

113th Session

Judgment No. 3150

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R.L. N. against the International Criminal Court (ICC) on 8 January 2010 and corrected on 15 March, the ICC's reply of 21 May, the complainant's rejoinder of 21 July and the Court's surrejoinder of 8 October 2010;

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 is a Dutch national born in 1957. He joined the Court in June 2004 under a General Temporary Assistance contract as an Information Technology Service Desk Assistant. His contract was renewed several times before he was granted a one-year fixed-term appointment, with effect from 10 May 2005, as a Network Support Technician. On 10 May 2006 his appointment was extended for three years.

His performance was rated "very good" from February 2005 to January 2007. The performance appraisal report for the period from January 2007 to January 2008 was completed in early 2008 by

the complainant's immediate supervisors, Ms A. N. and Mr J. L., who rated his overall performance as "average". His second-level supervisor stated that the complainant could do better and that improvements were needed in certain areas. The complainant submitted his comments thereon in a letter dated 13 August 2008 rebutting the criticisms made concerning his performance. In September 2008 Ms A. N. and Mr J. L. met with the complainant to discuss his performance. They warned him that his performance was not of sufficient quality to justify a full-term contract extension and that his contract would not be extended in May 2009 if there was no improvement. A further meeting was held in January 2009 during which he was again warned that his performance was unsatisfactory. On 11 March Ms A. N. and Mr J. L. signed the complainant's appraisal report for the period from February 2008 to February 2009 indicating that his overall performance was poor and they recommended against the extension of his appointment. On 17 March 2009 the second-level supervisor signed the report stating that he agreed that the complainant's performance was unsatisfactory. Ten days later the complainant signed the appraisal report indicating that he disagreed with the appraisal of his work and that he would soon provide his comments thereon.

On 9 April the Registrar of the Court informed the complainant that his appointment would not be extended upon expiry on 9 May on the grounds that his performance was not satisfactory. On that same day the complainant wrote to Mr J. L. expressing his surprise that his performance appraisal report was forwarded to the Registrar without his comments. He added that he had indicated when he signed his report that he would provide his comments soon but he was not able to do so before 9 April. By a letter of 28 April the complainant requested a review of that decision contending that it was procedurally flawed. The Registrar replied on 19 May that she had reconsidered his case and reviewed the additional information submitted but saw no reason to review her decision.

On 16 June the complainant filed an appeal with the Secretary of the Appeals Board against the decision not to extend his appointment.

In its report of 15 September the Board indicated that it was not competent to consider whether his performance was satisfactory or not. It nevertheless noted that the decision had been taken notwithstanding the fact that the complainant had not yet provided his comments on the 2009 performance appraisal report. Hence, it considered that the complainant's right to a rebuttal process had been violated and that the contested decision was therefore procedurally flawed. The Board recommended that the Registrar should reconsider the contested decision after having given the complainant an opportunity to present his comments on the 2009 appraisal report.

By a letter of 12 October 2009, to which the Board's report was attached, the Registrar informed the complainant that she had decided to offer him the opportunity to present further comments on the 2009 performance appraisal report, after which she would reconsider his pleas. She nevertheless stated that she did not share the Board's view that the non-extension decision was procedurally flawed. In her view, his performance had been appraised in accordance with the Performance Appraisal Guidelines. She added that her letter constituted a final decision, which he was entitled to appeal before the Tribunal. The complainant filed his complaint challenging that decision on 8 January 2010.

In the meantime, on 18 December 2009, the complainant had submitted his comments to the Registrar, who informed him by letter of 18 January 2010 that she had considered them but found no reason to reconsider her decision. She indicated that the letter should be construed as a confirmation of the final decision communicated to him on 12 October 2009.

B. The complainant contends that the decision not to extend his appointment is procedurally flawed as it was taken on the basis of the 2009 appraisal report, which was not established in accordance with the applicable rules. He alleges breach of due process insofar as he was not given the possibility to provide his comments on the performance appraisal report before the non-extension decision was taken. He also submits that he was prejudiced by the fact that

that decision was not suspended pending the outcome of the internal appeal proceedings.

According to the complainant, his supervisors did not take into account his poor state of health when they appraised his performance. He submits that his health deteriorated because of the “oppressive relationship” with his colleagues. He alleges that his supervisors were prejudiced against him, pointing out that up to 2007 his performance was rated “very good” and that it was rated “unsatisfactory” only after Ms A. N. had replaced Mr D. as one of his first-level supervisors. He alleges that Ms A. N. acted in an “unprofessional” manner both towards him and the members of her staff on several occasions and that his second-level supervisor failed to take measures to improve the situation, despite his requests. He further alleges breach of confidentiality, given that the 2009 performance appraisal report was placed in his in-box without being sealed in an envelope.

He asks the Tribunal to set aside the decisions relating to the non-extension of his appointment and to order the ICC to pay him three years’ salary and allowances, with interest at a rate of 6 per cent per annum from the date of separation to the date of payment. He asks to be reinstated in his former position or in an equivalent position or, alternatively, to be paid damages in an amount equivalent to five years’ net salary. He also claims 20,000 euros in legal costs and 10,000 euros in “administrative cost”. In addition, he asks for a written apology and a recommendation letter from his “former supervisor” and requests that his 2008 and 2009 performance appraisal reports and other related documents be removed from his personal file.

C. In its reply the ICC submits that the complainant was granted every opportunity to defend his rights in the context of the internal proceedings. It asserts that, contrary to the finding of the Appeal Board, his comments on his appraisal were duly taken into account, since he had attached them to the letter of 28 April 2009 by which he requested a review of the decision not to extend his contract. It points out that the Registrar also invited the complainant to submit his

comments after she had received the Board's recommendation, and that she took them into consideration when reconsidering her decision not to extend his appointment; hence, she took a reasoned decision.

The Court denies any procedural irregularity. It contends that the complainant was told as early as April 2008 that he had to improve his performance and that adequate monitoring measures were put in place to allow him to improve. The complainant participated in all the performance review meetings. According to the ICC, he has misconstrued the procedure set out in the Performance Appraisal Guidelines, as there is no provision for a rebuttal process. It explains that when a staff member wishes to make comments on an appraisal, he or she attaches them to the performance appraisal report before returning the report to his or her supervisor, who then forwards all the documents to the Human Resources Section. It argues that the performance appraisal process cannot be stalled because of a staff member's failure to provide comments in a timely manner. In this regard, it observes that on 9 April 2009 the complainant had not yet sent his comments, even though his appointment was due to expire a month later, and that this delay on his part can be perceived as an attempt to frustrate the performance appraisal process.

The defendant further points out that a decision not to extend an appointment is discretionary and that, in the present case, the decision was taken by the Registrar in the interest of the organisation on the basis of a recommendation made by two appraisers, both of whom had concluded that the complainant's performance was unsatisfactory. In any event, Staff Rule 104.4 provides that a fixed-term appointment carries no expectation of extension.

The Court asserts that the complainant's state of health was taken into account when appraising his performance. It denies that the assessment of his performance was tainted with prejudice, indicating that there is no evidence to support this allegation and that the second-level supervisor confirmed the assessment made by the first-level supervisors. It reaffirms that his poor performance was the sole reason for the non-extension of his appointment and emphasises that, according to its case law, the Tribunal is not competent to replace the

Court's assessment of the complainant's fitness for his duties with its own.

D. In his rejoinder the complainant reiterates his pleas. He contests the Court's attempt to draw a distinction between the right to comment and the right to rebut stating that they both serve the same purpose, i.e. to ensure that the right to be heard is not infringed. In his view, the Registrar's letter of 12 October 2009 was self-contradictory in that she asked him to provide comments on the contested appraisal while stating that the letter constituted her final decision with respect to the non-extension of his appointment.

With respect to his claims, the complainant specifies that he should be paid 67,899.12 euros in compensation for the salary he was not paid for the period from 9 May 2009 until the date of filing his rejoinder.

E. In its surrejoinder the ICC maintains its position. It denies that the complainant's right to be heard was infringed, asserting that the appraisal of his performance was transparent and that the requirements of due process were met. It adds that he was warned as early as April 2008 that his performance was unsatisfactory; meetings were held to review the progress made and he was given the opportunity to provide comments at different stages of the appraisal process. The Court sees no contradiction in the letter of 12 October 2009.

CONSIDERATIONS

1. The complainant joined the Court in June 2004 on a General Temporary Assistance contract as an Information Technology Service Desk Assistant. The ICC renewed his contract several times before he was granted a one-year fixed-term appointment with effect from 10 May 2005. His appointment was further extended from 10 May 2006 to 9 May 2009.

2. The complainant's performance was rated "very good" for 2005 and 2006. According to his performance appraisal report of

January 2008, his performance was rated “average”. This appraisal set new objectives for him and established a system of weekly meetings to monitor his progress. In September the complainant had a “6 month [objectives] review” meeting. The review was not graded, but the complainant’s supervisors warned him that he was not meeting most of his objectives and that his performance was not of sufficient quality to warrant a full-term contract extension. At a further progress monitoring meeting in January 2009, the complainant’s immediate supervisors, Ms A. N. and Mr J. L., warned the complainant that his performance was not satisfactory.

3. In his appraisal of February 2009 the complainant’s performance was rated as “poor”. The complainant’s immediate supervisors signed the performance appraisal report on 11 March and his second-level supervisor signed it on 17 March. The complainant signed the report on 27 March stating that he would use his “right to comment without prejudice” and that “[he would] submit [his] comments soon”. On 30 March the complainant’s responsible Director sent a recommendation to the Registrar that his contract should not be extended.

4. On 9 April 2009 the Registrar wrote to the complainant confirming that the ICC would allow his contract to expire on 9 May. On the same day the complainant wrote to Mr J. L. expressing his surprise that his performance appraisal report had been forwarded to the Registrar without his comments. On 28 April he asked the Registrar to review her decision. He alleged that his supervisors failed, in violation of the Staff Rules, to discuss his appraisal for 2009 with him; that in violation of the Staff Rules they did not allow him to attach his own comments to the report; that his ill health was not taken into account; and that the performance appraisal process was vitiated by personal prejudice. The Registrar responded on 19 May confirming her earlier decision “not to renew [the complainant’s] contract”. She stated that the performance appraisal was conducted in accordance with proper procedure and that the complainant’s supervisors had

taken his illness into account. Accordingly, there was no basis to review the earlier decision.

5. The complainant appealed the Registrar's decision to the Appeals Board. In its report of 15 September 2009, the Board rejected the majority of the complainant's submissions. However, it observed that the decision not to extend his contract was procedurally flawed due to the fact that the recommendation and the confirmation of the non-extension of the contract were issued before the complainant had provided his comments on the appraisal. The Board observed that the absence of the rebuttal procedure at the ICC could not deprive a staff member of his or her right to make observations and comments. As well, the Board concluded that the non-extension decision was procedurally flawed due to the lack of a rebuttal process. It further concluded that it was beyond its mandate to consider questions of unsatisfactory service or unsuitability. The Board recommended a reconsideration of the decision not to renew the complainant's contract after he had been given an opportunity to present his comments in the context of a rebuttal panel similar to the performance rebuttal panels then being contemplated by the ICC.

6. On 12 October 2009 the Registrar advised the complainant that she rejected the Board's conclusion that the process was procedurally flawed due to the absence of a rebuttal process and the recommendation flowing from this conclusion. However, she gave the complainant an "opportunity to present further comments regarding the appraisal of [his] performance for the period 23 February 2008 – 23 February 2009, after which [his] pleas, as stated in paragraph 17(b) and 17(d) of the [Appeal Board's] report, will be reconsidered". The Registrar also noted that this communication constituted her "final decision" on the appeal and drew the complainant's attention to his right of appeal of a final decision to the Tribunal.

7. On 18 December 2009 the complainant submitted his comments. In her letter of 18 January 2010 to the complainant the

Registrar reviewed the contents of her October 2009 communication and stated:

“Having considered your additional comments, I re-confirm that proper procedures were followed in appraising you and that there is no basis for me to reconsider my decision. The decision not to renew your contract is hereby re-confirmed.

Please construe this letter as confirmation of my final decision communicated to you on 12 October 2009.”

8. At this point, it is important to note that the complainant impugns before the Tribunal the decision of 12 October 2009. The central issue in this complaint is whether the decision not to extend the complainant’s appointment is tainted by procedural error.

9. The Tribunal’s case law establishes that a decision not to renew an official’s appointment for unsatisfactory service must be grounded on a consideration of the official’s appraisal reports. Additionally, an international organisation must comply with its own procedures in relation to performance appraisals (see, for example, Judgment 2850, under 10).

10. The Performance Appraisal Guidelines provide that, following a performance appraisal meeting between the staff member and his or her immediate supervisor, the supervisor records the output of the meeting on the performance appraisal report, signs it and forwards it to the second-level supervisor. The latter reviews and signs the report which is then sent to the staff member for signature and any comments the individual wishes to make.

11. The ICC submits that the complainant’s allegations of procedural irregularity are due to his failure to follow up on his stated intentions. It stresses that the “[f]inalization of performance appraisal process cannot be held hostage by a staff member’s unreasonable and unjustified delays in providing comments after signing the [performance appraisal report]”. The Court notes that, notwithstanding that his contract was due to expire on 9 May 2009, he had not submitted his comments by 9 April when the Registrar made her initial decision.

It adds that the complainant's failure to act in a timely fashion can only be viewed as an attempt to frustrate the performance appraisal process. In support of this position, the ICC points to other instances of tardiness on the complainant's part.

12. The fact that historically the complainant did not respond in a timely manner and that he had not responded by 9 April are irrelevant considerations. It remains that within three days of the complainant signing the performance appraisal report and indicating that he would provide his comments soon the process of the non-extension of his appointment was initiated. The Tribunal accepts that attempts to frustrate the appraisal process cannot be permitted. However, in circumstances such as these where non-extension is at stake, at a minimum the complainant should have been given a deadline to present his comments before any action was initiated.

13. The question remains, however, whether this procedural defect was overtaken by subsequent matters. While the Appeals Board was correct in stating that the recommendation and the 9 April confirmation of the non-extension of the complainant's contract were made before the complainant had an opportunity to present his comments, the Board overlooked the fact that he submitted his comments at the time of his request for a review of the Registrar's decision in April 2009. Although the comments were submitted as part of an alternative argument, the Registrar did have the benefit of those comments at the time of her review.

14. The Board also erred in concluding that the non-extension decision was procedurally flawed due to the lack of a rebuttal process. As the ICC points out, the complainant did not request a rebuttal process or complain about the absence of such a mechanism. His claim was directed at the Court's failure to follow its own guidelines for appraising performance.

15. As to the impugned decision, it appears from its content that the Registrar was aware of the comments submitted at the time

of the earlier review but decided to give the complainant an opportunity to “present further comments”. However, it is difficult to reconcile this additional opportunity to comment with the fact that the letter states that it is the final decision and may be appealed to the Tribunal. A meaningful opportunity to provide additional comments is inconsistent with the finality of the decision. This said, the Tribunal is satisfied that the complainant, in fact, provided his comments on the performance appraisal prior to the Registrar’s decisions of May and October 2009.

16. The complainant raises additional issues that for the sake of completeness require some brief observations. The complainant alleges that his supervisors did not take his ill health into consideration in his 2009 performance appraisal. This allegation is without merit. This performance appraisal clearly shows that his illness was taken into consideration. The complainant contends that the Appeals Board erred in not staying the non-extension of his contract process. As the complainant did not request the stay in accordance with the Staff Rules, no error was committed. Lastly, the complainant alleges that the entire process leading to his performance appraisal of 2009 was tainted by prejudice on the part of his immediate supervisor. He states that she scheduled a meeting in April 2008 without notice to Mr J. L. He claims that she ignored his questions on the propriety of this action and that, subsequently, relations between the two of them were strained. While recognising the difficulties inherent in proving a claim of prejudice, in this case, the complainant has failed to present any evidence in support of his allegation. The claim, in the Tribunal’s view, is speculative.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 4 May 2012, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet