

113th Session

Judgment No. 3128

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr C. T. against the Agency for International Trade Information and Cooperation (AITIC) on 5 May 2010 and corrected on 18 May, AITIC's reply of 7 September, the complainant's rejoinder of 14 December 2010 and the Agency's surrejoinder of 19 January 2011;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. The background to this case is described in Judgment 2781, delivered on 4 February 2009. Suffice it to recall that the complainant, a national of the United States of America born in 1972, was an intern at AITIC in 2003 for several months. On 1 April 2006 he was recruited by the Agency as a Trade Affairs Officer on a probationary one-year fixed-term contract.

At an evaluation meeting in November, he learnt that the Executive Director of the Agency had made a negative assessment of his performance. In his performance evaluation report dated

17 October 2006, the Executive Director wrote that “[the complainant] will need to make a very special effort in the few months that are left of his contract”.

The report was signed on 14 December 2006 by the complainant and the Executive Director, who informed him in writing that same day that his contract would not be renewed when it expired on 31 March 2007. The reasons given for the decision were not only the restructuring in progress at the Agency following the departure of a senior employee, but also the fact that the complainant’s analytical skills “would be better appreciated and used in a research organisation”.

In June 2007 the complainant lodged an appeal with the Executive Board, challenging the decision not to renew his contract. His appeal was dismissed as irreceivable and he then filed his first complaint with the Tribunal. In Judgment 2781 the Tribunal set aside the decision to reject the complainant’s appeal and remitted the matter to the Agency for a decision on the merits of his appeal.

Further to that judgment, the Executive Board examined the complainant’s appeal and decided on 19 January 2010, without providing any specific reasons, to reject it. The Agency notified the complainant by a letter dated 29 January 2010 that, at its eleventh meeting held on 26 January, the Executive Board had rejected his appeal “[o]n the basis of the information and guidance available to the [...] Board from the former Executive Director”. That is the impugned decision.

B. The complainant submits that the performance evaluation on which the non-renewal of his contract is based was not carried out in accordance with the applicable provisions, namely the terms of his employment contract and the relevant provisions of the AITIC Staff Regulations. He argues that the impugned decision contravenes the case law concerning the right to a hearing and the right to reasonable notice in the framework of performance appraisals, that it contains numerous incorrect statements and that it is tainted with bias on the

part of AITIC's Executive Director. In his view, the last sentence of the evaluation report stating that he "will need to make a very special effort in the few months that are left of his contract" illustrates the fact that the then Executive Director had already taken the decision not to renew his appointment in November 2006. He also contends that the non-renewal decision was abusive inasmuch as it was based on false reasons, the negative evaluation only constituting a "pretext". In this connection he points out, inter alia, that there is a contradiction between the reasons mentioned in the Executive Director's letter of 14 December 2006 and the content of his performance evaluation report dated 17 October 2006.

The complainant asks the Tribunal to set aside the impugned decision, to declare the evaluation report unlawful and order its withdrawal, to set aside the decision not to renew his contract and order his reinstatement, and to order any additional investigation for the purpose of establishing the pertinent facts. He claims compensation for loss of earnings from the date of separation until the date of reinstatement, 50,000 Swiss francs in moral damages and 15,000 francs in costs. Subsidiarily, in the event that his claim for reinstatement is denied, he maintains his other claims but seeks a different amount for loss of earnings.

C. The Agency submits that the complainant's contract expired lawfully in accordance with its terms and that he was given reasonable notice thereof. AITIC points out that neither the complainant's contract, nor the Staff Regulations, contain provisions on a possible extension of a contract. On the contrary, the applicable Staff Regulations provide that in cases of expiration of fixed-term contracts, the staff member concerned shall be given notice and the expiration shall not give rise to the payment of an indemnity. The complainant's contract also stipulates that the notice period for the non-renewal of a fixed-term contract is two months. As per its terms and conditions, the complainant's fixed-term contract ended on 31 March 2007 and he was informed thereof on 14 December 2006, some three and a half months earlier. He was therefore given reasonable notice.

The Agency underlines that the evaluation was signed by both parties on 14 December 2006 and that the complainant confirmed in that document that he had discussed the evaluation with the Executive Director and had received a copy of it. It argues that it was clear from the assessment made by the Executive Director that the complainant's performance was below the level expected by AITIC, that the decision not to extend or renew his contract was clear enough and that it did allow him to understand why his contract was not being renewed. Contrary to the complainant's assertions, there was nothing personal about the decision not to renew his contract, which stemmed only from the poor level of his work, as evidenced by the many criticisms contained in his 2006 performance evaluation report.

Lastly, AITIC asserts that the decision not to renew the complainant's contract was taken by the competent authority and that it complied with the Staff Regulations. It emphasises that, in such cases, the Tribunal will not substitute its own judgement for the assessment made by the Agency.

D. In his rejoinder the complainant presses his pleas. He alleges that the Executive Director had promised him a two-year fixed-term contract and that he therefore had a legitimate expectation of obtaining a renewal of the one-year contract he had signed. Further, he objects to the defendant's "truncated reading" of Article 18 of the Staff Regulations as well as its presentation of the facts. He contends that the review conducted by the Executive Board occurred only on the basis of information provided by the Executive Director, who had told the Board that he was likely to "give up" if his internal appeal was rejected and that accepting his appeal would cost the Agency over 300,000 Swiss francs. In his view, because of the manner in which the Executive Director presented the case to the Executive Board, the Board failed to address the merits of the case and instead focused only on the financial implications of his appeal. According to the complainant, both the Executive Director and the Executive Board committed an abuse of authority in dealing with this case.

E. In its surrejoinder the Agency maintains its position in full. It denies that any promise of extension was ever made to the complainant and points out that he has produced no evidence to support his assertion. AITIC reiterates that the decision not to renew his contract was neither abusive, nor tainted with procedural irregularities, but that it was based only on the poor quality of his work.

CONSIDERATIONS

1. The complainant joined AITIC as a Trade Affairs Officer on 1 April 2006. His contract was for a fixed-term of 12 months. Pursuant to Staff Regulation 18 “[a]ll initial contracts [are] for a probationary fixed term of at least one year”. On 14 December 2006 the Executive Director completed the complainant’s performance evaluation report in which she stated that he had “found difficulties in adapting to AITIC, and his learning process ha[d] been slow, both administratively as well as substantively”. She also reported that his drafting was not satisfactory and concluded that “after eight months [...] [he] ha[d] not been very successful in adapting to the institutional requirements, as well as the operational and substantive priorities and style of the Agency”. On the same day the Executive Director informed the complainant that his contract would not be renewed on its expiry on 31 March 2007. The reasons then given for that decision were that the complainant was better suited to a research organisation and, additionally, that there would be a restructuring following the departure of a senior staff member.

2. An appeal to the Executive Board of AITIC with respect to the complainant’s performance evaluation report and the decision not to renew his contract was initially rejected as time-barred. Following a complaint to the Tribunal and delivery of Judgment 2781, the appeal was considered and rejected by the Board on 19 January 2010. The complainant impugns that decision which was communicated to him on 29 January.

3. It is convenient to note at this stage that the Executive Board gave no reasons for its decision. Nor did it give the complainant an opportunity to appear before it, despite his request to do so. Moreover, AITIC does not seek to justify the decision not to renew the complainant's contract on the basis of a proposed restructuring. Rather, it seems the matter has at all stages been approached on the basis that the non-renewal of the complainant's contract was justified because of his unsatisfactory service.

4. As pointed out in Judgment 2991, consideration 13, "[i]t 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". And as also stated in that case, "[i]f 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". Staff Regulation 21 relevantly provides for an annual performance evaluation by a staff member's direct supervisor or the Executive Director, as appropriate, and Staff Regulation 22 stipulates that the staff member has the right to see and comment on it. In his comments on his performance evaluation report, the complainant agreed that "there [was] room for improve[ment]" but expressed his surprise at "not receiving any credit for [his] efforts to secure [...] 200,000 [United States dollars] [...] from Chinese Taipei for an Official Fellowship Programme". He added that he and the Executive Director had "very different perspectives o[n] [his] [...] performance" and that he would welcome guidance from her. Although Staff Regulations 21 and 22 were satisfied, it is not clear that the complainant was informed in a timely manner as to the unsatisfactory aspects of his performance. And as his was a probationary appointment, it was important that he be so informed and given an opportunity to remedy the situation.

5. It is well established, as stated in Judgment 2529, consideration 15, that "an organisation owes it to its employees,

especially probationers, to guide them in the performance of their duties and to warn them in specific terms if they are not giving satisfaction and are in risk of dismissal”. This obligation was elaborated in Judgment 2414, consideration 23, as follows:

“A staff member whose service is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation. Moreover, he or she is entitled to have objectives set in advance so that he or she will know the yardstick by which future performance will be assessed.”

6. AITIC does not argue that guidance was given to the complainant, that he was informed prior to the November 2006 meeting as to the unsatisfactory aspects of his work or that he was given an opportunity to remedy the situation. However, there is material, consisting of e-mails between the complainant and the Executive Director, that indicates that he knew that she, the Executive Director, was not entirely happy with his performance. To understand this material, it is necessary to say something of the relationship between her and the complainant.

7. The complainant met the Executive Director in 2003 when he was an intern with AITIC which was then an association registered under Swiss law and had not yet become an intergovernmental organisation. They developed a personal friendship and it was understood between them that the complainant would later return as a staff member. The complainant contends that the Executive Director assured him that he “would return to AITIC on a two-year contract plus moving expenses”. There is no evidence of an agreement in those terms but the complainant did return as the result of some understanding between him and the Executive Director. This notwithstanding, things did not proceed entirely smoothly. In September 2006 the complainant sent an e-mail to the Executive Director, reproaching her for having copied an e-mail to several other staff members. In the copied e-mail, the Executive Director criticised the complainant for lack of subtlety in a memorandum of understanding that he had drafted. The Executive Director replied, apologising for “having been so harsh”, explaining that she was under

“enormous work pressure” and inviting the complainant to lunch. The complainant accepted the invitation and a few days after the lunch, the Executive Director sent him an e-mail, stating amongst other things:

“I think we are getting there in leaps and bounds. On reflection, and I should have realised this sooner, it must be much more difficult for you than for any new staff to ‘adapt’ to the new AITIC, since you were so used to the old [one]. I promise to be more understanding and patient.”

8. It is not clear what, if anything, happened in the meanwhile, but a little over two weeks after their lunch, the complainant sent an e-mail to the Executive Director in which he acknowledged that his early period had not been smooth and stated that her “apparent loss of interest in [his] abilities [had come] as quite a shock”. He also said that he thought many of her criticisms during this period were unwarranted and that he had thought that she, the Executive Director, had been seeking his resignation. This resulted in a reply from the Executive Director on 17 October 2006 in which she stated with regard to their respective professional perspectives:

“[...] the few times we spoke on your vision and mine, these did not coincide at all; you were [...] particularly fond of theoretical approaches [...] to development. I do not share this perspective.”

She also commented on his “drafting and writing style” as follows:

“You consider that your style is perfectly acceptable. It might be for you, it might be for other organisations, but not for AITIC; not while I am directing the Agency.”

She responded to the complainant’s claim that many of her criticisms were unwarranted by saying:

“And yet you believe that my view of your work is unjustifiable or perhaps, superfluous. I would have liked to have more time to have a lengthy discussion on specifics with you, but I do not have the time at this point to discuss, or to convince or to let myself be convinced; regretfully, the priority is to act. [...] The bottom line, [...] it is not for me to consider whether you can contribute usefully to AITIC; it is for you to decide whether you can do it or not. How? By providing useful contributions, much in the way that others have discovered by themselves.”

As to the complainant’s statement that he had thought that she had wanted him to resign, the Executive Director said:

“I am sufficiently straightforward that if I believe someone is not making a contribution and does not have the will or the capacity to do so in the future, I rescind or not renew their contract. I have given ample proof of this. I do not beat around the bush making another person take the decision I want to take myself. If I have not yet suggested that we part ways it is because, although I am not fully satisfied with your performance so far, I am giving you the time to find your way because you have, I believe, the potential.”

9. Although the complainant’s comment on his performance evaluation report and the quoted e-mail exchange reveals that he knew that the Executive Director was not fully satisfied with his performance, the e-mail from her referring to the “few times” they spoke, and her wish that she had “more time to have a lengthy discussion on specifics” and indicating that he had to provide useful contributions as “others [had] discovered by themselves” indicates that the complainant was neither provided with guidance nor, save perhaps with respect to his drafting of documents, informed as to specific aspects which he needed to improve. And even with respect to drafting, there is no evidence that he was informed of the AITIC style required of him. Nor can it be said that the complainant was warned that he was at risk of not having his contract renewed: in September, the Executive Director indicated that they were “getting there in leaps and bounds” and in October, that, although she was not fully satisfied, she believed the complainant had potential. In the absence of any argument that the complainant was warned, provided with information as to the specific matters he needed to improve and/or given any guidance, the e-mail exchange must be taken as establishing that he was not. It follows that the decision not to renew the complainant’s contract should not have been taken on the basis of his unsatisfactory performance.

10. Further, the e-mail exchange is such as to give rise to the inference that the complainant’s unsatisfactory performance was not the real reason for the decision not to renew his contract. Indeed, it was not given as a reason in the letter informing him of that decision, the chief reason then given being that he was better suited to an

organisation concerned with research. That idea first found expression in the e-mail from the Executive Director of 17 October 2006 in which she stated that her and the complainant's vision did not coincide. However, there is nothing to indicate how, if at all, this difference in vision impacted on the complainant's performance. Rather, the inference to be drawn from the e-mail exchange is that the Executive Director was not pleased that the complainant had developed ideas of his own that did not coincide with her own ideas. Once this inference is drawn, a question arises as to whether the Executive Director's performance evaluation was fair and objective. As the Executive Board provided no reasons for its decision to reject the complainant's internal appeal and there is nothing to suggest that it conducted an independent assessment of the complainant's performance, it is to be concluded that it has not been established that the evaluation was either fair or objective.

11. Although it has not been established that the complainant's performance evaluation was fair and objective, it does not follow that, had it been, it would have resulted in a satisfactory report. Nor does it follow that the complainant would have received a satisfactory report or that his contract would have been renewed had he been provided with guidance as to the performance of his duties. However, that failure deprived him of a valuable opportunity of obtaining a satisfactory report and of having his contract renewed and, as the passage of time makes reinstatement impracticable, he is entitled to material damages for the loss of that opportunity. The Tribunal assesses those damages at 25,000 Swiss francs. The complainant is also entitled to have the performance evaluation report finalised on 14 December 2006 removed from his permanent record. He is further entitled to moral damages in the amount of 5,000 francs for the failure of the Executive Board to provide reasons for its decision to reject his appeal. He is also entitled to costs in the amount of 8,000 francs.

DECISION

For the above reasons,

1. The decision of the Executive Board communicated to the complainant on 29 January 2010 is set aside.
2. AITIC shall remove the performance evaluation report finalised on 14 December 2006 from the complainant's permanent record.
3. It shall pay the complainant material damages in the amount of 25,000 Swiss francs, and moral damages in the amount of 5,000 francs.
4. It shall also pay him costs in the amount of 8,000 francs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2012, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet