

S. M.

v.

ICC

138th Session

Judgment No. 4825

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. S. M. against the International Criminal Court (ICC) on 22 May 2020 and corrected on 3 June 2020, the ICC's reply of 21 September 2020, the complainant's rejoinder of 4 November 2020 and the ICC's surrejoinder of 5 February 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 case may be summed up as follows:

The complainant challenges the decision to reject his request for post classification.

The complainant, who joined the ICC in 2005, was appointed on 20 January 2014 to the position of Security Training Coordinator, grade G-6, in the Security and Safety Section (SSS). In 2015, following a classification exercise undertaken in the context of a restructuring of the ICC's Registry known as the "ReVision Project", the complainant's post was confirmed at grade G-6.

In August 2018, the complainant started discussions with the Chief of SSS about the reclassification of his post to grade P-2, contending that his duties and responsibilities had evolved considerably since the

last classification exercise. At this stage, the Chief of SSS encouraged the complainant to pursue the matter, but suggested that he should wait for the forthcoming promulgation of the Administrative Instruction on Classification and Reclassification of Posts, and further instructions on the process. The relevant Administrative Instruction, ICC/AI/2018/002, was published on 22 November 2018.

On 7 December 2018, the complainant submitted a formal request to initiate the post reclassification process provided for in the Administrative Instruction. In January and February 2019, he enquired with the Chief of SSS and the Human Resources Services (HRS) about the status of his request. On 4 February 2019, the Chief of SSS replied that HRS was in the process of putting the Administrative Instruction in place, which included training for the Classification Board, and that the ICC would be informed once all the modalities were in place for full implementation. By email of 12 March 2019, the President of the Staff Union Council, on behalf of the complainant, inquired about the steps that had been taken to address the complainant's request of 7 December 2018. By email of 15 March 2019, the Chief of SSS replied that the request fell outside the scope of the Administrative Instruction, since the complainant's post had previously been classified by an expert and his duties and responsibilities corresponded to the work survey established by that expert. He added that the increased scope of the duties and responsibilities performed by the complainant did not constitute a significant change and that there had been no classification review or audit justifying a reclassification of the post.

On 15 April 2019, the complainant filed a request for review of the decision of the Chief of SSS, which was rejected by the Registrar on 14 May 2019. The complainant lodged an internal appeal on 12 June 2019. In its report of 31 January 2020, the Appeals Board recommended to dismiss the complainant's request to initiate a reclassification of his post, but to authorise "a new classification audit/assessment" of his post in line with the Administrative Instruction. By letter of 2 March 2020, the Registrar decided not to submit the complainant's request to the Classification Board pursuant to section 4.2 of the Administrative

Instruction and dismissed his 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 on his request for reclassification of his post on the sole basis of the criteria set forth in Staff Rule 102.1(b) and the Administrative Instruction. He seeks an award of material damages amounting to the additional salary and allowances he would have received since 7 December 2018 had the reclassification request resulted in his reclassification as a Professional staff member. The complainant also claims 50,000 euros for moral damages, and he asks the Tribunal to order the ICC to pay 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. Lastly, the complainant claims costs in the amount of 5,000 euros.

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

CONSIDERATIONS

1. The background leading to this complaint is sufficiently set out in the preceding section of this judgment and it is unnecessary to repeat it. In his brief, the complainant advances his pleas on the merits under four general headings. The first is that the impugned decision (namely, the decision of the Registrar of 2 March 2020 dismissing his internal appeal and deciding not to submit the complainant's reclassification request to the Classification Board pursuant to section 4.2 of Administrative Instruction ICC/AI/2018/002) was attended by an error of procedure. The second general heading is that the impugned decision was attended by errors of law. This heading contains two subheadings. The first is that there had been an excessive reliance on the 2015 evaluation of the complainant's position. The second heading is that the request for reclassification fell within the scope of the Administrative Instruction. The third general heading is that the impugned decision was attended by an error of fact. The fourth general heading is that the impugned decision involved a misuse of authority.

This heading contains two subheadings. The first is that the complainant had been subjected to unequal treatment. The second is that the organisation had acted in bad faith.

2. It is convenient to consider the second alleged error of law, namely that the Registrar erred by concluding that the request for reclassification did not fall within the scope of the Administrative Instruction. The relevant section of the Administrative Instruction provided:

**“Section 4
Procedure for Requests to Classify or Reclassify a Post**

- 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 [Assembly of States Parties].
 - (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 [Assembly of States Parties] 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.”

3. In the present case, the complainant relies on his memorandum of 7 December 2018 to the Chief of the Security and Safety Section (SSS) in which he requested “the evaluation for the

reclassification of [his] post [...] due to the amount of extra responsibilities [...]”. He expressly relies in his memorandum on section 4.2(b) as creating a mechanism entitling him to make a request of the type just mentioned on the basis that it had legal consequences and could lead to a reclassification of his post. This is not correct. That provision creates a mechanism for the Head or Chief of a Section, in this case the Chief of SSS, to request the Head of Organ, in this case the Registrar, that the matter be considered under section 4.2, that is to say the Registrar requesting the Classification Board to consider the reclassification of the post. The provision does not contemplate a request by the incumbent, which, without more, had legal consequences and would lead to review of his classification. It is true that section 4.3 makes provision for a request directly by an incumbent. But that arises only in circumstances where there has been a restructuring or a decision of the Assembly of States Parties, which has no application to the present case. That is not to say an incumbent cannot encourage her or his chief to take steps to engage the procedure in section 4.2, in which case the chief may, in the exercise of her or his discretion, decide to advance the request if she or he is satisfied that the conditions provided for in that section are met. But the complainant elevates the effect of his memorandum as necessarily leading to a request to the Classification Board. The position adopted by the Registrar in the impugned decision was correct. This argument is unfounded and should be rejected.

4. There is no general right of a staff member of an international organisation to demand or request the reclassification of a post, particularly in the face of specific provisions identifying procedures for the reclassification of posts in normative legal documents creating the legal framework governing or regulating the employment of that staff member. Certainly, the complainant in these proceedings does not identify, apart from the Administrative Instruction, a legal basis for him having a right to require consideration of the reclassification of his post. In the absence of such a legal right then most of the remainder of the arguments in the complainant’s pleas cease to have any relevance, though there is one possible exception.

5. The possible exception is a plea by the complainant that the Chief of SSS acted in bad faith by, in particular so the complainant argues, initially supporting the reclassification of his post and then markedly shifting his position. The complainant argues, in effect, that had the Chief of SSS acted in good faith, he would have made a request to the Registrar under section 4.2 which would have triggered, at least potentially, a request by the Registrar to the Classification Board to consider the classification of the complainant's post.

6. Both in the impugned decision of the Registrar and in the ICC's pleas in these proceedings, reliance is placed on the following notions about what constitutes bad faith encapsulated in Judgment 4161, consideration 9:

"It is well established in the case law that 'bad faith cannot be presumed, it must be proven. Additionally, bad faith requires an element of malice, ill will, improper motive, fraud or similar dishonest purpose' (see Judgment 2800, consideration 21, cited in Judgment 3154, consideration 7; see also Judgment 3902, consideration 11). What is more, 'misuse of authority may not be presumed and the burden of proof is on the party that pleads it' (see Judgment 3939, consideration 10)."

Equally however, the Tribunal has accepted that bad faith is notoriously difficult to prove (see, for example, Judgment 2259, consideration 13).

7. In the present case, three relevant findings were made by the Appeals Board. In summary they were, firstly, that the Chief of SSS initially believed the duties of the complainant had changed and supported a case for reclassification, encouraging the complainant to pursue one. The second was that the attitude of the Chief of SSS changed and did so after a workshop following the introduction of the Administrative Instruction. The third was, at least implicitly, that this change of perspective could not have been justified by what the Chief of SSS was likely to have been told at the workshop. The Appeals Board said:

"[The more recent assessment of the Chief of SSS] is inconsistent with his previous assessment [...] and it is not explained how it could have changed justifiably as a result of [a] workshop on the issue he attended. It is thus

unclear what the basis was for this apparent reversal. The Chief of [...] SSS appears to entangle issue of process and substance, when they are separate factors. The fact that any reclassification must adhere to a process does not mean the [complainant]’s duties have not changed.”

The Appeals Board made no express finding that the Chief of SSS acted in bad faith, though the above passage may be seen to question his motives.

8. However, the ICC’s answer to this contention about bad faith revolves, as a matter of fact, on the explanation the Chief of SSS has given for the change in his approach. It contains at least two elements (as exemplified in an email from him of 15 March 2019). One is that the “increased scope of tasks and responsibilities performed by the incumbent [...] may not justify a defin[ition] of significant change”. This appears to be a reference to the expression “have substantially changed” in section 4.2(b). The other is that “[...] to date there has been no classification review or audit which would necessitate a reclassification of the post”. This appears to be a reference to a classification review or audit as described in section 4.2(c). Having regard to the limited scope of its review of a discretionary decision of this kind, the Tribunal will not substitute its own assessment for that of the Chief of SSS, who determined, following the workshop, that there had been no substantial change in the complainant’s duties and responsibilities for the purposes of section 4.2(b). Nor is there any evidence of a classification review or audit as contemplated by section 4.2(c). In light of the foregoing and in the absence of persuasive evidence of bad faith on the part of the Chief of SSS, this plea is unfounded and should be rejected.

9. In the result, the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 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