116th Session **Judgment No. 3262**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms S. V. against the International Organization for Migration (IOM) on 24 December 2011 and corrected on 10 February 2012, IOM's reply of 26 April, the complainant's rejoinder of 2 July, and IOM's surrejoinder of 31 August 2012;

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, an Australian national, joined IOM as a Research Assistant in 1996. At the material time, she was employed as Senior Legal Officer on an ungraded contract working from Melbourne, Australia, but based administratively at IOM Headquarters in Geneva, Switzerland. On 12 April 2010, IOM issued a vacancy notice for the position of Legal Adviser, based in Geneva, at grade D.1. The complainant applied for this position and she was called for an interview in July 2010. She was ranked first by the Selection Panel, which unanimously recommended that she be offered the position of Legal Adviser, noting that she met "all the requirements of the

vacancy notice and made a very good impression during the interview".

The Appointments and Postings Board (APB) reviewed the Selection Panel's recommendation and expressed several reservations. It recommended that the matter be remitted to the Selection Panel, and reviewed the latter's recommendation a second time on 3 December 2010. In their final recommendation, the members of the APB agreed to support the recommendation of the Selection Panel to appoint the complainant to the position of Legal Adviser at grade D.1, but noted that "it was equally important for the DG to weigh the dis/advantages as spelled out in the minutes" of its meeting, before making his final decision.

On 13 January 2011 the Director of Human Resources Management (HRM) contacted the complainant by telephone to inform her that she was the preferred candidate for the position of Legal Adviser, but indicated that the position was being offered at grade P.5 for 12 months, after which the complainant would be promoted to grade D.1. The complainant refused the offer verbally, and sent an e-mail on the same day confirming that she felt unable to accept the offer, adding that she hoped the Director of HRM could reconsider the offer.

On 20 January the Director of HRM contacted the complainant with a revised offer for the position of Legal Adviser at grade P.5 for six months, after which she would be promoted to grade D.1. On 25 January the complainant replied that she was "ready to accept the position at the grade at which it was advertised". The Administration did not respond.

On several occasions between 25 January and 8 March 2011 the complainant contacted the Director of HRM to enquire about the status of her application. She was informed on 14 February that there were no new developments, but that the Director of HRM would meet the Director General the next day. On 15 February 2011 the complainant made a proposal to the Director of HRM, which consisted in appointing her immediately at grade D.1, with a probation period extended from six to 12 months in accordance with Staff

Regulation 4.6 of the Staff Regulations and Staff Rules. On 18 February the Director of HRD wrote to inform her that the Director General was "still considering options".

On 8 March 2011 the complainant wrote to the Director of HRM to accept the revised offer of 20 January. The Director of HRM replied on 9 March 2011, stating that "at no time has IOM made a formal offer of appointment to [her] for the Legal Advisor position", and that as the complainant had made it clear that she found the proposed conditions unacceptable, IOM was continuing to explore all options. In an e-mail of the same date, the Director General informed the Director of HRM that he disagreed with the Selection Panel's recommendation to appoint the complainant. He concurred with the reservations expressed by the APB and found that the complainant did not have the required 15 years of professional experience and that, "for a position of this importance", he did not feel comfortable endorsing a candidate moving from a P.4 to a D.1, with an unknown managerial and representational profile.

On 17 March 2011 the complainant wrote to the Director General confirming her acceptance of the revised offer and informed him of the steps she had taken toward moving her family to Geneva. She asked him to confirm that a starting date of beginning June was acceptable to him.

On 18 March 2011 the Director of HRM informed the complainant that the Administration had decided to offer the position to an alternative candidate, who had accepted the position.

The complainant submitted an Action Prior to the Lodging of an Appeal on 26 March 2011, formally requesting that the Director General review his decision not to finalise her appointment. By a letter of 26 April 2011 the Director of HRM informed the complainant that, in the Administration's view, no offer had ever been formally made. The complainant filed an appeal with the Joint Administrative Review Board (JARB) on 25 May 2011.

In its report of 19 September 2011, the JARB found that the complainant had rejected the two offers made by IOM. The JARB recommended rejecting the complainant's appeal, but awarding her

moral damages in the amount of two months' salary for the Administration's failure to reply to several of her e-mails and the "unacceptable" manner in which it communicated with her between January and March 2011.

By a letter of 26 September 2011 the complainant was informed that the Director General had decided to follow the JARB's recommendation rejecting her internal appeal. However, he decided to reject the recommendation to award her moral damages. That is the impugned decision.

B. The complainant contends that a binding contract was formed. In her view, the offer of 20 January was validly accepted through her e-mail of 8 March 2011. Indeed, her e-mails of 25 January and 15 February 2011 make clear that she was inviting the Director General to reconsider the irregular offer made, while taking care not to refuse it. The JARB erred, therefore, when it analysed the e-mail of 15 February as a counter-offer. The complainant points out that, according to the Organization's Staff Regulations and Staff Rules, the Director General alone has the power of making offers of appointment. Consequently, it was not open to her to make a counter-offer and, as the Director General did not accede to her request for reconsideration, the offer was not rescinded and continued to exist until her acceptance of its terms on 8 March 2011. Further, she submits that IOM is estopped from invoking the invalidity of the offer made.

Moreover, the complainant argues that there were no lawful grounds to depart from the Selection Panel's and APB's recommendations. She points out that, at the time of the first and second offer, the Director General found her to be not only eligible for the position, but also the most suitable candidate to fulfil the functions of Legal Adviser. The Organization's subsequent attempts to claim that she did not meet all the requirements for the position constitute a blatant case of *venire contra factum proprium*.

The complainant wishes to draw the Tribunal's attention to the fact that it is only after her e-mail of 25 January 2011, where she

questioned the legal basis for offering the position at a lower grade, that the Director General decided to recruit another candidate.

In addition, the complainant submits that the decision to appoint another candidate is vitiated by errors of fact and law, and that it breached the principle of equal treatment in recruitment procedures. In her view, the decision impugned is also contrary to the Organization's stated commitment for gender equality, it is tainted with misuse of authority and it was taken in bad faith and breached IOM's duty of care. Lastly, referring to the Tribunal's case law, she argues that the appointment of the successful candidate was in any event illegal, as he lacked one of the qualifications required in the vacancy notice.

The complainant asks the Tribunal to set aside the impugned decision, to order that IOM appoint her to the position of Legal Adviser in accordance with the agreement reached on 8 March 2011, and to order that the Organization pay her the difference between her actual salary and the salary and pension contributions she would have received if she had commenced in the position of Legal Adviser at grade P.5 on 1 June 2011 and been granted the promotion to grade D.1 six months thereafter. Alternatively, she asks that the Tribunal quash the impugned decision as well as the appointment of the successful candidate, and to order that IOM take a new decision "based on the applicable findings and recommendations of the selection panel and the APB". She claims moral damages, as well as costs in the amount of 25,000 Swiss francs.

C. In its reply IOM maintains that it did not make any formal offers to appoint the complainant as Legal Adviser. It submits that the complainant is mistaken in her belief that the "selection" made by the Panel is binding on the APB or on the Director General. It recalls its Staff Regulations and Staff Rules, as well as its procedures governing appointments, and draws attention to paragraph 5 of Annex K to the Staff Regulations and Staff Rules which provides that "the final decision as to the selection of the candidate rests with the Director General". Referring to the Tribunal's case law, IOM argues that the vast discretionary power of appointment of the Director General

cannot be fettered by the choice of an interview panel whose function is merely advisory.

In addition, the defendant submits that the Director General had valid grounds to depart from the recommendation made by the Selection Panel, as expressed in his e-mail of 9 March 2011. As the appointing authority, the Director General was entitled to review the recruitment process and to make his own assessment on the most qualified candidate for the post. In its view, the Director General made a legitimate and valid assessment that the complainant did not fulfil the experience required for a D.1 post.

Moreover, IOM submits that the complainant is mistaken in her view that it was not open to the Director General to offer the post at level P.5. The Organization points out that Staff Regulations and Staff Rules do not preclude a staff member from being appointed or assigned to a post at a level that is higher than his or her own personal grade. It submits that the discretion to make an appointment at a level lower than that of the advertised position is inherent in the Director General's power of appointment. Consequently, the discussions between the Director of HRM and the complainant were perfectly legal, and their purpose was to explore whether the latter would accept the options being contemplated by the Director General in the exercise of his discretion. IOM denies the complainant's allegation that they were an attempt to impose illegal conditions of employment.

The defendant maintains that any alleged offers made to the complainant were rejected by her. Her e-mail of 25 January 2011 clearly states that she was willing to accept an offer of the post "at the grade at which it was advertised", and not at the grade at which it was offered. While IOM recognises that a contract of employment may be formed before the issuance of a letter of appointment, it argues that in the present case there was "no meeting of the minds" and, therefore, no contract. The record shows that the complainant did not accept an essential term of the offer, and it is an elementary principle of the law of contract that the acceptance of an offer must be unconditional, otherwise it amounts to a counter-offer and the rejected offer lapses. The complainant rejected the second alleged offer on

25 January 2011; therefore, that offer ceased to exist on that day. When she purported to accept it on 8 March 2011, there was no offer left to be accepted. It adds that the complainant is estopped from accepting an offer which she regards as illegal.

IOM denies that the Director General failed to take into account an essential fact as well as any breach of the principle of equal treatment. It further denies any errors of law and adds that her claim that the Organization breached its policy on the promotion of gender equality is unsubstantiated and points out that this policy does not prohibit the appointment of male candidates.

Lastly, IOM denies that the appointment of the successful candidate was a misuse of authority intended to retaliate against her "for speaking up against an irregular practice" and underlines that the complainant's claim is completely unsubstantiated. As regards her allegations of bad faith and breach of its duty of care, again IOM notes that a mere allegation does not constitute proof, and emphasises that bad faith is never presumed. Lastly, her claim that the appointment of the external candidate was illegal because he lacked one of the qualifications required in the vacancy notice is mistaken, as it is within the Director General's margin of discretion to place greater weight on a given requirement compared to another.

D. In her rejoinder the complainant presses all her pleas. She contests the defendant's presentation of the facts and points out that, as per IOM's own assessment of January 2011, she was more suitable for the post than the candidate ultimately appointed.

E. In its surrejoinder IOM maintains its position in full.

CONSIDERATIONS

1. The complainant is a lawyer. She was employed with IOM on an ungraded contract. In April 2010 the Organization posted a D.1 Legal Adviser position in Geneva. She applied for the position and the Selection Panel interviewed her.

2. On 13 January 2011 the Director of HRM telephoned the complainant and offered her the position at a P.5 grade for the first 12 months after which she would be promoted to grade D.1. She orally refused the offer and followed up with an e-mail of 13 January stating that she "wish[ed] to confirm that [she felt] unable to accept [the Director's] proposed offer". She noted, among other things, that she had applied for the post on the basis of it being a D.1 post and was interviewed on the same basis. She added that she hoped the Director could reconsider the offer.

3. On 20 January 2011 the Director telephoned the complainant and offered her the position at grade P.5 for the first six months, with an automatic promotion to D.1 thereafter. On 25 January, she replied by e-mail saying she would be happy to accept the position, but at grade D.1. She received no reply of substance from the Organization.

4. On 15 February 2011, after sending several e-mails enquiring about the status of her application, she offered to accept the position at grade D.1 with an extended probationary period, pursuant to the Staff Regulations and Staff Rules to which she received no reply of substance. On 8 March 2011 the complainant sent an e-mail to the Director of HRM accepting the 20 January 2011 offer. The Organization replied on 9 March 2011 saying it had never made her a formal offer. On 18 March 2011 the Director of HRM informed the complainant that an alternative candidate had accepted the position.

5. In March 2011 the complainant filed an Action Prior to the Lodging of an Appeal requesting a reconsideration of the decision not to finalise her appointment, pursuant to the Staff Regulations and Staff Rules. In April 2011 the Organization responded that it maintained its position that it had not formally offered her the position. In May 2011 the complainant filed an appeal with the Joint Administrative Review Board (JARB). On 19 September 2011 the JARB finalised its report. It recommended the rejection of the complainant's appeal. It also recommended that the Organization award her moral damages in the amount of two months' salary for its conduct in its communications

with her. In his 26 September 2011 decision the Director General endorsed the JARB's recommendation to reject her appeal but rejected the JARB's recommendation to award the complainant moral damages.

6. The determinative issue centres on the legal effect, if any, of the complainant's 8 March "acceptance" of the 20 January offer. Despite the complainant's arguments to the contrary, it is clear that her e-mail of 25 January was a counter-offer to the offer of 20 January. The legal consequence of the counter-offer is an implied rejection of the 20 January offer that usually can only be revived at the instance of the offerer. In these circumstances, it cannot be said that there was the requisite meeting of the minds on the essential terms of the appointment necessary for the formation of a contract.

7. Having been offered an appointment and having rejected the offer, the complainant, by her own actions, lost any standing she may have had to challenge the appointment that was ultimately made. On this basis, the complaint must be dismissed. However, contrary to the Director General's view, the Tribunal finds that in its communications with the complainant it did not treat her with the dignity and respect due to a staff member, for which she is entitled to moral damages in the amount of 25,000 Swiss francs.

8. Given her partial success, she is entitled to costs in the amount of 4,000 Swiss francs.

DECISION

For the above reasons,

1. IOM shall pay the complainant moral damages in the amount of 25,000 Swiss francs.
2. IOM shall pay the complainant 4,000 Swiss francs in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Hugh A. Rawlins
Catherine Comtet