S. (No. 2)

v.

ICC

131st Session **Judgment No. 4362**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms J. S. against the International Criminal Court (ICC) on 1 November 2018 and corrected on 15 November 2018, the ICC's reply of 27 February 2019, the complainant's rejoinder of 8 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 her summary dismissal for serious misconduct.

The complainant joined the ICC in 2004 as an International Cooperation Adviser, at grade P-3, in the Office of the Prosecutor. At the material time, she was part of a team investigating the situation in Libya.

On 25 September 2017 the complainant received an email from a journalist who said that she was writing an article about the former ICC Prosecutor (Mr O.) in which the complainant would also be mentioned. The article concerned Mr O.'s work for an initiative known as "Justice First", which had been founded by a Libyan businessman (Mr T.) who, according to the journalist, had close links with persons who were under investigation by the Office of the Prosecutor. The journalist alleged,

amongst other things, that in May 2015 the complainant had shared information related to the ICC's ongoing investigation of the Libya situation with Mr O., and that in June 2015 she had met with Mr O. and Mr T. in The Hague. She invited the complainant to answer a series of questions concerning these allegations. That same day, the complainant forwarded the journalist's email to her supervisors seeking guidance as to how to respond. She denied having disclosed any confidential information, and although she acknowledged that she had met with Mr O. and Mr T. in The Hague, she recalled that their discussion had been brief and that she "just gave the public lines on the Libya investigation".

Shortly afterwards, a series of articles appeared in the press containing various allegations of inappropriate conduct on the part of Mr O. Some articles specifically mentioned the complainant, alleging that she had disclosed information obtained in her capacity as an ICC staff member and that she had met with Mr O. and Mr T. in The Hague on 13 June 2015. The articles were said to be based on some 40,000 documents obtained by a French online journal and shared with other members of the European Investigative Collaborations network. Internet links to some of these documents were provided. They included screenshots of what appeared to be an email exchange between the complainant and Mr O., in which she arranged to meet with him and drew his attention to information concerning Mr T. that her colleagues had found on the Internet.

On 3 October 2017 the Prosecutor requested a preliminary review of the allegations against the complainant by the Independent Oversight Mechanism (hereinafter "the IOM")in order to determine whether they should be the subject of a full investigation. On 5 October 2017, having been informed by the Head of the IOM that a full investigation by his service was warranted, the Prosecutor formally notified the complainant of the opening of the investigation. The complainant was suspended with full pay pending completion of the investigation.

In her submissions to the IOM, the complainant mainly sought to establish that the Prosecutor had committed misconduct by referring for investigation allegations of misconduct that she knew to be false, and by breaching the confidentiality of the IOM process in her public statements concerning the press revelations. The IOM referred these allegations in due course to the Presidency as a complaint of misconduct against the Prosecutor, but the complaint was dismissed as manifestly unfounded.

The IOM submitted its investigation report to the Prosecutor on 7 December 2017, indicating that two signed witness statements referred to in the report would follow shortly. These were submitted on 23 January 2018. The IOM concluded that there was "clear evidence" that the complainant had committed misconduct. It recommended that disciplinary action be initiated and that summary dismissal be considered in view of the seriousness of the misconduct.

On 6 February 2018 the Prosecutor notified the complainant that she had decided to pursue the case in accordance with Section 2.6 of Administrative Instruction ICC/AI/2008/001 on disciplinary procedures. She informed the complainant of the allegations against her, provided her with a copy of the IOM's investigation report and invited her to respond within ten working days. Having obtained an extension of this deadline, the complainant submitted her response on 1 May 2018. She mainly argued that the allegations had not been proved beyond reasonable doubt, as required, and that in any case she had committed no misconduct because her meeting with Mr O. had been arranged for personal reasons and hence required no authorisation, and no confidential information had been disclosed. Having considered the complainant's response, the Prosecutor decided to refer the matter to the Disciplinary Advisory Board in accordance with Section 2.9(b) of the above-mentioned Administrative Instruction. In so doing, she explained that, based on the evidence in her possession, she had reached the conclusion that the facts appeared to indicate that the complainant had communicated confidential information to Mr O., his team, and Mr T., and had attended an unauthorised meeting with Mr O. and Mr T., in breach of various provisions of the Staff Regulations and Staff Rules.

After several exchanges of submissions between the parties, the Disciplinary Advisory Board submitted its report to the Prosecutor on 4 July 2018. It found that there was sufficient evidence to conclude beyond reasonable doubt that the complainant was guilty of serious misconduct, and unanimously recommended that she be summarily dismissed. By a letter of 3 August 2018, the Prosecutor informed the complainant that she accepted the Board's conclusions and that, having taken into account the various aggravating and mitigating circumstances, she had decided to accept the recommendation of summary dismissal. That is the impugned decision.

The complainant asks the Tribunal to award her moral damages, material damages to compensate for the loss of her employment contract from August 2018 to 31 December 2019, when it was due to end, and costs in the amount of 35,000 euros.

The ICC submits that the complaint should be dismissed as unfounded in its entirety.

CONSIDERATIONS

1. The complainant is a former member of the staff of the ICC who, at the time she was summarily dismissed, was working in the Office of the Prosecutor. She impugns in these proceedings the decision of the Prosecutor of 3 August 2018 to summarily dismiss her following a recommendation from the Disciplinary Advisory Board that she be summarily dismissed.

2. The factual background leading to the dismissal of the complainant can, at this point, be set out comparatively briefly. 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. That day the complainant was given written notice of the allegations and that the IOM would conduct a full investigation.

5. The IOM released a report on its investigation on 7 December 2017 concluding, amongst other things, that there was "a very high probability [...] that the allegations made against [the complainant] [we]re correct". The matter was referred by the Prosecutor, on 5 April 2018, to the Disciplinary Advisory Board requesting the Board to provide its advice within 30 days. After significant delays, the Board sent a report to the Prosecutor on 4 July 2018. As noted earlier, the Prosecutor decided on 3 August 2018 to summarily dismiss the complainant, as recommended by the Board. This is the decision impugned in these proceedings.

6. In her brief, the complainant advances four grounds for impugning the decision to summarily dismiss her. The first ground is that the IOM investigation was procedurally, factually and legally flawed. This ground contains two elements. The first is that there had been a breach of due process and the second is that the IOM erred legally and factually. The second ground is that the requisite standard of proof was not satisfied and the Prosecutor erred in ignoring and giving no weight to the credible innocent explanation. The third ground is that the disciplinary sanction was disproportionate. The fourth and final ground is that the IOM's mandate is not legitimate.

7. It is convenient to commence by addressing the complainant's second legal argument, namely that the requisite standard of proof was not satisfied and the Prosecutor erred in ignoring and giving no weight

to the credible innocent explanation. The relevant legal standard is beyond reasonable doubt. The role of the Tribunal in a case such as the present is not to assess the evidence itself and determine whether the charge of misconduct has been established beyond reasonable doubt but rather to assess whether there was evidence available to the relevant decision-maker to reach that conclusion (see, for example, Judgment 3863, consideration 11). Part of the Tribunal's role is to assess whether the decision-maker properly applied the standard when evaluating the evidence (see Judgment 3863, consideration 8).

8. The standard of proof of beyond reasonable doubt does not exist to create an insuperable barrier for organisations to successfully prosecute disciplinary proceedings against staff members. Indeed it should not have that effect. What is required is discussed in many judgments of the Tribunal. Rather the standard involves the recognition that often disciplinary proceedings can have severe consequences for the affected staff member, including dismissal and potentially serious adverse consequences on the reputation of the staff member and her or his career as an international civil servant, and in these circumstances it is appropriate to require a high level of satisfaction on the part of the organisation that the disciplinary measure is justified because the misconduct has been proved. The likelihood of misconduct having occurred is insufficient and does not afford appropriate protection to international civil servants. It is fundamentally unproductive to say, critically, this standard is the "criminal" standard in some domestic legal systems and a more appropriate standard is the "civil" standard in the same systems involving the assessment of evidence and proof on the balance of probabilities. The standard of beyond reasonable doubt derived from the Tribunal's case law as it has evolved over the decades, serves a purpose peculiar to the law of the international civil service.

9. The impugned decision of the Prosecutor of 3 August 2018 was substantially based on the consideration and analysis of the evidence by the Disciplinary Advisory Board. While the Prosecutor said she had undertaken a careful consideration of the available evidence, that was in the context of also saying she had undertaken a careful consideration of the Board's report. No independent analysis of the evidence was undertaken by the Prosecutor in the impugned decision.

10. It is convenient to commence by focusing on the Board's consideration of two related factual issues. One was whether the complainant was aware that at the meeting of 13 June 2015, Mr T. would be present in addition to Mr O. And if the answer to that is in the affirmative, whether she was authorised to attend such a meeting with both of them. Plainly enough, had the complainant not been aware Mr T. was to be there, the whole question of authorisation would have taken on a different colour, indeed no issue of authorisation might have arisen. Before embarking upon consideration of the Board's approach it is convenient to mention one further aspect of the standard of proof. The standard of beyond reasonable doubt concerns both the finding of specific facts and the overall level of satisfaction that the case against the staff member has been made out. In relation to the proof of any essential relevant fact, the person or body charged with the task of assessing the evidence and making a decision in the context of determining disciplinary proceedings must be satisfied beyond reasonable doubt that a particular fact exists.

11. In paragraph 45 of its report, the Disciplinary Advisory Board addresses the question, amongst others, whether the complainant knew Mr T. would be at the meeting. It records that the position of the complainant was that she did not expect him to be present. The Board does not then tackle the question of whether, on all the evidence, it was proved beyond reasonable doubt that she knew he would be present. Rather it digresses into a consideration of whether she knew who Mr T. was before the meeting. The central evidence is this. As recorded in the Prosecutor's referral of the matter to the Board dated 5 April 2018, the complainant said in a November 2017 statement to the IOM she was asked before the meeting by Mr O. whether Mr T. could join the meeting and whether it was "OK". The sentence begins with the words "As I recall", which are almost universally words of qualification or reservation. But this qualified admission is nonetheless inculpatory evidence that the complainant knew Mr T. would, or at the very least, might be present.

12. However, importantly, there was exculpatory evidence pointing in the opposite direction. The complainant's team leader, Mr N., provided a statement in November 2017 to the IOM. He said, relevantly, two things about the meeting. The first was that either on the

day of the meeting or the day before, the complainant made him aware she would be meeting with Mr O. at his invitation. Mr N. said: "I had to assume that [the complainant] would know what could and could not be discussed at such an outside meeting." He also said that on the day and after the meeting or in the next day or so, the complainant expressed surprise to him that Mr T. had been present and "she did not know he [Mr T.] would be present with Mr [O.] and had not expected to meet him". If Mr N. was accepted as a reliable witness (and there was no suggestion that he was not), then subject to considerations of the reliability of his recollection of events many months before, his account is of an almost contemporaneous conversation with the complainant indicating that she did not know Mr T. would be there. It is improbable that her statements to Mr N. were false or contrived. The evidence of Mr N. about these conversations also is at odds with Mr R.'s (a senior investigator) conjecture relied on by the Board in paragraph 46 of its report, that because the meeting was not mentioned in subsequent emails nobody on the team except the complainant knew about the meeting and she told no one about it.

13. The Tribunal is satisfied that the Board and the Prosecutor could not have been satisfied beyond reasonable doubt that the complainant knew, before the meeting, that Mr T. was going to be present. The finding made was important in the evaluation of the complainant's conduct in material respects and the ultimate conclusion that at least some of what she did constituted misconduct. It was a factual building block for the criticism that the complainant did not have permission to meet with Mr O. and Mr T. No question of obtaining permission to meet Mr T. arises in the absence of a sustainable finding that she knew he would be there.

14. In its pleas in these proceedings, the ICC draws attention to, amongst other things, the fact that the complainant went ahead with the meeting when she became aware that Mr T. was present (and on the assumption she did not know he would be before the meeting) and the duration of the meeting (three hours). The Prosecutor's letter of 5 April 2018 referring the matter to the Disciplinary Advisory Board is not entirely clear about what aspect of the complainant's conduct concerning the meeting was viewed as misconduct, but the focus of the letter in this respect was on the fact that the meeting was with not only Mr O. but

also Mr T. and this meeting was not authorised. Lack of authorisation was the only, or at least the central, element of the alleged misconduct. The approach of the Board was to similar effect as was the Prosecutor's dismissal letter of 3 August 2018. Accordingly the finding of misconduct in relation to the meeting was unsustainable.

15. However the finding that the complainant had disclosed confidential material cannot be the subject of the same criticism. The complainant corresponded with Mr O. by email on 18 May 2015. This is not disputed by the complainant. She referred him to Internet links concerning the situation in Libya. Again this is not disputed. It is true that, as the complainant points out, this was publicly available information. However the manner in which the information was conveyed to Mr O. would have made it apparent to him that staff of the ICC were themselves gathering this information. The fact that the staff were doing so was plainly important confidential information about the inner workings of the ICC. The complainant should not have revealed this information and, in doing so, breached her duty of confidentiality. To similar effect was a Facebook communication on the same day from the complainant to a friend, Ms J.F., who, as it turns out, forwarded this communication to Mr O.

16. Unfortunately, however, the Board makes no explicit detailed findings about these communications and to whom the confidential information was sent, other than to say that it was sent to external parties. In the letter of 3 August 2018 containing the impugned decision to dismiss the complainant, the Prosecutor says:

> "I am satisfied that it is proven beyond a reasonable doubt that you (i) did communicate confidential information to [Mr O.], his team and [Mr T.], and (ii) did have an unauthorised meeting with [Mr O.] and [Mr T.]."

The difficulty with this approach is that there was no finding by the Board that the complainant communicated confidential information to Mr T. unless an inference was drawn, applying the appropriate test of beyond reasonable doubt, that the complainant knew that by communicating to Mr O., he would pass on the information to Mr T. But no such finding was made either by the Board or the Prosecutor. This is an important omission. What would have ultimately been a matter for the Prosecutor, there may well be a material difference in relation to the gravity of the conduct, between the complainant communicating information to Mr O.

(himself a former Prosecutor and with whom the Prosecutor, herself, had been in contact) and communicating not only with Mr O. but also Mr T.

17. The flaws in the Prosecutor's decision discussed in the preceding considerations warrant the setting aside of the decision. It is unnecessary to consider the other grounds advanced by the complainant.

18. Any breach of confidentiality by staff of an international court is an extremely serious matter. But there will be cases where the breach is grave and undoubtedly warrants summary dismissal and others where that outcome is not so obviously justified. It is possible that, had the matter been approached properly by the ICC, a decision would have been made not to dismiss the complainant. Equally a decision might have been made to dismiss her. No reinstatement will be ordered, but the complainant is entitled to material damages taking into account the loss of a contingent opportunity to remain in employment for the duration of her contract and thereafter. In this respect the Tribunal will award her 40,000 euros as material damages. She is also entitled to moral damages assessed in the sum of 15,000 euros.

19. The complainant is entitled to costs, which the Tribunal assesses in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The impugned decision of the Prosecutor of 3 August 2018 dismissing the complainant is set aside.
2. The ICC shall pay the complainant 40,000 euros in material damages.
3. The ICC shall pay the complainant 15,000 euros in moral damages.
4. It shall also pay the complainant 8,000 euros in costs.
5. All other claims are 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