

110th Session

Judgment No. 2982

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. T. against the International Organization for Migration (IOM) on 28 April 2009 and corrected on 5 August, IOM's reply of 12 October 2009, the complainant's rejoinder of 13 January 2010 and the Organization's surrejoinder of 17 February 2010;

Considering Articles II, paragraph 5, and VII 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 Egyptian national born in 1972, joined IOM in 2000. On 1 November 2006 he was appointed as Programme Manager of the NATO Trust Fund Project (NTF Project) for Bosnia and Herzegovina implemented by the IOM. He was based in Sarajevo and held a one-year fixed-term contract. Although the position was advertised at grade P.4, he was appointed at grade P.3 and subject to a one-year probation period.

On 13 September 2007 he wrote an e-mail to the Chief of Mission in Sarajevo stating that his contributions to the NTF Project were often disregarded and asking her to clarify their respective responsibilities concerning the management of the project. She replied on 17 September in these terms: "Please summarize before our meeting tomorrow." In October the complainant was informed that his contract would be extended for six months, i.e. until 30 April 2008.

The Chief of Mission met with the complainant on 18 December 2007 to discuss the progress made in the implementation of the NTF Project. Having noted that little progress had been made since their last discussions on a one-on-one basis, she informed him that the meeting would be recorded in a Note for the File. According to that Note, the Chief of Mission told the complainant that significant improvement was expected on his part and that this was his last chance to show improvement; she gave him specific tasks together with deadlines. She also told him that he was not mature enough to manage the project, pointing out that staff were not given clear instructions or feed-back and that there was a backlog of work.

By an e-mail dated 7 February 2008 the Chief of Mission informed the complainant that she had discussed the progress made in the implementation of the project with the Director General and other officials and that they had decided to ask a colleague, Mr P., to join the Sarajevo team, for a six-month period, to "help [him] with project implementation". On 5 March the complainant was informed orally by the Director ad interim of Human Resources Management (HRM) that Ms K. would be appointed instead of Mr P. That same day the Chief of Mission sent an e-mail to several persons, including the complainant, indicating that Ms K. would "replace" him as Programme Manager as from the following week and that HRM was seeking a suitable assignment for the complainant. Having understood from his earlier conversation with the Director ad interim of HRM that Ms K. would be appointed to help him and not to replace him, the complainant asked the Director to confirm that she would replace him. The Director did so on 10 March, explaining that the Director General had decided to replace him in the best interests of the project and of the Organization. The Administration would

nevertheless do its best to find him a suitable assignment. An exchange of e-mails ensued in which the complainant criticised the management of the Mission in Sarajevo and asked to be given reasons for the decision to remove him from his post. In late April he was notified that his contract, which was due to expire on 30 April, would be extended until 30 June.

On 30 April 2008 the complainant submitted a formal complaint to the Joint Administrative Review Board (JARB) and the Director ad interim of HRM alleging harassment on the part of the Chief of Mission. He contended inter alia that the decision to extend his contract for six months rather than a year was illegal and constituted retaliation for having denounced the harassment and abuse of power to which he had been subjected.

By letter dated 17 June 2008 the complainant was notified that his contract, which was due to expire on 30 June, would be extended for a three-month period, which constituted the statutory three-month notice period. It was expressly indicated that his contract would not be renewed in the present location and for the NTF Project beyond 30 September 2008 but that efforts would be made to find him another assignment within IOM. On 25 June the Chief of Mission requested him to vacate his office by the end of the month. Two days later the complainant replied that he felt he should continue working on the project until the end of his contract and that it was merely indicated in the letter of 17 June that he “d[id] not need” to report for work. By an e-mail of 8 July 2008 the Director ad interim of HRM notified him that serious disciplinary measures, which could lead to his summary dismissal, would be taken if he continued to disobey the instructions given by the Chief of Mission not to report for work.

In the meantime, on 27 June 2008, the complainant submitted a request for review to the Chief of Mission, copying the Director ad interim of HRM. He asserted that the Administration had not replied to his complaint of 30 April and reiterated his allegations of harassment against her. He also contended that the decision of 17 June 2008 to

remove him from his post was procedurally flawed and that he had been given no proper reason for it. He therefore asked that he be reinstated as Programme Manager of the NTF Project and that appropriate measures be taken to prevent him from being harassed in the future or, in the alternative, to be offered another post commensurate with his experience and seniority, i.e. at grade P.4 in a family duty station. He also asked that his contract be “retroactively renewed” for a year. Having received no response, the complainant lodged an appeal with the JARB on 27 August 2008, challenging the decision of 17 June and contesting the Administration’s failure to respond to his harassment complaint of 30 April 2008.

In its report of 10 December 2008 the JARB found that the complainant’s allegation of harassment was not substantiated. It nevertheless held that the “whole management of this issue ha[d] been poorly handled by the Administration resulting in unnecessary personal distress” for the complainant. It also acknowledged the Administration’s right not to renew a fixed-term contract based on unsatisfactory performance. However, it observed *inter alia* that the Administration had failed to manage appropriately the conflict between the complainant and the Chief of Mission and it had failed to address the complainant’s performance issue. Consequently, it recommended *inter alia* that the Administration assess his competencies and subsequently assist him actively in finding a position commensurate with his profile and experience. Moreover, once a suitable position had been found, the complainant should be placed on probation for at least half of the initial duration of the new contract, under increased supervision from HRM, and a proper Performance Development System process should be carried out to evaluate his performance.

By a letter of 27 January 2009, which is the impugned decision, the Director of HRM informed the complainant that the Director General had decided to endorse the JARB’s recommendations. A copy of the JARB’s report was attached to that letter. Since the non-renewal of his contract as Programme Manager, the complainant has remained employed on a half-time basis under a series of three-month short-term contracts with IOM.

B. The complainant provides details of the Chief of Mission's hostile and offensive attitude towards him and submits that her behaviour constitutes harassment within the meaning of General Bulletin No. 1312 of 26 March 2002. He alleges, for instance, that she shouted at him in front of colleagues, expressed unjustified criticisms of his work in meetings without allowing him to respond, gave contradicting instructions to staff under his supervision and discredited his work in communications to staff at Headquarters. He adds that the decision to renew his contract for six months rather than a year and the decision to remove him from his post constituted retaliation for having criticised the mismanagement of the Mission. In his view, there was no reason to depart from the rule set out in General Bulletin No. 2034 of 15 April 2008, according to which staff recruited through a one-year Vacancy Notice should be granted one-year fixed-term contracts upon renewal, given that funds were available and that he had received no negative appraisal of his performance. He also objects to the inaction of the Director ad interim of HRM on the formal complaint of harassment he filed on 30 April 2008, pointing out that, according to General Bulletin No. 2017 of 22 August 2007, the Director of HRM is responsible for dealing with such a complaint. He asserts that neither the Organization nor the JARB conducted a proper investigation before rejecting his allegation of harassment.

In his view, the Administration abused its authority by refusing to give him reasons for the decisions to remove him from his post as Programme Manager and to terminate his contract on 30 September 2008. In this connection, he points out that his working relationship with donors was excellent and that he had not reached the standard assignment length in that duty station. He stresses that in December 2007 a representative of the Emergency and Post-Crisis Division (EPC) at Headquarters in Geneva visited the Mission in Sarajevo to appraise the progress of the NTF Project and concluded that there was

no mismanagement of the project on his part. In his report, the EPC representative rather identified issues in the general management of the Mission in Sarajevo that had to be addressed by the Chief of Mission. The complainant adds that the decision to remove him from his post formed the basis for the decision to terminate his contract on 30 September 2008, and that they are tainted with errors of law insofar as none of the conditions laid down in Article 9.2 of the Staff Regulations to justify terminating a contract was met in his case.

The complainant submits that he was denied due process in the internal appeal proceedings insofar as he was not given access to certain documents submitted by the Administration to the JARB before the latter's recommendations were provided to him in January 2009. Thus, he was denied the opportunity to comment on the documents, in particular on those containing criticisms about his performance. Moreover, the JARB heard the Chief of Mission without informing him or allowing him to comment. By contrast, the Organization received a transcript of the complainant's hearing before the JARB and was invited to provide its remarks. Relying on the Tribunal's case law, he also considers that he should have been heard and given a chance to defend himself before the decision to remove him from his post and the decision to terminate his contract were taken.

The complainant seeks the quashing of the impugned decision, the retroactive renewal of his contract for a period of one year starting on 1 November 2007, with two subsequent one-year renewals, appointment to a P.4 position commensurate with his experience and in a family duty station, and payment of the difference between the salary and pension contributions he was paid, and those he would have been paid had he been employed on a full-time basis since 1 October 2008. He also asks the Tribunal to award him moral damages and costs in the amount of 20,000 Swiss francs.

C. In its reply IOM submits that the complainant's claim concerning harassment is irreceivable since the JARB conducted an investigation into that allegation and made a recommendation in that respect. It points out that General Bulletin No. 1312, to which the complainant

refers, was superseded by General Bulletin No. 2017 of 22 August 2007, according to which the JARB is the “final point of recourse” concerning formal harassment complaints. The defendant also submits that the complainant has no cause of action with regard to his claim concerning the non-renewal of his contract beyond 30 September 2008 given that he was offered, and accepted, a series of contracts covering the period from 1 October 2008 to 30 September 2009. It adds that on 25 September 2009 the Administration offered him another contract for the period from 1 October to 31 December 2009 but that he had neither accepted nor rejected the offer at the time IOM submitted its reply to the Tribunal. Should the Tribunal consider the complaint receivable, the claims made with respect to the decision of October 2007 to renew the complainant’s contract for six months and the decision of March 2008 to remove him from his post should, the Organization argues, be deemed irreceivable to the extent that they are raised independently from his harassment claim because he has not exhausted internal means of redress with regard to these decisions. It further submits that the request to be granted a one-year contract as from 1 November 2009, the claim to be appointed to a P.4 position in a family duty station and the request to be paid the difference between the salary and pension contributions he was paid and those he would have been paid had he been employed on a full-time basis since 1 October 2008 were not raised during the internal appeal proceedings and are hence irreceivable.

On the merits, the Organization indicates that the rationale behind the decision to remove the complainant from his post as Programme Manager was his unsatisfactory performance, and therefore on no account did it amount to a disguised disciplinary measure. It denies any misuse of authority, repeating that the decision to remove the complainant from his post and the subsequent decision not to renew his contract beyond 30 September 2008 were taken considering the Organization’s best interest and the complainant’s unsatisfactory performance. The defendant explains that the decision to renew a contract is discretionary and that it is under no obligation to renew a

contract for the same duration as the original one. General Bulletin No. 2034 of 15 April 2008 does not prevent the Organization from shortening the length of a contract upon renewal when the staff member concerned is not performing satisfactorily. It adds that that bulletin entered into force after the complainant's contract had been renewed for six months only. Moreover, the provision cited by the complainant concerns requests to modify the duration of contracts granted upon initial appointment and not upon renewal. It states that the complainant was offered a six-month extension, rather than a year, because there were concerns about his performance. The Chief of Mission, as the complainant's supervisor, was the only person responsible for assessing his performance and he was informed of his shortcomings as early as January 2007. IOM emphasises that, contrary to the complainant's allegation, his contract was not terminated effective 30 September 2008; it was simply not renewed upon expiry.

The defendant submits that the complainant has not proved that he was the victim of harassment or retaliation and reiterates that the decision to renew his contract for only six months was taken solely on the basis of his unsatisfactory performance and his inability to work with the Chief of Mission. It stresses that, according to the JARB's investigation, no harassment occurred.

IOM denies any violation of the complainant's right to be heard. It states that the fact that he did not receive certain documents provided by the Chief of Mission to the JARB at its request is irrelevant given that the impugned decision would in all likelihood have been the same had he received them. In any event the failure to communicate these documents to him is "cured" by the fact that they were attached to the JARB's report, which means that the complainant has had the opportunity to comment on them in the present proceedings before the Tribunal. It adds that Annex D to the Staff Rules, which governs, inter alia, the process of the JARB, allows it to call witnesses and does not provide that an appellant has a right to comment on their oral or written statements. Concerning the failure to address his formal complaint of harassment, the defendant is of the view that the JARB's investigation has "cured the complainant's claim" in that respect.

With respect to his claim to be appointed to a P.4 position, the Organization considers that this would be an inappropriate remedy given that he held a P.3 position and that satisfactory performance is a prerequisite for promotion.

D. In his rejoinder the complainant submits that his complaint is receivable because the impugned decision constituted a final decision with respect to both his harassment grievance and his request for the renewal of his contract for one year on a full-time basis. He adds that the decision to renew his contract for six months rather than a year and the subsequent decision to remove him from his post as Programme Manager are instances of harassment and were challenged in his formal complaint of 30 April 2008. Concerning the relief claimed, he explains that he has merely updated his initial claims to account for the time that has elapsed and the fact that the NTF Project has come to an end; thus, reinstatement is no longer possible.

He points out that his formal complaint of harassment was sent to the Director ad interim of HRM, as provided for in General Bulletin No. 2017, and he contests IOM's contention that the JARB had investigated the harassment issue extensively. He maintains that he was praised for his work, both internally and externally, and denies having received any indication of poor performance prior to the Note for the File regarding the meeting of 18 December 2007. He adds that the Chief of Mission did not follow the Performance Development System to appraise his performance, although it has been compulsory since 9 August 2006.

E. In its surrejoinder the Organization maintains its position. It reiterates in particular that the JARB conducted an investigation of the allegation of harassment. It indicates that, although it became compulsory in August 2006, the Performance Development System was not introduced before July 2007 and then only gradually. It adds

that the report of the EPC representative, to which the complainant refers to support his view that his performance was satisfactory, was a draft that has never been endorsed by the Administration.

CONSIDERATIONS

1. The complainant, who joined IOM in 2000, was appointed to the position of Programme Manager of the NTF Project in Sarajevo, Bosnia and Herzegovina, on 1 November 2006. Although the post was advertised as P.4, he was appointed at P.3 on a one-year fixed-term contract for a probationary period of one year. His contract was extended for a period of six months from 1 November 2007 to 30 April 2008. He did not then challenge the decision to extend his contract for only six months.

2. In early March 2008 the complainant was informed during a telephone conference with the Chief of Mission and the Director ad interim of HRM in Geneva that he was to be replaced as Programme Manager. The complainant sent an e-mail to the Director ad interim of HRM on 10 March 2008, asking whether he was, in fact, to be replaced and referring to what he said was mismanagement on the part of the Chief of Mission. The Director ad interim replied the same day, confirming that the complainant was to be replaced and informing him that he was required to “provide all necessary assistance”. The only reason then given for the decision to replace the complainant as Programme Manager was that it was “in the best interest of the project and that of the Organization”. The Director ad interim added that “[i]n due course [they would make their] best effort in finding a suitable assignment for [him]”. On 12 March the complainant asked the Director ad interim for “clarification behind the Administration’s decision”. He replied on 13 March but no clarification was provided. On 14 March the complainant asked for “a thorough explanation”. The new Programme Manager arrived in mid-March and, having heard nothing further from the Director ad interim, the complainant sent another e-mail to him on

20 March 2008, with a copy to the Ombudsperson, stating that he would be grateful for a reply to his concerns and asking how the new Programme Manager had been appointed as there had been no vacancy notice. He also raised questions as to why his contract had only been extended for six months.

3. On 27 March 2008 the Director ad interim of HRM indicated in an e-mail to the complainant that he was prepared to speak to him. However, the complainant replied soon afterwards referring to misunderstandings that had arisen in other conversations and expressing a preference to communicate in writing. On 4 April the Director ad interim replied indicating that the new Programme Manager had been appointed “following a selection process and reference check” and that a vacancy notice had not been necessary. He added that he would shortly be contacting the complainant to discuss his next assignment. However, he provided no further explanation for the decision to remove him as Programme Manager.

4. There were further e-mails between the complainant and the Director ad interim of HRM in early April 2008 but no further reason was provided for replacing him as Programme Manager. Nothing appears to have been done with respect to a further assignment. On 29 April the complainant was informed that his contract would be renewed for two months until 30 June 2008. On 30 April 2008 he forwarded a formal complaint of harassment on the part of the Chief of Mission to the JARB and to the Director ad interim of HRM. Amongst other matters, he raised issues as to the role of the Chief of Mission in recommending only a six-month extension to his contract and in having him replaced as Programme Manager. The complaint to the JARB was premature as the complainant had not first submitted a request for review. However, General Bulletin No. 2017 allows for a complaint to be forwarded to the Director of HRM who is then to decide how best to respond. The Director ad interim of HRM did not then or at any time subsequent contact the complainant with respect to his harassment claim.

5. On 17 June 2008 the Director ad interim of HRM wrote to the complainant as follows:

“[...] your contract (which expires on 30 June 2008) is being extended for three months, i.e. up to 30 September 2008, to cover the statutory three months notice period, after which it will not be renewed in the present location and for the NATO funded project. This is in the interest of the project implementation and the overall functioning of the IOM-Sarajevo mission.”

The Director ad interim informed the complainant in the same letter that efforts would be made to find him another assignment but, if that were not possible, separation procedures would be initiated. The letter concluded:

“In the meantime, you do not need to attend the office in, and report to, IOM-Sarajevo.”

As it happened, the complainant continued to report for work. On 25 June 2008 the Chief of Mission instructed him “to free up [his] desk and office space by the end of [the] month”. The complainant informed her, with a copy to the Director ad interim of HRM, that he would continue to work as he had only been told that it was not necessary for him to report to work and it seemed a more efficient use of funds if he worked for the remainder of his contract. On 8 July the Director ad interim informed him that serious disciplinary measures could result if he continued to report for work and, apparently, he thereafter ceased to work. At the end of September 2008 the complainant was offered and accepted a half-time appointment for three months in Sarajevo. His contract for that appointment was renewed several times for periods of three months. It is not clear whether he continues to work for IOM.

6. The complainant submitted a request for review to the Chief of Mission on 27 June 2008 and lodged an appeal with the JARB on 27 August. He identified the appeal as “against the Administration’s failure to address [his] harassment complaint [...] and against [the] decision of 17 June 2008 not to renew [his] employment contract beyond 30 September”. It will shortly be necessary to say something of the proceedings before the JARB. For the moment, it is sufficient to note that it rejected the complainant’s claim of harassment,

made some general recommendations with respect to IOM procedures and some specific recommendations with respect to the complainant. Those specific recommendations were that “an assessment of [his] competencies” should be undertaken and that, based on that assessment, he should be actively assisted in finding a suitable position. It also recommended that the period in which he could apply for vacancies as an internal candidate be extended from six months to one year and that, when a suitable position was found, he be placed on probation and a proper Performance Development System process carried out. The complainant was informed on 27 January 2009 that the Director General had endorsed the recommendations of the JARB. That is the decision impugned by the complaint by which the complainant seeks the retroactive renewal of his contract for a period of 12 months from 1 November 2007 with subsequent yearly renewals, appointment to a P.4 post at a family duty station, payment of the difference between the salary and pension contributions he was paid and those he would have been paid had he been employed on a full-time basis since 1 October 2008, moral damages and costs.

7. It is convenient to deal first with the complainant’s claim for retroactive renewal of his contract from 1 November 2007. That claim is based on an argument that his contract should then have been renewed for 12 months, not six months. However, no issue was raised with respect to the renewal decision until March 2008, well after the time within which it could be challenged. Although that decision forms part of the complainant’s harassment claim and may be considered in that context, the decision must stand. Accordingly, there is no basis for the granting of retrospective renewal as asked.

8. Although the complainant challenged the decision of 17 June 2008 within time, IOM contends that his claim in that regard is not receivable. In his internal appeal, the complainant characterised that decision as a “decision [...] not to renew his employment contract beyond 30 September 2008”. IOM argues that, as it, in fact, renewed his contract, the complainant has no cause of action for “failure to renew”. It is not obvious that a half-time contract for three months is

properly to be characterised as a renewal of a full-time contract, as distinct from a new and different contract replacing the earlier full-time contract. However and whatever the proper legal characterisation of the complainant's subsequent appointment, the decision of 17 June 2008 had adverse legal consequences for him and, thus, he has a cause of action.

9. The only basis on which IOM seeks to justify the decision of 17 June 2008 is that the complainant's performance was unsatisfactory and that he failed to establish good working relations with the Chief of Mission. It argues that he was informed of his shortcomings with respect to report writing in January and July 2007 and points to notes written by the Chief of Mission on progress reports prepared by the complainant in those months. It also points to a meeting between the complainant and the Chief of Mission on 18 December 2007 in which the Chief of Mission criticised aspects of his work, provided him with a list of activities to be undertaken by 2 January 2008, and informed him that this was his "last chance to show [w]hat he [could] do as [Programme Manager]". Although these matters indicate that the Chief of Mission was dissatisfied with the complainant's work, there are difficulties in accepting that that was the real reason for the decision of 17 June 2008. These difficulties will be considered later.

10. It is to be remembered that the complainant was initially appointed as Programme Manager for a probationary period of one year. His contract was renewed with effect from 1 November 2007, albeit for only six months, but his probationary period was not extended. The Tribunal has consistently held that "[a]n organisation may not in good faith end someone's appointment for poor performance without first warning him and giving him an opportunity to do better" and that an organisation "cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance" (see Judgment 2916, under 4). It is also well established that an organisation "owes it to its employees, especially probationers, to

guide them in the performance of their duties and to warn them in specific terms if they are not giving satisfaction and are in risk of dismissal” (see Judgment 2732, under 16). The notes appended to the reports prepared by the complainant in January and July 2007 constitute neither guidance nor warning. As the complainant’s probationary period was not extended, he was entitled to assume in the absence of any indication to the contrary that the renewal of his contract, even if only for six months, indicated that his service was satisfactory. At least that was so until the meeting of 18 December 2007.

11. Although the Chief of Mission informed the complainant at the meeting of 18 December 2007 of her dissatisfaction with certain aspects of his performance and warned him that that was his last chance, the Note for the File of the meeting indicates that there was no real attempt to provide guidance or indicate how his performance might be improved. Further, the complainant was given no opportunity to ask questions of the Chief of Mission or to answer her criticisms, although it was said that he could respond later. More significantly, no attempt was made at any stage to evaluate the complainant’s performance or to set performance objectives in accordance with the Performance Development System which, according to IOM, became “compulsory” in August 2006 but was only “initiated by the Administration in July 2007”. Whatever the reasons for this delay, the failure to conduct a proper evaluation in accordance with the Performance Development System has the inevitable consequence that the decision of 17 June 2008 was fundamentally flawed.

12. Before turning to the complainant’s claim of harassment, it is necessary to note that the JARB neither analysed his claim in that regard nor provided any reason for its finding that it was not substantiated. Further, the JARB proceedings involved a serious failure of due process. Although the complainant appeared before the JARB and put his case, he was given no opportunity to answer the arguments put forward by the Administration. In particular, he was not present

when the Chief of Mission was interviewed and not provided with a transcript of her statements. Nor was he provided with documents submitted by the Administration. In these circumstances, it is necessary for the Tribunal to analyse the evidence and the claim for itself.

13. So far as concerns the harassment claim, two matters are not in dispute. The first is that there was a poor working relationship between the complainant and the Chief of Mission. The second is that, in the complainant's words, she "micromanaged" the project. He claims that aspects of this "micromanagement" constituted harassment in that in that process the Chief of Mission humiliated him in front of colleagues and interfered with his management of the project "behind his back". It appears from the Note for the File of the meeting of 18 December 2007 that the Chief of Mission accepted that she was micromanaging the project but said that that was because she had given the complainant "three months to set the programme on the right bases and when [he] did not [she] stepped in". The JARB found that "[t]he increased involvement of the [Chief of Mission] was called for by her founded doubts about the ability of the [complainant] to properly manage and successfully implement the project". However and as already indicated, the Chief of Mission had a duty to provide guidance to the complainant, particularly during his probationary period, and there is no evidence that she did so. This notwithstanding, the complainant has not provided any concrete details of humiliating behaviour or interference with his management "behind his back". Accordingly, this part of his claim must be dismissed.

14. It is clear that the difficulties between the complainant and the Chief of Mission escalated after 13 September 2007 when he forwarded an e-mail to her setting out some instances in which he claimed that she had failed to advise or consult him about aspects of the project and detailing some of the difficulties he saw as a result of "the [...] dual communication and management structure". He asked for clarification of their "respective duties and responsibilities (and

those of support staff)” so that they could “compl[e]ment each other’s efforts”. The response of the Chief of Mission on 17 September was:

“Please summarize before our meeting tomorrow.”

The complainant claims, and it is not denied, that he then sought guidance and advice from the Emergency and Post-Conflict Division at Headquarters in Geneva. That he did so and that it came to the knowledge of the Chief of Mission appears to be borne out by a statement made by her in the meeting of 18 December 2007 that the complainant “had been to Geneva to complain [...] [b]ut that [she] had called before to ask for his transfer”. In any event, in October 2007, the Chief of Mission recommended a six-month extension of the complainant’s contract and, at or about the same time, interviewed the person who subsequently replaced him as Programme Manager. In an e-mail of 26 October 2007 to the Director ad interim of HRM and the Director of the Operations Support Department (OSD), the Chief of Mission noted that the interview had taken place and asked for “advice on how to proceed”, stating that “[f]or the NTF project, the sooner, the better”. The Director of the OSD replied “[g]uess we will have to fix [the complainant] first: it can be done”. This correspondence gives rise to the overwhelming inference that, by October 2007, the Chief of Mission had decided to replace the complainant as Programme Manager if and when she could. That inference is also borne out by the statement by the Chief of Mission in the meeting of 18 December 2007 that she had already asked for his transfer.

15. Although the decision of 17 June 2008 must be set aside for failure to observe the procedures with respect to performance appraisal, it does not follow that the complainant’s performance was satisfactory. Nor do the matters to which the complainant points in his pleadings positively establish that it was. Moreover, it is clear that, by October 2007, there was a very poor relationship between the complainant and the Chief of Mission. The evidence indicates that, in that regard, there was fault on both sides. However, given these circumstances, the possibility that the complainant’s contract was

extended for only six months for proper managerial purposes cannot be excluded (see Judgment 2370, under 17). Moreover and contrary to the complainant's argument, there was then no requirement that his contract should be renewed for one year. The requirement to that effect in General Bulletin No. 2034 did not come into operation until 15 April 2008.

16. Although there are some unusual features of the meeting of 18 December 2007, including the Chief of Mission's reference to the complainant's immaturity and the failure to allow him to respond to her criticisms, the meeting was directed, in the main, to what she saw as his shortcomings and is, thus, also explicable on the basis that it had a proper managerial purpose, as is the fact that there was someone present to record what was said.

17. It follows that neither the decision to renew the complainant's contract for only six months nor the meeting of 18 December 2007 constitutes harassment. However, the events in 2008 are in a different category. On 7 February 2008 the Chief of Mission informed the complainant that she had spoken with the Director General and other officials and that they had agreed "to ask [F. P.] to come to Sarajevo [to] help [the complainant] with project implementation and find the best way forward". It is not clear why this did not happen. There is some dispute as to what was said in conversations between the complainant and the Director ad interim of HRM in early March. However, without assigning any reason beyond "the best interest of the project and that of the Organization", the Director ad interim informed him soon thereafter that he was to be replaced as Programme Manager. Given that the Chief of Mission had earlier interviewed the person who replaced the complainant and had asked for guidance as to how the replacement could be effected, it is to be inferred that it was at her behest that the complainant was replaced, and replaced in the manner that he was. He was replaced virtually immediately even though his contract had somewhat less than two months to run, i.e. until April 2008, and he had earlier been told that he was to be provided with assistance for the project; he was given no warning of

the decision; he was not heard on the question and adequate reasons were not provided. Replacing the complainant in these circumstances constituted “[a]ctions [...] directed at actively damaging [his] personal and/or professional reputation” and, thus, falls within the definition of “harassment” in General Bulletin No. 1312 of 26 March 2002.

18. Although not raised specifically in his internal appeal, it is appropriate to say something of the circumstances in which the complainant ceased work in Sarajevo. At the time he was replaced as Programme Manager, the complainant was requested and indicated his willingness to assist his replacement. He did so until 25 June 2008 – a period slightly in excess of three months. In these circumstances, the Chief of Mission’s unexplained directive of 25 June requiring him to free up his desk and office by the end of the month also constituted action “directed at actively damaging [his] personal and/or professional reputation” and constituted harassment. The complainant is entitled to moral damages for this and for the fact that he was replaced as Programme Manager in the circumstances referred to above.

19. As earlier indicated, there are difficulties with the view that the decision of 17 June 2008 was based on the complainant’s poor performance. There is nothing to indicate that his work was unsatisfactory after the meeting of 18 December 2007. Rather, the complainant claims, and it is not disputed, that after that meeting he was able to proceed with the implementation of the project. And it was envisaged in early February 2008 that he would be provided with assistance, not that he would be replaced as Programme Manager, nor that his contract would not be renewed in Sarajevo. In these circumstances, it is properly to be concluded that the real reason for the decision of 17 June was that the person who, in fact, replaced him as Programme Manager had become available to do so. The complainant is entitled to moral damages on this account. He is also entitled to moral damages for the failure of the Director ad interim of HRM to act on his complaint of harassment and for the failure of due process in the proceedings before the JARB.

20. As earlier indicated, the decision terminating the complainant's appointment in Sarajevo was fundamentally flawed. That does not mean that he must be reinstated in the Sarajevo post. His post as Programme Manager was filled by his replacement and there is no evidence of other suitable posts in that location. Nor is there any basis for an order that the complainant be appointed to a P.4 post, whether at a family duty station or elsewhere. In this regard, he was appointed to the Sarajevo post at grade P.3 and it is not for the Tribunal to assign a higher grade. As the complainant continued in the employ of IOM – at least until September 2009 – and as the Director General accepted the JARB recommendation to assist actively the complainant in finding a suitable position, the proper course is to order the payment of the difference between the salary and pension contributions that would have been paid if the complainant had continued to work full time in a P.3 post and that actually paid from 1 October 2008 until such time as he was or is appointed to a full-time post or, in the alternative, until his employment was or is lawfully terminated. The difference in salary should bear interest at the rate of 8 per cent per annum from due dates until the date of payment. Additionally and as outlined above, the complainant is entitled to moral damages which the Tribunal fixes in the global sum of 20,000 Swiss francs. He is also entitled to costs in the amount of 5,000 francs.

DECISION

For the above reasons,

1. The decision of 27 January 2009 is set aside insofar as it failed to allow the complainant's internal appeal with respect to his claim of harassment and the decision of 17 June 2008.
2. IOM shall pay the complainant the difference between the salary he would have earned had he worked full time in a P.3 post and that actually earned from 1 October 2008 until he is or was appointed to a full-time post or, in the alternative, until his employment is or was lawfully terminated together with interest at the rate of 8 per cent per annum from due dates until the date of payment. It shall also pay the difference in pension contributions for the same period.
3. The Organization shall pay the complainant moral damages in the sum of 20,000 Swiss francs and costs in the amount of 5,000 francs.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 4 November 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet