

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.
v.
ICGEB

130th Session

Judgment No. 4289

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. E. S. against the International Centre for Genetic Engineering and Biotechnology (ICGEB) on 21 August 2018 and corrected on 22 September, the ICGEB's reply of 8 November, corrected on 14 November 2018, the complainant's rejoinder of 25 February 2019 and the ICGEB's surrejoinder of 24 April 2019;

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 the decision not to renew her appointment for unsatisfactory performance and the decision to reject her harassment complaint.

At the material time, the complainant, who held a post at grade G5, was employed under a fixed-term appointment which had been renewed several times and which was due to expire on 31 December 2016. In her performance appraisal report for 2016, her supervisor gave her the overall rating of "Partially meets expectations". On 15 November 2016 the complainant made her final comments and signed the document.

On 30 November 2016 she was informed that her appointment would be renewed for six months, until 30 June 2017, and that she would be placed on a Performance Improvement Plan (PIP) in order to address the gap in her performance and to give her the opportunity to improve.

On 26 January 2017 the complainant signed her PIP providing for four monthly follow-up discussions. The third one took place on 14 April. On that day, the Chief, Legal and Administration sent her a memorandum stating that, as indicated during the meeting, she had not demonstrated improvement and her performance was still not satisfactory and that her appointment would not be renewed. Nevertheless she offered the complainant three options: the first one involved her separation on 30 June 2017 and the two others involved an “extension” of the appointment for a further six months. The complainant did not take up any of these options. Accordingly, her appointment was terminated on 30 June 2017.

On 8 June 2017 the complainant requested the Director-General to review the decision not to renew her appointment. She also attached to that request a harassment complaint against her supervisor, Ms F. On 20 July an Advisory Panel, which was responsible for assessing whether the complainant’s allegations warranted a full formal investigation, recommended that no further investigation be conducted. In its opinion, the allegations were not sufficiently grounded and most of them derived from a lack of communication.

On 8 August 2017 the Director-General informed the complainant that he had decided to confirm the decision not to renew her appointment and that he considered that her allegations of harassment were unfounded, as the alleged incidents appeared to be related to normal workplace evaluation and disagreements.

On 6 September 2017 the complainant submitted an appeal to the Joint Appeals Board (JAB). She contended that the decision not to renew her appointment was tainted by an error of fact, that it was contrary to the applicable rules and that it breached the principle of good faith and mutual trust. Regarding her harassment complaint, she maintained that the non-renewal decision was the culmination of the harassment she suffered from her supervisor. She sought inter alia the setting aside of the 8 August 2017 decision, her reinstatement or alternatively the payment, with interest, of the equivalent of one year’s

salary, emoluments and benefits and the payment of compensation. At all events, she claimed moral damages and costs.

In its report of 7 May 2018, the JAB found that the complainant's technical abilities were inadequate for the duties required and that she had failed to make use of the ample opportunities provided to rectify her deficiencies, of which she was repeatedly made aware over an extended period of time. It concluded that the decision not to renew her appointment was justified. It also found that, whilst the relationship with her supervisor had deteriorated due to her inability to perform the required tasks of her post satisfactorily, and although communications from both parties could have been better, there was no objective evidence to support her harassment complaint.

On 5 June 2018 the Director-General informed the complainant that he had decided to accept the findings of the JAB and that her appeal was therefore dismissed. That is the impugned decision.

The complainant requests the Tribunal to set aside this decision and to order her reinstatement. Alternatively, she claims material damages. She also seeks moral and consequential damages, costs and any other relief that the Tribunal considers just and fair.

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

CONSIDERATIONS

1. The complainant commenced employment with the ICGEB in January 2003. She was employed under a series of fixed-term contracts, the most recent of which was a six-month fixed-term appointment beginning on 1 January 2017. Thus, in the absence of a further fixed-term appointment, her employment was to conclude on 30 June 2017. It in fact did.

2. Beginning in 2003, the complainant was employed as the Personal Assistant to the Director, Administration and External Relations, Mr R. She remained in that position (though it was later reclassified and, in addition, the complainant was promoted to a higher grade) until Mr R.'s retirement on 30 November 2015. A little earlier, in October 2015, a consultancy firm was commissioned to review the structure of the ICGEB. This is relevant in two respects. Firstly, the

position held by Mr R. was, in due course, redesigned and some of the functions of that position devolved to the Director-General. Secondly, the consultancy firm undertook a review of the performance of staff or some of them in the positions they then held. In this context, the complainant's performance was reviewed between April and July 2016, and an assessment undertaken on 31 August 2016 and on 19 September 2016 was critical of her performance. After Mr R.'s retirement, the newly redesigned position replacing the position he had held was designated Chief, Legal and Administration. This was the position to which Ms F. was appointed effective 1 December 2015. The complainant then became Ms F.'s personal assistant though Ms F. viewed the complainant's position as having a broader range of duties than simply that of a secretarial role.

3. The complainant's 2016 performance appraisal report was finalised in late October 2016 through to the end of November (signed by the complainant on 15 November 2016) and in it Ms F., as the first reporting officer, was critical of some of the work done by the complainant and her overall performance was rated "Partially meets expectations". However Ms F. recommended an extension of the complainant's then current appointment. On 30 November 2016 the complainant was advised by a memorandum from the Head, Personnel Unit that she would be offered (an offer she accepted) a six-month (1 January 2017 to 30 June 2017) fixed-term appointment at 50% status with a new job description. The complainant was also informed that, in accordance with the Human Resources Management Framework, "in order to address the gap in [her] work performance and allow [her] the opportunity to demonstrate improvement and commitment in [her] performance a Performance Improvement Plan [PIP] w[ould] be developed". That Framework was set out in Administrative Instruction No. 013 from the Director-General promulgated on 4 October 2016.

4. The complainant met with Ms F. and others on 24, 26 and 27 January 2017 and the terms of the PIP were agreed. The PIP specified what needed to be improved in the complainant's performance and that there would be "close monitoring on a monthly basis". Dates were specified for follow-up discussions, namely 23 February, 23 March, 14 April and 23 May 2017. The notes of one of the January meetings record that the complainant was told by Ms F. that "in case of full

improvement a one-year extension of the contract would be considered, while in case of partial improvement a further six months extension supported by PIP would be granted”.

5. The first two scheduled meetings took place and while the complainant criticises in her pleas the feedback she received, the meetings were, broadly described, in accordance with Administrative Instruction No. 013. While the third of the four planned follow-up meetings took place on 14 April 2017, it was not to provide, in accordance with the PIP, feedback on her performance. Rather it was to inform the complainant that her appointment would not be renewed beyond 30 June 2017. Later that day she received a memorandum formally advising her that her appointment would not be renewed at its expiry. The memorandum noted that at the meeting that morning and on earlier occasions she had been told she was “not showing the desired improvements” and that her performance remained not satisfactory. The complainant was offered three options, two of which involved an extension of the contract for a further six months. The complainant did not take up any of these options though, in substance, the first option, that is separation on 30 June 2017, was implemented.

6. The complainant unsuccessfully sought a review of this decision and attached to her request for review a complaint of harassment against Ms F. She lodged an internal appeal and the Joint Appeals Board reported on 7 May 2018 recommending that the appeal be dismissed. On 5 June 2018, the Director-General accepted the recommendation and dismissed the appeal. This is the decision impugned in these proceedings.

7. A convenient starting point in examining the complainant’s pleas is to consider whether the decision not to renew the complainant’s appointment was attended by legal error. It was. The Tribunal’s case law has consistently stated that the decision not to renew a fixed-term contract is a discretionary decision, but if the decision is based on poor performance, the assessment of that performance has to be made in accordance with the rules established for that purpose. As the Tribunal observed in Judgment 2991, consideration 13:

“It is a general principle of international civil service law that there must be a valid reason for any decision not to renew a fixed-term contract. If the reason given is the unsatisfactory nature of the performance of the staff

member concerned, who is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service, the organisation must base its decision on an assessment of that person's work carried out in compliance with previously established rules (see, for example, Judgments 1911, under 6, and 2414, under 23)."

Allied to this is an obligation to afford an opportunity to improve (see, for example, Judgments 2678, consideration 8, and 3026, considerations 7 and 8). In the present case, the ICGEB assessed the complainant's performance as less than completely satisfactory in the complainant's 2016 performance appraisal report. However it then embarked on a procedure established by Administrative Instruction No. 013 that existed for the purpose of helping an underperforming employee to attain the desired level of performance in a context where there would be sustained feedback to guide any improvement. Having commenced this process, the ICGEB was obliged to pursue it to completion. That is to say, the PIP should have been complied with in its entirety. It was not completed to finality as originally envisaged. The implementation of a PIP cannot be peremptorily cut short, as this would undermine the very purpose for which this process is established by Administrative Instruction No. 013. It is not possible to disregard the prospect that an employee engaged in a PIP will dramatically improve performance towards the conclusion of the PIP as the consequences of not improving fall into starker relief. The ICGEB argues that the complainant did not accept the PIP in good faith but this is not made out on the evidence and, in any event, it acted as if it had been having regard to the fact that meetings were held in February and March in furtherance of the PIP.

8. The complainant advanced a number of subsidiary arguments concerning the assessment of her performance. Save for one, these arguments are subsumed by the conclusion that the PIP was unlawfully brought to an end prematurely. The additional argument was that the ICGEB erroneously relied on the complainant's 2016 performance appraisal report to decide not to renew her appointment. The organisation was entitled to do so. The performance appraisal report had not been challenged and was legally fully effective. Additionally, the complainant argues that the decision not to renew her appointment was not adequately substantiated. In the Tribunal's view, it was, having regard to the explanation given in the memorandum of 14 April 2017. The complainant is entitled to compensation for the premature termination of the PIP. The amount and its rationale will be addressed shortly.

9. As noted earlier, the complainant attached a complaint of harassment to her request for review of the decision not to renew her appointment. The complaint was dated 8 June 2017. A decision was taken to constitute an Advisory Panel to investigate, on a preliminary basis, the complaint of harassment. If the facts alleged in the harassment complaint were true, they could well constitute harassing conduct subject to explanations that might be given for that conduct. The ICGEB did not have, at the time, a formal written policy concerning the investigation of harassment complaints. The Tribunal's case law requires that such complaints be investigated promptly and thoroughly (see, for example, Judgment 3071, consideration 36).

10. In the present case the Advisory Panel concluded that the allegations of harassment were not sufficiently established on the documentation to warrant further investigation. In the complainant's brief the use of an Advisory Panel is challenged and arguments are advanced to the effect that the facts alleged by the complainant did constitute harassment and were not adequately considered. This is disputed by the ICGEB. It is unnecessary to descend into detail because the approach of the Advisory Panel was fundamentally flawed. In its report of 20 July 2017, the Advisory Panel set out and answered or addressed a series of propositions. The first proposition was: "whether the allegations contained in the [complaint] are sufficiently grounded in fact beyond reasonable doubt and are made in good faith". The Advisory Panel answered this proposition in the negative. A staff member alleging harassment, and a fortiori in an investigation on a preliminary basis of the type being undertaken, does not need to establish, nor does the person or body evaluating the claim, that the facts establish beyond reasonable doubt that harassment occurred. While an allegation of harassment may found disciplinary proceedings in which the standard of "beyond reasonable doubt" would apply, it has no application in the assessment of the claim of harassment where the staff member is seeking workplace protection or damages or both. This issue has recently been addressed by the Tribunal (see Judgment 4207, consideration 20). The complainant does not seek to have her harassment complaint remitted to the organisation to consider it further but rather seeks moral damages.

11. The quantification of the damages to which the complainant is entitled because of the premature termination of the PIP is informed by the fact that her performance had been negatively assessed in her 2016 performance appraisal, an assessment which she did not challenge. So while it is possible the complainant's performance would have improved had the PIP run its course, the likelihood of this occurring was not great. Thus the likelihood that her appointment would have been renewed was similarly not great but the renewal was nonetheless possible. For this and the organisation's failure to adequately address her complaint of harassment, the Tribunal considers the complainant should be awarded compensation in the amount of 40,000 euros under all heads. She is entitled to costs which the Tribunal assesses in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The ICGEB shall pay the complainant compensation in the amount of 40,000 euros under all heads.
2. The ICGEB shall pay the complainant 8,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 2 July 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ