Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

115th Session **Judgment No. 3224**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. D'A. against the International Organization for Migration (IOM) on 1 April 2011 and corrected on 28 April, the Organization's reply of 8 July, the complainant's rejoinder of 7 October and IOM's surrejoinder of 12 December 2011;

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, who has dual Italian and Uruguayan nationality, was born in 1970. She joined IOM in June 2001. Having initially been employed on a special temporary contract as a clerk typist in the Spanish section of the Translation Service, within the External Relations Department, on 1 July 2002 she was granted a fixed-term contract. On 1 November 2008 she received a regular contract. At the material time she was working as a secretary at grade G.4 and was still assigned to the above-mentioned section.

In the night of 18 to 19 October 2009 the complainant's home was ravaged by fire. She returned to work after sick leave on 9 November. That day her supervisor held a meeting with her and then sent her an e-mail "to clarify some professional issues and put them into perspective", in which she pointed out that she had already drawn the complainant's attention to a "deterioration in the quality of [her] work, [but] to little effect" and that the amount of time the complainant was devoting to her personal problems was distracting her from her work. She made several recommendations to the complainant, one of which was that she should apply the checking, cross-checking and rereading procedures which formed part of the work of transcribing and preparing translations, in order to reduce omissions, mistakes, inconsistences, etc. as far as possible. She stressed that, although the various points mentioned in the e-mail had already been raised with the complainant, owing to the worsening situation she had been obliged to refer the matter to her own supervisor. Lastly, she suggested that the situation should be reviewed in 30 days' time. One month later two meetings were therefore held between the complainant, her supervisor and the Director of the External Relations Department. The complainant's supervisor was on leave from 18 December 2009 to 14 January 2010. The complainant was absent from 25 January to 5 February.

On 8 February 2010 the Director of the Human Resources Management Department wrote to the complainant stating that, over the previous months, the quality of her work and her conduct towards her colleagues and supervisors had not met expectations and that no improvement had been discerned since December. Noting that the Organization was unable to offer her alternative employment, he informed her that her appointment was being terminated on the grounds of unsatisfactory service in accordance with Regulation 9.2.1(d) of the Staff Regulations and Staff Rules for Employees at Geneva, that she was entitled to a termination indemnity and that she would receive three months' salary in lieu of notice. On 1 April the complainant asked him to review this decision. As no action was taken on this request, the complainant referred the matter to the Joint Administrative Review Board on 27 May. In its report of

10 December 2010 the Board recommended that the appeal should be dismissed as unfounded, although it considered that working in the Spanish translation section – which was possibly understaffed – called for above-average performance and that, in view of the events in October 2009, the complainant could have been offered more time to improve her performance. By a letter of 14 December 2010, which constitutes the impugned decision, the complainant was informed that the Director General had decided to endorse the Board's recommendation.

B. The complainant first submits that her service was never assessed either before or after 9 November 2009 and that, in these circumstances, there is no valid reason for the decision to dismiss her for unsatisfactory service, which must therefore be set aside. While she acknowledges that she might have made some mistakes, she explains that she had "neither the status, nor the qualifications for correcting and editing" and that her supervisor had shown her only "some small oversights or sometimes some omissions". In this connection, relying on the terms of General Bulletin No. 2034 of 15 April 2008, she points out that the decision to grant her a regular contract in November 2008 meant that her performance in previous years had been satisfactory. She also considers that 30 days was too short a period for reappraising the situation and asserts that, at the two meetings in December 2009, she had no opportunity to say anything about her skills and that no proof of the unsatisfactory nature of her service was furnished. She adds that she had not been set any precise objective and, in this connection, she refers to Tribunal Judgment 2414.

The complainant further submits that, although her supervisor sent her numerous e-mails, she was unable to detect any warning in them because of their courteous tone. She says that she did not receive any explicit warning before 9 November 2009 and that she was never advised that she might be dismissed for unsatisfactory service.

Lastly, the complainant contends that her supervisor and the Joint Administrative Review Board were biased against her and offers some examples in support of this contention.

The complainant seeks the setting aside of the decisions of 8 February and 14 December 2010, reinstatement and a transfer to another service. She also requests that the "assessment mechanisms" be applied for 2010 and 2011, with feasible objectives being set, and that an investigation be launched into her supervisor's conduct. She claims damages for moral and professional injury and an award of costs.

C. In its reply IOM states that the complainant's performance was "constantly and continually" assessed by her supervisor both orally and in writing. It considers that she was warned in good time that her service was unsatisfactory and in need of improvement. It explains that some incidents in September and October 2009, combined with the lack of any improvement, led to the meeting on 9 November and to the sending of the e-mail of that date in which the complainant was set specific objectives and which, as the Joint Administrative Review Board noted, could be understood to be a final warning. It adds that, in accordance with Rule 9.211 of the Staff Regulations and Staff Rules for Employees at Geneva, she was given 30 days to improve her performance which, in the circumstances of the case, cannot be regarded as too short a period. Nevertheless, at the meetings in December 2009, she denied any wrongdoing and adopted a provocative attitude which rendered any discussion virtually impossible. She was then given more time, but to no avail. The Organization infers from the foregoing that, by December 2009, the complainant must have realised how serious her situation was and she could not have been unaware that an unsatisfactory assessment of her work would lead to the termination of her appointment, especially as Judgment 1583 specifies that a warning need not contain express mention of the risk of termination if performance does not improve.

The Organization explains that, as the Spanish translation section has a heavy workload and is under considerable pressure, it cannot function if one of the two people assigned to it does not do their job properly. In IOM's opinion, the complainant's work had been deemed substandard since the beginning of 2008 and she has not proved the

contrary. The Organization submits that she made serious mistakes when processing translations, bypassed her supervisors – for which she received a warning in February 2008 – and ignored administrative procedures.

IOM considers that the complainant's supervisor did everything possible to help her subordinate to improve and that her assessment was not biased, a fact which was confirmed by the Joint Administrative Review Board. It points out that the Board was also of the opinion that the decision to terminate the complainant's appointment complied with Staff Regulation 9.2. Lastly, it explains that the complainant's insufficient knowledge of English limited the possibilities of reassigning her.

D. In her rejoinder the complainant reiterates her arguments. She contends that the warning she received in February 2008 cannot be regarded as evidence of her unsatisfactory service, since a few months later she was given a regular contract. In her view, her discussions with her supervisor were no substitute for a genuine assessment procedure.

E. In its surrejoinder IOM maintains its position. It contends that the decision to give the complainant a regular contract is to be seen as an example of the many attempts to help her to improve her performance.

CONSIDERATIONS

1. The complainant, who joined IOM in June 2001 as a clerk typist, was granted a regular contract on 1 November 2008. At the material time she was working as a secretary at grade G.4 in the Spanish translation section of the External Relations Department.

2. In the night of 18 to 19 October 2009 her home was ravaged by fire. As her doctor placed her on sick leave, she did not return to work until 9 November 2009. That day, after talking to her about her performance and her conduct at work, her supervisor sent her an

e-mail in which she made several recommendations regarding various aspects of her work. This e-mail ended as follows:

> "None of the points that I have just made are new, as they form part of your work and we have already talked about them. For that very reason, in view of the recurrent nature of the problems and the worsening situation, I have felt obliged to inform my supervisor about them.
>
> As always, I am ready to discuss the matter [and] am open to any proposal which might help to improve our work or solve any problems. In these circumstances, I propose that we review the situation in 30 days."

3. One month later the complainant and her supervisor met with the director of the above-mentioned department on two occasions. According to IOM, the purpose of these meetings was to take stock of the complainant's progress, but they ended without the parties being able to "agree on [her] level of performance, or to find a satisfactory solution for working together in the future".

4. Having been notified by a letter of 8 February 2010 that her appointment was being terminated on the grounds of unsatisfactory service in accordance with Regulation 9.2.1(d) of the Staff Regulations and Staff Rules for Employees at Geneva and that she would receive, inter alia, three months' salary in lieu of notice, the complainant initiated internal appeal proceedings. She was informed by a letter of 14 December 2010 that the Director General had endorsed the Joint Administrative Review Board's recommendation that her appeal should be dismissed as unfounded. That is the decision impugned before the Tribunal.

5. The complainant submits, in substance, that the decision to terminate her appointment for unsatisfactory service was not preceded by a proper warning and that it does not rest on lawful reasons, because her work was never assessed. She also contends that she was the victim of bias.

She seeks the setting aside of the decisions of 8 February and 14 December 2010, reinstatement and a transfer to another service. She also requests that the "assessment mechanisms" be applied for

2010 and 2011, the opening of an investigation into her supervisor's conduct, damages for the injury suffered and an award of costs.

6. The Organization considers that the complaint is groundless. It provides some examples to demonstrate that the quality of the complainant's work, which was "constantly and continually" assessed, had been deemed unsatisfactory since the beginning of 2008. It states that the complainant's behaviour towards her colleagues and external collaborators "left something to be desired" and stresses that in February 2008 the complainant had received a warning about bypassing her supervisor.

Moreover, the Organization argues that on several occasions the complainant received a written warning that her service was regarded as unsatisfactory. It explains that she also had several meetings with her supervisor, in the course of which the latter "proposed various solutions to remedy the repeated shortcomings in the quality of [her] work", but that it deteriorated still further in September and October 2009. It states that on 9 November 2009 the complainant's supervisor "assessed the work and professional conduct" of her subordinate and that, with the agreement of the Director of the External Relations Department, she then sent her an "official written warning". As the complainant's performance did not improve within the 30 days granted in this "warning", her appointment was terminated for unsatisfactory service.

7. The Tribunal recalls that a staff member whose service is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service, so as to be in a position to remedy the situation, and to have objectives set in advance. It also recalls that an organisation cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules governing the evaluation of that performance. Except in a case of manifest error, the Tribunal will not substitute its own assessment of a staff member's services for that of the competent bodies of an international organisation. Nevertheless, such an

assessment must be made in full knowledge of the facts, and the considerations on which it is based must be accurate and properly established (see Judgments 3070, under 9, 2468, under 16, and 2414, under 23 and 24).

8. In the instant case, the Tribunal notes, on the one hand, that it would have been more appropriate to deal with the insubordination of which the complainant is accused by means of a disciplinary measure, which could have been imposed only after valid disciplinary proceedings and, on the other hand, that the evidence in the file does not show, as it did in another dispute between IOM and a staff member (see Judgment 2274), that the complainant's work was evaluated in compliance with the applicable rules, including the instruction concerning the Performance Development System, and with the requirements of the case law. No assessment form, duly filled out and signed by the complainant and her supervisors, has been produced in order to prove that an objective, adversarial evaluation procedure took place. The Organization's explanations for this breach of its duty cannot be accepted. In particular, the fact that, because the Spanish translation section consisted of only two people, the problems were "immediately tackled orally", was not a valid reason for depriving the complainant of an assessment performed in accordance with the applicable rules, in breach of the principle of equal treatment.

9. Moreover, the Tribunal notes that the e-mail of 9 November 2009, which the Organization describes as an "official written warning", in fact merely proposes a review of the situation after 30 days, without setting the complainant any precise objectives or providing her with a sufficiently clear indication that her performance was so questionable that she was likely to have her appointment terminated.

10. It follows from the foregoing that, since the requirements of the case law regarding the termination of a contract for unsatisfactory service were not met, the decisions of 8 February and 14 December 2010 must be set aside.

11. The complainant requests her reinstatement within the Organization. The Tribunal considers that, in view of the circumstances of the case and the fact that since 1 November 2008 the complainant had held a regular contract which had been granted on the strength of her performance, this request is justified. It will therefore order this reinstatement, with all the legal consequences, as from the date on which her contract was terminated.

12. The complainant contends that she has been the victim of bias and requests damages for the moral and professional injury which, she says, stems from the "disproportionate treatment which culminated in the termination of [her] contract after eight years of service and which deeply affected [her]".

The Tribunal will not accept the latter plea, which is not corroborated by any tangible evidence. However, it considers that, bearing in mind the circumstances and the unlawful nature of her termination, the complainant suffered moral injury which must be redressed by the award of 10,000 Swiss francs in compensation.

13. Since the complainant must be reinstated with all the legal consequences, the Tribunal sees no need to grant her other claims.

14. As she succeeds for the most part, the complainant is entitled to costs in the amount of 5,000 francs.

DECISION

For the above reasons,

1. The decisions of 14 December 2010 and 8 February 2010 are set aside.
2. IOM shall reinstate the complainant as stated under 11, above.
3. It shall pay her 10,000 Swiss francs in compensation for the moral injury suffered.

4. It shall also pay her costs in the amount of 5,000 francs.

5. All other claims are dismissed.

In witness of this judgment, adopted on 26 April 2013, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet