

115th Session

Judgment No. 3216

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Ms R. M. against the International Labour Organization (ILO) on 15 June 2010 and corrected on 29 June, the Organization's reply of 7 October, the complainant's rejoinder of 4 November 2010 and the ILO's surrejoinder of 20 January 2011;

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. Relevant facts concerning the background to this complaint can be found under A in Judgments 3064 and 3065, which dealt with the complainant's third and fourth complaints, respectively. The complainant is a former official of the International Labour Office, the ILO's secretariat, who retired on 31 October 2009 on reaching the statutory retirement age. At the material time she was employed as a translator at grade P.3 in the German Section of the Official Relations and Documentation Branch.

On 22 November 2007 the complainant was given by her supervisor, Mr B., a draft version of her performance appraisal for the period from 1 August 2005 to 31 July 2007, drawn up on the simplified form provided for in Circular No. 611, Series 6. She contested this appraisal, and in due course it was submitted to the Reports Board, which requested in July 2008 that a new appraisal be completed in long form and that samples of the complainant's work during the reporting period be provided so that an independent assessment by a third party could be arranged. It was stipulated that the complainant should be given the opportunity to confirm that the selected samples were representative of her work for the period under review. The Reports Board also recommended that the complainant and her supervisor enter into a dialogue to discuss the contents of the new performance appraisal in the presence of a representative of the Human Resources Development Department (HRD) or the Mediator. On 25 September 2008, following a series of meetings involving Mr B., a legal officer from HRD and the Mediator, the complainant was provided with a finalised long-form performance appraisal, signed by her supervisor, which she again contested.

On 27 March 2009 the Reports Board decided to request an independent assessment of the complainant's work before reviewing the new appraisal. On 1 June she received the comments of the Board, dated 28 May, along with a copy of the independent assessment of her work provided by two revisers from the German Translation Section of the United Nations in New York. The Board concluded that "some attention was needed by [the complainant] to improving skills" and encouraged her "to take note of the feedback from the independent assessment".

On 8 June 2009 the complainant submitted a grievance to HRD under Article 13.2 of the Staff Regulations, in which she requested that the disputed performance appraisal be set aside and that a new one be drawn up. These requests were rejected on 13 October by the Director of HRD, and on 19 October the complainant referred the matter to the Joint Advisory Appeals Board. In January 2010 the

Director of HRD submitted to the Board a report on an investigation into allegations of harassment which the complainant had made against her supervisor in the context of an earlier grievance, on the basis that it might be of relevance in the present case. The Board unanimously concluded in its report dated 12 February 2010 that the assessment procedure had been carried out in compliance with the adversarial principle and in a transparent manner and that the disputed performance appraisal should therefore stand. Consequently, it recommended that the complainant's grievance be rejected as groundless. By a letter dated 16 March 2010 the Executive Director of the Management and Administration Sector provided the complainant with a copy of the Board's report and informed her that, on the basis of the Board's unanimous recommendation, the Director-General had decided to reject her grievance as groundless. That is the impugned decision.

B. The complainant contests her performance appraisal for its content and also on the basis of what she considers to be procedural flaws. Citing Judgment 2468, in which the Tribunal held that the "procedures used to assess the performance of international civil servants must be both transparent and adversarial", she contends that this principle was not respected in her case. In particular, she asserts that Mr B. did not initiate any discussion concerning further assignments or objectives for the development of her work prior to issuing her performance appraisal on 22 November 2007, in breach of the Guidelines for Completion of Performance Appraisals. Moreover, during the entire period under review, he never showed her revised versions of her translations or provided her with comments on them, so that the appraisal came as a surprise to her, which again is contrary to the Guidelines. Indeed, she had received several positive comments from other sources concerning the quality of her work.

She points out that, according to his job description, her supervisor, as a translator/reviser at grade P.5, was expected "to provide leadership, to motivate and train staff, and to provide

authoritative advice and guidance on technical and procedural aspects relating to work”, and that as a translator at grade P.3 she had a right to expect guidance from her supervisor. She recalls that, despite his undertaking in the performance appraisal of 22 November 2007 to “support [her] in undertaking relevant further training and to actively engage in a dialogue with [him]”, Mr B. took no action to further either of these objectives, and it was only at the initiative of the HRD Legal Officer in September 2008 that any dialogue was initiated.

With respect to the content of her performance appraisal, the complainant contends that she was not assessed on the basis of her own P.3 job description, and she considers that her language skills (in English and French), which had previously been evaluated as excellent, were not fairly assessed by Mr B. She emphasises that her supervisor had formerly worked as a translator for the United Nations in New York, and she submits that his appraisal of her work did not take into account the fact that she came from a different professional background and had a different writing style.

The complainant contends that the independent assessment of her work was marred by a lack of transparency, as it was unclear to her which texts, of those agreed between her and Mr B., had been submitted, and whether the full texts were submitted, or simply extracts thereof. She argues that the “extremely brief evaluations” by the external assessors are “very general”, and that the “approach chosen by the two assessors is opaque and reveals a lack of objective criteria”.

She deplores the fact that, in the context of her internal appeal, she was not given an opportunity to comment on the investigation report concerning her allegations of harassment, which the Joint Advisory Appeals Board took into account in its deliberations; she adds that she has filed a complaint with the Tribunal challenging the decision of the Director-General based on that report.

Lastly, the complainant asserts that the criticism of the quality and style of her work began only after she filed a grievance in February 2007 for “unfair treatment and discrimination”. She requests that the

impugned decision be set aside, and she seeks an award of moral damages as well as costs.

C. In its reply the ILO recalls that, according to the case law, the appraisal of an official's performance lies within its discretionary authority and that, consequently, the Tribunal will set aside or amend an appraisal report only on limited grounds.

Regarding the alleged absence of feedback from the complainant's supervisor during the period under review and the lack of dialogue between them prior to the preparation of the performance appraisal, the Organization points out that their working relationship had been poor for some time, and that Mr B.'s appraisals of the complainant's work had always been a source of conflict, so that the contested performance appraisal could hardly have come as a surprise to her. Indeed, in a previous grievance the complainant herself highlighted the history of their difficult working relations. It is for this reason that the Office provided the Joint Advisory Appeals Board with the report of the investigation into her allegations of harassment. Furthermore, the complainant had been informed in advance that the investigation report would be shared with the Board in the context of the grievance concerning her performance appraisal, and she could therefore have submitted her comments on the matter to the Board.

The Organization states that Mr B. has confirmed that he invited the complainant to meet with him to discuss his comments in the preparation of her performance appraisal in November 2007, but that she refused to do so. Nor was this the first time that he had tried to provide feedback on the complainant's work. However, over time he became discouraged as a result of the complainant's attitude. The defendant emphasises that it "cannot enforce a constructive dialogue in the absence of good will and cooperation on the part of the individuals involved".

The ILO asserts that it used its best efforts to try to resolve the lack of dialogue and communication between the complainant and her supervisor through the involvement of HRD and the Mediator. It

considers that the Reports Board properly discharged its responsibility towards the complainant by requiring that the performance appraisal be conducted in accordance with the established guidelines and by making the explicit request that both the complainant and her supervisor make efforts to engage in dialogue, but it notes with regret that it was in fact the HRD Legal Officer who initiated the process, rather than the complainant or her supervisor. It emphasises that the Reports Board verified Mr B.'s comments by requesting samples of the complainant's work for an independent assessment. The complainant acknowledged both in the internal proceedings and in the present complaint that she saw and signed those samples prior to their submission to the Reports Board. The revisers in New York were asked for an evaluation of the overall quality of the work samples, taking into account the fact that they had been produced by an official at grade P.3, and to comment on whether the corrections made by the supervisor were necessary.

Concerning the complainant's allegation that the criticism of her work was linked to her filing of a grievance in February 2007 for unfair treatment and discrimination, the defendant notes that the critical comments concerning her work had begun long before 2007 and came not only from Mr B. but also from her previous supervisor. The complainant herself acknowledged this in the grievance she submitted in February 2007. Lastly, regarding the fact that Mr B. had formerly worked for the German Translation Section of the United Nations in New York, it points out that this was 20 years before the filing of her grievance.

D. In her rejoinder the complainant submits that, by not informing her that it had decided to accept the investigation report for consideration, the Joint Advisory Appeals Board deprived her of an opportunity to provide her comments. She denies the defendant's assertion, based entirely on the word of Mr B., that he invited her to meet with him to discuss his draft comments during the preparation of her appraisal in November 2007. She underlines that, during the period under review, Mr B. did not show her any text with his

corrections, and she emphasises that her progress was hindered as a result.

Regarding the independent assessment of her work, the complainant contends that the documentation provided in annex to the Office's reply shows that, as she had suspected, her supervisor had indeed submitted for external evaluation only pages containing errors, rather than the entire texts of her translations. In her view, it was not possible to form an objective view of her performance on the basis of this material. The complainant also disputes the Organization's contention that her work had been criticised by Mr B. and her previous supervisor long before 2007.

E. In its surrejoinder the Organization maintains its position. It submits that, even if Mr B. did not invite the complainant to discuss the draft appraisal report, in any case such a prior meeting is not mandatory since it is envisaged neither in the Staff Regulations nor in any other internal rules. Furthermore, the Guidelines referred to by the complainant are only indicative and do not constitute binding rules. Regarding the independent assessment, the Administration argues that, regardless of whether or not the complainant and Mr B. agreed on a complete set of documents, or on a set of samples, the 50 pages provided to the independent assessors were sufficient to allow them to form an objective view of the quality of the complainant's work. It maintains that Mr B. had also made critical comments in the previous appraisal report, but explains that these comments had been withdrawn from the final version following discussions with the Mediator.

CONSIDERATIONS

1. This complaint is one of three interrelated complaints filed by the complainant. The relevant background facts may be found in Judgments 3064 and 3065. The complaint now before the Tribunal concerns a grievance the complainant submitted to the Joint Advisory

Appeals Board regarding her performance appraisal for the period from 1 August 2005 to 31 July 2007. By a letter of 16 March 2010 she was informed that, on the unanimous recommendation of the Board, the Director-General had dismissed the appeal.

2. The complainant claims that the Board relied on the report of the independent investigation into her allegations of harassment by her supervisor without giving her an opportunity to respond to its contents.

3. In relation to the performance appraisal, the complainant advances the same arguments she put forward before the Board. In particular, she submits that as she did not receive sufficient feedback from her supervisor during the relevant period, she was not given an opportunity to improve and that her supervisor's poor assessment of her performance was retaliation for the grievance she had filed against him for harassment. She also disputes the methods used to assess her performance.

4. The determinative issue is whether the Joint Advisory Appeals Board improperly relied on the investigation report. The Organization asserts that the complainant was aware that the report had been submitted to the Board in the grievance proceeding giving rise to this complaint (Case No. 156) and had an opportunity to provide comments. In support of this assertion, it points to the letter of 15 January 2010 from the Executive Director of the Management and Administration Sector advising the complainant of the Director-General's decision (impugned in the case leading to Judgment 3065) that the complainant's allegations of harassment were groundless. A copy of the investigation report was enclosed with the letter. The letter relevantly states:

"Furthermore, the Office intends to forward a copy of the investigation report to the [Joint Advisory Appeals Board] in the context of the Board's examination of your grievance in Case No. 156."^{*}

^{*} Registry's translation from a French original.

5. Contrary to the Organization's assertion, this does not state that the report has been submitted to the Board. Rather, it indicates that the Office intends to do so. In these circumstances, it was reasonable for the complainant to wait to see if the intention materialised before making any comments.

6. However, despite this statement, the Office had already submitted the report to the Board on 6 January 2010. A fundamental principle of the adversarial process is the right to know and have an opportunity to respond to the evidence adduced by the opposing party (see Judgments 1815, under 5, and 2700, under 6). Upon receipt of the report, the Board, which ultimately relied upon it, was obliged to advise the complainant of the receipt of new evidence and give her an opportunity to respond before taking it into consideration. The Director-General's decision is tainted by the acceptance of the recommendation stemming from the fatally flawed proceeding of the Joint Advisory Appeals Board and will be set aside. In the circumstances, a consideration of the complainant's pleas in relation to her performance appraisal is unnecessary. The complainant is entitled to moral damages for the flawed process in the amount of 5,000 Swiss francs and costs in the amount of 1,000 francs.

DECISION

For the above reasons,

1. The Director-General's decision of 16 March 2010 is set aside.
2. The Organization shall pay the complainant moral damages in the amount of 5,000 Swiss francs.
3. It shall also pay her costs in the amount of 1,000 francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 2 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet