

The Administrative Tribunal,

Considering the complaint filed by Mr P. S. against the International Labour Organization (ILO) on 2 October 2006 and corrected on 9 October 2006, the Organization's reply of 12 January 2007, the complainant's rejoinder of 12 February and the ILO's surrejoinder of 15 May 2007;

Considering Articles II, paragraph 1, and VII 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 French national born in 1959, worked as an external collaborator for the International Labour Office, the ILO's secretariat, almost continuously from 22 November 1993 to 28 February 2003. Following a favourable assessment of his work during the period 1 January 1998 to 30 April 2001 and having passed the Assessment Centre's test, the complainant was offered a fixed-term contract for one year, starting on 1 March 2003, at grade P.3. This appointment, which was subject to a two-year probationary period in accordance with Article 5.1 of the Staff Regulations, was extended twice and ended on 30 April 2005.

Following a reorganisation of his unit, the complainant reported to a different supervisor who deemed the quality of his work to be unsatisfactory in his first performance appraisal of February 2004. Having reviewed that appraisal, the Reports Board suggested on 10 March 2004 that the responsible chief should "coach" the complainant and "closely monitor his progress" and it indicated that, unless there was a significant improvement, the probationary period might need to be extended, or consideration given to non-renewal of his contract. His contract was, however, extended until 28 February 2005. In his second performance appraisal, which was written in September 2004, it was recommended that his contract should not be renewed. On 1 November 2004 the complainant challenged the criticisms, which were mainly technical in tenor, contained in this appraisal. The Reports Board, to which the matter was referred on 4 November, issued its comments on 13 December 2004. In order to permit the completion of the procedure before the Board, the complainant's contract was extended for two months until 30 April 2005.

By a letter of 29 April 2005 the complainant was informed that the Director-General had decided to follow the Reports Board's recommendation not to extend his appointment. According to that letter the Board had "noted some serious concerns" about his ability to work methodically on his own without supervision, and about his ability to liaise efficiently with his responsible chiefs. It had also noted some technical mistakes made by the complainant.

On 19 October 2005 the complainant filed a grievance with the Human Resources Development Department under Article 13.2 of the Staff Regulations, challenging the decision not to renew his contract. As this grievance was dismissed, the complainant referred the matter to the Joint Advisory Appeals Board (JAAB) on 14 February 2006. In its report of 30 June the JAAB considered, inter alia, that the complainant had been warned of the need to improve his performance and that he had not proved that the Organization had shown personal prejudice. The complainant was informed by a letter of 13 July 2006 of the Director-General's decision to dismiss his grievance in the light of the findings of the JAAB. That is the impugned decision.

B. The complainant takes issue with the circumstances in which the two performance appraisals were drawn up. He points out that he was not able to comment on the first appraisal until after he had complained to the Human Resources Development Department that his immediate supervisor had required him to sign it immediately. As for the second appraisal, aside from the fact that it was written not by his supervisor but by a subordinate of the latter, the coaching suggested by the Reports Board after the first performance appraisal had not been provided.

The complainant states that, at the hearing before the Reports Board, he was unable to say anything, apart from answering the questions put by the members of the Board, and that neither the circumstances surrounding the non-

renewal of his contract, nor his career as a whole, were examined. In his opinion, the issue of his alleged failings was avoided. He submits that the members of the Board had no technical training in his area of expertise and that they simply endorsed his supervisors' technical opinion without calling in an expert from outside the Office or from another department. He considers that the adversarial principle was violated because the hearing to which he was summoned was not attended by his supervisors and he was not given an opportunity to express an opinion on their comments to the Board. He emphasises that he has never received the Board's comments. He also contends that the Board showed bias against him. According to the decision of 29 April 2005, the Board said that it had heard both parties' arguments, yet no mention is made of those he put forward to defend himself and it is clear that his supervisors' criticisms of him were accepted without reference to proven facts. He submits that no details were given of the "serious concerns" to which the Board referred and that they cannot be used to justify the decision not to renew the contract of an official with ten years' service.

The complainant asserts that when his contractual status improved, his relations with his supervisors deteriorated, although he had never been criticised before. He believes that the real reason for not renewing his contract is financial and that by replacing him with an external collaborator, as may be inferred from the Certificate of Service he was given, the Office violated Circular No. 630 on the inappropriate use of employment contracts in the Office.

The complainant takes the JAAB to task inter alia for not commenting on the lack of adversarial proceedings before the Reports Board, or on the fact that his post was eliminated so that his work could be given to an external collaborator, or indeed on the contradictory and unsubstantiated nature of some of the allegations mentioned in the letter of 29 April 2005, which were not made either in the "discussion" before the Board or in his performance appraisals.

He asks the Tribunal to order the Organization to reintegrate him retroactively and to pay him 40,000 United States dollars in compensation for the injury suffered as well as 6,000 dollars in costs.

C. In its reply the Organization challenges the receivability of some of the issues which the complainant raises before the Tribunal, on the grounds that they were not mentioned during the internal appeal proceedings. These issues are the allegations that the coaching advocated by the Reports Board after the first performance appraisal was not provided, that the adversarial principle was violated by the Board during the proceedings following the second performance appraisal, that the two performance appraisals were finalised in circumstances open to criticism and that the complainant's status as an external collaborator was "unlawful".

On the merits, the Organization submits that it came to the conclusion that the complainant had not completed his probationary period satisfactorily after having correctly followed the procedure for assessing his performance and having given him an opportunity to improve his performance, and that it based its decision on the Reports Board's findings. It submits that there is no evidence to support the complainant's allegations.

With regard to the assertion that the coaching advocated by the Reports Board was not supplied, the Organization states that the second performance appraisal describes it "in minute detail". As for the assertion that the adversarial principle was violated, the Organization considers that "the complainant is engaging in pure speculation" about hypothetical statements which his supervisors might have made to the Board, and it stresses that the latter based its recommendation on the two appraisals as well as the comments submitted by the complainant, as is plain from the letter of 29 April 2005. The Organization points out, in respect of the allegation that the Reports Board disregarded the complainant's comments, that he has not identified any specific point raised in his comments that might suggest that there was an error in the performance appraisals. As for the assertion that some of the information contained in the letter of 29 April 2005 was not mentioned in the Board's discussions or in the performance appraisals, the Organization observes that the contents of the second performance appraisal have only to be compared with the letter in order to see that the latter does not contain any new information whatsoever and that the complainant had ample opportunity to comment on them.

The Organization rejects the accusations of bias. It denies that the complainant was pressured by his supervisor into signing his appraisal without delay and submits that this action should be merely regarded as a reflection of the supervisor's legitimate concern "to speed up the process". It explains that the Administration had taken the step of having the second performance appraisal carried out by another official because of the strained relations between the complainant and his previous supervisor. Regarding the complainant's allegation that the Reports Board's findings contain contradictions, the Organization contends that, on the contrary, the Board displayed objectivity and impartiality by underlining the positive aspects of the complainant's performance as well. It points out that although

the work he had performed previously as an external collaborator had been deemed satisfactory, the mere fact that the appraisal carried out by one person for a given period differs from that carried out by another does not necessarily imply the existence of bias. The Organization rejects the assertion that the complainant's contract was not renewed because it was cheaper to use an external collaborator, and it states that the Certificate of Service produced by the complainant merely reflects the Administration's effort not to jeopardise his chances of employment in the future.

D. In his rejoinder the complainant emphasises that the Reports Board is the only body that can exercise technical oversight and that it plays an important fact-finding role. Relying on the Tribunal's case law, he maintains that the Board violated the adversarial principle, for he did not know what arguments had been presented, the names of the persons who had been heard or what comments they had made. He also points out that the letter of 29 April 2005 contains only a vague reference to the contents of the Board's report, which he has not received. He asks the Organization to provide a copy of the Reports Board's recommendation concerning him as an annex to its surrejoinder. He says that he did raise the issue of the lack of an adversarial debate in his written submissions to the JAAB.

The complainant considers that he adequately substantiated his arguments concerning the contents of the second performance appraisal in documents submitted to the Reports Board and he states that he considers his supervisors' allegations to be completely untrue.

He asserts that an external consultant has taken over his duties and his office and that no competition has been held for his job, which has become vacant. He says that, like his successor, he was given a "fake sub-contractor's contract", based on the performance of a specific task, although every day he reported for duty in the office allocated to him in order to carry out the work of an official under supervision.

E. In its surrejoinder the Organization reiterates its position. It maintains that the argument that there was no adversarial debate is irreceivable, because in his written submissions to the Joint Advisory Appeals Board the complainant raised this point in such general terms that the Board was unable to grasp the tenor of his criticism. The complainant did not present his argument in a comprehensible manner until he filed his submissions with the Tribunal.

Relying on the case law, the ILO argues that while the requirement of due process is of prime importance in the context of judicial or disciplinary proceedings, this does not apply to other proceedings such as those of the Reports Board. Moreover, the Board's proceedings are secret, pursuant to Article 10.3 of the Staff Regulations. The Organization also stresses that confidentiality plays a key role in the extremely sensitive field of appraising officials' performance. It acknowledges that the Board's findings are subject to limited review, but considers that in this case the complainant has not demonstrated that these findings are flawed.

In the Organization's opinion, the point at issue is that of whether it acted properly in deciding not to renew the complainant's contract, and not that of the action it took after that non-renewal.

CONSIDERATIONS

1. The complainant, who was first employed by the Organization under external collaboration contracts, was granted a fixed-term contract at grade P.3 for one year starting on 1 March 2003, which was subsequently extended for a year, until 28 February 2005. Although the complainant's work had been rated unsatisfactory in his performance appraisals and the non-renewal of his contract had been recommended, his contract was extended for two months until 30 April 2005 pending a final decision on its renewal. On 29 April 2005 the complainant was informed that his contract would not be renewed. Following the dismissal of his internal appeal against that decision, he filed a complaint with the Tribunal, requesting that the Organization be ordered to reintegrate him retroactively and to pay him 40,000 United States dollars in compensation for the injury suffered as well as 6,000 dollars in costs.

2. The complainant submits that the decision not to renew his contract was taken improperly and is tainted with bias, and that the adversarial principle was violated in the proceedings before the Reports Board.

In his rejoinder the complainant asks the Organization to produce a copy of the Reports Board's recommendation,

which has never been forwarded to him.

3. The Organization objects to the receivability of some of the issues raised by the complainant. It argues that the allegation that the adversarial principle was violated during the proceedings before the Reports Board is irreceivable because internal means of redress have not been exhausted. The Tribunal will not allow this objection, because the written observations submitted by the complainant to the Joint Advisory Appeals Board show that he clearly raised the issue of a violation of the rules governing adversarial proceedings, even though the Organization considers that the complainant's criticism was couched in such general terms that the Board was unable to understand it.

4. The Tribunal considers that the Organization's failure to forward the Reports Board's recommendation to the complainant for reasons of confidentiality is a cardinal issue which must be dealt with first.

In order to justify its refusal to produce the Reports Board's recommendation, the Organization relies on Article 10.3 of the Staff Regulations, which states that "[t]he proceedings of the Board shall be regarded as secret".

The ILO states that it accepts that the requirement of due process, which applies to all administrative actions that may adversely affect someone, is an essential condition which – as the Tribunal has often recalled – must always accompany the action of international organisations, and that "the procedures used to assess the performance of international civil servants must be both transparent and adversarial"; however, again relying on the case law, it submits that not all administrative procedures can be treated in the same way. In its opinion, not all procedures are subject to the same requirements, which means that the requirement of due process may be more or less onerous, depending on the interests which have to be protected in the procedure in question.

It emphasises that in the extremely sensitive area of appraising officials' performance, confidentiality, which is necessary in order to serve the public interest in the best way possible by seeking to ensure that only the brightest and the best fill the ranks of the international civil service, is of fundamental importance. It cites Judgment 2513 to support the view that, in some special circumstances, the need to preserve confidentiality may be of paramount importance.

The ILO also points out that in Judgment 557 the Tribunal recognised the intrinsic value of the confidentiality surrounding the Reports Board's proceedings, since it held that without such confidentiality this body could not act in full independence. In particular, it stated in considerations 3(b) and 4(b) that the complainant must be satisfied with the conclusions of the Reports Board as set out in the performance appraisal form, that he has no right of access to texts produced for or by the Reports Board, which are regarded as secret under the relevant provision of the Staff Regulations, and that, if that were not so, the Board could not act in full independence.

The Organization concludes its arguments on this point by "hoping" that "the Tribunal will not upset this delicate balance which its case law has preserved until now between the requirements of due process, on the one hand, and the confidentiality designed to safeguard the public interest in having a reliable appraisal of international civil servants' performance, on the other".

In the light of the foregoing it submits that "no violation of the adversarial principle, in the meaning defined above, can be seen in this case".

5. The Tribunal first draws attention to the fact that, irrespective of the circumstances, an official is always entitled to have his case judged in proper, transparent and fair proceedings which comply with the general principles of law. It finds that the precedent established in Judgment 557, on which the Organization relies, does not apply here. In that case the complainant asked for "the disclosure of all minutes of the Reports Board's discussion on his appraisal reports", and the Tribunal rightly rejected this request and held that it was sufficient that the complainant had been apprised of the Board's conclusions. Nothing in that judgment implies that the Tribunal intended to rule on the importance of confidentiality in the Reports Board's procedure as a whole, or permits the conclusion that such confidentiality could prevent the application of generally accepted rules of procedure.

6. In the present case, the complainant is asking only for the disclosure of the Reports Board's recommendation concerning him, which the Director-General endorsed and took as his basis for the decision conveyed to the complainant on 29 April 2005. That decision refers to the said recommendation, which it quotes at length in order to justify the non-renewal of the complainant's contract.

As the Tribunal has consistently held, the staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him. Under normal circumstances, such evidence cannot be withheld on grounds of confidentiality (see Judgment 2229, under 3(b)).

As the Organization points out, there may indeed be some special cases in which a higher interest stands in the way of the disclosure of certain documents. But such disclosure may not be refused merely in order to strengthen the position of the Administration or one of its officers (see Judgment 1756, under 10).

7. The Tribunal considers that in the present case the complainant is entitled to see the Reports Board's recommendation, an essential document on which the Administration based its decision not to renew his contract. By withholding that document the Organization deprived the complainant of an item of evidence that was essential for the preparation of his defence and the Tribunal of a document enabling it to exercise its power of review.

Accordingly there are grounds for ordering further submissions in order that the file may be supplemented with a copy of the Reports Board's recommendation, as requested by the complainant. The Organization must produce it within 15 days of the notification of this judgment. The complainant shall be allowed thirty days from receipt of the recommendation, and any comments by the defendant, to submit his observations. The Organization shall have thirty days to file final submissions if it wishes to do so.

8. The complainant is entitled to the award of 3,000 United States dollars in compensation for the injury suffered on account of the fact that the withholding of the requested document has delayed the proceedings. He is also entitled to 3,000 dollars in costs.

DECISION

For the above reasons,

1. The Tribunal orders the filing of further submissions on the conditions set forth in consideration 7 above.
2. The Organization shall pay the complainant 3,000 United States dollars in compensation for the injury suffered.
3. It shall also pay him 3,000 dollars in costs.

In witness of this judgment, adopted on 15 November 2007, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet