

S.
v.
ICC

131st Session

Judgment No. 4361

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms J. S. against the International Criminal Court (ICC) on 29 September 2018 and corrected on 6 November 2018, the ICC's reply of 27 February 2019, the complainant's rejoinder of 8 April, corrected on 19 April, and the ICC's surrejoinder of 30 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 case may be summed up as follows:

The complainant challenges the decision to suspend her pending the outcome of a disciplinary procedure.

Facts relevant to this case are to be found in Judgment 4362, delivered concurrently herewith, concerning the complainant's summary dismissal for serious misconduct. Suffice it to recall that following the publication in the press of a series of articles alleging, amongst other things, that the complainant had disclosed information related to the ICC's ongoing investigation of the Libya situation to the ICC's former Prosecutor (Mr O.), and that she had met with Mr O. and a client of his (Mr T.) who was closely connected with persons targeted by that investigation, the complainant was informed that the matter had been referred to the Independent Oversight Mechanism (hereinafter "the IOM"). On 6 October 2017 the complainant was suspended with full

pay for an initial period of three months pending completion of the IOM's investigation of the allegations against her. The Notice of Suspension specified that this step was being taken in accordance with Staff Rule 110.5(a), in order not to prejudice the interests of the Office of the Prosecutor and the Court and to ensure the integrity of the investigation.

The IOM submitted its investigation report to the Prosecutor on 7 December 2017. On 3 January 2018 the Prosecutor extended the suspension by one month to allow time for her to consider the investigation report and to take a decision as to whether to pursue the matter. She emphasised that, as the disciplinary proceedings were ongoing, the reasons underlying the original suspension remained valid. On 15 January 2018 the complainant lodged a request for review of the decision of 3 January to extend her suspension, and of "all the previous decisions on which it relie[d]".

In light of the findings of the IOM investigation, the Prosecutor decided that the matter should be pursued in accordance with Section 2.6 of Administrative Instruction ICC/AI/2008/001 on disciplinary procedures. She notified the complainant of that decision on 6 February 2018 and invited her to respond to the allegations.

By a letter of 12 February 2018, the Prosecutor informed the complainant of her decision on the complainant's request for review. She considered that the request was time-barred insofar as it sought to challenge her decision to submit the allegations of misconduct to the IOM for an initial review and the initial suspension decision, and that it was unmeritorious insofar as it concerned the subsequent decision to extend the suspension. She observed that as the reasons for the original suspension remained valid, and given the serious nature of the allegations, the complainant's presence in the Office would be prejudicial to the Court. The extension was therefore necessary.

The complainant was informed by an email of 22 February 2018 that her suspension had been further extended until 22 April 2018. On 20 March 2018 she lodged an appeal with the Appeals Board challenging the rejection of her request for review on two grounds. Firstly, she argued that, based on the available evidence, there was no valid and legitimate basis for the suspension and its extension. Secondly, she argued that she was denied the right to be heard before the suspension decision was taken.

On 5 April 2018 the Prosecutor decided to refer the allegations of misconduct against the complainant to the Disciplinary Advisory Board. She informed the complainant on 20 April that her suspension had been extended again until 22 June 2018, because the disciplinary proceedings were ongoing and the reasons for the initial suspension continued to apply.

The Appeals Board issued its report on 8 June 2018. It considered that neither of the grounds of appeal put forward by the complainant was meritorious and therefore recommended that the challenged decision be maintained. Nevertheless, the Board noted that according to Staff Rule 110.5(a) such a measure should normally not exceed three months. Emphasising the negative impact of the suspension on the complainant, it observed that, with the passage of time, her interest in returning to the workplace even if the disciplinary proceedings had not been completed might well outweigh the Prosecutor's interest in maintaining the suspension.

By an email of 21 June 2018, the Prosecutor notified the complainant that her suspension was further extended until 22 August 2018. The Prosecutor stated that she was aware of the length of the suspension and the impact it might have on the complainant, but that she considered that her return to work would still be prejudicial to the interests of the Court.

By a letter of 4 July 2018, to which a copy of the Appeals Board's report was attached, the Prosecutor informed the complainant that she had decided to accept the Board's conclusions and to maintain the challenged decision. She added that, in accordance with the Board's recommendation, she would take into account the overall length of the suspension in the event that she decided to extend it further. That is the impugned decision.

The complainant claims moral damages in the amount of 150,000 euros, exemplary damages in the amount of 50,000 euros, and costs in the amount of 35,000 euros to cover not only her counsel's fees but also the cost of an expert cyber forensics report that she obtained.

The ICC asks the Tribunal to dismiss the complaint as unmeritorious in its entirety.

CONSIDERATIONS

1. The complainant is a former member of the staff of the ICC who, at the time serious and adverse allegations were made against her, was working in the Office of the Prosecutor. She impugns in these

proceedings a decision of the Prosecutor of 4 July 2018 to dismiss an appeal challenging an earlier decision to suspend her on full pay pending the resolution of an allegation of misconduct against her. In related proceedings the subject of a judgment given at the same time as this, she challenges her dismissal for serious misconduct. Neither the complainant nor the ICC sought the joinder of the two proceedings. This is appropriate because the factual issues are different, as are the legal issues, notwithstanding that they arise from the same continuum of events. Nor did they seek the joinder of either of these proceedings with similar proceedings concerning the suspension and dismissal of another former staff member.

2. The factual background leading to the suspension of the complainant and her challenge to it can be set out comparatively briefly. Specific facts concerning each of the various grounds relied on by the complainant to impugn the decision will be referred to later. On and from 29 September 2017, articles appeared in European media making serious and adverse allegations against the former ICC Prosecutor, Mr O. The articles also made specific adverse allegations against the complainant concerning her conduct. After the allegations concerning the complainant (and another staff member) came to the attention of the Office of the Prosecutor, the Deputy Prosecutor, Mr S., wrote on behalf of the Prosecutor to Mr F., the Head of the IOM, by letter dated 3 October 2017. The letter set out the allegations, in a summary way, against the complainant and the other staff member.

3. The purpose of the letter was described in the first and fourth paragraphs. In the first paragraph the identified purpose was to submit material to the IOM “to gauge whether, following a preliminary review, the matter ought to proceed to a full investigation pursuant to Resolution ICC-ASP/12/Res.6 of the Assembly of States Parties, para. 28, Section C of Annex, ‘Operational mandate of the Independent Oversight Mechanism’”. In the fourth paragraph the identified purpose was “to refer the matter to the IOM so that the allegations can, in the first instance, be looked at by a body independent of the Office to determine whether a full investigation, or ‘preliminary investigation and fact-finding’ within the meaning of AI (ICC/AI/2008/001, dated 5 Feb. 2008), is warranted, first, and if so, to conduct such an investigation”.

4. Mr F. wrote to the Prosecutor by internal memorandum dated 5 October 2017 responding to the “report” of 3 October 2017. Mr F. said the IOM had undertaken a preliminary review and its purpose was “to determine whether there [were] reasonable grounds to pursue the report as received to investigation by the IOM”. He went on to say that the IOM’s preliminary review had determined that in its opinion, the allegations in the report did come within the legal mandate of the IOM and the criteria to pursue an investigation had been met. He confirmed that the IOM would conduct an investigation and set out the administrative arrangements for it.

5. On 6 October 2017 the Prosecutor wrote to the complainant telling her that pursuant to Staff Rule 110.5(a) she was suspended for three months on full pay. The complainant had, the previous day, been given written notice of the allegations and that the IOM would conduct a full investigation. The stated reason in the 6 October 2017 letter for the suspension was “in order not to prejudice the interests of the Office of the Prosecutor and the Court and to ensure the integrity of the investigation [...]”.

6. The IOM released a report on its investigation on 7 December 2017 concluding, amongst other things, that “there [was] clear evidence that [the complainant] committed misconduct through the unauthorised meeting with persons who were clearly connected in some manner with the Libya investigation, and through the unauthorised disclosure of information obtained in the course of her [Office of the Prosecutor] work with those same persons”. On 3 January 2018 the Prosecutor wrote to the complainant informing her of a further extension of the suspension of one month. The Prosecutor observed that at that stage “the disciplinary proceedings [were] ongoing and ha[d] not yet reached a conclusion” and said, in effect, that the further suspension was justified for the reasons given in the preceding consideration. The suspension was further extended on 22 February 2018 (for two months), on 20 April 2018 (until 22 June 2018) and on 21 June 2018 (until 22 August 2018). The complainant was summarily dismissed on 3 August 2018. During this period, the complainant unsuccessfully challenged her suspension by request for review and then by internal appeal to the Appeals Board. On 4 July 2018 the Prosecutor effectively dismissed the complainant’s appeal against her suspension. In all, the suspension was for a little over ten months.

7. In her brief, the complainant advances six grounds impugning the decision to suspend her. The first is that there was no legitimate and reasonable basis for the suspension and its extensions. The second is that it constituted unequal and unfair treatment. The third ground is that the complainant posed no danger to the Court. The fourth ground is that the complainant had no opportunity to be heard and the fifth ground is that there had been a lack of due process and violations of fundamental rights. The sixth ground is that there had been no justification for the extensive delay and harm caused. It should be noted at the outset that the Tribunal's case law establishes that a decision to suspend is a discretionary one and is subject to limited review (see Judgments 3496, consideration 2, and 3035, consideration 10).

8. It should also be noted, at this point, that the complainant is represented in these proceedings by a lawyer who represented another former member of the staff of the ICC challenging her suspension and ultimately, her dismissal. The grounds and arguments raised in these proceedings concerning the complainant's suspension substantially mirror the grounds and arguments raised on behalf of the other staff member. Necessarily, the Tribunal's discussion of the grounds also mirrors its discussion in the other proceedings.

9. The Tribunal considers the first ground that there was no legitimate and reasonable basis for the suspension and its extensions. The gravamen of this argument is that the Prosecutor and her staff knew that the allegations that appeared in the media were false. But that is not the point. Serious allegations had been made in the media. The IOM had undertaken a preliminary review, at the Prosecutor's request, of the allegations of unsatisfactory conduct against the complainant and another staff member. On the basis of that preliminary review, the IOM determined there were reasonable grounds to undertake an investigation. This was the setting within which the initial decision to suspend the complainant was made. It was, in these circumstances, open to the Prosecutor to exercise her discretionary power to suspend the complainant. Moreover the power to suspend conferred by Staff Rule 110.5(a) can be, having regard to its terms, exercised at the beginning of the fact-finding process. This ground should be rejected.

10. In support of her second ground, that the suspension constituted unequal and unfair treatment, the complainant points to similar allegations made against the present Prosecutor in the media and argues that she was treated differentially. It is difficult to see how the Prosecutor and the complainant were in the same or similar positions in fact and in law, a condition precedent to the engagement of the legal principle of equal treatment (see Judgment 4157, consideration 13, and the cases cited therein). In any event and more fundamentally, the Tribunal has long recognised that the principle of equal treatment cannot be invoked to protect misconduct (see Judgment 3575, consideration 5, and the cases cited therein). By parity of reasoning, it cannot be invoked in relation to suspension during investigation of misconduct. This ground should be rejected.

11. The third ground to be addressed is that the complainant posed no danger to the Court. The power to suspend conferred by Staff Rule 110.5(a) is enlivened if, relevantly, the Prosecutor decides that “the staff member’s continuance in service would prejudice the interests of the Court”. This Rule is, hierarchically, the governing normative legal document. This criterion is expressed in the most general terms and is plainly intended to confer on the Prosecutor a power to undertake the widest of discretionary evaluations. It is not for the Tribunal to substitute its view for that of the Prosecutor (see Judgments 3496, consideration 2, and 2365, consideration 4(a)). In any event the approach of the Prosecutor was clearly open to her on the facts of this case. This ground should be rejected.

12. The fourth ground is that the complainant had no opportunity to be heard and it is convenient to consider this with the fifth ground, that there had been a lack of due process and violations of fundamental rights, which is the same point differently expressed in these proceedings. In her pleas, the complainant argues that no action, including suspension, should have been undertaken without hearing her account. But Judgment 3863, consideration 13, clearly establishes that suspension can take place at the outset and can occur before the investigation of the allegations and there is no violation of due process rights for this to occur (see also Judgments 3502, consideration 17, and 3138, consideration 10). Mistakenly, the complainant calls in aid Administrative Instruction ICC/AI/2008/001 and effectively says it modifies Staff Rule 110.5(a).

But Staff Rule 110.5(a) deals with suspension and does not expressly or impliedly confer a right on a staff member to be heard before a decision is taken to suspend that staff member. Nor does Administrative Instruction ICC/AI/2008/001 expressly or impliedly confer such a right to be heard. These grounds should be rejected.

13. The complainant argues in her sixth ground that there had been no justification for the extensive delay and harm caused. This concerns the duration of the suspension viewed overall. The Appeals Board recommended in its report of 8 June 2018 that the appeal be dismissed and noted the appeal was only against the first extension of the suspension. It nonetheless recommended that the Prosecutor take into account the overall length of the suspension if she decided the suspension should be maintained further. There was one more decision to suspend on 21 June 2018. The ICC argues in these proceedings this claim concerning the overall length of the suspension is not receivable as the duration of the suspension was not raised in the internal appeal process. As just noted, the subject matter of the internal appeal was the first extension (on 3 January 2018) only and there was no appeal against any subsequent decision to extend the suspension, including the last decision in June 2018 before the complainant's summary dismissal in August 2018. The complainant has not exhausted internal means of redress in relation to all decisions resulting in the entire period of suspension. This claim is irreceivable. Thus this ground should be rejected.

14. The complainant has failed to establish that any aspect of the decision to suspend her and of the extension of the suspension in January 2018 was unlawful. Accordingly the complaint should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 23 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