

119th Session

Judgment No. 3417

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. T. against the International Organization for Migration (IOM) on 27 March 2013, IOM's reply of 10 July and the complainant's letter of 30 July 2013 informing the Registrar of the Tribunal that he did not wish to enter a rejoinder;

Considering Article II, paragraph 5, 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, who had worked for IOM in various posts since 1999, was selected in November 2009 for the position of Regional Representative, Kinshasa. This grade P5 position was subsequently redefined as Chief of Mission, Kinshasa. The complainant took up his duties in January 2010 under a one-year fixed-term contract, which was subsequently renewed twice. This complaint originates from the decision not to renew his contract upon its expiry on 31 December 2012 due to unsatisfactory performance.

The letter of 29 May 2012 notifying him of the non-renewal decision referred to his unsatisfactory management of IOM Kinshasa and, in particular, to the Mission's dire financial situation, to unaddressed human resources management issues and to problematic relations with IOM partners as well as staff. It was stated that the Director General had lost all confidence in the complainant's ability to

manage the Mission and had decided not to renew his contract. The complainant was requested to prepare for a handover in the course of August 2012, following which he would be placed on special leave with full pay from 1 September 2012 until the expiry of his contract.

On 21 June 2012 the complainant filed an Action Prior to the Lodging of an Appeal requesting a review of that decision. He contended that IOM had not complied with its rules on performance evaluation and that he could not be held responsible for the problems identified in the letter of 29 May. He asked to be reinstated in his post until he was offered another suitable position within IOM, or until he was offered a mutually agreed termination package placing him in a financial situation equivalent to a retirement on 30 June 2014. By a letter of 25 July 2012 he was informed that his request for review and related claims were dismissed as without legal foundation. In IOM's view, it was his own lack of cooperation that had prevented the finalization of his performance evaluation on at least one occasion. Moreover, specific instances of serious shortcomings in the Mission's budgetary, financial and administrative functions, for which he held overall supervisory responsibility, had been brought to his attention on several occasions. He had been given the opportunity to respond to the criticism levelled at him and to improve his performance within deadlines to which he had agreed. IOM underlined that it was his responsibility as Chief of Mission to ensure oversight of sub-offices, their staff and finances in order to be informed of any problems affecting projects and to address difficulties and deficits in a timely manner. The letter also referred to his non-compliance with the recommendations of an internal audit report of September 2011 and to his wilful disregard for IOM rules and instructions aimed at protecting the Organization and its staff.

The complainant lodged an appeal with the Joint Administrative Review Board (JARB) on 7 October 2012. In its report of December 2012 the JARB found that the Administration had failed to follow its own procedures on performance evaluation laid down in the Staff Evaluation System (SES) and the Performance Development System (PDS), and that its failure to specifically warn the complainant about

his performance had denied him the opportunity to improve. However, the JARB concluded that the errors made by the Administration were not serious enough to recommend quashing the decision, and that there was no reason to award material damages as the Administration had allowed the contract to run to its expiry. Nor was there any evidence that the Director General had improperly exercised his discretion. In view of the failures identified and the fact that the complainant had been removed from his post before the expiry of his contract, the JARB recommended that the Administration pay him an additional 3 months' salary as compensatory damages.

By a letter of 27 December 2012 the complainant was informed that the Director General had decided to follow the JARB's recommendations in part and to dismiss his appeal as unfounded in its entirety. The Director General disagreed with the JARB's finding that the complainant had not been warned of his unsatisfactory performance. In his view the complainant had received a clear warning and had been given sufficient time to improve his performance, as his contract had been renewed twice. His performance had nevertheless remained clearly unsatisfactory, which justified the decision not to renew his contract and to remove him from his post. The Director General considered that no financial compensation was warranted. That is the impugned decision.

B. The complainant contends that he was abruptly removed from his post without any warning and without the opportunity to be heard. IOM alleged that he had breached several of its rules but it failed to conduct an investigation, which deprived him of the possibility to rebut the accusations made against him. The non-renewal of his contract thus amounts to a hidden disciplinary sanction. According to him, IOM failed to comply with its own rules on performance evaluation and, as a result, his performance was never properly evaluated. It is therefore barred from basing its decision not to renew his contract on his alleged unsatisfactory performance. The responsibility for ensuring that performance evaluations are completed lies with the Organization, and IOM's attempt to shift the blame onto him by alleging lack of cooperation is not a valid excuse. Neither may it

invoke audit reports as evidence of his alleged underperformance or as evidence of a warning. Audit reports are not designed to assess performance, and in this case they are not relevant as performance must be assessed during the year of the decision not to renew. The JARB correctly noted that he could not be expected to know that his performance was unsatisfactory, as he had never been specifically warned about his personal performance and his contract had been renewed twice. In view of the failure to inform him of his alleged unsatisfactory performance, the decision not to renew his contract shows a lack of good faith. The absence of a proper performance appraisal in the year preceding the decision not to renew his contract also constitutes a procedural flaw, the effect of which is that an essential fact has not been taken into consideration. The complainant asks the Tribunal to quash the impugned decision, to order his retroactive reinstatement effective 1 January 2013 in his post as Chief of Mission in Kinshasa and to order IOM to appoint him to a position commensurate with his grade, experience, and seniority with secure funding for at least two years. Alternatively, he asks the Tribunal to quash the impugned decision and to order IOM to pay him an amount equivalent to 3 years' salary and benefits. In all events, he seeks moral damages and an award of costs in the amount of 20,000 Swiss francs.

C. In its reply IOM emphasizes that the Director General has a wide discretion in deciding whether to renew a fixed-term contract, and he may refuse renewal for reasons that include unsatisfactory performance. Such a decision is subject to only limited review by the Tribunal, and it is the Organization and not the Tribunal that determines whether a staff member's performance is satisfactory. IOM denies that the non-renewal decision constituted a hidden disciplinary sanction: it was taken because of the complainant's continuous and serious unsatisfactory performance in his post as Chief of Mission, of which there is undisputable evidence in the file. His performance was not only unsatisfactory, it was also unworthy of a high-ranking official. IOM refers in particular to his wilful disregard for IOM rules and policies and his failure to coordinate prior to taking decisions and making statements that could bring the Organization into disrepute. Instead of ensuring the

implementation of IOM rules and policies in his position as Chief of Mission, he overruled the Legal Department's advice and did not comply with the auditors' recommendations, despite his commitment to do so. Two projects under his responsibility ended with serious deficits amounting to 1,627,000 United States dollars, which is evidence of his mismanagement. IOM denies any violation of due process; the complainant was given ample notice of the non-renewal of his contract, and the finalization of the performance evaluation report is not a prerequisite as long as the staff member is duly warned about his unsatisfactory performance and given the opportunity to comment and time to improve. Even if his performance evaluation had been completed, it would not have resulted in an extension of his contract, as his performance remained consistently unsatisfactory. The complainant's argument that he did not receive any warning is factually incorrect. IOM underlines that, according to Tribunal's case law, the warning need not expressly mention the risk that termination may ensue if performance does not improve. The complainant was given the opportunity to improve in 2011 and 2012 through the renewal of his contract, but he continuously refused to take into account the warnings received and failed to improve his performance.

CONSIDERATIONS

1. The complainant first worked with IOM in May 1999 on secondment from the Swiss Agency for Development and Cooperation. Between then and January 2010 he worked with IOM on special contracts or fixed-term contracts and also took periods of special leave without pay. In November 2009 he was offered the position of Regional Representative based in Kinshasa though the position was subsequently defined as Chief of Mission, Kinshasa, in the Democratic Republic of Congo (DRC). On 3 February 2010, the complainant was offered a one-year contract commencing 10 January 2010 and concluding 9 January 2011. He secured a second one-year contract commencing 10 January 2011 and concluding 9 January 2012, and a third one from 10 January 2012 to 31 December 2012. On 29 May 2012, the

complainant was informed by letter from the Officer-in-Charge of Human Resources Management that his contract would not be extended beyond the expiry date of 31 December 2012, he should prepare for a handover to his successor in the course of August 2012 and he would be placed on special leave with full pay from 1 September 2012 until the expiry of his contract. This letter contained a critical commentary of his management style and other aspects of the performance of his duties.

2. The complainant challenged this decision. However, by letter dated 25 July 2012 the complainant was informed the decision was maintained. The complainant thereupon lodged an internal appeal on 7 October 2012. The Joint Administrative Review Board (JARB) provided a report in December 2012 to the Director General. By letter dated 27 December 2012, the Director General informed the complainant that, in substance, his appeal was rejected in its entirety though the letter does not say so. This is the impugned decision. The letter deals, *seriatim*, with the conclusions and recommendations of the JARB. The Director General endorsed the JARB's findings and conclusions that IOM had acted within its authority when it decided not to renew the complainant's contract, that there was no evidence that suggests the Director General did not properly exercise the authority, that even if all the rules and procedures (concerning the evaluation of the complainant's performance) had been followed (that they had not been was not accepted by the Director General) it did not give the complainant a guarantee of the extension of his contract and that the complainant had not suffered material damage as a result of the conduct of IOM. The Director General disagreed with the JARB's conclusion that the IOM had failed to comply with the rules established as part of the performance evaluation of its staff members and disagreed with the recommendation that the complainant be paid three months' salary as compensatory damages.

3. In his complaint to this Tribunal, the complainant advances six propositions. The first is that there had been a failure by IOM to comply with its rules to evaluate performance and, secondly, there had been a failure to inform the complainant of his alleged unsatisfactory

performance. The third proposition is that there had been an error of law, namely an omission of an essential fact in the decision not to renew the complainant's contract. The fourth is that the decision not to renew his contract amounted to a hidden disciplinary sanction. The fifth and sixth are that the complainant had suffered adversely and was entitled to substantial financial damages and, additionally, moral damages.

4. The report of the JARB is lengthy, logically structured and manifests a comprehensive and thoughtful consideration of the evidence and applicable principles. Its conclusions are rational and balanced. In these circumstances its findings warrant "considerable deference" (see Judgment 2295, under 10). One finding it made was that there had been a serious disregard of two systems designed to monitor, assess and evaluate staff performance and progress (the PDS and SES systems). While, as the JARB observed, responsibility for this befell both IOM and the complainant, the JARB also observed that the management of staff is a responsibility of IOM and it must assume "the main responsibility for [this] failure". Its ultimate conclusion on this topic was that "having never been specifically warned about his personal performance and having his contract renewed in previous years, with his performance never identified as a problem, he could not have been expected to know" and that IOM "effectively denied [the complainant] the opportunity to improve until it was too late and then it decided not only not to renew his contract but even to remove him from post before the expiry of his contract".

5. In the impugned decision, the Director General sought to answer this conclusion by saying there had been a lack of cooperation on the part of the complainant, for which IOM was not responsible and, in addition, the complainant would have been aware of serious concerns about his performance from various documents and reports analysing, critically, significant deficiencies in the operation of the post in Kinshasa. The IOM's reply in the proceedings before this Tribunal repeats and develops this argument. It does so having referred to the Tribunal's jurisprudence to the effect that an organisation has a wide discretion whether to renew a fixed-term appointment and can decline

to renew for reasons including unsatisfactory performance, citing Judgments 1610, under 24, 1405, under 4, 1262, under 4, 892, under 8, and 1741, under 15.

6. However while there is an undoubted right of an organisation to decide not to renew a fixed-term contract, it does not follow that an organisation is, additionally, immune from any liability if it has failed to follow its own procedures designed to monitor, assess and evaluate staff performance and progress. The fundamental purpose of such procedures is to explicitly alert a staff member to identified deficiencies in her or his performance and thus give the staff member an opportunity to address those deficiencies and improve performance. The interaction of such procedures and decisions not to renew fixed-term contracts was discussed by the Tribunal in Judgment 2991, under 13:

“It is a general principle of international civil service law that there must be a valid reason for any decision not to renew a fixed-term contract. If the reason given is the unsatisfactory nature of the performance of the staff member concerned, who is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service, the organisation must base its decision on an assessment of that person’s work carried out in compliance with previously established rules [...].”

7. This principle has been violated by IOM in that “previously established rules” of assessment of performance embodied in the PDS and SES systems (set out in Instructions IN/82 and IN/181, respectively) have not been followed. Accordingly, the complainant has made good his first and second propositions. The third proposition, that there had been an omission of an essential fact (there had been no proper performance appraisal) in the decision not to renew, is really the first and second propositions expressed from a different perspective.

8. The fourth proposition advanced by the complainant is that his removal from his post and the non-renewal of his contract were a hidden disciplinary measure. The complainant refers to Judgment 2659, under 8 and 10. This argument was based on a premise that amongst the grounds put forward to justify the complainant’s removal and the non-renewal of his contract, was that he had breached several of IOM’s

rules. In the letter of 29 May 2012 informing the complainant of his removal and the non-renewal of his contract, reference was made to several matters where applicable rules or policy had not been complied with and this was the result of the conduct of the complainant. They related to a failure of the complainant to ensure that all staff were enrolled in the applicable medical service plan, that certain payments had not been made to the staff and should have been and other staff-related requirements which had not been complied with, and finally that an agreement had been signed with UNESCO without final authorisation from Headquarters. However it is clear from the letter that these are subsidiary issues. Overwhelmingly, IOM's grievances about the complainant's performance concerned more general issues including perceived mismanagement of finances and his management of staff generally. The complainant has not established, as he is required to, that his removal and the non-renewal of his contract were a hidden disciplinary measure (see Judgment 2907, under 23).

9. The relief the complainant seeks is that the decision of the Director General of 27 December 2012 be quashed and reinstatement or, alternatively, an amount equivalent to 3 years' salary as Chief of Mission, Kinshasa. An order of reinstatement would be inappropriate. According to the Tribunal's jurisprudence, the reinstatement of a person on a fixed-term contract would be ordered only in exceptional cases (see Judgments 3353, under 35, 3299, under 28, and 1351, under 13). Moreover, while the Director General failed to recognise the significance of IOM's performance evaluation procedures and the consequences of non-compliance with them, the decision not to renew the complainant's contract was made in the exercise of a broad discretion that has not miscarried.

10. However the complainant is entitled to damages. As the decision not to renew is not set aside, no occasion arises for material damages. But the complainant is entitled to moral damages for the Director General's failure referred to at the conclusion of the preceding consideration and, more generally, the IOM's failure to ensure compliance with its performance evaluation procedures. In the circumstances of this

case, this failure warrants moral damages in the sum of 20,000 Swiss francs. IOM should pay the complainant costs in the sum of 5,000 Swiss francs.

DECISION

For the above reasons,

1. IOM shall pay the complainant 20,000 Swiss francs as moral damages.
2. IOM shall pay the complainant 5,000 Swiss francs in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 31 October 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ