

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.
v.
IOM

138th Session

Judgment No. 4840

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms Z. S. against the International Organization for Migration (IOM) on 5 February 2021 and corrected on 13 April 2021, IOM's reply of 29 July 2021, the complainant's rejoinder of 8 November 2021 and IOM's surrejoinder of 7 February 2022;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant contests the decision not to renew her fixed-term contract due to underperformance after placing her on a three-month Performance Improvement Plan (PIP).

The complainant joined IOM in 2015 as a National Programme Officer with IOM Egypt. At the material time, she was assigned as Head, Migrant Protection and Assistance (MPA) Unit (Return and Reintegration Officer), at grade P-2, with IOM Algeria, under a one-year fixed-term contract expiring on 30 June 2019.

In March 2019, Mr C. was appointed Chief of Mission (CoM), IOM Algeria, and became the complainant's supervisor. Soon after Mr C. assumed his duties, tensions arose between him and the complainant. These tensions stemmed from disagreements about work-

related matters and the CoM's concerns about the appropriateness of the complainant's behaviour towards colleagues and her willingness and readiness to follow his instructions.

On 15 May 2019, following an incident between the complainant and the CoM during an official visit earlier that day, the complainant wrote an email to the CoM in which she accused him of talking to her in a "condescending and accusing tone" and of "yelling at [her] in front of other colleagues", and informed him that his behaviour had affected her health. In an email of the next day, the CoM responded that he was "baffled" on why the complainant would "want to openly challenge [him] even on very basic things" and criticised her handling of specific work-related matters. On 18 May 2019, after an exchange of emails, he advised the complainant that he was available to work together to put in place for her a PIP. The complainant responded questioning the need for a PIP and the "rationale behind such a plan".

First orally at a meeting held on 13 June 2019, and then in writing by an email of 14 June 2019, the CoM informed the complainant that a three-month PIP would soon be formally sent to her and that she would be offered a three-month extension of her fixed-term contract (from 1 July to 30 September 2019) to coincide with the duration of the PIP. In that email, the CoM informed her that the situation would be re-evaluated towards the end of the three-month PIP process and that, although the PIP was not intended to terminate a staff member's contract, it could lead to a contract termination if it was not successfully implemented.

By an email of 18 June 2019, the CoM provided the complainant with the PIP as contemplated, noting that her 2019 Midpoint Review under the Staff Evaluation System (SES) should be finalised prior to the commencement of the PIP process on 1 July 2019. The complainant's "Identified performance shortcomings (objectives, competencies)" listed in the PIP were: (a) Insufficient attention for supervisor's instructions and poor subsequent follow up; (b) Conflictual relationships and lack of respect for other units; and (c) Inappropriate use of social media. The complainant expressed serious concerns that the PIP lacked objective justification and that it was not in line with the IOM Unified Staff

Regulations and Rules, as it was initiated only three months after Mr C.'s appointment as CoM and before her SES Midpoint Review had been conducted. She also disagreed with the content of her PIP and asserted that it was contrary to the Unified Staff Regulations and Rules to offer her a three-month contract, when she already held a one-year fixed-term contract, and to do so just two weeks prior to the expiry of that contract.

The complainant's SES Midpoint Review was discussed at a meeting held on 24 June 2019. Although this meeting was intended exclusively for her SES Midpoint Review, her PIP was also discussed. That same day, the CoM instructed the complainant to prepare the final draft of her SES Midpoint Review by 30 June 2019. This, however, was not possible, as no agreement could be reached between the parties regarding the CoM's proposal for the inclusion of an additional behavioural objective in the complainant's SES Midpoint Review. Also on 24 June 2019, the complainant complained to the Ombudsperson that the decision to subject her to a PIP process and to shorten the extension of her one-year fixed-term contract year to three months constituted retaliation by the CoM. The Ombudsperson refrained from responding on the allegations of retaliation, as he had already been requested to participate in the discussions related to the complainant's SES Midpoint Review and PIP.

In early July 2019, the complainant wrote to the Director, Human Resources Management Division (HRM), to seek guidance on the PIP process and to voice her concerns regarding, inter alia, her contract renewal, the absence of a SES Midpoint Review that would justify her alleged "performance gaps" and the initiation of a PIP, the lack of agreement on the content of the PIP, and the "unjustifiable pressure" put on her by the CoM. The Director, HRM, sought to respond to the points raised by the complainant and encouraged her to actively participate in the PIP process and to take full advantage of the opportunity to improve.

The complainant's SES Midpoint Review was further discussed at meetings held on 3 and 8 July 2019. Her PIP was discussed at meetings held on 24 July, 28 August, 4 September, and 6 October 2019. At the meeting held for that purpose on 4 September 2019, the CoM informed

the complainant of his proposal to offer her a six-month extension of contract upon its expiry on 30 September 2019. Indeed, the next day, on 5 September, the CoM wrote to Human Resources (HR) Operations to request the extension of the complainant's contract for six months (from 1 October 2019 to 31 March 2020). However, a few days later, on 11 September 2019, the CoM wrote to HR Operations to request that "a correction" be made and that the complainant's contract be extended for three months (from 1 October to 31 December 2019), not six months as previously indicated, adding that the change was "based on feedback from HRM based on the ongoing PIP". The CoM relevantly informed the complainant by an email of that same day.

On 16 September 2019, the CoM sent an email to several staff members, including the complainant, to apologise for having unnecessarily raised his voice during a staff meeting the day before. In email exchanges following that turbulent staff meeting of 15 September, the complainant reproached the CoM for his humiliating tone, disrespectful ways, and mistreatment that had seriously affected her physical and mental health, while the CoM accused her of failing to show respect or follow instructions, and asked her to refrain from aggressively interrupting colleagues. On 23 September 2019, the complainant submitted a formal complaint of harassment against the CoM pursuant to Instruction IN/90*.

A meeting scheduled for 24 September 2019 to discuss the complainant's PIP was postponed a few times due to the CoM's conflicting engagements and another time due to the complainant's absence on sick leave. On 30 September 2019, the CoM informed the complainant that he had asked HR Operations to extend her contract for one month, i.e. until 31 October 2019, and that the final meeting to

* This complaint was referred to the Office of the Inspector General (OIG) which, further to a preliminary assessment, found that it was supported by *prima facie* evidence only in part, namely the complainant's allegations of harassment by the CoM during the 15 September 2019 meeting. OIG thus decided to refer those allegations to the Human Resources Legal Issues Division (LEG-HR) and to close the complaint for the remainder. The complainant was relevantly notified by an email of 12 February 2020.

discuss her performance under the PIP would be rescheduled. The complainant repeatedly wrote to the CoM to protest against the uncertain and precarious situation in which she had been placed and to request an explanation as to when the PIP process would come to an end; whether her contract would be reinstated to its initial one-year duration, given the positive feedback she had previously received from him; and the basis for offering her a one-month contract extension.

During the final meeting to discuss the complainant's PIP, held on 6 October 2019, the CoM told her that her contract would not be renewed beyond its expiry on 31 October 2019 and, by a letter of the same day (6 October 2019), he officially notified her of the decision not to renew her contract due to underperformance. He noted that her contract had almost been extended towards the end of the PIP period, when she had shown noticeable improvement, but that her performance had deteriorated once again in the identified areas before the conclusion of the PIP. Attached to the letter was the complainant's PIP, signed by the CoM also on 6 October 2019. In the "Evaluation" section, under "Outcome of the [PIP]", the CoM ticked the box "I certify that the staff member has not achieved the required improvement(s) described above", and under "Conclusions", he concluded that improvements in two "Identified performance shortcomings (objectives, competencies)", i.e. (a) "Insufficient attention for supervisor's instructions and poor follow up" and (b) "Conflictual relationships and lack of respect for other units", were insufficient for the complainant to pass the PIP.

On 4 December 2019, the complainant submitted a request for review of the 6 October 2019 decision. However this was rejected on 3 February 2020, following which she filed an appeal with the Joint Administrative Review Board (JARB) on 4 March 2020.

In its report of 8 October 2020, the JARB limited its scope of review to the contested decision, i.e. the decision not to renew the complainant's contract due to underperformance, excluding from it the complainant's claims of harassment. As regards the content of the witness statements attached to the complainant's rejoinder, it found there was no evidence therein that could be relevant to the decision not to renew the complainant's contract or that could substantiate her plea

of retaliation. The JARB also excluded from its scope of review the complainant's pleas regarding the procedural aspects of the PIP, as she had failed to follow the formal appeal mechanisms to contest them, but considered the content of the PIP report, along with the relevant SES information and email exchanges.

On the merits, the JARB found there was evidence of the complainant's underperformance issues, especially in relation to her "behavioural aspects" and interpersonal skills, that she had not made concrete efforts to address performance gaps and to show results, and that there were instances where her communication tone towards the CoM could be considered bossy and aggressive. The JARB also found that underperformance was observed in the lack of timely replies to the CoM and the failure to follow his instructions, which amounted to insubordination. It concluded that the decision not to renew her contract was taken on valid grounds and in line with the internal legal framework. The JARB more generally recommended that IOM strengthen its staff evaluation system.

By a letter of 9 November 2020, the Director General informed the complainant of his decision to endorse the JARB's recommendations and to reject her appeal along with all requests for redress. This is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to draw all legal consequences therefrom. She also asks the Tribunal to order IOM to reinstate her to a post commensurate with her grade, training, skills, and experience, to grant her a one-year fixed-term contract retroactively from 31 October 2019, the date of her wrongful separation, and to pay her retroactively from that date through the date of reinstatement all salary, benefits, pension contributions and all other entitlements and emoluments she would have received had she not been wrongfully separated from service. In the event she is not reinstated, she claims: (i) material damages in an amount equal to two years salary, benefits, step increases, pension contributions, and all other entitlements and emoluments that she would have received had she not been wrongfully separated from service; and (ii) moral damages for the unlawful separation from service, the biased and irregular

performance evaluation, and her supervisor's bias and malice against her, in an amount equal to not less than one year of her former gross salary and benefits. She also claims reimbursement of all legal fees she incurred in bringing this appeal, interest at the rate of 5 per cent per annum on all amounts awarded from 31 October 2019 through the date that such amounts are paid in full and such other redress as the Tribunal may determine fair, just, and reasonable.

IOM submits that the complaint is receivable only to the extent that it concerns the decision not to renew the complainant's contract and that it is devoid of merit in the remainder. It thus asks the Tribunal to dismiss it in its entirety.

CONSIDERATIONS

1. The complainant, a former staff member of IOM, impugns the decision of the Director General dated 9 November 2020 to dismiss, based on a recommendation of the Joint Administrative Review Board (JARB) dated 8 October 2020, her appeal of the prior decision of her supervisor and Chief of Mission (CoM), IOM Algeria, dated 6 October 2019 not to renew her fixed-term contract on grounds of underperformance.

At the time of her contested separation on 31 October 2019, the complainant was Head, Migrant Protection and Assistance (MPA) Unit (Return and Reintegration Officer), at grade P-2. Her one-year fixed-term contract expiring on 30 June 2019 had first been renewed for a three-month period until 30 September 2019, and afterwards for a one-month period until 31 October 2019.

The impugned decision was taken following the implementation of a three-month Performance Improvement Plan (PIP), which targeted alleged deficiencies in the complainant's skills and competencies and was based on the conclusion that she had failed to make improvements to meet the required standards.

2. The Tribunal observes that the complainant was informed of the CoM's decision to place her on a three-month PIP and to limit the renewal of her contract until the end of that period on 13 June 2019,

two weeks prior to the end of her one-year fixed-term contract. It is not disputed that at such time, the Midpoint Review under the Staff Evaluation System (SES), where the objectives set forth had been identified and agreed upon together with her previous supervisor, had not yet been discussed. The assertion of the complainant to the effect that her performance appraisals for the years prior to the arrival of the CoM (namely from 2015 to 2018) had all been good and that no deficiencies were ever expressed with respect to her work, has not been challenged in any way by IOM, and nothing in the record before the Tribunal suggests otherwise.

3. The Tribunal further observes that in the letter of 6 October 2019, informing the complainant of the decision not to renew her fixed-term contract, the CoM indicated the following:

“In my letter dated June 17, 2019, I communicated that in my opinion your overall performance, as well as certain competencies, needed to be improved. In order to help you make the necessary improvements, I initiated - in coordination with the Human Resources Management Department (HRM) - a 3-month Performance Improvement Plan (PIP).

Your contract was extended for a period of three months to coincide with the period of the PIP. This PIP took place from July 1, 2019 until September 30, 2019. Your contract was further extended by one month until October 31, 2019 as we were unable to schedule the last PIP meeting before the expiry of your contract on September 30, 2019.

As outlined in detail in the *‘Summary, Conclusions and Final Recommendation’* document (attached to the PIP), in my opinion your performance has not improved to a satisfactory level.

This letter is to therefore inform you that my recommendation to the Manila Human Resources Operations (MHRO) is to not renew, due to underperformance, your current contract, that as you know is ending on October 31, 2019.

I entered into this process in good faith and, as you know, your contract was almost extended towards the end of the PIP period when you had shown noticeable improvement. Unfortunately, however, your performance deteriorated once again before the conclusion of the PIP in the identified areas with performance shortcomings.”

In the “Conclusions” and “Final Recommendation” sections of the document attached to the PIP, and to the 6 October 2019 letter, the CoM emphasized the following:

“CONCLUSIONS

20. The PIP for [the complainant] had three *‘Identified performance shortcomings (objectives, competencies)’*:
 - a. Insufficient attention for supervisor’s instructions and poor follow up
 - b. Conflictual relationships and lack of respect for other units
 - c. Inappropriate use of social media
21. Regretfully, despite my best intentions, and an initial willingness to extend [the complainant]’s contract, improvements on points a + b were insufficient for [the complainant] to pass the PIP. To the best of my knowledge no further inappropriate use of social media was observed during the PIP period.

FINAL RECOMMENDATION

22. I hereby recommend not to extend the contract of [the complainant] beyond October 31, 2019.
23. As a manager, I believe that I tried everything possible to improve the performance of [the complainant]. The fact that initially I was willing to recommend an extension of [the complainant]’s contract shows that I went into this process with positive intentions and in good faith.”

4. The complainant requested oral proceedings. However, in view of the abundant and sufficiently clear submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the case and does not therefore deem it necessary to grant this request.

5. It is desirable to address at the outset two arguments raised by the Organization regarding what it describes as objections to the receivability of the complaint.

On the one hand, the Tribunal agrees with IOM that the harassment complaint filed by the complainant against the CoM on 23 September 2019 lies beyond the scope of the present complaint. It has indeed been the subject of a separate and distinct process. The complainant did not in fact dispute that she has not appealed the outcome of the investigation

into her complaint of harassment and abuse of authority on the part of the CoM.

On the other hand though, the Tribunal disagrees with IOM's assertion that the complaint is allegedly irreceivable (for failure to exhaust the internal means of redress, as the underlying appeal was not filed within the applicable deadline), insofar as it concerns the decisions, communicated to the complainant on 13 June 2019, to establish the PIP (including any alleged violation of the SES process) and to extend the complainant's contract for a three-month period corresponding to the PIP's duration. The Tribunal considers that a staff member may challenge the decision to subject her or him to a PIP in the context of an appeal against the final decision taken at the end of the PIP process. In Judgment 3713, consideration 3, the Tribunal recalled that:

“[I]t is obvious that the setting of a performance objective is merely a step in the process of evaluating the performance of employees. It is firmly established by the Tribunal's case law that a measure of this kind can only be challenged in the context of an appeal against the final decision taken at the end of the process in question (see for example Judgment 2366, consideration 16, or Judgment 3198, consideration 13).” (See also Judgment 3890, consideration 5.)

In the present case, the decision taken at the end of the PIP process was a decision not to renew the complainant's fixed-term contract due to underperformance and this decision resulted in the complainant being separated from IOM. This being so, the Tribunal considers that the above-cited case law from Judgments 3713, consideration 3, and 3890, consideration 5, is equally applicable in a case such as the present. And given that the complainant impugns her final contract extension and ultimate non-renewal, it is of no relevance whether the issue of her prior three-month extension is receivable.

6. The complainant pleads that the impugned decision is unlawful, being tainted by procedural irregularities and being based on erroneous facts and mistaken conclusions. In particular, she contends that IOM failed to adhere to the policies it established for the evaluation of staff performance, resorting instead to an arbitrary process that did

not safeguard her due process rights and resulted in an irregular and unduly negative appraisal tainted by bias and bad faith, amounting to an abuse of authority. She asserts that there was no evidence to support the conclusion that her performance was so unsatisfactory as to warrant the non-renewal of her fixed-term contract, claiming that she was not in any event afforded sufficient opportunity to remedy the shortcomings alleged prior to being separated from service.

7. With respect to decisions relating to performance evaluation, the Tribunal has emphasized that it has a limited power of review. For instance, in Judgment 4666, consideration 4, it recalled the following:

“[T]he Tribunal recalls first of all that, under its settled case law, the assessment of an employee’s merit during a specified period involves a value judgement and it cannot substitute its own opinion for the assessment made by the competent bodies of the qualities, performance and conduct of the person concerned. The Tribunal will interfere only if a decision was taken in breach of applicable rules on competence, form or procedure, if it was based on a mistake of law or of fact, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 4543, consideration 4, 4169, consideration 7, 4010, consideration 5, 3268, consideration 9, and 3039, consideration 7).” (See also Judgments 4713, consideration 11, and 4564, consideration 3.)

8. Similarly, with respect to decisions pertaining to the non-renewal of fixed-term contracts, the Tribunal has also emphasized the limited scope of the review it can exercise. In Judgment 4146, consideration 3, it stated, in particular, the following:

“The case law of the Tribunal states that an organisation enjoys wide discretion in deciding whether or not to renew a fixed-term appointment and, *a fortiori*, whether to convert it into an indefinite one. Although the exercise of such discretion is not unfettered, it is subject to only limited review, as the Tribunal will respect the organisation’s freedom to determine its own requirements. Accordingly, the Tribunal will only set aside such decisions if they were taken without authority or in breach of a rule of form or of procedure, or if they rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgment 3772, under 5).”

9. Among the many arguments raised by the complainant in support of her complaint, there are three which relate to procedural breaches, violations of due process, and manifestly mistaken conclusions drawn from the evidence, and therefore fall within the limited scope of the Tribunal's power of review as defined above and, as will be apparent shortly, are decisive for the outcome of this dispute.

First, the complainant argues that IOM failed to abide by its own policies and procedures in breach of the principle *tu patere legem quam ipse fecisti*. Second, she contends that IOM failed to abide by the tenets of due process by separating her from service prior to the completion of the performance appraisal process and by depriving her of the right to improve her performance. Third, she maintains that there was no evidence of underperformance justifying that her contract be terminated. She notes in that respect that her alleged shortcomings were never recorded in a Midpoint Review, that her performance prior to being placed on a PIP had always been considered satisfactory, and that it is unlikely that her performance would have suddenly deteriorated within a three-month period after five years of otherwise good service.

10. Turning to the first argument, the Tribunal considers that the record indeed establishes that the Organization failed to abide by its own policies and procedures in breach of the *patere legem* principle. In this regard, it is convenient to recall that an international organization must comply with the procedures it has established for evaluating performance before deciding to terminate or not to renew a contract for unsatisfactory performance. In Judgment 4666, consideration 4, the Tribunal aptly stated the following in this respect:

“An examination of a staff member's assessment report before taking any decision not to renew that person's contract on the basis of unsatisfactory performance is a fundamental obligation, non-compliance with which constitutes a procedural flaw that has the effect of an essential fact being overlooked (see, in particular, Judgments 2992, consideration 18, 2096, consideration 13, and the case law cited therein).”

In Judgment 3417, also involving IOM, this principle was enunciated in no uncertain terms at consideration 6:

“However while there is an undoubted right of an organisation to decide not to renew a fixed-term contract, it does not follow that an organisation is, additionally, immune from any liability if it has failed to follow its own procedures designed to monitor, assess and evaluate staff performance and progress. The fundamental purpose of such procedures is to explicitly alert a staff member to identified deficiencies in her or his performance and thus give the staff member an opportunity to address those deficiencies and improve performance. The interaction of such procedures and decisions not to renew fixed-term contracts was discussed by the Tribunal in Judgment 2991, under 13:

‘It is a general principle of international civil service law that there must be a valid reason for any decision not to renew a fixed-term contract. If the reason given is the unsatisfactory nature of the performance of the staff member concerned, who is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service, the organisation must base its decision on an assessment of that person’s work carried out in compliance with previously established rules [...].’”

This is entirely consistent with the related principle to the effect that an organization cannot base an adverse decision on a staff member’s unsatisfactory performance if it has not complied with the rules established to evaluate that performance (see, for example, Judgments 3932, consideration 21, and 3252, consideration 8, and the case law cited therein).

As such, whether the evaluation of the complainant’s performance was procedurally flawed is a determinative issue in this case.

11. The IOM Unified Staff Regulations and Rules provide, in particular, for the following regarding the performance of staff members, the types of contracts and their expiration and renewal:

“Rule 1.2.2 Performance of Staff Members

- (a) Staff members are required to uphold the highest standards of integrity, competence and efficiency in the discharge of their functions.
- (b) Staff members’ performance will be appraised periodically through performance appraisal mechanisms to ensure that the required standards of performance are met. [...]

[...]

Rule 4.4.1 Types of Contracts

- (a) The term ‘regular contract’ refers to contracts with no fixed period of employment.
- (b) The term ‘fixed-term contract’ refers to contracts initially issued for a fixed period of one year or more.

[...]

Rule 4.4.2 Expiration and Renewal

Fixed-term and special short-term contracts shall expire automatically on the expiration date specified in the letter of appointment. Fixed-term and special short-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.”

12. In addition, Instruction IN/181, entitled “Staff Evaluation System Policy”, sets out the scope and purpose of the SES system at paragraphs 1.2. and 1.3:

“1.2 [...] The SES will standardize evaluation criteria throughout the Organization and help identify high performance and address underperformance in an equitable manner.

1.3 The SES provides a means of setting objectives, planning work in advance and promoting two-way communication between the Staff Member and the supervisor. It will also assist in planning career development and in identifying training requirements.”

And at paragraph 9.8.2, it defines the Midpoint Review phase of the annual SES cycle as follows:

“9.8 The annual SES cycle consists of three phases: the Initial Phase, the Midpoint Review Phase, and the End-of-Cycle Evaluation Phase.

[...]

9.8.2 During the Midpoint Review, progress to date is reviewed jointly by the Staff Member and the Manager. The default deadline for the Midpoint Review is May 15.”

13. Notwithstanding the requirements of these internal rules that it had established, which are clear and suffer no ambiguity, in the process leading up to the decision not to renew the fixed-term contract of the complainant, IOM simply disregarded these rules. On the one

hand, it did not abide by the Midpoint Review default deadline of 15 May. The record indicates that this review started, at best, at the beginning of the 24 June 2019 meeting, well after the default deadline date and, indeed, even after the Organization had reached the decision to renew the complainant's one-year fixed-term contract (set to expire on 30 June 2019) for a limited three-month period in order to proceed with the PIP it had elected to conduct under the circumstances.

On the other hand, in proceeding in this fashion, IOM ended up not conducting any of the "progress to date" review otherwise contemplated by this Midpoint Review prior to the expiry of the then applicable one-year fixed-term contract of the complainant, thereby rendering devoid of any meaning and purpose this Midpoint Review phase of the annual SES cycle it had implemented in its internal rules.

14. The complainant voiced her concerns in this respect as soon as the PIP process the Organization had elected to follow was put in place. She emphasised the fact that this way of doing was procedurally flawed, but to no avail. It is not disputed by IOM that the complainant did underline these violations of the SES process.

Even though the SES was discussed during the first three meetings held on 24 June, 3 July and 8 July 2019, which were contemplated to normally focus on the PIP, the fact remains that the Midpoint Review was initially overlooked and that the CoM chose to impose a PIP a few days before the discussion on this review was expected to take place, without then using the SES mechanism to notify the complainant of her alleged performance gaps and give her a true opportunity to address those within the prescribed setting of the SES.

15. While IOM, in answer to these concerns, pointed to the practise of setting up a PIP that it was allegedly following in this regard to properly assess the performance of a staff member, the existence of this practice, even assuming that it was an established one that was binding upon the Organization, is of no assistance to IOM in the present situation, as such clearly did not purport to replace or set aside the

process explicitly set up in the internal rules for the performance evaluation of staff members.

16. The Tribunal in fact observes that this alleged practice of following this PIP process is surprisingly nowhere to be found in any of the rules and regulations of the Organization, such that a staff member is simply unaware of its workings and applicable parameters up until he or she is faced with a request calling for its application. And, as the Organization candidly indicated in its submissions, such a request cannot be refused.

As just noted, there is no mention of the PIP process or policy in the IOM Unified Staff Regulations and Rules, and the Tribunal understands from the record that little guidance, procedure, or policy, if any, exists in this regard within IOM for staff members. In the case of the complainant, in an email dated 18 June 2019, the Director, HRM, responded the following to the queries she raised regarding the PIP practice:

“The purpose of a [PIP] is to help the supervisee improve their performance, with help, support and coaching from their supervisor. Please note that a PIP is a structured process that is initiated by the supervisor in case performance gaps are identified. In IOM’s Staff Regulations (9.4b) there are established administrative consequences linked to the performance of [s]taff [m]embers, such as termination or non-renewal if the staff member’s services are assessed as being unsatisfactory.

Because a consequence of not improving is termination or non-renewal, it is standard practice that your contract, which happens to be up for renewal in June, will only be extended until the end of the PIP period.

At the outset of the period of the PIP, the supervisor should provide specific examples to the supervisee that highlight the gaps in performance, and how this varies from the position requirements and/or agreed objectives and competencies set out in the SES. Guidance and coaching should be provided to the supervisee, and regular meetings should be held between the supervisee and supervisor. At the end of the PIP, an evaluation is undertaken. As mentioned above, if performance has not reached the required standards, the staff member may be subject to administrative actions, including extending the PIP, or termination/non-renewal of contract.

Staff members do not have a choice to ‘decline’ a PIP. To do so may be considered insubordination.”

While this indicates that the complainant received some guidance from HRM, there were still no written rules or policy documents providing any institutional guidance regarding performance improvement plans, nor was there any clarity provided, as she rightly emphasized, with respect to the PIP's relationship to the SES process. Without such rules, policy or guidance in place, staff members were left to speculate as to what their rights were, or what procedures were applicable to them.

17. The Organization recognizes that Instruction IN/181 introduced the SES as the relevant mechanism for the regular evaluation of performance throughout IOM in accordance with standardized criteria. Yet, it adds that the SES is not a substitute for communication between staff members and their supervisors on performance issues. It therefore suggests that discussions may be conducted as needed to manage identified shortcomings in staff performance, like through the PIP process, and such discussions are not required to be "held over" for Midpoint or End-of-cycle Reviews under the SES, nor are they contingent upon the completion of a particular stage in the SES process.

The Tribunal finds this argument unconvincing. Encouraging communication between supervisees and supervisors on performance issues does not allow IOM to ignore, as a result, its own rules or bypass them. Instruction IN/181 does not refer to an evaluation process outside of the SES process, and any established practice cannot be applied with the understanding that it may amount to a substitute for the SES process without IOM breaching its internal rules on performance evaluation. In Judgment 4072, consideration 14, the Tribunal recognized that international organizations have the discretion to manage their performance management objectives, but it highlighted as well that they must do so using the tools they have in the way they were designed.

18. In sum, here, in the process leading up to the 6 October 2019 decision that ended up being confirmed by the impugned decision, IOM breached Rule 1.2.2(b) and Instruction IN/181 by not undertaking in due course the required periodic appraisal of the complainant's work.

The leap to the PIP was, in this sense, premature and a breach of due process, as much as a failure to adhere to explicit organizational rules.

In this regard, it is indeed telling to note from the record that the SES review document, which ended up being completed, albeit late, before the PIP process finally began after 24 July 2019, indicated that the complainant's performance was satisfactory and that each of her identified overall objectives was marked as being "on track" for the purposes of the SES Midpoint Review. It was only on 6 October 2019, after the complainant was notified of her alleged underperformance and of the CoM's decision not to renew her fixed-term contract beyond 31 October 2019, that this assessment was changed to "partially on track".

The first argument of the complainant is well founded.

19. In support of her second argument, to the effect that the Organization failed to abide by the tenets of due process by separating her from service prior to the completion of the performance appraisal process (through the PIP) that IOM tried to substitute to the one contemplated by its internal rules, namely the SES process, the complainant points to i) the fact that the PIP lasted in reality barely two months rather than three, and ii) the fact that, in any event, she was not even provided with any time to improve her alleged lack of performance on the issues that were brought to her attention for the first time on 6 October 2019.

20. The Tribunal observes that, while the discussions on performance between the complainant and the CoM started on 24 June 2019, given the concerns raised by the complainant over the fact that the SES process was ignored, the PIP process itself started only on 24 July 2019. IOM indeed acknowledged, in its submissions to the Tribunal, that the first three meetings of 24 June, 3 July and 8 July 2019 rather "focused on finalising the mid-point review for the complainant's annual SES". It was only at the fourth meeting, on 24 July 2019, that the discussions on the PIP started for the first time.

It is, therefore, not contested by anyone that, as a result, the complainant was ultimately not provided with a full three months to improve her performance, even though it was initially determined by the Organization that this was the necessary period established for improvement. In addition, while the draft PIP contemplated holding meetings every two weeks, in the end only four meetings took place to discuss the complainant's PIP (24 July, 28 August, 4 September and 6 October 2019). And while the complainant was told at the 4 September meeting that her fixed-term contract would be renewed for six months, at the 6 October meeting that followed, she was rather notified of the non-renewal of that fixed-term contract beyond its expiry on 31 October 2019 because of the alleged sudden deterioration of her performance after mid-September.

It follows that, on this basis alone, the PIP process was irregular and procedurally flawed, as was the subsequent decision not to renew the complainant's contract based on the results of that PIP.

21. In this regard, given the state of the record, the Tribunal cannot accept the argument of the Organization to the effect that the PIP included no less than seven meetings. It is rather clear that the first three meetings were devoted to the Midpoint Review and the objectives for the purpose of the SES (which until that point had been irregularly bypassed), while the last and seventh meeting (on 6 October 2019) was simply to notify the complainant of the decision not to renew her contract beyond 31 October 2019 and could thus hardly be considered as being part of the PIP process.

22. The Tribunal further observes that in the complainant's situation, shortening in such a manner the expected length and number of meetings of the PIP was much more than a mere inaccurate technical calculation of weeks and numbers of meetings. The record indeed indicates that within a little more than a month, namely between 24 July and 4 September, the complainant had been able to improve her performance to the point that the CoM was satisfied that a six-month renewal of her fixed-term contract could then be awarded to her.

This view drastically changed merely two weeks later because of an alleged sudden deterioration of the complainant's performance that occurred around 15 to 17 September. But the record shows that the two errors that she allegedly committed in mid-September 2019, both of which were disputed by her, differed to a large extent from the other alleged behavioural issues that had triggered for the most part the implementation of the PIP and which were by then considered as sufficiently improved to justify an extension of her fixed-term contract in early September.

23. Yet, the record indicates that the CoM never discussed with the complainant these issues that arose in mid-September as part of the PIP process before she was notified, on 6 October 2019, of the non-renewal of her fixed-term contract relying on the very same events that allegedly led to the sudden deterioration of her performance.

In his 6 October 2019 letter, the CoM indeed admitted that the complainant's contract "was almost extended towards the end of the PIP period when [she] had shown noticeable improvement. Unfortunately, however, [her] performance deteriorated once again before the conclusion of the PIP in the identified areas with performance shortcomings." This confirms that the CoM took the decision to separate the complainant from service, even if there had been some gradual improvement on her part up to that point in the PIP process. Still, she was not allowed any additional time to continue to consolidate that improvement, nor was she then told why and how it had suddenly declined because of two issues that were unrelated to the performance issues that explained the setting up of the PIP process.

Procedurally speaking, the CoM thus failed to give the complainant reasonable time to improve her performance between the time that he recognized that it had improved sufficiently enough to warrant a longer contract renewal and the last-minute reversal of this view that led to the sudden imposition of the decision of non-renewal.

24. In this regard, the Tribunal considers that the Organization breached its duty to act in good faith by failing to provide adequate time for the complainant to improve her performance. The Tribunal recalls its well-settled case law that in terms of alleged unsatisfactory performance, a staff member should not only be warned but also given an opportunity to improve and correct the alleged poor or unsatisfactory performance. In Judgment 3282, consideration 5, it stated the following in this respect:

“As in Judgment 2916, under 4, the Tribunal holds that ‘an organisation may not in good faith end someone’s appointment for poor performance without first warning him and giving him an opportunity to do better [...]. Moreover, it cannot base an adverse decision on a staff member’s unsatisfactory performance if it has not complied with the rules established to evaluate that performance [...].’”

Similarly, in Judgment 3026, consideration 8, the Tribunal recalled that “[a]n opportunity to improve requires not only that the staff member be made aware of the matters requiring improvement, but, also, that he or she be given a reasonable time for that improvement to occur”.

25. In the present case, despite having been informed by the CoM verbally, and in writing on 4 September 2019, that her contract was to be renewed for six months following the positive feedback provided in the prior PIP meetings, the complainant was first informed on 11 September 2019 that it would instead be renewed for only three months. And on 30 September 2019, the last day of her contract, she was then informed by him that her contract would be extended for only one month, ending on 31 October 2019, again without explanation. No PIP meetings were held between 4 and 30 September 2019. It was only on 6 October 2019 that she was informed that her contract would not be renewed beyond its expiry on 31 October 2019 for alleged underperformance.

The second argument of the complainant is also well founded.

26. Finally, in support of her third argument, the complainant submits that in the impugned decision, there were two clearly mistaken conclusions drawn from the evidence. In her view, these irregularities

were sufficient as well to justify that the Tribunal set aside that decision in the exercise of its power of review in these circumstances.

27. It bears recalling at this juncture that in the impugned decision of 9 November 2020, the Director General noted and accepted the JARB's findings to the effect that:

“The evidence submitted in connection with the PIP process contained proof of your underperformance identified by the [CoM], notably in relation to your behaviour and interpersonal skills at work. In particular, the documentation revealed instances of communication towards the [CoM] on your part that could be considered ‘bossy and aggressive’, and lack of timely replies to the [CoM] on your part in connection with ‘serious operational cases and contexts in the mission, including going against the instructions of the [CoM] leading to insubordination’. The JARB concluded that you had ‘failed to make concrete efforts to address these underperformance gaps throughout the time and show results.’”

In its report of 8 October 2020 upon which the impugned decision relied, the JARB indeed noted the following with respect to the underperformance reasons raised by IOM to support the decision not to renew the complainant's fixed-term contract:

“47. The [complainant] contests that underperformance was an issue. Upon reviewing all written evidence submitted by the parties, including documentation related to SES, PIP and email communication between the [CoM] and [the complainant], JARB observes that there is evidence of identified underperformance issues by the [CoM], notably in relation to the behavioural aspects of [the complainant] and her interpersonal skills at work. JARB found that the [complainant] failed to make concrete efforts to address these under-performance gaps throughout the time and show results.

48. JARB found that there were instances of communication by the [complainant] towards [the CoM] presented on the shared documentation by the parties that can be considered by the supervisor as bossy and aggressive.

49. As per written evidence shared by the parties, underperformance was also observed on the lack of timely replies by the [complainant] to the [CoM] in relation to serious operational cases and contexts in the mission, including going against the instructions of the [CoM] leading to insubordination.” (Emphasis added.)

28. Yet, in the “Conclusions” and “Final Recommendation” sections of the document attached to the PIP form and to his decision of 6 October 2019, the CoM had, for his part, pointed to the following:

- “13. Beginning from 15/09/19 all the signs of improvement provided by [the complainant] were suddenly dissipated. At 11 am I called a meeting with [the complainant], 3 members of her unit and two colleagues from Operations. The objective of the meeting was to discuss the case of two minor migrant girls, most likely victims of trafficking. During the meeting it became clear that key information (privy to [the complainant] and members of her team since Wednesday 11/09 at 16:49) had not been timely shared with me. That information was only verbally and vaguely communicated to me during the meeting, and finally in writing and precisely only on Monday 16/09/2019 at 3:19 PM. The withholding of this key information had two severe consequences:
- a. IOM Algeria missed the window of opportunity to organize a life-saving rescue mission for the girls:
 - b. IOM Algeria lost contact forever with the girls.

(annexes 10, 11, 12, 13,14 and 15)

14. Between 16/9/19 and 17/9/19 a very worrisome and negative series of e-mail exchanges occurred with [the complainant], putting at risk the preparation of a massive and strategic [...] operation to Niger, under the responsibility of [the complainant] and the MPA Unit I:

[...]

15. This erratic decision process by [the complainant] lead to the result that an activity (registration of migrants eligible for [...]) technically under the responsibility of MPA, in order to avoid obvious delays, had to be carried out for 70% of the work load by colleagues on loan from Operations (annex 18).
16. After consulting and coordinating with HRM, on 16/9/19 I requested MHRO to put on hold the 3 months offer of extension to [the complainant] (annex 19). The troubling behavior of [the complainant], who was still on a PIP until the end of September, meant I simply could not reach any other decision than the one below.” (Emphasis added.)

Based on that and on the matters otherwise set out in that document, the CoM concluded as follows:

“The PIP for [the complainant] had three ‘identified performance shortcomings (objectives, competencies)’:

- a. Insufficient attention for supervisor’s instructions and poor follow up

- b. Conflictual relationships and lack of respect for other units
- c. Inappropriate use of social media

Regretfully, despite my best intentions and an initial willingness to extend [the complainant's] contract, improvements on points a and b were insufficient for [the complainant] to pass the PIP. To the best of my knowledge no further inappropriate use of social media was observed during the PIP period."

29. Firm and constant precedent has it that an international organization has a duty to provide valid reasons for a decision not to renew a fixed-term contract. For example, in Judgment 4503, consideration 7, the Tribunal stated the following in support of this principle:

"Even though an organization is generally under no obligation to extend a fixed-term contract or to reassign someone whose fixed-term contract is expiring, unless it is specifically provided by a provision in the staff rules or regulations, the reason for the non-renewal must be valid (and not an excuse to get rid of a staff member) and be notified within a reasonable time (see Judgments 1128, consideration 2, 1154, consideration 4, 1983, consideration 6, 2406, consideration 14, 3353, consideration 15, 3582, consideration 9, 3586, consideration 10, 3626, consideration 12, and 3769, consideration 7).

An international organization is under an obligation to consider whether or not it is in its interests to renew a contract and to make a decision accordingly: though such a decision is discretionary, it cannot be arbitrary or irrational; there must be a good reason for it and the reason must be given (see Judgment 1128, consideration 2)."

In Judgment 3586, consideration 6, the Tribunal further clarified that "[t]hese grounds of review are applicable notwithstanding that the Tribunal has consistently stated, in Judgment 3444, [consideration] 3, for example, that an employee who is in the service of an international organization on a fixed-term contract does not have a right to the renewal of the contract when it expires and the complainant's terms of appointment contained a similar provision".

30. In the present case, the Tribunal observes first that, notwithstanding what both the JARB in its report and the Director General in the impugned decision referred to, there is nothing in the complainant's PIP, the document the CoM attached to the PIP, or the

decision he rendered on 6 October 2019 that refers to an alleged issue or finding of insubordination as grounds for the non-renewal of the complainant's fixed-term contract.

The only reason voiced and proffered for the non-renewal of the complainant's fixed-term contract was her underperformance in relation to the three identified performance objectives and competencies of her PIP. Clearly, alleged insubordination was not raised as a reason, let alone as a valid or good reason, for this decision. Indeed, if insubordination was the true reason for the decision, it would have normally triggered disciplinary measures with respect to which a different process would have likely applied (see, for example, Judgment 3224, considerations 8 to 10, a case involving IOM).

In this regard, the Tribunal considers that the JARB's report and the impugned decision, in stating that the underperformance observed in the lack of timely replies by the complainant to the CoM included going against the instructions of the latter and leading to insubordination, both contained manifestly mistaken conclusions drawn from the evidence and the record which justify that the Tribunal exercise its power of review as a result of this irregularity.

31. Second, the Tribunal further observes that, even though the CoM highlighted in these documents that the complainant had demonstrated resistance to the PIP process such that the first three meetings concerned her challenges to its legitimacy, thereby preventing discussion of substantive matters and blocking progress, and that during the course of the PIP process, complaints from staff members about the complainant's "aggressive and bossy behaviour" working under her supervision and in other units were shared with her, he still considered in the fourth, fifth and sixth PIP meetings that the complainant had demonstrated in this regard an "improved problem-solving attitude" which enabled him to recommend the extension of her contract in early September 2019.

In fact, the record shows that the decisive reason for which the complainant's contract was not renewed beyond 31 October 2019 was her alleged underperformance during the second half of September

2019, following the two incidents that the CoM qualified as “a sudden dissipation in the improvements made by the [c]omplainant in her performance and behaviour” from 15 September 2019 onwards.

But, on the one hand, issues of improper performance of a technical nature like those related to these two situations did not form part of the three identified shortcomings that led to the PIP. One cannot ignore in this respect that it is not disputed that the complainant had received satisfactory and positive performance appraisals from her other supervisors since 2015. And, on the other hand, these two events did not pertain to issues in relation to the behavioural aspects of the complainant or her interpersonal skills at work with respect to which the CoM had after all concluded, barely a month before his decision of 6 October 2019, that improvements were such that a six-month extension of her fixed-term contract was called for.

The Tribunal thus considers that the JARB and the Director General also drew mistaken conclusions in relying on the circumstances that there was evidence of underperformance issues, especially in relation to the behavioural aspects of the complainant and her interpersonal skills at work, or in relation to communications that could be considered as bossy and aggressive, in a context where this evidence was clearly not the decisive reason for his finding of underperformance of the complainant. This manifestly mistaken conclusion drawn from the evidence and the record also justify that the Tribunal exercise its power of review because of this irregularity.

The third argument of the complainant is also well founded.

32. It follows from the foregoing that the Director General’s decision of 9 November 2020, as well as the CoM’s decision of 6 October 2019 not to renew the fixed-term contract of the complainant, were both tainted with procedural flaws and irregularities and they must be set aside without there being any need to examine the other pleas raised by the complainant.

33. The complainant seeks reinstatement in the Organization. The Tribunal considers that, in view of the time that has passed since the events giving rise to this case and the fact that the complainant held a fixed-term appointment, it is not appropriate, in the circumstances, to order her reinstatement. In Judgment 4674, consideration 23, the Tribunal recalled that it was only in exceptional cases that reinstatement might be ordered in a context where the complainant was on a fixed-term contract that has expired (see also, for example, Judgment 4063, consideration 11). The present case is not exceptional.

In addition, the Tribunal cannot ignore that, despite its conclusion that in view of the above-mentioned irregularities and findings the impugned decision of 9 November 2020 and the prior decision of 6 October 2019 must be annulled, the very acrimonious and sometimes never-ending exchanges between the parties establish that the reinstatement of the complainant is no longer possible, nor appropriate or in the interest of either one of the parties. Any reasonable likelihood of the parties being able to establish a satisfactory working relationship with the necessary trust and confidence, despite the conflictual situation that transpired from these numerous exchanges, is simply non-existent.

34. In the event that she is not reinstated, the complainant claims material damages in an amount equal to two years' salary, benefits, step increases, pension contributions, and all other entitlements and emoluments that she would have received had she not been wrongfully separated from service. This claim is not substantiated in the complainant's proceedings be it in terms of years sought or of her expectations within the Organization. Given that any fixed-term contract the complainant ever held with IOM never exceeded one year and that the total length of her services with the Organization lasted approximately five years, the Tribunal considers that this claim is not justified and overstated in the circumstances.

An award of material damages in an amount equivalent to nine months' salary, including benefits, entitlements and emoluments, represents a fair and reasonable compensation in the present case. IOM will be ordered to pay this amount to the complainant, plus interest at

the rate of 5 per cent per annum from 1 November 2019, less any amounts she may have earned from other employment during that period of nine months beginning on 1 November 2019.

35. The complainant also claims moral damages in an amount equal to no less than one year of her former gross salary and benefits. But the Tribunal's case law states that in respect of damages, the complainant bears the burden of proof and that she must provide evidence of the alleged injury (see, for example, Judgment 4156, consideration 5). It suffices to note that in the present situation, notwithstanding this precedent, the complainant did not provide any specification of the moral injury she allegedly suffered nor evidence supporting its existence. This claim must consequently be rejected.

36. As the complainant succeeds, she is entitled to an award of costs, which the Tribunal sets at the amount of 10,000 euros.

DECISION

For the above reasons,

1. The impugned decision of the Director General of 9 November 2020 and the decision of the Chief of Mission of 6 October 2019 are set aside.
2. IOM shall pay the complainant material damages in an amount equivalent to nine months of her last salary, including all benefits, entitlements and emoluments, plus interest at a rate of 5 per cent per annum from 1 November 2019, less any amounts she may have earned from other employment during the period of nine months beginning on 1 November 2019.
3. It shall also pay her costs in the amount of 10,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 13 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Mr Clément Gascon, 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.

MICHAEL F. MOORE

CLÉMENT GASCON

HONGYU SHEN

MIRKA DREGER