

NINETY-SEVENTH SESSION

Judgment No. 2350

The Administrative Tribunal,

Considering the complaint filed by Miss A.-M. H. against the European Free Trade Association (EFTA) on 17 April 2003, EFTA's reply of 22 July, the complainant's rejoinder of 22 September, and the Association's surrejoinder of 22 October 2003;

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 complainant, a Norwegian national born in 1968, joined EFTA on 1 September 1999 at grade P.3 in its Third-Country Unit, under a three-year fixed-term contract. On 21 March 2002 she met with the Deputy Secretary-General who offered her a two-year contract renewal and a one-step salary increase. Her supervisor had recommended a two-step salary increase. She resigned with effect from 30 November 2002.

In the meeting she had with the Deputy Secretary-General, the latter encouraged her to be more tolerant with colleagues and informed her that a warning might be considered if she was unable to change her attitude. On 28 May 2002 her supervisor received a call from the Yugoslav Embassy saying that it had been unable to reach the complainant for the past two days. A malfunction of the complainant's telephone had prevented her from receiving external calls. Her supervisor had been unable to locate her for several hours but when he did he informed her that she was expected to comply with instructions concerning availability and completion of substantive tasks, or disciplinary measures could be considered. She told him that she was going to hand in her notice within two weeks' time. She called in sick the next day and subsequently provided EFTA with a medical certificate authorising sick leave from 29 May to 13 June. EFTA requested that she undergo a second medical examination and she did so on 10 June; this examination confirmed that she had not been fit for work on 29 May and the physician recommended that she return as of 13 June. She returned on 17 June, after providing another medical certificate. In her absence the Administration had a copy made of her computer files in relation to a formal EFTA Sub-Committee meeting to be held on 14 June.

When the complainant returned to work she asked to meet with the Secretary-General to discuss her situation; she was told that the latter did not have the time but that she could meet with either the Deputy Secretary-General or the Head of Administration. The complainant met with the Head of Human Resources on three occasions in July 2002; she explained her situation and said that she did not understand certain actions taken by the Administration. The Head of Human Resources told her that she was regarded as a competent employee and that the Administration would prefer that she stay with EFTA; the complainant preferred to explore possibilities for "an amicable settlement", but she felt it was the Administration's responsibility to propose one. Although EFTA made some concrete proposals, the complainant rejected them. She made a counterproposal that EFTA found unacceptable. On 3 September 2002 she wrote a letter of resignation to the Secretary-General providing three months' notice. Her resignation took effect on 30 November 2002.

On 20 September the complainant wrote again to the Secretary-General, claiming compensation for harassment inflicted on her by EFTA officials. On 30 September the Secretary-General rejected her claim. She appealed against the decision to the Advisory Board on 9 October 2002. In its considered opinion dated 20 December 2002 the Board found that there had been no harassment of the complainant by EFTA officials. In a letter of 31 January 2003 the Secretary-General informed the complainant that he maintained his earlier decision rejecting her claim for compensation. That is the impugned decision.

B. The complainant argues that both the Advisory Board's composition and process have breached her rights to due process. She says that the composition was neither fair nor neutral because one of the persons that she alleged harassed her had been appointed to the Board. She also asserts that the procedure was flawed in several respects, notably in the fact that she was not given the opportunity to respond or question some of the statements made by others. The complainant concludes that, owing to the procedural flaws, the Board's opinion was one-sided and flawed.

She submits that the behaviour of the Administration towards her, from the time she had an informal meeting with the Deputy Secretary-General in March 2002 until she resigned, amounted to harassment. First, she was told that she would get only a one-step salary increase, rather than the two proposed by her supervisor; then she was informed that she would get only a two-year extension of contract rather than the "customary" three. She contends that asking for a second medical opinion while she was on "approved sick leave" was unjustified and showed distrust and bias. In addition, there was breach of medical confidentiality.

EFTA Administration accessed her computer without her knowledge or permission and this was done after she had given all necessary information by telephone to her replacement. She states that she would have given permission to access her computer if she had been so requested and given a clear reason. She points out that the Association does not have a policy on access to computers but that this fact should not prevent EFTA officials from respecting "the right to respect and privacy".

She contends that she was threatened with disciplinary action and maintains that her resignation was imposed on her as a direct result of professional and moral pressures. This made her working life unbearable, and damaged her health.

She asks the Tribunal to award her an amount equal to six months' salary plus "saving fund", as well as an additional 10,000 Swiss francs as compensation for injury. She also claims reimbursement for legal costs. Subsidiarily, she asks for the revision of certain rules and policies, in particular those concerning sick leave, performance evaluations, and the handling of electronic data. She claims the revision of the Rules concerning the Advisory Board and calls for it to formulate Rules of Procedure in line with other international organisations.

C. In its reply the Association submits that the Tribunal is not competent to hear the complaint insofar as the complainant asks for a revision of certain rules and policies.

It argues that the decision to offer the complainant a two-year contract extension was in line with EFTA's policy of a maximum six year length of service. Under that policy, staff members having already served three years are offered a contract extension of "up to" three years. When proposing an extension of contract the Association must bear in mind the best interest of the organisation and ensure a staggered turnover of staff. This was explained to the complainant when she was offered an extension. And even though her immediate supervisor felt that a two-step salary increase would be appropriate, the Secretary-General is not bound by that assessment. A single step increase is the "normal" increase, whereas a two-step increase is granted in exceptional circumstances.

The Association denies that she was threatened with disciplinary action; she was warned of what steps might be taken if she did not correct some shortcomings. It also denies having asked her to resign. She did not agree with any of EFTA's settlement proposals and resigned of her own free will. It submits that the appeals process was not flawed and that the statutory provisions were followed.

Concerning her sick leave, the Association points out that the complainant called in sick the day after she had mentioned to her supervisor that she was going to hand in her notice. Finding that her medical certificate lacked required information, EFTA asked for a second medical opinion, as provided for in the Staff Regulations and Rules. It points out that an inquiry had been conducted about a possible breach of confidentiality surrounding her sick leave, and that it had been determined that the information had been treated with the necessary confidentiality, but that it was the complainant herself who had provided the information to others. As far as accessing her computer, the Association notes that the complainant had been responsible for the preparation of an important meeting to be held on 14 June; since she refused to provide her password so that a colleague could access the necessary documents, the Association had no choice but to make a copy of her professional files.

D. In her rejoinder the complainant maintains her position. She considers the fact that she had to have a second physician examine her while she was on sick leave as "part of a pattern of hostility and mistrust from EFTA

management towards her”. It is this pattern of harassment that forced her into resigning; leaving such a hostile and stressful environment became a necessity.

She submits that the internal appeals procedure does not provide staff with appropriate safeguards and is therefore flawed. Likewise, the existing Staff Rules are flawed or incomplete insofar as these concern protection of staff members against harassment.

There was no reason for EFTA to enter her computer without first asking her permission.

E. In its surrejoinder the Association maintains that the Staff Regulations and Rules were properly applied in extending her contract and granting her step increase. It maintains that she was offered a two year extension in order to avoid too much turnover in her Unit in 2005.

It considers that EFTA’s request for a second medical opinion was justified based upon the circumstances surrounding her sick leave. Her case was precisely the type where a second certificate would be requested.

It says that there was “an imperative business reason” for gaining access to her computer files while she was on sick leave. It maintains that she was never asked or forced to resign and that she was always treated with the greatest dignity. She has not offered any evidence of professional or moral injury.

CONSIDERATIONS

1. In her complaint to the Tribunal, the complainant maintains the allegation of moral harassment that she put forward in her internal appeal and contends, in addition, that she was denied due process in the proceedings before the Advisory Board. She seeks compensation in an amount equivalent to six months’ salary plus “saving fund”, as claimed originally, and, for the first time, she seeks compensation for her forced resignation. Additionally, she seeks revision of certain Staff Rules, including those relating to the Advisory Board.

2. EFTA submits that the complaint is irreceivable insofar as it includes a claim for the revision of certain Staff Rules and policies. In this it is clearly correct. Relevantly, the Tribunal is competent only to hear complaints with respect to the non-observance of the terms of appointment or the provisions of EFTA’s Staff Regulations and Rules. As to the substance of the complaint, EFTA denies that the complainant was the victim of harassment and that she was forced to resign. Further, it maintains that there was no breach of due process in the proceedings before the Advisory Board.

Receivability and due process

3. Although no separate issue is raised by EFTA as to the receivability of the complaint, insofar as it contains a claim made for the first time to the Tribunal for compensation for what the complainant terms as her forced resignation, there is a real issue whether that aspect of the complaint is properly receivable. However, that question need not be considered, and likewise the question whether there was a failure to observe due process in the proceedings before the Advisory Board. That is because, even viewed in the most favourable light, the facts cannot support the complainant’s contention that she was the victim of harassment or that her resignation was involuntary.

Harassment and forced resignation

4. It is not in doubt that the complainant was a competent and highly valued staff member. In her performance evaluation report for 1 March 2001-1 March 2002, she was described as “an outstanding expert on fisheries” and her work was highly praised. Her supervisor’s comments concluded with these observations:

“[The complainant], in her extrovert and outspoken manner, also made a welcome contribution towards fostering the team spirit within the Unit. In light of her proven abilities [she] deserves to be offered a new contract reflecting her increased responsibilities. Grade P.3 Step V would seem an appropriate level.”

That was a recommendation for a two-step salary increase.

5. Unfortunately, outspokenness is not a quality that is universally admired. About the same time as her supervisor was completing the performance evaluation report, the Head of Administration sought and obtained the

complainant's views on the atmosphere in the Office. At the end of the conversation, he thanked her for her frankness but later expressed the view that he had "felt like a scolded child". Later still, when the complainant confronted him on the matter, he told her that she "reminded him of the fisherwomen [who] used to yell at him when he was a child".

6. The complainant had a meeting on 21 March 2002 with the Deputy Secretary-General who informed her that she would receive only a one-step salary increase and that her contract would be renewed for only two years. He also referred to the conversation with the Head of Administration and asked the complainant for a commitment that she not speak to or about management in a way that it could find offensive. According to the complainant, she was told that she would receive only a one-step salary increase because she was "a bad team player" and "the source of the bad atmosphere in the Geneva office" and that her contract was being renewed for two years rather than for three because she had been heard to say that "four years was a suitable timeframe in any job".

7. After the meeting with the Deputy Secretary-General the complainant spoke with the Secretary-General informing him that she was shocked by what the former had said. The Secretary-General told her that she was being offered a two-year contract in order to avoid contracts expiring at the same time. He said he would reconsider the one-step salary increase and would speak to the Deputy Secretary-General on the issue of commitment. He added that the complainant had a strong personality.

8. It is not now in issue that, pursuant to Staff Rule 21.5, a two step salary increase is granted only in exceptional cases for outstanding performance. Apparently, the Secretary-General was not satisfied that the complainant met that criterion and, on 22 March, the Deputy Secretary-General confirmed that she was to receive only a one-step increase but stated that the previously requested commitment was no longer required. There was some discussion as to what was perceived to be the problem; the complainant was informed that management "did not like her body language" and that, if there was no change, she could or would be sent a letter of warning. In the event, no such letter was ever sent.

9. A new head of the Third-Country Unit was appointed on 1 April 2002. It seems that he took exception to a remark made by the complainant on 11 April and the next day told her he found her behaviour "totally unacceptable". He also raised an objection to certain views expressed by her in an internal briefing paper.

10. On 28 May the Head of her Unit pointed out to the complainant that an Embassy had been unable to contact her for two days and that she was expected to be available during office hours. On that occasion, he complained about her body language and said that she could receive a letter of warning. However, no letter was sent. During the meeting the complainant informed her supervisor that she was going to resign within a few weeks. The next day she went on sick leave and, in the course of a telephone conversation while on sick leave, said she had back problems.

11. While absent on sick leave, two things happened which were particularly distressing to the complainant. First, she was requested to attend a medical examination by a doctor appointed by EFTA, despite the fact that she had provided a medical certificate stating that she had not been fit for work. Contrary to what the complainant claims, that course was clearly authorised by Rule 41.3 which provides:

"A staff member on sick leave may at any time be required to undergo a medical examination by a medical practitioner designated by the Secretary-General, who may refuse any further sick leave if the staff member is, in the physician's opinion, able to resume his duties."

However, the rule does not allow EFTA to require the medical practitioner to specify the nature of the illness, as was done in the present case. It was reported that the complainant was suffering from a depressed state as a result of workplace conflict. The complainant became even more distressed when this information became known to other staff.

12. Secondly, while the complainant was on sick leave, her computer was accessed without her permission. The complainant had been preparing for a formal Sub-Committee meeting, which was taken over by another person during her absence. She had told that other person that there was nothing in her computer which would be of use. However, her computer was accessed, it being said that that course of action was taken to enable completion of the preparations for the meeting which was to be held on 14 June 2002.

13. The complainant returned to work on 17 June and requested a meeting with the Secretary-General to discuss her situation. She was referred to the Head of Human Resources to whom she complained, on 17 July, of the events that had occurred. Apparently, she also raised the possibility of resigning, but according to her own account, she was told that “[m]anagement would prefer that she stayed [...] as she was regarded as a competent employee”. Again, according to the complainant, she then stated that there had to be “a minimum of trust and confidence” and indicated that she was looking for “an amicable settlement”. She was offered three months’ salary if she resigned but she refused the offer.

14. The complainant had subsequent meetings with the Head of Human Resources and with the Secretary-General. In a meeting with the latter on 26 July, during which she claimed that the situation was a case of “moral harassment and violation of privacy”, she was told that as she was a competent employee management would like her to continue working for EFTA. Apparently, the complainant found this unconvincing and there was further discussion about resigning; the Secretary-General urged her to reflect on the offer already made of payment of three months’ salary and said that he would consider whether he could improve it. As a result, an offer of four months’ salary was made the following week.

15. The complainant did not accept the offer of four months’ salary and, on 20 August, she informed the Administration that she would accept six months’ salary, including “saving fund”, in one payment. She again met with the Secretary-General on 26 August and was informed that her proposal was not acceptable. The Secretary-General gave her 24 hours to reflect on his previous offer and told her that it would be annulled if she did not resign the next day. The complainant did not resign the following day but presented her resignation on 3 September. On 20 September 2002 she made a formal claim for compensation in an amount equivalent to six months’ salary, including saving fund, together with “a written recognition of the damage done by EFTA officials”, in particular the events that occurred during her sick leave.

16. In light of the fact that the complainant was told twice that management did not want her to resign, it is impossible to conclude that her resignation was not voluntary. Nor is her case improved by reference to the conversation she had with the Secretary-General during which he said his offer would be annulled if he did not receive her resignation the next day. That was clearly an attempt to bring negotiations to a conclusion – negotiations in which the Secretary-General had urged the complainant not to resign whereas she, apparently, was advancing resignation as a real possibility. Moreover, the complainant did not resign the next day, but several days later. The claim of forced resignation must be rejected.

17. The decisions to offer the complainant only a two-year contract and a one-step salary increase were decisions which the Secretary-General was entitled to reach in the exercise of his discretion. That being so, such decisions can only be viewed as part of a campaign of harassment if the other events upon which the complainant relies give rise to an inference that these were taken because of hostility, ill will or other improper motive.

18. The complainant has failed to prove harassment. The events which occurred during the complainant’s absence on sick leave were most unfortunate. However, the request for a second medical opinion was understandable in a context in which the complainant had suggested that she was going to resign within a few weeks and had not previously complained of back problems. So, too, it is understandable that, given the urgency attending the Sub-Committee meeting preparations on which the complainant was working, her computer was accessed. Both matters could and should have been handled with greater sensitivity and with proper regard to the complainant’s privacy. Even so, those events fall far short of establishing hostility amounting to harassment.

19. Nor is harassment established by the conversations in which the complainant’s attitude and body language were criticised. Just as her supervisors had an obligation to respect the complainant’s dignity, she had an obligation to treat them with respect. Unfortunately, it is often the case that the forthright expression of opinion is viewed as falling short of the respect due to a superior.

20. The claims of moral harassment and forced resignation are not borne out by the events on which the complainant bases her submissions.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet