

The Administrative Tribunal,

Considering the complaint filed by Ms I. S. against the International Organization for Migration (IOM) on 2 April 2007 and corrected on 17 April, the IOM's reply of 25 May, the complainant's rejoinder of 8 June and the Organization's surrejoinder of 12 July 2007;

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 and the pleadings may be summed up as follows:

A. The complainant is an Austrian national born in 1956. She joined the IOM's Mission in Belgrade on 17 June 2006 as Project Manager of the NATO Trust Fund for Assistance to Redundant Military Personnel within the Scope of Defence Reform in Serbia and Montenegro. She was appointed at grade P.4, step 1, under a one-year fixed-term contract.

On 20 November the Chief of Mission told the complainant that termination of her appointment was a possibility. By a letter of 27 November 2006 he gave her 15 days' notice, hence terminating her appointment with effect from 12 December 2006, on the grounds that she had failed to establish sound working relationships with colleagues both in the Belgrade mission and in other IOM units. He stated that she had conducted herself contrary to General Bulletins Nos. 1278 and 1312, concerning Standards of Conduct and a Policy for a Respectful Working Environment respectively, in that she had, inter alia, sidelined key colleagues and withheld information. Referring to Staff Regulations 10.1(a)(ii) and 9.2(c), he also stated that her services or conduct had not been fully satisfactory and that termination of her appointment was in the interest of the Organization. In a letter to the Regional Representative also dated 27 November 2006, which was copied to the Director General, the complainant alleged that there had been financial irregularities in the oversight of the project and that she had been harassed and mobbed by the Chief of Mission after she had proposed a budget revision to correct these irregularities. She requested the initiation of an internal investigation into these matters. On 7 December the Regional Representative replied that her request had been granted and that the investigation by the Office of the Inspector General had concluded that her allegations of financial irregularities, harassment and mobbing were unsubstantiated and that no further action would be taken. In the meantime, the complainant reiterated her allegations of financial irregularities in a letter to the Director General dated 6 December, whereby she also appealed against the decision terminating her appointment. In its reply of 8 December, the Administration confirmed the decision to terminate the complainant's appointment, asserting that, pursuant to Article 1(i) of Annex D to the Staff Regulations and Staff Rules for Officials, she had no right to appeal against termination action given that her appointment had been terminated during her probationary period.

In a letter dated 11 December 2006 to the Director General the complainant announced that she was terminating her appointment due to "material breach" by the Organization and requested financial compensation. That same day she submitted an appeal to the Joint Administrative Review Board against the Administration's decision of 27 November to terminate her appointment. In a letter of 15 January 2007 to the Chairperson of the Board, she commented on the statement of the Administration to the Board and stated that she had the right to appeal under the applicable Staff Regulations and Staff Rules. She subsequently appealed on 13 February 2007 against the Administration's failure to pay her salary and related entitlements for the period from 13 to 31 December 2006, on 15 February against its failure to issue a "complete" Certificate of Service, on 16 February against its failure to pay her salary, related entitlements and travel expenses for the period up to 12 December 2006, and on 2 March against its failure to pay her salary and related entitlements for January 2007.

On 1 March 2007 Human Resources Management issued a Certificate of Service that the complainant had requested, indicating that she had performed her tasks "to the general satisfaction of the Organization". On the same day the complainant submitted that Certificate to the Review Board in support of her appeal against the decision terminating her appointment. In its report of 24 February, dealing with the complainant's appeal

concerning termination, the Board held that under Annex D the complainant did not have the right to appeal against the decision to terminate her appointment during her probationary period, because her termination was based not on misconduct but on unsatisfactory performance. It considered that the termination letter made only a general reference to General Bulletins Nos. 1278 and 1312, and that the specific references to the complainant's conduct pointed to unsatisfactory performance. It accordingly concluded that the appeal was irreceivable. By a letter of 19 March 2007 the complainant was informed that the Director General had endorsed the Board's conclusion. That is the impugned decision.

B. The complainant contends that no probationary period was agreed between the Organization and herself. The provisions of her employment contract, which stipulate that the contract "may be cancelled prior to expiration by either part [sic] giving the other three months' notice thereof in writing", supersede any "side agreement" or other documents mentioned therein. Therefore, the contractually agreed notice period applies. She adds that the Staff Regulations and Staff Rules were not made available to her upon signing the contract and that she was only able to obtain them in November 2006 after repeated requests.

She submits that, contrary to Staff Rule 9.211, which requires that "[b]efore action is taken to terminate an official for unsatisfactory service, he shall be given a written warning at least 30 days in advance of any notice of termination on that ground", she was not given any written warning prior to receiving notice of termination by letter of 27 November 2006. Despite the IOM's contention that she was serving a period of probation, she never received the Staff Rating Report required by Staff Rule 4.61 and, contrary to the Organization's Performance Development Guidelines, no performance appraisal interview ever took place.

She also considers that her termination for unsatisfactory services was wrongful because the Organization has not demonstrated that her services were unsatisfactory. On the contrary, the Certificate of Service she was provided with on separation states that she "performed [her] tasks to the general satisfaction of the Organization". In addition, the specific grounds for termination mentioned in the letter of 27 November, such as sidelining key colleagues, withholding information and challenging travel practices, are either unsubstantiated or unrelated to unsatisfactory services. She argues that her questioning of accounting practices was an obligation rather than evidence of unsatisfactory services. She asserts that Staff Regulation 9.2(c), which provides for termination in the interest of the Organization, was not applicable to her, since she was not serving a probationary period for a permanent appointment. She further contends that the Administration acted in breach of Staff Regulation 10.1(b) in that it did not inform the Staff Association Committee that her appointment was terminated.

The complainant seeks the quashing of the impugned decision, retroactive reinstatement in her former position with effect from 13 December 2006 and payment of an amount equal to the salary and benefits, including post adjustment, the Organization's contribution to the Provident Fund and compensation for annual leave, that she would have received had she remained in service at her grade and step from the date of termination until the date of reinstatement, that is a total of 57,331.43 United States dollars. She also seeks payment of the Organization's contribution to the Provident Fund from 17 June to 13 December 2006, that is 9,490.57 dollars, and interest at the rate of 12 per cent per annum on all amounts as from their due dates. She requests that her contract be extended for a period of one year or that she be paid equivalent financial compensation based on an annual salary and benefits of 105,966.90 dollars. She claims 20,000 euros in moral damages, as well as costs in the amount of 4,700 euros. In addition, she asks that a notification be issued by the Organization to the beneficiary and donor institutions of the project, stating that her termination was wrongful and that she has been reinstated.

C. In its reply the IOM asserts that the complaint does not fall within the jurisdiction of the Tribunal and must therefore be dismissed as irreceivable. It relies on Article 1(i) of Annex D, according to which "staff members shall not have the right to appeal against termination action during the probationary period of employment unless the charge is misconduct", and Staff Regulation 4.6, which provides that "[t]he first six months of service of an official shall be considered a probationary period which may be extended, by the Director General, to a maximum of twelve months". Accordingly, the complainant did not have the right to appeal against termination, given that her appointment was terminated during her probationary period and on grounds other than misconduct.

The Organization rejects the complainant's contention that she was not subject to probation. Recalling the basic principle of contract law that "one is bound by the contract one signs", it argues that the complainant was bound by the Staff Regulations and Staff Rules, which were incorporated into her employment contract, irrespective of whether she had actually read them or her contract.

It emphasises that the complainant's appointment was terminated on the grounds of unsatisfactory services. She had failed to establish sound working relations with key colleagues and her personality was not suited to the collegial environment the Chief of Mission sought to encourage. The latter discussed these issues with her in detail on 20 November 2006 and warned her that termination was a "real possibility" if she did not improve.

Following the termination of her appointment, the complainant's actions against the Organization were abusive and unnecessary and resulted in a considerable waste of time and money. It therefore brings a counterclaim for damages in an amount to be determined by the Tribunal.

D. In her rejoinder the complainant states that, even assuming her appeal to the Board was irreceivable, her complaint falls within the Tribunal's competence by virtue of Article II, paragraph 5, of its Statute. She presses her pleas on the merits, emphasising that, apart from an issue concerning the selection of an air carrier for a planned duty travel, no reason for a possible termination was given to her prior to 27 November 2006. She refutes the IOM's arguments and in particular its allegation of unsatisfactory services, arguing that the true reason behind the decision to terminate her appointment was not her performance but rather her refusal to participate in unlawful practices and the threat this represented for the Chief of Mission. She invites the Tribunal to dismiss the Organization's counterclaim for damages.

E. In its surrejoinder the IOM reiterates that the complaint is irreceivable. It rejects the contention that there were ulterior motives for the termination of her appointment and observes that a staff member's performance is not assessed solely on the basis of technical skills but also the ability to work harmoniously with others. It explains that in order to provide the complainant with a Certificate of Service that would not be "too damning" and to put an end to her repeated requests, it issued a Certificate focusing on her technical skills rather than her conduct. It otherwise maintains its position.

## CONSIDERATIONS

1. On 17 June 2006 the complainant joined the IOM on a one-year fixed-term contract as a Project Manager for the NATO Trust Fund at grade P.4.
2. On 20 November 2006 the Chief of Mission and the complainant met. The parties are not in full agreement as to the content of their discussion at the meeting. The complainant states that the Chief of Mission informed her that he was considering terminating her contract before her probationary period expired. She also states that the only reason given for this action was that she was "making problems" with regard to the selection of an air carrier for a planned duty travel. The Organization maintains that the Chief of Mission had a detailed discussion with the complainant regarding her unsatisfactory performance and the need for improvement.
3. Having noted no improvement, on 27 November the Chief of Mission terminated the complainant's contract with 15 days' notice, that is with effect from 12 December 2006.
4. The complainant appealed that decision to the Joint Administrative Review Board. In its report of 24 February 2007 the Review Board concluded that the appeal was irreceivable as Article 1(i) of Annex D to the Staff Regulations and Staff Rules provides that staff members do not have the right to appeal against a termination during probationary periods unless the charge is misconduct. The Review Board considered whether the termination was for misconduct and determined that it was not. The basis for this conclusion was that the termination letter made only general reference to General Bulletins Nos. 1278 and 1312, and that the specific conduct outlined in the termination letter – such as failure to establish sound working relationships, the treatment of colleagues, the withholding of information – did not amount to misbehaviour associated with misconduct.
5. By letter of 19 March 2007, the complainant was informed of the Director General's agreement with the conclusion reached by the Review Board that her appeal was not receivable. She impugns that decision before the Tribunal.
6. The complainant takes the position that since no agreement as to a probationary period was reached between the Organization and herself, the required notice period was three months. She argues that this was the notice period stated in her contract and that the Staff Regulations and Staff Rules had no applicability since, although they were mentioned in the contract, they were "not included in the contract, neither in paper form nor

electronically”. She also points out that she was not able to gain access to the Organization’s intranet to view the Staff Regulations and Staff Rules prior to signing the contract and that Human Resources Management confirmed the three-month notice period in an e-mail of 1 June 2006. The complainant submits that it is a principle of contract law that only the terms to which an employee has access upon signing the contract form part of it.

7. The Tribunal rejects the complainant’s assertion that the Staff Regulations and Staff Rules did not form part of her contract. The complainant’s contract stipulated: “[y]our terms of employment, benefits and obligations will be those stated in [the] letter [of appointment], in the Staff Regulations and Staff Rules [...]”. Thus, it is clear that the Staff Regulations and Staff Rules were specifically incorporated by reference into her contract. As to her claim that she did not have access to the Staff Regulations and Staff Rules, the complainant could have requested a copy thereof before signing the contract but did not do so.

8. Staff Regulation 4.6 states that the first six months of an official’s service shall be considered a probationary period. Accordingly, it is clear that the complainant was on probation at the relevant time. As noted above, Article 1 of Annex D precludes an appeal against termination during a probationary period, unless the charge is misconduct.

9. The letter of 27 November 2006 stated that the complainant was being terminated because “[her] services or conduct ha[d] not been fully satisfactory ([Staff Regulation] 10(a)(ii))” and “in the interests of the Organization ([Staff Regulation] 9.2(c))”.

10. Chapter 10 of the Staff Regulations and Staff Rules concerns disciplinary measures. Staff Regulation 10.1 provides that the Director General may impose disciplinary measures on an official in certain listed circumstances. It also lists the range of disciplinary measures that may be imposed. In particular, Staff Regulation 10.1(a)(ii) permits the imposition of a disciplinary measure if the official’s “services or conduct are not fully satisfactory”.

11. Chapter 9 of the Staff Regulations and Staff Rules deals with separation from service. Under Staff Regulation 9.2(a)(v), the Director General may terminate the appointment of an official for any of the reasons stated in Staff Regulation 10.1. Under subsection (c) of the same Staff Regulation, the Director General may terminate the appointment of an official serving a probationary period at any time in the interest of the Organization.

12. The term “misconduct” is not defined in the Staff Regulations and Staff Rules. Although one of the grounds cited for the termination in the letter of 27 November 2006 is found in Staff Regulation 10.1, this alone does not mean that the ground for the termination was misconduct. Staff Regulation 10.1 simply provides a list of those matters that, at the discretion of the Director General, may be dealt with by the imposition of one of the listed disciplinary measures. The Director General may also opt to deal with the matter under the termination provision contained in Staff Regulation 9.2(v).

13. Lastly, as the Board observed, the specific references to the complainant’s conduct do not amount to allegations of misconduct but to unsatisfactory performance. In view of the fact that the complainant was on probation at the time of the termination and in the absence of a charge of misconduct, the Board was correct in concluding that the appeal was irreceivable. Nor did the Director General err in reaching the same conclusion. This, however, does not mean that the complaint filed with the Tribunal is irreceivable as the Organization contends.

14. As there is no means of internal redress for a staff member who is terminated during a probationary period for reasons other than misconduct, it follows that the decision to terminate is a final decision as contemplated in Article VII, paragraph 1, of the Tribunal’s Statute, and the affected staff member will have direct recourse to the Tribunal. In these circumstances, a staff member will be required to file the complaint within the ninety-day time limit specified in Article VII, paragraph 2.

15. Where, as in the present case, it is not entirely clear that the termination is not for misconduct and a staff member pursues the internal means of redress, the time limit for lodging a complaint with the Tribunal will not start to run until a final decision has been taken in relation to the internal appeal. For this reason, the Tribunal concludes that the complaint is receivable.

16. Staff Regulation 9.2(c) states that the Director General may at any time terminate an appointment of a staff member serving a probationary period if, in his opinion, it would be in the interest of the Organization. This

provision, however, does not displace the well- established principle that an organisation “owes it to its employees, especially probationers, to guide them in the performance of their duties and to warn them in specific terms if they are not giving satisfaction and are in risk of dismissal” (see Judgments 1212 and 2529). As well, a probationer is entitled to a timely warning so that measures can be taken to remedy the situation (see Judgment 2414).

17. In the present case, given the nature of the complainant’s functions, a period of seven days to demonstrate improvement was clearly inadequate. Accordingly, the decision to terminate her contract must be set aside.

18. The complainant seeks the following relief:

- quashing of the decision to terminate her appointment;
- retroactive reinstatement in her former position, with payment of all amounts that would have been paid had the appointment not been terminated, including the Organization’s contributions to the Provident Fund from 17 June to 13 December 2006, and extension of her contract for a period of one year, or equivalent financial compensation, together with interest at the rate of 12 per cent per annum from their due dates;
- moral damages;
- costs; and
- notification issued by the Organization to various bodies stating that her termination was wrongful and that she has been reinstated.

19. Although the impugned decision must be set aside, in view of the circumstances it is not clear that, even if she had been given a proper warning and an opportunity to improve, her appointment would have been confirmed. However, as a result of the Organization’s actions she lost a valuable opportunity to improve and demonstrate her suitability for the position and to have her contract considered in that light. The loss of that opportunity warrants an award of material damages in the amount of 15,000 euros. Further, the Tribunal concludes that the Organization’s conduct was an affront to the complainant’s dignity and caused her stress for which she is entitled to moral damages in the amount of 10,000 euros. Although the complainant claimed compensation for damage to her professional reputation, as she has not proven such damage, her claim is dismissed. The complainant is also entitled to costs which the Tribunal sets at 500 euros. All other claims are dismissed, including the claim for a notification stating that her termination was wrongful and that she has been reinstated, which the Tribunal has no power to order.

20. The Organization seeks damages for the “abusive and unnecessary procedures” instigated by the complainant. The complaint has been upheld and, accordingly, there is no basis for this claim. It is rejected.

## DECISION

For the above reasons,

1. The decision of 27 November 2006 terminating the complainant’s contract is set aside.
2. The IOM shall pay the complainant material damages in the amount of 15,000 euros.
3. It shall pay her moral damages in the amount of 10,000 euros.
4. It shall also pay her 500 euros in costs.
5. All other claims are dismissed, as is the Organization’s counterclaim for damages.

In witness of this judgment, adopted on 16 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr

Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.