

**C.**  
**v.**  
**IOM**

**121st Session**

**Judgment No. 3575**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr O. C. against the International Organization for Migration (IOM) on 15 March 2013 and corrected on 8 July, IOM's reply of 7 August 2013, the complainant's rejoinder of 10 February 2014 and IOM's surrejoinder of 20 May 2014;

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 may be summed up as follows:

The complainant challenges the decision to impose on him the disciplinary measure of discharge from duty with due notice.

Having worked for IOM since 2001 in various duty stations, the complainant was assigned in June 2009 to the position of Deputy Chief of Mission in Kabul, Afghanistan, under a one-year fixed-term contract. He obtained a regular contract in November 2009.

In June 2011 he was evacuated from Kabul for medical reasons. Following a period of sick leave, he took some annual leave, after which he was placed on special leave with full pay. In September 2011, the Director of Human Resources Management (HRM) informed him that several colleagues had accused him of offensive behaviour which

might constitute harassment. A fact-finding team would therefore be sent to Kabul, and he would in due course be informed of the outcome of the fact-finding mission and given an opportunity to respond. The fact-finding team went to Kabul in October 2011. The complainant, who was still absent on special leave, asked the Director of HRM to be heard. He was interviewed at IOM's headquarters in Geneva on 9 November 2011 and was specifically questioned about his purchase and possession of a firearm.

By a letter of 13 March 2012 (hereinafter the "Charges Letter") the Director of HRM informed the complainant that the fact-finding team had interviewed 27 of his colleagues, and that the main concern raised by staff was that he was in possession of an unauthorised handgun. Some of them had also raised concerns about the way he addressed them and his failure to attend a meeting. He was therefore charged with possession of an unauthorised firearm, use of inappropriate and offensive language, verbal abuse of staff members, and absence from a meeting on 23 May 2011. He was asked to respond to these allegations within 14 days, after which the Director General would determine the appropriate actions, if any, to be taken, which might include disciplinary measures. The complainant responded on 26 March, denying the accusations against him and stressing that it was his former girlfriend and colleague who had asked him to buy the firearm for her.

By a letter of 16 May 2012 (hereinafter the "Dismissal Letter") the Director General notified the complainant that he had decided to discharge him from service with three months' notice, in accordance with Staff Regulation 10(a)(ii). He considered that the complainant had shown extremely poor judgement and disregard for staff security and for IOM's reputation in buying a firearm on the streets in Kabul and keeping it in his quarters in the IOM compound, which he did not deny. He emphasised that IOM operated in compliance with the security standards established by the United Nations Department of Safety and Security (UNDSS). The other allegations against him were withdrawn and would not appear on his personnel file.

The complainant's request for review of that decision was rejected by a letter of August 2012. He then filed an appeal with the Joint Administrative Review Board (JARB) on 12 September 2012. Having heard the complainant, the JARB issued its report on 6 December 2012. It found that the complainant did purchase and de facto possessed a firearm in his private living quarters. In so doing, he had not violated any written rule, but as a senior official he should have requested further information as to the legality of his action; having failed to do so, he had exercised poor judgement, which had put the Organization's reputation in danger and potentially endangered others. The JARB concluded that the correct disciplinary measure had been applied, but considered that the fact that he had been serving in a hardship position for many years was a mitigating factor. For this reason, it recommended that no reference be made in his record to disciplinary action, that his terminal emoluments be paid in full and that he be granted an *ex gratia* payment in recognition of his ten years of service, mostly in hardship positions.

By a letter of 17 December 2012, which is the impugned decision, the Director General informed the complainant that he maintained the disciplinary measure, but that he did not endorse the JARB's findings concerning the mitigating factors. In his view, the complainant was not entitled to be paid terminal emoluments, and he also rejected the recommendation to pay him an *ex gratia* payment, considering that the complainant had been "sufficiently compensated for [his] years of service".

The complainant asks the Tribunal to quash the impugned decision and to retroactively reinstate him with effect from 16 August 2012 as Deputy Chief of Mission of IOM Kabul, with the same salary, pension entitlements and other benefits that those he received previously. In the alternative, he asks the Tribunal to quash the impugned decision and to order IOM to pay him an amount equivalent to three years' full salary as Deputy Chief of Mission of IOM Kabul, including pension contributions and other benefits. In all events, he claims moral damages and costs.

IOM asks the Tribunal to dismiss the complaint as unfounded. It adds that the complainant's reinstatement would not be appropriate as it has lost confidence in him.

### CONSIDERATIONS

1. The complainant impugns the determination that his purchase and possession of a firearm constituted unsatisfactory conduct of a grave nature and the imposition of the disciplinary measure of discharge with due notice. In his complaint, the complainant raises a number of issues.

2. The complainant submits that in making the finding in relation to the purchase and possession of a firearm, IOM overlooked two essential facts. The first is the role played by Ms L. He claims that she was, in fact, the main actor as she was the one who requested the firearm, paid for it and then kept the firearm wherever she stayed. He merely purchased the firearm on Ms L.'s behalf. This argument is rejected. It is clear from the Dismissal Letter that the Director General considered the role played by Ms L. as originally alleged by the complainant before deciding to terminate his employment. Specifically, the Director General wrote:

"I have considered your statements that you had purchased the Beretta at the request of staff member Ms [L.], with whom you were having a romantic relationship and who shared your quarters, and that when you were away from Kabul, she took it to her own quarters. Ms [L.] is your junior both in grade and in years, and had very limited experience working in dangerous duty stations relative to your experience in this regard. Whether or not to purchase and keep the gun remained your decision. In taking the decision to do so, you showed extremely poor judgment and disregard for staff security and IOM's reputation. Therefore I do not find Ms [L.'s] (purported) role to excuse your misconduct in buying the gun and keeping it in your quarters."

Moreover, the JARB also examined Ms L.'s role and found:

"It has however throughout the case, including during the hearing with the [complainant], been clear that the factual possession of the weapon was de facto with the [complainant]. The [complainant] has admitted both during the proceedings prior to the Appeal and during the hearing before

the JARB to being the purchaser of the gun and it remained in his living quarters, except when he was outside Kabul. The possession can be said to have been principally with the Appellant since it was out of his quarters only when he was absent.

[...]

The JARB therefore concludes that the former girlfriend's occasional possession and her request to be provided with a gun cannot on its own remove responsibility for the purchase and the de facto possession by the [complainant]." (Emphasis added.)

3. This was the factual assessment before the Director General when he endorsed the JARB's recommendation to terminate the complainant's employment and, therefore, it cannot be said that Ms L.'s role was overlooked.

4. The second fact that was allegedly overlooked was the situation in Afghanistan. The complainant submits that the IOM overlooked the situational context in which the events unfolded when determining that the purchase and possession of a firearm risked bringing the Organization's reputation into disrepute. The complainant notes Afghanistan to be a very dangerous and war-torn country where private ownership of firearms is prevalent. In this context, the purchase and possession of a firearm may not have impacted the reputation of the Organization. IOM, however, failed to take into account the "situation on the ground" before assessing the risk to its reputation. The evidence does not support this submission. The situation in Afghanistan was brought to the attention of the Director General in the complainant's response to the Charges Letter. The Director General then acknowledged the complainant's submissions in this regard in the Dismissal Letter. Second, the IOM's knowledge of the situation in Afghanistan is evidenced not only by the Organization's own admissions but also by the fact that Kabul was rated a category E duty station. The extensive security measures in place for the IOM compound in Kabul also indicate the Organization was aware of the violence and prevalence of firearms in Kabul. Third, IOM correctly notes that the complainant was a senior official of an organization with a peaceful

and humanitarian mandate and that his actions risked the reputation of IOM despite the situation in Kabul.

5. The complainant alleges that the IOM's purported failure to initiate any disciplinary measures against Ms L. for her alleged role in the purchase and possession of the firearm constitutes a breach of the principle of equal treatment. Leaving aside the fact that the complainant and Ms L. were not similarly situated in fact and law, the case law consistently holds that the principle of equal treatment cannot be invoked to protect misconduct (see Judgments 2773, 2555, 1977, 1271 and 207).

6. The complainant's argument that IOM failed to prove the content and existence of a rule or law prohibiting the purchase and possession of a firearm in the IOM compound is without merit. As IOM did not base its dismissal decision on the breach of a specific rule or law, the proof of the existence and content of either was not required. It is also observed that contrary to the complainant's submissions, IOM has never alleged the violation of a specific IOM/United Nations Department for Safety and Security (UNDSS) rule or national law as the reason for the complainant's dismissal. The Organization's reference to the contravention of UNDSS advice in the Charges Letter and the Dismissal Letter was mentioned simply to summarize what was purportedly stated by the complainant in the 9 November 2011 interview. Likewise, the reference to UNDSS-established security standards in the Dismissal Letter was commented on in order to emphasize the existence of proper security procedures and protocols in place at the IOM compound but was not addressed as the basis for the complainant's termination. Finally, the United Nations Field Security Handbook (UNFSH) and the supposed copy of Afghan national law on firearm possession were produced in response to requests from the complainant and the JARB but they were not relied upon by IOM as grounds for the disciplinary measure.

7. The complainant also submits that there was insufficient evidence before the Director-General to prove misconduct beyond a

reasonable doubt. The complainant admits to purchasing the firearm for his then girlfriend, Ms L. However, the complainant submits he was not in *possession* of the firearm following its purchase. Instead, the complainant says possession of the firearm remained with Ms L. In making his submission, the complainant quotes from *Black's Law Dictionary's* definition of possession as follows: *possession means "having control over a thing with the intent to have and to exercise such control"*. The complainant submits his purchase and possession of the firearm were in full compliance with applicable rules as set out in the UNFSH. Accordingly, his actions cannot, therefore, be considered to constitute unsatisfactory conduct.

8. On the basis of the complainant's own submissions there was sufficient evidence to establish beyond a reasonable doubt that he purchased and was in de facto possession of a firearm within the IOM compound. Additionally, the Director General's conclusion that the complainant exhibited extremely poor judgment which jeopardized the safety of staff members and put at risk the reputation of IOM is well founded on the evidence. The possession of a firearm within the IOM compound clearly represented a risk to the safety of the complainant, Ms L. and all other individuals who may have been exposed to the firearm. As correctly noted by the Director General in the Dismissal Letter and later endorsed by the JARB, among other possible scenarios, the firearm could have killed or seriously injured someone if intentionally or unintentionally discharged. This is particularly true when one considers the firearm was made available to Ms L., who had little to no firearms training outside the occasional visit to the shooting range. Furthermore, and despite the complainant's submissions to the contrary, the purchase of the firearm on the streets of Kabul risked jeopardizing the IOM's reputation. As noted by the Director General and the JARB, IOM provides humanitarian assistance and maintains a peaceful mandate in Kabul. The purchase of a firearm, on the streets, by a senior official represents a public contradiction to the broad ideals of IOM and puts its reputation at risk.

9. Lastly, the complainant submits that his discharge was disproportionate to the offence and must be set aside. He claims that the IOM re-characterized the charges against him over the course of the proceedings but did not review the sanction in light of the altered charges. Additionally, the complainant says his good faith dealings with IOM and his full cooperation throughout the course of the disciplinary proceedings should be considered as a mitigating factor. The complainant maintains IOM should have imposed a lesser sanction by simply notifying him that private possession of firearms was not authorized on IOM compounds.

10. The Tribunal observes that despite the mitigating factors including the complainant's employment history that stretched over a period of ten years and included numerous contract renewals and promotions, and eventually the granting of a regular contract, and that he had no prior disciplinary record, the complainant's actions were of a grave nature in that they jeopardized the safety of IOM staff members and risked the peaceful and humanitarian reputation of IOM. The Director General properly considered the incompatibility of the complainant's conduct with his role as Deputy Chief of Mission, and considered the nature of the actions of misconduct in deciding that, when taken together, they justified a dismissal from service. The Director General's further decisions not to omit the disciplinary action from the complainant's employment record and not to grant financial compensation were also properly considered and fell within the Director General's discretionary authority. In these circumstances, the fault committed is sufficiently serious to justify dismissal with notice, which is not the most serious penalty that could have been imposed.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ