Z. (Nos. 1, 2 and 3)

v.

ICC

138th Session **Judgment No. 4826**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first, second and third complaints filed by Ms D. Z. against the International Criminal Court (ICC) on 9 October 2020, the ICC's single reply of 2 February 2021, the complainant's rejoinder of 4 April 2021 and the ICC's surrejoinder of 14 July 2021;

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 cases may be summed up as follows:

The complainant seeks compensation for alleged procedural errors in the processing of her complaint of harassment and misconduct.

In February 2019, the complainant, who was working in the Interpretation Unit of the Language Services Section (LSS), lodged an internal complaint against three of her colleagues (Ms T., Ms D.R. and Ms S.) alleging harassment, retaliation and unauthorised access to her email account. She asserted that she had been the victim of harassment, in various forms, since 2015. The Registrar of the ICC forwarded her complaint to the Disciplinary Advisory Board (DAB) and to the Independent Oversight Mechanism (IOM) on 18 March 2019.

To enable it to examine the complainant's allegations of unauthorised access to her email account, in June 2019, the DAB requested that a technical examination of certain computers be conducted by the Information Management Services Section (IMSS).

By a memorandum of 26 June 2019, the Head of the IOM informed the Registrar that the IOM would not conduct an assessment or an investigation with respect to this case. He noted that the case had been referred to the DAB. The complainant was not informed, at this stage of the proceedings, that her complaint would not be investigated by the IOM.

IMSS submitted its Technical Evaluation Report in November 2019 and the complainant was invited to comment on its findings. On 15 January 2020, the DAB issued separate reports dealing with the allegations against Ms T. and Ms D.R. It concluded that none of the complainant's allegations amounted to harassment and that there was no evidence to support her allegations of retaliation and unauthorised access to her email account. It therefore recommended that these complaints be dismissed, but that the parties should participate in mediation in view of the deterioration in the working atmosphere in LSS.

On 4 February 2020, the Registrar notified the complainant of his final decisions on the cases against Ms T. and Ms D.R. On the basis of the findings and recommendations of the DAB, he had decided to close both cases. Attached to each decision was a copy of the relevant DAB report and of the memorandum of 26 June 2019 from the Head of the IOM.

In March 2020, the DAB informed the complainant that it was re-opening these two cases, as well as the case concerning Ms S. (though no final decision had been taken regarding the latter case), in order to remedy a procedural error. The DAB explained that it had realised that there had been a failure to share certain documents with the parties in the course of its proceedings. It therefore forwarded those documents to the parties concerned and invited them to submit their comments, after which it would reconsider the cases and make recommendations to the Registrar. The complainant questioned the legal basis for the re-

opening of the cases concerning Ms T. and Ms D.R., arguing that the procedural errors affecting the proceedings could not be remedied in this way. She suggested that the parties should engage in mediation and that, if that process proved unsuccessful, her complaint should be examined afresh by a different DAB panel. Meanwhile, she requested that the examination of the case concerning Ms S. be suspended. However, the Registrar informed her that he saw no need to re-start or suspend the proceedings. He encouraged the complainant to contact the Human Resources Section (HRS) to enquire about the possibility of a mediation process.

In the event, after having consulted HRS, the complainant invited the three colleagues against whom her allegations were directed to participate in a mediation process, but two were unwilling to participate whilst the other did not respond.

The DAB issued revised reports on the cases concerning Ms T. and Ms D.R. and a report on the case concerning Ms S. on 11 June 2020. In each case, it considered that there was insufficient evidence to support the complainant's allegations. On 13 July 2020, the Registrar notified the complainant that on the basis of these reports he had decided to close all three cases. These are the impugned decisions.

In each complaint, the complainant asks the Tribunal to declare that the impugned decision is tainted by procedural errors and is therefore void. She seeks an order requiring the ICC to notify her, as well as the Tribunal, in writing, of the measures it has implemented to ensure a safe working environment in her section, which, she says, should include ensuring the distribution of a reasonable workload, defining and implementing a mechanism to review her workload on a regular basis, and reviewing and confirming that her job description reflects the job actually performed, or updating it as required. She claims damages in the amount of 106,000 euros, comprising material damages in respect of the DAB's failure to give a full and fair consideration of the merits of her complaint, and moral damages for procedural errors, unreasonable delay in the proceedings, institutional harassment and "medical injuries". The complainant also seeks the reimbursement of "out-of-pocket medical costs" and an award of legal costs.

The ICC asks the Tribunal to dismiss the three complaints as unmeritorious.

CONSIDERATIONS

1. The complainant is a staff member of the ICC who, at the material time, was working in the Interpretation Unit of the Language Services Section (LSS) of the ICC's Registry. On 9 October 2020, she filed three complaints with the Tribunal impugning three final decisions made by the Registrar communicated to her through three internal memoranda dated 13 July 2020. These decisions closed her harassment complaints against Ms T., Ms D.R. and Ms S., which she had lodged on 25 February 2019. The relevant background facts are set out earlier in this judgment.

2. The ICC asks the Tribunal to join the three complaints, and filed a single reply. The complainant indicated that she agrees with the joinder. She indeed filed a single rejoinder. Apart from a few footnotes referencing communications that are specific to each case, the three complaints before the Tribunal are identical. They essentially seek the same redress, rest on the same submissions, and raise the same legal issues. They will therefore be joined to form the subject of a single judgment.

3. In her brief, the complainant explains that her complaints before the Tribunal are "not brought against the subjects of the allegations" but "against the defendant organization on the basis that [its] handling of the entire matter has been seriously deficient and breached the duty of care owed [...] to the [c]omplainant". In short, she does not want the Tribunal to examine the merits of her allegations against her colleagues; nor does she want the case to be remitted to the ICC for a fresh investigation of those allegations. She only wants the Tribunal to find that the examination of her internal complaint was procedurally flawed and that she is therefore entitled to relief, including material and moral damages.

4. The complainant also requests the Tribunal to order that "physical measures and virtual measures" be implemented by the ICC to ensure a safe working environment in the complainant's section. This request is rejected as it is not within the competence of the Tribunal to make orders of this kind against organizations (see, for example, Judgment 4622, consideration 19).

5. In seeking to set aside the impugned decisions, the complainant advances three grounds of challenge. She first argues that the procedure followed by the Disciplinary Advisory Board (DAB) in examining her internal complaint was vitiated by procedural flaws so fundamental that they could not be remedied by simply "reopening" the cases and obtaining additional submissions from the parties, especially since the matter was then re-examined by the same DAB panel. According to her, those flaws could not be remedied by remitting the case to the ICC at this stage, in view of the time that has elapsed since the events underpinning her allegations, and the only way to redress the injury caused by the mishandling of her complaint is to award her damages. Second, she argues that the unreasonable delay in addressing her complaint has made it "barely possible" for the ICC to make a full and fair assessment of the merits of her allegations, particularly as one of the subjects is no longer a staff member. Third, she seeks to establish that the ICC's ongoing failure to address problems affecting her working environment amounts to institutional harassment.

6. The applicable legal framework of the DAB in handling a harassment complaint is outlined in the ICC's "Administrative Instruction on Sexual and Other Forms of Harassment" (ICC/AI/2005/005), Staff Rule 110.3 "Disciplinary Advisory Board", Rule 110.4 "Procedures of the Disciplinary Advisory Board", and the "Rules of Procedure of the Disciplinary Advisory Board" (ICC/INF/2007/003).

Section 7 of ICC/AI/2005/005 relevantly provides as follows:

> "7.1 An individual wishing to file a formal complaint may do so by contacting either the Registrar or the Prosecutor to commence disciplinary proceedings.
>
> [...]

> 7.3 In accordance with Chapter X of the Staff Rules, the Registrar or Prosecutor shall transmit the complaint to the [DAB], which shall advise the Registrar or the Prosecutor as to whether harassing behaviour has taken place and recommend what, if any, measures should be taken.
>
> [...]
>
> 7.5 If the alleged conduct is not found by the Registrar or Prosecutor, upon the recommendation of the [DAB], to constitute harassment, the case shall be closed.
>
> [...]
>
> 7.7 The final decision of the Registrar or Prosecutor shall be communicated to both the complainant and the alleged harasser."

Staff Rule 110.4(c) relevantly provides that "[n]ormally, proceedings before the [DAB] shall be limited to the original presentation of the case together with brief statements and rebuttals, which may be made orally or in writing, without delay by the staff member in one of the working languages of the Court".

The Rules of Procedure of the Disciplinary Advisory Board (RPDAB) relevantly provide as follows:

> "**Rule 2: Interpretation**
>
> A Panel of the DAB shall, to the extent required, interpret these rules, in consultation with the Chairperson if need be.
>
> [...]
>
> **Rule 5: Notice of hearing**
>
> (a) Proceedings shall be in written form unless the Panel decides otherwise.
>
> [...]
>
> **Rule 6: Submission of written material**
>
> (a) As stated in Staff Rule 110.4(c), proceedings before the DAB shall normally be limited to the original presentation of the case together with brief statements and rebuttals, made in writing or orally if so decided by the Panel.
>
> (b) Each written submission shall be presented to the Panel of the DAB through the DAB Secretary. [...]
>
> [...]
>
> (d) A copy of each written submission and document furnished to the Panel of the DAB in connection with a case will generally be communicated by the DAB Secretary, upon receipt, to the other party. [...]

[...]

Rule 9: Calling of witnesses

(a) As per Staff Rule 110.4(d), the Panel may call witnesses at its sole discretion.

[...]

Rule 14: Report of the Panel

[...]

(c) The report of the Panel shall normally be submitted to the Registrar or the Prosecutor, as appropriate, within 30 days of receipt of the referral by the DAB in accordance with Staff Rule 110.4.(b). The Panel may, under exceptional circumstances, request the Registrar or the Prosecutor, as appropriate, for an extension of the time limit.

[...]

Rule 18: Organization

[...] The Chairperson of the DAB, during her/his term, shall direct the work and operation of the DAB. She/he inter alia shall:

[...]

- Constitute Panels of the DAB for the consideration of cases;

[...]"

7. In her first ground, the complainant alleges procedural errors as follows. First, the DAB divided her complaint into three separate cases without her consent and without inviting her to make submissions on this issue. Second, she was not given an opportunity to reply to the submissions by the subjects of her complaint. By the time she received "updates", one year had elapsed, making the calling of witnesses "no longer an option". Third, she was not given an opportunity to provide submissions on the nature and scope of the report by the Information Management Services Section (IMSS) before it was commissioned and before Information Technology (IT) security updates were implemented throughout the ICC. Fourth, she was not given an opportunity to make submissions on the Independent Oversight Mechanism (IOM)'s decision not to investigate. Under this heading, she argues that she was denied the protection that would have been afforded to her under the Whistleblowing Protection Policy as a result of the IOM's failure to investigate. Fifth, she could not properly consider whether interviews

should have been conducted and statements shared with the parties, or whether to request an oral hearing, as the arguments raised by the three subjects of her complaint were not shared with her. Sixth, there was no legal basis for the DAB to re-open the cases when the DAB recognized its own errors. Seventh, the Registrar's failure to appoint new DAB members violated the principle *nemo judex in causa sua*.

8. The Tribunal finds the complainant's second, fifth, and sixth arguments intertwined, concerning the issue of whether the procedural error could be rectified retroactively in the administrative proceedings. After the Registrar's final decisions of 4 February 2020, which endorsed the DAB's reports dated 6 January 2020 on Cases DAB 02/2019(i) and 02/2019(ii), the DAB Secretariat discovered that it had failed to communicate submissions made by one party to the other party. On 16 March 2020, the DAB Secretariat informed the parties, stating that the DAB "recognise[d] that this was a grave oversight on the part of the Secretariat", "apologized for this serious error", and "intended to rectify this grave error as follows":

> "1) The DAB has decided to reopen this case.
>
> 2) To that end, the Secretariat will provide copies of all submissions to the DAB Panel made by one party to the other party.
>
> 3) The Panel has agreed to grant each party the period of ten working days to respond to the submission, should they so wish.
>
> 4) Upon receipt of the responses, the Panel will revisit the case, in light of the new submissions.
>
> 5) After considering the case anew, the Panel will make a recommendation to the Registrar."

9. The complainant wrote to the DAB Secretariat on 30 March 2020, requesting clarifications as to the legal basis to re-open Cases DAB 02/2019(i) and (ii), requesting that Case DAB 02/2019(iii) be suspended, and requesting that the DAB proceedings be started afresh with a newly composed DAB panel. The Registrar informed the complainant that he saw no need to restart or suspend the proceedings. On 11 June 2020, the DAB submitted its revised reports to the Registrar, who accordingly rescinded his decisions of 4 February 2020 and

rendered the impugned decisions to close the complainant's three cases, endorsing the DAB's revised reports.

10. The complainant's second, fifth, and sixth arguments are unfounded. It can be seen from the legal framework set out in consideration 6 that the DAB's role includes gathering sufficient information and evidence to reach an informed recommendation for consideration by the Registrar. It is true that the RPDAB contain no rule specifically providing for the re-opening of the cases to rectify the procedural error, but also no rule against it. According to the Tribunal's case law, in the context of an investigation into allegations of harassment, a complainant must have the opportunity to see the statements gathered in order to challenge or rectify them if necessary by furnishing evidence (see Judgments 4111, consideration 4, 4110, consideration 4, 4109, consideration 4, 4108, consideration 4, 3617, consideration 12, and 3065, consideration 8). Rule 6(d) of the RPDAB also requires that a copy of each written submission and document furnished to the Panel of the DAB in connection with a case be communicated to the other party. Consequently, the DAB was obliged to ensure that all parties had access to the same information and were given the opportunity to submit their response to the Panel before it made its recommendations to the Registrar. The Tribunal considers that it was practical and appropriate for the Panel of the DAB to re-open the cases so as to remedy the breach of due process and to deal with the complainant's complaint properly, which enabled the complainant, eventually, to comment on the materials that had originally not been shared with her. Moreover, in the absence of rules regarding re-opening of the cases, the re-opening of the cases by the Panel aligns with Rule 2 of the RPDAB, which entitles the Panel to interpret the RPDAB "to the extent possible" (Rule 2).

11. The complainant's seventh argument that the Registrar's failure to appoint new DAB members violated the principle *nemo judex in causa sua* as "the same DAB panel should not review its own errors" is also unfounded. The Tribunal observes that, pursuant to Rule 6 of the RPDAB, it is the DAB Secretariat, and not the Panel, that is specifically

responsible for communicating copies of the written submissions to the parties. Therefore, in any event, there was no need to change the composition of the DAB after the re-opening of the cases.

12. As regards the complainant's first argument, the complainant does not refer to any rule or provision against the DAB's division of her harassment complaint. Having regard to the fact that the complainant's allegations were directed against three individuals and were not identical, the Tribunal finds that the decision by the DAB to divide her complaint into three separate cases, considered by the same Panel, was a procedural choice, supported by its discretionary powers.

13. In the complainant's fourth argument, she asserts that she did not have the opportunity to provide "submissions on [the] IOM declining to conduct an investigation and the scope of the investigation [...], as well as the IOM's reasoning that the investigation should have been conducted by the DAB". However, the complainant does not identify any rule or provision that requires the ICC to seek her views in this regard. In the present case, the Registrar duly referred her complaint to the IOM in accordance with paragraph 33 of the IOM Operational Mandate. Subsequently, the IOM informed the Registrar that it would not take any further action, whilst noting that the DAB was seized of the matter. This course of action was consistent with the IOM's Operational Mandate, which confers a discretion on the IOM to decide which cases it should investigate. The Registrar then referred the complainant's complaint to the DAB for advice pursuant to Section 7.3 of ICC/AI/2005/005. The DAB is itself a body responsible for investigating and reporting on claims of harassment. So, both the Registrar and the IOM acted in compliance with the relevant applicable provisions. The complainant's reliance on the Whistleblowing and Whistleblower Protection Policy is irrelevant in this regard, given that, in any event, there is no specific provision requiring that an investigation be conducted by IOM on any complaint made by a whistleblower. The complainant's fourth argument is unfounded.

14. The complainant's other contentions regarding alleged procedural errors, including her third argument that she was not given an opportunity to provide submissions on the nature and scope of the Information Management Services Section (IMSS) investigation before it was commissioned, are all unfounded. Pursuant to the DAB's applicable legal framework, it is the prerogative of the Panel to determine the form of the hearing, whether it requires any additional information or testimony over and above that which is provided in the original presentation, statements and rebuttals, and whether to call witnesses. Contrary to the complainant's assertions, she was provided with both the Technical Evaluation Report and the IMSS' further response and was given ample opportunities to respond to all submissions made by the subjects of her complaints. As no error of procedure that warrants the setting aside of the impugned decision has been established, the complainant's first ground is unfounded.

15. Regarding the complainant's second ground of unreasonable delay, the Tribunal notes that Rule 14(c) of the RPDAB provides that the Panel's report should normally be submitted within 30 days, but the Panel may request extensions of the deadline under exceptional circumstances. Having regard to the circumstances of the present case, including revision of the composition of the Panel and the time for IMSS to conduct the technical evaluation into the complainant's allegations of unauthorized email access, there was no undue delay by the DAB in processing the complainant's internal complaint. The complainant's second ground is accordingly unfounded.

16. Regarding the complainant's third ground of institutional harassment, she submits that the ICC's failure to take measures to address the "broken, toxic working environment", its indifference to the complainant's situation and its failure to observe its duty to provide a safe working environment amount to institutional harassment which, coupled with the breaches of due process, warrant an award of moral damages. The Tribunal recalls its case law that an accumulation of repeated events of mismanagement or omissions, for which there is no reasonable explanation and which deeply and adversely affect the

dignity and career objectives of a complainant, can constitute institutional harassment (see Judgments 4345, consideration 8, 3315, consideration 22, and 3250, consideration 9). However, in the present case, the complainant has not established the elements of mismanagement or omissions on the part of the ICC. The facts that the Registrar decided to put in place an informal mechanism to address tensions in the working environment and that the complainant's attempt to pursue mediation proved unsuccessful do not, in any event, evidence institutional harassment. The complainant's third ground is therefore unfounded.

17. In the foregoing premises, the complaints will be dismissed in their entirety.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 26 April 2024, Mr Patrick Frydman, President of the Tribunal, Ms Rosanna De Nictolis, 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.

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER