G.

v.

ICC

128th Session **Judgment No. 4180**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs L. M. G. against the International Criminal Court (ICC) on 1 September 2016 and corrected on 10 October 2016, the ICC's reply of 21 February 2017, the complainant's rejoinder of 17 July, corrected on 10 August, the ICC's surrejoinder of 11 December 2017 and the ICC's additional submissions of 13 March 2018, no final comments having been made by the complainant;

Considering the decision by the President of the Tribunal to grant a stay of proceedings, requested by the ICC, for the period from 8 May to 17 September 2018;

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 challenges the rejection of her appeal against the decision to abolish her post and terminate her appointment, the decision not to shortlist her for a specific position and the decisions not to select her for three other positions.

At the material time the complainant was employed with the ICC as a Systems Support Technician at grade G-6 under a fixed-term appointment which the ICC states was due to expire on 18 May 2020.

By a letter of 24 June 2015 the complainant was informed that, as a result of a reorganisation of the Registry known as the *Re*Vision Project, her post would be abolished and her appointment would terminate as of 22 October 2015, in accordance with Staff Regulation 9.1(b)(i), Staff Rule 109.2 and paragraph 9 of the "Principles and Procedures Applicable to Decisions Arising from the *Re*Vision Project" contained in Information Circular ICC/INF/2014/011 Rev.1 (hereinafter "the Principles and Procedures"). She was advised that two options were open to her. The first option was to accept an "enhanced agreed separation package", in which case her departure from the ICC would take the form of a separation by mutual agreement with enhanced separation entitlements. Alternatively, she could apply as an internal candidate for newly created positions arising as a result of the *Re*Vision Project, in which case her applications would receive priority consideration as provided for in the Principles and Procedures. In the event that she sat for an interview for any position as a priority candidate, she would lose the option to elect the enhanced agreed separation package.

In late July the complainant applied for four positions as a priority candidate: Services Support Technician; Data Management Assistant; Application Support and Training Assistant; and End-User Support Coordinator. The first three positions were each graded at G-6, the latter position was graded at P-2.

On 24 August 2015 she was informed that she had not been shortlisted for the position of Services Support Technician. In September she took written tests and was interviewed for the remaining three positions for which she had applied. On 14 October she was notified that she had not been selected for the position of Data Management Assistant. Later that month she was informed that she had not been selected for the other positions.

On 12 and 26 November 2015 the complainant lodged two separate requests for review in which she raised a number of issues, including the effect of the *Re*Vision Project on her employment, and she made allegations of harassment, bias and discrimination. In a single decision of 14 December 2015 the Registrar characterized both requests as being directed against the decision to abolish her post and the decisions not to

select her for the positions for which she had applied. He found that her challenges to the decision to abolish her post and the decision not to shortlist her for the position of Services Support Technician were irreceivable *ratione temporis* and he upheld the remaining decisions.

On 13 January 2016 the complainant submitted an appeal to the Appeals Board in which she challenged the decision to abolish her post and terminate her contract, the decision not to shortlist her for the post of Services Support Technician and the decisions not to select her for the remaining three posts for which she had applied as a priority candidate. In its report of 4 May 2016 the Appeals Board found that insofar as the appeal was directed against the decision of 24 June 2015 and the manner in which her contract was terminated, as well as the decision of 24 August 2015, her appeal was irreceivable as time-barred. With respect to her challenges to her non-selection for the three positions, it found no apparent flaws in the challenged recruitment processes. It recommended that the appeal be dismissed but that the Administration further investigate her allegations of harassment.

By a letter of 3 June 2016 the Registrar notified the complainant that he had decided to accept the Appeals Board's recommendation to dismiss the appeal and that he did not accept its recommendation to further investigate her claims of harassment. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to set aside the Registrar's earlier decision of 14 December 2015. She seeks payment of what she characterizes as the total compensation package due to her until February 2020, based on the fixed-term contract she held, in the amount of 269,614.40 euros. She claims further compensation in the amount of 1,362,778.24 euros. She seeks moral damages in the amount of 500,000 euros, reimbursement of the costs she incurred for medical treatment and payment of the legal costs she incurred to submit her internal appeal and her complaint before the Tribunal.

The ICC asks the Tribunal to dismiss as irreceivable her claims regarding the decisions of 24 June and 24 August 2015 and her claims related to alleged harassment and discrimination. In the alternative it asks the Tribunal to dismiss those claims as devoid of merit and to deny her related claims for relief. It asks the Tribunal to dismiss her remaining

claims in their entirety. In the event that the Tribunal awards the complainant material damages, the ICC requests that the termination indemnity she received and any earnings she may have received after her separation from service be deducted from those damages.

CONSIDERATIONS

1. The complainant requests oral proceedings. For the purpose of this case, however, it is unnecessary for the Tribunal to hear further evidence. The parties have presented ample submissions and documents to permit the Tribunal to reach an informed decision on the case. The request for oral proceedings will therefore be rejected.

2. The complainant impugns the decision issued by the Registrar on 3 June 2016 in which he:

(1) accepted the Appeals Board's unanimous recommendation to dismiss her internal appeal against the decision of 24 June 2015 to abolish her G-6 post of Systems Support Technician and to terminate her appointment as of 22 October 2015;

(2) accepted the Appeals Board's unanimous recommendation to dismiss her internal appeal against the decision of 24 August 2015 not to shortlist her for the G-6 post of Services Support Technician;

(3) accepted the Appeals Board's unanimous recommendation to dismiss her internal appeal against the decision of 14 October 2015 not to select her for the G-6 post of Data Management Assistant;

(4) accepted the Appeals Board's unanimous recommendation to dismiss her internal appeal against the decision of 27 October 2015 not to select her for the G-6 post of Application Support and Training Assistant;

(5) accepted the Appeals Board's unanimous recommendation to dismiss her internal appeal against the decision of 27 October 2015 not to select her for the P-2 post of End-User Support Coordinator; and

(6) rejected the Appeals Board's unanimous recommendation to further investigate her claims of harassment.

3. Consistent principle has it that decisions concerning restructuring within an international organisation, including the abolition of posts, as well as decisions concerning the selection of a successful applicant in a competition, may be taken at the discretion of the executive head of the organisation and are consequently subject to only limited review. Accordingly, the Tribunal will ascertain whether such decisions are taken in accordance with the relevant rules on competence, form or procedure, whether they rest upon a mistake of fact or of law or whether they constituted abuse of authority. The Tribunal will not rule on the appropriateness of the restructuring and decisions relating to it as it will not substitute the organisation's view with its own (see, for example, Judgments 2933, under 10, and 3372, under 12, respectively).

4. The ICC raises receivability as a threshold issue in relation to three matters. It contends that the complainant's challenges to the decision to abolish her post and the decision not to shortlist her for the G-6 post of Services Support Technician are irreceivable as they are out of time. It further submits that the complainant's claims related to her alleged harassment and discrimination are irreceivable as she failed to exhaust the internal means of redress that were available to her as required by Article VII, paragraph 1, of the Tribunal's Statute and that, in any event, her allegations are time-barred.

5. The complainant's request for review of the decision of 24 August 2015 not to place her on the shortlist for the G-6 post of Services Support Technician, which was submitted on 12 November 2015, was out of time. Staff Rule 111.1(b) required her to submit a request for review in writing to the Secretary of the Appeals Board within thirty days of notification of the decision. The Tribunal finds, in accordance with the Appeals Board's opinion, which the Registrar accepted in the impugned decision, that there were no exceptional circumstances beyond the complainant's control that could have led to a waiver of the time limit established in Staff Rule 111.1(b). Accordingly, the challenge against the decision of 24 August 2015 is irreceivable before the Tribunal.

6. The complainant's request for review of the decision of 24 June 2015 to abolish her G-6 post of Systems Support Technician and to terminate her appointment as of 22 October 2015 was also submitted on 12 November 2015, beyond the time limit set out in Staff Rule 111.1(b). The Registrar was correct in dismissing the internal appeal as time-barred insofar as it related to these matters. In the result, the internal means of redress were not exhausted and the complaint is irreceivable pursuant to Article VII, paragraph 1, of the Tribunal's Statute to the extent that it challenges the above-mentioned decisions.

7. The complainant challenges the Appeals Board's recommendation, accepted by the Registrar in the impugned decision, that her internal appeal be rejected to the extent that it involved unsuccessful applications for the three remaining posts. The Tribunal notes, specifically, that the Appeals Board reviewed the comments made by the Recruitment Panels for those posts and found no basis upon which to question the Panels' conclusions and no evidence of unequal treatment compared to other candidates in relation to the use of the performance appraisals by the Panels. The Appeals Board's report in the present matter is a balanced and thoughtful analysis of the issues raised in the internal appeal and, on its analysis, the conclusions and recommendations of the Appeals Board were justified and rational. It is a report of a character which engages the principle recently discussed by the Tribunal in Judgment 3608, consideration 7, that the report warrants "considerable deference" (see also, for example, Judgments 3400, consideration 6, and 2295, consideration 10). Accordingly, the complainant's challenge to the subject decision concerning her unsuccessful applications for the three posts fails.

8. The ICC prohibits harassment and has a framework for dealing with any complaints of harassment in Administrative Instruction ICC/AI/2005/005 of 14 July 2005 regarding Sexual and Other Forms of Harassment (hereinafter "the Instruction"). In the Instruction the ICC made a commitment to recognize the right of a staff member to be treated with dignity and respect, as well as to prevent all forms of harassment in the workplace.

Section 7 of the Instruction provides for a formal or informal grievance procedure, which a staff member may pursue to report harassment. The formal procedure may be initiated by contacting either the Registrar or the Prosecutor (Section 7.1). Section 7.2 permits a staff member to pursue the informal procedure by confiding in a third party, including a manager, supervisor or a fellow staff member, "who shall in turn file a formal complaint with either" the Registrar or the Prosecutor on behalf of the staff member. Section 7.3 mandates either of these officials to transmit the complaint to the Disciplinary Advisory Board, which shall advise whether harassing behaviour occurred and recommend what measures, if any, should be taken. Section 7.5 provides that the case shall be closed if the alleged conduct is not found by the Registrar or the Prosecutor, upon the recommendation of the Disciplinary Advisory Board, to constitute harassment.

9. In an email dated 5 September 2014, sent to her supervisor and other members of the Administration, the complainant reported a number of incidents in the workplace, which she stated caused her to feel harassed, and sought their help. It is common ground that her supervisor spoke with her about the matter. The complainant raised the matter in her request for review dated 12 November 2015. In its report, the Appeals Board observed the Registrar's assertion that the complainant did not pursue her case of harassment and unequal treatment. However, the Tribunal observes that she had initiated the informal procedure under Section 7.2 when she approached her supervisor and requested that disciplinary action be taken against the alleged harasser, and, as the Appeals Board noted, the necessary and mandatory action required by Section 7.2 was not taken. During the internal appeal the Registrar had further argued that the supervisor was not authorized to receive complaints of harassment so the complainant could only have asked the supervisor to file a complaint on her behalf. The requirement under Section 7.2, however, is that once the staff member approaches a third party that person "shall in turn file a formal complaint with the Registrar" on the staff member's behalf. Thus, the Registrar's assertion that the complainant could have asked another third party to file a complaint on her behalf was wrong. The Registrar incorrectly argued

that the fact that she did not do so indicated that she voluntarily declined to pursue the matter formally, and, furthermore, even if there was truth in her assertion that she had approached her supervisor there was no evidence that these matters had any bearing on the decisions which she had sought to impugn.

10. The Tribunal finds that the process provided for in Sections 7.2 and 7.3 of Administrative Instruction ICC/AI/2005/005 was not followed. The Appeals Board correctly concluded that there is information that merits closer inspection of the complaint of harassment. When the complainant initially made it the necessary procedure should then have been followed. Raising the matter in the request for review required the Registrar to note the failure to follow the procedure established in Section 7 of the Instruction. To the extent that the Registrar rejected the Appeals Board's recommendation concerning a harassment investigation considering that the harassment complaint could have been raised directly with him, he ignored Section 7.2 of the Instruction. Thus, the impugned decision is flawed and must be set aside to this extent.

11. The Tribunal would normally remit the matter to the ICC so that a proper investigation regarding the complainant's harassment complaint could be conducted. However, in this case, in view of the fact that the complainant is no longer employed with the ICC and given the passage of time since the alleged events leading to the harassment complaint occurred, remitting the matter to the ICC would serve no useful purpose. Nevertheless, since the complainant was denied the right to have her harassment complaint duly investigated, and also taking due note of the fact that she could have initiated the formal procedure directly with the Registrar in accordance with Section 7.1 of the Instruction, the complainant will be awarded moral damages in the amount of 8,000 euros.

12. As the complainant is successful in part, she will also be awarded 500 euros in costs.

DECISION

For the above reasons,

1. The impugned decision dated 3 June 2016 is set aside to the extent stated in consideration 10 above.
2. The ICC shall pay the complainant moral damages in the amount of 8,000 euros.
3. The ICC shall also pay the complainant costs in the amount of 500 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 22 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ