

The Administrative Tribunal,

Considering the complaint filed by Ms A d. C. A. A. against the International Criminal Court (ICC) on 20 May 2006 and corrected on 24 June, the ICC's reply of 10 November 2006, the complainant's rejoinder of 10 January 2007 and the letter of 9 May 2007 by which the ICC informed the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Portuguese national born in 1965, joined the ICC on 1 December 2003 under a one-year fixed-term contract as an Associate Legal Officer at level P-2. Her contract was subsequently extended for a period of one year, until 30 November 2005.

By a memorandum of 12 May 2005 entitled "Work Performance", her supervisor, the Second Vice-President of the Court, informed her that it was not possible for them to continue working together in view of the complainant's apparent inability to maintain harmonious working relationships with some of her colleagues. She had therefore asked the Human Resources Section to find a solution.

On 19 May the complainant met with her supervisor and the First Vice-President to discuss the implications of that memorandum and, in particular, the possibility of a transfer. On 26 May she met with the Head of the Human Resources Section, who advised her to respond to the memorandum, given that it would remain in her official status file. That same day he sent an e-mail to the complainant, summarising what they had discussed: he recalled that the complainant had indicated that she agreed that it was not possible for her to continue working with the Second Vice-President and that she preferred to look for another position, and he drew her attention to the fact that, if she wished to apply for another position within the Court, the required recruitment procedure, involving a competitive selection, would have to be followed.

On 28 November 2005 the Head of Human Resources informed the complainant that her assignment as Associate Legal Officer reporting to the Second Vice-President would end upon the expiry of her contract on 30 November, but he offered to extend her contract by three months, during which time she would work with another judge on a special project funded by General Temporary Assistance funds. He emphasised that in view of the temporary nature of the project no further extension was envisaged. On 1 December 2005 the complainant accepted the extension of her contract, which indicated under the heading "Special conditions" that it was "limited to meeting a temporary need based on the availability of funds".

On 5 December 2005 the complainant was handed a performance appraisal report covering the period 1 December 2003 to 30 May 2005. She refused to sign this report on the grounds that it had been prepared without her knowledge by the Second Vice-President some six months after the latter had ceased to supervise her, in breach of the relevant provisions of the Staff Rules and the Court's Performance Appraisal Guidelines.

By a memorandum of 22 December 2005 the complainant lodged an appeal with the Registrar of the Court, challenging the decision of 28 November 2005 not to renew her appointment as Associate Legal Officer in Chambers. The Registrar dismissed her appeal in a memorandum of 20 February 2006. Given that her contract had in fact been extended beyond its expiry date of 30 November 2005 and that she had accepted the conditions on which that extension had been granted, he considered that there was no legal basis for her appeal against an alleged decision not to renew her contract.

The complainant's contract was extended again, until 30 April 2006, subject to the same special conditions as her previous extension. She lodged an appeal with the Appeals Board on 21 April against the Registrar's decision of 20

February. By a memorandum dated 27 April 2006, the Secretary of the Appeals Board advised the complainant that an appeal panel had been constituted and that, in accordance with the Rules of Procedure of the Appeals Board, she had five days to file a request to have a proposed panel member disqualified. The Secretary enclosed a copy of the Rules of Procedure of the Appeals Board and asked the complainant to complete the "Statement of Appeal" form. She noted that the appeal should have been filed on 20 March 2006, but that Rule 5(b) of the Rules of Procedure permitted a waiver of the time limit in exceptional circumstances. She therefore asked the complainant for submissions to justify the late filing. On 6 May the complainant submitted her Statement of Appeal together with the supporting documentation.

On 20 May 2006, while her appeal was pending, the complainant filed her complaint with the Tribunal, also challenging the decision of 20 February. After having been granted a final one-month extension of her contract, she separated from the ICC on 31 May 2006.

The Appeals Board issued its report on 27 July 2006. It observed that, in principle, the complainant should have complied with the time limits in the Staff Rules. However, the fact that the appeal process was in a "transitional stage" on 20 February 2006 and the absence of a clear, established procedure constituted exceptional circumstances as contemplated by its Rules of Procedure. Accordingly, the Board held that the appeal was receivable. On the merits the Board found that the challenged decision was procedurally flawed, in that the memorandum of 12 May 2005 concerning the complainant's work performance did not constitute a sufficient basis for a decision, taken some six months later, not to extend her fixed-term contract. Nevertheless, it considered that there was no basis on which to find that the Court would have renewed her contract for three years. The Board recommended that she be granted the equivalent of one month's net base salary in recognition of that procedural flaw.

On 15 August 2006 the Registrar of the Court wrote to inform the complainant that he accepted the Board's recommendation. He also stated that this constituted the final decision and that the complainant could appeal the decision to the Tribunal.

B. The complainant submits that she reasonably expected her appointment as an Associate Legal Officer to be extended for a period of three years, particularly since it had already been extended once. She points out in this regard that she was given no indication that her work was unsatisfactory and that, on the contrary, the nature of the tasks with which she was entrusted and the feedback that she received from her colleagues show that her work was widely appreciated.

She contends that the ICC breached the provisions of its Staff Rules and Regulations, as well as its Performance Appraisal Guidelines, by failing to conduct an appraisal of her performance during the two years that she spent as an Associate Legal Officer. She acknowledges that she received an appraisal report in December 2005, but observes that it was produced by the Second Vice- President long after the latter had ceased to supervise her.

According to the complainant, the decision not to renew her budgeted contract is tainted with bad faith and abuse of power on the part of her supervisor. She asserts that her supervisor's decision to put an end to their working relationship was prompted by a misunderstanding between the complainant and the supervisor's secretary, and that from that time onwards her supervisor sought to discredit her, not only through her belated performance appraisal, but also by subjecting her to "systematic humiliating treatment".

She asks the Tribunal to set aside the decision of 20 February 2006 and to order the ICC to remove from her personal file the December 2005 performance appraisal. In addition, she claims material damages in an amount equal to three years' salary and benefits for "wrongful termination" of her "budgeted contract", failure to substantiate the decision not to renew that contract and failure to conduct an assessment of her work performance, as well as an award of moral damages. Lastly, she seeks an apology "for the unnecessary and malicious personal attack on [her] person and on [her] reputation".

C. In its reply the ICC submits that the complaint is irreceivable, under Article VII of the Statute of the Tribunal, for failure to exhaust internal remedies. It points out that, at the time when the complainant filed her complaint with the Tribunal, no final decision had been taken on her internal appeal. Given that there was no indication that the proceedings before the Appeals Board would not end within a reasonable time, the filing of her complaint was premature.

On the merits the ICC contends that there was no basis for the complainant's expectation regarding the renewal of

her contract. It points out that she accepted the terms of her initial fixed-term contract, which expressly stipulated that it carried no expectancy of renewal or of conversion to any other type of contract. Furthermore, she accepted the special conditions attached to the last three extensions of her contract, each of which stipulated that it was “limited to meeting a temporary need based on the availability of funds”. Recalling the Tribunal’s case law, the ICC adds that the decision whether or not to renew her fixed-term appointment lay within the discretionary authority of the Registrar, as the appointing authority of the Court.

As regards the issue of the complainant’s performance appraisal, the ICC submits that the renewal of a staff member’s appointment is not dependent on a formal appraisal, the purpose of which is rather to ensure that the required standards of performance are met and to reward staff members who perform their functions satisfactorily. It considers that the Second Vice-President’s memorandum of 12 May 2005 to all intents and purposes constituted an evaluation of the complainant’s performance and asserts that the complainant’s “behavioural problem”, which it viewed as an important factor in evaluating her performance, was brought to her attention.

Lastly, the ICC observes that the complainant has produced no evidence to support her allegations of bad faith on the part of her supervisor. It emphasises that it was the complainant herself who asked to be transferred, and that it tried to assist her in finding another suitable position within the Court.

D. In her rejoinder the complainant argues that she did exhaust internal remedies before filing her complaint, because at the time when the impugned decision was taken the ICC’s internal appeal mechanisms were not yet functioning. She points out that the Appeals Board noted in its report that in February 2006 “the appeal process was still in a transitional stage”, and she deplores the fact that the ICC took more than two years to establish an Appeals Board. She states that she filed her complaint in May 2006 in order to ensure that she would not forfeit her right to appeal to the Tribunal.

On the merits the complainant presses her pleas. She rejects the view that the memorandum of 12 May constituted an evaluation of her performance and maintains that her supervisor acted in bad faith, since her intention was to replace her with a colleague whose qualifications, according to the complainant, did not meet the minimum requirements of the post. She asserts that all other Associate Legal Officers had their contracts extended for a period of three years.

CONSIDERATIONS

1. The complainant impugns the decision of 20 February 2006 by which the Registrar of the ICC dismissed her request for review of the earlier decision not to renew her appointment as Associate Legal Officer in a budgeted post.

2. The ICC takes the position that the complaint is irreceivable as the impugned decision is not a final decision, the complainant having failed to exhaust the internal means of redress as required by Article VII(1) of the Statute of the Tribunal.

3. The complainant acknowledges having commenced the present proceedings in addition to having appealed the Registrar’s decision to the Appeals Board. She states that this was motivated by the uncertainty of the “pragmatic” application of the internal appeals procedure, the unduly lengthy delay and the lack of clear internal procedures.

She contends, in response to the objection to receivability raised by the ICC, that at the time the decision not to renew her budgeted contract was taken, on 28 November 2005, the highest internal remedy available was an appeal to the Registrar. Accordingly, in her view, the Registrar’s decision of 20 February 2006 was a final decision and she had exhausted all internal means of redress open to her, as contemplated by Article VII(1).

She submits that due to the failure of the ICC to establish an Appeals Board, there was no Secretary of the Board and she was therefore not in a position to comply with Staff Rule 111.1(b).

She also submits there was no effective mechanism in place for a final decision to be reached at the time her complaint was filed.

4. Before turning to the complainant’s submissions, a review of the ICC’s internal appeal process found in

Staff Rule 111.1 is useful. A staff member wishing to appeal against an administrative decision must within 30 days of the notification of the decision submit a written request to the Secretary of the Appeals Board for a review of the decision by the Registrar (Rule 111.1(b)). Upon completion of the review, the Registrar must provide a written decision to the staff member. An appeal against this decision must be submitted in writing to the Appeals Board's Secretary within 30 days of the notification of the decision (Rule 111.1(d)).

5. Rule 111.3 sets out the procedures of the Appeals Board. The Appeals Board may not hear an appeal until all of the time limits provided in Staff Rule 111.1 have been met or have been waived by the Appeals Board by reason of exceptional circumstances beyond the control of the staff member (Rule 111.3(b)). The Appeals Board must submit a report including its advice on the appeal to the Registrar (Rule 111.3(f)). Within 30 days of receipt of the Appeals Board's report, the Registrar must make a final decision on the appeal and communicate the decision to the staff member (Rule 111.3(g)). If a decision is not taken by the Registrar within the required time frame, at the request of the staff member, the Secretary of the Appeals Board must provide a copy of the report to enable the staff member to file a complaint with the Tribunal (Rule 111.3(h)).

6. Lastly, Rule 111.5 provides that a staff member may appeal the final decision of the Registrar to the Tribunal.

7. The complainant submits that she was not in a position to comply with Staff Rule 111.1(b) in December 2005 since there was no Secretary of the Appeals Board. While the complainant is correct that the Appeals Board had not been constituted and a Secretary had not been appointed at the time of the initial administrative decision of 28 November 2005, she was, in fact, able to exercise her right of appeal by submitting her request for review directly to the Registrar, and she did. The Registrar rendered a decision on 20 February 2006.

8. The complainant also maintains that the Court's failure to establish appropriate appeal mechanisms, as provided for in the Staff Regulations and Rules, left her with no option but to appeal the decision of 20 February 2006 directly to the Tribunal.

9. The evidence discloses, however, that at the time the complainant filed her complaint, on 20 May 2006, the appeal process provided for in the Staff Rules was fully operational. By 18 January 2006 the ICC had established the Appeals Board and announced its composition to staff members. The Board promulgated its Rules of Procedure on 21 March 2006. Furthermore, the complainant had engaged the internal appeal process approximately one month before bringing a complaint before the Tribunal and she pursued her internal appeal after she had filed her complaint. The internal appeal process ultimately led to the Registrar's decision of 15 August 2006.

10. The complainant's contention that the Registrar's decision of 20 February 2006 is a final decision and that she had exhausted all internal means of redress is premised on her assertion that a review by the Registrar was the only internal means of redress available at the time when the decision not to renew her appointment in a budgeted post was made, that is to say on 28 November 2005. The complainant, in effect, is arguing that for the purpose of ascertaining compliance with Article VII of the Statute of the Tribunal, the material date to determine receivability is the date of the initial administrative decision. This position, however, does not find support in the case law. It is well established that where an appeal is lodged with an internal administrative body, whatever the validity of the appeal, the period of ninety days laid down for filing a complaint with the Tribunal under Article VII(2) of the Statute of the Tribunal starts not on the day of the notification of the decision impugned in the said appeal but on the day of the notification of the decision taken on that appeal by the competent authority. In this case, therefore, it commenced to run on the date she was notified of the decision of 15 August 2006 (see Judgment 50, under 3).

11. According to the Staff Rules, the decision taken by the Registrar on 15 August 2006 subsequent to the receipt of the Appeals Board's report and advice is the final decision in the internal appeals process (Rule 111.3(g)). Pursuant to Rule 111.5, it is also the decision that may be appealed to the Tribunal. Therefore, as the Court argues, it is on the date the complainant received that decision, that is on 23 August 2006, that she obtained a final decision – within the meaning of Article VII(1) of the Tribunal's Statute – which she could have challenged before the Tribunal.

12. The complainant also makes general assertions of uncertainty and delay in relation to the internal appeals procedure. However, she has not identified the uncertainty to which she is referring, nor has she explained how the uncertainty has impaired her ability to pursue the internal appeals process. Even if the fact that the Rules of Procedure were not promulgated until 21 March 2006 could be said to have given rise to uncertainty, at the

material time the uncertainty had been resolved, as discussed above.

13. As with the assertion of uncertainty, the complainant has not specified, nor has she provided any evidence of unreasonable delay or the likelihood of unreasonable delay. In fact, the evidence discloses that the Appeals Board process was completed in a timely manner and that the Registrar of the Court rendered a decision within the time limit specified in the Staff Rules.

14. Accordingly, the Tribunal concludes that the complaint is irreceivable as the impugned decision is not a final decision and the complainant did not exhaust the internal means of redress before filing her complaint with the Tribunal, as required by Article VII(1) of its Statute.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2007, Ms Mary G. Gaudron, Presiding Judge for this case, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Mary G. Gaudron

Agustín Gordillo

Dolores M. Hansen

Catherine Comtet