A.

v.

IOM

125th Session **Judgment No. 3947**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr O. F. M. A. against the International Organization for Migration (IOM) on 30 September 2015 and corrected on 27 November 2015, IOM's reply of 21 March 2016, the complainant's rejoinder of 25 April and IOM's surrejoinder of 8 August 2016;

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 may be summed up as follows:

The complainant impugns the decision to terminate his fixed-term contract.

The complainant joined IOM's mission in Amman, Jordan, as a General Service staff member in April 2008. In October 2009 he was appointed to a Professional category post at grade P1. In December 2013 he was engaged as a Field Supervisor, at grade P2, for an IOM project with the Bagdad Resettlement Support Centre, Iraq. At the material time he held a fixed-term contract which was due to expire on 31 August 2015.

On 1 March 2015 the complainant was verbally informed that his contract would be terminated on 31 May 2015. On 2 March 2015 he received a letter dated 1 March 2015 confirming that his contract would be terminated on 31 May 2015 due to a lack of funding. On 1 May 2015 he sent an e-mail to Mr P.L., then Director of the IOM Regional Office for the Middle East and North Africa and member of the Staff Association Committee, entitled "Termination of Contract". In that e-mail, which was also copied to the Staff Association Committee group e-mail address, the complainant wrote: "I would like to appeal this termination decision" and "I am sending you this email to consider as an appeal and a complaint to the decision that was taken against me". On 31 May 2015 the complainant separated from IOM.

On 7 June 2015 he sent an e-mail entitled "Request for Exceptional Review" to the Director of the Human Resources Management Division (HRMD), with a copy to the Staff Association Committee Secretariat and his counsel. As an attachment to this e-mail, the complainant sent the Director of HRMD a letter dated 6 June 2015 in which he requested an exceptional 15-day extension of the time limit for submitting a request for review of the decision to terminate his contract or, failing that, the Director General's authorisation to file a complaint directly with the Tribunal. By a further e-mail of 11 June 2015, he sent the Director of HRMD a corrected version of his request.

In an e-mail of 1 July 2015, the Chief, HR Policy and Advisory Services, informed the complainant that the Administration could not agree to an extension of the time limit to submit a request for review and that, in the event that he filed a complaint directly with the Tribunal, IOM would contest its receivability. This decision was subsequently confirmed in a further e-mail sent to the complainant on 6 July 2015. On 30 September 2015 the complainant filed a complaint with the Tribunal against the decision of 1 July 2015.

The complainant requests that the Tribunal consider his case receivable so that he may then submit it to the Joint Administrative Review Board (JARB) or the Tribunal. He claims compensation for moral and professional damage and reimbursement of legal fees.

IOM asks the Tribunal to dismiss the complaint as irreceivable for failure to comply with the applicable internal appeal procedures and time limits.

CONSIDERATIONS

1. Receivability is the only issue that arises for determination on this complaint. The complainant seeks to set aside the decision of 1 July 2015 in which the Administration rejected his request for an exceptional 15-day extension of time to submit a request for review of the prior decision to terminate his contract three months before its due expiry date on 31 August 2015. On 1 March 2015 he had been verbally notified of the termination decision and he received written confirmation on 2 March 2015 that his contract would be terminated due to a lack of funding for his position and funding constraints for the completion of the programme.

2. IOM contends that the complaint is irreceivable on two grounds. It argues, on the one hand, that the complainant did not exhaust the internal means of redress before filing the complaint, as Article VII, paragraph 1, of the Tribunal's Statute requires. In the second place, it argues that the complaint is out of time because it was not filed within ninety days of the complainant's notification of the decision impugned, as Article VII, paragraph 2, of the Tribunal's Statute requires.

3. Article VII, paragraphs 1 and 2, of the Tribunal's Statute relevantly states as follows:

> "1. A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations.
>
> 2. To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned [...]."

4. Regarding Article VII, paragraph 1, consistent principle has it that a complainant must comply with the time limits and the procedures, as set out in the organisation's internal rules and regulations. The following was stated, for example, in Judgment 1653, consideration 6:

> "According to Article VII, paragraph 1, of the Tribunal's Statute, a complaint 'shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations'. So where the staff regulations lay down a procedure for internal appeal it must be duly followed: there must be compliance not only with the set time limits but also with any rules of procedure in the regulations or implementing rules."

In the same vein, it was stated in Judgment 1469, consideration 16, that to satisfy the requirement in Article VII, paragraph 1, that internal means of redress must be exhausted, the complainant must not only follow the prescribed internal procedure for appeal, but she or he must follow it properly and in particular observe any time limit that may be set for the purpose of that procedure.

It has also been stated that a staff member of an international organisation cannot of her or his own initiative evade the requirement that internal remedies must be exhausted prior to lodging a complaint with the Tribunal. Accordingly, the following was relevantly stated in Judgment 3458, consideration 7:

> "It is firm case law that a staff member is not allowed on his or her own initiative to evade the requirement that internal means of redress must be exhausted before a complaint is filed before the Tribunal (see Judgments 3190, under 9, and 2811, under 10 and 11, and the case law cited therein)."

There are limited exceptions to the requirement in Article VII, paragraph 1. The following was relevantly stated in Judgment 3714, consideration 12:

> "The Tribunal has established through its case law that exceptions to the requirement of Article VII, paragraph 1, of the Statute that internal remedies be exhausted will be made only in very limited circumstances, namely where staff regulations provide that the decision in question is not such as to be subject to the internal appeal procedure; where for specific reasons connected with the personal status of the complainant she or he does not have access to the internal appeal body; where there is an inordinate and inexcusable delay in the internal appeal procedure; or, lastly, where the parties have mutually agreed to forgo this requirement that internal means of redress must have been exhausted (see, in particular, Judgments 2912, consideration 6, 3397, consideration 1, and 3505, consideration 1). Moreover, the complainant bears the burden of proving that the above conditions are satisfied [...]."

5. With respect to Article VII, paragraph 2, of the Tribunal's Statute, the Tribunal's case law requires strict adherence to the ninety-day time limit on the grounds that time limits are an objective matter of fact and that strict adherence is necessary for the efficacy of the whole system of administrative and judicial review of decisions. It was relevantly stated in Judgment 3559, consideration 3, that:

> "Article VII, paragraph 2, of the Tribunal's Statute provides that "[t]o be receivable, a complaint must [...] have been filed within ninety days after the complainant was notified of the decision impugned". It is not within the competence of the Tribunal to extend this period of time set forth by the Statute. As the Tribunal has repeatedly stated, this time limit is an objective matter of fact and the Tribunal will not entertain a complaint filed after it has expired. Any other conclusion, even if founded on considerations of equity would impair the necessary stability of the parties' legal relations, which is the very justification for the time bar. The ninety-day period begins to run on the day following the date of notification of the impugned decision. Where the ninetieth day falls on a public holiday, the period is extended until the next business day (see Judgments 2250, under 8, 3393, under 1, and 3467, under 2)."

The foregoing has also been confirmed in Judgments 3304, consideration 2, 3545, consideration 2, and 3838, consideration 1.

6. IOM states that the complainant did not exhaust the internal means of redress because he did not contest the termination decision in accordance with the procedures and timelines provided by IOM's Staff Regulations and Rules for contesting that decision. IOM notes, in particular, that the complainant did not submit a request for review, which pursuant to Instruction IN/217 is the first step in the internal appeal process, within the specified timeframe or in the prescribed form. The Tribunal observes that paragraph 5(a) of IN/217 requires a staff member in the Professional category, as the complainant was at the material time, to initiate that process by submitting the request for review to the Director of HRMD, copying it to the Chief of Staff. Paragraph 6 requires the request to be made in the form provided in Appendix A, while paragraph 8 requires the request to be made "within 60 calendar days after [the staff member] received notification of the [...] decision [...]".

7. On 1 May 2015 the complainant sent an e-mail to Mr P.L., who was the Director of the IOM Regional Office for the Middle East and North Africa, copied to the Staff Association Committee and addressed to "Dear [Staff Association Committee] Members". At that time Mr P.L. was also a member of the Staff Association Committee. That e-mail communication explained the manner in which the complainant was verbally informed at a meeting of 1 March 2015 of the decision to terminate his contract stating that he was also told, in effect, that his termination was certain since, additionally, "his Baghdad vetting [had] been denied". The complainant further informed the recipients: "I would like to appeal this termination decision" and he added that he had already submitted the signed termination letter, as he felt that his work and dedication were never acknowledged and thought that he would not be assisted. He ended by stating that he was sending them the e-mail "to consider as an appeal and a complaint to the decision that was taken against [him]".

8. The complainant urges the Tribunal to accept his e-mail of 1 May 2015 as a request for review notwithstanding that it was not in the prescribed form. Principle has it that the right to lodge an internal appeal is not lost if the appeal is sent to the wrong body. The following was accordingly relevantly stated in Judgment 3027, consideration 7:

> "[I]n Judgment 1832, under 6, it was held that a staff member did not lose his right to appeal simply because the appeal was sent to the wrong internal body. It was said in that case:
>
> > 'If the staff member appeals in time but makes the wrong choice between Council and President, there is nothing in the rules to prevent correction of the mistake. After all, both Council and President are authorities within one and the same Organisation.'."

This statement makes it plain that in order to rely on the foregoing principle, the appeal, in whatever form and to whomever addressed, must be lodged in time. The initiating communication in the present case was the e-mail of 1 May 2015, which ought to have been lodged within the sixty calendar days after the complainant was notified of the termination decision, as paragraph 8 of IN/217 required.

9. The complainant states that his e-mail of 1 May 2015 was sent and received within the sixty-day time limit for lodging his request for review because "the termination decision was received on 2 March 2015 and as per the rules [he should have submitted the request for review] within 60 days, that is on 3 May 2015". However, paragraph 8 of IN/217 does not mandate notification to be in writing. The notification of the termination decision may have taken any form which informed the complainant of the subject decision (see Judgment 3505, consideration 8, and the judgments cited therein). Having been verbally notified of the termination decision on 1 March 2015, the complainant's deadline for sending a request for review was 30 April 2015. The complainant's e-mail of 1 May 2015 was therefore out of time, as it was in breach of the requirement of paragraph 8 of IN/217. He has therefore not exhausted the internal means of redress pursuant to Article VII, paragraph 1, of the Tribunal's Statute.

10. The complainant submits that he should be exempted from the general rule that time limits are to be stringently applied because IOM did not act in good faith: it provided him with no guidance or assistance in lodging his internal appeal, thus frustrating his attempts to exercise that right; it refused his request to extend the time limit to permit him to lodge his request for review; and it terminated his contract in the circumstances in which it did. However, the Tribunal finds no exceptional grounds in the case law, as stated in Judgment 3714, consideration 12 (reproduced in consideration 4 above), on which to waive the requirement that the complainant ought to have exhausted the internal means of redress before he lodged his complaint with the Tribunal. Among other things, there was no mutual agreement between the parties to forgo that requirement.

11. Moreover, having been notified of the decision of 1 July 2015 not to extend the time limit within which he was to submit his request for review, the complainant filed his complaint to the Tribunal ninety one days thereafter (on 30 September 2015). The complaint was therefore filed outside of the ninety-day time limit stipulated in Article VII, paragraph 2, of the Tribunal's Statute. Contrary to the complainant's

assertions, the Tribunal sees no evidence that IOM misled him so as to deprive him of the possibility of exercising his right of appeal in breach of the principle of good faith. Neither does the Tribunal find any evidence that IOM acted in bad faith.

12. In the foregoing premises, the complaint is irreceivable and will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2017, Mr Giuseppe Barbagallo, 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 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ