L. (No. 4)

v.

ICC

128th Session **Judgment No. 4181**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr C. L. against the International Criminal Court (ICC) on 22 March 2016 and corrected on 27 April, the ICC's reply of 26 September, corrected on 28 September, the complainant's rejoinder of 1 November 2016 and the ICC's surrejoinder of 9 February 2017;

Considering the decision of the President of the Tribunal to grant a stay of proceedings, requested by the ICC, for the period from 4 May to 17 September 2018;

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 failure by the ICC to complete his performance appraisal in conformity with the applicable statutory provisions.

Facts related to this case can be found in Judgment 3706, delivered in public on 6 July 2016, and Judgment 3908, delivered in public on 24 January 2018, concerning the complainant's second and third complaints, respectively.

At the material time the complainant held a P-4 position in the Court's Registry. In 2014 the ICC implemented what was known as the *Re*Vision Project, with the aim of reorganizing the ICC's Registry. On 5 February 2015 the Chief of the then Legal Advisory Services Section (now Legal Counsel and Chief of the Legal Office), Mr H., informed staff of the Section that it was intended to postpone the completion of their performance appraisals for the current performance cycle until after the *Re*Vision Project. Nevertheless, performance appraisals would be undertaken for staff members who requested them earlier.

By an email of 19 February 2015 the complainant requested the completion of his performance appraisal for the period from October 2013 to February 2015. On 12 March he filled out the relevant section of a performance appraisal form and submitted it electronically.

On 1 May 2015 the complainant sent an email to Mr H. in which he requested that his performance appraisal be completed, including any review by the Registrar, before mid-May.

On 12 June 2015 the complainant filed a request for review with the Secretary of the Appeals Board in which he challenged the implied denial of his request to have his performance appraised. Subsequent to this request for review the Administration proceeded with the performance appraisal process and on 2 July Mr H. provided the complainant with a draft performance appraisal for his comments.

In the meantime, on 22 June 2015 the complainant was notified of the decision to abolish his post and terminate his fixed-term appointment with effect from 20 October 2015 (this decision was the subject of his third complaint before the Tribunal which resulted in Judgment 3908).

On 15 July 2015 the Registrar issued a decision on the complainant's request for review. He concluded that the request was irreceivable on the basis that there had not been an implied administrative decision to deny the complainant's request for the completion of his performance appraisal.

Mr H. signed the complainant's performance appraisal on 23 July 2015. In a memorandum of the same date the complainant sent comments on the appraisal to the Registrar, which he copied to Mr H. and to his

former immediate supervisor. The Registrar (as the reviewer) signed the appraisal on 27 July and the complainant subsequently signed the appraisal on 4 August 2015.

On 14 August 2015 the complainant filed an appeal with the Appeals Board in which he challenged the Registrar's decision of 15 July. In its report of 23 November 2015 the Appeals Board found that the appeal was receivable but recommended against granting any of the remedies sought by the complainant. On 23 December 2015 the Registrar informed the complainant that he disagreed with the Appeals Board's finding that the appeal was receivable but nonetheless agreed with its recommendation not to grant any of the relief sought. In addition he stated that the appeal was moot as the complainant's performance appraisal had been completed. That is the impugned decision.

The complainant asks the Tribunal to refer to and grant the remedies that he sought in his second complaint. In the alternative, he requests it to set aside the impugned decision and to cancel the performance appraisal report completed on 4 August 2015 and order its removal from his official status file. He seeks moral, reputational, punitive and exemplary damages, and costs. He states that he makes these claims for relief without prejudice to the remedies he claims in other complaints he has made against the ICC which are pending before the Tribunal.

The ICC asks the Tribunal to dismiss the complaint as irreceivable. In the event that the Tribunal finds the complaint receivable, the ICC asks it to deny the complainant's requests for relief.

CONSIDERATIONS

1. The complainant applied for the joinder of this complaint with his second complaint, which was the subject of Judgment 3706 delivered in public on 6 July 2016. However, he subsequently withdrew that application.

The ICC asks the Tribunal to protect the confidentiality of a document regarding another staff member which the complainant has disclosed in these proceedings without the consent of the staff member.

As this document, which is clearly marked "Staff in confidence", was disclosed without the consent of the ICC and apparently without the consent of the staff member concerned, the Tribunal will protect its confidentiality and not refer to it.

2. In his complaint brief, the complainant states that the complaint is directed against the final decision that was issued on 23 December 2015 by the Registrar on his internal appeal "against the implied decision denying his request to have his performance timely appraised in compliance with [the ICC's] Performance Appraisal System". The reference is to his performance appraisal for the period from 1 October 2013 to 28 February 2015. In his request for review of 12 June 2015 the complainant described the decision which he was challenging as "[t]he failure to respond to [his] request of 1st May 2015 and to complete [his] performance appraisal by the requested time limit of mid-May 2015 [which] constitute[d] an implied administrative decision denying [his] request to have [his] performance appraised for the Performance Cycle [...]". That appraisal was, however, completed on 4 August 2015 when the complainant signed it. The complainant noted this in his internal appeal, dated 14 August 2015, which he stated was against the Registrar's decision of 15 July 2015. He referred to the challenged decision as an implied decision denying his requests for his performance appraisal for the subject period. Given that by 14 August 2015 there was no longer an implied decision denying his request for completion of the performance appraisal, that aspect of this complaint became moot. However, as in his request for review the complainant specifically challenged the timeliness of the completion of his performance appraisal, that aspect of his challenge remained a live issue and the internal appeal was filed within the statutory time limit. The Registrar in his impugned decision erred in concluding that the internal appeal was not receivable to the extent that the complainant challenged the timeliness of his performance appraisal for the period from 1 October 2013 to 28 February 2015.

3. Having noted in his internal appeal of 14 August 2015 that his performance appraisal was completed on 4 August 2015, the complainant stated that he reserved his comments on the substance of the appraisal for the rebuttal process. He alluded to "numerous breaches of procedure,

errors of law, errors of fact and misuse of authority tainting th[e] appraisal" but he added that those matters did not fall under the jurisdiction of the Appeals Board and that they were not further developed in his internal appeal. This was correct as those matters were to be considered in the rebuttal process. They are irrelevant in this case in which the discrete issue to be determined is whether the complainant's performance appraisal was completed in a timely manner.

4. The complainant asks the Tribunal to refer to and consider the submissions he made in his second complaint and to grant the remedies he sought therein. The Tribunal will not grant these remedies. It has stated on a number of occasions that it is inappropriate to effectively incorporate by reference into the pleas before it the arguments, contentions and pleas found in other documents, often a document created for the purposes of internal review and appeal (see, for example, Judgment 3920, under 5). This case law also applies in situations where a complainant refers to documents filed in other proceedings before the Tribunal.

5. Alternatively, the complainant asks the Tribunal to: "set aside the Impugned Decision denying the timely performance of [his] performance appraisal in compliance with the Performance Appraisal System"; find that the ICC violated his terms of appointment because his performance for the subject period was not appraised in a timely manner in compliance with the applicable rules; cancel the performance appraisal report which was completed on 4 August 2015 and to order its removal from his official status file, and award him moral and reputational damages, punitive damages and costs.

There is no legal ground for cancelling the performance appraisal report merely on the basis that the appraisal was not completed in a timely manner.

6. The complainant submits that the timely conduct of his performance appraisal was within the terms of his appointment and governed by Staff Rule 104.17. That provision states that the performance of each staff member shall be regularly appraised in accordance with procedures established by the Registrar, in consultation with the

Prosecutor; the appraisal shall be completed and discussed with the staff member for her or his comment; the immediate supervisor shall participate in the appraisal, and the report and any comments made by the staff member shall form part of her or his official status file. The procedures for the performance appraisal system are provided in Administrative Instruction ICC/AI/2013/003 that entered into force on 6 March 2013 (hereinafter "the Instruction"). Under its terms, a performance appraisal cycle is normally the 12-month period from 1 March to 28 February of the following year. However, the performance period may be shorter or longer than the 12-month period (relevantly normally not longer than 18 months) in specific circumstances. Section 4.6 proscribes non-compliance with the terms of the Instruction by a staff member, supervisor or reviewer and Heads of Organ are made responsible for implementing the appraisal system process by Section 4.7. Section 4.8 puts the primary responsibility for the timely execution of the performance appraisal system upon the Heads of Organ and Section 4.9 requires them to hold all supervisors accountable for the effective use of the system through all stages of the process.

7. As to timeframes, Section 7.1 of the Instruction provides that a concerned staff member and her or his immediate supervisor shall meet at least four weeks before the end of the performance appraisal cycle to discuss the overall performance during the cycle. In an email of 6 February 2015 the Human Resources Section (HRS) issued a reminder regarding the performance appraisal cycle and requested all concerned to complete the end-of-year formalities by the end of the business day on 20 March 2015. HRS issued a further reminder on 24 March 2015 and extended the date to complete the end-of-year formalities to 31 March 2015. In the meantime, however, on 5 February 2015 Mr H. had announced that he and the Registrar had decided not to complete the appraisals of staff in the Legal Advisory Services Section for the cycle unless they insisted on having them done. On 19 February 2015 the complainant wrote to Mr H. insisting that his appraisal be completed in light of the Registrar's announcement the day before of the impending implementation of restructuring under the *Re*Vision Project. The complainant stated that he felt compelled to insist on its

completion as he needed to rely on it, in effect, to have a documented record which would allay any suspicion that the changes in his functions in the restructuring were motivated by an allegation of poor performance and he had a legitimate interest to protect his dignity. Although he received no written response, Mr H. told him, verbally, that he was taking the matter very seriously and would take care of it. The complainant then completed his first input into the appraisal form electronically on 12 March 2015 and informed Mr H. on the same day. He gave a reminder to Mr H. on 1 May 2015 and requested that his appraisal be completed before mid-May. He received no response and in early June his former immediate supervisor, who was also to be consulted concerning his appraisal under Section 3.3 of the Instruction, informed him that he had not been consulted. The complainant lodged his request for review on 12 June.

8. The complainant states that it was because he lodged the request for review that the end of cycle formalities were triggered. His former immediate supervisor spoke with him on 15 June 2015 to discuss his appraisal without prior notification. The complainant agreed to have the discussion immediately by telephone. The discussion was completed that same evening. The complainant had the end of cycle discussion with Mr H. on 17 June 2015 and Mr H. later submitted his written comments and ratings. The Registrar added a sentence on 27 July 2015 agreeing with the appraisal and the complainant signed it on 4 August 2015. This action completed the appraisal pursuant to Section 7.5 of the Instruction. The complainant filed his statement of appeal challenging the Registrar's decision of 15 July on 14 August 2015. He submitted his rebuttal statement concerning the appraisal to the Chief of HRS on 27 August 2015.

9. The Tribunal's view is that, under the provisions referred to in considerations 6 and 7 of this judgment, the complainant's appraisal should have been completed within a reasonable time. What is reasonable will depend on all the circumstances. This would include the time determined by HRS, but that determination does not preclude the consideration of other matters.

The ICC states that practical considerations caused the appraisal to be postponed. According to the ICC, the Registrar had approved the proposal to postpone performance appraisals until the *Re*Vision Project was implemented "based on the need to devote a significant part of the resources of the section to the completion of [that] Project". This was done considering that performance management, including the setting of objectives, would be re-prioritized and centrally coordinated throughout the Registry upon the conclusion of the *Re*Vision Project. It was also done as one of the *Re*Vision Project's core objectives was to redesign the legal function in the Registry and because the appraisal process would have been "more complicated than usual", particularly as Mr H. had been appointed some months after the beginning of the performance appraisal cycle and would have needed input from the previous supervisor of the staff. According to the ICC, the previous supervisor had only been acting on an interim basis while still performing other functions and had not engaged with staff members regarding their performance objectives. However, these considerations do not provide compelling reasons enabling the Tribunal to conclude that the completion of the appraisal on 4 August 2015 was within a reasonable time. The result is that the impugned decision will be set aside to the extent that it did not acknowledge that the complainant's internal appeal was receivable in relation to his claim that the completion of his appraisal was untimely. The complainant will be awarded 5,000 euros given the doubtless importance to the complainant of receiving the appraisal in a timely manner, particularly having regard to the impending reorganisation and his need to equip himself to secure a position within the reorganised Registry.

10. The complainant's submission that the untimely completion of the appraisal militated against his chances of being selected for one of the posts created by the *Re*Vision Project for which he applied is not borne out by the evidence. Other staff members who, like the complainant, applied as priority candidates were assessed on the basis of written tests and interviews. Staff Rule 104.18 relevantly states that "the fullest regard shall be paid, in filling vacancies, to the requisite qualifications and experience of staff members already in the service of the Court". The complainant's pleas that he was subjected to unequal

treatment and discrimination are therefore unfounded. He was subjected to the same rules as others staff members in the Legal Office who were in similar situations in the process (see, for example, Judgment 4027, under 12). His pleas of personal bias and retaliation are also unfounded as he has presented no evidence to support them (see, for example, Judgment 3748, under 6). The complainant's pleas that the untimely completion of his appraisal was caused by bad faith, malice or misuse of authority are also unfounded as he has not discharged the burden to prove these pleas (see, for example, Judgment 3996, under 4(b)).

11. The complainant also submits, in effect, that the impugned decision should be set aside because the Appeals Board failed to make a finding about the numerous violations of the performance appraisal system and thus failed to fulfil its mandate under Staff Regulation 11.1 and Staff Rule 111.2(a). He insists that this was a miscarriage of justice which prejudiced his right to appeal, demonstrates bad faith, and is a ground for punitive damages. The Tribunal does not accept these submissions. The report of the Appeals Board plainly shows that it carried out its mandate and substantiated its opinion that the internal appeal was receivable, but that the complainant was not entitled to the damages which he had claimed. The complainant came to this Tribunal to appeal the impugned decision, in which the Registrar did not accept the Appeals Board's opinion that the internal appeal was receivable but accepted that the complainant was not entitled to the relief that he sought.

The complainant's further submission that the Appeals Board did not address the ground of misuse of authority; did not examine the full elements of the dispute and did not as an internal appeals body properly consider his appeal, fails. The Board considered the internal appeal and the complainant has had recourse to this Tribunal to appeal against the impugned decision. Moreover, as determined earlier, the allegation of misuse of authority is not proved. As to the complainant's plea that the impugned decision was tainted with errors of law and fact, the Tribunal has set out the aspects of that decision with which it differs. As to the complainant's further allegations that the impugned decision is tainted by misuse of authority, abuse of purpose, and personal bias, he has provided insufficient evidence to support these allegations. The pleas that the

impugned decision should be set aside on the bases of the foregoing allegations are therefore unfounded, as is his claim for exemplary damages. He has provided no evidence or analysis to demonstrate that there was bias, ill will, malice, bad faith or other improper purpose on which to base an award of exemplary damages (see, for example, Judgment 3419, under 8).

12. As he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 23 December 2015 is set aside, as is the initial decision of 15 July 2015, to the extent stated in consideration 9 above.
2. The ICC shall pay the complainant 5,000 euros in moral damages.
3. The ICC shall pay the complainant 1,000 euros costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, 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

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ