

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

119th Session

Judgment No. 3416

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. B. against the International Organization for Migration (IOM) on 15 February 2012 and corrected on 31 May, IOM's reply of 10 September, the complainant's rejoinder of 13 December 2012, IOM's surrejoinder of 25 March 2013, the further submissions filed by the complainant on 28 June and IOM's final observations of 1 October 2013;

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

Having examined the written submissions and decided not to hold oral proceedings, 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 is a former official of IOM. He joined the Organization in 2002 as a special assistant to the Deputy Director General. He was initially employed under a special temporary contract. On 1 April 2002 he was given a fixed-term contract. On 1 December 2008 he received a regular contract.

The complainant was placed on sick leave as from 7 September 2005. His illness was subsequently recognized as being of occupational origin. On 14 October 2005 he submitted a formal complaint to the Director General in which he alleged inter alia that he was a victim of harassment by his supervisor, the Deputy Director General. On 11 January 2006, she in turn lodged a formal complaint in which

she asserted that the complainant's allegations were completely unfounded and that, while performing his duties, he had divulged confidential information. She therefore asked the Director General to consider terminating her subordinate's contract.

In her report of 30 January 2006 on the complainant's complaint, the Inspector General found that there were sufficient grounds to conclude that the complainant had been harassed by his supervisor. In addition, she found that the Deputy Director General's complaint constituted an inappropriate retaliatory measure. She consequently made several recommendations, including that of offering remedial action and "reasonable reparation" to the complainant. By a memorandum of 17 March 2006, the Director General informed the Deputy Director General and the complainant, *inter alia*, that the latter would be offered another post and that their complaints were considered to be closed. He further instructed them to refrain from engaging in any form of retaliation. As from April 2006 the complainant was transferred to the post of Head of the International Dialogue on Migration Division.

Since he was still suffering from his occupational illness, between 11 October 2007 and 30 September 2010 the complainant alternated periods of part-time work and sick leave. On 27 September 2010, having almost exhausted his entitlement to sick leave with full pay, the complainant underwent a medical examination to determine his capacity to work. In a report submitted on 3 November 2010 the doctor who had been chosen to conduct the examination concluded that the complainant was fit to resume full-time work as from 1 December 2010.

On 15 December 2010 the complainant was informed that he should resume full-time work as from 1 January 2011. By a memorandum of 13 January 2011, he asked the Director of the Department of Resources Management to reconsider that decision, mainly on the grounds that the examination which he had undergone had been flawed in several respects. He also contended that the decision "belied" his state of health, which had deteriorated on account of the harassment to which he had been subjected by his former supervisor between 2002 and September 2009, when she had finally left IOM. He added that since September 2009 he had suffered from "different forms" of harassment.

He therefore sought compensation for the injury which he had suffered and for the repercussions of that situation on his health. Further to that memorandum, to which the above-mentioned director replied on 11 February 2011, a second doctor examined the complainant. In his report of 9 May 2011 he concluded that the complainant could not resume work at the IOM and that he was completely unfit to work “in his current post, in the current circumstances”. On 26 May the complainant, who had resumed part-time work on 10 January and had then been placed on sick leave as from 20 January, referred his case to the Joint Administrative Review Board.

In its report of 7 November 2011, the Board noted that the cause of action of the appeal was twofold. It concluded that it was unable to make a recommendation with regard to the disputed decision of 15 December 2010, since it had never been enforced and therefore, in its opinion, did not constitute a final appealable decision. With regard to the allegations of harassment, the Board explained that it had distinguished between three periods. In respect of the period from 2002 until April 2006, the month in which the complainant had been transferred, it noted that it had been recognized that he had been harassed by his former supervisor and that IOM had taken measures – which he had accepted – to protect him. In respect of the period from April 2006 to 31 August 2009, when the Deputy Director General had left IOM, the Board identified several incidents in which she had been implicated. As it considered that one of them amounted to harassment, it recommended that the complainant should be paid a sum equivalent to six weeks of his net salary. It found that he had not been subjected to harassment during the period from September 2009 to May 2011, the month in which he had filed his appeal.

On 21 November 2011 the Director General informed the complainant that he had decided to endorse the Board’s finding that the decision of 15 December 2010 was not a final decision and that, insofar as the complainant’s appeal was directed against that decision, it was therefore irreceivable. In addition, the Director General advised him that he had decided to dismiss the recommendation that he should be awarded financial compensation since, in his view, the

Board's finding that one of the incidents which it had identified amounted to harassment had been based on an error of fact. The Director General therefore dismissed the appeal insofar as it concerned the allegations of harassment. That is the impugned decision.

On 27 February 2012 the Director General informed the complainant that he had decided to terminate his employment on health grounds as of 31 May 2012.

B. The complainant accuses IOM of failing to comply with its duty of assistance and protection in that it ignored the e-mails which he had sent to the Director General on 6 December 2006, 1 April 2007 and 2 September 2009, in which he complained of his treatment by the former Deputy Director General. He points out that, in accordance with the Tribunal's case law, when an official alleges harassment, an international organisation is bound to initiate proceedings to investigate them, and he takes the Organization to task for remaining "silent" when it received his memorandum of 13 January 2011 and his appeal of 26 May 2011, although they contained "explicit references" to the harassment to which he was being subjected. He also submits that IOM breached its duty to respect his dignity and to provide him with a safe and adequate working environment. He asserts that it is an established fact that he was subjected to harassment by his former supervisor from the time he joined IOM until April 2006. He considers that he is entitled to redress for the injury suffered during that period. He provides several examples to support his allegation that, despite his transfer, his former supervisor continued to harass him during the period between April 2006 and 31 August 2009. Lastly, he submits that the harassment to which he was subjected continued after that person's separation from service and that it took the form of "a lack of consideration and care on the part of the Administration, of tactlessness or hostile behaviour". He considers that the fact that IOM decided to terminate his appointment rather than offer him healthy working conditions is "deplorable".

The complainant asks the Tribunal to set aside the impugned decision and to order IOM to compensate him for the serious injury

which he has suffered, including the deterioration in his state of health, and to pay him interest at 5 per cent per annum as from 13 January 2011. He claims 15,000 euros in costs. Lastly, he asks the Tribunal to find that, should these various sums be subject to national taxation, he would be entitled to a refund of the tax paid from the IOM.

C. In his reply, IOM asks the Tribunal to disregard all “acts, decisions or omissions” of IOM after 21 November 2011. In addition, it states that the complainant may not claim “financial compensation” for the period prior to 17 March 2006, as the decision taken on that date concerned that period and he accepted the terms thereof.

IOM contends, providing examples, that it fully abided by its duty to assist the complainant. It emphasises that, after the decision of 17 March 2006, it protected him against any retaliatory measures by transferring him and it states that, in response to his e-mail of 6 December 2006, the Director General acted promptly, that the e-mail of 1 April 2007 did not evidence reprehensible conduct on the part of his former supervisor and that the e-mail of 2 September 2009 did not request the opening of an investigation into any harassment which the complainant might have suffered. It states that the members of the Joint Administrative Review Board investigated the allegations of harassment which the complainant had made in his appeal.

The Organization considers that the complainant has not furnished the necessary evidence to corroborate his allegation that he continued to be harassed by his former supervisor after his transfer. Lastly, it endeavours to show that the acts or decisions after 2009 on which the complainant relies may not be described as harassment having regard to the definition of that term given in the Tribunal’s case law or in General Bulletin No. 2017.

D. In his rejoinder the complainant expands his arguments. He maintains that he may rely on all the acts constituting harassment of which he complains, including those prior to 17 March 2006, in order to obtain full redress for the injury which he suffered.

E. In its surrejoinder IOM submits that “any indemnification or other action” in respect of the acts covered by the memorandum of 17 March 2006, which the complainant did not challenge within the prescribed time limits, is irreceivable as it is time-barred. On the merits it maintains its position.

F. In his further submissions, the complainant submits that he challenged the decision to terminate his employment before the Medical Board. He states that, in its report, the Board gave a detailed list of the harmful consequences which the harassment he had undergone had had on his health.

G. In its final observations, IOM maintains its position. However, it objects to the complainant’s “sterile rhetoric” in his further submissions and accuses him of seeking to drag out the proceedings to the detriment of the sound administration of justice.

CONSIDERATIONS

1. The complainant requests the setting aside of the decision of 21 November 2011 in which the defendant organisation refused to acknowledge that he had been subjected to harassment during the period between April 2006 and May 2011, the month in which he had filed an appeal with the Joint Administrative Review Board.

As the Tribunal has often recalled in its case law, allegations of harassment must be supported by specific facts and it is up to the person alleging harassment to prove the facts (see Judgments 3233, under 6, and 3192, under 9, and the case law cited therein).

2. General Bulletin No. 1312, entitled “Policy for a Respectful Working Environment”, was published on 26 March 2002. This document defined harassment and gave several examples of behaviour that might constitute harassment, including the creation of an intimidating, hostile or offensive work environment.

On 22 August 2007 General Bulletin No. 2017, also entitled “Policy for a Respectful Working Environment”, replaced and superseded General Bulletin No. 1312. This document stated that the term “[h]arassment encompasses any act, conduct, statement or request which is unwelcome to another person(s) and could, in all circumstances, reasonably be regarded as behaviour of a discriminatory, offensive, humiliating, intimidating or violent nature or an intrusion of privacy. [...] Harassment concerns not only intent but also effect. An act which is reasonably perceived by a person or group as offensive may constitute harassment, be it intentional or not.”

Paragraph 6 of General Bulletin No. 2017 defines bullying/mobbing as “repeated or persistent aggression, by one or more persons, whether verbal, psychological or physical, at the workplace or in connection with work that has the effect of humiliating, belittling, offending, intimidating or discriminating against a person [...]. Mobbing includes, but is not limited to, measures to isolate another person from professional activities, persistent negative attacks on personal or professional performance without legitimate reason, manipulation of a person’s personal or professional reputation by rumor or gossip, abusing a position of power by persistently undermining a person’s work, and unreasonable refusal of leave and training.”

3. At the end of 2005 and the beginning of 2006, respectively, IOM received a harassment complaint from the complainant against the Deputy Director General whose immediate subordinate he was followed by a counter-complaint from the Deputy Director General. On the basis of a report in which the Inspector General had concluded that the complainant’s complaint was founded, IOM promptly adopted appropriate measures by transferring him – a solution which immediately ended his subordinate relationship with the Deputy Director General, but which was not imposed on the complainant. Both protagonists were duly invited to refrain from engaging in any retaliation. In view of all the circumstances, IOM cannot be held to have breached its duties towards the complainant by acting in that manner.

4. The complainant submits, however, that IOM tolerated the Deputy Director General's continued harassment of him after his transfer until she left the Organization on 31 August 2009.

It is clear that during that period the complainant suffered from the behaviour of his former supervisor, who did not always temper her language in the light of his psychological situation.

While it is certainly regrettable that the Organization did not adopt a firmer stance towards the Deputy Director General by categorically forbidding her to have any contact with the complainant, it would be going too far to consider that it thereby breached its duties of assistance and good governance. Indeed, at the beginning of April 2006, the Director General took advantage of an unfortunate exchange of e-mails between the complainant and the Deputy Director General to invite her to be careful when addressing the complainant and to remind her that it was her duty to avoid giving him the impression that he might be subject to retaliation. Similarly, the Director General was not insensitive to the effect on the complainant of another e-mail from the Deputy Director General. The evidence shows that the Organization ensured that two days later the Deputy Director General apologised for having written such a text.

On the other hand, it seems that the Director General remained silent with regard to statements in which the Deputy Director General is alleged to have publicly criticised the complainant's personality and action during her farewell address on 31 August 2009. It is, however, clear from the file that this lack of action was warranted, for there was no evidence that the words in question were actually spoken, since the complainant, who was not present at the event, could rely only on hearsay.

5. The Joint Administrative Review Board did, however, find that the complainant had been harassed by the Deputy Director General after his transfer, because she had made an apparently scathing assessment of a document which he had drawn up in April 2006.

This was the only element taken into account by the Board in recommending that the complainant should receive compensation for

the injury suffered during the period between his transfer and the final departure of the Deputy Director General. In the impugned decision the Director General refused to follow this recommendation on the grounds that it rested on an error of fact, since the complainant had provided no evidence that the alleged incident had taken place and, even if it had, there was no proof that this criticism had been motivated by hostility towards him.

Having regard to the evidence on file, the Tribunal sees no basis on which to interfere with the Director General's assessment.

6. The complainant relies on several factors which, he contends, demonstrate that the Organization breached its duty to respect his dignity and to provide him with a safe and adequate working environment, including in the period following the departure of the Deputy Director General.

7. It must first be noted that, after the departure of the Deputy Director General at the end of August 2009, the complainant informed the new Director General that he wished to close what had been a distressing chapter for him and to look ahead. The difficulties which nevertheless arose later are plainly connected with his state of health. The complainant, who had been placed on sick leave for very lengthy periods until IOM decided to terminate his appointment as of 31 May 2012, mainly takes IOM to task for not treating him after 1 September 2009 with the care necessitated by his state of health.

While it is true that the complainant's state of health was such that IOM had to show particular care towards him, it must be found that, insofar as they are proven, the acts alleged by the complainant, considered singly or as a whole, do not in any way constitute harassment as defined in the above-mentioned General Bulletin No. 2017 and reveal no breach of the Organization's duties.

8. (a) Although the complainant was on the IOM rotation list on account of his length of service, in 2008, 2009, 2010 and 2011 he was exempted from the mobility obligation laid down in Staff Rule 8.113.

IOM explains that this solution was chosen because it had to review the complainant's administrative and medical situation every year. This solution cannot be regarded as an abuse of the discretion which the Tribunal allows the Administration in this sphere.

(b) It is certainly regrettable that, during one of the complainant's periods of sick leave which lasted a little over four months, without prior warning the Organization temporarily reassigned the complainant's office to another official. The fact that this measure was necessitated by the limited amount of work space available did not dispense IOM from informing the complainant of it, which would have avoided the regrettable situation that he faced when he went to his office after one month's absence to pick up some personal effects. However, this was a clumsy or tactless act and there is nothing in the file to suggest that it stemmed from harassment or disregard for the complainant's dignity.

(c) The refusal to authorise the complainant's participation in an international conference in Cancun (Mexico) does not amount to harassment or discrimination either. Objective reasons connected with the health of the complainant who, for that reason, was then working part-time, were sufficient grounds for the Organization to prevent him from participating in that conference.

The complainant nevertheless accuses the Organization's Chief Medical Officer, who advised against his undertaking of that journey, of harassment. He also submits that, generally speaking, she obliged him to undergo vexatious checks on the status of his vaccinations and on medical certificates in support of his sick leave. It is impossible to see how these requirements, one of which was designed to protect the complainant's health and the other of which was linked to routine checks applicable to all members of staff who are absent from work on health grounds, could be indicative of treatment falling within the definition of harassment established in the aforementioned General Bulletin No. 2017.

(d) While it is true that the complainant's professional performance was not evaluated regularly, whereas precedent has it that the absence of appraisal reports is a sign of administrative malfunctioning open to

criticism, in the circumstances of the case, the absence of appraisal reports cannot be regarded as indicative of harassment (for a comparable case, see Judgment 2067, under 10).

9. It follows from the foregoing that IOM did not harass the complainant and was not in breach of its duties towards him.

10. The complaint must therefore be dismissed, without there being any need to rule on the objections to receivability raised by the defendant.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

(Signed)

GIUSEPPE BARBAGALLO CLAUDE ROUILLER PATRICK FRYDMAN

DRAŽEN PETROVIĆ