

The Administrative Tribunal,

Considering the complaint filed by Mr C. P. against the International Criminal Court (ICC) on 17 August 2007, the ICC's reply of 18 December 2007, the complainant's rejoinder of 7 January 2008 and the Court's surrejoinder of 10 March 2008;

Considering Article II, paragraph 5, 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 Swedish national born in 1952, joined the ICC on 6 June 2004 as a Media Relations Officer in the Office of the Prosecutor, at level P-3, under a one-year fixed-term appointment. In July 2004 he was appointed to the position of Public Information Adviser, at level P-4 in the same office. He was given a fixed-term appointment which, having been extended twice, was due to expire on 30 June 2007.

On 20 October 2006 he submitted an internal complaint to the Presidency of the Court pursuant to Regulation 119.1 of the Regulations of the Court, alleging inter alia that the Prosecutor had:

“committed serious misconduct, either in the course of his official duties, which is incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court; or of a grave nature outside the course of his official duties that causes or is likely to cause serious harm to the standing of the Court, by committing the crime of rape, or sexual assault, or sexual coercion, or sexual abuse against [a named individual] and that for this reason he should be removed from Office by the Assembly of States Parties.”

Consequently, a panel of three ICC judges was appointed in accordance with Regulation 120 in order to determine whether the complaint was manifestly unfounded.

By a memorandum dated 8 December 2006 the Presidency informed the complainant that it had decided to accept the panel's recommendations and that his internal complaint was accordingly set aside as manifestly unfounded. It also requested that he obtain and hand to the President for destruction all copies of the audio-recording of a conversation between the alleged victim and a colleague, which the complainant had submitted as evidence in support of his internal complaint.

By a letter of 23 January 2007 from the Chief of the Human Resources Section, the complainant was notified that he was suspended for three months with pay, effective immediately, pending an investigation into charges of serious misconduct which had been brought against him by the Office of the Prosecutor. He was accused of having misused his access to the Prosecutor's electronic agenda and of having tape-recorded a colleague's conversation without that person's knowledge.

On 10 March 2007 the *Chef de Cabinet* of the Office of the Prosecutor asked in writing for the advice of an external legal consultant, who provided it on 13 March.

By a letter of 16 March 2007 the Chief of the Human Resources Section informed the complainant that the Prosecutor was contemplating the possibility of dismissing him summarily for serious misconduct pursuant to Rule 110.7(a) of the Staff Rules of the Court on the grounds that “[b]y a note dated 20 October 2006 [he had] falsely alleged, with obvious malicious intent, to damage the professional and personal reputation of the Prosecutor, that [...] he ‘committed the crime of rape’”. The complainant was invited to respond to these charges against him, which he did on 30 March 2007.

By a letter dated 11 April 2007 the complainant was advised by the Chief of the Human Resources Section that the

Prosecutor had decided to dismiss him summarily for serious misconduct, effective from the date of receipt of the letter. The complainant received it on 13 April 2007.

On 1 May the complainant submitted a request for review of summary dismissal to the Disciplinary Advisory Board pursuant to Staff Rule 110.2(c), alleging several procedural and substantive flaws. At the Board's request, the Presidency provided it with a copy of the panel's report. In so doing, it emphasised that the report was confidential. However, the Presidency asked the Board, "in the interest of fairness", to inform both the Prosecutor and the complainant that neither the panel nor the Presidency had made any finding of bad faith or malicious intent on the part of the complainant. The Board conveyed this information to both parties by letters of 26 May 2007.

In its report of 18 June 2007 the Board unanimously considered that the decision to summarily dismiss the complainant was procedurally flawed on the grounds that the Prosecutor should not have participated personally in the decision-making process. It also held that one of the substantive elements on which the decision of summary dismissal was based, namely that the complainant had acted with "obvious malicious intent", had not been established. It therefore recommended to the Prosecutor that he rescind the decision of summary dismissal.

By a letter dated 13 July 2007, which constitutes the impugned decision, the Prosecutor informed the complainant that he had decided not to follow the Board's recommendation, and that he confirmed his decision to dismiss him summarily. He considered in particular that the fact that the "serious misconduct concerned [him] personally [was] not enough to call into question his impartiality". He also concluded that he was "fully justified in making the inference that [the complainant had] presented [his] false allegation [...] with an obvious malicious intent to damage [his] professional and personal reputation".

B. The complainant alleges several breaches of due process. He submits that he was not duly informed of the charges against him by the letter of 11 April 2007, which did not provide any reason for his summary dismissal, but merely referred to the letter of 16 March. This, he argues, also indicates that the decision to dismiss him summarily had already been taken before he had been made aware of the charges and that he did not have an opportunity to respond to them. He adds that there were no grounds for taking any disciplinary measure against him, much less summary dismissal. The complainant also submits that he was not given the opportunity to be heard by the panel and to respond to the assertion that his internal complaint was unfounded. Furthermore, the decision of summary dismissal was taken before the suspension expired and on grounds completely different from those put forward to justify the suspension. The summary dismissal decision is therefore arbitrary. The complainant contends that, because of the Prosecutor's work and holiday schedule, no serious consideration was given to his response to the charges against him.

The complainant also argues that the impugned decision endorsed the Board's erroneous conclusion that his internal complaint had been made falsely. He contends that his allegations against the Prosecutor were based on evidence which met "a reasonable threshold for a prima facie case", and that it was not established that such evidence had been falsified. Moreover, neither the panel of judges nor the Presidency, nor the Board made any finding that there was malicious intent on his part.

Relying on the Tribunal's case law, he asserts that the impugned decision is tainted with bias. The fact that the Prosecutor took the decision to dismiss the complainant summarily on the advice of an external legal consultant and that he subsequently maintained it against the Board's unanimous recommendation clearly shows, in his view, the retaliatory nature of his dismissal. Referring to the United Nations Secretary-General's Bulletin on "Protection against retaliation for reporting misconduct and for cooperation with duly authorized audits or investigations" dated 19 December 2005, he adds that international civil servants have a duty to report serious misconduct and should be protected from retaliation when they do so in good faith.

The complainant asks the Tribunal to quash the impugned decision and to order the Presidency to disclose the panel's report. He claims material damages in an amount equal to the net salary he would have earned from 13 April to 30 June 2007, compensation for leave during this period, repatriation grant according to the staff rules, interest of 5 per cent per annum on the sum of these amounts from 30 June 2007 until the date of payment, and three years' net salary, including allowances. He also claims moral damages in the amount of five years' net salary. He seeks 15,000 euros in legal costs and 1,500 euros in administrative costs.

C. In its reply the ICC submits that the letter of 16 March 2007 indicated that the Prosecutor was contemplating the possibility of dismissing the complainant summarily for serious misconduct, the particulars of which it

specified, and it invited him to respond. Thus, by referring to it, the letter of 11 April 2007 duly informed him of the charges he was facing and gave him the opportunity to respond to these charges. In line with the Disciplinary Advisory Board's findings, the Court rejects as unfounded the contention that the complainant's response was not considered.

It contends that, irrespective of the complainant's state of mind when he made the allegations, the latter were made falsely since there was no evidence of the alleged rape. It stresses in this regard the "unambiguous denials" of both the alleged victim and the Prosecutor during the interviews with the panel. The Court maintains that the complainant had malicious intent. In its view, neither the panel nor the Presidency made any finding as to the complainant's intent because they only considered the merits of his allegations.

The ICC argues that the fact that the complainant's allegations concerned the Prosecutor could not by itself constitute a reasonable ground calling the latter's impartiality into question. The Prosecutor exercised his responsibilities in accordance with the applicable Staff Rules and the Rome Statute, which provides for his "full authority over the management and administration" of his Office's staff, and in light of the advice he obtained from an external legal consultant. Besides, the complainant has not proved the existence of bias or personal prejudice against him.

As to the disclosure of the panel's report, the Court opposes it on account of its confidentiality, the previous communication of its pertinent content to both the complainant and the Prosecutor and the irrelevance of the report for the purpose of demonstrating that the complainant's allegations were not made falsely.

D. In his rejoinder the complainant presses his pleas. He challenges the independence and credibility of the external legal consultant, who, he argues, only had access to limited and partial information provided by the Prosecutor and who failed to recommend that he be given an opportunity to respond to the charges made against him. He reiterates his request to be provided with the panel's report.

E. In its surrejoinder the ICC maintains its position. It emphasises that the summary dismissal decision was taken by the Prosecutor in the exercise of his discretionary authority and in the interest of the Court, and that the complainant has produced no evidence justifying a review by the Tribunal.

CONSIDERATIONS

1. The complainant was employed by the ICC in the Office of the Prosecutor from 6 June 2004 until 13 April 2007 when the Prosecutor's decision to dismiss him summarily took effect. The summary dismissal decision was later the subject of proceedings before the Disciplinary Advisory Board which recommended that the decision be rescinded. However, on 13 July 2007 the Prosecutor confirmed the complainant's summary dismissal. That is the decision the complainant impugns before the Tribunal.

2. The decision to dismiss the complainant summarily had its origins in a complaint filed by him with the Presidency of the Court on 20 October 2006. The complainant alleged that the Prosecutor, while on an official mission in the Republic of South Africa, had engaged in improper conduct with a female journalist from that country as he had taken that journalist's car keys and would not return them to her until she agreed to sexual intercourse. The complainant characterised the conduct as "rape, or sexual assault, or sexual coercion or sexual abuse". He stated in his internal complaint that the conduct was serious misconduct either in the course of the Prosecutor's official duties or of a grave nature outside the course of his official duties that was likely to cause serious harm to the standing of the ICC and, in consequence, "he should be removed from Office by the Assembly of States Parties".

3. The internal complaint was accompanied by an audio tape which included a record of a telephone conversation between the alleged victim of the Prosecutor's conduct and a colleague of the complainant. The alleged victim sounded distressed and denied that she had been forced to have sexual intercourse but did not deny that she had consented in order to regain possession of her keys.

4. A panel of three ICC judges considered the complaint against the Prosecutor. They established contact with the alleged victim and interviewed her and the Prosecutor separately. In the result, the Presidency, acting on the unanimous recommendation of the panel of judges, set aside the complaint as "manifestly unfounded". It later

emerged in an internal memorandum from the Presidency to the Disciplinary Advisory Board that the internal complaint was found to be manifestly unfounded “based upon unambiguous denials of the allegation [...] both by the person [...] alleged to be the victim and the [P]rosecutor”. The memorandum also indicated that the Presidency had made no finding that the complaint had been made in bad faith or with malicious intent.

5. On 23 January 2007 the complainant was suspended from duty pending enquiries and possible disciplinary action relating to the obtaining and use of certain evidence provided with his internal complaint. As it happened, no action was taken in respect of those matters. Instead, and in accordance with the advice provided by an external legal consultant, the complainant was informed by letter of 16 March 2007 that the Prosecutor was “contemplating the possibility of dismissing [him] summarily for serious misconduct”. The conduct in question was relevantly particularised as follows:

“By a note dated 20 October 2006 [...] addressed to the President of the Court, you falsely alleged, with obvious malicious intent, to damage the professional and personal reputation of the Prosecutor, that [...] he ‘committed the crime of rape’”.

6. The complainant responded to the above charges on 30 March 2007, denying that he had made false allegations and stating that the evidence he had presented to the Presidency met “a reasonable threshold for a prima facie case”. He also denied that he had acted maliciously, stating that “making a complaint in good faith [...] cannot constitute misconduct”. He also made various claims with respect to due process of which it is necessary to mention only one, namely, that it was “inappropriate that the Prosecutor, whose behaviour was the subject of an enquiry following [his] complaint, should be the one who takes the administrative decision in [his] case”. These three issues form the core of the complaint he lodged before the Tribunal.

7. The Disciplinary Advisory Board was of the view that the complainant had made false allegations but that he had not done so with malicious intent. In reaching its conclusion with respect to falsity, the Board considered that the test to be applied was whether the information available to the complainant “supported a reasonable belief that the alleged misconduct of the Prosecutor took place”. The Board was of the view that it did not, primarily because, in the recorded conversation between the alleged victim and the complainant’s colleague, the former “did not confirm that she had been forced to have sexual intercourse”. The Board did not at any stage consider the precise factual allegation made by the complainant, namely, that the alleged victim had consented to sexual intercourse in order to regain possession of her keys.

8. The ICC contends for a more stringent test of falsity, arguing that the only issue is whether the statement “turns out to be as manifestly unfounded to be untrue, the state of mind of the person making the allegation being quite immaterial”. In the alternative, it argues that “[an internal] complaint that a crime of rape has been committed is indeed falsely made in the absence of evidence of rape”.

9. In the context of “serious misconduct”, the question whether a statement was made falsely is not simply whether the statement is true or false. A statement made innocently, which turns out to be false, does not constitute serious misconduct. A statement is made innocently if the person concerned honestly believes on reasonable grounds that the statement is true. Conversely, for the purposes of serious misconduct, a statement is falsely made if it is both untrue and the person concerned did not believe on reasonable grounds that it was true. In the present case, there is nothing to suggest that the complainant did not believe in the truth of what he wrote in his internal complaint. Thus, the only question is whether he had reasonable grounds for that belief.

10. In determining whether a statement is objectively true or false, it is necessary to have regard to the statement actually made. The same is necessary when deciding whether the person who made the statement believed on reasonable grounds that it was true. In that process, regard must be had to the whole statement, not selected excerpts or, as in this case, a single excerpt. The charge of serious misconduct was based on a single word in the internal complaint filed against the Prosecutor, namely, “rape”. Doubtless, it was for this reason that the Disciplinary Advisory Board considered that the absence of confirmation by the alleged victim that force was used was vital to the question of reasonable belief. However, a proper reading of the internal complaint makes it clear that there was no allegation of force. Rather, the allegation was that the alleged victim had consented to sexual intercourse in order to regain possession of her keys. Thus, for example, the complainant stated that the alleged victim was “apparently under the erroneous belief” that, because there was no physical force, there was no rape or sexual assault. In so doing, he referred to a decision of the European Court of Human Rights indicating what, he said, was “a universal trend” to regard lack of consent, rather than force, as the essential element of rape and sexual

abuse. Moreover, the complainant did not categorically assert that rape had occurred. Rather, he characterised the Prosecutor's alleged conduct as "rape, or sexual assault, or sexual coercion or sexual abuse" which, given differing national laws, is tolerably accurate. That being so, the question is whether the complainant had reasonable grounds for believing that the conduct had taken place.

11. The information available to the complainant came primarily from a colleague who knew the alleged victim and to whom she apparently turned for support. The colleague's evidence was secondary evidence but, depending on the circumstances, it may have been probative in criminal proceedings. Moreover, there is nothing to suggest that the complainant's colleague was unreliable or untrustworthy, much less that he was known to be so by the complainant. The recorded telephone conversation that occurred two days after the alleged event indicated that the journalist was distressed. And in that conversation, she indicated unambiguously that the Prosecutor "took [her] keys" and that she had consented to sexual intercourse "to get out of [the situation]". In these circumstances, there is no basis for concluding that the complainant did not believe on reasonable grounds the truth of what he put in his internal complaint.

12. The ICC contends that malice is to be inferred from the following:

- (a) the complainant had no evidence of relevant probative value;
- (b) the complainant was neither the alleged victim nor her relative;
- (c) the complainant made no effort to obtain information from the alleged victim;
- (d) the complainant did not seek legal advice before making his internal complaint;
- (e) the panel of three judges and the President of the Court held that the complaint was manifestly unfounded;
- (f) the complainant did not show remorse;
- (g) the complainant did not ask the Presidency to "transmit the [internal] complaint to the Bureau of the Assembly of the States Parties" but, rather, submitted that the Prosecutor "should be removed from Office";
- (h) the complainant threatened to publish material related to his internal complaint to the Presidency even before the decision was taken to summarily dismiss him; and
- (i) other conduct by the complainant subsequent to the decision to dismiss him summarily.

13. Malice is generally described either as the absence of good faith or as acting from improper motive. Frequently, the absence of a belief on reasonable grounds is sufficient to base an inference of malice. So, too, is the communication of information that is defamatory of a person to those who do not have a legitimate interest in obtaining that information. In this case, however, it is not established that the complainant did not believe on reasonable grounds that what he put in his internal complaint against the Prosecutor was true. Nor is it suggested that he communicated his belief to anyone other than those who were charged with consideration of the conduct of the Prosecutor. In the absence of either of those considerations, it is necessary to point to some act or circumstance that positively indicates bad faith or improper purpose, such as personal animosity, revenge or the desire to obtain some personal or collateral advantage.

14. It is convenient, in the first instance, to analyse separately a number of the matters on which the ICC relies to establish malice. When regard is had to the precise factual allegations actually made, rather than the charge of misconduct based on an allegation of rape, it is not correct to say that the complainant acted "[w]ithout any evidence of relevant probative value". Further, as a finding of malice is a finding as to a state of mind or motive of the person whose conduct is in question, it is irrelevant that three judges and the President found the internal complaint against the Prosecutor to be "manifestly unfounded"; what is relevant is whether the person concerned believed on reasonable grounds that what he said was true – a matter that has already been determined in the complainant's favour. Nor is it relevant that the complainant was neither the alleged victim nor her relative. Vindication of an alleged victim is not the only legitimate purpose of an internal complaint such as that made by the complainant. The protection of the standing of the ICC, a matter in which the complainant had a legitimate interest, is also a proper purpose, as are other purposes such as ensuring observance of the law.

15. Before turning to the other matters relied upon to establish malice, it is convenient to note that once the complainant had formed the belief that the Prosecutor had acted as alleged, there were, realistically, only three options available to him: to do nothing; to make further enquiries; or to report the matter in accordance with the Regulations of the Court. The fact that he decided to act on his belief, rather than do nothing, is not evidence of malice. Further, it is clear from the internal complaint that the complainant was acutely aware of his obligation to maintain confidentiality. In this regard, he stated that he had not and would not confide in anyone concerning the complaint. Failure to make further enquiries or to obtain legal advice is consistent with the complainant's conception of his obligation of confidentiality and, thus, does not indicate malice. Nor, as the Disciplinary Advisory Board noted, is malice to be inferred from the fact that the complainant sought an outcome, namely, removal from office, specifically provided for in the Rome Statute and Rules of Procedure and Evidence of the Court. Particularly is that so in a context where the complainant foresaw in his internal complaint against the Prosecutor that, before that could happen, there would have to be an inquiry by the Bureau of the Assembly of States Parties. Moreover, absence of remorse is not indicative of malice in a person who has a legitimate interest in taking action in accordance with prescribed procedures.

16. Subsequent acts and statements by a person whose conduct is claimed to be malicious may well indicate that person's state of mind at the time of the conduct in question. However, the issue is always the state of mind at the time of that conduct. Subsequent acts and statements that are otherwise explicable are not reliable indications of a previous state of mind. In the present case, although the subsequent acts of the complainant, including his threat to ensure widespread publicity of the Tribunal's judgment in this matter, indicate considerable hostility, that hostility is explicable on the basis of his having been charged with and, ultimately, dismissed for serious misconduct. Accordingly, the material on which the ICC relies does not justify a finding that the complainant acted with malicious intent.

17. In the absence of evidence justifying a finding of either falsity, as defined above, or malice, the impugned decision must be set aside, as must the earlier summary dismissal decision. However and because they are relevant to the claim for moral damages, it is necessary to consider two further matters.

18. The first matter is the complainant's argument that the decision to dismiss him summarily was taken by way of reprisal for his lodging an internal complaint. It is clear that the charge leading to the complainant's summary dismissal was made on the advice of an "external legal consultant". In these circumstances, it has not been established that that charge and the subsequent course of action constitute a form of reprisal.

19. The second matter to which it is necessary to refer is the complainant's argument that the Prosecutor should not have participated in the decision-making process in this case. In this respect, it is a fundamental aspect of due process that a person should not take a decision in a matter in which he or she has a personal interest. The Prosecutor had a direct personal interest in establishing that the internal complaint against him had been made falsely and maliciously. In some circumstances, necessity will direct that a decision be taken by a person with a direct personal interest in the outcome. The fact that the Prosecutor has authority over the management and administration of the Office of the Prosecutor and is specifically empowered to dismiss staff members of the Office does not constitute necessity. As pointed out by the Disciplinary Advisory Board, he could have delegated the power in the present case. As to other claims made by the complainant with respect to due process, it is sufficient to state that there is no discernible error in the analysis of those arguments by the Board. However, the breach of due process that did occur constituted a serious infringement of his rights and was compounded by the Prosecutor's action in maintaining his decision in the face of the internal memorandum from the Presidency indicating that there had been no finding of bad faith or malice and contrary to the recommendation of the Disciplinary Advisory Board. Accordingly, there should be an award of moral damages in the sum of 25,000 euros.

20. As earlier indicated, the impugned decision must be set aside, as must the earlier decision to dismiss the complainant summarily. Accordingly, it is unnecessary either to consider other issues raised by the complainant or to order disclosure of the report provided to the Presidency by the panel of three judges. Subject to the complainant giving credit for any earnings from employment during the period, he is entitled to be paid his net base salary and post adjustment from 13 April until 30 June 2007, when his contract would otherwise have expired, plus repatriation grant and other benefits he would have received if his contract had then expired. All such sums should bear interest at the rate claimed by the complainant, namely, 5 per cent per annum from due dates until the date of payment. And as the complainant's summary dismissal for serious misconduct must inevitably have harmed his professional reputation and employment prospects, he is entitled to material damages which the Tribunal sets in an amount equivalent to two years' net base salary and allowances. The complainant is also entitled to costs.

DECISION

For the above reasons,

1. The Prosecutor's decision of 13 July 2007 is set aside, as is his earlier decision of 11 April 2007.
2. The ICC shall pay the complainant his net base salary and post adjustment from 13 April 2007 until 30 June 2007, as well as repatriation grant and other benefits payable on the basis that his contract would have expired on 30 June 2007, together with interest at the rate of 5 per cent per annum from due dates until the date of payment. The complainant is to give credit for any earnings from employment in that period.
3. The Court shall pay the complainant an amount equivalent to two years' net base salary and allowances in material damages, and 25,000 euros in moral damages.
4. It shall also pay him 5,000 euros in costs.
5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 8 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Dolores M. Hansen

Patrick Frydman

Catherine Comtet