

The Administrative Tribunal,

Considering the complaint filed by Mr S. H. against the International Organization for Migration (IOM) on 26 April 2002 and corrected on 29 May, the Organization's reply of 1 August, the complainant's rejoinder of 30 September and the IOM's surrejoinder of 1 November 2002;

Considering Article II, paragraph 5, 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, who was born in 1948 and has British nationality, was employed by the IOM from December 1996 until August 2001, initially under special, temporary contracts and later under a series of fixed-term contracts. In November 1998 he was appointed to the position of Senior Finance and Administrative Officer at the IOM's Sub-Regional Office for North Africa and the Middle East, in Cairo, for a one-year period beginning on 1 September 1998, but owing to other commitments at headquarters in Geneva he did not take up his duties in Cairo until April 1999. At that time he held grade P.4.

In October 1999 the complainant was seconded for ten weeks to the IOM's office in Kosovo. In February 2000, shortly after his return from Kosovo, a new Chief of Operations and Management for IOM Cairo and the region was appointed *ad interim*, whose terms of reference were considered by the complainant as overlapping with his own to the extent that they deprived him of his main duties. Reluctant to remain in Cairo under those circumstances, he applied in March 2000 for the position of Administrative Support Officer in Dakar. On 19 April 2000 he was informed that he had been selected for the position.

Although the Dakar post was offered at the same grade and step as his position in Cairo, it would have entailed a reduction in his take-home pay because the post adjustment rate was lower for Dakar than for Cairo. In May 2000 the complainant asked the Organization to grant him four additional steps within his grade to compensate for the reduced salary. His supervisors gave him informal assurances that this issue would be resolved and in the meantime he was given a temporary assignment in Dakar. However, on 16 July 2000 the Director of the Human Resources Division informed him that additional steps could not be granted and that the post adjustment rate for Dakar could not be changed. The complainant replied that in that case he would prefer to remain in Cairo or to be considered for other positions.

By this time the Cairo option was no longer open to him since the Organization had begun to recruit a replacement for him. The Organization encouraged him to apply for other positions and renewed his contract for a further one-year period. The complainant continued to work in Dakar on temporary assignments and pursued his efforts to negotiate improved financial terms for the Dakar appointment, to no avail. He also applied unsuccessfully for a number of other positions in the Organization.

At the end of March 2001 the complainant fell ill and was repatriated to Switzerland. He subsequently returned to work on a part-time basis and was given a temporary assignment in Geneva. By a letter of 18 May 2001 he was informed by the Director of the Administrative Support Department that his fixed-term contract, which was due to end on 31 August 2001, would not be renewed on expiry because there was no position available for him. Having challenged this decision informally, on 30 August 2001 the complainant requested a final administrative decision on the matter. On 31 August the Director of the Administrative Support Department informed the complainant that the notice of non-renewal would not be withdrawn but that the Director General had exceptionally agreed to consider him as an internal candidate for IOM vacancies for a period of 12 months following the expiry of his

contract, in order to assist him in finding another job.

On 31 October 2001 the complainant lodged an internal appeal with the Joint Administrative Review Board, which issued its report on 21 January 2002. The Board found no infringement of the complainant's rights, but found certain shortcomings in the Organization's recruitment procedures. It recommended first, that the Organization "actively refer available positions to [the complainant] without prejudicing the outcome of selections", secondly, that it provide him with a detailed letter of reference and thirdly, with regard to his medical condition, that it consider either compensating him on the basis of the medical evidence as it then stood by an *ex gratia* payment of 20,000 Swiss francs, or referring the case to an external medical expert to determine whether compensation was warranted or not.

On 26 January 2002 the Director General endorsed the first two recommendations and agreed to award the complainant 20,000 francs "on the understanding that this would be in full and final settlement of the case, and that [the complainant] would therefore waive any further claim against IOM arising out of [his] employment with IOM". That decision, which the complainant now impugns, was notified to the complainant by a letter of 29 January from the Director of the Administrative Support Department.

B. The complainant submits that the decision to terminate his appointment was arbitrary and tainted by irregularity. He states that his case is essentially based on a "stream of events" culminating in and invalidating that decision. Furthermore, there was a lack of due process and of adequate consultation.

He contends that his secondment to Kosovo shortly after his arrival in Cairo negatively affected his career because the events which unfolded in his absence precipitated a reorganisation of the Cairo office resulting in the loss of his principal duties.

He asserts that the post in Dakar was offered to him as "a clear upgrade from the job advertised and a quasi promotion" and that he was "made to expect and hope for a favourable decision" on his salary package. In his view, the Director General could and should have accepted his requests for improved salary conditions, and the Organization's delay in providing a definitive answer to his request constituted "a serious breach of normal and reasonable practices", as confirmed by the Joint Administrative Review Board.

He considers that the rejection of his subsequent applications for vacant positions within the Organization showed discrimination in favour of female candidates, or in favour of applicants from Headquarters as opposed to applicants from field offices, or that his applications were not treated seriously because of an incorrect assumption that he had already accepted the post in Dakar. He argues that the reason put forward to justify the non-renewal of his contract, namely the absence of a suitable position to offer him, was invalid: there were other positions to offer him, but his applications were "consistently rejected in favour of less qualified applicants".

Regarding his medical condition, he acknowledges that the Organization was under no legal obligation to wait until he had returned to work before giving him notice of the non-renewal of his contract, but argues that it had a "strong moral obligation" to do so, particularly in view of the fact that his illness was found to be work-related.

The complainant seeks the withdrawal of the impugned decision, "reinstatement on full pay and allowances" with effect from 1 September 2001, reassignment to a post commensurate with his professional experience, compensation for the unwarranted termination of his appointment, and for "his state of ill health caused by stress [...] directly related to his work situation". He also claims costs.

C. In its reply the Organization first draws attention to the fact that the case concerns the non-renewal of a fixed-term appointment, and not the termination of an appointment, and that a decision not to renew a contract is discretionary. It considers that in taking the decision the relevant procedures were followed, every effort was made to accommodate the complainant, and no mistakes or abuses were committed in concluding that there was no post available for him.

Responding to the complainant's specific arguments, it observes, with regard to his work situation in Cairo, that his early secondment to Kosovo did not adversely affect his career. It points out that the new Chief of Operations and Management had "full supervisory functions of all activities in the office" and was "the new supervisor of all the staff including the complainant". The complainant's terms of reference clearly showed that he reported to her. Moreover, the complainant alone "took the appointment of a new Chief as a direct slight on his own work and

responsibilities, and it was he who considered that he could not stay in Cairo". The Organization also queries what relevance the reorganisation of the Cairo office has to the issue of the non-renewal of his contract long after he had chosen to leave Cairo.

Regarding the post in Dakar, the Organization submits that the Staff Regulations and Rules do not confer a discretion on the Director General to grant salary increases to reward exceptional experience or to make up shortfalls in post adjustment. The limited discretion enjoyed by the Director General by virtue of the Staff Regulations and Rules can be exercised where an official's responsibilities "have been so changed that they have become permanently greater but not so great as to warrant reclassification of his post", but in any case it is confined to an increase in salary equal to "one or exceptionally two steps", and certainly not the number of steps requested by the complainant. The Organization also observes that the complainant was fully aware of the salary and status of the post for which he applied, and that he was familiar with the post adjustment system. It denies that the post was offered to him as "a clear upgrade from the job advertised and a quasi promotion".

The Organization also denies that the complainant was discriminated against in his applications for other vacancies. It considers that the proper procedure was followed in each case, adding that the decisions to make the appointments in question were discretionary and hence subject to only limited review.

With regard to the complainant's occupational illness, the Organization points out that it did not separate the complainant during his period of sick leave, but merely gave him the statutory notice period of three months that his contract would not be renewed. It then helped the complainant to look for another job, and even allowed him to be considered as an internal applicant after the expiry of his contract. It therefore objects to the suggestion that it acted unethically or in a manner contrary to good practice.

D. In his rejoinder the complainant presses his pleas, re-emphasising that his complaint "must be seen as a stream of events".

E. In its surrejoinder the Organization maintains that the non-renewal of the complainant's contract was lawful.

CONSIDERATIONS

1. The complainant was employed by the IOM under a series of contracts from 15 December 1996 until 31 August 2001. On 18 May 2001 he was given "formal notice of termination upon expiry of [his] contract on 31 August". The notice assigned two grounds for the non-renewal of his contract, namely, that:

- (a) he did not accept a posting in Dakar for which he "had applied and been selected"; and
- (b) his temporary assignment in Dakar had finished and there was "no other position" to offer him.

2. It will later be necessary to refer in some detail to the Dakar posting and the complainant's temporary assignment there. For the moment, it is sufficient to note that correspondence ensued between the complainant and the Administrative Support Department of the IOM, with the latter informing him by letter dated 31 August 2001 of the following: "as we currently have no post to offer you, we are unable to withdraw the notice of non-renewal of your contract from 31 August 2001". The complainant then appealed to the Joint Administrative Review Board, indicating in his statement of appeal that he was challenging "the non-renewal of [his] contract".

3. Notwithstanding that the complainant's internal appeal was against the non-renewal of his contract, the Board undertook a wide-ranging inquiry covering various matters described in his complaint to the Tribunal as a "stream of events" which, he contends, was causative of the non-renewal of his contract. The essence of his submission is that those events or the reasons underlying those events were the real reason for the non-renewal of his contract. Further, it is implicit in his complaint that the "stream of events" was such that the non-renewal of his contract was tainted with error or unfairness of a kind that renders the decision not to renew his contract liable to be set aside and to entitle him, as he asserts in his complaint to the Tribunal, to "reinstatement on full pay and allowances as from 1 September 2001 and [...] reassignment to a post commensurate with his professional background and experience". He also claims relief by way of "appropriate compensation for the unwarranted termination of his appointment, and [for] his state of ill health caused by stress and hardship directly related to his work situation [...] and work-related personal and family situation".

4. As already indicated, the "stream of events" upon which the complainant relies in his pleadings was examined by the Joint Administrative Review Board. However, not all those events were the subject of precise findings. It is sufficient to note that the Board accepted much of what the complainant then advanced in respect of the events, and made precise recommendations with respect to management practices, selection procedures and personnel planning which, in the complainant's view, had led to or, at the very least, contributed to the non-renewal of his contract. So far as concerns the complainant directly, the Board recommended that:

"1. The Administration actively refer available positions to [the complainant] without prejudicing the outcome of selections.

2. The Administration write a detailed letter of reference for [him] (as there is no performance evaluation system in place).

3. On the medical/health issue: in consideration of the hardships experienced by [the complainant] at times of work-related uncertainty for him and his family, and high work expectations of him in different locations, the Administration consider one of two possible courses of action:

- accept the medical evidence to date and agree to compensate [him] a reasonable nominal amount *ex gratia* as a one-off form of 'hardship allowance'. The Board recommends an amount of 20,000 Swiss francs.

OR

- refer the case to an external medical expert for further objective corroboration of the direct link between his work situation and his illness at the time, and an assessment of whether compensation was warranted or not."

However, the Board did not recommend withdrawal of the notice of non-renewal of the complainant's contract.

5. Subject to one qualification, the recommendations of the Board concerning the complainant were accepted by the Director General. That qualification is that an *ex gratia* payment of 20,000 Swiss francs would be made "on the understanding that this would be in full and final settlement of the case, and that [the complainant] would therefore waive any further claim against IOM arising out of [his] employment with IOM". It is with respect to that decision, which necessarily constitutes a decision not to renew the complainant's contract, that the complainant brings these proceedings.

6. It is not in issue that the complaint is receivable. What is in issue is whether the "stream of events" on which the complaint is based provides grounds for review of the decision not to renew the complainant's contract.

7. For present purposes, it is sufficient to summarise the "stream of events" from the perspective of the complainant, without making findings on any particular issue. The events begin with his posting to Cairo as Senior Finance and Administrative Officer at the Organization's Sub-Regional Office for North Africa and the Middle East. He was appointed in November 1998 but, because of commitments to other projects, he did not commence his duties in Cairo until April 1999. During the first six months of his posting to Cairo, the complainant spent only three months there as he was required to spend time on several missions. After six months, he was seconded to Kosovo for ten weeks.

8. When the complainant returned to Cairo from Kosovo in December 1999, the Cairo office was embroiled in troubles for which, it is agreed, the complainant was not in any way responsible. As a result of those troubles, the Regional Representative for North Africa and the Middle East sub-region was relieved of managerial responsibility for the region and another official was appointed as interim Chief of Operations and Management for IOM Cairo and the region, with terms of reference which overlapped the complainant's, thus severely reducing his status, functions and responsibilities.

9. Faced with a reduction in his status in Cairo, and encouraged by the Administration so to do, the complainant applied for the post of Administrative Support Officer in Dakar where, according to him, his services were required because there was no other person with the necessary qualifications available for the position. He subsequently withdrew his application but allowed it to be reinstated on the basis that the job to be performed was "a clear upgrade from the job advertised and a quasi promotion". He was informed by an e-mail of 19 April 2000 that he had been selected for the Dakar position.

10. When informed that he had been selected for the Dakar position, the complainant contacted the Administration to negotiate various issues. One of the issues - indeed, the main issue - was the question of salary and allowances. It became clear that if he accepted the position, he would, by reason of the different post adjustment rate, receive significantly reduced take-home pay. He was led to believe that adjustments could be made by the Administration, as a matter of discretion, and that those adjustments would result in appropriate salary and allowances. In fact, a recommendation to that effect was made but ultimately rejected. Upon learning of its rejection in July 2000, the complainant made it known that, rather than accept the Dakar post, he would prefer to remain in Cairo or apply for other positions.

11. In the meantime, a recruitment process had begun for his Cairo post and, thus, he was informed that he could not stay in Cairo but that there were two posts for which he could apply. It was then agreed that the complainant would go to Dakar on a temporary duty basis and that his "applications for the other two posts would not be prejudiced by this action". Following that agreement, his contract was extended until 31 August 2001.

12. Following the extension of his contract, the complainant spent time in Brazzaville, Dakar and Cairo. At that stage, he still believed that a solution could be found to the pay issue relating to the Dakar post. In fact, a recommendation to that effect was made and the Director General indicated that there were "some strong arguments for adjustment". However, the complainant was informed on 27 October 2000 that the recommendation had been "formally and absolutely rejected by the Director General". It was at that stage that the complainant indicated that it was impossible for him to accept the Dakar post, but that he would accept a short-term assignment to either South Africa or Senegal. In the end, he accepted a short-term assignment to Dakar.

13. At the end of March, the complainant fell ill and was repatriated to Geneva. Although not able to work at full capacity, he undertook a number of projects at IOM headquarters between May and the end of August. He was undertaking one such project when he was formally notified that his contract of employment would not be renewed.

14. Between July 2000, when the complainant made it known that he would rather stay in Cairo than accept the Dakar post for which he had been selected, and December 2000, the complainant applied unsuccessfully for four positions, for which he was well qualified. In each case, the position was awarded to a woman, constituting, according to the complainant, gender bias. In two cases, the fact that the complainant had been selected for the post in Dakar was, it seems, a consideration and, in the view of the Joint Administrative Review Board, may have resulted in bias against him. In another case, the selection procedures were questionable, to say the least. Indeed, as already mentioned, these matters led to the Board making specific recommendations with respect to selection procedures to be observed in the future within the IOM.

15. The facts recounted above are not in serious dispute, although the complainant claims, and the IOM disputes, that the Director General had authority to take action to resolve the pay issue for the Dakar post. Further, the complainant contends, and the IOM denies, that the selection procedures for the positions for which he applied between July and December 2000 resulted in discrimination against him, the Organization arguing that in each case the successful candidate's experience and qualifications were superior to those of the complainant. Whatever view might be taken on the questions raised with respect to the complainant's unsuccessful job applications, the events related above indicate severe deficiencies in the personnel practices and policies of the IOM, as recognised by the Joint Administrative Review Board. However, the question that presently calls for answer is whether, accepting all that the complainant asserts, the decision not to renew his contract of employment may be set aside.

16. It is well established that a decision not to renew a fixed-term contract is a discretionary decision which may be set aside only if it was taken without authority, or in breach of a rule of form or procedure, or was based on a mistake of fact or of law or if some essential fact was overlooked or if clearly mistaken conclusions were drawn from the facts or if there was abuse of authority. By his reference to the "stream of events", the complainant implicitly argues that the decision not to renew his contract constituted an abuse of authority.

17. Were it the case that the events upon which the complainant relies had been engineered so as to bring about the situation that there was no available position for him to fill, the non-renewal of his contract on the ground that there was no such position would constitute an abuse of authority, being the final step in a series of actions taken in bad faith for the specific purpose of disadvantaging him in his employment. Can it be said that the "stream of events" constitutes actions taken in bad faith so as to disadvantage the complainant?

18. Taking the complainant's account of events at its highest, it is possible to infer that the various actions of which he complains were taken by the Administration to suit its own purposes, whether in filling particular positions or in achieving what it considered to be appropriate gender balance, and without regard to the legitimate interests of the complainant. It is also possible to infer that those actions led to his considerable disadvantage and, ultimately, the non-renewal of his contract. However, it is not possible to infer that they were intended to have those consequences. That being so, it cannot be said that the decision not to renew the complainant's contract was an abuse of authority. Rather, and in the events which happened, it must be concluded that the reason for non-renewal was, as the IOM contends, that, given the complainant's failure to take up the Dakar post, there was no position which he could be offered when his contract expired.

19. It follows that the complaint must fail and the complainant's claim to be reinstated and reassigned to a post commensurate with his professional background and experience must be rejected. The Tribunal assumes that, to the extent that the recommendations of the Joint Administrative Review Board have not been implemented, the offer contained in the letter communicating the impugned decision remains open.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 16 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet