114th Session **Judgment No. 3163**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. Z. against the International Organization for Migration (IOM) on 3 December 2010 and corrected on 14 March 2011, IOM's reply of 20 May, the complainant's rejoinder of 23 August and the Organization's surrejoinder dated 25 October 2011;

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, an Italian national born in 1972, joined IOM in 2004 as an Associate Expert/Programme Officer at grade P.2. She was based in Dakar (Senegal) and her position was funded by the Italian Government. She was transferred in 2005 to Brussels (Belgium), where she continued to work as an Associate Expert at the same grade. In January 2007 she was granted a one-year fixed-term contract as Programme Officer at grade P.2 in Mission with Regional Functions (MRF) Brussels, her position as Associate Expert/Programme Officer being no longer funded by the Italian

Government. Her contract was extended for the period from January to December 2008 and again from January to December 2009.

In early 2009 the complainant requested that her fixed-term contract be converted into a "regular" contract under IOM's Staff Regulations and Staff Rules for Officials, i.e. a contract with no fixed duration. She was informed by an e-mail of 23 March that this was not possible, as the requirement under the Staff Regulations and Staff Rules that there be one year of funding for the position was not met. However, the author of this e-mail added that "as soon as the funding is warranted for the whole year, we will process the regular contract".

On 22 October the complainant was verbally informed by the Regional Representative for IOM in Brussels that her contract expiring on 31 December 2009 would be renewed for one month, but that it could not be renewed thereafter for lack of funding. This was confirmed in a letter dated 26 October 2009, in which it was explained that, due to budgetary constraints, her position as Programme Officer would be abolished on 31 January 2010. As there was no other position in MRF Brussels to which she could be transferred, her contract would be extended for one month and not renewed thereafter. In his letter the Regional Representative encouraged the complainant to apply for other positions advertised within the Organization and indicated that he would be pleased to support her applications.

In an e-mail of 27 October 2009 the complainant expressed her surprise at the decision to abolish her position and asked the Regional Representative to clarify the funding situation. In a series of e-mail exchanges with the complainant, the Regional Representative explained the reasons for the abolition of her post and reiterated his willingness to support her in seeking another assignment.

In November and December 2009 respectively, vacancy notices were issued for two new positions in IOM Brussels, one at grade P.2, the other at grade G.6. The complainant applied for both. She was not shortlisted for the G.6 position and was subsequently informed by the Regional Resource Management Officer that, "as advised by HQ it is not considered to be a good practice to have P staff applying to G staff positions". With respect to the P.2 position, she was shortlisted and

interviewed by the selection panel in December 2009. The selection panel unanimously recommended appointing another candidate and this recommendation was forwarded to the Director General who approved it on 18 March 2010.

By a letter dated 14 January 2010 the complainant requested a review of the decision to abolish her post, the decision not to shortlist her for the G.6 position and the decision to "put on hold" the awarding of a regular contract. Her fixed-term contract expired on 31 January and, effective 1 February 2010, she was placed on special leave without pay, to enable her to continue to compete as an internal candidate for vacant posts.

Having received no reply to her request for review within the 30-day period stipulated in Annex D to the Staff Rules, the complainant lodged an appeal with the Joint Administrative Review Board (JARB). In its report the JARB concluded that the non-renewal of the complainant's contract and the refusal to grant her a regular appointment were lawful. However, it considered that her rights might have been prejudiced because the G.6 position for which she had applied appeared to have been under-graded and her candidature ought not to have been excluded on the grounds that she was overqualified for the grade. It recommended that she be awarded three months' salary at G.6 level in compensation. The Director General decided to follow the JARB's recommendation, which he approved on 31 August 2010. That is the impugned decision.

B. The complainant contends that the decision not to renew her contract is tainted with an error of fact, insofar as there was no real lack of funding, and that it is also tainted with an error of law, insofar as the Administration considered that it was entitled to abolish her post without taking into account alternative sources of funding. She submits that, given IOM's funding structure, which relies heavily on project funding, the Organization may not lawfully abolish a post, even when the source of funding for a given project is exhausted, if there are available funds assigned to other projects which can be used to fund the post in question. Otherwise, she argues, the Organization

would be at liberty to "hire and fire" many of its staff "simply by virtue of having their positions naturally move from one source of project funding to another over time".

The complainant also contends that the Director General's decision is tainted with a procedural irregularity, since she was not given the requisite three months' notice. In light of the explicit assurance she received from the Administration in March 2009 that she would be granted a regular contract, she should have been informed of the non-renewal of her contract no later than 30 September 2009, failing which she had, in her view, a legitimate expectation that her contract would be renewed for a full year, as had been the case in previous years.

Lastly, the complainant alleges misuse of authority, asserting inter alia that the grade G.6 vacancy was deliberately downgraded so as to render her ineligible for it. She asks the Tribunal to quash the impugned decision of 31 August 2010 and to order IOM to reinstate her in her former position with retroactive effect from 1 February 2010. Alternatively, she asks the Tribunal to order the Organization to appoint her to a position commensurate with her seniority and experience, with retroactive effect from 1 February 2010. She further asks the Tribunal to order IOM to renew the selection procedure for the G.6 position after grading that position in accordance with the applicable International Civil Service Commission classification standards, and to allow her to compete in that selection procedure. The complainant asks, in all events, that the Tribunal order the Organization immediately to resume the procedure for converting her contract into a regular contract. She claims moral damages, as well as costs in the amount of 20,000 Swiss francs.

C. In its reply IOM submits that, contrary to the complainant's allegations, the abolition of her post was due to a genuine lack of funding. It argues that the non-renewal of the complainant's contract must be considered in light of the Organization's funding structure, where more than 97 per cent of the total funding is in the form of voluntary contributions earmarked for specific projects. IOM's model

of "projectization" requires that staff and office costs be charged to the operational projects to which they relate. The complainant worked on two projects which were the primary sources of funds for her salary. As the funding for these two projects stopped in 2009, IOM was not in a position to renew the complainant's contract beyond January 2010, given that there were no other confirmed sources of funding sufficient to cover the renewal. It explains that the same lack of funding which necessitated the abolition of her post in January 2010 also justified the decision not to grant her a regular contract in March 2009. According to the Organization, the e-mail of March 2009 upon which the complainant relies as an "assurance" of being granted a regular contract does not contain any such promise. Rather, it informed the complainant that the granting of a regular contract was conditional on her meeting the necessary funding requirement, which she did not, and its author in any case did not have the authority to waive that requirement.

IOM contends that it was under no obligation to renew the complainant's contract upon its expiration, nor was it obliged to secure her an alternative position. Lack of funding is a well-established basis for non-renewal and, given the Organization's funding structure, staff members wishing to stay with the Organization generally have to apply for vacancies and go through a competitive selection process in order to secure a new post. It considers that it is entirely within its prerogative both to fill new positions through a competitive process and, when new project contributions do not provide sufficient resources to fund an entire post, to make use of such contributions in a manner that is consistent with the best interests of the Organization. It disputes the complainant's interpretation of the Tribunal's case law in this domain.

IOM adds that the complainant's functions in her former post were quite different from those of the advertised P.2 and G.6 positions and related to different projects in terms of substance and geographical scope. It explains that the G.6 vacancy was advertised at that grade for valid managerial reasons. At the time, MRF Brussels routinely made a university degree mandatory for G-category

positions and, in any event, this did not prejudice the complainant as she possessed such a degree. In relation to the decision not to shortlist her for the G.6 position, it notes that the Regional Resource Management Officer informed her in December 2009 that the Organization might need staff at her level in other areas and suggested that she forward her curriculum vitae directly to the then Director of Human Resources Management (HRM). With respect to the P.2 position, it asserts that the selection panel, the Appointments and Postings Board and the Director General acted in accordance with IOM's standard recruitment procedures, but simply did not find the complainant to be the most qualified candidate. There was no impropriety or illegality tainting the selection process. It asserts that the allegations of abuse of authority on the Regional Representative's part are without merit and the complainant provides no convincing evidence to support such allegations.

The Organization considers that it gave the complainant reasonable notice of the non-renewal of her contract and notes that she provides no evidence of the alleged "practice" of giving a "statutory" three-month notice period. IOM points out that the Administration had reminded the complainant on several occasions that the funding for her position was coming to an end.

D. In her rejoinder the complainant presses all her pleas. She further argues that the transfer of tasks previously performed by a P.2 official to a G.6 post in order to save approximately 30 per cent of the related costs can hardly be described as a "valid managerial reason" as it violates the principle of equal pay for equal work. Additionally, she alleges unequal treatment based on a comparison of her situation with that of other officials within the Brussels office. Lastly, she asserts that there were no bona fide efforts on the part of the Regional Representative to find her an alternative assignment.

In light of the fact that she found a new job as of August 2011, the complainant no longer seeks reinstatement. She asks the Tribunal to quash the impugned decision and to order IOM to pay her full salary at P.2 level and the corresponding pension contributions for the

period from 1 February 2010 to 31 July 2011. She maintains her claims for moral damages and costs.

E. In its surrejoinder IOM reiterates its position. It submits that the complainant's claim for 18 months' salary in compensation on the basis of the non-renewal of a one-year fixed-term contract is clearly excessive, and notes that she has also withdrawn her request to renew the selection procedure for the G.6 position.

CONSIDERATIONS

1. The complainant commenced employment with IOM in 2004 in a grade P.2 position as an Associate Expert/Programme Officer. In October 2009 she was informed orally, and shortly thereafter in writing, that the one-year fixed-term contract on which she was then employed would not be renewed and would be extended to and expire on 31 January 2010. Her position would then be abolished. The reason given was lack of funding to continue to support the position. The present complaint centrally concerns the abolition of the position. The complainant's claims were ultimately reformulated in her rejoinder dated 23 August 2011. The reformulation was a consequence of her securing employment in the same month, August 2011.

2. The complainant challenges the defendant's proposition that there was a lack of funding and that challenge raises the first issue in this case. The complainant contends that in any event, the notice of non-renewal was too short, which is the second issue. In 2009 and faced with the prospect of non-renewal, the complainant applied for two other positions. One was a G.6 position, the other a P.2 position. The complainant's candidature for the G.6 position was rejected at an early stage because she was considered to be overqualified. She contends the position was under-graded and the rejection of her candidature was wrong. This raises the third issue.

3. Before considering each of these issues, the impugned decision should be identified. It is the adoption by the Director General on 31 August 2010 of the recommendations in an undated report of the Joint Administrative Review Board (JARB). In relation to the notice, the JARB thought the preferable characterisation of what had occurred was that the complainant's contract had not been renewed rather than terminated and the three months' notice of non-renewal was "wholly reasonable". The JARB accepted that "the funding for the project on which the [complainant] worked and by which she was funded [had] come to an end". It accepted, in substance, that it was unreasonable to have expected reallocation or realignment of funding in order to fund the continued employment of the complainant observing that such activity by a Chief of Mission would be "inconsistent with his or her project fiscal and fiduciary responsibilities".

4. In relation to the rejection of the complainant's candidature for the G.6 position, the JARB indicated it was "concerned about two points". The first was that, in the JARB's assessment, the responsibilities and qualifications required for this position as detailed in the vacancy notice did not appear consistent with a G.6 grading. The second was that, in the opinion of the JARB, the complainant should not have been disqualified as overqualified for the grade; indeed, while she was more than qualified for the grade, she was not for the tasks as described. In the result, the JARB recommended that the complainant be awarded compensation in the amount of three months' salary at G.6 level effectively to compensate her for the "potentially improper grading of the position" as well as her "unwarranted disqualification […] from competing for it". It declined to nullify the selection of another person then occupying the position or determine that the complainant should be established in the position as a matter of right.

5. The complainant approaches the first issue in her complaint brief and rejoinder by seeking to demonstrate that funding could have been found to sustain her employment and that the impugned decision

is therefore tainted with an error of fact and an error of law. IOM, on the other hand, advances in its reply the comparatively simple proposition that the complainant had worked on two projects that primarily funded her salary, each of which contributed approximately 50 per cent. One project concerned the training of counter-trafficking specialists engaged in preventing and combating trafficking in human beings (the "CT project"). The other concerned capacity building for migration management in China (the "China CBMM project").

6. IOM makes five central points in its reply. The first is that no funding was available from those two projects to fund an extension of the complainant's contract past 31 January 2010. The second is that the CT project and its funding concluded on 31 December 2009. The third is that, as to the China CBMM project, the funding line which had been used to pay the complainant's salary had run out in mid-May 2009 and charges to that line for her salary from May 2009 through the end of the year had caused a deficit of approximately 20,000 euros. The fourth is that while it had been necessary to draw upon MRF Brussels Discretionary Income (DI) to fund the complainant's contract to January 2010, there was no DI to fund the contract further. The fifth central point is that, while certain new projects were under negotiation with donors, there were no other confirmed sources of funding sufficient to renew the complainant's contract beyond 31 January 2010.

7. In her rejoinder and building on contentions in her complaint brief, the complainant rebuts what she describes as the "main falsehoods in the reply". The complainant identifies several project-related funding sources that were available in January 2010 and could have funded her position. She also seeks to illustrate that her treatment could be contrasted with the treatment of two other employees and that it was at odds with "standard practice", which, she argues, involves funding consisting of a "patchwork" of project funds, discretionary income and surplus project funds. The complainant contests the central points in IOM's reply. She contends that the alleged lack of funding for the position results primarily from the

arbitrary diversion of available funds towards other positions; that funds from the China CBMM project were available to cover 20 per cent of the salary at the relevant time; and that there were several funding sources available, but for "dubious motives" the Organization made the choice not to use them.

8. It is unnecessary to descend into greater detail about whether funds were or were not available to fund the complainant's position beyond the beginning of 2010. That is because this Tribunal has set its face against assessing the exercise of a discretionary power, such as the power not to renew a fixed-term contract, unless it is demonstrated that the competent body acted on some wrong principle, breached procedural rules, overlooked some material fact or reached a clearly wrong conclusion (see, for example, Judgments 1044, under 3, 1262, under 4, and 2975, under 15). The substance of the complainant's case on this issue is that other decisions could have been made which would have resulted in funding being available for the position. The error of fact identified in the complainant's submissions does not involve the identification of a material fact assumed by the decision-maker to exist, which did not exist. Rather, she identifies facts which would sustain a decision other than the decision actually made. To impugn the exercise of a discretionary decision-making power by reference to, and based on, the factual matrix in which the decision was made, a complainant must demonstrate something more than that other decisions might reasonably have been made on the known facts. It is necessary to establish that the exercise of the discretionary power miscarried because the decision-maker was led into error by proceeding on a misunderstanding about what the material facts were. As the complainant has failed to do so, this plea must be rejected.

9. Similarly, the alleged error of law is said by the complainant to involve "a dubious interpretation of accepted standards for abolitions of posts on budgetary grounds". But no error of law is identified. The complainant characterises as an error of law a process of decision-making with which the complainant, on the facts, disagrees in the sense that she contends other decisions should have

been made. On the case advanced by the complainant, this does not involve an error of law.

10. The second issue concerns the notice given to the complainant about the non-renewal of her contract. The short point raised by the complainant in her complaint brief is that she was given notice by letter delivered on 2 November 2009 of the termination of the contract due to expire on 31 December 2009. This, she says, was contrary to "a statutory three-month notice period" applying to individuals on one-year fixed-term contracts. Further, it constituted a procedural irregularity tainting the non-renewal of her contract. IOM points out, correctly, in its reply that the Tribunal's case law requires that the notice be reasonable, and reference is made to Judgment 2104. The source of the "statutory three-month notice period" is not identified by the complainant, who merely points to a reference to such a period in a letter to another individual produced as an annex to her rejoinder. But in any event, by virtue of the extension of the complainant's contract to 31 January 2010, three months' notice was given. The Tribunal is satisfied that this period is reasonable.

11. Regarding the claim against the improper classification of the G.6 position and the rejection of the complainant's candidature for that position, the impugned decision endorsing the JARB's report plainly recognised that both these decisions were unlawful; consequently the complainant was awarded compensation in the amount of three months' salary at G.6 level. The Tribunal is of the opinion that the decision not to nullify the selection was correct, considering that the position had been filled; similarly, the Tribunal considers that the amount of compensation for the loss of the opportunity of further appointment was reasonable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Giuseppe Barbagallo
Michael F. Moore
Catherine Comtet