Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

114th Session **Judgment No. 3171**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Miss A. P. against the World Trade Organization (WTO) on 16 March 2010 and corrected on 23 April, the Organization's reply of 28 May, the complainant's rejoinder of 1 September and the WTO's surrejoinder of 11 October 2010;

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. Facts relevant to this case may be found in Judgments 3010, delivered on 6 July 2011, and 3170, also delivered this day, concerning the complainant's first and fourth complaints respectively. It may be recalled that, in May 1995, the complainant, who had been working for three years in the United Nations Joint Medical Service administered by the World Health Organization (WHO), was appointed Head Nurse of the WTO Medical Service, although she was still employed by WHO under a five-year contract which was due to expire on 31 May 2006. After the WTO decided to leave the Joint Medical Service and set up its own Medical Service, it employed the complainant under a

two-year fixed-term contract commencing on 1 March 2006, which was subsequently renewed. The complainant's first-level supervisor was Dr M.

In the complainant's performance evaluation reports for 2006 and 2007 Dr M. said that she "[did] not fully meet performance requirements". Having been informed by a memorandum of 29 February 2008 that her contract would be renewed for only one year, the complainant wrote to the Director-General to challenge this decision and then filed an appeal with the Joint Appeals Board. On 26 November 2008 she was informed that her contract would not be renewed upon its expiry on 28 February 2009, because her post was to be abolished owing to a restructuring of the Medical Service, as was Dr M.'s post. On 23 January 2009 the Board concluded that both of the above-mentioned performance evaluation reports were tainted with several procedural flaws, including the fact that no specific examples had been given in support of the comments in their evaluation section. By a memorandum of 18 February 2009 the Director-General informed the complainant that he had decided, on the Board's recommendation, that the reports would not be used against her and to lengthen her latest contract extension to two years, but that her contract would be terminated on 31 May 2009, as her post was to be abolished and it was impossible to reassign her.

In the meantime, the process of drawing up the complainant's performance evaluation report for 2008 had begun. The complainant expressed her disagreement with the objectives which Dr M. had set for her by adding the following handwritten comment in the relevant section: "I refuse to sign, but I will carry out the duties". In the year-end review Dr M. again concluded that her subordinate "[did] not fully meet performance requirements" since, in her opinion, she had failed to achieve half of the aforementioned objectives, including that of "behav[ing] respectfully towards colleagues in the service". On 5 February 2009 the complainant announced that she refused to sign her evaluation report and submitted several comments. By a memorandum of 17 March 2009 she asked the Director-General to cancel this report. As the certificate of service which she had been

given had proved to be counterproductive in her endeavours to find work, she also asked for a "letter of recommendation".

Having been informed by letter of 16 April that her requests had been denied, the complainant filed an appeal with the Joint Appeals Board on 14 May. In its report of 10 November 2009 the Board noted that the disputed performance evaluation report was tainted with a serious procedural flaw, in that the complainant's first-level supervisor and the competent senior official had not signed it. It recommended that the Director-General should reconsider the decision of 16 April and that a new certificate should be drawn up. By a letter of 15 December 2009, which constitutes the impugned decision, the complainant was informed that the Director-General had decided to accept the Board's conclusions. She was therefore sent a duly signed copy of her performance evaluation report. She was also reminded that a draft "letter of recommendation" summarising only the positive aspects of her last three performance evaluation reports had been sent to her counsel on 13 November 2009.

B. The complainant observes that the conclusions reached by the Joint Appeals Board in its report of 10 November 2009 rest mainly on the testimony allegedly given by a representative of the Human Resources Division. However, as it is impossible to discern from the report in question whether that person was actually consulted, whether in writing or orally, the complainant infers that these conclusions are tainted with a major procedural flaw. The complainant adds that the serious procedural flaw identified by the Board has not been rectified. Indeed, relying on the Tribunal's case law, she submits that the approval of her performance evaluation report by the competent senior official – the *chef de cabinet* – should not be a mere formality. In her view, however, this person "simply reiterated the opinion of [her] first-level supervisor without further ado" and ignored essential facts such as a petition in her favour.

Furthermore, the complainant points out that her performance evaluation report for 2008, like the two previous reports, did not contain specific examples of the shortcomings for which she is

criticised. This omission is all the more serious for the fact that, as no report was drawn up for 2004 and 2005 and her reports for 2006 and 2007 cannot be used against her, the 2008 report constituted the first unfavourable assessment after many years of satisfactory, if not excellent, appraisals. She draws the Tribunal's attention to the fact that the lack of a valid evaluation since 2003 is certainly making it harder to find employment and is causing her substantial moral injury.

In addition, the complainant endeavours to prove that her performance throughout 2008 was satisfactory and that she amply fulfilled the objectives set for her. She submits that Dr M. who, she says, harassed her from 2006 onwards, committed an error of judgement on account of her "bias" against her. In the complainant's view, the disputed performance evaluation report was in reality "retaliation" for her first internal appeal in which she criticised her supervisor's incompetence (see Judgment 3170, also delivered this day).

The complainant asks the Tribunal to set aside the report of the Joint Appeals Board of 10 November 2009, the impugned decision and her performance evaluation report for 2008, which is to be removed from her personnel file. She also asks it to order the drawing up of a new performance evaluation report for 2008 and a "letter of recommendation" taking account of the fresh evaluation "and of all [her] performance evaluations since 1995". Lastly, she claims compensation in the amount of 50,000 Swiss francs for moral injury and damage to her professional reputation, as well as costs in the amount of 5,000 francs.

C. In its reply the WTO submits that the performance evaluation report for 2008 was objective and took into consideration the troubled relationship between Dr M. and the complainant. It adds that the complainant has not proved that she was harassed by her supervisor and that the latter's conduct merely reflected the "legitimate frustration" of a head of service faced with a subordinate who rejected her authority. In the WTO's opinion, the complainant's poor performance

evaluation reports were due solely to her inappropriate professional conduct and the petition which she mentions does not constitute proof of her ability to work in a team.

The WTO states that the reference made by the Joint Appeals Board to the testimony of a representative of the Human Resources Division appears to have been drawn from the Organization's reply to the complainant's internal appeal. It endeavours to show that there are several reasons for the different evaluation of the complainant's performance as from 2006. It submits that once the *chef de cabinet* had read the disputed performance evaluation report and obtained what she regarded as the necessary information, she had not seen any reason to make a fresh evaluation of the complainant's performance, especially as a memorandum of 27 February 2009 written by the representative of the above-mentioned division showed that Dr M. had followed the applicable procedures. In the Organization's view, the complainant's comments in that report prove that, even if the report did not provide specific examples of the shortcomings for which she was criticised, she had been informed of them. Lastly, the Organization observes that the draft "letter of recommendation" of 13 November 2009 has not elicited any comment from the complainant.

D. In her rejoinder the complainant presses her pleas. She contends that the WTO's reply is essentially no more than "a series of unsubstantiated statements on some peripheral aspects of the case", such as the accusations of insubordination which have never been levelled at her before. She considers that the Organization has not proved the existence of objective factors justifying Dr M.'s radical change in opinion about her between her glowing appraisal for 2003 and her unfavourable evaluations from 2006 onwards.

The complainant asks the Tribunal to disregard the testimony of the representative of the Human Resources Division, on the grounds that it was not produced before the Joint Appeals Board and was not disclosed to her in a timely manner, in breach of the adversarial principle.

E. In its surrejoinder the Organization asserts that the Joint Appeals Board's report of 10 November 2009 is not tainted with a procedural flaw, because the complainant had the opportunity to comment on the above-mentioned testimony. In its opinion, the complainant simply cannot bring herself to accept that as from 2006 she did not measure up to the duties entrusted to her.

CONSIDERATIONS

1. Shortly after the WTO had set up its new Medical Service, differences of opinion arose between the complainant and her first-level supervisor, Dr M., who had been appointed Head of the Medical Service on 1 March 2005. The worsening relationship between them lies at the root of the complainant's allegations of harassment which form the subject of her fourth complaint, on which the Tribunal ruled in Judgment 3170, also delivered this day.

2. The complainant's performance evaluation reports for 2006 and 2007 were drawn up by Dr M. in February and December 2007 respectively. Both concluded that the complainant "[did] not fully meet performance requirements".

3. On 29 February 2008 the complainant, who was then serving under a two-year fixed-term contract, was informed by the Director of the Human Resources Division that her contract would be renewed for only one year until 28 February 2009. The complainant filed an internal appeal against that decision.

4. In the meantime the WTO, acting on the basis of recommendations from its Joint Advisory Committee and an audit commissioned from an expert from Geneva University Hospital, had begun to contemplate redefining the functions and structure of the Medical Service. This resulted in a thorough restructuring of the service as of 1 March 2009 and, in particular, in the abolition of the complainant's post.

5. The Joint Appeals Board issued its report on the complainant's above-mentioned appeal on 23 January 2009. It concluded that her performance evaluation reports were tainted with procedural flaws, in particular the lack of a mid-year review in 2006 and 2007. It therefore recommended that the Director-General should reconsider his "decision to limit the renewal of the [complainant's] contract to one year only".

6. On 18 February 2009 the Director-General issued his final decision on the complainant's appeal against the aforementioned decision of 29 February 2008. He followed the Joint Appeals Board's recommendation in considering that the latest extension of the complainant's contract should be lengthened to two years. He also stated that her performance evaluation reports for 2006 and 2007 could not be used against her. However, in consequence of the fact that the complainant's post was to be abolished and that it was impossible to reassign her to another post within the Organization, he informed her that her contract would be terminated with effect from 31 May 2009. As the complainant received a payment in lieu of the usual three months' notice, this measure, like the earlier decision, meant that her contract effectively ended on 28 February 2009.

7. This new decision formed the subject of the complainant's first complaint on which the Tribunal ruled in Judgment 3010, delivered on 6 July 2011, where it rejected the complainant's claims concerning the decision to abolish her post and dismissed her arguments on various other points, but set aside the decision to terminate her contract. It found that this decision was vitiated by the fact that there had been no proper prior consideration of the matter by the Appointment and Promotion Board, as required by Staff Regulation 10.8. The Tribunal therefore ordered the WTO to pay the complainant the salary and other benefits she would have received until the date on which her contract would otherwise have expired, as well as moral damages in the amount of 15,000 Swiss francs. It also ordered the removal of the complainant's 2006 and 2007 performance evaluation reports from her personnel file and their destruction.

8. The complainant's performance evaluation report for 2008, which indicated that there had been a mid-year review, was drawn up by Dr M. on 30 January 2009. Like the reports for the two previous years, it concluded that the complainant "[did] not fully meet performance requirements". The complainant refused to sign this report.

9. By a memorandum of 17 March 2009 the complainant requested the Director-General to review that performance evaluation report in accordance with Staff Rule 105.3. She also asked for a "letter of recommendation" more favourable than the certificate of service which she had been given by the Human Resources Division.

10. These requests were rejected by a decision of 16 April 2009, against which the complainant lodged an appeal on the basis of Staff Rule 114.5. In its report of 10 November 2009 the Joint Appeals Board noted that the disputed performance evaluation report had not been signed by the complainant's first-level supervisor or by the competent senior official and that it was therefore invalid. It consequently recommended that the Director-General should reconsider his decision. It also recommended that the complainant should be issued with a new certificate of service.

11. The complainant was notified of the Director-General's decision by a letter of 15 December 2009 informing her that the disputed performance evaluation report had been signed and that, since the Joint Appeals Board had not accepted her other pleas, the report would simply be replaced in her personnel file with the corrected version. She was also reminded that a draft "letter of recommendation" had been sent to her counsel and that he was being contacted with a view to reaching agreement on its terms.

12. That is the decision which is now impugned. The complainant requests the setting aside of this decision, of her performance evaluation report for 2008 and of the report of the Joint Appeals Board of 10 November 2009. She asks the Tribunal to order the WTO to draw up a new performance evaluation report for 2008 and to issue her with a "letter of recommendation". Lastly, she claims

compensation for moral injury and damage to her professional reputation, as well as costs.

13. An opinion issued by an advisory appeal body, which is merely a preparatory step in the process of reaching the final decision on the appeal filed with that body, does not in itself constitute a decision causing injury which may be impugned before the Tribunal. While the complainant may and in fact does plead that the Board's report is invalid in support of her challenge to the impugned decision, her claim to have this report set aside must therefore be dismissed as irreceivable (see, for example, Judgment 1104, under 3).

14. In order to challenge her performance evaluation report for 2008, the complainant submits that the unfavourable assessment of her performance was prompted by Dr M.'s "bias" and amounted to "retaliation" rendering her assessment – which she calls a "farce" – completely meaningless.

15. In the aforementioned Judgment 3170, also delivered this day, the Tribunal found that the complainant had suffered harassment, at least of an objective kind, by her first-level supervisor. While the Tribunal did not consider that the complainant's performance evaluation reports for 2006, 2007 and 2008 could in themselves be regarded as constituting harassment, as the complainant argued in that case, the fact that such harassment has been found to have occurred obviously casts strong doubt on the objectivity with which Dr M. assessed the complainant's professional merits.

16. Moreover, given that the complainant's performance evaluation report for 2008 mentions certain good points, such as "sound knowledge and good nursing skills", "ability to pass on information concerning medical situations" and "progress […] in the organisation of work in general", the Tribunal is somewhat surprised that these were not reflected in any way in the section reserved for the supervisor's overall assessment, which contains nothing but extremely unfavourable comments.

17. In addition, the Tribunal notes that the mid-year review criticises the importance which the complainant attached to "pursuing personal demands", and that in the year-end review her first-level supervisor emphasises that she was "very concerned with her personal interests". Seen against the background of statements made by Dr M. at a service meeting on 24 September 2008, where she upbraided the complainant for having lodged internal appeals against her performance evaluation reports for 2006 and 2007, these comments plainly referred to the legal steps taken by the complainant to defend her rights. Even if they do not amount to retaliation against the complainant, such statements are, to say the least, out of place in a performance evaluation.

18. The Tribunal therefore considers that the complainant's performance evaluation report for 2008 was not drawn up with the requisite objectivity, which is sufficient to justify setting it aside.

19. In addition, the Tribunal notes that the "rectification" of the lack of signatures on the performance evaluation report in order to comply with the Joint Appeals Board's recommendation, did not in fact remedy this flaw.

20. The Tribunal sees from the copy of the performance evaluation report in the file that, from a formal point of view, this procedural flaw was only partially rectified, because the section concerning the mid-year review was not signed by the complainant's first-level supervisor, who merely signed the year-end review. Furthermore, the competent senior official, in other words the *chef de cabinet* of the Director-General, did not tick one of the boxes on the form to indicate whether or not she intended to approve the first-level supervisor's assessment, with the result that it is no more than a reasonable assumption that her signature may be interpreted as approval.

21. Above all, it is clear from the evidence that the *chef de cabinet* regarded the signing of this report as a mere formality that

was needed in order to correct the flaw identified by the Joint Appeals Board, and that she did not really re-examine the assessment made by the first-level supervisor. In doing so, she ignored the very purpose of the requirement that a second-level supervisor must sign a performance evaluation report.

22. Indeed, as the Tribunal has already had occasion to state, if the rules of an international organisation require that an appraisal form must be signed not only by the direct supervisor of the staff member concerned but also by his or her second-level supervisor, this 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 between these two authorities 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 is therefore of the utmost importance that the competent second-level supervisor should take care to ascertain that the assessment submitted for his or her approval does not require modification (see Judgment 320, under 12, 13 and 17, or, more recently, Judgment 2917, under 9).

23. In an attempt to prove that the *chef de cabinet* fulfilled her role, the WTO submits inter alia that she checked with the relevant services that the requisite procedural rules had been followed when the disputed evaluation report had been drawn up. It adds that appraising the complainant's medical skills called for technical knowledge which the *chef de cabinet* did not possess. It states that, as far as the other aspects of the evaluation were concerned, the *chef de cabinet* believed that she could "legitimately rely on" the complainant's first-level supervisor. The Tribunal would point out that these various arguments only confirm that the *chef de cabinet* did not genuinely check whether the evaluation submitted for her approval was objective. In this case, however, such a check was all the more necessary for the fact that the extremely antagonistic relationship between the complainant and Dr M. and the latter's

very unfavourable assessments in the aforementioned performance evaluation report were obviously grounds for fearing that she might lack objectivity.

24. It may be concluded from the foregoing that the complainant's performance evaluation report for 2008 must be set aside, without there being any need to examine the other pleas by which she seeks to challenge the report's validity.

25. In view of the time which has passed since 2008, the fact that the complainant has now separated from the WTO and the fact that she had no immediate supervisor other than Dr M., it is now manifestly impossible to order the drawing up of a new performance evaluation report. The complainant's claim to that effect will therefore be dismissed.

26. Nevertheless, the setting aside of the initial report means that it must be removed from the complainant's personnel file and destroyed by the Organization. The Tribunal will therefore order that this be done, as the complainant rightly requests.

27. The complainant asks that the WTO be ordered to issue her with a "letter of recommendation" taking account of all the evaluations of her service with the Organization since 1995.

28. Staff Rule 111.12, entitled "Certification of service", reads: "Upon request, a staff member shall, on leaving the service of the WTO, be given a statement relating to the nature of the duties performed and the length of service. Upon written request, the statement shall also refer to the quality of work and conduct." The complainant's written request for a "letter of recommendation" from the WTO must be interpreted in this case as a request for the issue of a certificate of service on this basis. Since the only performance evaluation reports drawn up during the complainant's service with the

WTO, namely those for 2006, 2007 and 2008, have been set aside, the Tribunal considers that this certificate cannot contain any unfavourable references to the quality of her work and conduct. It will therefore be incumbent upon the Organization, if it has not already done so, to issue the complainant with a certificate satisfying this requirement. The complainant's claim that this certificate should relate to the period prior to 2006 is, on the contrary, without merit, since at that time she was not employed by the WTO, but by WHO.

29. It follows from the foregoing considerations that the decision of 15 December 2009 and that of 16 April 2009 must be set aside, without there being any need to examine the plea regarding a flaw in the procedure followed by the Joint Appeals Board.

30. The fact that the complainant's performance evaluation report for 2008 is invalid has in itself caused her moral injury. This injury has been aggravated by the setting aside of her evaluation reports for 2006 and 2007 for the reasons recalled above. Although the complainant is wrong, for the reason just given, to take the WTO to task for not drawing up such reports for earlier years, she was nonetheless unduly deprived of any valid evaluation for three years, in breach of the right of every international civil servant to be informed of his or her supervisors' appraisal of his or her service (see Judgments 1394, under 5, or 2067, under 10). In the instant case, this moral injury is coupled with professional injury, since the complainant was unable to present her evaluations as references to potential future employers and in particular to other international organisations after her contract was terminated because her post was abolished (for a comparable case, see Judgment 2902, under 11). In view of all the circumstances of the case, the Tribunal considers that the complainant's injuries may fairly be compensated by awarding her 10,000 Swiss francs.

31. As the complainant succeeds for the most part, she is entitled to costs, which the Tribunal sets at 4,000 francs.

DECISION

For the above reasons,

1. The decision of the Director-General of the WTO of 15 December 2009 and that of 16 April 2009 are set aside.

2. The complainant's performance evaluation report for 2008 is set aside. It shall be removed from her personnel file and destroyed.

3. The WTO shall issue the complainant with a certificate of service, as indicated under 28 above.

4. The Organization shall pay her 10,000 Swiss francs in compensation for moral and professional injury.

5. It shall also pay her costs in the amount of 4,000 francs.

6. All other claims are dismissed.

In witness of this judgment, adopted on 13 November 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Giuseppe Barbagallo
Patrick Frydman
Catherine Comtet