L.

v.

ICC

124th Session **Judgment No. 3860**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. L. against the International Criminal Court (ICC) on 14 August 2015, his application of 20 August for the fast-track procedure and the ICC's comments of 7 October 2015 indicating that it was opposed to that application;

Considering the Registrar's e-mail of 11 December 2015 requesting the complainant to correct his complaint by removing all references to the fast-track procedure;

Considering the complaint as corrected on 18 December 2015 and on 23 January 2016, the ICC's reply of 4 May, corrected on 18 May, the complainant's rejoinder of 1 July and the ICC's surrejoinder of 20 October 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 contests the decision to reject his request for suspension of the decision to abolish his post and terminate his contract pending the outcome of the internal appeal proceedings.

At the material time the complainant held the P-4 position of Legal Officer in the Legal Office under a fixed-term appointment, which was due to expire in March 2017. On 22 June 2015 he was notified of the Registrar of the Court's decision to abolish his post and to terminate his contract as from 20 October 2015. On 29 June he submitted a request for review of that decision to the Secretary to the Appeals Board. He also applied for the immediate suspension of the contested decision and of the opening of a vacancy announcement for the new position to be created in the Legal Office.

In its report of 30 July the Appeals Board recalled that, according to Staff Rule 111.4(c), it may recommend the suspension of action if two conditions are met: the contested decision has not yet been implemented and the implementation of that decision would result in an irreparable injury to the staff member concerned. The Board observed in particular that the decision of 22 June 2015 had not yet been implemented, and that the complainant was a senior competent staff member, who "from all objective standpoints" could have been in line for a further 5-year renewal of his appointment. In its view, abolishing his post and terminating his contract would potentially lead to his permanent loss of employment, which might affect his career opportunities in the future, especially considering his field of expertise. The Appeals Board therefore recommended suspending the contested decision pending the outcome of the internal appeal proceedings.

On 3 August 2015 the complainant was informed of the Registrar's decision to reject the Appeals Board's recommendation, which he considered to be flawed. In the Registrar's view, the Appeals Board confused abolition of post with termination of appointment when finding that the complainant would suffer an irreparable injury. The Registrar also found that the Appeals Board's conclusion as to the future career prospects of the complainant was illogical and that it had failed to take into account the absence of reputational damages in concluding that he might suffer an irreparable injury if the request for suspension were denied. The Registrar stated that, in accordance with Staff Rule 111.4(d), his decision was final and was not subject to appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to grant him whatever remedy the Tribunal finds appropriate considering in particular that when the judgment will be delivered the ICC will no longer be in a position to grant him his request for suspension of action. He also claims costs. He further asks the Tribunal to take into consideration the breaches he has raised in this complaint when examining the complaint he may file once he receives a final decision on the merits of his appeal. In his rejoinder, he maintains his claims for relief and further seeks the award of 10,000 euros as punitive damages.

The ICC asks the Tribunal to dismiss the complaint as irreceivable or, alternatively, as unfounded.

CONSIDERATIONS

1. The complainant was employed as a Legal Officer, P-4 level, in the Registry Legal Office of the ICC at the time the decision was made which he impugns in these proceedings, namely 3 August 2015. The ICC challenges the receivability of this complaint on the footing that it does not concern a final administrative decision. It is convenient to deal with this issue at the outset.

2. By letter dated 22 June 2015, the complainant was advised by the Registrar of the Court that his post would be abolished and his appointment would be terminated effective 20 October 2015. The stated reason that his position was to be abolished was the restructuring of the Registry. On 29 June 2015 the complainant applied for administrative review of the decision of 22 June 2015. In that application, the complainant also sought the suspension of the administrative decision of 22 June 2015 and of the opening of a vacancy announcement for the new position to be created in the Legal Office. The suspension of an administrative decision is provided for by Rule 111.4 of the ICC's Staff Rules:

> "**Suspension of the administrative decision during appeal**
>
> (a) Neither a request for administrative review, an attempt at conciliation, nor the filing with the Appeals Board of an appeal against a decision resulting from a review shall have the effect of suspending action on the contested decision.

(b) Notwithstanding paragraph (a), a staff member may request a suspension of action on such a decision by writing to the Appeals Board Secretary, setting out the relevant facts and how implementation would directly and irreparably injure the staff member's rights.

(c) Upon receipt of such a request, the Appeals Board shall hear the request promptly and expeditiously and consider the views of the appealing staff member, as well as of the Registrar or the Prosecutor, as appropriate. If the Appeals Board determines that the decision has not been implemented, and that its implementation would result in irreparable injury to the staff member, it may recommend to the Registrar or the Prosecutor, as appropriate, the suspension of action on that decision until the time limits in staff rule 111.1 have passed without an appeal being filed or, if an appeal is filed, until a final decision on the appeal is made.

(d) The decision of the Registrar or the Prosecutor, as appropriate, on a recommendation under paragraph (c) shall be final and shall not be subject to appeal within the Court."

3. The complainant's application for review of 29 June 2015 was sent to the Secretary of the Appeals Board. Thereafter the Board considered the request for a suspension of action. A number of procedural steps took place that the complainant challenged before the Appeals Board dealt with this request but, for present purposes, they are not relevant. On 30 July 2015 the Appeals Board recommended that the request for the suspension of action should be granted. On 3 August 2015, the Registrar rejected this recommendation and rejected the request for the suspension of action. This is the decision impugned in the present proceedings.

4. The first legal issue is thus whether a decision to reject a request for the suspension of action under Staff Rule 111.4(b) is a final decision such as to render it amenable to challenge by way of a complaint to the Tribunal. If the response to the request had been in the complainant's favour, steps would not have been taken, in this case, to abolish the position and terminate the complainant's contract until a final decision had been made in his internal appeal against the decision to abolish his position and terminate his contract.

5. Whether a decision is a final decision is a question raised by Article VII, paragraph 1, of the Tribunal's Statute that declares a complaint is not receivable unless the decision impugned is a final decision. The case law of the Tribunal establishes two principles. The first is that for a decision to be final it cannot, at least in the ordinary course, be amenable to internal appeal or review or further internal appeal or review. In the present case, Rule 111.4(d) makes it clear that there is no further appeal against a decision of, relevantly, the Registrar on the request for the suspension of action. Accordingly, the Registrar's rejection of the complainant's request was final.

6. The second principle is that a decision, to be a final decision for the purposes of Article VII, paragraph 1, must of itself have legal effect (see, for example, Judgments 2201, consideration 4, and 3141, consideration 21). In the present case, the refusal of the request for suspension of action had, of itself, a legal effect in that the decision to abolish the complainant's post and terminate his appointment remained legally effective. In these proceedings it is unnecessary to determine whether there were one or two decisions. If the request for the suspension of action had been decided in the complainant's favour, the abolition and termination decision would cease, for the time being, to have legal effect at least after the nominated date for the abolition and termination, namely 20 October 2015. Thus the rejection of the request had legal effect, even if conditional on the decision taking effect on 20 October 2015. In this respect it was a decision which could constitute a final decision.

The only qualification to the preceding conclusion arises from the Tribunal's judgments which distinguish between a number of steps leading to a final decision and the final decision itself. Ordinarily the steps, while they may have the appearance of being a decision, are not treated as a final decision but can be challenged in a challenge to the final decision itself (see, for example, Judgment 3433, consideration 9). It might be thought that a refusal of a request for the suspension of action is a step leading to a decision arising from the internal appeal. However the Tribunal has recognised that this approach has to be applied with some care (see Judgment 2366, consideration 16). In the present case the request for the suspension of action and the decision

rejecting it were a quite discrete step in the internal appeal requiring the application of specific criteria. The final decision of the Registrar in this matter arising from the internal appeal will not subsume the decision on the request for suspension. This is to be contrasted with proceedings where the steps are subsumed in the final decision and can be challenged when challenging that final decision. In the result, the rejection of the request for the suspension of action was a final decision.

7. The complaint is receivable.

8. The Tribunal recalls, having regard to the terms of Rule 111.4(c) properly construed, a condition precedent to agreeing to a request to suspend action is that the staff member would suffer irreparable injury if the challenged decision was implemented. Both the Appeals Board and the Registrar discussed, at length, what was meant by "irreparable" injury and their views differed in a number of respects. It is unnecessary to repeat or discuss their respective analyses. This question has been addressed by the Tribunal in Judgment 1883, consideration 5. "Irreparable" injury or harm occurs only where the injury or harm cannot be "compensated by financial damages". The harm or injury identified by the complainant including damage to his career and reputation as well as his inability to continue working at the ICC can be compensated by financial damages. Indeed, in this case the Registrar, when considering the Appeals Board's recommendations following the hearing of the internal appeal, has a range of remedies available to him which would ensure the harm to the complainant was reparable, including resiling from the earlier decision to abolish the complainant's post and terminate his employment. Obviously his consideration of those recommendations has to involve a *bona fide* exercise by the Registrar of the powers conferred on him. Accordingly a condition precedent, irreparable injury, to granting the suspension request was not satisfied and the impugned decision of the Registrar refusing the request should not be set aside.

9. However the reasoning of the Registrar leading to the impugned decision is not beyond criticism. For example, he relies on the time an appeal to this Tribunal might take as a relevant consideration. It is not.

That is because Rule 111.4 concerns only the suspension of action, relevantly, until a final decision in the internal appeal is made. It would not operate beyond that date.

10. In the result the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Patrick Frydman, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ