

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

F.
v.
ILO

121st Session

Judgment No. 3625

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms N. F. against the International Labour Organization (ILO) on 8 March 2013 and corrected on 6 June, the ILO's reply of 11 September, the complainant's rejoinder of 18 November 2013, the ILO's surrejoinder of 18 February 2014, the complainant's further submissions of 2 June and the ILO's final comments thereon of 13 October 2014;

Considering Article II, paragraph 1, of the Statute of the Tribunal;
Having examined the written submissions;

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

The complainant challenges the decision to reject her allegations of harassment without conducting an investigation. She also challenges the decision to maintain her performance appraisal for 1 January to 31 December 2010 and the Reports Board's conclusions and recommendations thereon, as well as the decision not to renew her contract and the decision not to reassign her by direct selection to another post.

Following a competitive selection process, the complainant was appointed under a one-year fixed-term contract as a Labour Administration Officer at grade P2 in February 2007. In her first performance appraisal report covering the period from 5 February to 31 October 2007, the

complainant's overall performance was rated as "fully satisfactory" by her responsible chief. In its comments of December 2007 the Reports Board observed that this was a very positive evaluation and approved the appraisal report.

In her second appraisal report covering the period 1 November 2007 to 31 July 2008, her overall performance was rated as satisfactory "from a technical viewpoint" but unsatisfactory "from a behavioural viewpoint" and her responsible chief recommended that her probationary period be extended for one year. In her comments, the complainant acknowledged her responsible chief's concerns and committed herself to making the required efforts. In December 2008, noting the serious reservations expressed by the responsible chief with respect to the complainant's interpersonal and communication skills, the Reports Board requested that the responsible chief complete an ad hoc appraisal report covering the period 1 August 2008 to 31 July 2009. It approved the responsible chief's recommendation to extend the complainant's probationary period.

In the ad hoc performance appraisal of October 2009 covering the period from 1 August 2008 to 31 July 2009, the complainant's overall performance was rated as satisfactory, but it was recommended that she obtain better comparative knowledge of her area of work. Following requests by the Reports Board for additional information and hearings conducted with the complainant, her immediate chief and her responsible chief, the Reports Board concluded in its report of 20 May 2010 that there were still issues of concern in relation to the complainant's interpersonal and communication skills. It noted that her chiefs had also expressed reservations in relation to her work planning and organizational skills, as well as her fit in the unit. The Reports Board approved the end of her probationary period and endorsed the extension of her contract beyond the probationary period in light of a number of considerations including that her technical work contributions were considered satisfactory, that she was willing to work on her behavioural skills and may not have received sufficient training, and that the re-organization in 2009 of the department in which her unit was located may have influenced her willingness to ask for further

guidance from her chiefs in relation to prioritizing work assignments. It wished to remain involved in the review of the subsequent performance appraisal reports.

Meanwhile the ILO changed its performance appraisal system by introducing the “Performance Management Framework” which consists of three phases: the Beginning of Cycle (BoC), the Mid-term Review (MtR), and the End of Cycle (EoC).

The complainant’s BoC form was prepared in January 2010. In her MtR covering the period from 1 January to 31 December 2010, both her immediate and responsible chiefs expressed serious concerns with her performance alleging a lack of analytical skills and recommended that the complainant consider other career opportunities and alternative assignments outside the unit. In her comments the complainant disagreed with this assessment. She drew attention to previous positive appraisals and alleged that, since January 2010, she had been subjected to systematic and unjustified criticism as well as a systematic “downgrading” of her task portfolio. The complainant concluded that her work had not been assessed in an objective manner and that, in those circumstances, it would be best if she were given the opportunity to continue her career in another unit.

In its comments of March 2011 the Reports Board took note of the serious issues raised as well as the diverging views between the complainant and her chiefs. It requested to review samples of the complainant’s work and asked her chiefs to coordinate with the Human Resources Development Department (HRD) in order to seek a temporary 6-month assignment outside the unit, which would be subject to an ad hoc appraisal. In the absence of agreement between the complainant and her chiefs, the Reports Board chose five samples from those presented (three samples provided by the complainant and two by her chiefs).

In its report of 14 April 2011 the Reports Board concluded that after four years in the position, the complainant’s progress did not appear to be sustained and consistent. While it recognized that she had adopted a positive attitude to feedback, issues remained in relation to her overall performance and development.

By a letter of 11 November 2011 the complainant was informed that her position would be abolished and that her contract would not be renewed beyond its expiry on 4 February 2012. The letter explained that the staffing needs of the former department had changed following a restructuring and that the unit where the complainant worked required more senior level officials because of the increase in the number of requests made by constituents for high-level technical advice and expertise in the area of labour inspection and labour administration. Despite efforts to develop her professional competencies and in light of the Reports Board's considerations, her improvements were not deemed sufficient to meet the new requirements of the unit. The same letter informed her that, in view of her personal circumstances, a temporary assignment at grade P2 in another department had been identified which would allow the complainant to provide a residence status and social coverage for her family as well as the possibility of applying to ILO internal competitions and/or external employment opportunities for a further final period.

In December 2011 the complainant filed a grievance entitled "Grievance of treatment incompatible with terms and conditions of employment" with HRD alleging elements which, in her view, amounted to a harassment campaign. She requested an investigation into her allegations. She also requested that the MtR covering the period 1 January to 31 December 2010 as well as the summary of the Reports Board's hearings be removed from her personnel file and be replaced by a corrective note, and that the decision not to renew her contract be set aside. She filed a second grievance in February 2012 challenging the Reports Board's conclusions and recommendations of 14 April 2011 and the subsequent decision not to renew her contract. By a letter of March 2012 she requested that the decision not to renew her contract be withdrawn and that she be assigned by direct selection to one of the two Legal Officer positions at grade P2 which were then open for competition.

By a letter of 14 March 2012 the complainant was informed that the Administration had found no reason to withdraw her performance appraisals or the decision not to renew her contract. The letter stated

that the Administration had carefully considered all the documentation submitted, as well as the complainant's personnel file and the records of the Reports Board and that many of the complainant's allegations of "unfair treatment [...] ha[d] already been brought to the attention of the Reports Board".

In April 2012 the complainant filed three separate grievances with the Joint Advisory Appeals Board (JAAB) challenging the decisions contained in the letter of 14 March. In its single report of November 2012 the JAAB unanimously recommended that her grievances be rejected as devoid of merit. The JAAB considered that the decision not to renew her contract had been made for valid reasons, based on operational requirements as well as her performance and potential for growth, that the Reports Board procedure in reviewing the complainant's appraisal was not flawed, and that she had not been subjected to unfair treatment or harassment.

On 13 December 2012 the complainant was informed that the Director-General had decided to accept the JAAB's recommendation. That is the impugned decision.

The complainant, who left the ILO on 4 May 2013, asks the Tribunal to set aside the impugned decision and to order that an independent investigation be conducted into her allegations of harassment. With respect to the decision not to renew her contract, she asks that the Tribunal order the ILO to reassign her to a regular position corresponding to her grade and qualifications, to order the ILO to remove from her personnel file the Reports Board's conclusions of 14 April 2011, the MtR and the Reports Board's report of the hearing with her immediate and responsible chiefs of March 2010. She seeks material and moral damages, as well as costs in the amount of 2,000 Swiss francs.

The ILO invites the Tribunal to reject the complainant's claims as partly irreceivable and wholly unfounded.

CONSIDERATIONS

1. The complainant joined the ILO on 5 February 2007, at grade P2 under a fixed-term contract. Her appointment was subject to satisfactory completion of the mandatory two-year probationary period. Following the first two appraisal periods (5 February – 31 October 2007 and 1 November 2007 – 31 July 2008), it was recommended that the probationary period be extended for another year (5 February 2009 – 4 February 2010) and the Reports Board endorsed this recommendation and requested an ad hoc appraisal for the period 1 August 2008 – 31 July 2009. The ad hoc appraisal report was submitted in October 2009 and indicated that the complainant's overall performance was satisfactory and that she had improved on her interpersonal skills. In November 2009 the Reports Board considered that it should have been provided with more detail and requested that the responsible chief provide further input. The complainant's immediate chief provided further input in November 2009, indicating that while there had been improvement, the complainant still needed to improve her ability and skills to manage and organize the high amount of work in the unit and that further work was required to improve her interpersonal skills. The Reports Board met separately with the complainant and her management to discuss the issues which had led to the extension of the probationary period and concluded in its "Minute Sheet" dated 20 May 2010 that "there were valid issues of concern in relation to [the complainant's] interpersonal and communication skills", and noted the chiefs' concerns that her improvements had been "short-lived" and that "although she worked relatively well at a technical level, her overall performance and development was not as advanced as it should be at [that] stage of her employment with the Office". The Reports Board decided to approve the end of the probationary period "[i]n view of the fact that the official's technical work contributions were considered to be satisfactory". It requested that the responsible and immediate chiefs work with her to provide for its review the Beginning of Cycle (BoC) form by 15 June 2010, identifying the complainant's agreed outputs and the competencies which are most relevant to achieving those outputs, and specific developmental objectives. It also requested that the complainant be

provided with appropriate training in collaboration with HRD and that the responsible and immediate chiefs monitor her progress and submit a Mid-term Review (MtR) to the Reports Board Secretariat by 31 January 2011.

In her MtR covering the period from 1 January to 31 December 2010, both her immediate and responsible chiefs expressed serious concerns with her performance alleging a lack of analytical skills and recommended that the complainant consider other career opportunities and alternative assignments outside the unit.

2. The complainant was notified by letter dated 11 November 2011 that due to the restructuring of her unit and the increased requests for high-level technical advice and expertise in the area of labour inspection and labour administration, her position at the P2 level could not be maintained and her contract would not be renewed beyond its expiration on 4 February 2012. The letter also stated that, “despite efforts over the past years to develop [the complainant’s] professional competencies in certain areas, and in light of the considerations of the Reports Board, [her] improvements [were] not deemed to be sufficient to meet the requirements of [the unit]”. In consideration of her personal circumstances which would make the loss of her Swiss *carte de légitimation* (legitimation card) at that time particularly devastating, and in response to her request, a temporary assignment was identified for her at the P2 level in another department with effect from 5 February 2012, effectively extending her contract for a further final period. She was offered the option to choose either a 5-month contract extension at 80 per cent working time or an 8-month extension at 50 per cent working time. The complainant accepted the 8-month extension.

3. The complainant filed three appeals with the JAAB dated 13 April 2012. The first appeal was against the decision not to carry out an investigation into her allegations of unfair treatment and harassment and to dismiss the allegations made in her grievance to HRD (dated 14 December 2011). The second appeal contested the decision of 11 November 2011 not to renew her contract based on a wrongful and incomplete assessment of her development potential.

The third appeal regarded the grievance filed with HRD (dated 7 February 2012) in which she claimed that the Reports Board had come to wrong conclusions concerning her performance and development prospects. The JAAB joined her three appeals as the issues were closely interrelated. With regard to the complainant's claim that there was no valid reason for the decision not to renew her contract, the JAAB found that "the restructuring of the [complainant's] unit was based on objective operational requirements and the suppression of [her] post was done because there was no longer a need for such a junior post in the programme". Regarding the evaluation of the Reports Board, the JAAB noted that "in the four reviews that the Reports Board had made of the [complainant's] appraisals, it had consistently identified issues in relation to the [complainant's] performance, namely her weaknesses in analytical, communication and interpersonal skills; her developmental needs and her difficulties in adequately completing specific work assignments. In its last review of the [complainant's] performance the Reports Board concluded that after four years recurring issues remained in relation to the [complainant's] overall performance and development, including regarding her capacity to adequately complete specific work assignments; that the level of support she needed was too high and could prove very demanding for her department and impact negatively upon its functioning; and that her slow and fluctuating progress curve did not meet the expectations of her department". The JAAB found that that assessment provided a valid reason for not extending the complainant's contract. It found no evidence that the procedure followed by the Reports Board was flawed. On the contrary, it considered that the Reports Board gave the complainant ample opportunities to express her views at all stages, that it took into account many of her comments, was considerate towards the complainant, and thorough in its reviews. Considering the claims of unfair treatment and harassment, the JAAB noted that "a number of [the complainant's] allegations have to do with the appreciation by the [complainant's] supervisors and responsible chiefs of her performance and the way they acted in the framework of the Reports Board procedures". It found that the Reports Board had duly considered the complainant's allegations in reviewing her

appraisals and that the complainant had not been subjected to a campaign of harassment nor had she been treated unfairly by the management of her unit, the Reports Board, or HRD and that, consequently, there was no need to investigate her allegations. The JAAB concluded that “the decision not to renew the [complainant’s] contract was made for valid reasons, based on the operational requirements of her programme and the [complainant’s] performance and potential for growth; that the Reports Board procedure in reviewing the [complainant’s] appraisals was not flawed; and that the [complainant] was not subject to unfair treatment or harassment”.

4. The complainant was informed, by letter dated 13 December 2012, of the Director-General’s decision to accept the JAAB’s unanimous recommendation to reject her grievances as without merit on the grounds mentioned in JAAB’s report. She impugns that decision in the present complaint.

5. The complainant bases her complaint on the grounds that she provided the ILO with sufficient proof to initiate a harassment investigation in conformity with the Tribunal’s case law, and the ILO’s refusal to order an independent, thorough and diligent investigation was unlawful; the appraisals of her performance were arbitrary and biased against her; the non-renewal of her contract was based on pretexts as the goal was only to remove her from the position; and the ILO should have reassigned her to another P2 position by direct appointment without competition.

6. The elements of harassment submitted by the complainant include: untrue and unwarranted criticism of the complainant’s performance; inappropriate levels of work assigned; humiliation in front of colleagues; being bypassed by short-term colleagues for better assignments; being monitored by younger colleagues or being asked to report to colleagues with less seniority than herself; intentional withholding of development opportunities; her work plan was not respected; tasks were taken away from her; her work was often solitary; not assigning to her more interactive tasks so that she could

work on her communication and interaction skills; and the Reports Board's suggestion to move her to a temporary six-month post in a new department in order to see a comparison of her work appraisals was not carried out.

7. The ILO submits that the complainant's allegations of harassment are time-barred in accordance with Article 13.2 of the Staff Regulations which requires that grievances be filed within six months of the challenged treatment. It states that her grievance challenging her hostile working environment, filed with HRD in December 2011, was based on exchanges which occurred between 5 March 2010 and 14 March 2011. It notes that the grievance was filed only after she was notified by letter dated 11 November 2011 that her contract would not be renewed. The ILO further asserts that the non-renewal of her contract and the treatment which she challenged in her grievance were based on organisational necessity and were found to be managerially sound by the Reports Board and the JAAB. It considers that transferring her through direct selection without competition would not be appropriate and that there were no irregularities in terms of form or substance in the appraisals or the reviews by the Reports Board.

8. The Tribunal finds that the ample written submissions are sufficient to allow for a detailed analysis of the situation and to result in a final reasoned decision. Thus, there is no need for oral proceedings and that request is denied.

The Tribunal will not address the question of receivability of the claim against the decision not to investigate the harassment grievance as the claim fails on the merits.

9. The Tribunal notes that the complainant's work was closely followed by her chiefs as well as by the Reports Board (from her arrival at the ILO in 2007 until the non-renewal of her contract) and that this supervision was deemed to be appropriate by both HRD and the JAAB. The complainant had ample opportunity to comment at each stage of the appraisals and reviews. It is firm precedent that allegations of harassment must be dealt with promptly but it is also

important to note that “an allegation of harassment must be borne out by specific facts, the burden of proof being on the person who pleads it” (see Judgments 2100, under 13, and 3347, under 8), and that “[a]n unlawful decision or unsatisfactory conduct is not sufficient in itself to constitute harassment [...]. The question as to whether or not harassment has occurred must be determined in the light of a careful examination of all the objective circumstances surrounding the events complained of [...]” (See Judgment 3233, under 6, and the case law cited therein.) In this case, all the complainant’s allegations were examined by HRD, the Reports Board and the JAAB, and they were found to be without merit as the facts on which they were based were determined to be managerially sound and necessary. It is well-established that conduct by management which is necessary and reasonable does not constitute harassment, particularly if it serves a legitimate managerial or supervisory function (see Judgment 3069, under 9). The Tribunal finds that the complainant has not shown that the original appraisals were incorrect or that the review of those appraisals was biased or mistaken in anyway. In light of this, the decision not to further investigate her claims of harassment was reasonable.

10. The Tribunal is satisfied that the contested treatment is, in substance, the manifestation of a difference of opinion on the evaluation of the complainant’s work performance (particularly her interaction with staff and constituents, analytical and communication skills, and ability to prioritize and complete assignments in a timely manner) between the complainant and her chiefs. “Criticism of a subordinate’s performance and behavior [...] does not, of itself, evidence harassment or prejudice. Certainly, that is so where [...] the performance and behaviour in question are confirmed by other senior and responsible officials. That being so, and there being no other evidence to support the complainant’s claims, the allegations of harassment and prejudice must be rejected.” (See Judgment 2507, under 7.)

11. The claim that the complainant was given inappropriate levels of work was contradicted by the Reports Board’s reports which noted that her assignments were consistent with a P2 level and stated

(in the report of 14 April 2011) that “the [complainant] was in effect performing at P2 level but her progress after four years in the job did not appear to be sustained and consistent”. Concerning the complainant’s argument that she was supervised by, and subordinate to, colleagues with less seniority, it is enough to note that those colleagues were of a higher grade. The JAAB noted “that there were objective reasons why other officials were assigned certain tasks, although they were younger and had a shorter duration of service than the [complainant], since they had a higher grade and were deemed to be better equipped for the task than the [complainant]”. The Tribunal observes that it is natural for the assignment of work to change within the department following the appointment of other staff members, particularly when those staff members are of a higher grade.

12. In relation to the complainant’s claim that the Reports Board’s recommendation to transfer her for a six-month assignment in another department was not carried out, the Tribunal notes that the “Conclusions of the Reports Board” dated 14 April 2011 effectively replaces the 1 March 2011 “Comments and Recommendations of the Reports Board”, rendering that recommendation moot. Particularly as, in its conclusion, the Reports Board stated that “the Board acknowledged that although [the complainant’s] performance appraisal history had reflected some progress at different intervals, and that she has demonstrated a positive attitude and commitment, the progress has not been sustained and that recurring issues remain in relation to her overall performance and development, resulting in a relatively slow and fluctuating progress curve that did not meet the expectations of the unit and department”. Based on the Report Board’s conclusions and the need to restructure the unit to reflect the recommendations of the International Labour Conference (ILC), the ILO acted reasonably in deciding not to renew the complainant’s contract and abolishing her post after the expiry of her contract. The Tribunal finds that the decision not to renew the complainant’s contract was properly based on the organisational need to restructure the unit to raise the level of work in accordance with the requests of the ILC. In fact, after the expiration of

her contract there were no more P2 posts in the unit which was later even further restructured to completely eliminate all junior posts.

13. The claim that she should have been reassigned by direct appointment without competition is unfounded. There is no applicable rule which provides for such an arrangement and in any case it would be an unfair outcome which negatively affects other potential candidates for the vacant posts who would otherwise have the opportunity to compete.

14. In light of the above, the Tribunal finds that the complaint is unfounded and that it must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLores M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ