

R. (No. 2)

v.

IOM

133rd Session

Judgment No. 4460

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs M. R. against the International Organization for Migration (IOM) on 25 March 2019 and corrected on 11 April, IOM's reply of 25 July, the complainant's rejoinder of 25 September 2019 and IOM's surrejoinder of 6 January 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 decision to impose upon her the disciplinary measure of discharge after due notice.

Facts relevant to this case are to be found in Judgment 4459, also delivered in public this day, concerning the complainant's first complaint in which she challenged the decision not to defer beyond 1 October 2017 the date of her transfer, under IOM's policy on rotation, from Damascus (Syria), where she held the Chief of Mission (COM) position, to Khartoum (Sudan).

Between 2008 and 2013, the complainant's transfer from Damascus under the policy on rotation was postponed a number of times in view of the needs of her disabled daughter. In March 2014 the Director General decided to transfer her to the IOM Mission in Iraq, based in Amman (Jordan). As a result of the complainant's appeal against this

decision, her transfer was deferred once again. In January 2016 it was decided to transfer her to the position of COM in Beirut (Lebanon). In January 2017, since the Government of Lebanon had verbally refused to accredit the complainant, the Director General proposed to her to either be reassigned to Geneva (Switzerland) or that she be included in the 2017 rotation exercise. The complainant replied on 28 January that, keeping in mind her daughter's needs, the only viable option for her was the post of COM in Baghdad (Iraq).

By a letter of 16 February 2017 the complainant was informed that the Director General had decided to reassign her to the position of COM in Khartoum but that, alternatively, he was prepared to maintain his previous offer to transfer her to a position in Geneva. The complainant was invited to make her decision known by 3 March. Again, she expressed her concerns in view of her daughter's needs. On 30 March she emphasised that she had applied for the COM position in Baghdad to show her willingness to comply with the rotation policy.

On 11 April the complainant sent an email to the Director General stating that the Government of Lebanon had endorsed her nomination as COM. She expressed her hope that this would put an end to all the issues relating to her transfer. By an email of 12 April she was informed that, several months earlier, IOM had been verbally informed that the Lebanese authorities had refused the proposal to designate her as COM and that it had not received any official notification to the contrary since then. The complainant was asked to communicate her acceptance or rejection of the positions in Geneva or in Sudan by close of business that day. On 14 April, she accepted her transfer to Sudan.

Having been informed by IOM on 7 July 2017 that the Government of Sudan had confirmed her accreditation, the complainant pointed out that her move to Sudan was subject to finding suitable medical and schooling facilities for her daughter. On 13 July 2017 she was informed that she was expected to assume her duties in Sudan by 1 October, which was considered to give her sufficient time to manage the transition and logistics. The complainant then indicated that she was unable to set any date of transfer to Khartoum until she could enrol her daughter in a school. By an email of 6 September she was informed that the Organization would not accept any delay in her transfer beyond 1 October. Her concerns regarding her family situation were noted but, as clearly stated in the rotation guidelines, personal considerations and preferences could not

always be accommodated in staffing decisions. The complainant's transfer to Khartoum became effective on 1 October. She challenged the decision that her transfer be implemented no later than that date but her appeal was ultimately dismissed.

Between the end of September and 9 December 2017, the complainant was on sick leave. Her home leave to the United States of America was approved for the period 5 December 2017 to 10 January 2018.

On 15 December 2017 the Director of the Human Resources Management Division (HRM) sent to the complainant a Letter of Charges concerning her conduct in connection with her reassignment. The Director presented four charges. The Director emphasised that the delay in taking up the position in Khartoum not only impacted IOM's relations with the Government of Sudan but also the effective continuation of programmatic activities of IOM Sudan. She stressed that the Organization had taken into account the complainant's family needs in its reassignment decisions but reminded her that by accepting to work for IOM, staff members undertake to discharge their functions and to regulate their conduct with the interests of the Organization in view and that they also accept the role of international civil servants with the related advantages and requirements regarding rotation. During her tenure with IOM, the complainant had never applied for any position outside her duty station whereas the rotation guidelines provide that staff members are expected to do so. The Director concluded that the complainant's conduct was inconsistent with Staff Regulation 1.2 (entitled "Authority of the Director General") and Staff Rule 1.2.1(b) (according to which staff members shall follow the instructions of the Director General). The Director also stated that paragraph 5.36 of Instruction 15 (IN/15) Rev. 1 on IOM's Standards of Conduct (which states that a staff member shall not seek to influence Member States in order to obtain a reversal of a decision taken by the Director General) and Staff Regulation 1.5 (dealing with the communication of unpublished information) had also been breached. The Director General was considering whether the complainant's conduct constituted misconduct and, before he took any action, she was requested to submit a written explanation for her conduct. Her counsel did so on her behalf on 30 December. The counsel stressed that the complainant was on sick leave and on authorised travel and that the threat of disciplinary proceedings constituted retaliation against the complainant for appealing against the decision requiring her to take up her duties in Sudan by 1 October 2017. He asked that the

letter of 15 December be withdrawn, that IOM recognise that parts of that letter constituted acts of harassment and that the complainant be paid legal fees in the amount of 5,000 United States dollars. Meanwhile, on 16 December 2017, the complainant had travelled to the United States in order to take her home leave.

In a letter of 5 January 2018 the Director, HRM, drew the complainant's attention to the fact that, as of 9 December 2017, she was no longer on sick leave. The Director indicated that the Director General had lost confidence in her ability to successfully fulfil her functions and to conduct herself in compliance with the Staff Regulations and Rules, as well as IOM's Standards of Conduct. It had been established that she had failed to comply with the Director General's instructions with regard to her reassignment and that she had engaged in a pattern of actions to delay her reassignment. She also had failed to give a credible explanation for what appeared to have been inappropriate contacts with representatives of the Government of Lebanon in an attempt to circumvent the Director General's decision regarding her reassignment to Beirut and she had challenged the truthfulness of the statement of the Director General regarding her accreditation for that assignment. The Director General was of the view that her conduct had proven to be unsatisfactory and that she had failed to comply with Staff Regulation 1.2, Staff Rule 1.2.1(b) and paragraph 5.36 of IN/15 Rev. 1. In accordance with Staff Regulation 10 the Director General had decided to impose upon her the disciplinary measure of discharge after due notice. However, the complainant would not be requested to serve the three-month notice period (IOM would make a corresponding payment in lieu of notice) and her termination would be effective upon receipt of the letter. That same day the complainant provided a medical certificate prescribing two months' sick leave, which was issued in Florida and dated 2 January.

On 7 February 2018 the complainant submitted a medical certificate prescribing one month's sick leave, issued by a doctor in Jordan on 9 December 2017.

On 6 March 2018 the complainant lodged a request for review of the 5 January decision, asking that it be set aside. She also claimed damages for moral and psychological injury and costs. The request was dismissed on 7 May.

On 6 June the complainant lodged an appeal with the Joint Administrative Review Board (JARB), challenging the 7 May decision and asking, *inter alia*, to be reinstated in IOM. The JARB issued its report on 19 December 2018. After examining the four reasons given to substantiate the decision to discharge the complainant from duty, which it considered to be well founded, it noted that the complainant had failed to inform her supervisors of her whereabouts in December 2017, had not followed the appropriate procedures concerning sick leave, annual leave and home leave and had provided medical certificates to cover periods of sick leave after they had already taken place and following her discharge from duty. The JARB concluded that the Administration was within its rights to address her conduct, which was inconsistent with the Staff Regulations and Rules as well as IOM's Standards of Conduct, through the administrative means at its disposal. It also noted that the complainant repeatedly failed to follow instructions, that she did not follow established procedures to address the various issues she had raised with the Administration and that, over the years, the Administration had attempted to accommodate her needs and preferences. In a letter of 18 January 2019 the Director General informed the complainant that he agreed with the findings and analysis of the JARB, based on which he concluded that the process which had been followed did not infringe any of her rights and that the decision to discharge her from duty for unsatisfactory conduct was well founded. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision to discharge her from duty and to order her reinstatement in a family duty station in a position commensurate with her qualifications, experience and personal circumstances. She seeks the payment of all salaries and benefits from the date of her separation from service up until her reinstatement. She also seeks an award of actual and moral damages in the sum of three years' net base salary for the harm caused to her career and professional reputation, the infliction of emotional stress and professional dislocation. She asks that her first and second complaints be heard together.

IOM asks the Tribunal to find that the complaint is receivable only insofar as it relates to the decision to discharge the complainant from duty after due notice and that all other claims are irreceivable. In any event, it considers the complaint to be unfounded on the merits. In the

interest of the sound administration of justice, IOM asks that the complainant's first and second complaints be considered simultaneously.

CONSIDERATIONS

1. Staff Regulation 10, which is under the rubric "Disciplinary Measures", provides, in sub-paragraphs (a) and (b), the bases of such measures and the nature of the measures which may be imposed on a staff member:

- "(a) The Director General may impose disciplinary measures on a staff member if:
 - [...]
 - (ii) his or her conduct is proven to be unsatisfactory or of such character as to bring the Organization into disrepute;
 - [...]
 - (iv) he or she is judged guilty of a serious offence: absence without leave; harassment; dishonesty; violation of national laws; failure to comply with the Staff Regulations and Rules; use of staff position, of the authority attached to it or of the property of the Organization for personal gain or advantage; abuse of authority.
- (b) Disciplinary measures may take the form of any one or a combination of the following: written warning; written reprimand; reduction of salary within grade; demotion to a lower grade; discharge after due notice; summary dismissal."

2. In a letter, dated 15 December 2017 (the "Letter of Charges"), which set out the charges against the complainant and their particulars, the Director, HRM, commenced by referring to IOM's efforts to reassign the complainant (under IOM's rotational policy) from her post of COM Damascus, eventually to the post of COM Khartoum. The Director referred to the rules on rotation contained in Annex 8 to the Staff Rules; reminded the complainant that under those rules she first became eligible for rotation in the 2008-2009 cycle and that for various reasons, including her personal circumstances and particularly the special needs of her daughter who has a disability, she was granted a series of deferrals, but was informed in January 2016 of the Director General's decision to transfer her to the post of COM Beirut. The Director stated that as the Government of Lebanon did not approve her accreditation, the Director General, acting on the advice of the Rotation Appointments and Postings Board (RAPB), decided to transfer her to the post of COM

Khartoum. The Director also reminded the complainant that she had been so informed on 16 February 2017 and that after a series of correspondences between her and the Administration in which she, in effect, prevaricated, failed to keep deadlines in accordance with requests or instructions and indicated her intention to delay her posting to Khartoum, the Director General finally instructed her to assume duties there not later than 1 October 2017. The Director further noted that the complainant requested a review of that decision, and, subsequently, appealed to the JARB and that she entered sick leave in the electronic leave management system for a period of eight weeks beginning 24 September 2017. She also noted that in April 2017 the complainant wrote to the Director General that she had just been informed that the Government of Lebanon had endorsed her nomination to be COM Beirut. The charges against the complainant were then made.

3. The complainant was charged for having: 1) failed to comply with the Director General's clear and repeated instructions with regard to her reassignment by failing to respect deadlines for reply and indicate preferences between options for reassignment proposed for her, 2) engaged in a pattern of actions to delay possible reassignment and, in the case of reassignment to Khartoum, indicated repeatedly that although she accepted the assignment, she intended indefinitely to delay its implementation, 3) appeared to have engaged in inappropriate contacts with representatives of the Government of Lebanon in an attempt to circumvent the Director General's decision regarding her reassignment to Beirut, and 4) challenged the truthfulness of the information the Director General had provided her regarding her accreditation for the post in Lebanon.

4. Regarding the bases of the charges, the Director stated that the complainant's conduct was inconsistent with Staff Regulation 1.2 and Staff Rule 1.2.1(b), which provide:

“Staff members are subject to the authority of the Director General. They are responsible to him or her in the performance of their duties. [...]

Staff members shall follow the directions and instructions issued by the Director General and by their supervisors.”

Additionally, the Director stated that the complainant's conduct was inconsistent with IOM's Standards of Conduct (IN/15 Rev. 1), paragraph 5.36, and Staff Regulation 1.5 which provide:

“IOM staff members shall not seek to influence Member States or Observers in order to obtain a reversal of an internal decision taken by the Director General, including decisions [...] connected with professional career advancement or personal status.”

“Staff members shall exercise the utmost discretion in regard to all matters of official business. They shall not communicate to any person any information known to them that has not been made public, except in the course of their duties or by authorization of the Director General, nor shall they at any time use such information to private advantage. [...]”

5. The complainant, who was further informed by the Director, HRM, that the Director General was considering whether her conduct constituted misconduct, responded by the stipulated deadline: 30 December 2017. By letter of 5 January 2018, the Director, HRM, informed her of the decision to impose upon her the disciplinary measure of discharge after due notice. When her internal appeal was eventually rejected in the impugned decision, she challenged that decision on various bases including that there was a failure to examine the allegations in accordance with due process; the decision to impose the disciplinary measure upon her is vitiated by abuse of authority; none of the charges against her was proved with evidence beyond a reasonable doubt; the decision to reassign her lacked transparency; IOM did not follow its procedures and failed to specify what violation of the rules constituted the basis for her discharge; the decision to impose the disciplinary measure upon her was arbitrary; the allegation that her actions constituted misconduct is unreasonable; IOM failed to treat her with dignity and breached its duty of care towards her; the disciplinary measure imposed upon her was disproportionate; she suffered acts of harassment.

6. IOM correctly submits that the complainant’s allegations concerning harassment are irreceivable pursuant to Article VII, paragraph 1, of the Tribunal’s Statute as she has not exhausted the internal means of redress that were available to her under the applicable Staff Regulations. Consequently, the scope of the present complaint concerns only the decision to discharge the complainant from IOM.

7. One other procedural matter must be addressed before considering the merits of this complaint. The complainant requests that this complaint be heard concurrently with her first complaint, which challenges the Director General’s decision not to waive her rotation to Khartoum from 1 October 2017. In its reply, IOM states that it has no

objection to the joinder of the complainant's first and second complaints. In her rejoinder, the complainant states that IOM misinterpreted her request that the two complaints be heard concurrently as a request for their joinder. She emphasizes that her request that they be heard concurrently does not imply their joinder because there are distinct and separate causes of action that require individual adjudication and that she requests that they be heard concurrently due to the similarity of their factual background. In its surrejoinder IOM asks that both complaints be considered simultaneously because the complainant repeatedly mixes the facts, arguments and decisions challenged in various appeals and complaints. The Tribunal will not join the complaints to be the subject of a single judgment as they do not raise the same issues of law and because justice will be better served by focusing in separate judgments on the discrete scope of each complaint and the remedies sought therein.

8. Inasmuch as the complainant challenges a disciplinary decision, it is recalled that consistent precedent has it that such decisions are within the discretionary authority of the executive head of an international organisation and are subject to limited review. The Tribunal must determine whether a decision taken by virtue of a discretionary authority was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the organisation's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority (see, for example, Judgment 3297, consideration 8).

9. In the Discharge Letter of 5 January 2018, having chronicled the events that led to the four charges being proffered against the complainant, the Director, HRM, in effect concluded that, as those charges had been proved, the Director General determined that the complainant's conduct had "proven to be unsatisfactory and that [she] failed to comply with the Staff Regulations and Rules". The Director, HRM, also informed her that the Director General had accordingly decided to impose on her the disciplinary measure of discharge after due notice. In its report, which the Director General endorsed in the impugned decision, the JARB also unanimously concluded that the four

charges proffered against the complainant had been proved, and, accordingly, it did not consider any of her claims for relief (including setting aside the decision to discharge her) to be justified. The JARB therefore further concluded that “the Administration was within its rights to address the [complainant]’s conduct, which was inconsistent with the Staff Regulations and Rules and the IOM standards of conduct, through the administrative means at its disposal”.

10. The Director General maintained the discharge decision in the impugned decision on the basis that the four charges had been proved, in effect, viewing the decision to discharge the complainant as proportionate on the four charges, cumulatively. However, in Judgment 4459, which is also delivered in public this day, the Tribunal has set aside the impugned decision which confirmed the Director General’s decision not to temporarily defer the complainant’s reassignment to Sudan. The Tribunal concluded that in the particular circumstances of the case, IOM breached its duty of care towards the complainant by not granting her request to temporary defer that reassignment. That decision may well have had an effect on the first and second charges proffered against the complainant. In the circumstances, the Tribunal cannot be affirmatively satisfied that the decision to discharge the complainant, which the Director General confirmed in the impugned decision, would have been the same. Issues of proportionality may well arise which, under the Tribunal’s case law, must be considered in a case such as this (see, for example, Judgments 3953, consideration 14, and 4400, consideration 29). For this reason, the impugned decision of 18 January 2019 will be set aside.

11. The matter will be remitted to IOM in order for the Director General to take a new decision on the complainant’s appeal against the decision to discharge her. As a consequence, the complainant’s claims for reinstatement and for damages will remain in abeyance.

DECISION

For the above reasons,

1. The impugned decision dated 18 January 2019 is set aside.

2. The matter is remitted to IOM in order for the Director General to take a new decision on the complainant's appeal against the decision to discharge her.

In witness of this judgment, adopted on 2 November 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ