

*Registry's translation,
the French text alone
being authoritative.*

109th Session

Judgment No. 2917

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. T. against the International Telecommunication Union (ITU) on 9 May 2008 and corrected on 27 August, the ITU's reply of 15 December 2008, the complainant's rejoinder of 6 April 2009 and the Union's surrejoinder of 8 July 2009;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, who has dual British and American nationality, was born in 1961. He joined the ITU in June 1994 and was awarded a permanent contract in October 2000. From November 2001 to October 2004 he was seconded to the International Trade Centre (ITC) at grade P.4, and on his return to the ITU he was appointed, at grade P.5, as Head of the Administrative and Finance Services (ADM) in the Telecommunication Development Bureau (BDT) with effect from 1 November 2004.

In his performance appraisal report for the period from November 2004 to December 2005, which was drawn up in April 2006, the complainant was given the overall rating 2, corresponding to “Partly met requirements”. It was therefore decided that an interim appraisal should be carried out after six months to allow him to improve his performance. However, in the interim appraisal report which he drew up in August 2006, the complainant’s supervisor, the Director of BDT, gave him the overall rating 1, corresponding to “Did not meet fundamental requirements”. On 29 August 2006, following a meeting with the complainant, the Director of BDT sent the interim appraisal report – which the complainant had refused to sign – to the Personnel and Social Protection Department. The Chief of that department wrote to the complainant on 6 September, urging him to sign the report, even if he did not agree with its content, and to add any comments he might wish to make.

In November 2006 the complainant’s supervisor was elected Secretary-General of the ITU. A new Director of BDT was appointed at the same time and both of these appointments took effect on 1 January 2007. By an e-mail of 29 June the latter announced to BDT staff that, with a view to strengthening the Project Unit in the Projects and Initiatives Department within BDT, the complainant would be assigned to that unit with effect from 2 July.

On 10 July 2007 the complainant met with the Secretary-General, who issued him with a performance appraisal report covering the period January to December 2006 in which he again gave him the overall rating 1. In the box reserved for his comments, the complainant wrote: “I appreciate the chance to now close a horrible chapter on life and move ahead on my work and the mission of ITU”. He signed the report that same day.

On 30 July the complainant was informed by the new Director of BDT that a recommendation had been made to terminate his contract for unsatisfactory services. The same day he sent an e-mail to the Personnel and Social Protection Department seeking clarification. He pointed out that, to his knowledge, his 2006 appraisal had not been

finalised and he stated that he wished to rebut it but that he had not been given an opportunity to do so during the evaluation.

On 1 August 2007 the complainant filed a request for review with the Secretary-General regarding this appraisal. On 19 August he reminded the Administration that he had not been given an opportunity to rebut his appraisal report and he asked to be provided with a copy of the completed appraisal. He wrote again on 30 August to the Administration asking for guidance and clarification, and a few days later he requested that the matter be submitted directly to the Appeal Board, given that the Secretary-General had written the disputed appraisal report and therefore had a conflict of interest. The complainant was absent on sick leave from 30 August 2007 until 22 April 2008. On 3 October 2007 he received a copy of his 2006 appraisal report. He lodged an appeal with the Appeal Board on 23 October 2007, challenging that appraisal on the grounds of serious procedural irregularities and grave substantial errors.

In its report dated 22 January 2008 the Appeal Board considered that the appeal was not admissible, since there was no final administrative decision in this matter. It noted that the Administration had informed the complainant in July 2007 that his appraisal report had not yet been finalised as it did not contain his objectives for 2007. The Board also found that the rebuttal procedure had not been completed, and it pointed out that in this case that procedure should culminate in a decision by the Deputy Secretary-General, given the Secretary-General's obvious conflict of interest. By a letter dated 5 February 2008 the Secretary-General informed the complainant that he had decided to maintain his 2006 performance appraisal report, but not, however, for the same reasons as those contained in the Appeal Board's report. He considered that the absence of objectives for 2007 was due to the complainant's own unavailability and that it was not such as to invalidate the evaluation of the latter's performance during the year 2006. As for the rebuttal procedure, he considered that it could not be followed in this case, owing to the fact that he, the Secretary-General, had also been the complainant's direct and second-level supervisor during the period covered by the appraisal. That is the

impugned decision. The complainant's appointment was terminated for unsatisfactory services, with effect from 11 August 2008.

B. The complainant contends that he successfully managed the work assigned to him. In his view, the relationship between him and his supervisor deteriorated because the latter expected him to become implicated in his personal fight with the former Secretary-General and, as he had refused to enter into this dispute, he was treated in an unfair and biased manner.

He alleges that his 2006 performance appraisal is tainted with serious procedural irregularities, in particular the absence of signature of his direct supervisor and the fact that he had no opportunity to rebut it. It is also vitiated by substantial errors. He asserts that the performance appraisal was a retaliatory measure following his refusal to approve an *ex post facto* payment and that it cannot be seen as a fair and objective assessment. The complainant argues that it is an incorrect assessment of his performance in relation to four of his five objectives for 2006; that it is an incomplete assessment of his competencies; that use was made of inexistent rating 0; that the assessment is tainted with bias; that the sequence of events indicates that the report was "prefabricated" to serve as a basis for the recommendation to terminate his contract, announced just two days later; and that no objectives had been set for 2007, which was a violation of the Union's duty to act in good faith and to respect his dignity.

The complainant asks the Tribunal to quash the impugned decision and to order that the ITU invalidate his 2006 performance appraisal and remove it from his personal file. He also seeks moral damages, as well as legal fees and costs.

C. In its reply the ITU submits that from the time of the complainant's new assignment at grade P.5 his performance declined and became unsatisfactory. It points out that this was evident from the 2005 appraisal report established after his first year as Head of ADM by the former Director of BDT, and was acknowledged by the complainant, who signed the report in April 2006.

It contends that the disputed appraisal report is lawful as to both form and procedure. It considers that the argument to the effect that the Secretary-General had not signed the report twice constitutes an excessive insistence on procedural formalities, and that this omission is not such as to invalidate the report. The ITU rejects the complainant's allegation that he was given no opportunity to rebut the performance appraisal. It states that the Secretary-General took the time to discuss with the complainant each rating before putting it on paper, and the complainant added his comments to the report on the same day. According to the ITU, these comments explicitly acknowledge poor performance in 2006 and demonstrate that, contrary to what the complainant claims, he had the opportunity to formulate any comment he wished to make in writing. The Union emphasises that it was only much later that, in reaction to the information regarding his termination announced to him on 30 July 2007 by the new Director of BDT, the complainant sought to challenge the appraisal report.

Moreover, the Union rejects the complainant's argument regarding the use of inexistent grade 0; it explains that competencies evaluated with a rating of 0 were deemed to be totally lacking. It also alleges that the lack of a set of objectives for 2007 is due to the complainant's unavailability, and it points out that the 2006 performance appraisal report was drawn up on the basis of objectives duly set in the previous appraisal report.

It asserts that when the complainant was reassigned at the beginning of July 2007, he met his new supervisor who informed him orally of the duties and objectives which he planned to assign him.

The ITU rejects as patently irreceivable and unfounded the complainant's allegations of abuse of authority on the part of the Secretary-General. It maintains that his performance in 2006 was fairly and objectively appraised and that the disputed report is entirely lawful as to substance.

D. In his rejoinder the complainant elaborates on his pleas. He asserts that the 2007 objectives were never discussed with or provided to him.

Further, the ITU failed to ensure that the 2006 performance appraisal report was reviewed by two independent authorities. The complainant emphasises that he requested several times that the appraisal be completed, and he maintains that it constitutes a purely retaliatory measure against him.

E. In its surrejoinder the Union maintains its position. It points out that the ITU Performance Appraisal Guide does not require that an appraisal report be reviewed by two supervisors.

CONSIDERATIONS

1. The complainant joined the ITU in 1994. After being seconded for approximately three years to another international organisation, he returned to the ITU on 1 November 2004 and was assigned, at grade P.5, to the Telecommunication Development Bureau (BDT).

On 6 April 2006 the Director of BDT conducted an appraisal of the complainant's performance in 2005. In his April 2006 report he found that three of the five objectives to be considered had not been met and rated the complainant's competencies at between 1 and 3, the lowest ratings in the scale of 1 to 5 established in the ITU Performance Appraisal Guide. He gave the complainant an overall rating of 2. The complainant signed the report with the following comment:

"I admit to a lack of focus during a period of several months arising from an extremely conflictual divorce and harassment from my wife. I am fully refocused on priorities and objectives for 2006."

2. On 10 July 2007 the former Director of BDT, who in November 2006 became Secretary-General, drew up a new performance appraisal report concerning the complainant, to whom new objectives had been assigned for 2006. He concluded in his report

that only one of the assigned objectives had been met and rated the complainant's competencies at between 0 and 2, except for one rating of 3, and gave him an overall rating of 1. The complainant signed the report with the following comment:

"I appreciate the chance to now close a horrible chapter on life and move ahead on my work and the mission of ITU."

The appraisal form dated 10 July 2007 is signed only by the complainant and by the former Director of BDT, his second-level supervisor, who had become Secretary-General. The signature of the latter was preceded by the following comment:

"[The complainant] still could not concentrate on his work. After all the previous poor evaluations, efforts have not been made to improve, or prove his capabilities in the professional field."

The form had also been signed in the usual manner by a member of the Personnel Department on 17 July 2007.

3. After taking note, *inter alia*, of this report, the newly appointed Director of BDT recommended to the new Secretary-General that the complainant's appointment be terminated.

Shortly afterwards the complainant filed a request for review of the appraisal report for 2006, and he then lodged an appeal with the Appeal Board on 23 October 2007. The Board considered that the appraisal procedure had not been completed and that the report was not final. On 22 January 2008 it recommended to the Secretary-General that he declare the appeal inadmissible for want of a challengeable decision meeting the requirements applicable to the appraisal of staff members' performance.

On 5 February 2008 the Secretary-General dismissed the appeal but diverged from the reasons and conclusions of the Appeal Board. He held that the appraisal procedure had been properly conducted and that the appeal was admissible. He concluded that the appraisal report was regular in terms of both form and procedure, and for the remainder he referred to the reply he had submitted to the Appeal Board. It is this decision that the complainant impugns before the Tribunal.

In a letter of 8 August 2008 the complainant was informed of the Secretary-General's decision to terminate his appointment for unsatisfactory services with effect from 11 August.

4. The complainant contends, in support of his complaint, that his appraisal report for 2006 failed to comply with the statutory requirements.

5. The ITU staff appraisal report is compiled on the basis of a six-part form. The performance of a staff member is assessed in the second part, in which it is compared to the objectives assigned to the post and the competencies that the staff member should have demonstrated in the performance of his/her professional duties. A third part is reserved for objectives set for the coming appraisal period, so that the staff member can draw appropriate lessons for his/her future career from any criticism or reservations expressed by his/her supervisor in the second part. The fourth part concerns personal development, for instance training, and the fifth is reserved for comments by the staff member and general observations by the supervisor. The requisite signatures are to be entered in the sixth part. Each part is divided into a number of sections, the purpose of which is explained in the Performance Appraisal Guide.

6. The comparison of the staff member's performance with the objectives assigned to his/her post falls under section 2.1 of the form, in which five groups of objectives are listed. According to the report at issue in this case, the complainant allegedly achieved only one of these five objectives.

The Performance Appraisal Guide states the following in this regard:

“Section 2.1 – Assessment of key results

- a) The supervisor will assess whether the objectives, as mutually agreed in the previous report, have been met. The supervisor and staff member are invited to comment on any relevant facts in the space provided for that purpose. Comments are mandatory where objectives have not been met.

- b) If the supervisor and staff member agree that key tasks or activities which were not stated as objectives have been accomplished, those tasks or activities should also be evaluated, without however indicating whether objectives were met. The same applies where no objectives were set in the previous period. The supervisor should indicate how the activities in question were performed.”

According to the complainant, the supervisor’s four negative assessments were formulated in incomplete and incorrect terms.

This criticism is irrelevant inasmuch as it implies that the supervisor is required to comment on each of the sentences describing the objectives to be met. The essential requirement is that it should be possible to deduce from the supervisor’s comments the reasons that prompted him to reach his stated conclusion. From this perspective, and since there is no need under the circumstances to rule on the validity of the disputed assessments, it must be concluded that the supervisor complied with the formal requirements of the Performance Appraisal Guide with respect to the method to be followed in indicating on the form whether or not the assigned objectives were met by the staff member concerned.

7. The competencies displayed by the staff member in the performance of his or her duties are assessed in section 2.2 of the form. This section contains a long list of the specific requirements of the post, which are divided into two major categories entitled “Core and functional competencies” and “Managerial competencies”. After appraising these competencies, the supervisor provides an overall rating.

(a) The Performance Appraisal Guide defines competencies, within the meaning of section 2.2 of the appraisal form, as “a combination of skills, attributes and behaviours that are directly related to successful performance of the job. While objectives are focused on key results, competencies express the manner in which staff members carry out their job.” It states that the criteria to be used in determining the competencies of the staff member concerned were defined after consultation with 120 staff members across the organisation.

(b) According to the annex to the Performance Appraisal Guide, each item involved in determining the competencies of the staff member is rated on a scale of 1 to 5. Minimum rating 1 corresponds to the assessment “Poor”. It is given when the staff member never demonstrated that he or she possessed the competencies required for the work. Maximum rating 5 corresponds to the assessment “Exceptional”. It is given when the staff member always demonstrated that he or she possessed the competencies required for the work.

(c) In the instant case, the ratings received by the complainant under the heading “Core and functional competencies” range between 0 (twice) and 3 (once); under the heading “Managerial competencies” the complainant consistently received the rating 2 for the four sets of criteria that were rated by the supervisor.

(d) It should be noted that there is no provision either in the Performance Appraisal Guide or in the section of the form concerning overall rating for 0, which was given for two competencies, productivity and dependability.

By twice giving the complainant a rating that is not envisaged in the Performance Appraisal Guide, the supervisor breached the rules applicable to the process of assessing a staff member’s performance. Furthermore, this kind of rating is likely to leave the staff member concerned feeling that his competencies or performance in the areas assessed are so substandard that they do not even merit an assessment on the part of his supervisor. Such conduct may be expected to foster in the staff member a deep sense of personal inadequacy.

As such a rating has no basis in law and is contrary to the rules of conduct applicable to the personal relations between international organisations and their staff, it cannot be upheld.

8. The third part of the form used for a staff member’s appraisal report concerns the objectives for the coming period, which was 2007 in the case in point. According to the form, the section is to be completed by the supervisor in consultation with the staff member concerned. The objectives to be met must be listed by order of

importance in the boxes numbered 1 to 5. The Performance Appraisal Guide states that these objectives, which are specific results expected for the period covered, should be set in order of priority by mutual agreement between the supervisor and the staff member, and that they need not cover all the tasks mentioned in the latter's job description.

This part of the form used for the appraisal of 10 July 2007 was not completed as required by the Performance Appraisal Guide. It simply contains the following handwritten note:

"New assignments are being coordinated with BDT management. To be added as annexe."

This approach was obviously taken by the supervisor, probably with the complainant's tacit consent, because the latter had just been assigned to another unit within BDT, a transfer entailing new responsibilities that the supervisor was clearly unable to assess objectively himself in consultation with the complainant, as required by the Performance Appraisal Guide.

The question as to why the description of the objectives for the coming period was apparently not forthcoming within a reasonable time need not be addressed. Suffice it to note that the approach taken by the supervisor in preparing the disputed appraisal report did not result in an infringement of the complainant's rights nor did it distort the assessment of his competencies and performance during the preceding year.

9. The sixth part of the appraisal form is reserved for the signatures of the persons involved in the assessment. The Performance Appraisal Guide states in this regard:

"The staff member and the supervisor must sign here. Any intermediate supervisor must also initial the report to indicate that he/she has seen and approved it.

[...]

The Director of the Bureau or, for the General Secretariat, the Chief of the Department concerned, must also sign the report and may make comments if necessary.

The Secretary-General or the Deputy Secretary-General will indicate that the report has been seen as necessary.

If any supervisor has made comments, the staff member must again initial the report to show that they have been seen. Under no circumstances does this imply agreement with the comments, nor does it in any way prejudice any subsequent action the staff member may wish to take.

The Personnel Department must initial the report and enter the date on which it was seen by the department.”

The form was signed in the present case only by the complainant and the then Director of BDT. In particular, it does not bear the signature of the Secretary-General or that of the Deputy Secretary-General, who ought to have signed it if the former was unable to do so for personal reasons. The ITU attributes this unusual situation to the fact that, during the material period, the Director of BDT was also the complainant’s supervisor and that, at the time when the form was completed, he had become the Secretary-General of the Union.

In the Tribunal’s view, this explanation does not justify the course taken in this case by the complainant’s supervisors and ultimately by the Secretary-General. The signing of a document with such important implications for the future career of a staff member is not a mere formality, and insistence on absolute compliance with this rule cannot be dismissed as an unduly formalistic approach. The provision requiring that the appraisal form be signed not only by the direct supervisor of the staff member concerned but also by other persons, such as the chief of the department, the Director of the Bureau and the Secretary-General or, in his absence, the Deputy Secretary-General, is designed to guarantee oversight, at least *prima facie*, of the objectivity of the report. The purpose of such a rule is to ensure that responsibilities are shared and that the staff member who is being appraised is shielded from a biased assessment by a supervisor, who should not be the only person issuing an opinion on the staff member’s skills and performance.

It follows from the passage in the Performance Appraisal Guide concerning signatures that the report in the present case should have been signed not only by the Director of the Bureau of which the

complainant's unit formed part, but also by the Deputy Secretary-General, as the Director in question was also the complainant's supervisor and had since become the Secretary-General of the Union. This obligation was all the more imperative in the case in point because the complainant's comments on the appraisal report for the preceding period and on the disputed report cast doubt on his ability to engage at the time in a free and frank discussion of his professional appraisal owing to the difficulties he was apparently encountering in his personal life. It matters little that the complainant's opinion regarding the scope, in practical terms, of the signature requirements contained in the Performance Appraisal Guide seems to have varied during the proceedings.

10. The Tribunal concludes from the foregoing that the disputed appraisal report is tainted with serious irregularities. The Secretary-General's refusal to censure them constituted a breach of the assessment rules laid down in the Union's Performance Appraisal Guide.

The complaint must therefore be allowed, without there being any need to examine the other procedural pleas raised therein. With regard to the substantive pleas, including the plea that the disputed appraisal was also an act of retaliation, the Tribunal finds that there is no evidence in the file to support them. The impugned decision must be set aside and the performance appraisal report for 2006 removed from the complainant's personal file.

11. The complainant is entitled to moral damages in the amount of 10,000 Swiss francs.

He is also entitled to costs in the amount of 5,000 francs.

DECISION

For the above reasons,

1. The Secretary-General's decision of 5 February 2008 is set aside and the performance appraisal report of 10 July 2007 shall be removed from the complainant's personal file.
2. The ITU shall pay the complainant moral damages in the amount of 10,000 Swiss francs.
3. It shall also pay him costs in the amount of 5,000 francs.

In witness of this judgment, adopted on 27 April 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron
Seydou Ba
Claude Rouiller
Catherine Comtet