

111th Session

Judgment No. 3017

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs A. J. against the International Organization for Migration (IOM) on 19 July 2007 and corrected on 17 January 2008, IOM's reply of 19 March, corrected on 25 April 2008, the complainant's rejoinder of 29 July 2010 and the Organization's surrejoinder of 11 October 2010;

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

Considering Article 9 of the Rules of the Tribunal;

Having examined the written submissions;

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

A. The complainant is an American national born in 1972. She joined IOM's Mission in Bogotá, Colombia, in 2003, as a Cooperation and Programme Development Officer, and was employed with different titles under a series of contracts until she separated from service on 31 August 2006.

On 19 May 2006 the Chief of Mission in Colombia issued a written warning to the complainant drawing her attention to the Organization's dissatisfaction with her conduct in the discharge of her

functions. He relieved her of some of her duties and informed her that if she did not modify her behaviour during the following two months her contract would be terminated. That same day, she went on certified sick leave. By a letter of 6 June 2006 from Human Resources Management (HRM) the complainant was informed that her contract would not be extended beyond its expiration date of 31 August 2006, that she would be on special leave with full pay as from 10 June until the expiry of her contract, and that for the period of special leave she was not required to report for work.

The complainant submitted a request for review to the Chief of Mission on 6 June 2006 in which she sought “an adequate and objective investigation of the facts and charges imposed” and the “ratification of [her] contractual condition”. Having received no response, the complainant lodged an appeal with the Joint Administrative Review Board (JARB) on 9 August. She alleged a number of irregularities.

In its report of 20 September 2006 the JARB recommended that the complainant’s appeal be dismissed as time-barred, and on 28 September the complainant was informed that the Director General had decided to endorse that recommendation.

During October and November 2006 a series of exchanges ensued between the complainant and the Administration with respect to what she described as her “incapacity” to work and her claim for related benefits. In March 2007 the Organization provided her with an airline ticket in order for her to repatriate to the Netherlands. On 21 April 2007 the complainant sent an e-mail to HRM and the Staff Association Committee attaching a document entitled “Formal Request [for] Remedial Actions” in which she sought compensation for her incapacity to work. She alleged a delay in the payment of her “terminal emoluments” and requested a review of the amount of the pension fund payment that had been made to her on 23 February 2007. She further requested access to a copy of her personnel file. On 20 May she sent another e-mail to HRM and the Staff Association Committee, to which she attached an “Appeal Submission”. On 10 June she was advised that, pursuant to Article 4 of Annex D to the

Staff Rules, her appeal had to be preceded by a request for review submitted to the Chief of Mission in Colombia. The Organization reiterated this requirement to the complainant in numerous subsequent e-mails, but she failed to request a review in accordance with Article 4. On 19 July 2007 she filed a complaint with the Tribunal.

B. The complainant submits that she was subjected to unfair working conditions and harassment on the part of the Chief of Mission, the Deputy Chief of Mission and an Administrative Officer. She contends that she was relieved of a large portion of her duties and pressured to resign before an investigation of the facts was undertaken, and that the Administration thus violated her due process rights. Moreover, she suffered defamation when the Organization breached its duty of confidentiality and informed a third party about the measures taken against her. In her view, the subsequent unilateral termination of her contract was also a violation of her due process rights, and she contends that she still has not been informed of the reasons for those decisions. She states that for a period of time she worked without having signed a letter of appointment and that, consequently, she was exposed to risk. In addition, the Organization failed to provide her with a performance appraisal.

She argues that IOM delayed the payment of her “terminal emoluments”. Furthermore, it failed to consider her claim for compensation for incapacity which, in her view, was caused by an occupational illness that began more than a year before her contract was terminated.

The complainant also contends that she was subjected to retaliation for exercising her right to appeal to the JARB.

The complainant requests an oral hearing. She seeks, *inter alia*, reinstatement with IOM as a programme officer or assignment to an equivalent post, at a grade and step commensurate with her experience, at a duty station in the United States or the Netherlands. She claims damages for harassment and for IOM’s failure to carry out an investigation of the circumstances surrounding the termination of her contract. She seeks an apology for the “wrong rumors” about her that

the defendant transmitted to a third party. She claims damages for incapacity to work which, in her view, is attributable to an occupational illness, and a permanent pension in this respect. She also claims material and moral damages for “being mistreated” and for “delaying the terminal emoluments payment [and] the home return ticket”, for performing work without having signed a letter of appointment or formal agreement, for the JARB’s failure to consider her case, and for retaliation taken against her for having executed her right to bring an appeal to the JARB. Lastly, she seeks compensation for the loss of employment opportunities outside of the Organization and a “fair work certification”.

C. In its reply IOM argues that the complainant failed to follow the internal appeal process as prescribed by Annex D to the Staff Rules and that, consequently, the complaint is irreceivable for failure to exhaust internal remedies. Moreover, her claims related to incapacity are time-barred and therefore irreceivable, whilst her claims for the issuance of a work certificate and an apology, which are brought for the first time in the complaint, are also irreceivable for failure to exhaust internal remedies. As for the complainant’s claims related to the written warning and the non-renewal of her contract, the Organization contends that they are irreceivable because they were the subject of a prior appeal which was dismissed as irreceivable, and because the complainant did not file a complaint against the Director General’s decision on that appeal within the time limit prescribed by the Statute of the Tribunal.

On the merits, IOM contends that the complainant has never been mistreated by it or any senior staff member and it denies her allegations of harassment. It asserts that she has failed to substantiate her claim regarding “unfair working conditions”. With respect to her claims regarding an investigation, it contends that the Chief of Mission carefully examined her conduct and gave her the opportunity to comment on his findings. Consequently, no further investigation was necessary. Furthermore, no rumours were spread about her to a third party by IOM or any of its senior staff.

IOM submits that at all material times the complainant was working under a proper employment contract and that it was her choice to refuse employment opportunities outside of the Organization.

The defendant denies that payment of the complainant's "terminal emoluments" was delayed. In addition, it asserts that some of her alleged health problems were the consequence of her misconduct, while others were caused by physical activity which was not work-related. They cannot be attributed to mistreatment on the part of IOM and she has failed to substantiate her claims in this respect.

The Organization submits that there was no retaliation against the complainant and that she has produced no evidence in support of this claim.

D. In her rejoinder the complainant presses her pleas.

E. In its surrejoinder IOM submits that the complainant's rejoinder is inadmissible because it was not filed within the time limit prescribed by Article 9, paragraphs 1 and 2, of the Rules of the Tribunal.

CONSIDERATIONS

1. The complainant joined IOM in August 2003 and remained in its employ in Bogotá, Colombia, in various capacities until 31 August 2006. On 19 May 2006 she was issued with a written warning by the Chief of Mission and was relieved of some of her duties. On the same day she proceeded on certified sick leave. On 6 June HRM informed her that her contract would not be renewed beyond 31 August 2006 and that she would be on special leave with pay from 10 June until the end of her contract.

2. On 6 June 2006 the complainant sent an e-mail to the Chief of Mission, entitled "Action Prior [to] Labour Appeal", seeking review of the various decisions referred to above and, also, "an adequate and objective investigation of the facts and charges imposed". Having received no reply to this request within the 30 days allowed for a reply, she lodged an appeal on 9 August 2006, raising issues

concerned with her contractual status, failure to conduct a performance appraisal, the written warning, the taking away of some of her duties, the non-renewal of her contract, an alleged communication with the Netherlands Embassy with respect to her conduct, claims of harassment and mobbing by her first-level supervisor, as well as defamation and damage to her physical and psychological health. On 20 September 2006 the JARB recommended that her appeal be dismissed as not having been brought within time. In this regard, an appeal must be filed within 30 days of a reply to a request for review or, if there is no reply, within 30 days of the expiry of the 30 days allowed for a reply. The Director General accepted the recommendation of the JARB and the complainant was informed to that effect on 28 September 2006. That decision was not the subject of a complaint to the Tribunal.

3. In October and November 2006 there was correspondence between the complainant and IOM relating to her alleged incapacity for work. In March 2007 IOM provided her with an airline ticket for her repatriation to the Netherlands. In April 2007 the complainant submitted a “Formal Request [for] Remedial Actions” to HRM with respect to her alleged incapacity for work and delay in the payment of “terminal emoluments”. She also sought review of the pension fund payment made to her on 23 February 2007 and access to her personnel file. On 20 May 2007 she purported to file an appeal with respect to these matters. She was informed on 10 June 2007 that Article 4 of Annex D to the Staff Rules required her to submit a request for review to the Chief of Mission before an appeal could be lodged. She was informed of this requirement on four subsequent occasions, the last occasion being on 17 July 2007. She made no request for review. Instead, she filed the present complaint on 19 July 2007.

4. It may be noted at this stage that, after IOM filed its reply in this matter, the Registrar of the Tribunal attempted to communicate with the complainant and to forward her a copy of the reply. This correspondence was sent to the complainant at the postal address shown in the complaint form, but was returned unclaimed.

However, contact was eventually made and the complainant's rejoinder was filed in July 2010, more than two years after IOM filed its reply. The defendant now submits that the complainant's rejoinder is inadmissible. There being nothing to suggest that the Organization is prejudiced by the delay, the Tribunal will proceed by reference to all pleadings that have been filed.

5. The matters raised in the complaint fall into three distinct categories. The first comprises claims that were the subject of the appeal in August 2006 or arise out of the decisions that were then in issue. These claims include a claim for reinstatement, a claim for damages for harassment, a claim for an apology for the "wrong rumors" communicated to the Netherlands Embassy and a claim for damages for the failure of IOM to conduct an objective investigation of the facts. There has been no new decision with respect to the claims made in the complainant's appeal of August 2006. Article VII, paragraph 2, of the Tribunal's Statute requires that "[t]o be receivable, a complaint must [...] [be] filed within ninety days after the complainant was notified of the decision impugned". So far as concerns the claims made in the appeal rejected on 28 September 2006, the complaint was filed more than ninety days after the notification of that decision. Accordingly and to that extent, the complaint is irreceivable.

6. The second category of claims made in the complaint comprises the claims that were the subject of the complainant's "Formal Request [for] Remedial Actions" of April 2007 or arise out of the claims then made. These claims include a claim for damages for occupational illness and a permanent pension by reason of that illness, a claim for damages for "being mistreated" and for "delaying the terminal emolument payment [and] the home return ticket". Those claims were not the subject of a request for review in accordance with Article 4 of Annex D to the Staff Rules and, hence, could not be the subject of an appeal. Thus, the complainant has not exhausted internal remedies in accordance with Article VII, paragraph 1, of the

Tribunal's Statute and her complaint in respect of these matters is also irreceivable.

7. The third category of claims comprises claims that are made for the first time in the complaint or, at least, were not distinctly made in the complainant's internal appeal of August 2006 or in her "Formal Request [for] Remedial Actions" of April 2007. They include a claim for a "fair work certification", a claim for compensation for lost employment opportunities occasioned by the complainant's decision to remain in the employ of IOM, a claim for damages for performing work without "signing a letter of appointment or any formal agreement", and a claim for damages for the failure of the JARB to consider her case and for "[r]etaliation [...] taken against [her] for executing [her] right to appeal to the [...] JARB". As with the claims made in the complainant's "Formal Request [for] Remedial Actions", these claims were not the subject of a request for review in accordance with Article 4 of Annex D to the Staff Rules and, hence, have not been the subject of an appeal. Accordingly, the complainant has not exhausted internal remedies in accordance with Article VII, paragraph 1, of the Tribunal's Statute. Her complaint in respect of these matters is also irreceivable.

8. The complaint includes an application for an oral hearing in which to call witnesses. As the complaint is irreceivable, there is no occasion for an oral hearing. Accordingly, the application is dismissed.

DECISION

For the above reasons,

The complaint is dismissed as irreceivable.

In witness of this judgment, adopted on 13 May 2011, 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 6 July 2011.

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