

P. L. (No. 4)

v.

ICC

138th Session

Judgment No. 4824

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr E. P. L. against the International Criminal Court (ICC) on 10 May 2020 and the ICC's reply of 27 August 2020, the complainant having chosen not to file a rejoinder;

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 close the case on his allegations of harassment and unequal treatment by the former Registrar of the ICC.

The background to this complaint is to be found in Judgment 4006, delivered in public on 26 June 2018, concerning the complainant's first complaint. Suffice it to recall that in 2015 he lodged an internal complaint seeking the removal of the then Registrar of the ICC for alleged harassment and unequal treatment. As the procedure for dealing with harassment complaints set out in Administrative Instruction ICC/AI/2005/005 would ordinarily have culminated in a final decision by the Registrar himself, the complainant argued that this procedure would be inappropriate and that his complaint should instead be dealt

with under Articles 46 and 47 of the Rome Statute of the ICC. Article 46 provides for the removal from office of a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar, in cases where they are found to have committed serious misconduct or a serious breach of their duties, or where they are unable to exercise their functions. Article 47 provides for disciplinary measures against those same individuals in the event that they are found to have committed misconduct of a less serious nature than that contemplated by Article 46. The complaint was examined under those provisions and, after consultation of a panel of judges, was rejected as manifestly unfounded.

The complainant impugned that decision in his first complaint, which the Tribunal dismissed as irreceivable in Judgment 4006 on the basis that proceedings invoking Articles 46 and 47 of the Rome Statute alone and seeking their enforcement were not within the Tribunal's competence. However, the Tribunal also observed (in consideration 14 of the judgment) that the harassment complaint could almost certainly have been dealt with under the ordinary procedure, either by operation of the doctrine of necessity or because the Registrar could have delegated his decision-making authority to another official, and that this should be taken into account by the ICC in the event that the complainant sought thereafter to pursue a formal complaint under ICC/AI/2005/005. The Tribunal recalled that the organisation had a duty to give proper advice to a staff member who pursued a grievance by an incorrect procedure.

Shortly after the delivery of Judgment 4006, the complainant re-submitted his harassment complaint to the new Registrar of the ICC. It was forwarded to the Disciplinary Advisory Board (DAB) and also to the Internal Oversight Mechanism (IOM). Following a preliminary review, the IOM informed the Registrar and the complainant, on 28 and 29 November 2018 respectively, that a full investigation was not warranted and that IOM had therefore closed the matter. As for the DAB, it submitted a report on 8 February 2019 in which it concluded that, under the applicable legal framework, it was not competent to deal with the case, because the alleged harasser was an elected official of the

Court and not a staff member. It also found that, even if the Registrar were considered to be subject to the same rules as staff members, the DAB would still not be competent, because the alleged harasser was no longer a staff member at the time when the complaint was referred to the DAB, and its competence was limited to “staff members”.

On 6 March 2019, the Registrar referred the matter back to the DAB and urged it to advise as to whether harassing behaviour had taken place, even if it felt unable to recommend disciplinary measures. He pointed out that to reject the complaint on the basis that the alleged harasser was no longer a staff member would seem contrary to the position adopted by the Tribunal in Judgment 4006. However, in a memorandum of 1 May 2019, the DAB maintained the position adopted in its initial report.

On 21 June 2019, the Registrar forwarded to the complainant a copy of the IOM’s memorandum of 28 November 2018, the DAB’s initial report, his memorandum of 6 March and the DAB’s response of 1 May. He told the complainant that, in light of the position adopted by the IOM and the DAB, he believed that he had no alternative but to close the case. Nevertheless, in view of the “unique circumstances” of the case, he invited the complainant to submit his views by 28 June 2019, after which he would take a final decision.

On 2 July 2019, the complainant’s counsel, who was apparently unaware of the Registrar’s memorandum of 21 June, filed a third complaint impugning the implied rejection of the harassment complaint on the basis of Article VII, paragraph 3, of the Tribunal’s Statute (this third complaint was, in due course, summarily dismissed as clearly irreceivable in Judgment 4271).

On 8 July 2019, the complainant’s counsel responded to the memorandum of 21 June, explaining that the complainant had not received it until then because he had been on sick leave. He expressed the view that the DAB members ought to have been recused, but did not comment on the conclusion reached in the memorandum of 21 June, as he considered it was “too late” to do so, now that the third complaint was pending before the Tribunal.

On 23 July 2019, the Registrar sent his final decision to the complainant, copying it to the complainant's counsel. Having recalled the above sequence of events, he informed the complainant that he had decided to close the case. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to examine the merits of his harassment complaint and to determine whether the charges of harassment and underlying disciplinary offences have been proved beyond reasonable doubt, in which case he asks the Tribunal to order the ICC to take disciplinary measures against the former Registrar. He also claims material damages in the amount of 125,000 euros, moral damages in the amount of 350,000 euros, punitive damages in the amount of 50,000 euros and costs in the amount of 7,500 euros.

The ICC asks the Tribunal to dismiss the complaint as irreceivable, on the grounds that it does not satisfy the requirements of Article VII, paragraph 2, of the Statute of the Tribunal, or, alternatively, as unmeritorious.

CONSIDERATIONS

1. In Judgment 4006, having dismissed, as irreceivable, the complainant's first complaint in which he challenged the decision to close his harassment complaint against the then Registrar, the Tribunal stated that in the circumstances of the case (as it explained in considerations 13 and 14 of the judgment) the complainant had been denied an opportunity to pursue his harassment complaint on its merits under Administrative Instruction ICC/AI/2005/005, in effect, because the Administration had failed in its duty to advise him to follow the appropriate procedure under this Administrative Instruction. The Tribunal then stated in conclusion in consideration 14, that "[i]f the complainant now elects to pursue a formal harassment complaint under Administrative Instruction ICC/AI/2005/005, then it would be desirable for [the matters it had noted, in considerations 13 and 14 of the judgment] to be taken into account by the Administration in assessing whether it should raise barriers, such as time limits, in order to prevent

this course being pursued”. On the basis of this statement, the complainant resubmitted his harassment complaint to the Registrar pursuant to ICC/AI/2005/005, which contained the regulatory provisions to defend staff members from harassment.

2. Article 1.2 of ICC/AI/2005/005 states that the ICC prohibits harassment of any kind and shall take all measures necessary to sustain a work environment upholding dignity and respect for all. Article 7.3 relevantly states that in accordance with Chapter X of the Staff Rules, the Registrar shall transmit a harassment complaint to the Disciplinary Advisory Board (DAB), which shall advise the Registrar as to whether harassing behaviour has taken place and recommend what, if any, measures should be taken. Article 7.4 relevantly states that proven cases of harassment may be subject to disciplinary measures as set forth in Staff Rule 110.6. Article 7.5 relevantly states that if the alleged conduct is not found by the Registrar, upon the recommendation of the DAB, to constitute harassment, the case shall be closed. Article 7.7 states that the final decision of the Registrar shall be communicated to both the complainant and the alleged harasser. As the facts reveal, the Registrar referred the complainant’s resubmitted harassment complaint not only to the DAB but also to the Internal Oversight Mechanism (IOM). They also reveal their responses to the Registrar and subsequent communications, which culminated in the Registrar’s final decision of 23 July 2019 to inform the complainant and his counsel that he had decided to close the case.

3. The complainant impugns the decision on three grounds. In the first and second grounds, he contends that the disciplinary procedure that led to the impugned decision is tainted with several procedural flaws which also constitute errors of law. In the third ground, he contends that each of the procedural flaws he raised in the first and second grounds amounts to unsatisfactory conduct on the part of the Registrar, who “abused his authority to commit unsatisfactory conduct under the [ICC]’s legal framework”.

4. In addition to requesting the Tribunal to set aside the impugned decision and award him material, moral and punitive damages and costs, the complainant requests the Tribunal to examine the merits of his grievance complaint and rule on whether the charges of harassment and underlying disciplinary offences have been proved beyond reasonable doubt, in which case he asks the Tribunal to order disciplinary measures against the former Registrar.

5. The ICC submits that the complaint is irreceivable because it was not filed within 90 days following the notification of the impugned decision, as required by Article VII, paragraph 2, of the Tribunal's Statute, which relevantly provides that "[t]o be receivable, a complaint must [...] have been filed within ninety days after the complainant was notified of the decision impugned". The case law further states that such time limits must be strictly adhered to. In Judgment 3758, consideration 11, for example, the Tribunal explained that strict adherence is essential to have finality and certainty in relation to the legal effect of decisions, so that when an applicable time limit to challenge a decision has passed, the organization is entitled to proceed on the basis that the decision is fully and legally effective. However, as the Tribunal recalled in consideration 2 of Judgment 4059, for example, the case law also recognizes that there are exceptions to the requirement of strict adherence to the applicable time limits in very limited circumstances. The circumstances identified in the case law are: where the complainant has been prevented by *vis major* from learning of the impugned decision in good time or where the organization, by misleading the complainant or concealing documents from him or her so as to do him or her harm, has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith; and where some new and unforeseeable fact of decisive importance has occurred since the decision was taken, or where the staff member concerned by that decision is relying on facts or evidence of decisive importance of which he or she was not and could not have been aware before the decision was taken.

6. The complainant submits that the strict time limit should not be adhered to in this case because by the time he was notified of the impugned decision, he had already filed his third complaint, so the case was already pending before the Tribunal; that he could not submit a new complaint on the same matter before the Tribunal had ruled on his third complaint; and that once it had delivered Judgment 4271 on his third complaint, he filed his fourth complaint within the following 90-day period, which brings his case within the exceptional circumstances.

7. The foregoing submissions are rejected. The complainant was notified of the Registrar's express final decision on his harassment complaint on 23 July 2019, and Article VII, paragraph 2, of the Tribunal's Statute required him to file his complaint with the Tribunal within ninety days following that notification, that is, by 21 October 2019. He filed this complaint more than six months beyond the expiry of the ninety-day time limit. It is clear that the reasons he advances in the foregoing submissions do not fall within any of the "very limited circumstances" recalled above, in which the requirement of strict adherence to the time limit can be waived. The complainant was not prevented by *vis major* from learning of the decision in good time; the organization did not mislead him or conceal documents from him, thereby preventing him from exercising his right of appeal; and there is no new and unforeseeable fact, nor any fact that existed but was unknown to the complainant before the decision was taken. In this regard, the fact that the complainant had already filed his third complaint impugning what he considered to be an implied decision to reject his harassment claim is irrelevant, given that the third complaint was clearly irreceivable for the reasons explained in Judgment 4271.

8. In the foregoing premises, the complainant's fourth complaint is irreceivable and must be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER