

**S. B.**

**v.**

**IOM**

**131st Session**

**Judgment No. 4340**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs M. I. S. B. against the International Organization for Migration (IOM) on 5 August 2019 and corrected on 30 August 2019, IOM's reply of 6 January 2020, the complainant's rejoinder of 11 February and IOM's surrejoinder of 10 June 2020;

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 Director General's decision not to provide her with a copy of the decision taken on her request for review previously sent to her by e-mail.

The complainant joined IOM in May 2008. In January 2018, while on maternity leave, she was notified that her position of National Project Officer would be abolished effective 30 April 2018 as a result of a downsizing exercise. She was also informed that she could apply for the new G7 position that would be advertised subsequently. On 1 February 2018 the complainant was notified that she had not been selected for that position. On 22 February 2018 she submitted a request for review challenging her non-selection for the G7 position. In April 2018, the complainant consented to IOM's request for an extension of the deadline to render a decision from 22 April to 30 April 2018. As she would not

have access to her professional mailbox after her last day at work scheduled for 27 April 2018, she and the Administration agreed that the decision would be sent to the complainant's private e-mail address which she had provided in her request for review. At IOM's request, the complainant also provided a second private e-mail address.

On 30 April 2018 the decision on the request for review was sent to the complainant's private e-mail address that she had indicated on her request for review. On 18 July the complainant informed the Administration that due to technical issues with her e-mail account, she was not able to find the e-mail communicating the decision on her request for review. She asked for confirmation of whether or not the decision had been sent to her and, if so, whether she could have a copy of it. On 26 July the Administration indicated to the complainant that irrespective of whether or not it had replied to her request for review, she had "30 days from 30 May 2018 to lodge an appeal" in accordance with Instruction No. 217 Rev.2 (IN/217 Rev.2), which concerns requests for review and appeals to the Joint Administrative Review Board (JARB). On 3 August, after the complainant had reiterated her request to be provided with a copy of the decision, the Administration replied that her request was irrelevant at this point in time insofar as the deadlines for any potential appeal had elapsed.

By a letter of 8 August, the complainant requested the Director of Human Resources Management (HRM) to exercise his discretion to grant her, in light of the exceptional circumstances in which her employment had ended, an extension of the applicable time limits in order for her to pursue the internal review process. On 30 August the Director of HRM reiterated that it was irrelevant to determine whether or not a decision was taken on her request for review since the deadline for any potential appeal had elapsed. He specified that IOM would not send a copy because this might re-open the timeline within which she could submit an internal appeal. On 19 September the complainant's legal counsel requested a copy of the decision of 30 April 2018. By a letter of 28 September, the Director of HRM confirmed IOM's decision not to send the complainant a copy of the 30 April 2018 decision on the basis that all matters raised in her request for review had become time-barred. He added that insofar as the Organization was not required to respond to a request for review, it was open to the complainant to appeal the implied rejection to the JARB within the prescribed time limits. Given

that she had failed to do so, sending a copy of the decision would have the effect of reopening the time period for appeal.

On 26 October 2018 the complainant lodged an internal appeal with the JARB against the refusal to provide her with a copy of the decision and requesting that the JARB consider the substance of her request for review. In its report of April 2019, the JARB found that the Administration had provided proof that the decision was sent on 30 April 2018 and that IOM could not be held accountable for the fact that the complainant did not receive the e-mail due to technical problems. It therefore concluded that the internal appeal was time-barred and decided not to rule on the merits of her claims related to the selection process for the G7 position. By letter of 13 May 2019, the Director General endorsed the JARB's recommendation and decided to dismiss the complainant's internal appeal as irreceivable. He noted that the complainant had not presented any exceptional circumstances that would justify reopening the time limits, and that providing her with a copy of the 30 April 2018 decision beyond the deadline for submitting an internal appeal would have impaired the necessary stability of the internal justice process. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision of 13 May 2019 and to quash the JARB's report. She seeks a declaration that IOM is required to produce a copy of the 30 April 2018 decision on her request for review and that the applicable time limits to appeal that decision be reopened upon receipt thereof by the complainant. She further requests material damages in the amount of 8,000 United States dollars or such amount the Tribunal deems appropriate for the procedural breaches committed by IOM in refusing four times to provide a copy of the decision at stake. The complainant seeks moral damages in the amount of 10,000 United States dollars or such amount the Tribunal deems appropriate as well as the payment of 5,000 pounds sterling for costs.

IOM asks the Tribunal to dismiss the complaint in its entirety as irreceivable and otherwise devoid of merit.

## CONSIDERATIONS

1. The question to be determined on this complaint is whether the impugned decision of 13 May 2019 was wrong, when it accepted the JARB's conclusion and recommendation to dismiss the complainant's

internal appeal on the basis that that appeal was irreceivable because it was time-barred.

2. In her request for review, dated 22 February 2018, the complainant had stated that she applied for the advertised G7 position but that she was not selected due to personal reasons through an unfair and biased selection process. She therefore requested that the selection process for the position be reviewed by an impartial Appointment and Postings Board and that the interviews for that G7 position be conducted again by a Panel that is not influenced by the Chief of Mission. She also stated that the decision not to select her infringed her right to work, as well as the rights she enjoyed as a staff member on maternity leave and that the matter had affected her health.

3. Paragraph 9 of IN/217 Rev.2, which provides the procedures that govern requests for review and appeals to the JARB, required the Administration to respond to the complainant's request for review in writing within 60 calendar days of its receipt of that request. The reply was therefore due by 22 April 2018. However, in accordance with paragraph 10, at the Administration's request, the complainant agreed to extend that time limit to 30 April 2018. They also agreed that the decision would be sent to the complainant's private e-mail address which she had submitted with her request for review. At the Administration's request, she provided another e-mail address on 20 April 2018. On 30 April 2018, the Administration sent the decision rejecting her request for review by way of an e-mail attachment to the e-mail address that was on the request for review. As the facts disclose, the complainant, who asserted that she had not received that e-mail because of technical problems, asked the Administration several times to provide her with a copy of the decision. She eventually submitted her internal appeal to the JARB on 26 October 2018 challenging the decision not to select her for the G7 position for which she had applied and the refusal to provide her with a copy of the decision on her request for review. The Director General dismissed it as irreceivable in the decision of 13 May 2019, which the complainant impugns.

4. It is convenient to reproduce paragraphs 10 and 13 to 15 of IN/217 Rev.2 so far as they are relevant to the issue of the receivability of an internal appeal to the JARB for the purpose of the present case. They state as follows:

“10. The Administration and the staff member may mutually agree in writing to a suspension or extension of the time limits set forth above for the staff member’s submission of a Request for Review and/or the Administration’s reply to the Request for Review.

[...]

13. If the Administration responds to the staff member’s Request for Review [...] within 60 calendar days of receipt thereof (see paragraph 9 of this Instruction), and the staff member wishes to appeal against this response, he or she must do so within 30 calendar days of receipt of the response. [...]

14. If the Administration does not respond to the staff member’s Request for Review [...] within 60 calendar days of receipt thereof (see paragraph 9 of this Instruction), the staff member may within the following 30 calendar days appeal against the contested administrative action, decision, omission or disciplinary action.

15. The Administration and the staff member may mutually agree, in writing, to a suspension or extension of the time limits set forth above for the staff member’s submission of an Appeal.”

5. IOM argues that the complaint is irreceivable in the Tribunal as, having not submitted her internal appeal to the JARB within the stipulated time limit in paragraph 13 of IN/217 Rev.2, the complainant failed to exhaust the internal means of redress that were open to her, as required by Article VII, paragraph 1, of the Tribunal’s Statute. IOM also refers to the Tribunal’s consistent statement that strict adherence to time limits is essential to have finality and certainty in relation to the legal effect of decisions and that when an applicable time limit to challenge a decision has passed, the organisation is entitled to proceed on the basis that the decision is fully and legally effective (see, for example, Judgment 4103, consideration 1).

6. Pursuant to paragraph 10 of IN/217 Rev.2, the complainant consented to IOM’s request for an extension of the deadline to render a decision on her request for review from 22 April to 30 April 2018. On that date, IOM sent the decision to the complainant’s private e-mail address, which she had provided in her request for review, as the parties had agreed. In the absence of an agreement under paragraph 15 of

IN/217 Rev.2, the complainant was required by paragraph 13 of IN/217 Rev.2 to file her internal appeal against that decision by 30 May 2018. She did not. Alternatively, it was open to her to engage the procedure for filing an internal appeal pursuant to paragraph 14 of IN/217 Rev.2 challenging the implied rejection of her request for review. If, as the complainant states, she was not able to find the e-mail communicating the decision on her request for review due to technical issues with her e-mail account, she should have so informed IOM in a timely manner: by early May 2018. She did not raise the matter with the Organization until 18 July 2018. As she did not challenge the decision within the time stipulated in either paragraph 13 or 14 of IN/217 Rev.2, IOM was entitled to proceed on the basis that the decision was fully and legally effective by 31 May 2018. There is no evidence that IOM misled the complainant, neither is there any evidence of circumstances that would warrant an exception to the rule of strict adherence to the stipulated time limits (see, for example, Judgment 3482, consideration 4).

7. Moreover, IOM submits, correctly, that the decision of 26 July 2018 to refuse to provide the complainant with a copy of the 30 April 2018 decision on her request for review was a new decision that the complainant did not contest under the applicable procedures, with the result that the complaint is irreceivable to the extent that it concerns that refusal as she failed to exhaust the internal means of redress that were open to her, as required by Article VII, paragraph 1, of the Tribunal's Statute.

The facts show that on 3 August 2018, after the complainant had reiterated her request to be provided with a copy of the decision on her request for review, the Administration replied that her request was irrelevant at that point in time insofar as the deadlines for any potential appeal had elapsed. By a letter of 8 August 2018, the complainant requested the Director of HRM to exercise his discretion to grant her an extension of the applicable time limits in order for her to pursue the internal review process, in light of the exceptional circumstances in which her employment had ended. It is noteworthy that, among other things, the complainant stated the following in her 8 August letter:

"I was very surprised by Mr. [T.]'s email to me on 3 August 2018 that *'Whether or not we replied is not relevant at this point in time, as the deadlines for any potential appeal have elapsed'*. This does not answer my very basic request [for a copy of] the [Request for Review decision]. I am not aware of any basis for Mr. [T.] to refuse my request – I am the

complainant and [I] am entitled to know whether my claims have been answered. Mr. [T.]’s response, which in practical terms amounts to a refusal to send me the [Request for Review decision], confirms my impression that my concerns have not been adequately addressed.”

Even assuming that this statement could be considered a request for review of the 26 July 2018 decision, it would have been rejected on 30 August 2018, when the Director of HRM replied to the complainant’s 8 August letter. The complainant should have challenged that decision within 30 days as provided by paragraph 13 of IN/217 Rev.2. Accordingly, the complainant’s internal appeal to the JARB was time-barred when she lodged it on 26 October 2018. The Director of HRM’s 28 September 2018 confirmation of the refusal to provide her with a copy of the decision on her request for review did not create a new timeframe within which the refusal could have been contested by way of an internal appeal. On this basis, the complaint is irreceivable in the Tribunal as the complainant failed to exhaust the internal means of redress that were open to her, as required by Article VII, paragraph 1, of the Tribunal’s Statute.

8. In the foregoing premises, the complaint will be dismissed in its entirety.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ