

J. (No. 2)

v.

IOM

129th Session

Judgment No. 4211

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms J. J. against the International Organization for Migration (IOM) on 20 October 2017 and corrected on 27 November 2017, IOM's reply of 25 April 2018, corrected on 8 May, the complainant's rejoinder of 21 August and IOM's surrejoinder of 3 December 2018;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

Considering that the facts of the case may be summed up as follows:

The complainant impugns what she considers to be an implied rejection of her claims of moral and sexual harassment and abuse of authority.

Facts relevant to the present case are to be found in Judgment 3948, arising out of the complainant's first complaint to the Tribunal. In that first complaint, the complainant appealed the decision of the Chief of IOM's Mission in Peru not to renew her contract upon its expiry due to budgetary constraints. She argued that the decision lacked objective and valid reasons and that it constituted an abuse of authority. She also argued that the Chief of Mission had subjected her to abusive behaviour and workplace harassment. In its report of 19 August 2015 to the

Director General, the Joint Administrative Review Board (JARB) considered that the decision of non-renewal fell under the discretionary power of the Chief of Mission, but it questioned the criteria that were applied in deciding which contracts would be renewed in the Mission. With regard to the alleged harassment, the JARB considered that it did not have sufficient information to make a determination on the merits and, therefore, returned the case to the Administration for further consideration of the complainant's harassment claim. By a letter of 21 September 2015, which was the impugned decision in the complainant's first complaint, the Director General informed the complainant of his decision to accept the JARB's recommendations and to refer her harassment complaint to the Ethics and Conduct Office ("the ECO"). The Director General also informed her that she would be contacted in due course concerning her allegations of abuse of authority and harassment.

Having found sufficient *prima facie* evidence to substantiate the complainant's allegations, the ECO referred the matter to the Office of the Inspector General ("the OIG") for further investigation in January 2016. The complainant was relevantly informed on 3 March 2016. In the course of the investigation the complainant also alleged that she had been sexually harassed by the Chief of Mission. On 12 October 2016 the OIG informed the complainant that there was insufficient evidence beyond a reasonable doubt to support her allegations of abuse of authority and harassment, including sexual harassment, and that unless she provided additional pertinent information by 26 October, the OIG would consider her complaint unsubstantiated. In an email of 27 October 2016, the complainant maintained her allegations of moral and sexual harassment and abuse of authority. On 15 November 2016 the OIG issued its report on the complainant's case. The report, which bore the title "closure report", concluded that reasonable doubt existed that the Chief of Mission had abused his authority against the complainant or that he had harassed her, including sexually. By an email of 18 November 2016, the OIG informed the complainant that her allegations had been found to be unsubstantiated and that it therefore considered the case closed. On 25 January 2017 the complainant requested a copy of the OIG report

but her request was denied on the ground that the OIG “[did] not share confidential investigation-related reports with complainants”.

On 15 August 2017 the complainant wrote an email to the Director General accusing IOM of abuse of procedure and fraud which, in her view, consisted in misrepresentations made by IOM to the Tribunal in the course of the written proceedings on her first complaint. She referred, in particular, to IOM’s surrejoinder (filed on 20 December 2016, just over a month after the OIG issued its report), in which IOM advised the Tribunal that only once the Director General was notified of the outcome of the OIG investigation he would be in a position to take a final decision on her appeal. She also referred to IOM’s final comments (filed with the Tribunal on 25 July and notified to the complainant on 26 July 2017), in which IOM advised that, if she was unsatisfied with the lack of action following the OIG decision to close her case, she should have filed a second complaint with the Tribunal within 90 days from the date of the OIG decision (18 November 2016). The complainant requested that the Director General take a final decision on her claims of harassment and abuse of authority, and she reiterated her request for a copy of the OIG report, as well as all documents considered by the OIG in the course of the investigation. She also requested moral damages for breach of due process, including for the delay following the closure of the OIG investigation, and costs.

In an email of 13 September 2017, IOM’s Chief of Staff responded on behalf of the Director General. Noting that IOM’s statements in its submissions to the Tribunal were in line with Article VII, paragraph 3, of the Tribunal’s Statute, she advised the complainant that no decision had been taken by the Director General on her harassment and abuse of authority allegations, but that any delay in that respect was due to administrative oversight and not malicious intent. An electronic link purportedly providing access to the OIG report and its exhibits was copied in the email. The Chief of Staff asked the complainant to provide her comments on the report by 27 September 2017 and noted that the Director General would then take a decision on her claim that “the non-renewal of [her] contract was the result of harassment and abuse of authority”. In a follow-up email of 3 October 2017, the Chief of Staff

again asked the complainant to provide her comments on the OIG report. She added that, if no comments were received from the complainant by 15 October 2017, the Director General would proceed to take a decision in her case.

Judgment 3948 was delivered in public on 24 January 2018. The Tribunal stated therein “it must be made clear that the harassment claim cannot be either receivable or irreceivable on the present complaint since [...] it is not the object of the present complaint” and took note of the complainant’s submission reserving her right to pursue remedies with regard to her harassment claim “if necessary and to the extent she deem[ed] appropriate after receipt of the outcome of the harassment investigation and procedure”. The Tribunal set aside the decision not to renew the complainant’s contract and awarded the complainant 50,000 United States dollars in material damages for the loss of an opportunity to have her contract renewed, 30,000 dollars in moral damages for IOM’s breach of due process and of its duty of care (failure by IOM to disclose to the JARB documents which would have assisted it to determine whether the reasons given for the non-renewal decision were valid and objective) and 6,000 dollars in costs.

Approximately three months before the public delivery of Judgment 3948, on 20 October 2017, the complainant filed the present complaint (her second) with the Tribunal, indicating in the complaint form that she impugned a decision dated 26 July 2017 (referring to IOM’s final comments filed on 25 July 2017 in the course of the proceedings on her first complaint).

In the present complaint, she asks the Tribunal to set aside the impugned decision and to reinstate her to a post consistent with her background and experience. She claims material damages in an amount equivalent to what she would have earned if her employment had not ceased, with interest or, alternatively, material damages equivalent to what she would have earned if her appointment had been further extended for a period of five years. She also claims material damages for the loss of pension benefits and future earnings. She seeks significant moral damages and costs. In her rejoinder, she claims appropriate material and moral damages for harassment and costs.

IOM asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded.

CONSIDERATIONS

1. On 20 October 2017, the complainant filed the present complaint with the Tribunal in which, as stated in the complaint form, she impugns a 26 July 2017 decision. The complainant elaborates that “with the filing of the IOM’s [final] comments to [her additional submission] on 26 July 2017 [in the first complaint] [...], the Director General had taken an implied final decision to reject her internal appeal”. This is the impugned decision.

2. This complaint concerns the complainant’s claims of harassment and abuse of authority by the Chief of IOM’s Mission in Peru and arises from the complainant’s first complaint. In her first complaint, the complainant impugned the Director General’s 21 September 2015 decision dismissing her internal appeal lodged against the non-renewal of her contract. In his decision the Director General informed the complainant that he had endorsed the JARB’s recommendations and that he would ask the ECO to conduct an initial assessment of her complaint of harassment and abuse of authority in order to establish whether there was *prima facie* evidence to support the allegations and, if so, the ECO would refer her complaint to the OIG for investigation, and she would be contacted in due course as regards these claims. On 24 January 2018, the Tribunal delivered in public its decision regarding the complainant’s first complaint in Judgment 3948.

3. The key issue in the present complaint centres on receivability. The positions taken by the parties on the question of the receivability of the present complaint stem from the parties’ submissions in the first complaint and facts that unfolded while the submissions were being exchanged. For this reason, it is useful to set out the Tribunal’s observations and findings in Judgment 3948 relevant to these submissions. The Tribunal observed that the complainant “specifically challenge[d] the impugned decision which was issued by the Director General on

21 September 2015 dismissing her appeal against the non-renewal decision” and noted that in her action prior to lodging her internal appeal, the complainant had alleged that the Chief of Mission’s behaviour toward her was hostile, intimidating and harassing.

4. In its 8 June 2016 reply to the first complaint, IOM submitted that the complaint was irreceivable pursuant to Article VII, paragraph 1, of the Tribunal’s Statute, because the impugned decision was not a final decision as required in that provision. IOM argued that the complaint was premature. In support of this argument, IOM pointed out that the complainant’s appeal contained two claims; the unlawful non-renewal of her contract and her allegations of harassment, and both claims were undergoing further assessment and investigation on the recommendation of the JARB when the complainant filed her first complaint with the Tribunal. IOM took the position that the Director General had adopted the JARB’s recommendation that the non-renewal claim should be remitted with the harassment claim for further investigation and had referred both claims to the ECO and the OIG. Accordingly, both the JARB and the Director General considered that prior to taking a final decision on the complainant’s appeal in which she contested the non-renewal of her contract and alleged harassment and abuse of authority, the claims needed to be reviewed by the ECO and the OIG. IOM added that it was only after the investigation procedure was completed that the Director General “will be in a position to take a final decision on the [c]omplainant’s appeal and the claims raised therein”. For the purpose of the analysis to follow, a summary of the complainant’s 14 September 2016 rejoinder on the first complaint is unnecessary.

5. In its 20 December 2016 surrejoinder on the first complaint, IOM reiterated the arguments it had advanced in its reply that the complaint was premature and, therefore, irreceivable. IOM also maintained its position in the reply that it was only after the investigation procedure was concluded that the Director General “will be in a position to take a final decision on the [c]omplainant’s appeal and the claims raised therein”.

6. In Judgment 3948 the Tribunal found that, as the complainant had made clear in her submissions, the harassment claim was not the object of the complaint. Thus, the harassment claim could not be receivable or irreceivable in the context of her complaint. The Tribunal rejected IOM's argument and found that the impugned decision regarding the complainant's non-renewal claim was a final decision and, accordingly, the complaint against the non-renewal decision was receivable. The Tribunal also concluded that the impugned decision was flawed and set aside that decision, as well as the earlier decisions underpinning that decision, and awarded the complainant material and moral damages and costs.

7. Returning to the present complaint, to place the implied final decision the complainant impugns in context, a summary of some additional background facts is needed. On 18 November 2016, the OIG informed the complainant that, as her allegations of harassment, sexual harassment and abuse of authority were found to be unsubstantiated, the case was closed. On 25 January 2017, the complainant asked the OIG for a copy of its Closure Report. The OIG refused this request on the ground that the OIG did not share confidential investigation-related reports with complainants.

8. On 20 March 2017, the complainant filed additional submissions with the Tribunal in the proceedings on her first complaint. In relevant part, the complainant observed that the OIG had closed her case and had denied her request for a copy of its Closure Report and, since then, she had not received any information from IOM about the status of her internal appeal. The complainant submitted that "in accordance with the duty of good faith and mutual trust, IOM was obliged to return the case to the JARB so it could consider [her] harassment allegations and report to the Director General, who would then take a final decision on that aspect of her appeal, so she could further pursue her remedies for harassment" (original emphasis). The complainant observed that there was no evidence that IOM had complied with this obligation. The complainant submitted that "IOM is thus directly and intentionally abusing the process before the Tribunal in applying for dismissal on the

grounds that the appeal is premature while at the same time delaying for undisclosed reasons the consideration by the JARB whether [she] was subject to harassment, with the unlawful [non-renewal] decision constituting an element of harassment”.

9. In its final comments, filed in response to the complainant’s additional submissions on 25 July and notified to the complainant on 26 July 2017, IOM summarized the positions taken by the parties up to that point, the steps that had been taken including the referral of the harassment complaint to the ECO and the OIG, and expressed its view that the additional submissions did not bring to light any new facts that would alter its position regarding the complaint. Relevantly, IOM observed that if the complainant was dissatisfied with an alleged lack of decision following the notification by the OIG that her case was closed, she should have filed a complaint with the Tribunal within 90 days of the notification.

10. In support of her submission that with the filing of the IOM’s response the Director General had taken an implied final decision to reject her appeal, the complainant points to the position taken by IOM in its reply and surrejoinder to her first complaint regarding the receivability of that complaint. In particular, she notes that IOM took the position that the complaint in its entirety was premature, given that the JARB recommended, and the Director General endorsed, the return of the case to the Administration for further investigation and that a final decision on the appeal would be taken after the OIG investigation was completed and had been reviewed by the JARB. In this regard, the complainant states that, although it was not expressly stated, “IOM must have meant that it would reseize the JARB of the matter so it could ‘dispose of the elements that would be necessary to take a decision on the merit of the harassment complaint’ and advise the Director General and enable a final decision on the harassment/abuse of authority complaint”. The complainant asserts that IOM unequivocally represented to the Tribunal that the Director General would communicate a final decision once the OIG harassment investigation was completed and he had considered its Closure Report.

11. The complainant also submits that in its July 2017 final comments, IOM abandoned its position that the first complaint was premature and instead argued that the complainant should have filed a complaint with the Tribunal within 90 days of receiving the OIG's notification of the closure of the investigation. The complainant contends that, in effect, IOM took the position that the Director General did not have a duty to take and communicate a final decision after the closure of the investigation. Rather, the closure of the OIG's investigation was a new administrative decision triggering new time limits for filing an appeal. The complainant adds that IOM "obviously considered that a final decision had been taken to dismiss [her] internal appeal and [that] a new appeal need not be filed". Thus, the complainant maintains that it is reasonable to conclude from IOM's July 2017 final comments on her first complaint that the Director General had taken an implied final decision to reject her appeal. The complainant adds that the purpose of her additional submissions in her first complaint was to bring to the Tribunal's attention that no action had been taken by IOM after the closure of her case and to express her expectation that IOM would remit the matter back to the JARB or take a final decision.

12. The Tribunal finds that in its final comments IOM resiled from its earlier position in the reply and surrejoinder on the first complaint that a decision would be taken following the closure of the investigation procedure. In the absence of any action having been taken following the closure of the investigation and having regard to IOM's statement that the complainant should have filed a complaint with the Tribunal within 90 days of IOM's notification of the closure of her case, the complainant was entitled to infer that an implied decision to dismiss her appeal had been taken. This inference can now be more readily drawn given that an express decision as of the date of the adoption of the present judgment has not been taken. Accordingly, the Tribunal concludes that the complaint is receivable.

13. As a decision has not been taken, the matter will be remitted to IOM to take such steps as are necessary to reach a motivated express final decision in relation to the complainant's claims of harassment

and abuse of authority. Upon receipt of such decision, it will be for the complainant to determine what action, if any, should be taken. As the complainant is not responsible for the IOM's failure to make a final decision to which the complainant was entitled, which has obviously exacerbated her feeling of distress, she will be awarded moral damages in the amount of 20,000 euros and costs in the amount of 7,000 euros.

DECISION

For the above reasons,

1. This matter is remitted to IOM to take such steps as are necessary to reach a motivated express final decision in relation to the complainant's claims of harassment and abuse of authority, and to communicate that decision to the complainant within 30 days from the date of the public delivery of this judgment.
2. IOM shall pay the complainant moral damages in the amount of 20,000 euros.
3. IOM shall pay the complainant costs in the amount of 7,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ