I.

v.

ICC

136th Session **Judgment No. 4682**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. H. I. against the International Criminal Court (ICC) on 22 January 2020, the ICC's reply of 30 April 2020, the complainant's rejoinder of 4 June 2020 and the ICC's surrejoinder of 3 September 2020;

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 the decision to reject his request for post reclassification.

The complainant joined the ICC on 1 December 2016 as the Head of Security Policy and Compliance Unit at grade G-7. That position was established on 1 July 2015 in the context of the restructuring of the ICC's Registry implemented through the "*Re*Vision Project". In Judgment 3907, delivered in public on 24 January 2018, the Tribunal concluded that the "Principles and Procedures Applicable to Decisions Arising from the *Re*Vision Project" were without legal foundation and, therefore, unlawful as were the decisions taken pursuant to these procedures.

In August 2018, the complainant started discussions about the classification of his post with the Chief of Security and Safety Section (SSS). He contended that his position was not correctly classified pursuant to the *Re*Vision Project and that his duties and responsibilities were those of a P-4 post. Both parties agree that, at this stage, the Chief of SSS supported the complainant but suggested that the latter wait for the forthcoming promulgation of the Administrative Instruction on Classification and Reclassification of Posts, and further instructions on the process. That Administrative Instruction was published on 22 November 2018.

On 6 December 2018, the complainant submitted a "Request for post re-classification". By email of 23 January 2019 to the Chief of SSS, the complainant raised a few questions regarding the existing audit of his post and the formalities to be completed for his request to go forward. The Chief of SSS replied, among other things, that the Administrative Instruction was still in the implementation phase and that he had to seek clarification on the process in situations when the Administrative Instruction does not match with the request and need for post reclassification. By email of 28 February 2019, the President of the Staff Union Council, on behalf of the complainant, inquired about the steps that had been undertaken to address the request of 6 December 2018. By email of 12 March 2019, the Chief of SSS replied to the President of the Staff Union Council that the request for reclassification fell outside the scope of the Administrative Instruction since the complainant had been performing his functions in line with the current work survey, which had not changed since the last time the post was classified. He emphasized that the complainant's post had been classified by experts and that there had been no reorganisation since, nor any classification review or audit which would necessitate a post reclassification.

On 28 March 2019, the complainant requested a review of the Chief of SSS's decision. The request was rejected by the ICC Registrar on 30 April 2019 and the complainant filed a statement of appeal on 31 May 2019. In its report of 27 September 2019, the Appeals Board unanimously found that the ICC was not obliged to initiate a

reclassification procedure under the Administrative Instruction and recommended dismissing the internal appeal. By letter of 30 October 2019, the Registrar endorsed the Appeals Board's recommendation and dismissed the internal appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and order the ICC to make a new determination of his request for a review of the classification of his post on the sole basis of the criteria set forth in Staff Rule 102.1(b). He seeks an award of material damages amounting to the additional salaries and allowances he would have received since his request for review of 6 December 2018 should the classification of his post have resulted in his reclassification as a Professional staff member. The complainant requests to be compensated in an amount of 50,000 euros for moral damages. He also asks the Tribunal to condemn the ICC to payment of punitive damages in the amount of 1,000 euros per month of delay since the date of the initial request until the date of an eventual review of the classification of his post. The complainant seeks costs in the amount of 5,000 euros.

The ICC asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant advances four pleas:

(a) "error of procedure";

(b) "errors of law";

(c) "error of fact"; and

(d) "misuse of authority".

2. It is appropriate to recall the relevant rules.

Staff Regulation 2.1 reads:

> "In conformity with principles laid down by the Assembly of States Parties [ASP], the Registrar, in consultation with the Prosecutor, shall make appropriate provision for the classification of posts according to the nature of the duties and responsibilities required and in conformity with the United Nations common system of salaries, allowances and benefits (hereinafter 'the United Nations common system standards')."

Staff Rule 102.1, entitled "Classification of posts", reads:

"(a) The system of classification of posts shall be maintained to ensure the assignment of appropriate grades and titles to all posts in the Court.

(b) Under principles laid down by the Assembly of States Parties, posts shall be classified according to the nature of their duties and responsibilities, in conformity with the United Nations common system of salaries, allowances and benefits (hereinafter: 'the United Nations common system standards').

(c) The following categories of posts shall apply at the Court:

(i) General Service category;

(ii) Professional and higher categories."

Section 4 of the Administrative Instruction ICC/AI/2018/002 on Classification and Reclassification of Posts, entitled "Procedure for Requests to Classify or Reclassify a Post", reads:

"4.1 When a post is newly established, or has not been previously classified, a request for its classification may be made to the Classification Board by a Head of Organ at the request of a Director of Division and/or a Head/Chief of Section, as appropriate.

4.2 A request for reclassification of a post may be made to the Classification Board by a Head of Organ, at the request of a Director of Division and/or a Head/Chief of Section, as appropriate, and any incumbent(s) of the affected post(s) shall be promptly notified:

(a) When the duties and responsibilities of a post have changed or will change substantially as a result of a restructuring within a Division, Section or Unit and/or a decision of the ASP;

(b) When the duties and responsibilities of a post have substantially changed or it is foreseen that they will substantially change since the previous classification was performed, to the extent that a reclassification upwards or downwards could be appropriate; or

(c) When required by a classification review or audit of a post or related posts, as determined by the Human Resources Section.

4.3 Incumbents who consider that the duties and responsibilities of their posts have been substantially affected by a restructuring within a Division, Section or Unit and/or a decision of the ASP may request, through their Director of Division and/or Head/Chief of Section, as appropriate, that the Head of Organ consider the matter for appropriate action under section 4.2 above.

4.4 Requests for classification or reclassification of posts shall be made before the issuance of a vacancy announcement and shall include:

(a) A complete and up-to-date job description or work survey for the post in question, using standardized job descriptions, where applicable;

(b) An up-to-date organizational chart showing the placement of the post in question and of other posts that may be affected by the reclassification requested; and

(c) A valid and available post number confirming the existence of a budgeted post accompanied, where relevant, by a justification explaining the reason for submitting the request for a review and the nature of the changes, in the light of the provisions set out in Section 1.

4.5 The incumbent(s) of the affected post(s) shall be promptly informed of the decision of the Registrar or the Prosecutor, as appropriate, to submit or not the request for reclassification to the Secretary of the Classification Board.

4.6 Requests for classification or reclassification shall be submitted to the Secretary of the Classification Board, who shall arrange for a person who has been appropriately trained in accordance with Section 3.7 above to provide an initial indication of the classification level based on the information included in the request and in accordance with the standards mentioned in Section 2. The request and the initial indication of the classification level shall then be transmitted to the Classification Board for consideration.

4.7 In providing its advice to the Registrar or the Prosecutor, as appropriate, on requests for classification or reclassification, the Classification Board shall consider:

(a) The reasons for the request for classification or reclassification in the light of the provisions set out in Section 1 above;

(b) The budgetary impact of the request;

(c) Whether an increase of responsibilities of one post may have led to a reduction of responsibilities of other posts;

(d) The relative merits of alternatives for distributing work and arranging work processes; and

(e) Any other relevant information.

4.8 The Classification Board shall consider the request and render its advice in writing to the Registrar or the Prosecutor, as appropriate. Such advice shall include its recommendation as to the level of the post based on the request. The advice of the Classification Board shall be adopted, whenever possible, by consensus. If such consensus is not possible, both the majority's advice and the dissenting view(s) shall be submitted to the Registrar or Prosecutor, as appropriate. The

incumbent(s) of the affected post(s) shall promptly receive a copy of the advice of the Classification Board.

4.9 If the Registrar or the Prosecutor, as appropriate, endorses the request, or any of the alternatives proposed by the Classification Board, a classification analysis of the affected post(s) shall be conducted independently by an external classification expert on the basis of the applicable classification standards established by the ICSC as set out in Section 2 above. The incumbent(s) of the affected post(s) shall be promptly notified of the decision by the Registrar or Prosecutor, as appropriate, together with a copy of the classification analysis.

4.10 The decision to put forth classification(s) or reclassification(s) of a post shall be taken by the Registrar or the Prosecutor, as appropriate. The incumbent(s) of the affected post(s) shall be promptly informed of this decision. The approval authority rests with the ASP, upon recommendation of the CBF. In order to make its recommendation, the CBF shall be provided by the Court, at its first session of the year, with the Classification Board's advice and related justification.

4.11 The Registrar or Prosecutor, as appropriate, shall decide to classify or reclassify a post only with the prior approval of the ASP. The Human Resources Section shall promptly notify such decision to the requesting Division, Section or Unit, and to the incumbent(s) of the affected post(s). This notification shall include the process followed, the final outcome and reasons for which the decision was taken.

4.12 Upon request, the incumbent of the affected post shall promptly have access to all evidence/information on which the authority bases, or intends to base, the decision(s) affecting him or her."

3. In his first plea, entitled "error of procedure", the complainant submits that the 12 March 2019 decision of the Chief of Security and Safety Section (SSS) erroneously assumed that any classification action requires an external classification expert to do the assessment. He alleges that such a decision infringed Staff Rule 102.1 and Section 4 of the Administrative Instruction, insofar as the Chief of SSS failed to submit the complainant's request for reclassification of his post to the Registrar. Referring the complainant's 6 December 2018 request to the Registrar was the only action required of the Chief of SSS under the relevant rules.

In his rejoinder, the complainant advances a further argument, submitting that the Chief of SSS firstly advised the complainant to wait, before lodging a formal request for reclassification of his post, until the promulgation of the Administrative Instruction, and afterwards stated that said Instruction was not applicable to the complainant's request. Advising the complainant to wait until the promulgation of the Administrative Instruction, knowing that it would not be applicable to his situation, amounted to bad faith.

This plea is unfounded. It is not presently relevant whether the complainant's request relied on Section 4.1 or on Section 4.2 of the Administrative Instruction. The request for both classification and reclassification of a post "may be made to the Classification Board by a Head of Organ at the request of a Director of Division and/or a Head/Chief of Section", provided that the prescribed requirements are met (see Section 4.1 and Section 4.2 of the Administrative Instruction). Pursuant to these provisions, the Head/Chief of Section (in the instant case, the Chief of SSS) is not obliged in any case and without a preliminary assessment to refer to the Head of Organ (in the instant case, the Registrar of ICC) a classification or reclassification request, which has been submitted by a staff member. Conversely, the Head/Chief of Section has the power to preliminarily assess whether the staff member's request is grounded, at least *prima facie*, on the legal requirements provided by Section 4. In the present case, the complainant submitted a request for "re-classification" of his post. Even though the complainant did not specify on which paragraph of Section 4 of the Administrative Instruction he relied, his reference to "re-classification" made it reasonable for the Chief of SSS to treat the application as having been submitted under Section 4.2. Considering that the complainant applied for reclassification but did not rely on any of the legal requirements for reclassification itself, the Chief of SSS correctly and lawfully did not refer the complainant's request to the Registrar.

The complainant, in the present complaint, only focuses on the statement of the Chief of SSS that an expert evaluation should be required and that he (the Chief of SSS) was not an expert. However,

such a statement must be read in the context of the entire 12 March 2019 decision. That decision, in essence, states that a post classification exercise had already been made by experts in 2015, and that there was no evidence of relevant conditions justifying a reclassification. Indeed, the decision states that the Administrative Instruction "does not apply to this particular situation [...] The current incumbent of the post is and has been performing his functions in line with the current work survey (which has not changed since the last time the post was classified) and there has been no organisational restructuring. Equally, until to date there has been no classification review or audit which would necessitate a reclassification of the post. Therefore the request for reclassification of this [post] falls outside of the ICC/AI/2018/02 in terms of the duties and responsibilities."

In any case, even assuming that the Chief of SSS should have submitted the complainant's request to the Registrar, and also construing the non-referral as an error of procedure, such an error would have no bearing on the lawfulness of the final decision. Indeed, the Registrar did receive the complainant's request for reclassification when he examined the complainant's request for review of the 12 March 2019 decision.

The allegation of bad faith, submitted in the complainant's rejoinder is unproven. Bad faith may not be presumed and the burden of proof is on the party that pleads it (see Judgments 4451, consideration 16, and 4067, consideration 11). When the Chief of SSS advised the complainant to wait for the issuance of the Administrative Instruction, he could not have known its content since the Administrative Instruction had not yet been adopted at that time.

4. In his second plea, entitled "errors of law", which is twofold, the complainant alleges that:

(i) both the 12 March 2019 and the 30 April 2019 decisions wrongly assumed that the complainant's request was a "reclassification" request based on Section 4.2 of the Administrative Instruction, whereas the complainant had never specified that he was relying on Section 4.2. His request should have been treated as having

been filed under Section 4.1, which is concerned with the "classification" of newly established posts and of posts not previously classified; and

(ii) the Appeals Board's report and the final decision wrongly held that the complainant was not allowed to lodge a request for classification of his post pursuant to Section 4.1 of the Administrative Instruction, as such a request was time-barred. On the contrary, he alleges his request was not time-barred by the circumstance that he did not challenge the classification of his post in due time, as such classification had been set aside by Judgment 3907, worded in general terms, and therefore applicable also to the complainant, even though he had not been a party to that judgment. Since the 2015 classification of his post was annulled by Judgment 3907, as a result, his post is "not previously classified" in the meaning of Section 4.1 of the Administrative Instruction. He also invokes the *stare decisis* authority of Judgment 3907.

In his rejoinder, the complainant adds that the classification of his post had been made in 2015, whereas he joined the ICC in December 2016; moreover, he was never notified of the post classification. As a result, he could not have challenged such classification in 2015 or in 2016, and therefore his challenge to the post classification was not time-barred.

This plea is unfounded.

Firstly, even though the complainant never specified on which paragraph of Section 4 of the Administrative Instruction he was relying, he applied for a "reclassification" and not for a "classification" of his post, both in his initial request of 6 December 2018 and in his application for review of 28 March 2019. Even the 28 February 2019 email, sent by the President of the Staff Union Council, on behalf of the complainant, to the Chief of SSS, made reference to "reclassification". Therefore, it was reasonable and appropriate for the Chief of the SSS and for the Registrar to consider the application as based on Section 4.3 of the Administrative Instruction (and therefore following the procedure provided for by Section 4.2), and to dismiss it as not satisfying the applicable requirements in the Administrative Instruction.

Secondly, the Appeals Board's report and the final decision, correctly considered that, even accepting that the complainant requested a "classification" under Section 4.1 of the Administrative Instruction, such a request would be time-barred. The complainant joined the ICC on 1 December 2016 and he was assigned to the position of Head of Security Policy and Compliance Unit at grade G-7. At the time he was assigned the grade G-7, he would have known his post classification and was therefore able to challenge it. He should have challenged the post classification in due time (i.e. within 30 days, pursuant to Staff Rule 111.1(b)), as from the date he received the grade G-7. The Tribunal's case law holds that time limits serve the purpose of, among other things, creating finality and certainty in relation to the legal effect of decisions. An organisation is entitled to proceed on the basis that a decision which is not challenged within the prescribed time limits is fully and legally effective when the applicable time limit for challenging that decision before the competent internal appeal bodies has passed (see Judgments 4374, considerations 7 and 8, 3940, consideration 2, 3755, consideration 3, 3439, consideration 4, and 2933, consideration 8).

Neither could Judgment 3907 be regarded as a new fact justifying an exception to the time limits for filing a complaint. The Tribunal's case law states that, since time limits are an objective matter of fact, any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties' legal relations, which is the very justification for a time bar. In particular, the fact that a complainant may have discovered a new fact showing that the impugned decision is unlawful only after the expiry of the time limit for submitting an appeal is not in principle a reason to deem her or his complaint receivable. It is true that, notwithstanding these rules, the Tribunal's case law allows an employee, concerned by an administrative decision which has become final, to ask the Administration for review, either when some new and previously unforeseeable fact of decisive importance has occurred since the decision was taken, or when the employee is relying on facts or evidence of decisive importance of which she or he was not and could not have been aware before the decision was taken. However, the fact that, after the expiry of the time limit for appealing against a decision, the Tribunal has rendered a judgment on the lawfulness of a

similar decision in another case, does not come within the scope of these exceptions (see Judgment 3002, considerations 13 and 14). Only under very special circumstances, did the Tribunal accept that the delivery of one of its judgments could be described as a new and unforeseeable fact of decisive importance, within the meaning of the above-cited case law and could therefore have the effect of reopening the time limit within which a complainant could lodge an appeal (see Judgment 676). No exceptional circumstances of this nature exist in the instant case, as the complainant, when he joined the ICC, was aware of the classification of his post and was therefore in a position to know the general decision on which such classification was based. Consequently, he was able to impugn both the individual and the general decisions in due time.

The complainant cannot benefit from Judgment 3907 by relying on the principles of *res judicata* or *stare decisis* in order to elude the time limit for challenging the classification of his post. It must be recalled that Judgment 3907 set aside individual decisions based on Information Circular ICC/INF/2014/011 entitled "Principles and Procedures Applicable to Decisions Arising from the *Re*Vision Project". It held that pursuant to Presidential Directive ICC/PRESD/G/2003/001 of 9 December 2003, the Principles and Procedures should have been promulgated by an Administrative Instruction or, arguably, by a Presidential Directive. "As the promulgation of the Principles and Procedures by Information Circular was in violation of the Presidential Directive, they were without legal foundation and are, therefore, unlawful as are the decisions taken pursuant to the Principles and Procedures. It follows that the decisions to abolish the complainant's position and to terminate the complainant's appointment were also unlawful and will be set aside" (see Judgment 3907, consideration 26).

Although the reference to the unlawfulness of "the decisions taken pursuant to the Principles and Procedures" may appear to be made in general terms, Judgment 3907 only concerns the decisions impugned in that case by the complainant who was party to that judgment, and it does not apply to third parties. Judgment 3907 has no *res judicata* authority in the present case, as the force and effect of *res judicata* can

only be attributed to a judgment rendered between the same parties on the same subject matter, and this is not the case here.

It is entrenched in the Tribunal's case law that there is no exception to the general rule of *res judicata*, not even when a decision is of "general" application. The judgments of the Tribunal operate only *in personam* and not *in rem*. Notwithstanding the generality of the terms in which the Tribunal may dispose of a case before it, the judgment has effect only as between the parties to it (see Judgment 2220, consideration 5).

Judgment 3907 has no effect on previously adopted individual decisions which were not impugned in due time (see Judgment 3357, considerations 13 and 14).

In the instant case, the complainant joined the ICC on 1 December 2016 and was aware of his post classification at that time. Judgment 3907 was delivered in public on 24 January 2018; the complainant started discussions about the classification of his post in August 2018 and submitted an official request for reclassification in December 2018. Accordingly, the Tribunal does not accept the complainant's contention that the 2015 classification of his post was annulled by Judgment 3907 and, as a result, his post is "not previously classified" in the meaning of Section 4.1 of the Administrative Instruction. On the contrary, the 2015 classification of the complainant's post is still valid and efficacious.

The complainant invokes the rule of *stare decisis*. In the present case, reliance on the *stare decisis* rule is not appropriate, and Judgment 3907 does not apply to the present case, as the legal and factual situations are different.

5. In his third plea, entitled "error of fact", which is twofold, the complainant contends that:

(i) the Chief of SSS, the Appeals Board and the Registrar erred in not taking into account "the *stare decisis* authority" of Judgment 3907; and

(ii) the Appeals Board's report and the Registrar in his final decision erred in the assessment of the complainant's submissions regarding the authenticity of the 2015 post classification.

By his first argument, the complainant merely reiterates his second plea, which has already been rejected in consideration 4 above.

The complainant's second argument is concerned with the 2015 post classification, whose challenge is time-barred, as already stated in consideration 4 above. Since the complainant's challenge to the initial post classification is irreceivable, any related plea and argument is irreceivable as well.

6. In his fourth plea, entitled "misuse of authority", the complainant argues that:

(i) Administrative Instruction ICC/AI/2018/002 on Classification and Reclassification of Posts infringes Staff Rule 102.1(b), to the extent it establishes a different division of responsibilities between the Assembly of States Parties (ASP) and the management of the organisation with regard to the classification and reclassification of posts;

(ii) specifically, the provisions of Sections 1.6, 4.10, and 4.11 of the Administrative Instruction, entrusting the ASP with the power to approve individual classification cases, are unlawful; and

(iii) in addition, under the Administrative Instruction, the classification/ reclassification of posts within the organisation is made according to its financial impact, contrary to Staff Rule 102.1(b), which provides that classification/reclassification exercises shall be led "according to the nature of [...] duties and responsibilities", irrespective of their financial impact.

The plea is unfounded. The complainant has no cause of action in complaining about the power of the ASP to approve the classification/ reclassification of his post, considering that the reclassification process, in the instant case, ended at a stage when the ASP had not yet been involved. He could only have complained if a classification/reclassification proposal had been submitted to and denied by the ASP. As a result, even

if the Tribunal were to state that the ASP has no power to approve the classification/reclassification of his post, he would have no benefit from such a statement. Furthermore, there is no evidence that the denial of reclassification of his post was governed by considerations or concerns about the financial impact of a reclassification.

7. Since the complainant's pleas are unfounded, his claim for setting aside the initial decision and the impugned decision should be dismissed, as well as his claims for material, moral, and punitive damages, and costs.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 24 May 2023, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ