

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

J.
v.
IOM

125th Session

Judgment No. 3948

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms J. J. against the International Organization for Migration (IOM) on 15 December 2015 and corrected on 26 February 2016, IOM's reply of 8 June, the complainant's rejoinder of 14 September, IOM's surrejoinder of 20 December 2016, the complainant's additional submissions of 20 March 2017 and IOM's final comments of 25 July 2017;

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

Having examined the written submissions;

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

The complainant impugns the decision not to renew her fixed-term contract.

The complainant joined IOM's Mission in Peru in August 2008 as a Project Assistant under a special short-term contract. In August 2012 she was granted a special fixed-term contract as a Programme Development Senior Assistant at grade G-5. This contract was extended three times, the last extension running from 1 August until 31 December 2014.

On 26 September 2014 the complainant received a letter of the same date from the Chief of Mission informing her that due to budgetary constraints IOM would not be able to renew her contract upon its expiry on 31 December 2014.

On 24 November 2014 she submitted an action prior to the lodging of an appeal, arguing that the decision not to renew her contract was arbitrary and unjustified, that it lacked objective and valid reasons and that it constituted an abuse of authority. She asserted that there were no budgetary constraints, as evidenced by the fact that after her dismissal a new staff member was hired on higher pay to perform her tasks. The complainant also alleged that the Chief of Mission had subjected her to abusive behaviour and workplace harassment. She requested in particular the immediate cessation of such behaviour by the Chief of Mission, reinstatement and compensation.

In an e-mail of 5 December 2014, the Chief of Mission acknowledged receipt of the complainant's action prior to the lodging of an appeal, noting that the complainant's request for review of the non-renewal decision was different from her complaint alleging harassment. He offered to discuss and resolve the latter complaint in a friendly manner, but he also advised the complainant that if she insisted on filing a formal harassment complaint, she would have to follow the procedures established in Instruction IN/90. By a letter of 24 December 2014, the Chief of Mission confirmed the decision not to renew the complainant's contract for "budget limitations".

On 20 January 2015 the complainant filed an appeal with the Joint Administrative Review Board (JARB). In its report of 19 August 2015 to the Director General, the JARB considered, with regard to the decision of non-renewal, that the allocation of the Mission's budget resources, which had been reduced due to budgetary constraints, was a strategic choice that fell under the discretionary power of the Chief of Mission. It nevertheless questioned the criteria that were applied in deciding which contracts would be renewed in the Mission at the material time and the logic in hiring new staff and renewing the appointments of less experienced staff but not the complainant's. With regard to the alleged harassment, the JARB considered that in the absence of a thorough

preliminary analysis of the situation by the Administration, it did not have sufficient information to take a decision on the merits of the harassment complaint and it therefore decided to “return the case to the Administration for further consideration of the harassment claim, in particular with regard to the alleged abuse of authority”. The JARB recommended that in its consideration of the harassment claim the Administration give due weight to the elements highlighted in its report regarding the non-renewal decision. It also recommended that, when a reduction in staff is foreseen, consideration for any new position be given to existing staff and that an open and fair selection process be followed. It noted in that regard that a vacancy notice for the position of Project Development Officer (Donor Relations) had been issued on 23 July 2015.

By a letter of 21 September 2015, the Director General notified the complainant of his decision to accept the JARB’s recommendations. He informed her that, although she had not filed a formal harassment complaint pursuant to IN/90, he had exceptionally decided to refer her harassment complaint to the Ethics and Conduct Office to establish if there was *prima facie* evidence of harassment or abuse of authority, in which case her complaint would be transmitted to the Office of the Inspector General for further investigation. He added that IOM would contact her in due course concerning her claims of harassment and abuse of authority. That is the impugned decision.

The complainant requests the Tribunal to set aside the impugned decision, to reinstate her in a post at her last grade consistent with her background and experience and to award her material damages, including back pay, in an amount equivalent to what she would have earned if her employment had not ceased, with interest at the rate of 5 per cent per annum from due dates through the date of reinstatement. Alternatively, she claims material damages for loss of the opportunity to gain further extensions in an amount equivalent to what she would have earned if her employment had been extended for a period of five years, including all salary, emoluments, allowances and benefits. She claims material damages in the amount of lost pension benefits, i.e. an amount equal to the share of contributions that IOM would have made

to the United Nations Joint Staff Pension Fund if the complainant had remained employed for a further period of five years, together with interest from due dates. She also claims material damages for loss of future earnings, moral damages in the amount of 100,000 United States dollars and costs in the amount of 20,000 dollars.

IOM asks the Tribunal to dismiss the complaint as premature, and thus irreceivable, on the grounds that it was filed before the Director General had taken a final decision on the complainant's internal appeal.

CONSIDERATIONS

1. The complainant seeks to impugn IOM's decision not to renew her six-month special fixed-term contract when it expired on 31 December 2014. In her action prior to the lodging of an appeal of 24 November 2014, she challenged this decision and additionally alleged that the Chief of Mission had progressively changed his behaviour towards her "up to the point that it turned hostile, intimidating and harassing". In the present complaint she specifically challenges the impugned decision which was issued by the Director General on 21 September 2015 dismissing her appeal against the non-renewal decision. She alleges that that "decision is tainted by errors of law and fact, including unequal treatment and discrimination, breach of due process [and] abuse of authority, breach of good faith and mutual trust". She seeks an order setting aside the impugned decision, reinstating her "with back pay together with moral damages and costs". Alternatively, she seeks material and moral damages and costs.

2. The basic applicable principles where a decision not to renew a contract is challenged have been relevantly stated, for example, in Judgment 3586, considerations 6 and 10, as follows:

"6. It bears recalling at this juncture that the Tribunal's scope of review in a case such as this is limited. Firm and consistent precedent has it that an organization enjoys wide discretion in deciding whether or not to extend a fixed-term appointment. The exercise of such discretion is subject to limited review because the Tribunal respects an organization's freedom to determine its own requirements and the career prospects of staff (see, for example,

Judgment 1349, under 11). The Tribunal will not substitute its own assessment for that of the organization. A decision in the exercise of this discretion may only be quashed or set aside for unlawfulness or illegality in the sense that it was taken in breach of a rule of form or procedure; or if it is based on an error of fact or of law, if some essential fact was overlooked; or if there was an abuse or misuse of authority; or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgments 3299, under 6, 2861, under 83, and 2850, under 6).

[...]

10. It is firm principle that the reason not to extend a fixed-term contract must be a valid one and not one that was given to conveniently get rid of a staff member (see, for example, Judgment 1154, under 4).”

3. IOM contends that the complaint is irreceivable pursuant to Article VII, paragraph 1, of the Tribunal’s Statute, because the impugned decision is not a final decision, as that provision requires. It insists that the complaint is premature, as the complainant’s appeal contained two claims alleging unlawful non-renewal of her contract and harassment, respectively, and both claims were undergoing further assessment and investigation on the recommendation of the JARB when the complainant filed the present complaint. IOM states that the Director General had accepted that recommendation, and, as such, it is incorrect for the complainant to assert that the Director General had dismissed her appeal when in fact he had not reached a final decision on it.

4. At the outset, it must be made clear that the harassment claim cannot be either receivable or irreceivable on the present complaint since, as the complainant makes plain, it is not the object of the present complaint. She explains in her rejoinder that she does not challenge the aspects of the impugned decision which remitted her harassment claim to the Ethics and Conduct Office and the Office of the Inspector General, but reserves her right to do so and to pursue related remedies, “if necessary and to the extent she deems appropriate after receipt of the outcome of the harassment investigation and procedure”. The Tribunal notes that the complainant did not raise harassment as a claim in this complaint. She raised it as an aspect of her plea for moral damages for breach of due process for the manner in which her claims were dealt with in the internal appeal proceedings.

5. In support of its plea of irreceivability of the non-renewal claim, IOM argues that there was no final decision, as the JARB recommended remitting it with the harassment claim for further investigation, and the Director General so referred both claims to the Ethics and Conduct Office and the Office of the Inspector General. IOM submits as follows:

“[The complainant] contends that the [Chief of Mission] abused his authority by not renewing her [contract] and she considers that the non-renewal and her allegations of harassment and abuse of authority are interlinked. [...] The JARB recognized in its report dated 19 August 2015 that the procedure in appeals against administrative actions, decisions and omissions (regulated by IN/217 [...]) and the procedure in harassment complaints (regulated by IN/90 [...]) are different. The [JARB] considered that in the absence of a thorough preliminary analysis of the situation by the Administration, including through fact-finding or proper investigation, [it] does not dispose of the elements that would be necessary to take a decision on the merit of the harassment complaint, and ultimately on the decision of non-renewal [...]. Consequently, the [JARB] decided to return the case to [IOM] for further consideration of the harassment claim, in particular with the alleged abuse of authority, and recommended to the Administration to give due weight to the elements highlighted by the JARB under the heading ‘Consideration of the [JARB] on the decision of non-renewal based on budgetary constraints’ [...]. In summary, the JARB returned the case to the Administration for further investigation and the Director General accepted this recommendation. Accordingly, both the JARB and the Director General considered that prior to taking a final decision on the Complainant’s Appeal in which she contested the non-renewal of her contract for budgetary constraints, questioning the existence of such budgetary constraints and alleging harassment and abuse of authority, the Complainant’s claims needed to be reviewed, in an independent manner and respecting due process, by [the Ethics and Conduct Office and the Office of the Inspector General]. It is only once this procedure is completed that the Director General [...] will be in a position to take a final decision on the Complainant’s Appeal and the claims raised therein, and reiterated in the present Complaint. [...] [The complainant] is actively and continuously involved in the assessment and investigative process of her claims.” (Emphasis added by IOM.)

6. IOM is mistaken. In the first place, the complainant has not reiterated her harassment claim in the present complaint. She only challenges the non-renewal decision and states that her harassment

claim is irrelevant to the present proceedings. In the second place, it is fallacious to find or to assert that the two claims are interlinked when they are discrete claims which are governed by different rules and procedures: the provisions of IN/90 apply to the harassment claim and those of IN/217 to the challenge to the non-renewal decision. Once the complainant raised harassment in her action prior to the lodging of an appeal in November 2014, that matter should have been put on the procedural track for harassment complaints while the non-renewal challenge should have continued pursuant to the IN/217 procedures. It was in error that IOM concludes, as the JARB and the Director General in effect did in their report and impugned decision, respectively, that the two claims are interlinked and must be simultaneously investigated. The error seems to have arisen because the JARB thought that the complainant's plea of misuse or abuse of authority as a vitiating ground for the non-renewal decision and her plea of abuse of authority with respect to her harassment complaint are common to both claims. In fact, the plea of abuse of authority in relation to the non-renewal decision is one of the generic grounds of challenge to a discretionary administrative decision. Thus the following was stated in Judgment 3172, consideration 16:

“A decision taken for an improper purpose is an abuse of authority. It follows that when a complainant challenges a discretionary decision, he or she by necessary implication also challenges the validity of the reasons underpinning that decision. In this respect, the Tribunal may examine the circumstances surrounding the abolition of the post to determine whether the impugned decision was tainted by abuse of authority.”

On the other hand, the plea of abuse of authority in relation to the harassment complaint is a specific type of harassment defined in IN/90 as such.

In the third place, there is no authority under which the JARB could have referred the non-renewal claim to the Ethics and Conduct Office and/or the Office of the Inspector General for further assessment and investigation. In the fourth place, the fact that the complainant was “actively and continuously involved in the assessment and investigative process”, as IOM points out in its submissions, did not legitimize the error of having referred the non-renewal claim for further assessment

and investigation. In the fifth place, the Tribunal notes that in November 2016 the complainant was informed that the Office of the Inspector General did not find her harassment allegations to have been substantiated and considered the case closed. This seems to suggest that IOM also considers the non-renewal case to be closed, although it has not confirmed whether it does or not. As at 20 March 2017 the complainant had not been notified of the outcome of the investigation with respect to the non-renewal decision notwithstanding her inquiries. There is no indication that she has been so notified to date.

7. IOM's assertion that the JARB did not take a position "ultimately on the decision of non-renewal" reflects the difficulty which the JARB's findings and recommendations created. It is observed that under the heading "Consideration of the Board on the decision of non-renewal based on budgetary constraints" the JARB considered that "the decision on how to allocate the budget of the Mission, which was reduced due to budgetary constraints, was a strategic choice that fell under the discretionary power of the Chief of Mission". However, the JARB expressed concern that it could not have determined what criteria IOM applied to decide which contracts were renewed or the logic that was applied in not renewing the complainant's contract "while renewing the contract of a less experienced staff and hiring new persons". The JARB further noted the complainant's six years' experience with IOM; the extensive expertise which she developed during that period at the IOM Mission in Peru; the fact that she was sufficiently trusted to represent the Mission at a number of meetings and to negotiate and develop proposals for donors; and the fact that in making the non-renewal decision her direct supervisor was not consulted in keeping with practice. The JARB opined that given the circumstances, which were foreseen as a result of cuts at the Mission, "the Chief of Mission should have considered issuing a Vacancy Notice [...] for the position of Project Development Officer (Donor Liaison) instead of going through direct recruitment". In the JARB's opinion, such a step would have allowed for a more transparent process and a fair competition among existing staff, particularly those whose contracts could not have been renewed for budgetary reasons.

8. In effect, the JARB took a position as it found that the non-renewal decision was tainted and that no reasonable steps were taken to place the complainant in an appropriate alternative position. Yet, because it thought that the issue of abuse of authority was common to both claims and needed further investigation, it recommended that both claims be remitted to permit the alleged abuse of authority to be further assessed and investigated. The impugned decision which adopted that recommendation had an adverse effect on the complainant's right with respect to the non-renewal decision (see, for example, Judgment 1203, consideration 2). In that regard, the impugned decision was a final decision on that claim. Accordingly, the present complaint against the non-renewal decision is receivable.

9. In the normal course of things, this case would be remitted to IOM for a decision to be issued in accordance with the foregoing guidance. This will not however be done in the present case given the time which has already elapsed, the fulsome nature of the submissions, including submissions on the merits, the evidence produced by the parties, and the fact that vitiating errors are obvious in the impugned decision. For these reasons, the complainant's request for an oral hearing will be dismissed.

10. IOM breached due process, first, when the harassment complaint was not put on an IN/90 procedural track while the non-renewal claim was sent to the JARB pursuant to IN/217.

The Tribunal also considers that IOM should have disclosed to the JARB the documents that it had in its possession, as they could have assisted it to determine whether the reason given for not renewing the complainant's contract, budgetary constraints, was a valid and objective reason. The documents, appropriately redacted, should also have been disclosed to the complainant. Having not disclosed them, IOM breached due process as well as its duty of care to the complainant.

The rationale for the latter determination can be gleaned from the statements in Judgment 3586, considerations 16 to 20, which may be summarized as follows: in keeping with consistent case law of the

Tribunal, a staff member of an international organization must, as a general rule, have access to all evidence on which an authority bases or intends to base its decision against her or him. In normal circumstances such evidence, which is peculiarly in the organization's control, cannot be withheld on grounds of confidentiality unless there is some special case in which a higher interest stands in the way of the disclosure of certain documents. However, such disclosure may not be refused merely in order to strengthen the position of the Administration or one of its officers. The principle of equality of arms must be observed by ensuring that all parties to a case are provided with all of the materials used by an internal adjudicating body, the JARB in this case. The failure to disclose them constitutes a breach of due process, as it would render its examination of the case incomplete and prevent it from properly considering the facts. This would not only violate due process but also the organization's duty of care causing the impugned decision to be set aside.

The Tribunal discerns nothing in the circumstances of the present case that establishes a special case which justified IOM withholding the documents that it should have disclosed to the JARB to assist it to determine whether the reason which was given for not renewing a complainant's contract, budgetary constraints, was a valid and objective reason.

11. Based on the foregoing, the impugned decision of 21 September 2015, as well as the original decision of 26 September 2014 not to renew the complainant's contract and that of 24 December 2014, which confirmed the original decision, will be set aside. Since, in the Tribunal's view, reinstatement is not a practicable form of relief, the complainant will be awarded 50,000 United States dollars in material damages for the loss of an opportunity to have her contract renewed. Additionally, she will be awarded 30,000 United States dollars in moral damages for IOM's violation of due process and of its duty of care towards her. She will also be awarded costs in the amount of 6,000 United States dollars.

DECISION

For the above reasons,

1. The impugned decision of 21 September 2015, as well as the original decision of 26 September 2014 not to renew the complainant's contract and that of 24 December 2014, which confirmed the original decision, are set aside.
2. IOM shall pay the complainant material damages in the amount of 50,000 United States dollars.
3. It shall pay the complainant moral damages in the amount of 30,000 United States dollars.
4. It shall also pay the complainant costs in the amount of 6,000 United States dollars.
5. All other claims are dismissed.

In witness of this judgment, adopted on 24 October 2017, 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 24 January 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ