L. (No. 5)

v.

ICC

128th Session **Judgment No. 4182**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr C. L. against the International Criminal Court (ICC) on 2 June 2016 and corrected on 28 June, the ICC's reply of 13 October, the complainant's rejoinder of 14 November, corrected on 23 November 2016, the ICC's surrejoinder of 3 March 2017, corrected on 9 March 2017, the ICC's additional submissions of 13 March 2018 and the complainant's final comments thereon of 16 April 2018;

Considering the decision by 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 challenges the decision not to place him on the shortlist for a position for which he had applied as a priority candidate.

Facts related to this case can be found in Judgments 3907 and 3908, delivered in public on 24 January 2018. Judgment 3908 concerns the complainant's third complaint. In 2013 the Assembly of States Parties to the Rome Statute of the International Criminal Court authorized the

Registrar of the Court to reorganize the Registry. This reorganization became known as the *Re*Vision Project, which was implemented in 2014. An Information Circular entitled "Principles and Procedures Applicable to Decisions Arising from the *Re*Vision Project" (hereinafter "the Principles and Procedures"), which was issued in August 2014 and modified in June 2015, established a framework for the implementation of decisions arising from the restructuring process. The Principles and Procedures declared that termination "shall take place only after reasonable efforts have been made to assist staff members in finding alternative employment within the Court, as well as providing them with support, in accordance with paragraphs 33 – 39 and 47 below, respectively". Paragraphs 33 to 39 identified a procedure whereby staff whose positions had been abolished would be treated as "Priority Candidates" who would have to apply for newly created positions.

By a letter of 22 June 2015 the complainant was notified of the decision to abolish his post and to terminate his fixed-term appointment as from 20 October 2015. At that time he held the P-4 position of Legal Officer in the Legal Office of the Registry and his contract was due to expire in March 2017. He was relevantly informed that he could apply as an internal candidate with the priority consideration provided for in the Principles and Procedures for newly created positions arising as a direct result of the *Re*Vision Project.

On 7 July 2015 the complainant applied for the newly created D-1 position of Director of the Division of External Affairs and Field Operations (hereinafter the "new Position"). By an email of 25 August he was informed by the Human Resources Section (HRS) that he had not been shortlisted for an interview. The following day he requested a fully motivated decision regarding the consideration of his application. By an email of 27 August the Chief of HRS provided him with information about the process and the main reasons why he had not been shortlisted.

On 28 August the complainant requested a review of the decision not to shortlist him and he sought suspension of action with respect to the recruitment process for the new Position. On 1 October 2015 the Registrar notified the complainant that he had decided to maintain the

contested decision. In a report of 2 October the Appeals Board found that the decision not to shortlist the complainant had already been implemented and it recommended that his request for suspension of action be denied; the Registrar dismissed that request later that month.

On 30 October 2015 the complainant lodged an appeal with the Appeals Board in which he challenged the decision not to shortlist him for the new Position. In its report of 12 February 2016 the Appeals Board unanimously recommended that the appeal be dismissed. On 14 March 2016 the Registrar endorsed the Appeals Board's recommendation and dismissed the appeal. That is the impugned decision.

The complainant asks the Tribunal to reverse the impugned decision. He seeks compensation for loss of opportunity, with interest and he claims moral, punitive and exemplary damages, and costs. He states that he makes the aforementioned claims for relief notwithstanding any other claims he has made against the ICC in other cases.

The ICC asks the Tribunal to dismiss the complaint and to deny the complainant's claims for relief. In the event that the Tribunal awards the complainant damages, the ICC requests that the damages awarded to him in Judgment 3908, plus any other damages awarded to him by the Tribunal, together with his subsequent earnings during the relevant period and the termination indemnity he received, should be taken into account and deducted from such an award.

CONSIDERATIONS

1. In his pleas, the complainant identifies with some particularity the decision he contests. It is a decision by HRS not to transmit his application for the new Position to the relevant Interview Panel. In his brief he advances five grounds why that decision is legally flawed. The first ground is that the decision was procedurally flawed. The second is that the decision-maker, HRS, did not have the authority "when it entered the subjective and qualitative assessment of the [c]omplainant's work experience and found that his experience" was deficient in several respects. The third ground is that the contested decision involved an error of law. This involves an argument that the shortlisting should not

have been done under the Principles and Procedures but rather under the ICC's Recruitment Guidelines for Established Posts for Professional and higher and General Service categories (hereinafter the "Recruitment Guidelines"). The fourth ground is that the contested decision was founded on errors of fact, "namely a manifestly wrong conclusion drawn from available relevant facts". The fifth and final argument is that there had been a misuse of authority.

2. After the written proceedings in the present complaint concluded with the ICC's surrejoinder, the parties filed additional submissions. That arose because the Tribunal delivered in public on 24 January 2018 Judgments 3907 and 3908. In Judgment 3907, which concerned a complaint made against the ICC by another former member of staff, the Tribunal considered the lawfulness of the Principles and Procedures and decisions made under them. The ICC does not raise in its pleas, including in its additional submissions, that the principle of *res judicata* is applicable in these proceedings, though it does so successfully in Judgment 4183, concerning the complainant's sixth complaint, also delivered in public this day.

3. In the explanation the complainant received for not being shortlisted provided in the email of 27 August 2015, he was told that he "lack[ed] [...] demonstrated experience relevant to this position in managing and leading field operations with extensive decision[-]making, diplomacy skills and accountability associated with Court wide external relations and field operations". The complainant does not contend that this description does not encapsulate some of the requirements in the vacancy notice. It does. Rather, he says he did meet these requirements and his application should have been further progressed at the very least by him being shortlisted and interviewed.

4. Putting to one side, for the moment, a plea of the complainant that the rejection of his application was motivated by personal bias against him and for the ulterior purpose of separating him from service, the question of whether the complainant satisfied the requirements of the new Position requiring the ICC to progress his application, is to be

ascertained by reference to what he said in his application concerning the satisfaction of those requirements. His application was the yardstick by reference to which the organisation was entitled to assess initially the application.

5. In the vacancy notice there was a description of the organisational context of the new Position. It said that the Division of External Affairs and Field Operations "[...] promotes the support for the Court [...] through fostering dialogue, cooperation and relations with stakeholders and partners including States and national agencies, intergovernmental organizations and civil society [...]". In a description of the qualifications in the vacancy notice there was a specific description of the experience required. It included "[...] relevant working experience, including the supervision of field operations in politically sensitive situations, diplomacy and external relations".

6. In his application for the new Position, the complainant did not use the word "diplomacy" or an equivalent word or expression. Moreover, nothing said in the application addressed, as a matter of substance, the skills of the complainant to engage in diplomatic exchanges in order to foster support for the Court. It is true that the complainant said in his application that he had been "in charge of, inter alia, external affairs" and, earlier in the application, he had given "legal advice on external affairs". However this does not address the requirement that he had working experience in diplomacy. Plainly this was an important element in the duties and functions of the new Position having regard to the organisational context described earlier. At the very least in this important respect, the decision not to progress the complainant's application for the new Position was well founded. This was sufficient for HRS to decide not to advance his application any further.

7. The complainant's pleas concerning bias and ulterior purpose are based on his perception of the relationship he had with the Registrar of the Court. Even assuming, for present purposes, that the Registrar had a coloured and partial view of the complainant which was negative, the decision not to progress his application for the new Position was not

taken by the Registrar nor is there any persuasive evidence that the Registrar influenced, either directly or indirectly, that decision.

8. In the face of the conclusion that the rejection of the complainant's application was well founded, the other pleas of the complainant are, in the circumstances of this case, irrelevant. Insofar as the complainant contends that the source of power to deal with his application was, relevantly, Section 6.1 of the ICC Recruitment Guidelines, the decision to reject his application was a decision open to HRS under that provision. That Section empowered HRS to engage in an initial evaluation of applicants with regard to their eligibility based on, amongst other things, their relevant work experience. By necessary implication, HRS was entitled to reject applications by applicants who did not have the relevant work experience.

9. The complaint should be dismissed.

10. Certain procedural requests were made by the ICC. Given the conclusion reached by the Tribunal they need not be addressed.

DECISION

For the above reasons,

The complaint is 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