

L. (No. 6)

v.

ICC

128th Session

Judgment No. 4183

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr C. L. against the International Criminal Court (ICC) on 26 August 2016, the ICC's reply of 20 December 2016, the complainant's rejoinder of 16 February 2017 and the ICC's surrejoinder of 29 May 2017;

Considering the complainant's additional submissions of 6 June 2017 and the email of 3 August 2017 by which the ICC informed the Registrar of the Tribunal that it did not wish to make any final comments on those submissions;

Considering 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 decisions not to select him for three positions for which he had applied as a priority candidate.

Facts related to this case can be found in Judgment 3908, delivered in public on 24 January 2018, and Judgment 4182, also delivered in public this day, concerning the complainant's third and fifth complaints respectively. 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 *ReVision* Project, which was implemented in 2014. An Information Circular entitled "Principles and Procedures Applicable to Decisions Arising from the *ReVision* 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.

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 *ReVision* Project.

The complainant subsequently applied for three new positions which arose as a result of the *ReVision* Project: Legal Officer, Judicial, at grade P-3; Legal Officer, External Relations, at grade P-3; and Deputy Legal Counsel, at grade P-4. In September 2015 he participated in written tests and interviews for all three positions.

On 15 October 2015 the Human Resources Section (HRS) informed the complainant that he had not been selected for the two positions of Legal Officer because he had been found not suitable. The following day he was informed that, for the same reason, he had not been selected for the position of Deputy Legal Counsel. By a letter of 20 October the Registrar of the Court notified him that he had been unsuccessful in securing a position as a result of the recruitment exercises in which he had participated and that the ICC would therefore proceed with the termination of his appointment on 27 October 2015.

On 11 November the complainant submitted to the Appeals Board a request for review of the decisions not to select him for the positions for which he had applied. He also requested a suspension of action with respect to the continuation of the pending recruitment processes for the positions which were not filled as a result of the priority consideration of applications.

On 11 December 2015 the Registrar rejected the complainant's request for review of the non-selection decisions. The complainant lodged an appeal with the Appeals Board on 8 January 2016 in which he challenged those decisions on several grounds and sought various forms of relief.

In a report of 2 February 2016 the Appeals Board unanimously recommended that the complainant's request for suspension of action be rejected; on 2 May 2016 the Registrar denied that request.

On 3 May 2016 the Appeals Board issued its report on the complainant's appeal. It found that there were no flaws in the recruitment processes, no errors of fact, no conflict of interest and that the complainant had failed to establish misuse of authority. It recommended that the appeal be dismissed. On 2 June 2016 the Registrar endorsed the Appeals Board's recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. He seeks reinstatement in the position of Deputy Legal Counsel at grade P-4 within the Legal Office and financial compensation for the economic loss suffered between 27 October 2015 (the date of his separation from service) and the date of his reinstatement, including the payment of all entitlements and emoluments, together with interest. If the Tribunal finds that reinstatement is not possible, he seeks compensation for loss of opportunity in an amount equal to two years' salary at grade P-4, including the payment of all entitlements and emoluments, together with interest. In any event, he also claims moral damages, exemplary damages, and costs. He states that he makes these claims for relief notwithstanding any relief he has claimed in other complaints he has filed against the ICC.

The ICC asks the Tribunal to dismiss the complaint. In the event that the Tribunal awards the complainant compensation for loss of income, the ICC requests it to deduct an amount equivalent to the complainant's occupational earnings, if any, during the relevant period. In addition, it asks the Tribunal to deduct an amount equivalent to any compensation for economic loss awarded by it as a result of the complainant's claims in his third and fifth complaints. In its additional submissions the ICC submits that the delivery of Judgment 3908 has rendered the present complaint irreceivable by virtue of the doctrine of *res judicata*. In addition, it contends that the damages awarded by the Tribunal in Judgment 3908 already encompass those that might have resulted from the impugned decision in the present case, if any.

CONSIDERATIONS

1. The complaint in these proceedings was filed on 26 August 2016. The written proceedings were completed on 29 May 2017 with the filing of the ICC's surrejoinder. The Tribunal delivered in public on 24 January 2018 Judgment 3908, which concerned the complainant's third complaint. After the pleas were completed in these proceedings the parties were given the opportunity to make submissions about the interaction between Judgment 3908 and the claims of the complainant in this matter. It is convenient to deal with this issue at the outset particularly given the contention of the ICC that the principle of *res judicata* precludes the pursuit, to finality, of the complainant's claims in these proceedings.

2. The complainant challenges in these proceedings the final decision by the Registrar of the Court dismissing the complainant's appeal challenging the decisions not to select him for three positions, namely Legal Officer, Judicial, at grade P-3, Legal Officer, External Relations, at grade P-3, and Deputy Legal Counsel, at grade P-4. The decisions regarding the first two positions were notified to the complainant on 15 October 2015. He was notified of his non-selection for the latter position on 16 October. The complainant applied for each of these positions against the background of having earlier been informed by a

letter dated 22 June 2015 that his then position was being abolished, and his appointment would terminate on 20 October 2015 as a consequence of the restructuring of the Registry.

3. The relief sought by the complainant in these proceedings is the “revers[al]” or rescission of the impugned decision, his “reinstatement” to the position of Deputy Legal Counsel at grade P-4 (which he contends corresponds to his former grade) compensation for loss of income from the date of his separation to the date of his reinstatement, moral damages “for the moral prejudice incurred as a consequence of his illegal non-selection for positions resulting from the redistribution of the functions he fulfilled” exacerbated by him reading the adverse and undermining comments made in the interview reports, and exemplary damages for six specified reasons. In the event that he is not reinstated he seeks compensation for loss of opportunity and moral damages as well as exemplary damages and costs.

4. In the proceedings leading to Judgment 3908, the complainant challenged the decision to abolish his post and to terminate his appointment. The complainant requested that the impugned decision be set aside and that he be reinstated. This relief was not granted nor, as a result, was relief constituted by compensation for economic loss from the time of his separation to the time of reinstatement. He sought, in the event that he was not reinstated, compensation for economic loss from the time of his separation until the expiration of his appointment as well as compensation for the loss of the opportunity to have his appointment extended. He also sought moral damages, what he described as reputational damages, as well as exemplary damages and costs.

5. There are superficial differences between the case determined by Judgment 3908 and the present proceedings but those differences are, as a matter of substance, illusory. In the former proceedings, the gravamen of the complainant’s cause of action was that the termination of his employment was unlawful because the abolition of his post was unlawful, attempts to reassign him were legally flawed and the termination should not have occurred. The Tribunal concluded that the

ICC unlawfully rejected the complainant's candidature for a number of available positions in the reassignment process and awarded him, amongst other things, 180,000 euros in material damages for income lost as a result of the unlawful termination of his employment and the lost opportunity to remain in employment at the ICC after the expiration of his contractual term.

6. In the present matter, the case is that his employment should not have been terminated because he should have been appointed to one of three positions but he was not because the selection processes were legally flawed. His applications for all of the three positions were submitted and considered during the reassignment period. While the precise legal arguments about the alleged flaws in the appointment process raised in these proceedings were not advanced in the earlier proceedings leading to Judgment 3908, the unlawfulness of the reassignment process was. Necessarily a conclusion that the entire reassignment process was unlawful subsumed any unlawfulness of any particular aspect of it including the selection process for the three positions.

7. The principle of *res judicata*, relied on by the ICC, serves at least two important purposes. One is to ensure that courts are not called on to determine again causes of action that were resolved in an earlier judgment. There is a clear public benefit in courts being freed from the task of doing so, particularly given the demand on courts both internationally and nationally to resolve disputes expeditiously, often in the face of increasing numbers of cases requiring resolution. The principle is intended to create finality in litigation. Another purpose is to ensure that a party against whom proceedings are brought is not required to defend again, with the attendant cost and inconvenience, a case earlier defended and resolved, irrespective of who was successful in the earlier proceedings. In circumstances where a party is successful in the earlier proceedings and obtains a remedy, no obvious public purpose is served in enabling the litigation of a case that may (though may not) result in the same remedy.

8. The Tribunal, in its case law, has identified the principle of *res judicata* as operating in circumstances where, in later litigation, the parties, the purpose of the suit and the cause of action are the same as in the earlier case (see, for example, Judgments 1216, consideration 3, 2993, consideration 6, and 3248, consideration 3). In the present case, plainly enough, the parties are the same. Likewise the purpose of the suit is the same, namely to bring about the reinstatement of the complainant as the primary relief, and the cause of action is the same, namely a claim challenging the legality of steps taken in the reassignment process.

9. In the result, the ICC is correct in arguing that the complaint is irreceivable by operation of the principle of *res judicata*. The complainant sought the disclosure of certain documents. As the proceedings fail at the threshold it is unnecessary to address this request. Accordingly, the complaint should be dismissed.

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