

P. (No. 2)

v.

IOM

124th Session

Judgment No. 3849

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Ž. P. against the International Organization for Migration (IOM) on 26 June 2014 and corrected on 13 August, IOM's reply of 19 December 2014, the complainant's rejoinder of 16 March 2015 and IOM's surrejoinder of 23 June 2015;

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 contests the non-renewal of his fixed-term contract.

The complainant was employed by IOM on a series of fixed-term contracts from 2002 until the expiry of his final one-year fixed-term contract on 31 October 2013. He initially worked in Kenya and was subsequently rotated to Pakistan where he assumed duties in December 2009. Prior to this transfer he underwent a periodic medical examination during which his physician concluded that he was "in normal health – in good work capacity", a conclusion that was accepted by the Head of IOM's Occupational Health Unit (OHU). His health subsequently deteriorated and for medical reasons he was exceptionally considered for early rotation in the 2011/2012 rotation cycle, but he was informed

on 19 April 2012 that no suitable position had been found for him. He was on sick leave, away from the duty station, from 9 July 2012 until the expiry of his contract on 31 October 2013.

On 28 September 2012 the complainant was informed that he was eligible for rotation in the 2012/2013 rotation cycle and was requested to submit to the Rotation Appointments and Postings Board (RAPB) all relevant documents within a particular timeframe, which he did not do. On 8 October 2012 OHU received a report from the complainant's physician dated 17 September 2012 stating that in his opinion the complainant could no longer continue his professional activities on medical grounds. The Head of OHU wrote to the complainant indicating the need to assess his capacity to work and after some correspondence with the Organization the complainant underwent a medical examination by an independent expert on 25 March 2013. This expert concluded that the complainant was fit to work provided that he was posted close to his family and in a location with access to suitable medical treatment, and recommended that he be reassessed a year later. This conclusion was endorsed by the Head of OHU.

In late May 2013 the complainant wrote to the Director of Human Resources Management (HRM) stating that he had not received any information from the RAPB regarding the rotation process. The Director of HRM replied by an e-mail of 5 June 2013 that the RAPB had failed to identify a placement for him at its January 2013 meeting. She indicated that in light of the confirmation by the Head of OHU of the independent expert's conclusion, the Administration would endeavour to identify a suitable alternative posting for him and she invited him to submit a number of relevant documents. The complainant submitted the requested documents on 24 June 2013.

In June 2013 the complainant's physician wrote a medical report stating that the complainant was not functioning at the level necessary for his role and recommending that consideration be given to the question of whether he was suffering from long-term disability. In an e-mail of 11 July 2013, the Director of HRM advised the complainant that IOM was facing difficulties finding a suitable placement for him and that, if none was found, it would be unable to renew his employment contract

beyond its expiry date of 31 October 2013. After further contacts and exchanges with the complainant, and on his behalf, IOM submitted his case to the United Nations Joint Staff Pension Fund (UNJSPF) on 8 October 2013. Since 1 November 2013 the complainant has been in receipt of a UNJSPF disability benefit.

Prior to that, by a memorandum dated 5 September 2013, the complainant was informed of the formalities related to his separation from service upon the expiry of his contract. On 1 November 2013 he submitted an Action Prior to the Lodging of an Appeal under Annex D to the Staff Rules, requesting a review of the “decision” contained in the 5 September memorandum. Following the rejection of this request, he submitted an appeal to the Joint Administrative Review Board (JARB) on 19 December 2013, contending that the Administration had decided not to renew his contract without considering the failure to rotate him in the preceding three years, the absence of an opportunity to convene a medical board, notwithstanding that his non-renewal was due to his health condition, the difficult situation he had experienced in Pakistan or his performance and achievements. He requested that his contract be renewed and that he be awarded appropriate financial compensation.

By an e-mail on 10 April 2014, and by hard copy on 23 April 2014, the complainant received both the JARB report dated 26 March 2014 and the Director General’s final decision dated 10 April 2014. In this decision the Director General agreed with the JARB’s conclusion that the appeal was irreceivable insofar as it related to the rotation procedure. However, he considered that other aspects of the appeal were also irreceivable or not properly raised before the JARB, though he agreed with the JARB’s overall conclusion that IOM had no liability towards the complainant. That is the impugned decision.

The complainant requests appropriate financial compensation for moral and professional damage as well as costs.

IOM invites the Tribunal to dismiss the complaint as time-barred and hence irreceivable, and as unfounded on the merits.

CONSIDERATIONS

1. In a complaint filed on 26 June 2014, the complainant impugns a decision of the Director General of 10 April 2014 effectively dismissing an internal appeal against an earlier decision not to renew his contract and other matters. There was an issue about whether the internal appeal, in whole or in part, was receivable which is also an issue raised by IOM in relation to the complaint in these proceedings before the Tribunal. It is convenient to deal with the question of receivability at the outset. For the moment, it is only necessary to set out the facts relevant to that issue.

2. The complainant joined IOM in 2002 as a Physician, Migration Health, based in Nairobi, Kenya. In late 2009 he was transferred to Islamabad, Pakistan, as the Chief Migration Health Physician in application of the IOM's policy of rotating officials. He was considered for rotation in the 2011/2012 rotation cycle but was informed, in a letter dated 19 April 2012, that the RAPB had been unable to find a suitable position for him. On 9 July 2012 the complainant began a period of sick leave from which he did not return until his contract came to an end on 31 October 2013. On 11 July 2013 the Director of HRM sent an e-mail to the complainant indicating that "IOM would be unable to renew [his] employment contract beyond its current expiration date on 31 October 2013". By memorandum dated 5 September 2013 from IOM's Human Resources Operations in Manila, the complainant was "inform[ed] [...] about the various formalities related to [his] separation from service which [would] take place as at 31 October 2013 following the message sent to [him] [...] in [the] email dated 11 July 2013". On 1 November 2013 the complainant submitted a request for review. This request was rejected by letter dated 4 December 2013 though the complainant did not receive a clear and complete copy of the letter until 10 December 2013. On 19 December 2013 the complainant lodged an internal appeal to the JARB. In the statement of appeal the complainant challenged, in terms, "the final decision not to renew his contract finalized in the letter sent to him by email on 5 September 2013".

3. In the internal appeal, IOM argued that the appeal was not receivable in any respect. This argument was accepted by the JARB in relation to the complainant's challenge to IOM's failure to rotate him in the preceding three years but not in relation to the failure of IOM to renew his contract and related issues though, in relation to the latter conclusion, the JARB provided no reasons. Additionally, the JARB found the appeal in relation to the non-renewal of his contract unfounded on the merits. In these proceedings IOM again advances the arguments raised before the JARB in relation to receivability.

4. In the letter of 19 April 2012 concerning the 2011/2012 rotation cycle, the Director of HRM said: "I herewith inform you of the decision with respect to your personal situation." The complainant was being informed, unambiguously, that a decision had been made about his rotation. It was an administrative decision amenable to internal review and appeal and ultimately complaint to the Tribunal. The complainant did not seek to impugn this decision by way of internal appeal within the specified time. The JARB was correct in concluding that the internal appeal was, in this respect, irreceivable. Accordingly, the complaint in this Tribunal is, on this subject matter, irreceivable as the complainant has not exhausted internal means of redress as required by Article VII, paragraph 1, of the Tribunal's Statute.

5. The next issue is whether the complaint is receivable insofar as it relates to the decision not to renew his contract. The resolution of this issue depends on whether the complainant was notified of that decision in the communication of 11 July 2013. There is no substance in the complainant's argument that the e-mail of 11 July 2013 could not have been notification because it took the form of an e-mail. No particular formality is required and notification by e-mail can constitute effective notification (see, for example, Judgment 2966, consideration 8). The real question is whether the e-mail of 11 July 2013 did communicate that a final decision had been made not to renew the complainant's contract.

6. Much of the e-mail of 11 July 2013 concerned the attempts that had been made to find a position for the complainant and the difficulties associated with doing so. It included the observation that “[d]espite the administration’s efforts, we unfortunately are facing difficulties in identifying suitable placements”. The e-mail concluded:

“On the basis of the above considerations, we regret that we have been unsuccessful in relocating you to this date. Please rest assured that we will not spare our efforts in trying to find a suitable alternative posting for you, however, in the event that we are unsuccessful, I regret to inform you that IOM would be unable to renew your employment contract beyond its current expiration date on 31 October 2013, at which time your sick leave and annual leave entitlements will also be exhausted.”

The e-mail also requested that the complainant “acknowledge receipt of this email” which added a measure of formality to the document which might otherwise not have existed.

7. It might be thought that the clear intimation from the Director of HRM that the contract would not be renewed should be viewed as conditional and thus should not be considered notification of a decision not to renew the contract. That is to say, it should not be taken to be notification of a final decision because there remained to be determined, before such a decision could be made, whether another position might be found for the complainant. However, the fact that a communication such as this might advert to further steps being taken to reassign or re-deploy an official, does not, of itself, result in the communication not being notification of a decision not to renew (see Judgment 634, consideration 2). Equally, however, in the event of non-renewal there must be a definite decision not to renew coupled with notification to the official (see Judgment 2104, consideration 6). But in the present case there is no evidence of when the decision not to renew was formally made unless, as one might reasonably infer, it was made by the Director of HRM shortly before or at the time she sent the e-mail of 11 July 2013.

8. Ultimately it is a question of how the e-mail of 11 July 2013 should be understood. It must be construed objectively (see Judgment 2739, consideration 13). The complainant refers to Judgment 2644, consideration 8, which, on the facts of that case, led the Tribunal to say

that “where, as here, there is no indication that the communication in question constitutes a final decision, there are and may be circumstances that lead a staff member to reasonably conclude that it does not”. That case concerned a memorandum dealing with the payment of entitlements on separation and one issue was whether the memorandum constituted a final decision. The Tribunal concluded it did not. However, importantly, the observations of the Tribunal just referred to were followed by the statement that: “Particularly is that so if, as in the present case, it concerns a matter that has not been the subject of an express claim or there is nothing to suggest that the matter in question has been considered by a person with authority to make a final decision thereon.” These factors are not present in this case.

9. In this matter, the e-mail of 11 July 2013 was being sent to the complainant just a little over three months before his contract was, according to its terms, due to expire. The complainant knew that. It was sent in circumstances where IOM had not been able to find some other position for him, and the complainant was then aware it had been trying to do so, and IOM was saying that it was having difficulties in identifying other suitable positions. While it is true that the e-mail spoke of the Administration not sparing its efforts in finding suitable positions, the overall thrust of the e-mail, particularly having regard to the context in which it was sent, suggested it was very unlikely that other positions would be identified with the consequence that the contract would, according to its terms, expire and would not be renewed. The better view, in the Tribunal’s opinion, is that it constituted notification of the final administrative decision that his contract would not be renewed with the caveat that if, in the very unlikely event, another position was found for him the decision not to renew the contract could be reviewed. Of some significance in this case, this conclusion is reinforced by IOM’s request in the e-mail that the complainant acknowledge its receipt. Such a request is ordinarily made in circumstances where the communication is of some significance and the party sending it seeks confirmation, because of its significance, that it has been received. The only real significance of this communication, warranting a request that its receipt be acknowledged, would have been if it was intended to be

notification of the non-renewal of the complainant's contract and that the contract would expire according to its terms. However, the Tribunal emphasises that it is desirable that an organisation make it absolutely clear in a communication that it constitutes notice that the contract will not be renewed and language to this effect should be used. Also, it is desirable for the organisation to say in such a communication that it manifests a final decision against which the official can appeal in a manner prescribed in the organisation's rules and regulations.

10. In the result, insofar as it related to the decision not to renew the complainant's contract, the internal appeal was not receivable, as it was out of time, with the consequence that the complainant has not exhausted internal means of redress and his complaint to this Tribunal is irreceivable (see, for example, Judgments 602, consideration 3, 1429, consideration 6, 3296, consideration 10, and 3311, considerations 5 and 6). For this reason the complaint should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Patrick Frydman, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ