports have been provided in these proceedings as a result of a request of the Tribunal. However, the complainant, who makes a clear distinction in the complaint form and in his submissions between moral and punitive damages, does not seek moral damages for that failure. This breach does not warrant, as sought by the complainant, an award of punitive damages.

13. The Tribunal does not accept, as argued by the complainant, that the Appeals Board's approach to the production of documents (even if considered with other aspects of its management of the internal appeal criticized by the complainant) manifests bias. While the reasoning of the Board in relation to the production of the documents is flawed and its approach erroneous, it cannot be said the Board was doing anything other than endeavouring to exercise *bona fide* its powers in the appeal.

Tenth complaint

14. On 20 October 2016, the ICC published a vacancy announcement (No. 10001) for the position of Head of Chambers on a fixed-term contract. The complainant applied unsuccessfully for the position (he was not shortlisted) and he thereafter followed the same path as discussed in relation to his eighth complaint, of seeking a review and unsuccessfully appealing internally. Mostly, the details of these steps and the arguments raised in relation to them need not be set out (save in respect of the circumstances in which the complainant was not shortlisted and an aspect of the internal appeal process), as any differences between his eighth and tenth complaints are immaterial. Also, mostly, the arguments he advances in his tenth complaint are substantially the same as the arguments dealt with above and should be rejected for the reasons already given notwithstanding they concern events occurring at a later time.

15. As he has in his eighth complaint, the complainant argues that the decision not to shortlist him was not made by the Panel assessing this third application (the Third Panel). The evidence does not support this argument. It is clear from the Third Panel's report that it was involved in the process and other evidence before the Tribunal establishes to the Tribunal's satisfaction that this involved some initial assessment by the hiring manager who consulted with the Third Panel which made the ultimate decision. The complainant seeks to utilise statistical data and other information revealed in the Third Panel's report to show this is not correct. His analysis is based, in part, on him being an internal candidate but the Tribunal is satisfied that for the purposes of the analysis of the data and information, he was treated as an external candidate even if, for other purposes, he was to be treated as an internal candidate.

16. The Appeals Board hearing the complainant's appeal against his non-selection for the post of Head of Chambers on a fixed-term contract declined the complainant's request that certain documents be produced. This involves the same error discussed in relation to the eighth complaint. However, the complainant, who makes a clear distinction in the complaint form and in his submissions between moral and punitive damages, does not seek moral damages for that failure. This breach does not warrant, as sought by the complainant, an award of punitive damages.

One specific matter raised by the complainant in relation to his internal appeal only in relation to his tenth complaint concerns an email relating to the ICC's Case Law Database and the complainant's involvement in its creation. It was provided by the ICC to the Appeals Board as being a copy of the document the complainant himself had reproduced in furtherance of arguments he had advanced earlier. In the proceedings before the Board the complainant argued it was a forgery. The Board rejected "in the strongest terms" the allegation of forgery and that its production was a deliberate attempt to mislead the Board. The Board was entitled to take that approach in the circumstances given that, as it pointed out, the substance of the document (the typed portions) were identical. Moreover the ICC has explained to the Tribunal's satisfaction in these proceedings the differences between the two versions of the document.

General conclusion

17. Several inconsequential additional issues raised by the complainant in both complaints have not been explicitly addressed in these reasons but all are unmeritorious and are rejected. The complainant has, in earlier proceedings leading to Judgment 3908, persuaded the Tribunal he was treated unlawfully by the ICC for which he was awarded significant damages exceeding 200,000 euros. As explained in consideration 21 of Judgment 3908 he was awarded significant material damages on the basis that he lost an opportunity to remain in employment with the ICC and on the footing that he could have expected a further five-year contract renewal with the organization. It is unnecessary to consider whether the damages so awarded would denude of any substance his right to moral or material damages in these proceedings had he been successful, because he has not been. Judgment 3908 was delivered in public shortly after the complainant filed his tenth complaint and several months after he filed his eighth. Both proceedings could have been discontinued after the complainant became aware of his success and the reasons for it in his third complaint founding Judgment 3908. The complainant ought to have appreciated that a right to bring proceedings in the Tribunal is not a license to litigate on any topic raising any conceivable argument and to do so repeatedly. It unreasonably taxes the resources of the defendant organization and also the resources of the Tribunal. It is tantamount to an abuse of process that needs to be deprecated in the strongest terms.

18. In light of the above, his complaints must be dismissed in their entirety.

DECISION

For the above reasons,

The complaints are 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