R.

v.

ICC

121st Session **Judgment No. 3599**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. L. R. Jr. against the International Criminal Court (ICC) on 13 October 2012 and corrected on 24 May 2013, the ICC's reply of 9 September 2013, corrected on 1 October 2013, the complainant's rejoinder of 13 January 2014 and the ICC's surrejoinder of 17 April 2014;

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, a former staff member of the ICC, impugns the decision of the ICC Registrar to reject his complaint of harassment and discrimination.

The complainant joined the ICC's General Services Section (GSS) in October 2005 as a driver. In February 2007 he was transferred to the post of Registry Clerk in the Correspondence Processing Centre (CPC). Due to medical reasons he was temporarily assigned in October 2010 to the Logistics and Transportation Unit (LTU). In November 2011 he returned to his post of Registry Clerk in CPC. In 2013 he separated from the ICC on health grounds and he was granted

a disability benefit under the United Nations Joint Staff Pension Fund Regulations and Rules.

Prior to that, on 29 May 2012, he filed a complaint of harassment and discrimination against Mr M. H., his immediate supervisor in CPC, Mr H. H., the Head of LTU, and Mr F. O'S., his immediate supervisor in LTU. In his complaint he also made allegations of harassment against the Human Resources Section. His complaint was referred to the Disciplinary Advisory Board (DAB) on 1 June 2012. The DAB issued its report on 18 September 2012 recommending that his allegations of harassment and discrimination be dismissed for lack of sufficient evidence or because they were time-barred and considered by the Panel as not being germane. By a letter dated 19 September 2012, the Registrar of the ICC informed the complainant of her decision to accept the DAB's recommendation. That is the impugned decision.

The complainant claims compensation for work-related illness, for illness caused by the process and for financial loss, as he now earns 50 per cent less than what he earned when he was employed by the ICC. He claims moral damages and damages for "family effects".

The ICC asks the Tribunal to dismiss the complaint and to deny the relief sought by the complainant. It argues that in the absence of any evidence to support the existence of abuse or harassment, there is no causal link to justify the award of compensation for work-related illness. As regards the claims for moral damages and for damages for "family effects", it asserts that the former is not justified and the latter irreceivable for failure to exhaust internal remedies.

CONSIDERATIONS

1. The complainant commenced working with the ICC in October 2005. In a complaint filed in this Tribunal on 13 October 2012, the complainant alleges workplace harassment that started shortly after he commenced working at the ICC.

2. It is desirable to address, at the outset, several procedural issues raised by the pleas. One such issue concerns the complainant's rejoinder and, indirectly, the ICC's surrejoinder. As noted earlier, the complaint was filed on 13 October 2012 though it was subsequently corrected. The corrected complaint was filed on 24 May 2013. The ICC sought an extension of time in which to file its reply. This was granted and allowed the ICC to file its reply by 9 September 2013. It did so on that day. The complainant then had until 7 January 2014 to file his rejoinder. It was not filed until 13 January 2014 even though no extension of time had been granted. In the result, Article 9(2) of the Tribunal's Rules had the legal effect of closing the pleadings on 7 January 2014. Accordingly, the Tribunal will not have regard to either the complainant's rejoinder or the ICC's surrejoinder save to the extent that the surrejoinder points to the fact that Article 9(2) had been engaged with the legal effect just discussed. The legal effect of this provision has been acted upon by the Tribunal on earlier occasions (see Judgments 211, consideration 1, 871, consideration 1, and 1141, considerations 20 and 21). In this matter the pleas are, in any event, sufficiently complete having regard to the complainant's complaint form and legal brief together with the ICC's reply.

3. The next procedural issue concerns time limits. Allied to this issue is a justified submission by the ICC that the complaint is unclear and lacks precision. Having regard to the complaint form and legal brief, this latter contention should be accepted. The ICC's submission on time limits reflects the approach of the DAB, which was the internal body that considered the complainant's allegations of harassment.

The complainant's account in his complaint to the Tribunal of events which appear to support his claim of harassment commences with events shortly after he began employment with the ICC in October 2005. However the complainant did not take the formal step of lodging a complaint with the DAB until 29 May 2012. The internal procedures within the ICC for the making and consideration of complaints of harassment are governed by Administrative Instruction ICC/AI/2005/005 on Sexual and Other Forms of Harassment (the Administrative Instruction) that took effect on 14 July 2005. That is to

say, it applied at the time the complainant commenced employment with the ICC and continued to apply thereafter. Article 6.6 of the Administrative Instruction provided, in relation to current staff members, that "a complaint alleging harassing conduct shall be submitted within six (6) months of the first instance of the alleged conduct". The DAB took the approach that it could only consider alleged harassing conduct which occurred on or after 29 November 2011 (the date six months before the filing of the complaint to the DAB on 29 May 2012) and that any allegations of harassing conduct before that date were time-barred.

4. The legal effect of Article 6.6 has recently been considered by the Tribunal in Judgment 3485, consideration 6:

> "Article 6.6 is a procedural rule that requires current staff members to submit a complaint of harassment 'within six (6) months of the first instance of the alleged [harassing] conduct', according to the English version of Administrative Instruction ICC/AI/2005/005. Thus it is intended to promote the timely lodging of complaints of harassment. This is both sensible and desirable. However, it does not follow that once such a complaint has been lodged the complainant is precluded from requesting or requiring examination of events which predated the period of six months immediately preceding the filing of the complaint. Harassment and discrimination can be the manifestation of conduct over a long period. Conduct may take place which, in isolation, appears innocent. However, repeated occurrences of the same or similar conduct may reveal, over time, the harassment of the complainant. In such a case there could be no "first instance" that could reasonably trigger the time limit in Article 6.6 with the effect of precluding consideration of events which occurred sometime before. Moreover, the Tribunal notes that the French version of Article 6.6 merely requires that the complaint of harassment be submitted within six months of the harassing conduct ('*dans les six (6) mois suivant la conduite en question'*), without reference to a 'first instance' thereof. The Tribunal's jurisprudence is that harassing conduct over a long period is evidence which can be relied upon to prove the existence of more recent harassing conduct, and also that harassment can be the cumulative effect of conduct which, in isolation, might not be viewed as harassment (see Judgments 2100, under 13, 2553, under 6, 3318, under 7, 3233, under 6, and 3347, under 8)."

5. This judgment of the Tribunal was published well after the DAB made its decision to limit its investigation to events from 29 November 2011.

6. Unlike the complaint filed on 29 May 2012 with the DAB, the complainant's allegations in his complaint to the Tribunal concern events occurring in four periods. Those allegations include, but are not limited to, the following. The first period was between October 2005 and February 2007 when the complainant worked in the GSS. Complaints of harassment during this period are made against another worker, Mr V. L. N. The second period was from February 2007 to October 2010. In that period the complainant worked in the CPC (a unit within GSS) though he was absent from work for an extended period of sick leave during the latter part of that time. His supervisor, against whom some of the allegations of harassing conduct are made, was Mr M. H. Between October 2010 and November 2011, the complainant worked in the LTU, in the Receiving and Inspection Unit (R&I). His supervisor, against whom some of the other allegations of harassing conduct are made, was Mr F. O'S. The final period was from November 2011, when the complainant returned to the CPC, until the complaint was lodged with the DAB. Allegations of harassment are made against Mr H. H., the head of LTU.

7. It should be noted that it appears from the complainant's legal brief in the Tribunal that the complainant began taking notes and logging incidents that he found unusual almost immediately after he commenced employment in 2005. Thus, it is tolerably clear that he was aware that events he was observing were unusual, from his perspective, and it is not difficult to infer that he believed they were harassment in some form or another. Indeed, in his brief he says he did not then, in the early days of his employment, file a formal complaint because he was then on a General Temporary Assistance contract. This is not a case where the complainant had doubts about whether conduct directed towards him was harassing conduct. Fairly obviously he did, but he did not then take steps to lodge a complaint in any formal way against the perpetrators. However he did so in

September 2010 against Mr M. H. But this was a complaint lodged with the staff union and not a complaint lodged under the procedures established by the Administrative Instruction. Thus, it is difficult to say, in relation to the approach taken by the DAB, that it was dealing with a complaint where events over a long period of time became harassment or that it had become apparent to the complainant only at some relatively recent time that he was being harassed.

8. While for reasons explained by the Tribunal in Judgment 3485, it is inappropriate to apply a provision such as Article 6.6 with any rigidity, it does not follow that such a provision does not establish a requirement that a complainant act in a timely way when the complainant becomes aware that she or he has been the subject of harassing conduct. It does establish such a requirement, and whatever may be the time limits reasonably established by Article 6.6, that provision would not have allowed, in the present circumstances, the lodging of a complaint in May 2012 about conduct that had occurred not only in the preceding six months but conduct spanning almost a six-year period commencing in or shortly after October 2005. Thus, with one qualification, the DAB was correct in concluding that allegations of conduct before 29 November 2011 were time-barred and it should refrain from considering them.

9. The qualification is that conduct, which occurred before 29 November 2011, may be relevant in assessing whether conduct after that date was harassment had such conduct been relied on by the complainant in the internal appeal. This could have been particularly so of the conduct of his supervisor in CPC, Mr M. H., between February 2007 and October 2010, which could have been relevant in determining whether his conduct after November 2011 constituted harassment. Accordingly, it may have been appropriate, if raised, for the DAB to have considered that earlier conduct when assessing how Mr M. H.'s post-November 2011 conduct should be characterised or that the cumulative effect of his conduct over the two periods constituted harassment.

10. However in his complaint lodged with the DAB the complainant recognised the constraints imposed by the Administrative Instruction and in particular Article 6.6. His complaint commenced:

> "With this letter, I formally submit this complaint on unsatisfactory conduct, harassment and discrimination against the following ICC staff members: [Mr M. H.], [Mr F. O'S.], [Mr H. H.] and accountable staff members of the Human Resources Section.
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> […]
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> In the […] period of October 2010 until November 2011 […] **I first reported acts of harassment by colleagues and supervisors at the CPC** [where the complainant worked from February 2007 until February 2012 except for the period October 2010 to November 2011].
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> […]
>
> However, my problems turned from bad to worse, as I was not spared from the treatment I sought to avoid in the CPC. This became more prevalent, as I neared the end of my stint at the R&I. **The acts complained of transpired from the month of October to November 2011 while I was still at the R&I Unit, and upon my return to the CPC from the month of December 2011 to the present. This is well within the six (6) month prescriptive period provided for in the [Administrative Instruction].**
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> […]
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> Throughout my years of service at the Court, I experienced a series of acts, revealing a pattern of moral harassment, discrimination, bullying and mobbing by my colleagues and supervisors at the LTU. This unbearable treatment continues to affect my physical, psychological, spiritual and emotional well-being. The totality of these events had the effect of violating my dignity and integrity, thus creating an intimidating, degrading, hostile, humiliating, or offensive work environment for me."

11. Consistent with the complainant's appreciation of the operation of Article 6.6, his complaint in the internal appeal focused on the conduct of Mr M. H., Mr F. O'S. and Mr H. H. after November 2011 and the internal means of redress sought by the complainant were restricted to allegations of harassment in that period. Though, additionally, his allegations included more generalised complaints about events after November 2011 concerning his performance appraisal and the state of his official status file. Accordingly, it was open to the DAB to consider the complainant's complaint of harassment only in respect of events that occurred after 29 November 2011.

12. In its examination of these events, the report of the DAB manifests a comprehensive and thoughtful consideration of the evidence produced by both the complainant and the Administration. The processes it adopted appear to be thorough and comprehensive. Its conclusions are rational and balanced. In these circumstances its findings warrant "considerable deference" (see, for example, Judgments 2295, consideration 10, and 3400, consideration 6). The complainant does not challenge, in his complaint, the procedures adopted by the DAB, its reasoning process or any of its findings of fact.

13. In the circumstances of this case, the Tribunal is not prepared to go behind the findings of the DAB. Accordingly, the complainant has not demonstrated that he was harassed or otherwise unlawfully treated during the period of his employment with the ICC in respect of which he sought internal redress. His complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2015, Mr Giuseppe Barbagallo, Vice-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 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ