K.

v.

ICC

121st Session **Judgment No. 3598**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F. K. against the International Criminal Court (ICC) on 11 April 2013, the ICC's reply of 28 August, corrected on 30 August, the complainant's rejoinder of 24 October 2013 and the ICC's surrejoinder of 22 January 2014;

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

Having examined the written submissions;

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

The complainant challenges the decision not to remunerate him at the P-3 level in light of the outcome of a review of the classification of his post.

On 1 November 2009 the complainant was appointed to the post of Senior Human Resources Assistant (Policy and Legal) at grade G-7. In May 2010 his immediate supervisor, Ms G. (who was the Chief of Human Resources), requested that he complete a work survey of his post. Both he and Ms G. signed the survey. In June 2010 the ICC's external classification expert concluded that the post should be classified at the P-3 level. The complainant was verbally informed of this by Ms G. shortly afterwards. However, he was further informed that the post would not be included in the budget proposal for 2011.

Having received no further communication or a confirmation from the Administration regarding the classification of his post, in an e-mail of 15 December 2011 he requested such confirmation and the effective date of the classification.

On 19 December 2011 the complainant was informed by the Administration that his post, as classified at P-3, was not included in the 2011 budget. In an e-mail 6 February 2012 the complainant stated that he should be placed at the classified level of his post as from the date of classification, or in any case no later than 1 January 2011. On 17 February 2012 he enquired whether the Administration intended to remunerate him at the P-3 level effective January 2011 and, if not, he asked to be provided with reasons. Having received no response, on 16 March 2012 he requested the Registrar to review the implicit decision refusing to remunerate him at the level corresponding to his duties and responsibilities.

On 26 March the Registrar notified him that his request for administrative review was irreceivable as time-barred. On 25 April the complainant appealed against that decision before the Appeals Board. The Board found his appeal receivable *ratione temporis* and recommended, in particular, that the ICC should determine a compensation to be awarded to the complainant commensurate with the duties he performed beyond the G-7 level until such time as he received instructions to perform revised duties corresponding to the G-7 level. In addition, a review of the post classification should be done in full compliance with the "pre-requisites" in place, and if this resulted in a P grade, the post should be re-advertised in accordance with ICC policy.

In a memorandum of 15 January 2013 the complainant was informed that the Registrar did not accept the conclusion and recommendations of the Appeals Board. That is the impugned decision.

As a preliminary matter, the complainant seeks oral proceedings. He asks the Tribunal to quash the impugned decision and to order the ICC to remunerate him at the correct level in accordance with the terms of his appointment. He thus claims retroactive payment, including compound interest, of salary in line with Staff Rule 103.21 and with the P-3 classification of his post, as of the date of its classification. He

also claims moral damages for breach of contract and for the injury and distress he has suffered, and reasonable legal costs.

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

CONSIDERATIONS

1. The complainant, who at the material time held a G-7 level post, contends that the ICC wrongfully refused to remunerate him at the P-3 level in accordance with the duties he performed and the classification of the post he occupied. He identifies the impugned decision as that of the Registrar dated 15 January 2013 in which the Registrar, refusing to accept the recommendations of the Appeals Board, dismissed his appeal as irreceivable and in any event unmeritorious. As the facts reveal, the Board had found that the internal appeal was receivable and meritorious and recommended, among other things, that the ICC should determine what compensation to award the complainant that was commensurate with the duties that he performed beyond the G-7 level of his post until such a time as he was given revised duties that corresponded to a G-7 level.

2. The complainant notes that the request for review which he lodged on 16 March 2012 was rejected on 26 March as irreceivable on the ground that it was submitted beyond the mandatory time limit, but that the Appeals Board found otherwise. He states that his complaint is directed against the Registrar's decision of 15 January 2013 and that he "seeks to be properly and fairly remunerated in accordance with the level P-3 duties and responsibilities he carried out". This makes it clear that the central issue which is raised in the complaint is whether the complainant was entitled to and should have been remunerated at the P-3 level for the period for which he seeks to be so remunerated. He makes it clear that he is not challenging the decision concerning the classification or reclassification of his post as that exercise was already carried out by the external classification expert who classified the post as a P-3 level post and he does not challenge that assessment. He also makes it clear that he is not challenging the decision not to

have included the post at that level in the ICC's 2011 Programme budget. His case is that as the post was reclassified at level P-3, he is entitled at least to be remunerated for performing duties at that level in the post until he is given duties that are in line with his G-7 status. On the other hand, the ICC contends that he has no such entitlement without the proper reclassification of the post in accordance with the rules, principles, policies and/or practices of the ICC which regulate such a matter.

3. The ICC raises receivability as a threshold issue insisting that the complainant's request for review of 16 March 2012 was out of time. In this respect the Tribunal has previously held (see, for example, Judgment 1734, under 3), that the observance of time limits is not an empty formality but essential to sound management and that only in exceptional cases may they be waived, namely when to demand strict compliance would cause a flagrant miscarriage of justice and good faith must instead prevail.

4. The ICC insists that the time limit for lodging the request for review started to run from June 2010 or at the latest from 19 December 2011 and that that time limit expired at the latest on 18 January 2012, with the result that, having lodged his request for review on 16 March 2012, it was almost two months out of time. This, according to the ICC, is because any decision that was taken after 19 December 2011 was merely a repetition of the challenged decision or a decision which, although it may have been made in different terms, had the same meaning and purport and did not constitute a new decision giving rise to new time limits. The ICC cites in authority the following statement in Judgment 2011, under 18:

> "According to the case law of the Tribunal, for a decision, taken after an initial decision has been made, to be considered as a new decision (setting off new time limits for the submission of an internal appeal) the following conditions are to be met. The new decision must alter the previous decision and not be identical in substance, or at least must provide further justification, and must relate to different issues from the previous one or be based on new grounds (see Judgments 660 […] and 759 […]). It must not be a mere confirmation of the original decision (see Judgment 1304 […]).

> The fact that discussions take place after a final decision is reached does not mean that the Organization has taken a new and final decision. A decision made in different terms, but with the same meaning and purport as a previous one, does not constitute a new decision giving rise to new time limits (see Judgment 586 […]), nor does a reply to requests for reconsideration made after a final decision has been taken (see Judgment 1528 […])."

5. The complainant insists that there was never a final decision at any time in 2010 or 2011 which formed the basis of his request for review on 16 March 2012. He submits that the decision which he challenged was not similar to the previous decisions that were taken in relation to his concern about the classification of the post. Accordingly, the complainant states as follows:

> "The Staff Member's complaint is, and has always been, straightforward: [the] claim is to be remunerated at the P-3 level in accordance with the duties he performed and the post he occupied. The Staff Member does not and has never contested the assessment of the level of his post, nor the non-inclusion of the post in the budget submission. The [ICC] argues that any correspondence sent by the Staff Member after 19th December 2011 is a request for further information or clarification; it is not. […] rather they are specific attempts to urge the Administration to take action on the practical status of the classified level of [the] post and to adhere to the terms of his appointment."

6. The Tribunal considers that in June 2010 the ICC's external classification expert was of the view that the post should be reclassified at the P-3 level. The complainant subsequently raised inquiries concerning the information that the post was not and would not have been included in the budget proposal for 2011. His e-mail of 15 December 2011 requested "confirmation of the level, the ratings and the effective date of the classification". The Administration informed him, by return e-mail of 19 December 2011, that the expert had classified the post at the P-3 level in 2010 but that after internal discussions the Registrar had decided not to include it as such in the 2011 budget. It also informed him that if approved, the newly reclassified post would have to be advertised and filled by a competitive process. It was upon this response that the complainant made a specific claim against the ICC (see in this respect Judgment 2629, under 6) and asked for relief in his e-mail of 6 February 2012. He asked to be placed at the level at which his post

was classified as from the date of classification, or in any case no later than from 1 January 2011. When he received no reply to that specific claim he followed up by e-mail on 17 February 2012, in terms that essentially had the same purport and objective as those which he specified on 6 February 2012. He stated as follows in the e-mail of 17 February 2012:

> "Further to my message [of 6 February 2012], please advise if the administration intends to remunerate me (salary and allowances) at the classified level (P-3), effective 1 January 2011. If not, I would like to be advised of the specific reasons.
>
> Please be reminded of my request for the formal confirmation letter of the classified level, including the date of classification."

It was after the complainant received no response to this enquiry that on 16 March 2012 he asked the Registrar to review the implicit decision rejecting the claim that he had specified.

7. Rule 5(a) of the Rules of Procedure of the Appeals Board provides that an appeal is receivable only if it complies with the format and the time limits set out in the Staff Rules and in the said Rules of Procedure. Staff Rule 111.1(b) requires a staff member who wishes to appeal against a decision by the Registrar or the Prosecutor to apply to the Secretary of the Board for the review of the decision within thirty days of the notification of the decision. Rule 2(a) of the Rules of Procedure of the Appeals Board restates that a request for review must be submitted within thirty days of the notification of the decision. The Rule provides that a staff member may only initiate internal appeal proceedings after the decision, which she or he wishes to challenge, has been reviewed by the Registrar or the Prosecutor. Under Rule 2(b) the staff member then has the right of appeal to the Appeals Board, if within thirty days after the request for review was submitted to the Registrar or Prosecutor, he received no response. In the present case the complainant made a specific claim against the ICC and asked for relief in his e-mail of 6 February 2012. Having received no response, he was entitled to treat that failure to respond as an implied rejection of his claim. His right of appeal then accrued under Staff Rule 111.1(b), which gave him thirty days within which to apply for a review of the implied rejection of his

claim. His request for review on 16 March 2012 was within that required time limit, and, accordingly, it was receivable.

8. The complainant centrally claims the following relief:

> "SPECIFIC PERFORMANCE of the remuneration of the Staff Member at the correct level in accordance with the terms of his appointment (i.e., retroactive payment – including compound interest – of salary in line with rule 103.21 of the Staff Rules of the ICC and with the P-3 classification of his post, as of the date of its classification, to compensate the Staff Member for the losses attributable to the [ICC]'s contractual breaches)."

9. It is observed that the classification or re-classification exercise further to which the external classification expert determined that the post which the complainant held should have been classified at the P-3 level was initiated on the basis of a memorandum dated 16 March 2010 from the Chief of Human Resources. The memorandum was addressed, in particular, to members of the Administration who were to initiate action for the reclassification exercise. In that memorandum the Chief of Human Resources drew the attention of the officials to whom it was addressed to the condition that only the Assembly of States Parties to the Rome Statute could approve the classification of professional posts and reclassifications for posts that would move from general service to professional category posts that would have had a budgetary impact. She further stated that there would be a classification exercise for 2010 tied to the 2011 Programme budget. The complainant's G-7 level post, which the external classification expert classified as a P-3 level post, fell within the category of posts which required that approval. Since the Assembly of States Parties had not approved the reclassification, at least at the time that the complainant made his request for review and lodged his internal appeal, the classification or re-classification of his G-7 post was incomplete at that time.

10. Notwithstanding that the reclassification exercise was incomplete, the Tribunal accepts the finding of the Appeals Board that the complainant performed duties beyond the duties which his G-7 post required. He seeks material damages for the ICC's failure to

remunerate him for performing those duties. In Judgment 3284, consideration 17, the Tribunal stated as follows:

> "These cases involve the application of the principle of equal value for equal work in contexts removed from the facts of this case. The Tribunal rejects this aspect of the complaint to the extent that the complainant invites the Tribunal to determine that the work he did from January 2007 should properly be viewed as work at the P-2 level and that he should have been remunerated accordingly. However, it was not in dispute that he was performing work beyond his current grade […]. He is entitled to material damages for this."

11. Considering the time the complainant performed duties beyond his G-7 level post, the complainant is entitled to material damages on this basis and the Tribunal will award him 25,000 euros. He will also be awarded 7,500 euros in costs.

12. The Tribunal will dismiss the complainant's request for oral proceedings in light of its clear finding in consideration 11 of this judgment.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The ICC shall pay the complainant 25,000 euros in material damages.
3. The ICC shall also pay the complainant 7,500 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 30 October 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ