

K.
v.
FAO

126th Session

Judgment No. 4010

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. A. K. against the Food and Agriculture Organization of the United Nations (FAO) on 28 July 2014 and corrected on 16 August 2014, the FAO's reply of 16 January 2015, the complainant's rejoinder of 30 March, corrected on 10 April, and the FAO's surrejoinder of 16 July 2015;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges his performance appraisals for 2012 and the decisions to renew his fixed-term appointment for a period of six months rather than one year and, subsequently, not to renew it beyond its expiry on 31 December 2013.

The complainant was appointed on 1 January 2009 as a Forestry Officer, at grade P-3, under a three-year fixed-term appointment, which was subsequently extended for one year from 1 January to 31 December 2012.

On 5 December 2012 the complainant's supervisor and first reporting officer completed the complainant's Performance Appraisal and Achievement Record (PAAR) for the period from 1 January to

31 December 2012 noting, inter alia, that overall the complainant's performance in 2012 "ha[d] not been satisfactory, mainly because of weaknesses in competencies, which ha[d] negatively affected his work output". He added that during the forthcoming months the complainant's activities and performance would be closely monitored to assess whether those weaknesses had been addressed. The supervisor gave the complainant the overall rating of "Unsatisfactory – performance consistently well below expected standards for the grade".

Soon after, by a memorandum of 13 December 2012, the complainant was informed that in view of his "unsatisfactory" PAAR rating, his appointment would be extended for six months only, i.e. to 30 June 2013. The complainant added his comments to his PAAR on 14 December 2012. He disagreed with the rating given by his supervisor and pointed out that his performance had been rated as unsatisfactory "based on some alleged sudden weaknesses in competencies", despite the fact that he had achieved all his work plan objectives. In a document attached to the PAAR form, he provided detailed comments to substantiate his position. The Director of the Division and second reporting officer signed the complainant's PAAR on 17 December 2012, indicating that the complainant was having "problems to achieve concrete results in the area of [his] work and expertise".

On 4 February 2013 the complainant's supervisor completed the complainant's Performance Evaluation and Management System (PEMS) review giving him the following Overall Ratings: Workplan "1 – Did Not Achieve"; Developmental "3 – Fully Achieved"; Competencies "2 – Developing Proficiency". The Multiraters' comments (i.e. colleagues' additional feedback) on the complainant's performance were positive and their average rating for Workplan, Objectives and Competencies was "3 – Fully Achieved".

The complainant filed an appeal with the Director-General on 11 March 2013 contesting his PAAR and PEMS review and the decision to extend his appointment for only six months. This appeal was dismissed and on 28 May 2013 he filed an appeal with the Appeals Committee. In an email of 6 June 2013, his second-level supervisor informed him that his appointment would be extended for a further

six months, i.e. to 31 December 2013, and that the appraisal of his performance over those six months would enable the Administration to determine the appropriate action to be taken upon the expiry of his appointment. By a memorandum of 24 December 2013, the Director of the Office of Human Resources informed the complainant that his appointment would not be extended beyond its expiry date on 31 December 2013 and that he would be paid compensation in lieu of notice.

The Appeals Committee submitted its report to the Director-General on 21 March 2014. It recommended that the appeal be dismissed and it also made some general recommendations regarding the manner in which the Organization ought to conduct the PEMS review process, in particular the PEMS Mid-Year Progress Review.

By a letter of 30 April 2014, the Director-General informed the complainant of his decision to dismiss his appeal in its entirety in accordance with the Appeals Committee's recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the Director-General's decision rejecting his appeal and to order the FAO to revise the ratings of his PAAR and PEMS for 2012 to "fully satisfactory" or, alternatively, to draw up a new performance appraisal for 2012. He also requests that the FAO be ordered to extend his contract until the foregoing claims have been satisfied, and that it then be ordered to make a new decision regarding the extension of his contract. He asks to be reinstated and to be paid the salary and allowances that he would have received in his former post from 1 January 2014 until the date of his reinstatement. He also claims moral damages and costs.

The FAO asks the Tribunal to dismiss the complaint as partly irreceivable for failure to exhaust internal remedies and unfounded in its entirety.

CONSIDERATIONS

1. The complainant commenced employment with the FAO in January 2009 as a Forestry Officer, at grade P-3, under a three-year fixed-term appointment. In June 2010 the complainant's appointment was confirmed after he had served a probationary period of one year, which was extended by a further six months. His appointment was later extended from 1 January to 31 December 2012, and extended again twice by two further six-month periods concluding on 31 December 2013. By that time, a decision had been made not to renew his appointment and, accordingly, he separated from the FAO on that date.

2. It is desirable, at the outset, to identify the subject matter of this complaint. That is because the FAO contests the receivability of the complaint insofar as the complainant's pleas appear to challenge the decision not to renew his appointment. This is the import of paragraph 20 of the complainant's rejoinder. In 2012 the complainant's performance was the subject of review and assessment. As a matter of fact, two documents were generated recording this assessment. The first was a PAAR completed by the complainant's supervisor (first reporting officer) and the Director of the Division in which he worked (second reporting officer) in December 2012. The second was a PEMS completed in February 2013.

3. On 11 March 2013 the complainant wrote to the Director-General appealing against what were described in that letter as "three related decisions". The first was identified as the 2012 PAAR, the second as the decision to extend his contract for only six months to 30 June 2013, and the third was the 2012 PEMS. The decision to extend the complainant's contract by six months was communicated to him in a memorandum of 13 December 2012. The complainant's appeal to the Director-General was dismissed by the Assistant Director-General by a letter dated 25 April 2013 in which, relevantly, the Assistant Director-General identified the subject matter of the appeal as including "the decision of the Organization to extend [the complainant's] fixed-term appointment for a period of six months, from 1 January to 30 June

2013". In his statement of appeal filed with the Appeals Committee on 28 May 2013, the complainant indicated that "[t]he present appeal seeks to reverse three related decisions", namely the three decisions identified in his 11 March 2013 appeal to the Director-General. This was the scope of the appeal as understood by the Appeals Committee. So much is apparent from the first paragraph of the Committee's report of 21 March 2014.

4. However the decision not to renew the complainant's appointment which resulted, directly, in his separation from the FAO on 31 December 2013 was communicated to the complainant on 24 December 2013. It was a decision which postdated the decisions that were the subject of the appeal just discussed. Indeed, the final and operative decision not to extend the complainant's contract resulting in his separation from service was the subject of separate appeal proceedings and ultimately a decision of the Tribunal in Judgment 3799 dismissing the complainant's second complaint as time-barred. Thus, the FAO's plea that these proceedings do not raise for consideration the lawfulness of the decision not to extend the complainant's contract beyond 31 December 2013, which led, directly, to his separation from the FAO, is well founded and, to the extent that the complainant seeks to impugn that decision, his complaint is irreceivable. The FAO also raises an issue about the receivability of the complainant's claim for moral damages but, for reasons which will emerge shortly, it is unnecessary to address that question, though it may be doubted that the FAO's contention is well founded (see, for example, Judgment 3080, consideration 25).

5. A convenient starting point in the Tribunal's consideration of the complainant's performance appraisals for 2012 is to identify the principles which are applicable. The principles are well settled. The Tribunal recognises that "assessment of an employee's merit during a specified period involves a value judgement; for this reason, the Tribunal must recognise the discretionary authority of the bodies responsible for conducting such an assessment" (see Judgment 3945, consideration 7). The Tribunal will set aside a report only if there is a

formal or procedural flaw, a mistake of fact or law, or neglect of some material fact, or misuse of authority or an obviously wrong inference drawn from the evidence (see, for example, Judgments 3842, consideration 7, 3692, consideration 8, 3378, consideration 6, 3006, consideration 7, and 2834, consideration 7).

6. In addition, it should be noted at the outset that the complainant's appeal against, amongst other things, his 2012 PAAR and his 2012 PEMS resulted in a unanimous report of 21 March 2014 from the Appeals Committee. In its report the Committee made, for the most part, general recommendations regarding the PEMS review. Two concerned the Mid-Year Progress Review which, while not mandatory, had been undertaken in the complainant's 2012 PEMS but not completed "mid-year" and only completed at the end of September, or, as the complainant argues, early October. The Committee recommended that the Mid-Year Progress Review should be made mandatory and should be completed by 30 June. It also recommended that the PEMS process would be improved by implementing a more formalised procedure for the selection of Multiraters. However, the only recommendation dealing with the substance of the complainant's claims was that those claims and requests be otherwise dismissed.

7. The Appeals Committee's report in the present matter, as it was in Judgment 3969, consideration 11, is a mostly balanced and thoughtful analysis of the issues raised in the internal appeal and, on its analysis, the conclusions and recommendations were justified and rational. It is a report of a character which engages the principle recently discussed by the Tribunal in Judgment 3608, consideration 7, that the report warrants "considerable deference" (see also, for example, Judgments 3400, consideration 6, and 2295, consideration 10). The complainant contends that the Appeals Committee viewed its role too narrowly in the sense that it applied the principles this Tribunal applies in the judicial review of an administrative decision. He argues the Appeals Committee's role is broader (citing Judgments 3125 and 3077). This proposition is correct in relation to internal appeal bodies generally. However, in the present case, Staff Rule 303.1.12 appears to circumscribe the role of the Appeals Committee when addressing questions of

efficiency. In any event, the Appeals Committee did review the contentions and material advanced by the complainant and rejected them.

8. The pleas of the complainant in his brief repeat much of the argumentation in his appeal. He argues that the three decisions which form the subject of the complaint (the 2012 PAAR, the decision to extend his contract by only six months to 30 June 2013 and the 2012 PEMS) “flow from the [2012] PAAR”. The complainant argues that the PAAR was based on serious factual errors concerning his activities in 2012. He also argues there were serious procedural flaws in the 2012 PEMS. The complainant goes on to detail the assessment in the 2012 PAAR which had been undertaken of seven of his activities reviewed in the section on “performance and achievements” entailing criticisms by his supervisor, and argues that the criticisms were not factually correct. However, the complainant’s analysis does not reveal any factual errors that might have had a material effect on the ultimate conclusions about his performance. While the analysis reflects the complainant’s view, understandably favourable to him, of how he had performed in relation to those seven activities, it does not reveal an error of the type that would warrant intervention by the Tribunal having regard to the principles discussed in consideration 5 above. The complainant’s supervisor was entitled to form the view he had of the complainant’s performance and it was not flawed by any material factual error. It was a view based on evaluation and assessment of available material. While the complainant disagrees with that evaluation and assessment, it was within the supervisor’s discretionary power to make that evaluation and assessment, and there is no basis established by the complainant for reviewing the exercise of that power and for setting aside the performance appraisal which was, in part, based on it.

9. Similarly, the complainant has not established any procedural flaw in the 2012 PEMS nor that it manifests bias, as the complainant alleges, on the part of his supervisor. The complainant bears the burden of establishing bias and has failed to do so (see, for example, Judgment 3753, consideration 13).

10. The complaint will be dismissed as unfounded.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 16 May 2018, Mr Giuseppe Barbagallo, 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 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ