

The Administrative Tribunal,

Considering the complaint filed by Mr K. B. against the International Labour Organization (ILO) on 30 April 2007, the Organization's reply of 6 August, the complainant's rejoinder of 16 November 2007 and the ILO's surrejoinder of 28 January 2008;

Considering Article II, paragraph 1, 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 former official of the International Labour Office, the ILO's secretariat, is a United States national born in 1946. He joined the Office in June 2002 on a one-year fixed-term contract as Chief, Client Services Section, in the Bureau of Library and Information Services at grade P.5. Pursuant to Article 5.1 of the Staff Regulations, his appointment was subject to probation.

On 5 June 2003 the complainant's responsible chief completed his first performance appraisal report, which covered the period from 1 July 2002 to 31 March 2003. She identified as the complainant's strengths his knowledge as a librarian, his familiarity with a range of electronic products and services, his experience in the client services area and his friendly and cooperative attitude, noting, however, that an improvement was expected in the areas of problem solving, initiative taking and decision making. The complainant signed the report on 6 June, stating that, while he disagreed with parts of the appraisal, he remained "firmly committed to putting forth [his] best effort[s]". The Reports Board reviewed the performance appraisal report and by a minute of 30 June 2003 invited the responsible chief and the complainant to develop a detailed work plan, which would clearly set the objectives that needed to be met. It indicated that it expected to see significant improvement in the next appraisal, failing which it would be likely that the consequences would be an extension of the complainant's probationary period or non-extension of his contract.

On 8 January 2004 the responsible chief completed the complainant's second performance appraisal report, which covered the period from 1 April to 31 December 2003 and which, according to Article 5.5 of the Staff Regulations, was also his probationary performance appraisal. She observed that, while the complainant had made efforts to improve his performance, he was "not working at the P5 level". She stated that he "lack[ed] the management and analytical capacity" required to develop client services and reiterated the need for improvement in the areas of problem solving, initiative taking and decision making. She recommended against an extension of his appointment. The complainant submitted his comments on 14 January 2004. He disagreed with the comments made by his responsible chief, characterising them as "sweeping judgements without evidence or specific explanation". He also stated that, although he had on several occasions requested a detailed list of the issues that were of concern to her, she had never provided him with such a list.

In a minute dated 19 March 2004 the Reports Board, to which the performance appraisal report had been transmitted for review, considered that the complainant's probationary period should be extended by six months so as to enable the responsible chief and himself to redouble their efforts to establish a work plan with clear objectives and time frames. Emphasising the need for clarity with respect to expectations and the work plan, it requested that the responsible chief set down in writing her expectations of the complainant's performance, clearly elaborating the work to be undertaken and the objectives to be achieved, and that these expectations be discussed and settled with the complainant and approved by the higher-level chief. It further considered that the extension of the probationary period would provide time to "re-build the working relationship" between the complainant and his responsible chief, and to that end it recommended that the parties seek assistance either from a mediator or from the Human Resources Development Department. Subsequently, two work plans were established: the first, covering the period from 1 April to 30 June 2004, was under the responsibility of the complainant's responsible chief and the second, covering the period from 1 July to 31 October 2004, was under the responsibility of the Acting Chief of the Bureau of Library and Information Services, following the departure of the former.

On 22 November 2004 the acting responsible chief completed the complainant's third performance appraisal report, covering the period from 1 January to 31 October 2004. Noting that the complainant's main strength lay in the "practical aspects of librarianship", she expressed reservations concerning his ability to perform his duties as a senior manager at the P.5 level. She indicated inter alia that he had difficulty with project planning and problem solving, that he was unable to carry out the administrative tasks associated with his post and that he needed considerable support to fulfil his role as senior manager. In his comments of 30 November, the complainant asserted that he had accomplished all the tasks set out in each of the work plans, emphasising that the fulfilment of those tasks provided the basis for assessing his performance. He drew attention to specific tasks that he had completed and argued that his accomplishments were tangible and important. After reviewing the case the Reports Board concluded in December 2004 that, although the complainant had completed the work plans as established, there were significant issues related to lack of autonomy, rigour and follow-through in his work. Noting that he had been adequately informed about his shortcomings and that he had been allowed sufficient time to address them, it recommended that his contract not be extended.

By letter of 26 April 2005 the Director of the Human Resources Development Department informed the complainant that the Director-General had decided not to extend his appointment, which would thus expire on 30 June 2005. The complainant requested a review of that decision, but his request was turned down. On 14 December 2005 he filed a grievance with the Joint Advisory Appeals Board. In its report of 15 December 2006 the Appeals Board unanimously recommended that the grievance be dismissed as devoid of merit. By letter dated 2 February 2007 the Executive Director for the Management and Administration Sector notified the complainant of the Director-General's decision to approve the Appeals Board's recommendation. That is the impugned decision.

B. The complainant submits that the Director-General's decision not to extend his appointment is unlawful. He contends that the Office disregarded the fact that he had completed the work plans agreed upon and that amounts to abuse of discretion. He points out that the work plans established upon the recommendation of the Reports Board were the sole objective yardstick for assessing his performance and deciding whether or not to extend his appointment.

He argues that there is no evidence that he was not performing well. The reason put forward by the Administration for not extending his appointment, namely that he had "failed to address the managerial aspects of [his] work objectives in an autonomous manner", was mentioned for the first time in the termination letter of 26 April 2005. That, according to him, is a clear indication of bias against him.

Relying on the Tribunal's case law, the complainant asserts that the Reports Board failed to respect the principles of due process and adversarial procedure because it did not provide him with a copy of the Reports Board's report prior to the decision not to extend his contract, and also because it interviewed him and his responsible chief separately, as a result of which he was not given an opportunity to respond to the views expressed by the latter before the Reports Board.

He asks the Tribunal to set aside the impugned decision and to order his reinstatement as from 1 July 2005 with full salary, post adjustment and all related benefits, including accrued leave and pension, or, alternatively, to pay him equivalent compensation. He claims 100,000 Swiss francs in moral damages and 15,000 francs in costs.

C. In its reply the Organization asserts that the impugned decision is lawful and appropriate. Noting that a decision not to confirm an appointment is subject to limited review by the Tribunal, it argues that the complainant has failed to provide evidence that the impugned decision is tainted by mistakes of law or fact, procedural irregularities or that it involves abuse of authority. It recalls that, in line with the case law, it must be allowed the widest measure of discretion in determining the suitability of officials on probation. The complainant was informed that his performance was lacking but he failed to improve, notwithstanding the feedback and assistance he was given. Therefore, an extension of his appointment would have been contrary to the interests of the Organization.

The defendant denies breach of due process: at the time of his interview the complainant was already aware of the concerns regarding his performance and, since the Staff Regulations provide that the proceedings of the Reports Board shall be secret, there is no requirement that the parties concerned be provided with a copy of the Reports Board's report.

Similarly, the ILO refutes the allegations that it abused its discretion and that it disregarded the work plans which were agreed upon, emphasising that the latter were not the "sole yardstick" for assessing the complainant's

performance. It also refutes his assertion that he was notified for the first time by the letter of 26 April 2005 that his lack of autonomy and managerial capacity could be valid reasons for the non-extension of his contract, since he had been informed on more than one occasion of his shortcomings in this regard.

D. In his rejoinder the complainant dismisses the defendant's "vague" and "undocumented" arguments concerning his managerial skills, contending that such skills were inherent to the successful completion of the agreed work plans. He asserts that the real issue was not his performance but the working relationship between himself and his responsible chief, as is shown by the statement made by the Director of the Human Resources Development Department that his non-extension was not due to his lack of competence but rather to "chemistry". He adds that the unilateral and unlawful extension of his probation on a month-to-month basis at the end of his statutory period of probation caused him an enormous amount of suffering and a feeling of precariousness. He reiterates that he was subject to unfair treatment and that he was not afforded due process.

E. In its surrejoinder the ILO maintains its position. It submits that the complainant has not brought forward any evidence in support of his contention that "the real issue" was the working relationship between himself and his responsible chief, and points out that he was informed in a timely and detailed manner, i.e. with concrete examples, of the shortcomings in his performance. It considers that the extension of his probationary period was neither unlawful nor unilateral, but rather in his interest, as it gave him additional time to improve. It denies that there was a breach of due process, emphasising the importance of maintaining the confidentiality of the Reports Board's proceedings.

CONSIDERATIONS

1. The complainant was appointed by the International Labour Office as Chief of the Client Services Section, at grade P.5, with effect from 1 June 2002. This appointment was subject to a two-year probationary period. His first performance appraisal report covered the period 1 July 2002 to 31 March 2003. It was said in that report that he needed to improve his problem-solving, initiative-taking and decision-making skills. On review of the performance appraisal, the Reports Board expressed its concerns with respect to these deficiencies and stated that these skills were "inherent in any senior position at the P.5 level". It also encouraged the development of a detailed work plan clearly setting the objectives to be met and urged that the responsible chief work with the complainant to improve his skills. The Reports Board concluded by saying that, unless there was significant improvement, the likely consequence would be extension of the probationary period or non-extension of the complainant's contract.

2. A second performance appraisal report was conducted for the period 1 April 2003 to 31 December 2003. Again, it was said that the complainant needed to improve in the areas of problem solving, initiative taking and decision making. It was also stated that he was not working at the P.5 level and, although he had made efforts to improve, he lacked "the management and analytical capacity [...] to develop the Client Services in [the Bureau of Library and Information Services]". Additionally, it was remarked that he had difficulty in accepting constructive criticism. In his comments, the complainant challenged the various negative comments and stated, amongst other things, that many of the criticisms were without specific detail.

3. The Reports Board reviewed the second performance appraisal and stated, on 19 March 2004, that "there was insufficient clarity with respect to expectations and the work plan". It concluded that an additional probationary period of six months would be beneficial and requested the responsible chief to set down her expectations in writing, elaborating the work to be undertaken and the objectives to be achieved. It also stated that the complainant should understand that he was "responsible for taking initiative and that the primary responsibility for delivering on the work plan rest[ed] with him". In the result, the complainant's probationary period was extended for six months and separate work plans were prepared for the periods 1 April to 30 June 2004 and 1 July to 31 October 2004. The responsible chief, who had prepared the complainant's first and second performance appraisal reports, prepared the first of these work plans. The second was prepared by her replacement, the acting responsible chief, as was the third and final performance appraisal report of 22 November 2004.

4. The acting responsible chief stated in the third performance appraisal report that she had reservations as to the complainant's "capability as a senior manager and his ability to perform his work assignments with the analytical and strategic thinking that is required at the P5 level". In his comments, the complainant pointed out that he had fulfilled the objectives of his work plans and claimed that they should form the basis of his performance appraisal rather than "subjective comments on [his] job performance". The Reports Board also considered the third

performance appraisal. In the course of its consideration it separately interviewed the acting responsible chief and the complainant.

5. On 26 April 2005 the complainant was informed that the Reports Board had found that he had completed the work plans but that he had “failed to address the managerial aspects of [his] work objectives in an autonomous manner”. In consequence, it recommended that his appointment not be extended. Accordingly he was informed that his appointment would not be renewed on its expiry on 30 June 2005. Thereafter, he filed a grievance with the Joint Advisory Appeals Board. In its report, dated 15 December 2006, the Appeals Board recommended that the complainant’s grievance be dismissed as devoid of merit. The Director-General accepted that recommendation and, by a letter of 2 February 2007, the complainant was so informed. That is the decision impugned by the complainant before the Tribunal.

6. The complainant contends that he was denied due process in the proceedings before the Reports Board in that he and the acting responsible chief were interviewed separately and, according to the argument, he was denied an opportunity to answer her criticisms. He also complains that he was not provided with the Board’s report before being informed of the decision not to extend his appointment. Further, he contends that a material fact was overlooked in that the Reports Board ignored the fact that he had completed his work plans, and an irrelevant fact taken into consideration in that it had regard to the “undocumented” consideration that he was “not functioning at the P.5 level”. In this last regard he suggests that there was bias on the part of the acting responsible chief. Additionally, he contends that the extension of his probationary period was unlawful.

7. It is convenient to deal first with the extension of the complainant’s probationary period. It may be noted that the decision in that regard was not then challenged. Moreover and contrary to the complainant’s claim that the decision was taken unilaterally, he agreed to the extension by signing the report of the Reports Board on 12 May 2004. Further, as the Joint Advisory Appeals Board noted, Article 5.1(c) read together with Article 14.6 of the Staff Regulations permitted the extension.

8. In considering the complainant’s argument with respect to due process, the Joint Advisory Appeals Board noted that the complainant had not had the opportunity “to confront his version of facts to that of his [responsible chief] before the Reports Board” and, also, that he had only received a summary of its discussions and not the full minutes. However, it rejected the complainant’s argument on the basis that it was not established that essential facts had been overlooked. The real issue, so far as concerns due process, is not whether essential facts were overlooked but whether the complainant was given a proper opportunity to answer the case against him and to put his own case in reply.

9. The case against the complainant was substantially detailed in his acting responsible chief’s remarks in the third performance appraisal report. The complainant provided his response in his comments in that report. A consideration of the performance appraisal by the Reports Board reveals that the Board asked both the acting responsible chief and the complainant, in that order, to inform it of the “issues involved” in the appraisal period and any related discussions. It appears that particular issues raised by the acting responsible chief were then the subject of specific questions to the complainant, and e-mails provided by her with respect to those issues had been sent to the complainant for his response. Moreover, the complainant was aware of the nature of his alleged deficiencies from the time of his first performance appraisal report and had ample opportunity to provide his answer to them. In these circumstances, and notwithstanding what was said by the Joint Advisory Appeals Board, it has not been established that there was any denial of due process in the proceedings of the Reports Board. Nor is it established by the fact that the complainant did not receive the report of the Reports Board before he was informed of the decision not to extend his appointment. The report was available to him for the purposes of the proceedings before the Joint Advisory Appeals Board and he then availed himself of the opportunity to make a detailed response to it.

10. It was said in Judgment 1161 that the purpose of probation is for the competent authority to find out whether a probationer has the mettle to make a satisfactory career in the organisation and, thus, it must be allowed the widest discretion in determining whether someone it has recruited shows the highest level of qualifications for a post in the particular field in which he is to be working. The “discretion” that is spoken of in that statement allows for subjective assessment of the “personal attributes” of the probationer (see Judgment 1183). Accordingly, a decision not to extend a probationer’s appointment will be set aside “only if there was a mistake of fact or law, or a formal or procedural flaw, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority” (see Judgment 1161).

11. In the present case, regard was had to the fact that the complainant had completed his work plans, as well as to various other positive aspects of his performance. It was equally relevant to have regard to the assessments made by his responsible chief and, later, the acting responsible chief as to the level of his performance. Accordingly, the complainant's contention that his performance should have been assessed solely by reference to his completion of his work plans must be rejected.

12. There is no material to support a finding of bias or other abuse of discretion. Certainly, none is to be discerned from the fact that the complainant's former post has not yet been opened to competition. Nor is there any other matter that might warrant the setting aside of the impugned decision.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet