

R.
v.
IOM

133rd Session

Judgment No. 4459

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs M. R. against the International Organization for Migration (IOM) on 25 February 2019 and corrected on 6 March, IOM's reply of 17 June, the complainant's rejoinder of 26 August and IOM's surrejoinder of 17 December 2019;

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 not to defer her transfer, under IOM's policy on rotation, to Sudan until she was able to find adequate medical and schooling facilities for her disabled daughter.

The complainant started employment with IOM in 2001 and was assigned to Damascus (Syria). In 2005 she was appointed as Chief of Mission (COM) in Damascus, at grade P-5.

Between 2008 and 2013 the complainant's transfer to another duty station under the policy on rotation was postponed a number of times in view of the needs of her disabled daughter, born in 2006. In March 2014 the Director General decided to transfer the complainant 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), but the Government of Lebanon refused

to accredit her in that position. On 20 January 2017 the Director General wrote to the complainant offering her a reassignment to Geneva (Switzerland). Alternatively, she could 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 (Sudan) 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 first by 3 March and then by 12 April. Again, she expressed her concerns in view of her daughter's needs but, ultimately, on 14 April, she accepted to be transferred to the position in Khartoum. Having been informed by IOM on 7 July 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 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 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 had been noted but, as clearly stated in the rotation guidelines, personal considerations and preferences could not always be accommodated in staffing decisions.

On 11 September the complainant submitted a request for review, challenging the 13 July decision. She asked, inter alia, that her transfer be deferred until a medically suitable schooling solution could be found for her daughter and that she be awarded compensation for the moral and psychological injury suffered. Her request for review was dismissed on 28 September, stating that any action against the decision to transfer her to the position in Khartoum was time-barred and that she continued to be required to assume her new duties by 1 October 2017. On 2 October the staff assigned to IOM Syria were informed that the reassignment of their COM had become effective as of 1 October and the staff assigned to IOM Sudan were advised that the complainant was their new COM as of the same date. However the complainant's transfer never occurred.

On 28 October 2017 the complainant lodged an appeal with the Joint Administrative Review Board (JARB), challenging the 28 September decision. After hearing the complainant, the JARB issued its report on 14 November 2018. It rejected the complainant's argument that, by refusing to further postpone the date of her transfer, the Administration had failed to take into account her situation and infringed the duty of care it had towards her. It recalled that staff members eligible for rotation are obliged to accept a transfer decision made by the Director General. It considered that the Administration had acted in accordance with the rules and procedures relating to rotation and that it had repeatedly tried to accommodate the complainant. For these reasons it concluded that there were no grounds to appeal against the date, timing and modalities of her transfer. In a letter of 19 December 2018 the Director General informed the complainant that, based on the JARB's findings, he considered that the decision that her transfer to Khartoum be implemented no later than 1 October 2017 did not infringe any of her rights. The complainant's internal appeal was therefore dismissed. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to order IOM to pay her moral damages in the sum of three years' net base salary for the psychological and emotional harm she suffered and to award her 15,000 euros in costs. She asks that this complaint be considered concurrently with her second complaint in which she challenges the decision to impose upon her the disciplinary measure of discharge after due notice.

IOM asks the Tribunal to find that the complaint is receivable only insofar as it relates to the issue of the effective date of the complainant's transfer to Khartoum and that all other claims are time-barred. In its surrejoinder it adds that the complainant's harassment claims are irreceivable for failure to exhaust the internal means of redress. In any event, IOM considers the complaint to be unfounded on the merits. In the interest of the sound administration of justice, in its surrejoinder IOM asks the Tribunal to consider simultaneously the complainant's first and second complaints.

CONSIDERATIONS

1. The complainant requests that this complaint be heard concurrently with her second complaint, in which she challenges the decision to discharge her from her duties with IOM. The Organization agrees. In consideration 7 of Judgment 4460, also delivered in public this day, on the complainant's second complaint, the Tribunal states the reason why it will not join the complaints as the subject of a single judgment.

2. As the complainant's submissions supporting this complaint are wide ranging, and, in light of IOM's submission that the complaint is receivable only insofar as it relates to the effective date of the complainant's transfer to the post of COM Sudan, it is necessary at the outset to determine its scope.

3. In her request for review, the complainant identified the decision contained in an email message she received on 13 July 2017 as the contested decision. The decision reminded the complainant that, on account of the specific needs of her daughter who had a disability, she had been given the option to choose between transfer either to Geneva or to Khartoum and she chose the latter (on 14 April 2017). The 13 July 2017 email further informed her that the Director General's decision to transfer her to the post of COM Sudan was final and that she was requested to coordinate the handover of her current duties and to expedite the process of assuming her new duties as COM Sudan by 1 October 2017. This, according to the email, provided her with sufficient time to manage the transition and logistics of the rotation. In her request for review the complainant did not contest the decision to transfer her to Sudan but the decision not to defer her transfer until she was able to find adequate medical and schooling facilities for her daughter. This was the scope of her internal appeal, as the JARB correctly concluded, noting that that appeal was "against the date, timing and modalities of the [complainant]'s transfer to Sudan, effective 1 October 2017". This is the scope of the present complaint.

4. In her request for review the complainant claimed, as one of her reasons for contesting the decision not to defer her transfer to Khartoum, that she suffered harassment. She repeats that claim in her

appeal to the JARB and in these proceedings. IOM correctly submits that, pursuant to Article VII, paragraph 1, of the Tribunal's Statute, that claim is irreceivable as the complainant has not exhausted the internal means of redress that were available to her under the applicable Staff Regulations. Whereas the other claims in the request for review, appeal to the JARB and complaint to the Tribunal fall under the procedures provided in Instruction 217 dealing with requests for review and appeals to the JARB (IN/217), a harassment claim is governed by the procedures provided by IOM's Policy for a Respectful Working Environment, Instruction 90 (IN/90). It provides procedures, which may result in mediation or an investigation followed by a decision by the Director of the Human Resources Management Division (HRM), appealable to the JARB, which may eventually culminate in a complaint to the Tribunal. It is noteworthy that allegations of harassment are the subject of another complaint filed with the Tribunal. The Tribunal emphasises that the scope of the present complaint concerns only the decision not to defer the complainant's transfer under the rotation policy until she was able to find adequate medical and schooling facilities for her daughter.

5. Regarding the merits, under Staff Regulation 1.2, staff members are subject to the authority of the Director General and are responsible to her or him in the performance of their duties. However, under Staff Rule 1.2.1 in exercising this authority, the Director General is mandated to seek to ensure that all necessary safety and security arrangements are made for staff members carrying out the responsibilities entrusted to them and staff members are mandated to follow the directions and instructions issued by the Director General and by their supervisors. Staff Rule 4.2.6 permits the Director General to rotate any staff member in the Professional category in the interests of IOM, in accordance with the provisions in Annex 8 to the Staff Rules and the Director General is mandated to establish a Rotation Appointments and Postings Board (RAPB) to advise on matters pertaining to the rotation of staff members. Rotation shall normally be made to a position of the same grade.

6. Annex 8 to the Staff Rules, which relates to rotation, states that rotation is an important element of organizational and career development for staff members in the Professional category (see paragraph 1). It states, in paragraph 2, that the scope and objectives of IOM's rotation policy are to enhance its ability to meet its strategic needs and develop

synergies among regions; contribute to professional growth and career development of staff members through the acquisition of a variety of skills, knowledge and experience; facilitate the movement of staff members to different duty stations to match appropriate skills with suitable job profiles; foster a fair distribution of working conditions over time for staff members in the Professional category and to mitigate against staff members becoming too close with the host government. Paragraph 3 relevantly states that all staff members in the Professional category holding a regular or fixed-term contract are subject to rotation. Under paragraph 4, a staff member becomes due for rotation upon completion of the standard assignment length (SAL) for the duty station in which she or he is currently serving. Paragraph 5 permits the Director General to temporarily waive the rotation of a staff member based on considerations related to the staff member, such as health and family circumstances, or related to organizational needs. Paragraph 6 states that the RAPB will advise the Director General on the placement of staff members due for rotation in accordance with the conditions established by her or him.

7. Having chronicled the communications between IOM's senior management and the complainant over the years (which are essentially reflected in the facts of this judgment) to discuss her situation, concerns and needs, the JARB rejected the complainant's arguments that by refusing to further defer the date of her transfer to Sudan the Administration had failed to take into account her situation and failed to show a duty of care towards her. The JARB concluded that it considered that the Administration had acted in accordance with the established rules and procedures relating to rotation, but that it also believed that the Administration repeatedly tried to accommodate her. The JARB also concluded that "in view of the various options that had been given to [her] since the 2008-2009 rotation cycle (e.g. deferrals, the possibility of being based in Amman, [to] transfer to Arabic-speaking countries, to Headquarters) and her career progression within IOM, [it was] not of the opinion that the Administration failed to take into account the [complainant]'s family situation, did not provide [her] with viable options, did not consider her preferences, or showed hostility towards her" as she had argued. The JARB stated that, to the contrary, the Administration had tried to accommodate the complainant's needs and preferences. In the impugned decision, the Director General endorsed these conclusions.

8. The JARB had also noted that the complainant sometimes used contradictory arguments to justify refusing the rotation options which the Administration offered or when she was expressing interest in posts which she deemed suitable to her family situation and her career development. The Board also noted that while the complainant claimed that she had been rushed into making the decision to move to Sudan, she was notified of the RAPB's decision to transfer her to that country by letter of 16 February 2017 from the Director, HRM, which also maintained the offer of the P-5 post in Geneva. The JARB stated that she had failed to accept either post or to decline both by the March deadline, accepting only on 14 April 2017 the option to be transferred to Sudan. The JARB further stated that after the email of 13 July 2017, which set the 1 October 2017 deadline for her transfer to Sudan in accordance with the Director General's instructions, the complainant failed to accept that instruction, which, in effect, constituted a breach of her contractual obligation to accept assignment to any duty station and failure to implement the decision within specified timelines.

9. Undoubtedly, over the years, IOM had taken into consideration the complainant's family situation, particularly as it concerned the needs relating to her child's disability, and had accommodated and facilitated the complainant's situation by not subjecting her to rotation in light of this. However, whether IOM breached its duty of care by insisting that the complainant be transferred to Sudan by 1 October 2017, rather than postponing that move, is to be determined by reference to the circumstances which existed at the particular time when she was instructed to move to that country. In that regard, it is noteworthy that the complainant had failed in her attempts to enrol her daughter in a school that was appropriate given her special needs. The record shows that by letter dated 10 August 2017, the Superintendent of the Khartoum American School informed the complainant that although it provided special support for children with special needs, it could not have enrolled her daughter for the academic year. In a letter dated 15 August 2017, the Superintendent informed the Director General, who had intervened on the complainant's behalf, that having received her daughter's records and interviewed the complainant, it was determined that the school did not have the resources, program and support staff to enrol the child for the school year.

10. In the foregoing circumstances, the Tribunal's view is that the complainant reasonably requested that her move to Sudan be delayed and that, pursuant to paragraph 5 to Annex 8 to the Staff Rules relating to rotation and the duty of care owed to the complainant, the Director General should have continued to temporarily waive her transfer under the rotation policy out of consideration for her daughter's special needs and related family circumstances until she was able to secure suitable facilities there for her educational needs. This would have been in accordance with the duty of care which IOM owed to the complainant, which was accordingly breached.

11. In the foregoing premises, the impugned decision of 19 December 2018 will be set aside, as should be the decision to require, in the email of 13 July 2017, the complainant to transfer to Sudan by 1 October 2017. Based on the evidence provided by the complainant, the Tribunal is satisfied that the situation caused the complainant stress and anxiety for which she will be awarded moral damages in the amount of 10,000 euros. She will also be awarded 8,000 euros in costs.

DECISION

For the above reasons,

1. The impugned decision dated 19 December 2018 is set aside, as is the decision of 13 July 2017.
2. IOM shall pay the complainant 10,000 euros in moral damages.
3. IOM shall also pay the complainant costs in the amount of 8,000 euros.

In witness of this judgment, adopted on 26 October 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