

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

*Registry's translation,  
the French text alone  
being authoritative.*

**T. (No. 3)**

**v.**

**ICC**

**139th Session**

**Judgment No. 4948**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr P. T. against the International Criminal Court (ICC) on 2 August 2022 and corrected on 10 August 2022, the ICC's reply of 10 November 2022, the complainant's rejoinder of 21 June 2023, corrected on 28 June 2023, and the ICC's surrejoinder of 26 September 2023;

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 suspend him from duty with pay and with immediate effect.

At the material time, the complainant worked as a Cooperation Adviser at grade P-4 in the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor of the ICC, under a fixed-term appointment.

On 11 October 2021 the Prosecutor of the ICC orally informed the complainant that, having received allegations that the latter had made inappropriate comments, involving in particular breaches of his duty of confidentiality, he had decided to suspend him from duty with

immediate effect. He asked the complainant to leave the building at once, escorted by his supervisor.

The following day, the complainant received written notice of that decision by email and by a letter delivered to him in person and signed for at his home address. In that letter, the Prosecutor stated that the allegations made against him concerned a discussion he had had on the morning of 11 October 2021 with members of a delegation from a State Party visiting the Court. The complainant was informed that the suspension decision, taken pursuant to Rule 110.5(a) of the Staff Rules of the Court and pending the outcome of disciplinary proceedings relating to those allegations, was made with immediate effect and with pay for a period of three months. The Prosecutor explained that the decision “[was] necessary in order not to prejudice the interests of the Office of the Prosecutor and the Court, to ensure the integrity of the consideration of the allegations made against [him], and because the alleged conduct [was] of such a nature to discredit and harm the reputation of the Office and the Court”. In addition, the Prosecutor asked the complainant to immediately hand over to the Administration all property of the Court in his possession. He was also informed that his access to the Court’s Intranet had been temporarily disabled and that he could only access the Court’s premises with prior authorisation.

That same day, the complainant sent the Prosecutor an email asking to meet him so that he could set out his version of events. The complainant subsequently met with the Prosecutor on 15 October 2021. At that meeting, he set out his version of events and replied to the Prosecutor’s questions about certain confidential information which he was said to have disclosed to external visitors to the Court during an informal discussion on 11 October 2021.

The complainant was notified on 20 October 2021 of the Prosecutor’s decision to refer the allegations made against him, together with a note of their meeting of 15 October 2021, to the Independent Oversight Mechanism (hereinafter “the Mechanism”) for an initial review, in accordance with Resolution ICC-ASP/19/Res.6 and paragraph 8 of Annex II to that resolution, concerning the Operational Mandate of the Mechanism.

On 22 October 2021 the Mechanism informed the complainant that an investigation had been opened into the allegations made against him that he might have engaged in misconduct or unsatisfactory conduct. The Mechanism specified that it was alleged that the complainant had disclosed confidential and/or inappropriate information to two members of the delegation from a State Party on 11 October 2021 and that, if the allegations were found to be true, it could amount to unsatisfactory conduct within the meaning of Section 5 of the Code of Conduct for Staff Members and Staff Rule 110.1.

On 4 November 2021 the complainant submitted to the Appeals Board a request for review of the decision to suspend him from duty.

On 6 December 2021 the Legal Adviser informed the complainant that the Prosecutor's decision to reject his request for review and to maintain the decision suspending him from duty with pay. He stated in particular that the decision in question had been taken in accordance with Staff Rule 110.5 and that it was proportionate because the allegations made against the complainant were sufficiently serious to warrant immediate suspension.

On 17 December 2021 the complainant submitted to the Appeals Board a request for suspension of action on the decision suspending him from duty pursuant to Staff Rule 111.4(b). On 5 January 2022, following the delivery of the Appeals Board's report on the matter, the complainant was informed of the Prosecutor's decision to reject his request for the suspension of action. On 4 April 2022 the complainant filed a first complaint before the Tribunal to challenge that decision, which was addressed in Judgment 4947, also delivered in public this day.

Also on 5 January 2022, the complainant lodged an appeal against the Prosecutor's decision of 6 December 2021 to reject his request of 4 November 2021 for a review of the decision to suspend him from duty with pay and with immediate effect.

On 10 January 2022 the Legal Adviser informed the complainant of the Prosecutor's decision of the same date to extend his suspension with pay by three months, effective from the following day. He explained to the complainant that the Mechanism had concluded its investigation and had submitted its report to the Prosecutor, who was in

the process of reviewing it to determine whether the matter should be pursued further.

On 11 January 2022 the Legal Adviser sent the complainant the Mechanism's report issued on 23 December 2021 and the complainant responded on 27 February 2022. In its report, the Mechanism found that there was sufficient evidence to conclude that the complainant had failed in his obligation of confidentiality and that his conduct could also amount to a violation of his duty of loyalty.

On 14 January 2022 the complainant submitted a second suspension request to the Appeals Board, this time in relation to the Prosecutor's decision of 10 January 2022 to extend his suspension with pay. On 31 January 2022, following the report from the Appeals Board in that regard, he was informed of the Prosecutor's decision to reject this suspension request. On 29 April 2022, the complainant filed a second complaint before the Tribunal to challenge that decision, which, together with the first complaint previously mentioned, is addressed in Judgment 4947, also delivered in public this day.

On 7 February 2022 the Legal Adviser conveyed to the Appeals Board the Prosecutor's response to the complainant's appeal of 5 January 2022 against the decision to suspend him with pay and with immediate effect, notified to him in writing on 12 October 2021. The complainant filed a reply on 22 February 2022, and the Prosecutor responded thereto on 4 March 2022.

On 1 April 2022 the Legal Adviser informed the complainant of the Prosecutor's decision to further extend his suspension with pay for three months from 11 April 2022. The complainant was also reminded that the Mechanism had completed its investigation and submitted its report to the Prosecutor, who had decided, in the light of the report's conclusions, to pursue the matter and to refer it to the Disciplinary Advisory Board on 11 March 2022. The complainant requested the suspension of action on that decision on 7 April 2022. On 21 September 2022, following the delivery of the Appeals Board's report in that regard dated 19 August 2022, the complainant was informed of the Prosecutor's decision to reject that suspension request. On 15 December 2022 he filed a fifth complaint before the Tribunal to

challenge this decision, which, together with the first and second complaints already mentioned, is addressed in Judgment 4947, also delivered in public this day.

On 7 April 2022 the Appeals Board issued its report on the complainant's appeal against the decision, notified to him in writing on 12 October 2021, to suspend him with pay and with immediate effect, and recommended that the appeal be dismissed.

On 4 May 2022 the Legal Adviser notified the complainant of the Prosecutor's decision, bearing the date 6 May (*sic*), to follow the recommendations of the Appeals Board and, therefore, to reject his appeal against the decision of 12 October 2021 to suspend him. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision as well as the decision of 11 October 2021 suspending him and to order the removal of any mention of the suspension decision from his official status file. He claims damages of 60,000 euros for the injury that he considers he has suffered as a result of the alleged unlawfulness of the suspension decision, of the alleged breach by the ICC of its duty of care and of the period of his suspension, which he regards as unreasonable. He also claims damages of 10,000 euros for the injury that he considers he has suffered as a result of the organisation imposing on him a disguised sanction and showing bad faith, and compensation of 5,000 euros for the errors of assessment made by the Appeals Board. The complainant also seeks the award of costs, which he assesses as at least 5,000 euros.

In his rejoinder, the complainant asks the Tribunal, in the event that the decision suspending him with pay is set aside, to award him further damages for the extension of the suspension measure, which he regards as abusive *ab initio*.

The ICC asks the Tribunal, primarily, to dismiss the complaint as unfounded, not to award the complainant any of the compensation he claims and to order him to pay the costs of the proceedings, in particular all expenses incurred for the case. It also asks the Tribunal to declare the complaint abusive.

## CONSIDERATIONS

1. The complainant is a former staff member of the International Criminal Court (ICC) who joined the organisation on 2 September 2003. At the material time, he held the role of Judicial Cooperation Adviser in the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor of the Court.

An incident which occurred towards the end of the morning of 11 October 2021 led to the decision by the ICC to suspend him from duty with pay and with immediate effect from 11 October 2021 and, subsequently, to impose on him the disciplinary sanction of summary dismissal for serious misconduct on 8 July 2022.

The evidence shows that the complainant was accused, firstly, of having said, during a discussion over coffee about the situation of an ICC investigation into [country X] and, in particular, about an earlier public statement made by the Prosecutor, in front of two members of a delegation from a State Party visiting the Court and in response to a question from one of them about the Prosecutor's remark that the delay in launching one aspect of the investigation was down to a lack of internal resources, that "the case against [the secret service agency of a major power] is ready, all the evidence is there", in a tone seemingly dismissive of the Prosecutor's public statement.

The complainant is also accused, secondly, of having proceeded, in front of the two members of the delegation from the State Party in question, to express his personal frustration about the restructuring and reorganisation of the Office of the Prosecutor following the recent arrival of the new Prosecutor, in particular with regard to his role and his sense of having been sidelined.

2. That incident gave rise to five complaints filed by the complainant before the Tribunal. Three of those complaints, being the first, second and fifth, are addressed in Judgment 4947, also delivered in public this day. They concern the decisions of the Prosecutor of the ICC to reject the complainant's requests for the suspension of action on the decision to suspend him with pay and with immediate effect on

11 October 2021 for a period of three months, and on the decisions to extend that suspension on two occasions, also for three months, pending the outcome of the internal appeal procedures that were underway.

3. The third complaint, which is addressed in this judgment, concerns the decision of 11 October 2021 to suspend the complainant from duty with pay and with immediate effect. The other complaint, being the complainant's fourth, concerns the decision of 8 July 2022 summarily dismissing him for serious misconduct and is addressed in Judgment 4949, also delivered in public this day. In the present complaint, the complainant impugns the decision of the Prosecutor of the ICC dated 6 May 2022, by which the Prosecutor informed him that he endorsed the recommendations contained in the Appeals Board's report of 7 April 2022 and dismissed his appeal against the earlier decision of 11 October 2021 suspending him from duty with pay and with immediate effect.

On that day, around midday, the Prosecutor orally informed the complainant, in the presence of the person responsible for human resources at the Office of the Prosecutor, the Senior Adviser to the Prosecutor, and the Head of International Cooperation, who was the complainant's line manager, that he had just received allegations that the complainant had made inappropriate comments during the abovementioned informal conversation over coffee with a colleague from the Prosecutor's Office and two members of a delegation from a State Party visiting the Court. The Prosecutor told the complainant in particular that the information received involved an alleged breach of confidentiality regarding a situation that the Court was dealing with at the time and an alleged failure to abide by the standards of conduct expected of a member of staff of the Prosecutor's Office.

The Prosecutor then informed the complainant that he had decided to suspend him from duty immediately and asked him to leave the building at once, escorted by his supervisor, which he did at around 12.30 p.m.

4. In the written notice of suspension with pay delivered to the complainant at his home the following day, that is on 12 October 2021, the Prosecutor also explained to him that the measure suspending him from duty had been taken to ensure the integrity of the consideration of the allegations made and to protect the reputation of the Court and the Office. The written notice of 12 October 2021 makes it clear that the Prosecutor decided to impose the suspension measure on the complainant pursuant to Staff Rule 110.5(a) and (b), which provides as follows:

**“Rule 110.5: Suspension during disciplinary proceedings**

- (a) If the Registrar or the Prosecutor, as appropriate, decides that the staff member’s continuance in service would prejudice the interests of the Court, the staff member may be suspended from duty during the fact finding and pending completion of disciplinary proceedings for a period which should normally not exceed three months. Such suspension shall be with pay unless, in exceptional circumstances, the Registrar or the Prosecutor, as appropriate, decides that suspension without pay is appropriate. The suspension shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.
- (b) A staff member suspended pursuant to paragraph (a) shall be given a written statement of the reasons for the suspension and its probable duration.

[...]”

The Tribunal notes that the legal framework governing a suspension such as this within the organisation also includes Sections 2.1 and 2.4 of Administrative Instruction ICC/AI/2008/001 of 5 February 2008 (hereinafter “the 2008 Administrative Instruction”), applicable to the present case, which provide as follows:

- “2.1 Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the Registrar or the Prosecutor, as appropriate, shall initiate a preliminary investigation. If necessary, the Registrar or the Prosecutor, as appropriate, shall have the authority to request the relevant supervisors, Heads of Section and/or Division Directors, of the full account of the facts which may be investigated and all the measures that they have undertaken in order to prevent and/or minimize the consequences of the alleged conduct. The Registrar or the Prosecutor, as appropriate, may instruct appropriate and

experienced staff to conduct such preliminary investigation. The staff who may conduct the preliminary investigation shall respect the due process rights of the staff member who is under investigation and provide him/her with reasonable time which shall not exceed 10 working days to provide his/her version of the facts and evidence, if any.

[...]

- 2.4 If the unsatisfactory conduct appears to be of such a nature and of such gravity that immediate suspension may be warranted, the preliminary investigation report shall make a recommendation to that effect, giving reasons. As a general principle, suspension may be contemplated if the conduct in question may pose a danger to other staff members or to the Court, or if the conduct is of such a nature to discredit and harm the reputation of the Court, or if there is a risk of evidence being destroyed or concealed. In accordance with Staff Rule 110.5(a) the suspension may normally not exceed three months, it shall be without prejudice to the rights of the staff member and shall not constitute a disciplinary measure.”

5. The Tribunal observes that, following the suspension, the matter was referred to the Independent Oversight Mechanism (hereinafter “the Mechanism”) on 20 October 2021 for an initial review of the allegations of unsatisfactory conduct made against the complainant in accordance with Resolution ICC-ASP/19/Res.6 and paragraph 8 of Annex II to that resolution concerning the Operational Mandate of the Mechanism, and that the latter submitted a detailed investigation report on 23 December 2021.

The Tribunal notes that, as part of its investigation, the Mechanism interviewed the complainant, his line manager, Mr B., as well as his colleague, Mr D., and the two members of the delegation from the State Party visiting the Court at the time, the latter three of whom had all been present at the incident of 11 October 2021. In its report, the Mechanism commented in particular as follows:

- the two delegates seemed reluctant to cooperate, in the Mechanism’s view;
- the meeting over coffee on the morning of 11 October 2021 appears to have been impromptu;

- there was certainly some discussion about what was perceived by the participants other than the complainant as his frustration and his sense of being sidelined in the organisation's new structure;
- the topic of the Prosecutor's recent public statement was also discussed and the Mechanism found Mr D.'s account of the discussions to be the most credible, especially when compared with the complainant's denials and the hesitancy of the other two individuals present;
- the complainant's conduct and the conversations he had after the incident, first with Mr B. and then with Mr D., when he said that he had committed a blunder or that, apart from one topic, he had not said anything inappropriate, could amount to material evidence.

In the light of this assessment, the Mechanism considered that there could have been breaches of confidentiality or of the duty of loyalty on the part of the complainant and, therefore, recommended that appropriate disciplinary action be taken against him.

6. The Tribunal also notes that, following the appeal lodged by the complainant against the decision to suspend him with pay and with immediate effect on 11 October 2021, the Appeals Board produced its own lengthy report on 7 April 2022, in which it examined the four arguments raised by the complainant against that decision.

In its report, the Board recommended that the appeal be dismissed, having considered as follows in respect of each of those arguments:

- First, it found that the alleged violation of the applicable legal framework had not been established. According to the Board, the text of Staff Rule 110.5(a) did not preclude the possibility of a suspension measure being applied prior to the opening of an investigation since such a decision, being an interim precautionary measure, had sometimes to be adopted urgently and this interpretation of the provision was consistent with the relevant case law of the Tribunal. The Board added that the conditions set out in Staff Rule 110.5 and in Section 2.4 of the 2008 Administrative Instruction, relating to the protection of the Court's interests or the

existence of a conduct of such a nature as to discredit and harm the reputation of the Court, were, in its view, met in the present case, that it was permissible under Rule 110.5(b) for a suspension to be initially communicated orally and then in writing, and that the oral and written decision notified to the complainant was adequately and sufficiently reasoned.

- Secondly, the Appeals Board found that, in view of the allegations of a potential disclosure of confidential information, the suspension did not appear to be disproportionate, at least “*prima facie*”.
- Thirdly, the Board found the complainant’s assertion that the measure applied was actually a disguised disciplinary measure to be unsupported.
- Fourthly, according to the Board, the alleged breaches of the organisation’s duty of care and protection, with particular regard to the manner in which the suspension had been implemented, disseminated and communicated, the injustice of which the complainant claimed to be the victim and the lack of support from his supervisors had not been established either.

7. The Tribunal notes lastly that, in the impugned decision, the Prosecutor took each of the four arguments raised by the complainant and, after outlining his understanding of the examination undertaken by the Appeals Board and the conclusions it had drawn, informed the complainant that he agreed with the assessment made and the resulting recommendation and, consequently, that he had decided to dismiss the appeal and uphold the earlier decision of 11 October 2021.

8. In his complaint, the complainant puts forward three pleas in support of his challenge to the decision to suspend him from duty. Those pleas essentially repeat the substance of the arguments examined by the Appeals Board in its report of 7 April 2022 and by the Prosecutor in the impugned decision of 6 May 2022.

Firstly, the complainant submits that the internal procedure followed by the organisation was flawed.

Secondly, he submits that the impugned decision is unlawful because, in the first place, the suspension measure was imposed in breach of the applicable legal framework, in the second place, the decision to impose that measure failed to take essential facts into account and was based on incorrect conclusions, in the third place, the measure was disproportionate and, in the last place, the decision was actually a disguised disciplinary measure.

Thirdly, he submits that the ICC acted in breach of the duty of care, protection and good faith incumbent upon it, given, in particular, the unreasonable length of the suspension imposed, the inappropriate communication of the decision to his colleagues, the manner in which the decision was carried out in that he was immediately escorted off the organisation's premises, the written notice of the decision delivered in person to his home address, the bias and prejudice seen in the decision to believe the word of another staff member (Mr D.), the lack of support from his supervisors throughout the suspension period and the injustice to which he was subjected in the circumstances of the case.

9. Before proceeding to the examination of these three pleas, it should be recalled that the Tribunal has consistently held that a suspension decision is a matter of discretion and subject to only limited review. Thus, in Judgment 4658, consideration 2, the Tribunal emphasised in particular the following in this regard:

"2. As the Tribunal has stated on a number of occasions, a measure of suspension decided in the context of disciplinary proceedings, with or without pay, is an interim measure which in no way prejudices the decision to be taken on the merits as to whether a disciplinary sanction should be imposed on the official concerned. [...] Such a decision lies at the discretion of the organisation's executive head. It is subject therefore to only limited review by the Tribunal and will not be set aside unless it was taken without authority or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the evidence (see, in particular, Judgments 4586, consideration 8, 4519, consideration 2, 4452, consideration 7, 3037, consideration 9, 3035, consideration 10, 2698, consideration 9, and 2365, consideration 4(a)). [...] Lastly, while an authority may adopt a measure of suspension if it considers, on the basis of the evidence before it and at its own discretion, that the charge

of misconduct against an official is reasonable, there is no need at this stage to prove that the accusations are well founded (see, in particular, Judgments 3036, consideration 13, 3035, consideration 14(a), and 2698, consideration 11).”

(See also Judgments 4612, consideration 3, 4586, considerations 8 and 11, 4361, considerations 7 and 11, 4359, considerations 7 and 11, 3496, consideration 2, and 3035, consideration 10.)

Nonetheless, in that same consideration of Judgment 4658, the Tribunal explained that, since a suspension measure imposes a constraint on the official concerned, it must be legally founded, justified by the requirements of the organisation and in accordance with the principle of proportionality (see also, in that regard, Judgment 4612, consideration 3). The Tribunal recalled that a measure of suspension will not be ordered except in cases of serious misconduct (see, for example, Judgments 4519, consideration 2, 3035, consideration 10, and 2365, consideration 4(a)). In addition, the Tribunal pointed out that, in assessing the lawfulness of a suspension measure, it is necessary to determine whether the requisite conditions for adopting such a measure were met when it was ordered, as subsequent facts cannot be taken into account (see, in that regard, Judgments 3036, consideration 13, 3035, consideration 12, and 2365, consideration 4(c)).

10. As regards the complainant’s first plea, that the internal procedure followed by the organisation was flawed, the complainant submits that, contrary to the Tribunal’s settled case law, the Appeals Board took account of facts subsequent to those known to the parties at the time when the suspension decision was taken, that the internal procedure was unfair and tainted by bias, and that the communication of the Mechanism’s report to the Appeals Board breached the confidentiality to which that document was subject.

The Tribunal recalls that, with regard to the decision to suspend the complainant with pay and with immediate effect on 11 October 2021, the review undertaken by the Appeals Board did not involve determining whether the allegations made against the complainant were true and the evidence sufficient, but rather whether those allegations had the potential to lead to an urgent suspension decision given the

seriousness of the misconduct alleged and the Court's interest in ensuring that the measure took immediate effect.

The Tribunal notes first of all that the majority of the extracts from the Appeals Board's report in relation to which the complainant claims that the Board took account of facts subsequent to the decision to suspend him appear in the part of the report which sets out a summary of the facts and procedure, rather than the part containing the analysis, considerations and recommendations. It has therefore not been established that the Board based its analysis on matters subsequent to the notification of the suspension or that those matters influenced its conclusions in any way.

The only paragraphs from the part of the report containing the Appeals Board's analysis and considerations to which the complainant refers in support of this argument deal with facts which, even though they occurred subsequently, were simply noted by the Board to confirm the accuracy of the facts known to the organisation before it took the suspension decision. For example, the emails sent by Mr D. to the Prosecutor after the notification of the suspension were simply a written confirmation of the verbal allegations that he had made to the Prosecutor and cannot be regarded as facts subsequent to the contested measure, which the Board could not take into account, in accordance with the aforementioned case law of the Tribunal on this question.

As for the references to communications between the complainant and his line manager, Mr B., or his colleague, Mr D., which postdated the suspension decision, these simply corroborated the Board's findings that the complainant was aware of the reasons behind the decision and that his contention that he was not duly informed in a timely manner of the reasons for his suspension was unfounded.

As for certain facts which postdated the suspension decision and to which the Board referred when responding to the complainant's allegations of breach of the duty of care and good faith, since the complainant's arguments in this regard concerned actions that were taken or situations that arose following that decision, and the consequences that subsequently befell him, they cannot be regarded as subsequent facts within the meaning of the case law on the analysis of

the grounds for a decision to suspend an official, but simply as references to facts material to the examination of the potential breach of the organisation's duty of care.

Next, it is well settled in the Tribunal's case law that the burden of proving allegations of prejudice or unequal treatment in internal proceedings falls on the complainant (see, for example, Judgment 4523, consideration 8), and the Tribunal considers that the written submissions do not lend convincing support to the complainant's assertion.

Lastly, the Tribunal finds that the complainant cannot successfully claim that the communication of the Mechanism's report to the Appeals Board constituted a breach of the confidentiality surrounding that report. He does not identify any provision of the Staff Rules which might have been infringed in this respect, bearing in mind that he himself had commented in detail on the Mechanism's report during the internal proceedings before the Appeals Board. Furthermore, this communication did not alter the requirement for the Board to act impartially.

The first plea is unfounded and must be rejected.

11. As regards the second plea, that the impugned decision is unlawful for four reasons, the complainant's first argument concerns alleged breaches by the organisation of the applicable legal framework.

In this respect, the complainant submits in the first place that the decision to suspend him was made prior to any preliminary investigation, contrary to the provisions of the internal rules by which the ICC is bound. However, as explained by both the Appeals Board in its report and the Prosecutor in the impugned decision, that argument must be rejected in the light of the text of the material rules, the rationale for taking a decision to suspend with immediate effect and the Tribunal's established case law on the interpretation to be given to the material rules, that is Staff Rule 110.5(a) and Section 2.4 of the 2008 Administrative Instruction.

Thus, in a situation where a staff member's continuance in service would prejudice the interests of the Court, Staff Rule 110.5 specifically contemplates the possibility of suspension from the outset of, and during, the fact-finding process. When faced with a similar argument that a reading of Section 2.4 of the 2008 Administrative Instruction raised doubts about the application of Staff Rule 110.5 before a preliminary investigation had been concluded, the Tribunal, in Judgment 3863, consideration 13, also stated the following:

"13. The complainant's second argument concerns one of several allegations that there were violations of his due process rights. He submits that he was suspended before investigation of the allegations against him. This, he argues, was contrary to the provisions of Administrative Instruction ICC/AI/2008/001 concerning disciplinary procedures. The Tribunal accepts that on one reading of Section 2.4 of Administrative Instruction ICC/AI/2008/001, any suspension decision ought to follow a preliminary investigation pointing to unsatisfactory conduct. However, it is tolerably clear that this provision is intended to operate in conjunction with Staff Rule 110.5(a) that, itself, clearly contemplates suspension at the outset and during the fact-finding process. The Tribunal rejects this argument of the complainant. [...]"

Furthermore, in Judgments 4361, consideration 12, and 4359, consideration 12, the Tribunal referred to consideration 13 of Judgment 3863 and clearly stated that, in the context of the rules governing staff members of the ICC, suspension can take place at the outset and can occur before the investigation of the allegations without this constituting a violation of due process rights.

The Tribunal considers that, in this case, there was no violation of the applicable legal framework in a context where, under the wording of the applicable staff rules of the organisation, it was possible for suspension to take place from the outset of the investigation into the allegations in question. As the ICC rightly explains in its written submissions, when the complainant was informed of the decision to suspend him from duty, the fact-finding process had indeed begun, even though a relatively short time had elapsed between the start of that process and the communication of the suspension decision to the complainant. The written submissions establish that, at the time the decision was taken, the Prosecutor had consulted his Senior Adviser, a

human resources liaison and coordination officer from the Office and the organisation's Head of International Cooperation, that the allegations had been made to him by Mr D., who was present at the conversation in question on 11 October 2021, and that he had informed the complainant of what Mr D. had said. The Tribunal has already recalled that suspension is a precautionary measure which must in principle be adopted swiftly and often urgently, it being understood, and as is confirmed by the organisation's Staff Rules, that it is not a disciplinary measure.

On this point, the Tribunal notes that the findings of the Disciplinary Advisory Board in its report of 9 June 2022, according to which Staff Rule 110.5(a), read in conjunction with Sections 2.1, 2.4 and 2.5 of the 2008 Administrative Instruction, requires that a preliminary investigation be carried out before a Staff Member is suspended, are at odds with the position taken by the Tribunal in aforementioned Judgments 4361, 4359 and 3863.

The Tribunal adds that, in Judgment 4612, consideration 25, it recalled that its case law does not require there to be a form of investigation of the facts before a suspension decision is taken, given that such decisions often have to be made urgently.

12. Still on the subject of alleged violations of the applicable legal framework, the complainant submits, in the second place, that oral communication of the suspension decision on 11 October 2021, with written notice not provided until the following day, on 12 October 2021, was in breach of Staff Rule 110.5(b).

However, since that rule simply requires the complainant to be informed in writing of the decision and does not specify that this must occur immediately after the decision is taken, written notice of the suspension decision the day after that on which the decision was communicated orally to the complainant does not constitute a flaw rendering the impugned decision or the suspension decision of 11 October 2021 unlawful. The Tribunal has already reiterated that the reasons for a decision may even be conveyed to a staff member at a meeting (see, for example, Judgments 4455, consideration 11, and

4451, consideration 11), and the use of oral notice followed by written notice, as did the ICC in the present case, complied with the applicable provisions of the Staff Rules.

13. In the third place, the complainant asserts that the organisation also breached the applicable legal framework by failing to provide sufficient reasons for the suspension measure. He claims in this regard that he was not able to understand the reasons behind the decision because no specific information was provided to him in that respect.

However, even though the written reasons for the suspension measure imposed were succinct and expressed in seemingly general terms, the Tribunal recalls that, under its settled case law (see, for example, Judgment 4451, consideration 11), the requisite statement of reasons may be contained in an oral notification informing the staff member of the decision or may be provided in prior proceedings (see, *inter alia*, Judgments 4397, consideration 15, 1757, consideration 5, and 1590, consideration 7), or may even be conveyed in response to a subsequent challenge (see Judgments 3316, consideration 7, and 1590, consideration 7).

It is clear from the file that the complainant was informed by the Prosecutor at their meeting of 11 October 2021 of the reasons for his suspension, as evidenced by the fact that he expressed his views on the reasons in question during his subsequent meeting with the Prosecutor on 15 October 2021.

The notes summarising the discussions which took place during that meeting, the accuracy and truth of which have not been disputed by the complainant, establish that the latter was sufficiently aware of the matters of which he was accused to be able to affirm, according to those notes, that he understood why he had been suspended with immediate effect on 11 October 2021.

Furthermore, the evidence on file shows that, according to the complainant's line manager, Mr B., the complainant had acknowledged immediately after his meeting on 11 October 2021 with the Prosecutor that he had made a blunder during his conversation that day with the

two representatives of the delegation from the State Party in question. As noted by the Mechanism, his colleague, Mr D., had also asserted that, barely a few minutes afterwards, the complainant had told him that he may have said something inappropriate in the course of that conversation.

In this context, the Tribunal considers that the reasons provided for the decision were sufficient to allow the complainant to understand its basis and, consequently, to determine the steps he could take to assert his point of view and challenge the measure imposed.

14. It follows that the various matters put forward by the complainant in support of this first argument that the impugned decision was unlawful for breaching the applicable legal framework must be rejected.

15. The second argument put forward by the complainant in support of his contention that the impugned decision was unlawful relates to what he regards as failures to take essential facts into account and blatantly wrong conclusions drawn by the Prosecutor in the decision to suspend him.

However, all that the complainant puts forward to substantiate this assertion is that his colleague, Mr D., who took part in the conversation in which confidential information was allegedly disclosed, did nothing to stop it, that he himself did not have access to any confidential information, that his career at the Court had been exemplary and that his longstanding professional relationship with the delegation from the State Party in question was good, in circumstances where, in his role as a Cooperation Adviser, he knew how and what to discuss with the members of that delegation.

In fact, these arguments actually relate to the basis of the disciplinary proceedings which followed, rather than to the challenge to the suspension measure imposed, and their relevance to the question of unlawfulness of the impugned decision has not been established. As the Tribunal has already recalled, in particular in aforementioned Judgment 4658, consideration 2, and in Judgment 2698, consideration 11,

an organisation may adopt a measure of suspension if it considers, on the basis of the evidence before it and at its own discretion, that the charge of misconduct against an official is reasonable, without the need at this stage to prove that the accusations are well founded. It is, furthermore, clear from the Appeals Board's report that, on the contrary, the thorough analysis undertaken by the Board to determine whether material facts had been omitted duly established that it was simply not the case in this situation.

The second argument put forward by the complainant in support of his second plea is therefore unfounded.

16. In his third argument in support of his claim that the impugned decision was unlawful, the complainant submits that the suspension decision was disproportionate, as he did not pose any risk to the interests and reputation of the Court. However, on this point, the Appeals Board's report and the impugned decision which endorsed its recommendations explain why the interests and reputation of the Court were perceived by the organisation as being potentially at risk in a situation where the complainant had been accused of misconduct which could be classed as serious and could constitute a serious breach of his obligation of confidentiality, duty of discretion or duty of loyalty. In view of the serious nature of the potential misconduct, a decision to suspend him with immediate effect was warranted.

As regards the need for a measure of suspension, the Tribunal's case law recognises that, if an authority considers that the charge of misconduct against an official is reasonable, "there is no need at this stage to prove that the accusations are well founded" (see Judgment 4658, consideration 2). In the present case, the written submissions show that the official was accused of potentially serious misconduct. Furthermore, the Tribunal recalled in Judgments 4361, consideration 11, and 4359, consideration 11, that Rule 110.5(a) of the Staff Rules of the ICC is expressed in the most general terms and is intended to confer on the Prosecutor the power to undertake a discretionary evaluation of the situation. In such cases, it is not for the Tribunal to substitute its view for that of the Prosecutor.

In a context where the Prosecutor had received seemingly valid information from Mr D. about the misconduct alleged and where this information involved potential breaches of the complainant's duty of discretion or his obligation of confidentiality and the possibility of an inappropriate disclosure of information about one of the organisation's dossiers and the complainant's frustration over the reorganisation of certain aspects of the running of his department, which were matters capable of tarnishing the reputation or image of the Court with a State Party, the Tribunal considers that the complainant has failed to show how, at the time it was imposed, the measure of suspension with pay and with immediate effect was not warranted.

This third argument in support of the second plea must also be rejected.

17. Lastly, the fourth argument put forward by the complainant in support of his second plea concerns what he regards as the imposition of a disguised disciplinary measure. However, firstly, the relevant rules and the letter of 12 October 2021 make it clear that the suspension was not a disciplinary measure. Secondly, the Tribunal cannot accept the complainant's assertion that the measure was imposed because he had not followed the Prosecutor's instructions on the need to seek approval from the Prosecutor before making contact with external parties. That assertion has not been established in any way.

18. As a result of the foregoing, the second plea is unfounded.

19. With regard to his third plea, that the ICC breached its duties of care, protection and good faith, the complainant relies on various circumstances surrounding the decision to suspend him and the application of that decision in order to support his contention that there was a breach of those duties by the organisation in the facts. However, the Tribunal considers that, in view of all those circumstances, the complainant has failed to establish any breach or error that falls within the limited power of review by which the Tribunal is constrained and which could justify its intervention in the exercise by the organisation's

executive head of the discretionary power to apply a suspension with pay and with immediate effect, such as took place in this case.

First of all, the Tribunal has already explained why the suspension measure was warranted. The alleged misapplication of the principle of proportionality can therefore not constitute a breach by the ICC of its duty of care.

Next, the complainant has not established any breach by the organisation of its obligations with regard to the supposedly unreasonable length of the suspension, the way in which it was made known or its sudden nature. As is clear from the Appeals Board's report and the impugned decision, on the date when the impugned decision was delivered, that is, on 4 May 2022, the length of the suspension was due to the internal appeal procedure which had required an initial review by the Mechanism followed by proceedings before the Appeals Board. The period of around seven months which elapsed between the date when the measure was imposed and the date of the impugned decision does not appear unreasonable in itself and, beyond merely asserting that it was unreasonable, the complainant fails to establish why this was so. The Tribunal adds that, in the context of the present complaint, it can only rule on the decision concerning the imposition of the initial three-month suspension measure, and not on the two subsequent decisions to extend that suspension for further periods of three months each. In Judgment 4658, consideration 2, the Tribunal observed that, where a measure of suspension has been extended, its role is to determine whether the conditions required for each extension were met at the time that decision was taken (see also in this regard Judgment 4586, consideration 11). It follows that this situation involves distinct final decisions which must, as appropriate, be challenged in separate complaints.

Neither can it be held that the organisation communicated the decision to suspend the complainant to his colleagues or outside the ICC in such a way as to undermine his professional integrity. The Tribunal has already recognised that notifying the staff members in a department of a measure imposed can sometimes be necessary for the proper functioning of the organisation (see, for example,

Judgment 4237, consideration 9). The Tribunal considers that the way in which the decision to suspend the complainant was announced was adequate in the circumstances of the case, as the Appeals Board also noted in its report.

As regards the fact that the complainant was escorted off the Court's premises immediately following the decision to suspend him, there is no evidence on file to substantiate the assertion that the measure was implemented in an unreasonable way. Again, in Judgment 4831, consideration 10, on the basis of an earlier judgment (see Judgment 3649, consideration 13), the Tribunal recalled that, while being escorted out of the workplace can be a humiliating experience, it is sometimes justified and, in the absence of any conduct on the part of the organisation's representatives that would exacerbate the humiliation (for example, by having the official escorted from the office by security personnel), it is simply a matter of sound business practice, as is the immediate disabling of the official's email account and the denial of access to the organisation's facilities.

As for the notification of the suspension decision, which was effected by the delivery of written notice to the complainant at his home, the organisation rightly points out that the document was handed to him in person at home to ensure that he received it promptly and because he was no longer present at the organisation's premises. Neither the written submissions nor the evidence on file substantiate the complainant's assertion that the notification dealt a devastating blow to him and his family since it took place at the time when his daughter came home from school.

The complainant's assertion that the organisation chose to believe the word of another staff member (Mr D.) rather than to give him the benefit of the doubt despite his 18 years' experience at the ICC is decidedly insufficient to substantiate the allegation of bias or prejudice on the organisation's part. At the time when the suspension decision was taken, the allegations made were such as to raise serious concerns about the way in which the complainant might have acted with the Court's external stakeholders and about his understanding of the limits on what he was allowed to disclose to representatives of States

interacting with the ICC. Under the Tribunal's consistent case law, it is also established that, in such cases, the complainant bears the evidentiary burden of proving his allegations (see, for example, Judgments 4612, consideration 23, 4523, consideration 8, and 4231, consideration 10).

The complainant's other allegations, that he did not receive any support from his supervisors following the decision to suspend him, are also unsubstantiated by any convincing evidence in the written submissions or documents on file. It appears in particular that the Prosecutor agreed to meet the complainant very promptly, four days after the incident, and that the complainant was kept informed of progress throughout the whole investigation. As the organisation points out, it is entirely understandable that some of the complainant's supervisors felt that it was not their place to discuss with him the content of the ongoing investigation or versions of events relayed during the investigation process.

Lastly, the deep sense of injustice to which the complainant refers, primarily owing to the fact that the other staff member who participated in the discussion of 11 October 2021 (Mr D.) was not suspended as he himself was, is unfounded in the circumstances of the case. First, it is clear that Mr D. was not the person accused of making comments involving potential breaches of the duties of confidentiality, discretion or loyalty. Secondly, Mr D., as a participant in meetings held with the two representatives of the delegation from the State Party in question on the morning of 11 October 2021 prior to the incident underlying this matter, was authorised to take part in a discussion with them, which places him in a different situation from that of the complainant. Furthermore, as the Tribunal has already recalled, the principle of equal treatment cannot be invoked to protect misconduct where a suspension measure has been imposed, such as in the present case (see, for example, Judgment 4359, consideration 10).

This third and final plea is, therefore, unfounded.

20. It follows from all the foregoing considerations that the complainant has not established any flaw in the impugned decision or in the decision of 11 October 2021 to suspend him with pay and with

immediate effect. Consequently, his complaint must be dismissed in its entirety.

21. In its written submissions, the ICC asks the Tribunal to order the complainant to pay his legal costs, the costs of the proceedings and all expenses incurred for the case, on the grounds that the complaint is not only unfounded but also vexatious and abusive. The Tribunal notes that the organisation has made the same request, mechanically and indiscriminately, in the context of each of the five complaints filed by the complainant in response to the measures taken following the incident of 11 October 2021, in what appears to be a tactic which is regrettable or indeed abusive itself to the extent that it is intended to dissuade the complainant from exercising his rights.

As already stated in Judgment 4947, also delivered in public this day, a costs order will only be made against a complainant in exceptional circumstances.

In the present case, this request is clearly unjustified.

#### DECISION

For the above reasons,

The complaint is dismissed, as is the organisation's claim for the award of costs.

In witness of this judgment, adopted on 1 November 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

*(Signed)*

PATRICK FRYDMAN    JACQUES JAUMOTTE    CLEMENT GASCON

MIRKA DREGER