

H.
v.
WTO

128th Session

Judgment No. 4144

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr K. H. against the World Trade Organization (WTO) on 14 May 2018, the WTO's reply of 23 July and the letter of 17 September 2018 by which the counsel of the complainant informed the Registrar of the Tribunal that the complainant did not wish to file a rejoinder;

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:

The complainant challenges the decision not to revise the "partly satisfactory" overall rating in his performance evaluation report (PER).

At the material time, the complainant was employed under a fixed-term contract. In his PER for 2016, the complainant's overall performance was rated as "partly satisfactory". His first level supervisor considered that while he generally met all requirements of his post, accomplished the daily tasks assigned to him and willingly shared his knowledge with colleagues, he had also shown shortcomings with regard to his behavioural skills "in the area of service oriented mindset, tactful and good communication, teamwork, professional attitude, flexibility and adaptability". This had led to several incidents, some of which were briefly summarised in the PER. On 1 May 2017 the

complainant's second-line supervisor endorsed the overall assessment made by the first level supervisor. In June 2017, in his final comments on the PER, the complainant expressed his disagreement with this assessment and denied having shown a negative attitude towards his colleagues. He nevertheless expressed his willingness to attend courses or any other training which would be deemed advisable.

On 12 August 2017 the complainant submitted a request for review to the Director-General seeking a change of his 2016 PER overall rating from "partly satisfactory" to "fully satisfactory". He argued that the rules governing performance evaluation had not been followed and that his evaluation was both unfair and undeserved. The Director-General rejected his request on 21 August 2017 asserting that he was not in a position to question the assessment made by his first level supervisor. The complainant was further informed that a Performance Improvement Plan (PIP) was to be put in place pursuant to Administrative Memorandum No. 967 of 23 February 2010 on performance management, and that the Human Resources Division (HRD) had been instructed to assist him in the identification of his training needs.

On 18 September 2017 the complainant filed an appeal with the Joint Appeals Board (JAB) against the decision of 21 August 2017, arguing, among other things, that the applicable policies, rules and regulations governing the PER process had not been followed. Without prejudice to his agreement to attend training or to be placed on a PIP, he requested that the 2016 PER overall rating be revised to "fully satisfactory".

In its report of 19 January 2018, the JAB found no evidence that the 2016 PER had been concluded in breach of the applicable legal framework. It recommended inter alia that the "partly satisfactory" overall rating be maintained and that any request for transfer by the complainant be considered favourably. By a memorandum dated 16 February 2018, which constitutes the impugned decision, the complainant was informed that the Director-General had decided to endorse the JAB's report and to maintain his decision of 21 August 2017.

The complainant asks the Tribunal to quash the impugned decision and to order the WTO to change the overall rating of his 2016 PER to “fully satisfactory” with full retroactive effect and to remove from his personnel records any evidence of the “partly satisfactory” rating. He seeks moral damages, as well as the full reimbursement of the costs incurred in bringing his appeal, with 5 per cent interest. He also claims such other redress as the Tribunal deems “necessary, just and fair”.

The WTO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant started working at the WTO under a short-term contract from 5 January to 31 August 2011 and then obtained a fixed-term appointment from 1 September 2011 onward. At the relevant time, he was working as a Registry Clerk at grade 3 in the WTO Languages, Documentation and Information Management Division (LDIMD). In the present complaint the complainant impugns the Director-General’s decision, communicated to him by memorandum dated 16 February 2018, insofar as it endorses the JAB’s report dated 19 January 2018 and maintains the decision not to revise his 2016 PER communicated to him on 21 August 2017. The memorandum of 16 February 2018 stated that the reasons for the impugned decision could be found in the Director-General’s 21 August 2017 reply to the complainant’s request for review, the Administration’s submissions before the JAB and the JAB’s report itself. It noted that a PIP had been implemented in order to assist the complainant in improving the aspects of his professional conduct which had led to his “partly satisfactory” evaluation. The memorandum also notified the complainant that, should he consider seeking other responsibilities in a different service, he could register for mobility and consult HRD on possible openings.

2. In its 19 January 2018 report, the JAB unanimously concluded that the 2016 PER was not flawed on procedural or substantive grounds, as alleged by the complainant, and that there was no evidence that the 2016 PER was not concluded in accordance with the applicable rules.

Therefore, it did not recommend that the Director-General should direct HRD to revise the complainant's 2016 PER. However, in its overall conclusions and recommendations, the JAB expressed concern regarding the emails the complainant had received from his new director on 25 July 2017, even though they were not the subject of the appeal. The JAB also criticized any stigmatization of staff members having recourse to internal grievance procedures, underlining that access to such procedures is a staff member's right. The JAB concluded by recommending that, "within the practical possibilities of the Secretariat, any request for transfer by the [complainant] be considered favourably".

3. The complainant bases his complaint on the following pleas:
- (a) the JAB erroneously limited its power of review to mirror the judicial power of review of the Tribunal;
 - (b) the complainant's first level supervisor's comments in the mid-term review did not mention any specific incidents of underperformance, interpersonal problems with colleagues or bad attitude on the part of the complainant;
 - (c) the Organization violated paragraph 21 of Administrative Memorandum No. 967 as he was not given a written advance warning that he would be receiving a less than satisfactory rating on his PER;
 - (d) there was no indication that the Deputy Director-General, acting as the complainant's second-line supervisor, had made his own assessment of the complainant's work or of the objectivity of the complainant's first level supervisor;
 - (e) the overall rating of "partly satisfactory" was not justified as the complainant completed his specific objectives and the comments of his first level supervisor were not specific enough to support that rating and to provide him with a sufficient basis to allow him to take actions to remedy his allegedly deficient performance;
 - (f) the complainant carried out tasks which were above his grade and which were not of a temporary or circumstantial nature;

- (g) the Director-General, in his 21 August 2017 rejection of the complainant's request for review, inappropriately mentioned elements unrelated to the complainant's 2016 PER, such as his 2014 PER and the complaint he had filed with the Office of Internal Oversight against his first level supervisor; and
- (h) the Organization violated Staff Rule 105.1 as there was no specific job description for his post.

4. It is convenient to deal with the issue under (a) at the outset, as this issue poses a threshold question. The plea is unfounded. The JAB stated that "in reviewing this case, [it] w[ould] use the same standard as the [Tribunal] would use, because all the elements that ha[d] led the [complainant] to claim that the decision [was] legally flawed [were] subject to judicial review by the [T]ribunal". The Tribunal observes that this quoted statement did not, in itself, exclude the JAB's power to take into account considerations of fairness and advisability in formulating its recommendations, as it in fact did. The JAB stated in its report that it may, in certain circumstances, also base its conclusions on equity in accordance with Article 17.2 of its Provisional Rules of Procedure. Moreover, as noted above, the JAB actually reviewed the appeal also on grounds of advisability. Indeed, in its overall conclusions and recommendations, it considered the emails the complainant had received from his new director on 25 July 2017, which were not the subject of the appeal, and recommended the complainant's transfer to another department of the Organization.

5. The plea under (b) regarding the lack of specific comments in the complainant's mid-term review informing him that he might receive a less than satisfactory rating is unfounded. As the JAB noted, "the rules governing the Performance Management do not require the mentioning of issues in mid-term review, or any particular documentation or written warning in order to find a ranking of ["partly satisfactory"] for a particular evaluation period". The mid-year review, which, in accordance with paragraph 16 of Administrative Memorandum No. 967, "is mandatory in cases of underperformance by a staff member", took place in July 2016. The complainant argues that the first level supervisor's comments

in the mid-term review did not give any indication of his underperformance, interpersonal problems with colleagues or bad attitude. The Tribunal notes that the complainant, in his internal appeal against the Director-General's reply of 21 August 2017 to his request for review of his 2016 PER, "concede[d] that some issues were raised in face-to-face discussions [even if] [his] supervisor did not document that these discussions took place". Moreover, the complainant's first level supervisor, in his responses to the questions of the JAB, provided a detailed list of incidents that had occurred in 2016. He explained that "[m]ost of the incidents throughout 2016 were dealt through oral discussion and not documented" and that some had occurred in the first half of 2016. Through these frequent discussions, the complainant was informed about the unsatisfactory aspects of his service. The Tribunal is satisfied with the oral information given to the complainant for his improper behaviour towards his colleagues or his supervisors throughout the mid-term review, i.e. the first six months of the performance evaluation 2016 cycle.

6. The plea under (c), which is connected to the plea examined in consideration 5 above, is also unfounded. The complainant argues that "the Director-General acknowledge[d] that 'a performance improvement plan [had been put] in place in order to assist [the complainant] in improving the aspects of [his] professional conduct which led to [his "partly satisfactory" evaluation].' However, the Director-General ignored the glaring violation of Administrative Memorandum No. 967. If indeed there [had been] an issue of professional conduct on the part of the [c]omplainant as is alleged, then in keeping with an effective performance management process, there should have been a timely identification and [an] advance warning in writing of the shortcomings, in compliance with the Memorandum and [the S]taff rules, to allow the [c]omplainant the opportunity to improve his performance and to avoid surprises at the end of the evaluation period, as regrettably occurred in the present case." As noted above in consideration 5 above, the JAB found that the provisions governing the performance management do not require a written warning for a "partly satisfactory" ranking for a PER. The relevant provisions read as follows:

Staff Rule 105.1

“Performance evaluation

- (a) Performance shall be evaluated on the basis of the duties and responsibilities as set forth in the job description, the tasks performed, the professional conduct of the staff member and the staff member’s potential to assume other responsibilities.
- (b) The staff member and the supervisor shall maintain a continuing dialogue with respect to the staff member’s performance. If necessary, the staff member and the supervisor shall identify in writing the areas where performance is less than satisfactory and the actions to be taken to improve performance.”

Administrative Memorandum No. 967

“18 [...] If the overall performance is ‘Partly Satisfactory (2)’ or ‘Unsatisfactory (1)’, a performance improvement plan must be put in place. [...]”

Formal Performance Improvement Procedure

Step 1: Face-to-face discussion

20. On any occasion in the course of the performance evaluation cycle where performance is below the required standard, the supervisor should draw this to the attention of the staff member, clearly explaining in what way the performance has failed to meet expectations, indicate the improvement needed, seek the staff member’s comments, seek agreement on appropriate solutions and discuss any training support needed where applicable. Although this is a face-to-face discussion, the supervisor or director should make a note of the content and date of the discussion.

Step 2: Advance warning

21. Where, after the face-to-face discussion, performance is again or continues to be below the required standard, the supervisor should again raise the issue with the staff member, refer to the face-to-face discussion, further explain carefully the problems, specify the improvement needed, seek the staff member’s comments, identify appropriate solutions and discuss any training needed if applicable. The supervisor shall clarify that this constitutes an advance warning. The advance warning shall be recorded in the form of a written note, separate from the PER form. A copy of the advance warning note is provided to the staff member who should acknowledge receipt. It will be retained by the supervisor and the director of the Division concerned and will be also be sent to HRD. At this point, the staff member should be given a timeframe in which to improve his/her performance. Should the supervisor confirm improvement in the staff member’s performance, the note will be removed from the staff member’s official status file and destroyed.

Step 3: First formal warning [...]

22. If underperformance persists after the advance warning, the supervisor will issue a first formal warning, outlining in sufficient detail the performance gaps to be addressed. The staff member's comments should also be recorded in a note to file. The supervisor or director establishes a performance improvement plan [...] in consultation with the staff member, and assisted by the Human Resources Division as appropriate, with specific and measurable goals and targets for improvement over a defined review period. [...]

[...]

Step 4: Second formal warning

24. Should there be insufficient improvement in the staff member's performance after the first formal warning, a second formal warning will be issued by the supervisor. The performance improvement plan will be reviewed, and clear measurable targets must be set with specified timeframes. [...]

Step 5: Administrative decisions

25. Should there be insufficient improvement in performance after the second formal warning, the Human Resources Division will meet with the supervisor and director and the staff member concerned to determine the administrative measures to be taken.

[...]"

Annex 1 to Administrative Memorandum No. 967 under the title "Formal Review Procedure for Staff Members with 'Partly Satisfactory' or 'Unsatisfactory' Performance" provides that the review procedure is a four-staged procedure which lasts normally one year and that each of the three warnings (advance, first formal and second formal) which precede the administrative decision lasts normally four months. Even if, according to paragraph 18 of Administrative Memorandum No. 967, the "partly satisfactory" or "unsatisfactory" overall performance ratings trigger a PIP, in light of the cited provisions, the performance evaluation and the PIP stem from two separate proceedings. The title of Annex 1 and the Section entitled "Formal Performance Improvement Procedure", containing paragraphs 20 to 26 of the Administrative Memorandum No. 967, clarify that the "partly satisfactory" or "unsatisfactory" overall performance ratings, as "performance [...] below the required standard" referred to in paragraph 21 of Administrative Memorandum No. 967, trigger the PIP. Accordingly, the "advance warning" and the two

“formal warnings” are steps of the PIP, which is distinct and separate from the performance evaluation process. The separation of the two proceedings is confirmed by the duration of four months of each warning of the PIP, which is not consistent with the timing of the performance evaluation cycle. Accordingly, as far as it is relevant here, the provision referred to in paragraph 21 of Administrative Memorandum No. 967, regarding the “advance warning” which must be recorded in the form of a written note, is exclusively a step leading to the establishment of the PIP. As such, it is not a precondition for a final evaluation of the annual performance as “partly satisfactory” or “unsatisfactory”. This does not alter the fact that, whenever possible and useful, a written warning should be given before a non-positive performance assessment.

7. The alleged absence of review of the complainant’s PER by the second-line supervisor (the plea under (d)) is unfounded. The complainant did not provide any evidence supporting his plea that the Deputy Director-General, acting as his second-line supervisor, did not discharge properly his duty of making his own assessment of the complainant’s work or of the objectivity of the complainant’s first level supervisor in endorsing the 2016 PER.

8. The pleas under (e) and (f) are unfounded. The complainant argues that five of his six agreed work objectives were rated “fully satisfactory” and only one was rated “partly satisfactory”; that the comments of his first level supervisor were not specific enough and took place before the mid-term review; that he had carried out tasks above his grade, which were not of a temporary or circumstantial nature. Therefore, the complainant contends that the contested “partly satisfactory” overall rating attributed to his 2016 performance was unjustified. The Tribunal observes that, as the JAB correctly noted in its report, the PER procedure includes not only the evaluation of the work objectives, but also of the personal skills and competencies (technical skills). Four out of twelve individual performance categories (work objectives and personal skills) were ranked “partly satisfactory”. As regards the allegation that the contested incidents were not specific

enough and took place before the mid-term review, the Tribunal points out that the complainant's first level supervisor, in his responses to the JAB's questions, explained that most of the incidents were dealt through oral discussions and gave a list of specific incidents which occurred throughout 2016. Regarding the complainant's allegations that he had carried out tasks above his grade (the plea under (f)), the Tribunal observes that the complainant himself stated that he carried out additional tasks above his grade only from October 2015 to May 2016. Staff Rule 106.5(b) provides that "[s]taff members shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher-level posts". In conclusion, as regards the pleas under (e) and (f), the Tribunal considers that those pleas challenge the substance of the evaluation, but they do not show that the contested assessment involved any reviewable error. The complainant merely proposes different evaluation criteria. The Tribunal must ascertain whether the marks given to the employee have been worked out in full conformity with the rules, but it cannot substitute its own opinion for that of the bodies responsible for assessing the qualities, performance and conduct of the person concerned. The Tribunal will therefore interfere in this field only if the decision was taken without authority, if it was based on an error of law or fact, a material fact was overlooked, or a plainly wrong conclusion was drawn from the facts, or if it was taken in breach of a rule of form or procedure, or if there was abuse of authority (see Judgment 3268, consideration 9, and the case law cited therein).

9. The plea under (g) is also unfounded. The fact that the Director-General mentioned elements unrelated to the complainant's 2016 PER does not have any bearing on the decision which was taken on 21 August 2017. The Tribunal observes that the alleged elements, unrelated to the 2016 evaluation period, were useful to provide the context for the decision at issue, particularly regarding the fact that issues similar to those reported in the complainant's 2016 PER had already arisen in the past. The reference to the 10 August memorandum of the Director of LDIMD, as noted in the 21 August 2017 decision, was an invitation to the complainant to change his "attitude vis-à-vis

[his] immediate colleagues”. In conclusion, these contested elements aim at correcting the complainant’s behaviour and do not invalidate the 2016 PER.

10. Finally, the Tribunal deals with the plea under (h) according to which the complainant’s 2016 PER was flawed as he did not have a specific job description on the basis of which his performance could be assessed, as provided for in Staff Rule 105.1. The Tribunal acknowledges that the Organization should have a specific job description for each post and that the performance should be evaluated on the basis of the duties and responsibilities as set forth in the job description, but it also notes that a general job classification standard, approved by the Director-General, exists. Indeed, Staff Rule 107.3 provides that “[t]he duties and responsibilities of each post in grades 1-12 inclusive shall be evaluated on the basis of job classification standards approved by the Director-General”. The complainant’s 2016 performance was evaluated based on the job classification standard for his post and grade and on the work objectives indicated by the supervisor. Moreover his underperformance, relating mostly to his interactions with his colleagues and supervisors, was not linked to the performance of specific duties and responsibilities. Accordingly, the JAB’s finding that the absence of a comprehensive job description and/or specific benchmarks in this case does not constitute a procedural flaw affecting the lawfulness of the 2016 PER is correct.

11. The complainant requests an oral hearing. The Tribunal however notes that the parties have presented ample submissions and documents to permit the Tribunal to be properly informed of their arguments and the evidence. The request for an oral hearing is therefore refused.

12. In light of the above considerations, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ