

D.
v.
IOM

124th Session

Judgment No. 3848

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F. D. against the International Organization for Migration (IOM) on 11 June 2014 and corrected on 18 August, IOM's reply of 23 December 2014, the complainant's rejoinder of 30 April 2015 and IOM's surrejoinder of 5 August 2015;

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 may be summed up as follows:

The complainant challenges the decision not to renew his special short-term contract for serious misconduct.

The complainant joined the IOM Haiti field office in January 2012 as a consultant. In June 2012 he was recruited under a special short-term contract, which was subsequently renewed.

A whistle-blower report was filed in July 2012 containing allegations against the IOM Haiti Camp Coordination and Camp Management (CCCM) Program Manager, Mr L. As a result, the complainant was appointed as interim CCCM Program Manager at grade P.4.

On 9 August 2012 the Officer-in-Charge of the IOM Haiti field office informed the complainant that he had received instructions from Headquarters to make sure that the former CCCM Program Manager “[was] not in copy or in discussion on any programme related matters”, and that more guidance would be received the following week.

On 7 December 2012 the Deputy Director General appointed an Investigation Team, composed of the same members who had conducted the investigation into the allegations against Mr L., to establish facts concerning the complainant’s conduct in relation to these allegations. This measure was prompted by certain findings contained in the investigation report on the allegations against Mr L.

On 10 January 2013 the complainant was informed that he was the subject of an investigation in relation to his involvement in the investigation of Mr L. and, in particular, his possible involvement in an act of retaliation against the whistle-blowers, a possible breach of confidentiality and whether he had continued to contact and/or communicate with Mr L. during the investigation. It was indicated that the Investigation Team would access his IOM e-mail account for the period July 2012 to December 2012.

The complainant was interviewed by the Investigation Team via videoconference on 7 February.

On 11 February 2013 the complainant sent additional information to the Investigation Team.

On 24 May 2013 the Investigation Team sent its preliminary findings to the complainant requesting that he respond to the evidence found. The complainant replied to the preliminary findings, asking that five witnesses be interviewed to confirm his innocence with respect to the allegation of retaliation. The suggested witnesses were not interviewed.

On 3 July 2013 the Administration transmitted the final Investigation Report and a summary of its findings to the complainant. The Administration considered that there was sufficient evidence to support a conclusion of serious misconduct, constituting grounds for disciplinary measures, with respect to the charges of retaliation against whistle-blowers, deliberate breach of confidentiality with regard to two investigations, against Mr L. in 2012 and against himself in 2013, and

unprofessional behaviour incompatible with IOM Standards of Conduct, including dishonest statement to the Investigation Team. He was asked to provide a written response.

The complainant replied on 15 July. He acknowledged that he had been in contact with Mr L. for programmatic reasons until 9 August 2012, at which point he had been instructed by IOM to stop that communication. Beyond that date Mr L. had been involved in some e-mail exchanges due to the fact that some interlocutors had not been informed of the investigation. He denied that that correspondence interfered with the pending investigation.

By a letter of 2 August 2013 (received on 19 August) the complainant was informed that it had been established beyond a reasonable doubt that he was guilty of serious misconduct. Taking into account mitigating circumstances, but in view of the seriousness of the acts of misconduct, both separately and jointly, the Director General had decided not to renew his contract beyond its expiry date of 31 August 2013.

On 9 September the complainant filed an Action Prior to the Lodging of an Appeal asking for the decision not to renew his contract to be reconsidered, which was rejected on 9 October.

The complainant filed an appeal on 7 November 2013 with the Joint Administrative Review Board (JARB), asking that the decision not to renew his contract be set aside, that he be reinstated and be awarded compensation for the moral and professional damages incurred.

In its report of 8 April 2014 the JARB found that, although “very serious mistakes” had been made in the course of the investigation, the Administration had acted within its authority when it decided not to renew the complainant’s contract. The JARB recommended dismissing the appeal and made a number of other recommendations relating to the need to develop procedures on conducting internal investigations.

By a letter of 24 April 2014 the Director General informed the complainant that he agreed with the JARB’s conclusion that there were no grounds to set aside the decision not to renew the complainant’s contract, but that he disagreed with its findings that very serious mistakes had been made as the general principles relevant to investigation procedures had been followed. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision not to renew his contract and to order his reintegration at grade P.4 with effect from February 2013. He asks the Tribunal to order that his staff evaluation report be amended in order not to reflect investigation-related inputs and to cancel the instruction IOM has given to his former supervisor to not act as a referee in his future job applications. He seeks material and moral damages under several heads, including for failing to appoint him when the CCCM Program Manager post was advertised and subsequently cancelling the competition, for breach of IOM's duty of care, and for the "missed opportunity" of being granted a special fixed-term contract in June 2013. He also claims costs. In his rejoinder the complainant asks the Tribunal to order the production of all relevant documents related to his application for the position of CCCM Program Manager. He abandons his claim for reinstatement and asks the Tribunal to assign him to a similar position.

IOM submits that the complaint should be dismissed as unfounded. In its surrejoinder it disputes the receivability of the complainant's claims concerning his non-selection for the position of CCCM Program Manager and his alleged entitlement to have his contract converted to a special fixed-term contract as of June 2013.

CONSIDERATIONS

1. On 2 August 2013, following an investigation into the complainant's alleged misconduct, the Director, Human Resources Management (HRM), informed the complainant that the Director General was of the view that it was established beyond a reasonable doubt that his actions, described in the letter, constituted serious misconduct. The letter also stated:

"After careful review of your written response of 15 July 2013 and taking into consideration mitigating elements that you have provided, but due to the seriousness of the acts of misconduct listed above, separately and jointly, the Director General has decided not to renew your contract beyond its expiry date of 31 August 2013. Consequently, your last date of employment with IOM shall be 31 August 2013."

2. On 24 April 2014, at the end of the internal appeal proceedings, the Director General maintained this decision. The complainant claims that in making this decision the Director General erred in law as his decision was based on the outcome of an investigation that involved violations of his due process rights; was not impartial; failed to take into account mitigating circumstances surrounding his interim position; and caused him prejudice. The complainant also contends that the impugned decision was not based on an expiration of contract but was based on alleged misconduct without the appropriate rules and guarantees usually attached to the termination of contracts.

3. In response, IOM points out that this case concerns the non-renewal of a contract on the ground of serious misconduct and is not a case involving the termination of a contract. It is convenient to observe that in his pleadings the complainant does not dispute that the impugned decision was a decision not to renew his contract. It appears that the reference to a termination decision was made to illustrate that the reason underpinning the decision was the alleged misconduct and not the expiration of the contract. IOM stresses that the decision not to renew the complainant's contract was not a disciplinary measure. Rather, it was a discretionary decision of the Director General which can only be reviewed on limited grounds. The IOM submits that instead of deciding not to renew the complainant's contract, the Director General could have imposed a disciplinary measure, which he opted not to do.

4. IOM's position must be rejected. Following the completion of the investigation into the alleged misconduct, on 3 July 2013 the Director, HRM, wrote to the complainant. In the letter, to which the Investigation Report was attached, the Director, HRM, summarized the findings in the Investigation Report. In relevant part, the letter states:

“The [I]nvestigation Team concluded, based on a review of all the facts that evidence shows beyond [a] reasonable doubt that you engaged in retaliation against the whistleblowers in relation to their July 2012 protected reporting. In addition, the Investigation Team found that the same evidence proves beyond [a] reasonable doubt that you breached the IN/15 on the Standards of Conduct [...].”

The letter also states:

“Based on the above, the Administration is of the view that there is sufficient evidence to support a conclusion of serious misconduct, constituting grounds for disciplinary measures pursuant to IOM Staff Regulation 10, in respect of the following conduct by you:

- i) Engagement in retaliation against the whistleblowers in relation to their report on [sexual exploitation and abuse] allegations made in July 2012;
- ii) Deliberate breach of confidentiality with regard to the two official IOM investigations against Mr [L.] in 2012 and against you in 2013; and
- iii) Unprofessional behavior incompatible with the IOM Standards of Conduct, including dishonest statement made to the Investigation Team.

Before any action is taken in respect of the above, you are requested to provide me with a written response to either refute the allegations of misconduct against you or to mitigate any possible disciplinary measures that might be instituted against you by 8 July 2013. Should no response be received from you by that date, IOM will proceed to take the necessary decisions regarding your conduct on the basis of the evidence described herein and in the attached Investigation Report.”

5. The complainant responded on 15 July. Nothing further transpired until the complainant received the 2 August 2013 letter according to which the Director General had found that it was established beyond a reasonable doubt that the actions detailed in consideration 4 constituted serious misconduct. A review of the record shows that prior to 2 August 2013, the only finding of serious misconduct beyond a reasonable doubt was in the 17 June 2013 Investigation Report. As well, there is nothing in the record indicating if or when the Director General determined that the serious misconduct had been established beyond a reasonable doubt. If he did rely on the conclusion reached in the Investigation Report, that reliance was misplaced. Such a conclusion was clearly beyond the scope of the Investigation Team’s mandate and Terms of Reference that were limited to fact-finding.

The Investigation Report, at paragraph 169, also states:

“Considering his current position in the mission’s hierarchy, and the circumstances that led to his temporary appointment, [the complainant’s] behavior was the antithesis of what should be expected on the part of a senior manager. In addition, this type of behavior which typically can discourage future reports by staff members, stands in blatant contradiction to relevant

IOM policies (including IN/142) and the current organization's priority to develop professionalism among staff. Since much of his misconduct was public among IOM staff members, it also opens the door to future negative behaviors towards whistleblowers in the mission. Finally, [the complainant's] professional conduct is unsatisfactory with regard to many [Staff Evaluation System] expected competencies, especially those related to accountability, communication, professionalism and teamwork."

This was the expression of an opinion that does not belong in a fact-finding report, was highly prejudicial to the complainant and undermines the fairness of the reporting.

6. IOM Staff Regulation 10(b) sets out the disciplinary measures the Director General may impose on a staff member. It provides that the disciplinary measures "may take the form of any one or a combination of" a "written warning; written reprimand; reduction of salary within grade; demotion to a lower grade; discharge after due notice; summary dismissal". Although it is true that the non-renewal of a contract is not one of the disciplinary measures that the Director General may impose pursuant to Staff Regulation 10(b), it does not follow, as IOM contends, that the decision not to renew the complainant's contract was a discretionary decision. A finding of misconduct is one that is only made in the context of a disciplinary process. For example, in contrast with an administrative determination regarding unsatisfactory service, misconduct must be proved beyond a reasonable doubt, a standard of proof that is only applicable in a disciplinary proceeding. Further, a finding of misconduct is the final step in the disciplinary process before the imposition of a disciplinary measure.

7. In the present case, it is not disputed that the decision not to renew the complainant's contract was based solely on the finding of misconduct. In these circumstances, the only conclusion that can be drawn is that the non-renewal of the complainant's contract was not an administrative discretionary decision, it was a disguised disciplinary measure and was unlawful. The case law consistently states that even if an organization's regulations, rules and other relevant documents do not provide for formal disciplinary procedures, the disciplinary process requires that "before deciding a disciplinary sanction" the concerned

staff member must be given “ample opportunity to take part in adversarial proceedings, in the course of which he is given the opportunity to express his point of view, put forward evidence and participate in the processing of the evidence submitted in support of the charges against him” (see Judgment 3682, consideration 12).

8. Having initiated a disciplinary process, fairness dictates that it was incumbent on the organization to bring the disciplinary process to a close. This necessitates a decision dismissing the allegations or the imposition of a disciplinary measure. This was not done.

Paragraphs (c) and (d) of Staff Regulation 10 state:

“(c) Disciplinary measures shall be imposed in accordance with the requirements of due process and shall be commensurate with the gravity of the offence committed.

(d) As a rule, the Director General shall bring proposed disciplinary measures to the attention of the Staff Association Committee for consideration. Any recommendations by the Staff Association Committee pertaining thereto shall be considered by the Director General before taking final action.”

9. The Director General’s unlawful imposition of a disguised disciplinary measure deprived the complainant of the requirements of due process and consultation with the Staff Association Committee that would have been open to him in an adversarial proceeding had a disciplinary measure been imposed.

10. Accordingly, the Director General’s 24 April 2014 and 2 August 2013 decisions will be set aside, IOM will be ordered to remove all materials in the complainant’s personnel file in relation to the findings of misconduct and any decision(s) taken as a result of those findings. The complainant initially asked the Tribunal to order his reinstatement. However, subsequently, in his rejoinder, he abandoned that request and asked the Tribunal to assign him to another similar post. This request is rejected as the Tribunal cannot assign officials to a different post. However, the complainant is entitled to an award of moral damages in the amount of 30,000 United States dollars and costs in the amount of 7,000 dollars.

DECISION

For the above reasons,

1. The Director General's 24 April 2014 decision is set aside, as is his earlier decision of 2 August 2013.
2. IOM shall pay the complainant moral damages in the amount of 30,000 United States dollars.
3. IOM shall pay the complainant costs in the amount of 7,000 dollars.
4. IOM shall within 15 days of the date of the public delivery of this judgment remove all materials in the complainant's personnel file in relation to the allegations and findings of misconduct and any decision(s) taken in relation to those allegations and findings.
5. All other claims are dismissed.

In witness of this judgment, adopted on 16 May 2017, 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 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ