

S.
v.
IOM

138th Session

Judgment No. 4841

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms S. S. against the International Organization for Migration (IOM) on 20 November 2021 and corrected on 14 January 2022, IOM's reply of 14 April 2022, corrected on 20 April 2022, the complainant's rejoinder of 21 June 2022 and IOM's surrejoinder of 20 September 2022;

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 decisions to abolish the post she used to hold and not to renew her contract beyond 31 December 2020.

The complainant joined IOM in 2015. She was promoted to the P-4 level in March 2018 and, in March 2019, she was laterally transferred to the position of Head of the Sub-Office in Aden, Yemen.

In April 2019, a Senior Field Coordinator (SFC) joined the IOM Mission in Yemen and the complainant was advised that she would report to him, whereas she previously reported to the Deputy Chief of Mission (DCoM). In November 2019, the incumbent of the SFC position was replaced by another staff member. In March 2020, the Chief of Mission (CoM) in Yemen temporarily assigned the new SFC and the

DCoM to the Aden Office. These temporary assignments were later extended.

The complainant raised concerns, on several occasions, that she was being excluded from information-sharing and decision-making by her hierarchy.

Following a direct order for international agencies to reduce the number of their staff in the country, due to the COVID-19 pandemic and the prevailing security situation, on 16 March 2020, the CoM instructed the complainant to evacuate from Aden. She continued working from her home country and her terms of reference were reviewed thereupon, removing certain duties which could not be performed remotely and which were absorbed by the SFC and the DCoM. During the following months, she repeatedly requested to return to her duty station, the last time being by email of 9 September 2020 to the DCoM. The Organization responded that it could not accommodate her request at that time, on the grounds of unavailability of flights, and later, of the ceiling imposed for security reasons which limited the total number of staff present.

Meanwhile, on 11 August 2020, the IOM Mission in Yemen's management prepared a new organigram of the Mission outlining a plan to change its structure. The organigram represented an overall reduction of professional staff. On 26 August, the Head, Resource Management Unit (RMU), of the IOM Mission in Yemen, emailed to the Head, Emergency Support Unit (ESU), in Headquarters, the details of the proposed restructuring, with copies of the old and new organigrams. After a series of exchanges among various units in the IOM Mission in Yemen and in Headquarters during September 2020, the Director, Department of Operations and Emergencies, approved the restructuring of the IOM Mission in Yemen as documented in the organigram, by email dated 24 September 2020.

On the same day, the complainant was orally informed that her post was to be abolished and that, as a consequence, her contract would not be renewed beyond 31 December 2020. On 25 September, this was confirmed by email, specifying that, since the SFC and the Head, RMU, were now based in Aden, there was no longer a need for the position of

a Head of the Sub-Office. By letter dated 28 September, the complainant received notice of the non-renewal of her contract.

By email of 30 September, in response to a request for further details by the complainant, the CoM stated, inter alia, that the structure changes did not constitute a downsizing exercise *per se*; the organigram could not be shared yet; it was not possible to directly transfer the complainant to another post within the IOM Mission in Yemen, as no suitable position was available, but that Human Resources Management (HRM) could be contacted to assist in trying to find a suitable alternative post. The new organigram was made public in an “all-international” meeting held on 15 October 2020.

On 11 November 2020, at the complainant’s request, she was placed on special leave without pay, so that she may continue applying to positions as an internal candidate.

On 21 November, the complainant requested a review of the decisions to abolish the post she had held and not to renew her contract for an additional one-year term, also making allegations of harassment and abuse of authority. She was informed that her request for review was rejected, by letter dated 20 January 2021. This letter stated, inter alia, that in the event that she wished to pursue the allegations of harassment and abuse of authority, the proper avenue was to contact the Office of the Inspector General (OIG).

On 18 February 2021, the complainant lodged an appeal before the Joint Administrative Review Board (JARB).

On 10 April 2021, the complainant filed a complaint of harassment and abuse of authority against her former supervisors with OIG, pursuant to Instruction IN/90, entitled “Policy for a Respectful Working Environment”. This complaint was subsequently closed following a closure report by OIG.

On 15 July 2021, the JARB rendered its report to the Director General, concluding that the appeal was without merit. By letter of 23 August 2021, the Director General informed the complainant of his decision to dismiss her appeal, following the JARB’s recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision of 23 August 2021 upholding the abolition of her post and the non-renewal of her contract, to reinstate her in her former position or in a P-4 position commensurate with her training, skills and experience, and that she be paid all salaries, benefits, step increases, pension contributions, entitlements and any other emoluments she would have received had she not been placed on special leave without pay on 1 January 2021. Alternatively, she requests to be granted material damages equal to two years' salary at the P-4 level, including benefits, step increases, pension contributions, entitlements and any other emolument, moral and exemplary damages in the amount of 100,000 Swiss francs, 20,000 francs in legal fees, interest on all amounts awarded, and any other relief the Tribunal deems fair and necessary.

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

CONSIDERATIONS

1. The complainant, at the relevant time, encumbered the position of Head of the Sub-Office in Aden, Yemen, at grade P-4, on a one-year fixed-term contract, extended until 31 December 2020. She received the 25 September 2020 decision of the Chief of Mission (CoM) to abolish her post in the context of a restructuring process of the IOM Mission in Yemen, and the 28 September 2020 decision of the Chief of Human Resources (HR) Operations and Administration Services not to renew her contract for an additional one-year term upon its expiry on 31 December 2020. Her request for administrative review was rejected by the 20 January 2021 decision, which she appealed internally. The complainant impugns before the Tribunal the 23 August 2021 decision, which, endorsing the Joint Administrative Review Board (JARB) report of 15 July 2021, upheld the 20 January 2021 decision, together with the 25 and 28 September 2020 decisions.

2. The complainant advances a number of arguments, grouped under five pleas entitled as follows:

- (i) IOM violated her right to an effective internal appeal.
- (ii) IOM breached its rules and the Tribunal's case law by failing to comply with IOM's Guidelines for Managing a Downsizing Exercise ("the Guidelines").
- (iii) The decisions to abolish her post and not to renew her contract constituted an abuse of authority.
- (iv) The decisions to abolish her post and not to renew her contract breached the Organization's duty of care and good faith.
- (v) IOM has not made reasonable efforts to find her alternative employment.

3. In her first plea, the complainant alleges that IOM violated her right to an effective internal appeal, as the JARB ignored many of her arguments and breached her procedural rights. She contends that the JARB:

- (i) failed to determine whether the IOM Mission in Yemen was obliged to follow the Guidelines, by saying that it was not obliged without giving reasons;
- (ii) ignored her claims of abuse of authority;
- (iii) improperly concluded, without evidence, that her position was abolished due to funding constraints;
- (iv) ignored her claims about IOM's failure to reassign her to another position;
- (v) improperly denied her right to make an oral presentation; and
- (vi) during the appeal process, improperly communicated with the Organization about the receivability of a pleading, to her detriment.

The first, second, third and fourth arguments are well founded as the JARB report entirely failed to address in any detail the merits of any of the complainant's pleas. In so doing, it denied her right to an effective internal appeal (see Judgments 4169, consideration 5, 4063, consideration 5, and 4028, consideration 8).

This is sufficient to set aside the impugned decision of 23 August 2021, without there being any need to address the complainant's fifth and sixth arguments. For the violation of her right to an effective internal appeal, the complainant is entitled to moral damages in the amount of 5,000 Swiss francs. However, in the circumstances of the case, the Tribunal will not send it back to the Organization and will directly address the complainant's pleas concerning the decisions to abolish her post and not to renew her contract.

4. In her second plea, the complainant contends that IOM breached its own rules and the Tribunal's case law regarding the abolition of posts in the context of a restructuring process, and did not comply with its Guidelines.

It is appropriate to recall that Staff Rule 4.4.2, in IOM's Unified Staff Regulations and Rules, reads as follows:

"Fixed-term [...] contracts shall expire automatically on the expiration date specified in the letter of appointment. Fixed-term [...] contracts may be extended or renewed at the discretion of the Director General, if the staff member is willing to accept such extension or renewal. At no time, however, shall such contracts be deemed to carry any expectancy, legal or otherwise, of extension, renewal or conversion, irrespective of the length of service."

It is also appropriate to recall the Tribunal's firm case law concerning the non-renewal of a fixed-term contract, specifically where the non-renewal is connected with the abolition of the post in the context of a restructuring process. The Tribunal's case law has often reiterated that a staff member appointed on a fixed-term contract does not have a right to the renewal of the contract, when it expires (see, for example, Judgments 4587, consideration 19, 4462, consideration 18, 3586, consideration 6, and 3448, consideration 7). As a result, the Tribunal's scope of review is limited when an organization decides not to extend or renew a fixed-term appointment because the Tribunal respects an organization's discretion to determine its own requirements and the career prospects of staff (see, for example, Judgment 3948, consideration 2, and the case law cited therein). Thus, the Tribunal will not substitute its own assessment for that of the organization. The non-renewal of a fixed-term contract may be lawfully justified by the

abolition of the post in the context of a restructuring process, provided that the abolition of the post be based on objective and valid grounds, as the abolition of a post must not serve as a pretext for removing unwanted staff, which would constitute an abuse of authority (see Judgment 3940, consideration 3). A restructuring decision must be justified by real needs (see Judgment 4009, consideration 15). An international organization may find that it has to reorganise some or all of its departments or units. Restructuring measures may naturally entail the abolition of posts, the creation of new posts or the redeployment of staff. The steps to be taken in this respect are a matter of an organization's discretion and are subject to only limited review by the Tribunal (see Judgments 4004, consideration 2, and 3940, consideration 3).

In brief, decisions concerning the non-renewal of a fixed-term contract, the abolition of a post, and/or a restructuring process, are discretionary decisions subject to limited review by the Tribunal. Non-renewal decisions may be set aside only if they were taken in breach of a rule of form or procedure; if they rest upon an error of fact or of law; if some essential fact was overlooked; if there was an abuse or misuse of authority; or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgment 3299, consideration 6). In turn, restructuring decisions, including the abolition of posts, may be set aside only if they are not taken in accordance with the relevant rules on competence, form or procedure, if they rest upon a mistake of fact or law, or if they constituted an abuse of authority. The Tribunal will not rule on the appropriateness of the restructuring, as it will not substitute the organization's view with its own (see, for example, Judgments 4004, consideration 2, 2933, consideration 10, and 2742, consideration 34).

The 20 January 2021 decision, issued on the complainant's request for administrative review, and the 25 September 2020 decision, explained in detail the grounds for the abolition of the post encumbered by the complainant (Head of the Sub-Office in Aden, Yemen). The decisions were based on a restructuring of the IOM Mission in Yemen. The 20 January 2021 decision reads as follows:

“The Mission was undergoing significant changes, motivated by a number of factors including operational challenges in the north of Yemen, the requirement to better reflect needs in the south of Yemen, and overall funding constraints, which would result in the merger of positions to avoid duplication and an overall reduction in staffing numbers.

[...] Pursuant to these changes, both the Senior Field Coordinator [(SFC)] and the Head of the [Resource Management Unit (RMU)] would be based in Aden, and would assume responsibility for administrative and programmatic oversight, as well as political coordination with authorities. As a consequence, there was no longer a need for the Head of Sub-Office position in Aden, and the position would be made redundant. Consequently, the Mission would not be able to renew [the complainant’s] contract.

[...]

Following an analysis of the positions in accordance with the criteria and considerations set out in [the Guidelines], and taking into account the overall interest of the Organization, a new [organigram] was prepared which detailed an amended structure for the Mission [...] The [organigram] reflected the proposed rationalization of certain positions in order to meet new operational needs and reduce staffing costs – including the P-4 position of Head of Sub-Office (Aden) [...] In addition, the P-3 position of Head of Sub-Office (Hodeida) was abolished due to the required closure of the Sub-Office; and of a further four other professional staff members separating from the Mission, two would not be replaced at all – with their duties being absorbed by existing colleagues, and the remaining two vacant posts would be merged into a single position. This represented a reduction in professional staff from six posts to one post, with resultant cost savings.”

The impugned decision, in turn, concluded that: “(i) the decision to abolish [the complainant’s] position had been well coordinated with multiple parties across IOM in multiple divisions, and had been implemented in line with IOM rules and procedures; and (ii) IOM had followed its Staff Regulations and Rules in taking the decision not to renew [the complainant’s] contract and, in particular, had given [her] due notice in line with [Instruction] IN/247 (‘Notice Periods’). [...]”

Thus, the Tribunal is satisfied that the justification for the restructuring was valid and reasonable.

The complainant also relies on the Guidelines assuming that they were binding and that the Organization was obliged to comply strictly with all the provisions contained therein. Her reliance in this regard is misplaced. The Guidelines expressly state that they were not intended

to be binding, but “for information only”. The language of the Guidelines is not prescriptive. They rather outline or suggest best practices. Thus, they are not part of the staff rules and regulations or of the complainant’s terms of appointment.

As said above, the Tribunal does not rule on the appropriateness of a restructuring process, unless and until it negatively affects a staff member in breach of staff rules and regulations. A line must be drawn between restructuring directions and decisions, which fall within the discretion of an organization, and individual decisions adopted as a consequence of a restructuring process. The Tribunal will assess whether such individual decisions comply with staff rules and regulations and the Organization’s duty of care. In the present case, there is no evidence that the Organization did not comply with rules and principles concerning the duty of care towards staff in case of restructuring exercises.

In light of the relevant rules, of the content of the decisions quoted above and of the evidence in the file, the Tribunal is satisfied that the abolition of the complainant’s post and the restructuring process were, in the present case, a correct exercise of the Organization’s discretionary power. The decisions were justified by an actual need to downsize the IOM Mission in Yemen. Moreover, the restructuring process did not concern only the complainant’s post, as it resulted in a reduction from six posts to one post.

5. The complainant’s third and fourth pleas will be examined together, as they partially overlap. She alleges that:

- (i) the decisions to abolish her post and not to renew her contract constituted an abuse of authority, as they were tainted by malice, bias and bad faith on the part of her supervisors against her;
- (ii) the abolition of her post was a mere pretext to get rid of her, “given the clear bias and ill-will exhibited by her supervisors against her in the months” preceding the abolition of her post and the non-renewal of her contract; and

- (iii) the decisions to abolish her post and not to renew her contract breached the Organization's duty of care and good faith and "were tainted by bias, malice and bad faith and, as a result, were an abuse of authority".

She relies on the following elements:

- in March 2020, during the COVID-19 pandemic, she was unnecessarily evacuated from her duty station in Yemen to her home country;
- her terms of reference were modified and reduced, she was excluded from information-sharing and decision-making in the Sub-Office in Yemen, even on matters that should have fallen under her functions; and
- the abolition of her post was planned in August 2020 whilst the Organization was reassuring her about her return to the duty station.

The Organization replies that the complainant's evacuation was prompted, in March 2020, by a direct order issued by the Designated Official to reduce the number of international staff in Aden with immediate effect, related to both the COVID-19 pandemic and the prevailing security situation in the country. The Government of Yemen had announced the closures of the Aden airport and seaport. The United Nations Department of Safety and Security (UNDSS) had reported deteriorating security scenarios and had expressed concerns regarding the number of staff present in Aden. Staffing levels had been reduced to essential personnel only. Agencies were being encouraged "to plan seriously if they should send staff to work from home" and to use the last rotation before the closure of the Aden airport as a means of implementation. As a consequence, senior management took action on 16 March 2020 to evacuate the complainant, together with the Programme Support Officer stationed in Aden. The complainant was evacuated to her designated home country, India, and continued to perform functions under revised terms of reference that were appropriate to her remote working arrangements. By necessity, certain tasks and responsibilities relevant to her role were absorbed by the SFC and the Deputy Chief of Mission (DCoM), who had remained in the Sub-Office in Aden due to

the suspension of flights returning to Sana'a, Yemen. While the complainant initially informed the IOM Mission in Yemen in July 2020 of her wish to return to her duty station, her request could not be accommodated due to the delayed resumption of flights between India and Yemen. In addition, in September 2020, due to prevalent "Security Threat Information", UNDSS imposed a ceiling, which limited the total number of IOM staff members across different duty stations in the country.

In light of the above, the third and fourth pleas are unfounded.

The Tribunal notes that bias, prejudice, and bad faith cannot be presumed, they must be proven and the complainant bears the burden of proof (see Judgment 4688, consideration 10, and the case law cited therein). Although evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances, that does not relieve complainants, who bear the burden of proving their allegations, from introducing evidence of sufficient quality and weight to persuade the Tribunal. Mere suspicion and unsupported allegations are clearly not enough, the less so where, as here, the actions of the organization, which are alleged to have been tainted by personal prejudice, are shown to have a verifiable objective justification (see Judgment 4745, consideration 12).

In the present case, the complainant has not established to the Tribunal's satisfaction that the actions taken by the Organization during the months that preceded her non-renewal, as from March 2020 onwards, lacked an objective and verifiable justification. Her evacuation in March 2020, as well as her delayed return to her duty station in Yemen, and the changes to her terms of reference appear to be motivated by the global and local situation due to the COVID-19 pandemic and to the security issues in Yemen, and not by bias against the complainant. The Tribunal also notes that the complainant accuses her supervisors of bias and prejudice, but the evidence in the file shows that she reported to the SFC and to the DCoM, whilst the decisions concerning the abolition of her post and the non-renewal of her contract were taken by different officers, namely by the CoM and by the Chief of HR. Hence, there is no evidence that her supervisors played a substantial role in the

restructuring decision and in the decision to abolish her post to her detriment.

6. In her fifth plea, the complainant alleges that IOM has not made reasonable efforts to find her alternative employment. She contends that, given that IOM has abolished the position of a staff member with over six years of professional experience in multiple duty stations, it had a duty to find alternative employment for her prior to her separation. According to her, IOM has not discharged this duty. She relies on Judgment 3908, consideration 16, and insists that IOM should have found a position for her and directly reassigned her, rather than requesting her to apply to positions through normal selection procedures. She has already applied to not less than 18 positions in IOM, including one in the IOM Mission in Yemen, to no avail. The complainant lists various positions for which she has applied and not been shortlisted, or for which she has been shortlisted but not selected.

This plea is unfounded. The complainant's reliance on Judgment 3908, consideration 16, is misconceived. Judgment 3908 stated that:

“[...] [T]he Tribunal has long recognised the right of an international organisation to restructure and abolish positions [...] This will imperil the continuing employment of the occupants of those abolished positions. However, a concomitant of that right to abolish positions is an obligation to deal fairly with the staff who occupy those abolished positions. That extends to finding, if they exist, other positions within the organisation for which those staff have the experience and qualifications.”

This principle has been expressed in a different factual situation, namely in cases of anticipated termination of an appointment due to the abolition of a post (see also, in addition to Judgment 3908, Judgments 4094, consideration 4, and 4036, considerations 6 to 8), not in a case of non-renewal of a contract, as the present one. In another case of non-renewal in connection to the abolition of a post, the Tribunal held that the Organization “was obliged to explore with the complainant other employment options prior to his separation”, but it did so having regard to the specific circumstances of the case, where the complainant had been “employed on a series of short-term

appointments for much of the complainant's employment [...] [b]ut the complainant nonetheless had worked, in a real and practical sense, for over a decade and a half in the service of the Organization", that is, more than 15 years from June 1993 to December 2008 (see Judgment 3159, consideration 20; see also Judgments 4654, consideration 20, and 2902, consideration 14). Instead, in the present case, the complainant had been working with IOM for six years but had encumbered only from 2019 the position that was abolished as from 1 January 2021. In any event, the Organization placed the complainant on special leave without pay after the expiry of her fixed-term contract, until 31 December 2022, and therefore the assistance in her search for other employment options was in fact provided "prior to her separation".

In the present case, the Organization was not bound by any specific provision to identify an alternative post. Where the non-renewal of a fixed-term contract is justified, the direct reassignment of the staff member to another adequate post, if it exists, is not mandatory. Moreover, the Organization highlighted, in the 20 January 2021 decision, "the unique nature of IOM's funding structure as a projectized organization, meaning that the employment of staff members is intrinsically linked to the duration of the specific projects for which they are engaged, and the availability of funding for the positions that they occupy". However, as noted above and consistent with its duty of care, the Organization placed the complainant on special leave without pay after the expiry of her fixed-term contract, until 31 December 2022, in order to enable her to apply to post vacancies within IOM as an internal candidate.

The Organization also explored, albeit to no avail, other employment options for the complainant. The evidence in the file shows that the Organization made serious efforts and attempts in this respect, on multiple occasions. Namely, the complainant was encouraged to contact the Head of Talent Management for assistance, to update her personal history form, and to apply for any vacancies for which she considered herself to be qualified. The Head, Talent Management, maintained regular contact with the complainant regarding her preferences and the post vacancies to which she had applied, which included "consistent

follow-up communication with management in Missions and Regional Offices” to support her candidacy.

As a result, the Tribunal cannot conclude that IOM violated its duty of care towards the complainant. To this extent, it is not sufficient, as the complainant frames her case, to demonstrate that she was unsuccessful in applying for a range of positions.

7. In conclusion, as said above, the complainant will be awarded moral damages in the amount of 5,000 Swiss francs. As she succeeds in part, she is entitled to costs in the amount of 5,000 Swiss francs. All other claims will be dismissed.

DECISION

For the above reasons,

1. The impugned decision of 23 August 2021 is set aside.
2. IOM shall pay the complainant moral damages in the amount of 5,000 Swiss francs.
3. IOM shall pay the complainant costs in the amount of 5,000 Swiss francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 17 May 2024, Mr Patrick Frydman, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER