

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

P.
v.
IOM

128th Session

Judgment No. 4152

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. P. against the International Organization for Migration (IOM) on 21 January 2017 and corrected on 14 March, IOM's reply of 24 July, the complainant's rejoinder of 19 December 2017, IOM's surrejoinder of 12 April 2018, and the documents submitted by IOM on 28 March 2019 and by the complainant on 2 April 2019 at the Tribunal's request;

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 challenges the circumstances in which he was separated from service upon the expiry of his special leave without pay (SLWOP), and the refusal to pay him a termination indemnity.

The complainant is a former staff member of IOM. He joined IOM's office in Rome (Italy) in August 2003 and, as of May 2005, he held a special appointment for international staff, ungraded, which was extended several times.

In July 2013 a government Minister wrote to the Director General stating that she would like the complainant to join her Ministry temporarily. She asked him to consider favourably the complainant's

request for “special leave” to be “seconded” to work with her. The Director General replied that he would ask the Administration to give favourable consideration to her request. The Administration subsequently informed the complainant that it had received information regarding his SLWOP and asked him to confirm when the special leave would begin.

By an email of 7 August 2013 the complainant was informed that his SLWOP for the period August 2013 to August 2014 had been approved. Instruction IN/100 on SLWOP was attached, and his attention was drawn to the fact that during the period of SLWOP he remained a staff member but that IOM was not able to guarantee that a position commensurate with his qualifications and experience would be available upon the expiry of his SLWOP, though every possible effort would be made to facilitate his return. An exchange of correspondence ensued concerning the duration of his SLWOP, which ultimately commenced on 26 August 2013 for an initial period of four months.

In November 2013 the complainant requested an extension of the SLWOP for an additional five months, which was granted. In February 2014 he ceased working for the Ministry, but his SLWOP was extended several times. In June 2014 he worked for IOM as a consultant for a period of three weeks.

On 24 July 2015 Human Resources Management (HRM) informed the complainant that by 25 August he would reach the maximum allowable period of SLWOP and that documents relating to the separation formalities effective upon the end of his SLWOP would be sent to him. The complainant, whose contract had been extended until 25 August “to cover Special Leave without Pay”, enquired on 28 July whether this was a final decision on the termination of his employment. HRM replied the following day that, according to the applicable rules, the total period of SLWOP should not exceed two years, and that separation from service would therefore have to take place. It stressed that IOM could not guarantee return from SLWOP unless there was a suitable position available, and that it had not been able to identify a suitable position for him. HRM added that a third year of SLWOP may, exceptionally, be granted “with the concurrence of the [Staff Association

Committee]” and invited him to submit a reasoned request for that purpose.

An exchange of emails ensued in which HRM confirmed that the complainant would be considered as an internal candidate as long as he was on SLWOP and encouraged him to continue applying for vacant positions, but the complainant indicated that he was reluctant to request a further extension of his special leave, given that IOM appeared to have made no efforts to reinstate him since his work at the Ministry had ended. In an email of 24 August 2015, he formally requested his reinstatement in a post at IOM upon the expiry of his special leave. On 7 September 2015 the Chief of Human Resources Policy and Advisory Services replied that IOM was unable to accommodate that request and that, as his SLWOP had ended on 25 August, separation formalities would be initiated unless he submitted a request for an extension of the special leave by 18 September 2015.

On 7 October 2015 the complainant received documents relating to his separation from service. He was asked to acknowledge receipt and to return the duly completed forms. By an email of 26 October 2015 he submitted a request to the Director of HRM asking that the “decision on the end of service, as communicated on 7th of October 2015” be reviewed. He claimed material damages corresponding to his salary for the period 21 February 2014 to 29 October 2015, moral damages and costs. His request was rejected by a letter of 22 December 2015 as time-barred and unfounded. On 20 January 2016 he filed an internal appeal with the Joint Administrative Review Board (JARB) challenging the decision of 22 December 2015.

On 8 March 2016 the complainant received a Personnel Action Form relating to his separation effective 26 August 2015. He wrote to the Administration enquiring about the payment of the “Terminal emolument”. On 22 April HRM “confirm[ed]” that he was not eligible to receive a termination indemnity because his contract had not been terminated.

On 5 May 2016 the complainant submitted a second request for review to the Director of HRM, challenging the decision not to pay him a termination indemnity. On 13 June this request for review was

rejected as time-barred on the grounds that he had been informed on 7 October 2015 about the formalities concerning his separation from service and had not challenged that decision within the prescribed time limits. In any event the request was unfounded as his contract had not been terminated. On 11 July 2016 he filed a second internal appeal with the JARB arguing that he had not elected to separate from service and that his contract had been terminated. He requested the payment of the termination indemnity together with costs. Alleging unequal treatment, he also asked the JARB to request information concerning staff who had worked in the Rome office in the last ten years and who had claimed and received the termination indemnity. On 27 July the complainant was informed that the Director General had decided to join his two internal appeals. The complainant objected to no avail.

In its report of 30 September 2016, the JARB stated that in light of the Director General's decision to join the two internal appeals, it had examined the internal appeals as part of the same process. It found that the first appeal was time-barred as the complainant had failed to contest the decision of 7 August 2013, which confirmed that his SLWOP was approved, within the prescribed time limit. It considered that the second appeal concerning the payment of the termination indemnity was also time-barred, as the separation documents had been sent to the complainant on 7 October 2015, but he had raised that issue only in May 2016 when he had submitted his second request for review. The JARB concluded that the complainant's contract had not been terminated but that his SLWOP had come to an end, and that he was therefore not entitled to a termination indemnity. However the JARB also stated that it did not understand the reasons for granting the complainant SLWOP and how the procedures concerning SLWOP were applied. It recommended that Instruction IN/100 be reviewed and updated to reflect existing practices.

On 24 October 2016 the Director General notified the complainant that he had decided to reject his internal appeals as time-barred, in accordance with the JARB's opinion. He also agreed with the JARB's finding that, in any event, the complainant was not entitled to a

termination indemnity as his contract had not been terminated. That is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to quash the impugned decision and to order that he be reinstated in a suitable post. He claims payment of the full salary and allowances he would have received from 23 February 2014 to 25 August 2015 and from 26 August 2015 to the date of his reinstatement, inclusive of all entitlements (including medical insurance), and 5 per cent interest. He claims the payment of an amount equivalent to three months' salary in lieu of notice. If the claim for reinstatement is denied he seeks the payment of the termination indemnity. In addition, he seeks an award of moral damages for the "illegal joinder" of his internal appeals and "for prolonged demeaning treatment [...] during his [SLWOP] and [IOM's] failure to reinstate him". Lastly, he claims costs.

IOM asks the Tribunal to dismiss the complaint as irreceivable on the grounds that the complainant's requests for review were time-barred, and because he failed to exhaust internal means of redress with respect to his claims for reinstatement and for payment of salary from 26 August 2015. Subsidiarily, it asks the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS

1. This complaint arises out of the complainant's two internal appeals, which were consolidated, contesting IOM's decision to separate him, as well as the decision rejecting his request to be paid termination indemnity. The impugned decision, dated 24 October 2016 which the complainant seeks to set aside, accepted the JARB's recommendation that both internal appeals be dismissed as irreceivable.

2. The complainant joined IOM on 1 August 2003 as Head of SID (Decentralized Intervention System) Unit/Head of Central Service. From 1 May 2005 he was employed under a special appointment as International Staff, ungraded. His appointment was extended several times. The Administration granted him SLWOP in August 2013 to facilitate his work with a government Ministry and extended his

appointment, which at that time was a special short-term appointment, to cover the period of SLWOP. However, the complainant ceased working with the Ministry in February 2014 because of changed circumstances. This was before his SLWOP that was then current expired on 25 May 2014. He sought to be reinstated in IOM but that was not achieved during the subsisting SLWOP nor during the extensions of his SLWOP to 25 August 2015. By this date he had been granted the maximum two-year period of SLWOP pursuant to paragraph 2 of Instruction IN/100. His appointment with IOM had been extended on various occasions, eventually to 25 August 2015 to cover his SLWOP to that date. The evidence shows that on 24 July 2015, one month before his SLWOP and contract of employment were due to expire, HRM informed the complainant that he would reach the maximum allowable period of SLWOP and that the documents for his separation formalities effective at the end of it would be sent to him. The evidence further shows exchanges of communications between the complainant and HRM that culminated in IOM sending him the communication of 7 October 2015 relating to his separation from service. Notwithstanding the email of 24 July 2015, he states that it was not clear to him that he was separated before the separation formalities were sent to him on 7 October 2015.

3. The complainant contends that when IOM separated him from its service it had in effect unlawfully terminated his employment without notice. He insists that his case “is not about SLWOP and [his] separation from service upon expiration thereof, but about the unlawful termination of a *sui generis* arrangement amounting to a constructive dismissal”. He also argues that by separating him, IOM breached its duty to reinstate him in a suitable post after his SLWOP ended; it lacked lawful authority to dismiss him from his position as the Head of SID; it wrongfully failed to pay him a termination indemnity, which he states was synonymous with terminal emolument, and thereby subjected him to demeaning and unequal treatment. He further argues that IOM harmed his professional reputation.

4. As to remedies, the complainant seeks the full salary and allowances that he would have received from 23 February 2014 to 25 August 2015 and from 26 August 2015 to the date of his reinstatement,

inclusive of all entitlements, and 5 per cent interest thereon. This, he states, is because IOM decided to send him to work with the Ministry on SLWOP, causing him to believe that his reinstatement into IOM was assured once his work with the Ministry ceased, but it made no attempts to assist him to be reinstated. The complainant further seeks an order that IOM pay him three months' salary in lieu of notice terminating his employment; termination indemnity if he is not reinstated; moral damages "for the illegal joinder of [his] two appeals by the Director-General"; moral damages "for prolonged demeaning treatment [...] during his [SLWOP] and [IOM's] failure to reinstate him", as well as costs.

5. As the complainant's claim that his employment was unlawfully terminated and his claim for the termination indemnity have their foundation in the same factual and legal background, their joinder in the internal appeal process was in the interest of economy of administrative time and resources. The complainant had submitted his second request for review on 5 May 2016 just weeks after he had filed his rejoinder in his first internal appeal on 22 April 2016. His second request for review was rejected on 13 June 2016 and he submitted his second internal appeal on 11 July 2016. On 27 July he was informed that the Director General had decided to join the two internal appeals. The JARB issued its report on both appeals on 30 September 2016. As any delay likely caused by the joinder was short, the complainant's contention that the Director General's decision to join his two internal appeals (thereby delaying the examination of his first appeal) is no ground for the award of moral damages as he claims. That claim accordingly fails.

6. It appears that the complainant is contesting the decision to grant him SLWOP. He states, among other things, that IOM mistakenly considered that his leave to work with the Ministry was an ordinary SLWOP which is normally based on specific reasons and is usually given on a request by the staff member concerned. He insists that the circumstances of his case are different as, among other things, he made no request for SLWOP as the relevant rules required and his SLWOP was in the nature of a secondment. However, any aspect of the complaint which purports to contest the decision to grant him SLWOP

to work with the Ministry is time-barred and accordingly irreceivable. The complainant accepted SLWOP, signed the agreements and did not contest the decision to put him on SLWOP in a timely manner. The initial decision to grant him SLWOP became final in 2013. He apparently accepts this when he states in his pleas that “October 2015 was too late to appeal against the decision to grant [him] SLWOP in 2013”. The complainant’s claim to be reinstated in a suitable post in IOM is also irreceivable. He did not plead it in the internal appeal proceedings and therefore did not exhaust the internal means of redress that were open to him in relation to that allegation, as Article VII, paragraph 1, of the Tribunal’s Statute required.

7. The complainant insists that the Administration’s statement in response to his first internal appeal was irreceivable in those proceedings and, by extension, in the Tribunal. This, he submits, is because the Director of HRM did not transmit it to the JARB’s Chairperson within 55 calendar days of receiving his internal appeal in January 2016 as paragraphs 33 and 34 of Instruction IN/217 required. This plea is unfounded. As IOM explained, notwithstanding that the appeal was filed on 20 January 2016, IOM did not receive it and the annexes thereto in complete form to permit it to fully examine the appeal and to respond to it appropriately until 7 February 2016. The 55 calendar days’ time limit therefore required the statement to be filed on 2 April 2016. However, that day being a Saturday, the statement was filed within the required time on 4 April 2016 as paragraph 76 of Instruction IN/217 states that if a deadline therein falls on a Saturday, Sunday or on an official IOM holiday, that deadline “shall be automatically advanced to the next working day”.

8. The complainant contends that the impugned decision is procedurally flawed because it was not properly motivated. He insists that the Director General should have better explained the reasons why he agreed with the JARB’s recommendation that his appeals were irreceivable. He is mistaken and this plea is unfounded. In the impugned decision the Director General noted the JARB’s finding that the complainant’s internal appeals were irreceivable because they were

time-barred. He agreed with that finding and confirmed that the internal appeals were time-barred “for the reasons explained by the JARB as well as by the Administration in its submissions during the Appeal procedures”. Inasmuch as the Director General accepted and adopted the recommendations of the JARB, he was not obliged to give any further reasons than those which the JARB gave if those reasons were adequate, which they were (see, for example, Judgments 3725, under 23, and 4044, under 6 and 7).

9. IOM contends that the complaint is irreceivable. This mirrors the JARB’s finding that was accepted in the impugned decision. Paragraph 8 of Instruction IN/217 requires an IOM staff member, as a first step to contest an administrative decision, to submit a request for review within 60 calendar days after receiving notification of the decision. The Tribunal holds that the complainant’s first request for review of the decision to terminate his appointment was time-barred when he submitted it by email on 26 October 2015. The evidence shows that HRM notified the complainant, in an email of 24 July 2015, that by 25 August 2015 he would have reached the maximum allowable period of SLWOP and that, “[i]n view of this and in reference to [HRM’s] email on [his] SLWOP dated 7 August 2013”, the corresponding separation formalities effective upon the end of his SLWOP would be sent to him. In this respect, the email of 7 August 2013, which explained the conditions governing his SLWOP, stated the following:

“Upon request and provided that you remain eligible, an extension of SLWOP may be granted [for] a maximum period of 1 year. As a rule, the total period of SLWOP shall not exceed 2 years. You must initiate and seek approval from MHRO for the extension of the SLWOP indicating the reason and supporting documentation for said extension no later than one (1) month before the expiry of the SLWOP. Otherwise, it is understood that the SLWOP will end and separation will be initiated.” (Emphasis added.)

It was therefore the decision of 24 July 2015 which the complainant had to contest, as nothing in the subsequent communications between him and the Administration (as disclosed in the facts) provided for concluding that there was a further decision not to renew his contract. That arguably may have been different had he submitted the application

for the exceptional extension of his SLWOP as HRM had invited him to do, but he did not. As the request for review was time-barred, his complaint relating to it is irreceivable pursuant to Article VII, paragraph 1, of the Tribunal's Statute. The complainant's claim, in his second request for review, for termination indemnity is plainly unfounded. As indicated in Staff Rule 9.6.1 and in paragraph 1(d) of Annex 15 to the Staff Regulations and Rules, he had no entitlement to that benefit. Neither was that benefit provided for in his initial or subsequent contracts.

10. In the foregoing premises, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

ANDREW BUTLER