

110th Session

Judgment No. 2990

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms P. D. J. against the Centre for the Development of Enterprise (CDE) on 4 January 2009 and corrected on 2 and 3 March, the CDE's reply of 27 May, the complainant's rejoinder of 10 July and the Centre's surrejoinder of 13 October 2009;

Considering Articles II, paragraph 5, and VII 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, who was born in 1953 and has dual Guyanese and Belgian nationality, joined the Centre for the Development of Industry (CDI), the CDE's predecessor, in 1979 as a clerical assistant. In 1996 she was promoted to the position of principal assistant at level 3.A. She was employed under a series of consecutive contracts of limited duration.

In February 2005 her contract was extended for a period of two years from 1 March 2005 until 28 February 2007. In May 2005 she

signed her assessment report for 2004, which indicated that her performance met expectations with respect to nine of the evaluation criteria and that improvement was needed with respect to the four remaining criteria. Her assessment report for 2005 – which she signed in October 2006 – indicated a global appreciation of 53.1 per cent. That score meant that her performance showed important weaknesses and that significant and constant supervision of her work was required. It was pointed out that improvement was needed and that disciplinary measures could be taken by the Directorate.

By letter of 20 December 2006 the Director of the CDE informed the complainant that, considering her 2005 evaluation, she was offered an extension of her contract from 1 March 2007 until 29 February 2008. He specified that if her efforts and future evaluations provided sufficient justification, she might be granted a contract of indefinite duration. He encouraged her to “take this period of time in order to make the substantial efforts necessary for having an assurance in [her] continued career within the CDE”. The complainant accepted the contract on 30 January 2007.

In June 2007 she signed her assessment report for 2006, which indicated a global appreciation of 47.3 per cent. A score of less than 50 per cent meant that her performance was “[u]nsatisfactory”, that she required significant and constant supervision and that disciplinary measures could be taken by the Directorate. By letter of 19 December 2007 the Director ad interim of the CDE informed the complainant of the decision not to renew her contract beyond its expiry date because of her unsatisfactory performance. He pointed to her assessment reports for 2005 and 2006 and the absence of improvements despite various warnings in 2007. On 7 January 2008 she was notified that, pursuant to Article 34, paragraph 2, of the Staff Regulations, she was entitled to nine months’ notice beginning on 3 January 2008 and that as from 8 January she was exempted from working.

On 12 February 2008 the complainant filed an internal complaint with the Chairman of the Executive Board of the CDE challenging the

decision of 19 December 2007 as well as her last fixed-term contract, signed on 30 January 2007, on the grounds that they were based on the assessment reports for 2005 and 2006, which did not comply with the applicable rules. The Director ad interim informed her by a letter of 18 April 2008 that he was the competent authority to examine her complaint and that he had decided to reject it as inadmissible to the extent that it was directed against the assessment reports of 2005 and 2006 and her last fixed-term contract. He added that the complaint was otherwise unfounded. The conciliation procedure provided for in Article 67, paragraph 1, and Annex IV of the Staff Regulations was subsequently initiated. In his report dated 3 October 2008, the conciliator concluded that no perspective of settlement was possible. The complainant filed a complaint with the Tribunal in accordance with Article 67 and Annex IV of the Staff Regulations, indicating the date of the report as an implied rejection of her internal complaint.

B. The complainant contends that the Centre denied her due process when it decided not to renew her contract on the basis of the assessment reports for 2005 and 2006 and her performance throughout 2007. She alleges in particular that the reports for 2005 and 2006 are incomplete, as neither work plans nor objectives were established; that an assessment report for 2007 should have been completed; that her supervisor failed in the aforementioned reports to substantiate his comments in relation to her performance; that the assessment reports were not provided in a timely manner; and that no written warning was given to her at any time. She argues that the decision not to renew her contract is flawed, as it is based on assessment reports which did not comply with the rules governing periodic assessment, as contained in Rule No. R3/CA/05. She explains that she did not lodge an internal complaint against these reports because in neither instance had the assessment process been completed.

She challenges the validity of her last fixed-term contract, as the rationale for its issuance was the flawed assessment report for 2005. She explains that she was denied the benefit of the final and voluntary

severance bonus, as it is paid only to staff members holding indefinite contracts, in accordance with Article 64 of the Staff Regulations and Internal Rule No. R25/CA/05. She states that, contrary to what was stipulated in the contract, it was not possible at the time she signed it to go before the Administrative Tribunal in case of a dispute; consequently, without an appeal process in place, she had no choice but to accept it.

Moreover, the decision not to renew her contract constitutes a disciplinary measure and the Centre should have therefore implemented disciplinary proceedings. She alleges procedural flaws in the appeal proceedings on the grounds that the Executive Board rather than the Director ad interim should have examined her internal complaint, as required under Article 66 of the Staff Regulations, which stipulates that the Executive Board is the competent authority to deal with appeals lodged against a disciplinary measure.

According to the complainant, in 2005 the CDE embarked on a downsizing exercise which it attempted to mask by issuing adverse assessment reports enabling it to separate staff members at a minimal cost. In her view, since her non-renewal results from a downsizing exercise, she should have been granted the “redundancy packages” as provided under Article 34, paragraph 6, of the Staff Regulations, namely nine months’ notice (or payment in lieu) and 12 months’ termination indemnity. She asserts that the decision not to renew her contract was not based on her performance but on prejudice, bias, age and sex discrimination combined with harassment and intimidation.

She further contends that the Centre failed in its duty to protect her dignity and reputation and caused her unnecessary personal distress because of the way it conducted the assessment reports for 2005 and 2006 and handled the non-renewal of her contract. Lastly, she criticises the manner in which the conciliation procedure was carried out.

The complainant asks the Tribunal to rescind both the decision not to renew her contract and her last fixed-term contract. In addition, she seeks 12 months’ salary in accordance with the provisions of

Article 34, paragraph 6, of the Staff Regulations, 18 months' salary as a final and voluntary severance bonus, moral damages in the amount of seven years' salary, and costs. Lastly, she requests the issuance of an "Attestation of Service" rating her performance and conduct during her term of service as satisfactory.

C. In its reply the CDE asserts that the complaint is manifestly time-barred insofar as it is directed against the assessment reports for 2005 and 2006. It points out that the reports were notified to the complainant "a long time ago" and that no internal complaint was filed within the prescribed time limit. Consequently, they have become definitive and unchallengeable. The Centre also asserts that the complaint is irreceivable insofar as it is directed against the fixed-term contract signed on 30 January 2007 by the complainant, since she should have lodged an internal complaint in accordance with Article 66, paragraph 2, of the Staff Regulations if she felt that the said contract adversely affected her rights. It adds that consequently the complainant is wrong in stating that no appeal process existed at the time.

On the merits, the defendant contends that the complainant's arguments relating to the assessment reports for 2005 and 2006 and her performance in 2007 are unfounded. It explains more specifically that there was no need to fill out the part of the reports regarding the objectives for the following year, as it was common ground that the complainant's objectives remained the same throughout the years under consideration. It also indicates that it was under no obligation to conduct an assessment of her performance for the year 2007.

The Centre states that the complainant was adequately warned about her unsatisfactory performance by the contents of her assessment reports for 2004, 2005 and 2006, by the terms of the letter of 20 December 2006 and also by a series of warnings addressed to her in 2007. In its view, after three consecutive years of insufficient performance, with no sign of improvement in sight, it had valid grounds not to renew her contract. The CDE adds that in May 2004 it

engaged an external consultant to carry out a profiling session of the personnel, that the consultant's report indicated certain shortcomings regarding the complainant's performance and that this report, which was communicated to the complainant, was already a clear warning as to the need to improve.

As to the allegation that the Director ad interim was not competent to reply to her internal complaint, it submits that the non-renewal of the complainant's contract was not the result of any disciplinary proceedings but was due to a "substantial and persistent insufficiency of her professional performance". The Director ad interim was therefore the competent authority to hear her internal complaint, in accordance with Article 66, paragraph 2, of the Staff Regulations.

Regarding the alleged downsizing of the CDE, it argues that this allegation is wrong from both a factual and a legal point of view and that it is designed to mask the fact that her performance became "increasingly insufficient" and that she never challenged her assessment reports within the prescribed time limits. Moreover, the argument that the non-renewal of her contract was based on prejudice, bias, age and sex discrimination is speculative, unproven and vague.

The defendant also indicates that the complainant was not entitled to the final and voluntary severance bonus because she did not hold an indefinite contract and her performance was not satisfactory, as required by point 2 of Internal Rule No. R25/CA/05.

The Centre affirms that it has taken due account of the interests of the complainant and that it has shown a "very reasonable degree of care and patience vis-à-vis [her]". Given that it did not behave illegally and that the prejudices allegedly suffered by the complainant are not supported by any concrete and objective element of proof, her request for moral damages is unfounded.

D. In her rejoinder the complainant submits that the assessment reports for 2005 and 2006 are challengeable as they constitute steps leading to the decision of non-renewal. She alleges that the Centre, including the former Director and her supervisor, plotted her termination.

Regarding the profiling exercise conducted by the external consultant in 2004, she states that the process was extremely suspect, if not critically flawed, and that the CDE had no right to use it in defence of its position. She stresses that her assessment report for 2004 did not contain comments which could have been taken as a clear and explicit warning about the level of her performance and that the reports for 2005 and 2006 are fabrications deliberately designed to destroy her professional standing. She rejects the Centre's allegations concerning her performance and denies having received warnings throughout 2007.

E. In its surrejoinder the defendant maintains that the complaint is partly irreceivable and in any event unfounded. It asserts that the assessment report for 2004 was not only very clear as to the need for the complainant to make greater progress in terms of productivity but is also unchallengeable, and that the reports for 2005 and 2006 are not "step[s] leading to [the] decision of [...] non-renewal" but autonomous decisions.

CONSIDERATIONS

1. The complainant challenges the non-renewal of her contract. Throughout her submissions, she also challenges her 2005 and 2006 performance assessment reports and seeks a rescission of her one-year fixed-term contract signed on 30 January 2007 for the period commencing on 1 March 2007. Additionally, she alleges procedural irregularities in relation to her internal complaint and her claim for conciliation concerning the non-renewal of her contract.

2. With respect to the challenges to the 2005 and 2006 performance assessment reports and the last fixed-term contract, as the internal means of redress were not exhausted they are irreceivable.

3. As to the non-renewal of her contract, the Tribunal's case law establishes that "[a] staff member whose service is not considered [to be] satisfactory is entitled to be informed in a timely manner as to the

unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation”. Further, “he or she is entitled to have objectives set in advance so that he or she will know the yardstick by which future performance will be assessed” (see Judgment 2414, under 23).

4. In the present case, the record reveals that starting in 2004 and up to the date of the decision not to renew her contract, through the formal performance assessments process and numerous other communications, the Administration informed the complainant that her work was not satisfactory and indicated the specific aspects of her work that were not satisfactory, the Administration’s expectations regarding her performance, as well as the potential negative consequences should her work not improve.

5. With respect to the procedural irregularities, the complainant alleges that the Director ad interim was not the competent authority to hear her internal complaint. She contends that the non-renewal of her contract constituted a disciplinary measure and, therefore, pursuant to Article 66, paragraph 2, of the Staff Regulations, the competent authority to deal with her internal complaint was the Executive Board and not the Director ad interim.

6. The Tribunal rejects this argument. Although one of the possible outcomes of a disciplinary proceeding is the termination of employment, in the present case there were no allegations of misconduct which could give rise to a disciplinary proceeding. The non-renewal of the contract was based on unsatisfactory service, which is not a disciplinary matter.

7. Lastly, the complainant submits that she was at a disadvantage during the conciliation proceeding due to the fact that it was held in French and not in English. In addition, she alleges that there were significant audio-technical difficulties associated with the use of the “SKYPE” technology which impeded the conciliator’s understanding of her submissions.

8. The Tribunal notes that according to the conciliator's report simultaneous interpretation was provided for the hearing. The conciliator also noted that although some interventions required repetition, the observations made by the person who represented and assisted the complainant were understood and taken into account in making his recommendation. As the complainant has not identified any specific aspect of the report that could be due to some misunderstanding, the complainant's submission is rejected.

9. Accordingly, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 November 2010, Ms Mary G. Gaudron, 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 2 February 2011.

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