

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

R. (No. 2)

v.

WTO

120th Session

Judgment No. 3487

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr F. R. against the World Trade Organization (WTO) on 1 June 2012, the WTO's reply of 20 October 2012, the complainant's rejoinder of 24 January 2013 and the WTO's surrejoinder of 6 March 2013;

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

Having examined the written submissions;

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

In his complaint, the complainant challenges the decision to allow the "Note for the File" to remain on his personal file.

The complainant joined the WTO in 1991. In his performance evaluation report (PER) for 2010, the complainant's overall performance was rated as "partly satisfactory". In January 2011, in his final comments on the PER, the complainant asserted that the WTO evaluation system was a "total farce" and made accusations of prejudice against his Director, the then Director of the Languages, Documentation and Information Management Division, as well as other disparaging comments about the integrity of the United Nations system as a whole.

On 28 March 2011 the complainant's Director responded to his comments in a document entitled "Note for the File" ("the Note"),

stating that his attitude was regrettable and that the language used was inappropriate. She pointed out that the complainant spent more time fighting his supervisors than doing his translation work and that, had he reached a reasonable production level, his performance reports and attitude towards his colleagues and towards international organizations would have been more positive. Before she retired at the end of March 2011, the complainant's Director asked a colleague to ensure that the Note would be placed on the complainant's personal file. To that end, the Note was forwarded to the Human Resources Division (HRD) by an e-mail of 1 April 2011, which was copied to the complainant and his supervisor. The complainant was then on sick leave.

After he resumed work, the complainant's supervisor placed him on a Performance Improvement Plan (PIP) pursuant to Administrative Memorandum No. 967 of 23 February 2010. However, the complainant's supervisor suspended the PIP on 27 September 2011 on the ground that he had substantially increased his productivity.

In August 2011 the complainant submitted a request for review to the Director-General seeking the withdrawal of the Note from his personal file and claiming damages for the "actual and moral" injury allegedly caused to his reputation and to his career by the Note. He argued that the decision to append the Note to his personal file, without his having been consulted or informed, was unlawful and contrary to the rules governing performance evaluation. The Director-General rejected his request on 20 September 2011. He decided that the disputed Note would remain on the complainant's personal file, but that he would be given the opportunity to comment on the Note and that the comments together with the Note would be attached to his 2010 PER and placed on his personal file.

In his appeal before the Joint Appeals Board (JAB) the complainant extended his claims to include the withdrawal of his 2010 PER, an *ad personam* promotion and costs. The JAB, in its report of February 2012, recommended that the complainant be allowed to make a full written reply to the Note and that both the Note and his reply be added to his personal file. However, it recommended that the Note should not be appended to the complainant's 2010 PER, as this would wrongly

imply that the Note, which had been drafted after the evaluation process had been finalized, formed part of the PER. As for the complainant's other claims concerning the 2010 PER, the JAB considered that as they had not been raised in his initial request for review, they were not receivable. In the proceedings before the Tribunal the complainant impugns the Director-General's decision of 6 March 2012 accepting the JAB's recommendations.

The complainant asks the Tribunal to quash the impugned decision and to order the withdrawal of the Note from his personal file, as well as the withdrawal of his 2010 PER on the grounds that it is tainted with malice, prejudice, discrimination and harassment. He asks the Tribunal to order his *ad personam* promotion to the next grade pursuant to paragraph 49(d) of Administrative Memorandum No. 934, with retroactive effect from the date when he first became eligible for such a promotion, arguing that the "partly satisfactory" overall rating in his 2010 PER precluded his promotion. He seeks material and moral damages in the amount of 100,000 Swiss francs, as well as the full reimbursement of the costs incurred in bringing his appeal, with 8 per cent interest.

The WTO rejects all the complainant's claims as unfounded.

CONSIDERATIONS

1. The Tribunal notes that in these proceedings the parties and the JAB have referred interchangeably to the complainant's "personnel file" or "personal file". It seems clear that these references are to one and the same file, which constitutes the complainant's "permanent record" as a staff member of the WTO, which is the term used in Staff Rule 105.2(e) and Staff Regulation 5.3. For ease of reference the word "file" will simply be used hereinafter.

2. The complainant has requested the production of a large number of documents. That request is refused because it is cast in the most general terms and constitutes an impermissible "fishing expedition" (see, for example, Judgment 2497, consideration 15). The

complainant has also requested oral proceedings. He says that he wishes to give evidence on his own behalf. Having regard to his pleas and the evidence he has given in the materials that he has provided, the Tribunal finds it is unnecessary for him to give evidence in oral hearings. He also asks to call the colleague whom he said that he wished to represent him in his internal appeal. This is however unnecessary as there is no merit in the complainant's contention that the WTO refused to permit that colleague to represent him in his internal appeal out of bias and in violation of his right of defence and to choose his own legal representation. The complainant states in his rejoinder that the colleague was prohibited from assisting "any staff member without the prior authorization of the [Director-General]". There is no evidence that such authorization was either sought or refused. The complainant states that he would welcome the opportunity to cross-examine his Director who had the Note placed on his file because of an alleged vendetta and threats against him, which he asserts she made good by having the Note placed on his file. The Tribunal finds this unnecessary and confines itself to noting that the written submissions are sufficient to render a reasoned judgment. The application for oral proceedings is therefore denied.

3. In the impugned decision, dated 6 March 2012, the Director-General accepted the recommendations of the JAB to allow the Note which the complainant's Director had placed on the complainant's file in April 2011 to remain on his file, with a reply which the complainant was permitted to make to the Note. The JAB had also recommended that the Note and the complainant's reply should not be appended to his 2010 PER, as that would wrongly imply that the Note formed part of the evaluation report, whereas the Note was written after the evaluation exercise was finalized.

4. It is necessary at this juncture to put this case into perspective. In the complainant's initial request for review, he specifically challenged the decision of HRD to have the Note placed on his file. He stated that he had only "discovered" the Note there on or about 4 July 2011. In essence, his case was that the placing of the Note on his file was

ultra vires and breached the WTO Staff Regulations and Staff Rules concerning performance evaluation. He further stated that the Note severely injured his professional reputation and adversely affected his future career prospects both inside and outside the WTO. He requested its immediate removal from his file and an award of damages.

5. However, when the Director-General dismissed his application for review and he filed his internal appeal to the JAB against that decision, the complainant additionally sought the setting aside of his 2010 PER. He also sought an *ad personam* promotion to the next grade. He repeats these additional claims in his complaint. Having not raised these claims in his request for review, he could not properly circumvent the requirement to pursue and exhaust his internal remedies to challenge his 2010 PER and its alleged adverse effect on his chances of receiving a promotion by adding these new claims in his internal appeal and then in his complaint (see, for example, Judgment 3222, under 11 and the case law cited therein). Accordingly, his claims for setting aside his 2010 PER and for an *ad personam* promotion are irreceivable and will be dismissed.

6. It is clear that the decision to have the Note appended to the complainant's 2010 PER was made in error. Under Staff Rule 105.2 and the Circular on the Implementation of the New Performance Evaluation Report Form for 2010 (OFFICE(10)/7) of 29 January 2010, the evaluation process ends when the staff member dates and signs the PER form in Section 8 of the PER. She or he may also add comments in Section 8 on any aspect of her or his supervisor's evaluation with which the staff member does not agree or about which the staff member has reservations. On 25 January 2011 the complainant's supervisor entered comments in the complainant's evaluation report. On the following day the complainant's Director signed off on the report. These actions were in accordance with Staff Rule 105.2(b) and (c) and Sections 6.C and 7 of the aforementioned Circular. The complainant's response in Section 8 of the evaluation report, which was in accordance with Staff Rule 105.2(d) and Section 8 of the Circular, was entered on 31 January 2011. The WTO's Staff Rule 105.2(e), which provides that

the final evaluation report shall carry the complainant's signature and those of the supervisors, was also satisfied. The final administrative requirements in the performance evaluation process, pursuant to paragraph 57 of Section 8 of the Circular, with the eventual forwarding of a copy to HRD for filing, were done before the Note was made on 28 March 2011. Accordingly, the Note could not validly have been a part of the performance evaluation process. That process was effectively completed almost two months prior, on 31 January 2011.

7. The complainant's Director, who authored the Note, did not ask to have it appended to the complainant's 2010 PER. Her request was that it be placed on his file. The complainant saw it appended to the PER in early July 2011 after his return from sick leave. It is apparent that it was so appended by an Officer in HRD. A copy of the Note had been sent to the complainant, with a copy of the correspondence dated 1 April 2011, by which it was sent to HRD for filing.

8. In his decision of 20 September 2011 on the complainant's 23 August 2011 request for review of the decision to have the Note placed on his file, the Director-General determined that the Note should remain on the file appended to the 2010 PER. He however permitted the complainant to comment on the Note and his comments together with the Note were then to be attached to his 2010 PER and placed on his file. However, by subsequently accepting the JAB's recommendation that the Note be removed from the 2010 PER, the Director-General accepted that the decision to append the Note to the complainant's 2010 PER was wrong. There is no rule, regulation, nor principle of law, which permitted the Note to be appended to the complainant's 2010 PER after the performance evaluation process was completed on 31 January 2011. The Director-General's decision and that action constituted an error which remained until the time of the impugned decision of 6 March 2012.

9. The complainant has requested that the Note, the gist of which has been stated in the factual background to this Judgment, be removed from his personal file. Whether the Note is to be removed is

to be determined in light of the regulatory framework and the applicable principles. The Tribunal has stated, for example in Judgment 1135, under 10, that the make-up of a staff member's file is subject to formal rules calculated to guard against the filing of documents throughout a staff member's career about her or his conduct which have not been drawn up with due regard to the elementary safeguards of her or his rights. Consistent precedent requires that a staff member should be notified of any document that is placed on her or his file and be given an opportunity to respond to it (see, for example, Judgment 3239, under 10).

10. The complainant argues that the Note should be removed from his file because its inclusion therein is *ultra vires* in that it violates the WTO's internal laws, including the Staff Regulations and Staff Rules, as well as established principles of international civil service law. His submissions on this claim are primarily based on his assessment of the provisions and principles that are concerned with the PER procedure. In particular he insists that the attachment of the Note to his 2010 PER breached the applicable provisions. As it has been observed in consideration 6 of this Judgment, the Note was appended to the complainant's 2010 PER in error.

11. The complainant further argues that the Note should be removed from his file because it is false and defamatory, causing him actual and moral damage; injuring his professional reputation and adversely affecting his future career options. However, he has provided no evidence to support these allegations. Moreover, the fact that the complainant was put on a Performance Improvement Plan (PIP) upon his return from sick leave in July 2011 did not result from the placing of the Note on his file. Rather, it was because of the "partly satisfactory" rating in his 2010 PER, which he did not challenge in his initial request for review. Neither does the Tribunal accept the complainant's allegation that the irregularity of appending the Note to the 2010 PER is evidence, *prima facie* or otherwise, of malice, personal prejudice and bias, discrimination, harassment or bad faith directed towards him.

12. However, the Tribunal accepts the complainant's submission that the placing of the Note on his file was unlawful for two reasons. One is that the PER process had come to an end and the Note could not then properly have been attached to the 2010 PER, and, by extension it should not have been placed in the file at all. Second, the Director-General's decision to maintain the Note in the file was unlawful because there is no mechanism in the WTO's regulatory regime whereby such a note could be unilaterally placed on the complainant's file by his Director. Accordingly, the Note should be removed from the complainant's file.

13. The complainant's plea that his right to confidentiality was breached is well founded. In this regard, the Tribunal finds, as did the JAB, that the contents of the Note were confidential and sensitive. As such, it should have been transmitted by the author or by her secretary directly to a senior member of HRD, rather than by way of the budget co-ordinator. In all of the circumstances of this case, this and the foregoing errors of law entitle the complainant to moral damages for which he will be awarded 1,000 Swiss francs.

14. However, the Tribunal finds no merit in the complainant's allegation that the impugned decision of 6 March 2012 was taken without the proper or appropriate delegation of authority by the Director-General. The communication of that date was done on behalf of and on the direction of the Director-General.

15. The complainant is entitled to costs in the amount of 4,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision dated 6 March 2012 is set aside to the extent that it permitted the "Note for the File" of 28 March 2011 to remain on the complainant's file.

2. The said “Note for the File” shall be removed from the complainant’s file.
3. The WTO shall pay the complainant 1,000 Swiss francs in moral damages.
4. It shall also pay him 4,000 Swiss francs in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ