

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.
v.
FAO

122nd Session

Judgment No. 3654

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. S. against the Food and Agriculture Organization of the United Nations (FAO) on 27 May 2013 and corrected on 30 July, the FAO's reply of 20 November 2013, the complainant's rejoinder of 8 March 2014 and the FAO's surrejoinder of 2 July 2014;

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

Having examined the written submissions and rejected the complainant's application for oral proceedings;

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

The complainant challenges the decision to maintain on his personal file a disputed Performance Appraisal Report (PAR) issued after the expiry of his temporary appointment, as well as the decision to reject his application for inclusion on the Temporary Assistance Unit (TAU) Roster, a roster of candidates eligible for temporary contracts.

The complainant joined the World Food Programme (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO – in April 2009 under a one-month TAU contract as Office Assistant at grade G-2. In his PAR, the quality of his work was rated as

unsatisfactory, but it was noted that he may be considered a valuable candidate for jobs more focused on other areas.

In August 2009 the complainant was offered another TAU contract as Office Assistant at grade G-2 in the Policy, Planning and Strategy Division (OEDP). He was separated upon the expiry of his appointment on 31 December 2009.

In February 2010 the complainant received a PAR relating to the period from September to December 2009 with a number of unfavourable ratings and comments. The complainant signed it on 8 March 2010 and submitted his comments to WFP's Human Resources Division (HR), which held discussions with the complainant's supervisor, Mr O.

On 5 August 2010, HR informed the complainant that the previous version of his PAR would be replaced with an amended version, also dated February 2010. The overall unfavourable ratings of his performance were maintained.

By an email of 7 September 2010 the complainant was informed that he had not been approved for continued inclusion on the TAU Roster. The decision not to include him in the Roster was based on HR's assessment of candidates' office and language skills and their suitability to perform the tasks required at a satisfactory level.

On 1 November 2010 the complainant submitted an appeal to WFP's Executive Director against this PAR and against his exclusion from the TAU Roster. By a letter of 8 February 2011 the complainant was informed that the appeal against his PAR was denied. Concerning the decision to exclude him from the TAU Roster, the letter indicated that it "was not related to the terms of [his] former appointment, but to [his] possible future employment with WFP".

On 14 April 2011 the complainant lodged an internal appeal with the FAO Appeals Committee against the decision of 8 February 2011. The Appeals Committee deemed the PAR invalid and recommended that the PAR be removed from the complainant's personal file and that his application for inclusion on the TAU Roster be reconsidered, without taking into account the invalid PAR.

By a letter of 25 February 2013 the complainant was informed that the Director-General of the FAO had decided not to follow the Appeals Committee's recommendations. In his view, the Appeals Committee's findings did not demonstrate that bias existed or that the PAR assessment was flawed. With respect to the complainant's exclusion from the TAU Roster, the Appeals Committee had erred in not taking into account that both of his supervisors at WFP had evaluated the quality of his work as "unsatisfactory" and his overall performance as "marginal" and had indicated that they would not re-employ the complainant. This claim, in any event, was irreceivable as the complainant had no standing to challenge his exclusion from the TAU Roster. That is the impugned decision.

The complainant asks the Tribunal to declare the PAR invalid and to order its removal from his personal file. He also asks to be "reinstated in the TAU Roster" or that his application be re-examined without taking into account the contested PAR. He seeks material and moral damages.

In its reply the FAO submits that the complainant lacks standing to challenge the decision to reject his application for inclusion on the TAU Roster. With regard to his claim concerning the process by which his PAR was reviewed, it is also irreceivable as the complainant has failed to exhaust internal remedies. It further argues that the complaint should be dismissed as entirely unfounded.

CONSIDERATIONS

1. The complainant was recruited as a temporary Office Assistant, at the G-2 level, in the OEDP from 6 August to 31 December 2009. It was his second temporary employment assignment with the WFP. A negative PAR was issued after that appointment expired and his name was not included on the TAU Roster of persons who were eligible for temporary contracts with the WFP. He applied to have his name included on the Roster but the application was not granted. He was informed that the decision to deny the application was based on HR's assessment of his office and language skills and his inability to perform the required tasks of the post satisfactorily. In a letter dated 1 November 2010, the

complainant challenged this decision as well as the negative PAR in an appeal to the Executive Director of the WFP, who dismissed the appeal.

2. On the complainant's further appeal, the Appeals Committee recommended that his appeal be allowed. This was because the Committee considered that the PAR was invalid as it found that there were "dramatic changes" in successive versions of the PAR. The Appeals Committee accordingly recommended that the PAR be removed from the complainant's personal file; that no new PAR be prepared for his second assignment; that an entry be made in his file that "no valid PAR was available", and that the complainant's application for his inclusion in the TAU Roster be reconsidered without taking the invalid PAR into account. In the impugned decision, however, the Director-General rejected all of these recommendations. He disagreed with the Appeals Committee's assessment concerning the degree of objectivity that the complainant's supervisor applied in evaluating the complainant's performance and rejected the appeal in its entirety.

3. The complainant requests that the negative PAR be set aside as invalid and that it be removed from his personal file. He also requests that his name be included on the TAU Roster, or, alternatively, that his application to have it included in the Roster be re-examined without taking the PAR, which he insists is invalid, into account. He contends that the PAR was flawed in that the facts did not support the negative PAR rating. He further contends that the negative rating was based on bias/prejudice towards him on the part of the supervisor who conducted the evaluation.

The Tribunal however considers that the complainant has not provided sufficient evidence, as against surmise or conjecture, to support the allegations of bias or prejudice. Neither has he provided sufficient evidence to substantiate his allegation that his work and the evaluation were affected by the environment in which he worked, which he has alleged, in part resulted from conflicts that were occasioned by a familial relationship in the OEDP, contrary to WFP Rules and Regulations. These allegations of bias or prejudice are therefore not accepted.

4. The FAO however raises irreceivability as a threshold issue in relation to the further contention that the PAR is invalid because the evaluation process was flawed as it was conducted after the complainant's assignment ended and without his input, contrary to applicable rules. The FAO submits that it is irreceivable as it was raised for the first time in the present complaint. The Tribunal observes that this was not raised as an independent claim in the internal appeal, but that the complainant mentioned the fact that he received the PAR appraisal two months after the end of his appointment and referred to the applicable case law. To this extent it amounts to a plea to support his case, rather than a claim, and is accordingly receivable.

The FAO further submits that the claim that relates to the decision to reject the complainant's application for inclusion in the TAU Roster is also irreceivable because the complainant lacks standing to contest that decision as his application to be included in the Roster does not relate to his former employment but to possible future employment. However, for reasons that will become clear later in this judgment, it is unnecessary to deal with the receivability of this claim.

5. WFP, by its expression in its email of 7 September 2010, expressly rejected the complainant's application to be included in the Roster on the basis of the unsatisfactory assessment of his work contained in his PAR. Those reasons were stated as follows in the email of 7 September 2010:

"Inclusion in the roster is based on our assessment of candidates' office and language skills and to their suitability to perform the tasks required at a satisfactory level.

We regret to inform you that, based on our assessment, you have not been approved for reinclusion in [the] roster."

6. The Tribunal has established that a decision concerning the evaluation or appraisal of a staff member's service is subject to only limited review. This is borne out, for example, by the following statement in Judgment 2579, consideration 3:

"A staff report may be challenged by means of a complaint satisfying the requirements of Article VII of the Statute of the Tribunal. However, a decision

on a staff report, being a discretionary one, may be set aside only on limited grounds such as a formal or procedural flaw, a mistake of fact or of law, failure to take account of some material fact, abuse of authority or the drawing of a mistaken conclusion from the evidence (see Judgments 806, under 15, and 1144, under 7). The Tribunal has made it clear that the person approving the report must allow the reporting officer wide discretion and that the staff member's own comments, which are inserted in the report, may serve to remedy any error of judgement there may have been. Approval of the report may be refused if the reporting officer has made an obvious mistake of fact over some important point, if he has neglected some essential fact, if he has been grossly inconsistent, or if he can be shown to have been prejudiced (see Judgment 973, under 4)."

It was also stated, in Judgment 1136, consideration 6, for example, that the Tribunal will exercise this power only where there has been an obvious mistake of fact or failure to show the sort of objectivity that ought to govern reporting.

7. The complainant relevantly submits that the PAR is invalid because it was based on obvious mistaken facts and/or failure by his supervisor to show objectivity, with the result that the overall marginal evaluation of his performance is not supported by any evidence apart from a few emails regarding his language skills. The complainant objects to the assessment, which was done in February 2010 and was dated 8 February 2010. It is observed that paragraph 5.1.5 of the Human Resources Directive No. HR2001/008 entitled Policy for Hiring General Service Staff on a Temporary and Short-Term Basis at Headquarters of 7 November 2001 (hereinafter "the Human Resources Directive") requires managers to carry out a PAR at least two weeks prior to the expiration of a temporary assignment, but in breach of this provision, this evaluation was carried out after the assignment ended. The Administration eventually admitted that there were mistakes in the evaluation and a review of the PAR was done.

8. It is further observed that in the initial PAR dated 8 February 2010 the complainant's typing skills were rated as marginal and his technical skills were rated as fully satisfactory. In fact there was an earlier version of the PAR for the subject period, which bore the signature of his supervisor, Mr O. It was dated 11 January 2010. In it the complainant's

technical skills were not rated and the complainant did not return it to HR. The initial evaluation of February 2010 shows that the complainant's knowledge of language used, except for his mother tongue, was rated as marginal; his work attitude was rated as reasonably hard working; the quality of his work was rated as unsatisfactory; the quantity of work that he accomplished was rated as insufficient; his degree of initiative was rated as acceptable. It was also stated in that evaluation, in relation to his interpersonal skills, that he had occasional difficulties in maintaining good relations. A reservation was entered in relation to his general conduct. In explaining the reservation, in section 10 of the PAR, the supervisor stated that at the end of his assignment the complainant unilaterally decided to take the last two days off, leaving a considerable amount of outstanding work to his colleagues and that he performed a poor handover. The overall evaluation of his performance was entered as "Marginal". The complainant returned this version, in which he raised certain objections, to the Administration by email dated 9 March 2010.

9. The complainant's objections occasioned discussions between his supervisor and the Deputy Director, HR. The latter's written reply to the complainant, which is dated 5 August 2010, indicates that the complainant had been informed of the discussions. However, there is no indication that there were any discussions with the complainant, as a transparent review would have required. The complainant was informed that the previous version of the PAR would be removed from his personal file and that it would be replaced by the amended version which was attached to the reply of 5 August 2010. However, there is no indication that the complainant's objections were also placed on his file. That amended version was also dated 8 February 2010 although it must have been done subsequently as it was done in response to the objections which the complainant raised in March 2010 when he returned the prior evaluation. In the amended version, the "not punctual" rating was changed to "punctual" as it was agreed that there was no evidence that the complainant was not punctual. The foregoing and the fact that the PAR was carried out after the complainant's assignment ended, in breach of paragraph 5.1.5 of the Human Resources Directive, are anomalies which the Tribunal determines occasioned an invalid evaluation. The complaint

is well founded on this ground and the invalid PAR must be set aside. The FAO will be ordered to remove both the original and the amended versions of the PAR dated 8 February 2010 from the complainant's file.

The Tribunal further observes that the complainant's rating for general conduct was changed from "Reservations" to "Good". However, a comment was entered under the Reservations section, which stated that at the end of his assignment he suddenly requested unplanned leave although a considerable amount of work was outstanding, which had to be completed by his colleagues. It also stated that he had performed a poor handover. In effect, the reservation in the prior PAR was retained, except for a change from the prior comment that the complainant had "unilaterally decided to take the last two days off". The explanation was that his supervisor, Mr O., had agreed with the complainant that he had not taken leave unilaterally because his leave slip was signed by the Officer in Charge. The overall "marginal" evaluation remained.

10. In light of the invalidity of the PAR and the fact that the FAO has admitted that the complainant's name was not included on the Roster on the basis of the invalid PAR, as a matter of logic and fairness, the Organization must reconsider its decision not to include the complainant's name on the Roster. In the foregoing circumstances, the complainant is entitled to moral damages in the amount of 5,000 euros and material damages in the amount of 10,000 euros for possible loss of opportunity for employment with the FAO in the last five years. These sums should be paid within 28 days of the date of delivery of this judgment, failing which they shall bear interest at the rate of 5 per cent per annum from that date until the date of payment. The FAO will also be ordered to pay 750 euros in costs to the complainant.

DECISION

For the above reasons,

1. The complainant's PAR for the period September to December 2009, dated 8 February 2010, is set aside and the FAO shall remove both

the original and the amended versions of the PAR from the complainant's file.

2. The FAO shall pay the complainant material damages in the amount of 10,000 euros.
3. The FAO shall pay the complainant moral damages in the amount of 5,000 euros.
4. The FAO shall pay interest on the sums referred to in points 2 and 3 at the rate of 5 per cent per annum from the date of public delivery of this judgment until the date of payment, unless these sums are paid within 28 days of the date of public delivery of this judgment.
5. The FAO shall also pay the complainant costs in the amount of 750 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 11 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ