

B. (No. 3)

v.

ILO

128th Session

Judgment No. 4185

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr N. B. against the International Labour Organization (ILO) on 15 September 2016 and corrected on 28 September, the ILO's reply of 5 December 2016, the complainant's rejoinder of 13 February 2017, corrected on 1 March, and the ILO's surrejoinder of 7 April 2017;

Considering Articles II, paragraph 1, 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, who alleges that he was the victim of harassment, seeks redress for the injury he considers he has suffered.

At the material time the complainant was employed at the International Training Centre of the ILO (hereinafter "the Centre"), located in Turin (Italy), as Executive Driver. On 15 January 2014 he submitted a first internal complaint alleging that his tasks had been abusively transferred to an external company following the Centre's 2013 decision to outsource certain transport services and denouncing an alleged conflict of interest due to the fact that his responsible chief had in the past been employed by that company. Following exchanges

with the Organization, he withdrew his complaint and apologized to his responsible chief.

On 27 June 2014 the complainant submitted a second internal complaint claiming harassment and retaliation on the grounds that his first complaint had not been properly reviewed and that he had been sanctioned immediately after having submitted it by “dismissal at half-time”. On 18 August he agreed that his harassment-related allegations be dealt with under Circular No. 13/2009 of 27 March 2009 concerning the Centre’s policy and procedures for dealing with harassment. By a minute of 19 December 2014 the complainant was informed of the Director of the Centre’s decision to close the file. On 6 March 2015 he filed a complaint with the Tribunal (his second) against this decision. Following informal discussions between the Organization, the Staff Union and the complainant, an agreement was reached on 25 May 2015 according to which the complainant agreed to abandon any accusations of harassment. A second agreement was reached on 27 May clarifying that the complainant’s overtime work would no longer be paid, but would be compensated by time-off in accordance with Circular HRS 29/2012 of 3 December 2012 on working time arrangements, overtime and compensatory leave. On 29 May 2015 the complainant withdrew both his internal complaint and his second complaint to the Tribunal.

In the meantime, on 14 November 2014 the complainant had submitted a third internal complaint requesting the withdrawal of the disciplinary sanction which had been imposed on him on 14 October 2014 for an unauthorised absence. On 22 January 2015 he had been informed that the Director of the Centre had decided to withdraw the sanction as he had agreed to use annual leave to cover his unauthorised absence. He submitted a fourth internal complaint on 9 October 2015 alleging that documents relating to the withdrawn sanction remained in his personal file and claiming that he had suffered institutional harassment since his first internal complaint. On 25 November 2015 the Director of the Centre invited him to follow the procedures prescribed in Circular No. 13/2009 with respect to his harassment-related allegations.

On 22 April 2016 the complainant submitted a fifth internal complaint against the decision of 25 November 2015, the reduction of his salary due to non-payment of overtime to which he was entitled following the 2013 outsourcing decision and the Director of the Centre's decision of 1 December 2015 "[endorsing] the refusal of the Reports Committee to carefully examin[e] the comments [he] presented on [his] performance appraisal for the period June 2013 – May 2015 and to cancel [the] appraisal". He contended that he had been subjected to unjustifiable and unfair treatment, as well as protracted persecution and harassment by the senior officials of the Centre. He requested among other things that the disciplinary sanction imposed on him in October 2014 and all related documents be removed from his personal file, that the evaluations made by the Chief of the Human Resources Services (HRS), Mr Z., the former Director of the Centre, Ms O'D., and the former Deputy Director, Mr A., for the period at issue be cancelled and removed from the said file, that the agreement he signed on 27 May 2015 be reviewed and that he be paid for the days for which he had not been compensated, that the practice of purchasing the driver uniforms be restored and that the moral and material injury suffered by him be repaired.

By a letter of 23 June 2016, which constitutes the impugned decision, the Director of the Centre informed the complainant that his allegations of harassment and retaliation were being reviewed in accordance with Circular No. 13/2009 and would form the subject of a separate decision; that there was no justification for cancelling and removing from his personal file the evaluations made by Mr Z., Ms O'D. and Mr A.; and that there was no reason to review the agreement of 27 May 2015 under which his overtime was compensated by time-off. Lastly, the Director agreed, as a gesture of good will, to have all documents relating to his disciplinary sanction removed from his personal file.

In his complaint, filed on 15 September 2016, the complainant requests the Tribunal to set aside part of the impugned decision, to order the Centre to cancel and remove from his personal file the unfair evaluations made by Mr Z., Ms O'D. and Mr A. for the period from June 2013 to May 2015, to consider that the agreement of 27 May 2015

has not been respected by the Administration, to order the payment of overtime due to him and additional overtime that will not be compensated between 1 September 2016 and the date of the judgment and to order the Centre to review part of the agreement. He also requests that the Centre be ordered to restore the practice of purchasing the driver uniforms. He claims an indemnity to compensate for his income reduction following the outsourcing decision from January 2013, material and moral damages for harassment and retaliation, and an award of costs.

The ILO asks the Tribunal to reject all accusations of harassment prior to 25 May 2015 as irreceivable and to dismiss the complaint, to the extent that it is receivable, as devoid of merit.

CONSIDERATIONS

1. The complainant impugns the 23 June 2016 final decision of the Director of the Centre with the present complaint filed on 15 September 2016. In the 23 June decision, the Director fully endorsed the attached memorandum which provided a detailed examination of the complainant's 22 April 2016 internal complaint "with the exception of those aspects of the [internal] complaint concerning alleged harassment and retaliation which are being reviewed in accordance with Circular No. 13/2009 on Policy and procedures for dealing with harassment, dated 27 March 2009, and which will form the object of a separate decision". The Director concluded (under point 4 of the decision) that the review of the complainant's performance evaluation for the period from 1 June 2013 to 31 May 2015 was conducted fairly and in accordance with the applicable rules and that there were no procedural or substantive flaws in the review of the appraisal by the Reports Committee which could justify cancelling or removing from the complainant's personal file the evaluations as requested by the complainant. With regard to the complainant's claims concerning his reduction of salary due to non-payment of overtime to which he was entitled following the 2013 decision to outsource certain transport services, the Director noted (under point 5 of the decision) that there had been no impact on the level

of the complainant's statutory basic remuneration within the meaning of the Centre's Staff Regulations and that compensatory time-off had been granted in accordance with the agreement of 27 May 2015 and the applicable rules. As a gesture of good will, and without prejudice to the ongoing review of the harassment allegations, the Director decided to remove all documents relating to the disciplinary sanction of 14 October 2014 from the complainant's personal file.

2. In the present complaint, the complainant asks the Tribunal to:

- (a) set aside points 4 and 5 of the 23 June 2016 decision;
- (b) order the Centre to cancel and remove from his personal file the unfair performance evaluations made by Mr Z., Ms O'D. and Mr A. for the period from June 2013 to May 2015;
- (c) order the Centre to pay him the overtime hours accrued up to 31 August 2016, plus any additional amount of overtime accumulated between 1 September 2016 and the date of the judgment, and review part of the agreement of 27 May 2015 to return to the modality of providing financial compensation for overtime (rather than compensatory time-off);
- (d) order the Centre to restore the practice of purchasing the driver uniforms;
- (e) order the Centre to pay an indemnity to compensate the reduction of his income following the irregular outsourcing of part of his tasks from January 2013;
- (f) award him moral and material damages for the long period of harassment and retaliation; and
- (g) award him costs.

3. The complaint is irreceivable in part and unfounded in the remainder. As the complainant was informed by the 23 June 2016 decision, all elements regarding his allegations of harassment and retaliation were being reviewed separately in accordance with the provisions of Circular No. 13/2009 and would be addressed in a separate decision. Thus, claim (f) is irreceivable for lack of a final decision

within the meaning of Article VII, paragraph 1, of the Tribunal's Statute. With regard to claim (e), it is a new claim which is irreceivable as it extends the scope of the claims submitted during the internal appeal process (see, for example, Judgment 4066, consideration 4, and the case law cited therein).

Moreover, making an order that the practice of purchasing the driver uniforms be restored is beyond the competence of the Tribunal (see, for example, Judgment 4038, consideration 19) and claim (d) will therefore be rejected.

4. The complainant's claims regarding overtime (under (a) (point 5 of the impugned decision) and (c)) are unfounded. The arguments presented by the Centre regarding the overtime calculation are convincing. The Centre has diligently responded to the complainant's multiple requests for clarifications. In fact, the complainant and the Administration have met and corresponded on several occasions to clarify the relevant procedures for calculating and compensating overtime. In its submissions the Centre states that "HRS has repeatedly checked the calculations provided by the e-leave management system and confirmed each time that they were correct. Since the system's implementation in 2012, no complaints have arisen on the way the system calculates leave and overtime balances. Further checks were also performed by HRS officials in accordance with the applicable regulations and procedures. [...] It appears that the main difference between the complainant's calculations and those issued by the e-leave management system are due to [the complainant's] incorrect application of the provisions of HRS Circular No. 29/2012, in particular paragraph 9, which excludes mid-day breaks from calculation of overtime, and paragraph 29, which provides that overtime is calculated only upon completion of one full hour of continuous work." The complainant has not provided any convincing evidence that his overtime credit has not been correctly handled by HRS.

5. The complainant's claims under (a) (point 4 of the impugned decision) and (b), regarding the cancellation of the unfair performance evaluations for the period from 1 June 2013 to 31 May 2015, written by

Mr Z., Ms O'D. and Mr A., and their removal from his personal file, are unfounded. The complainant contends that there has been a violation of Item 16 of the Guidelines for completion of performance appraisals, appended to Personnel Office Circular No. 91/5 of 27 February 1991 on performance appraisals, and a lack of discussion during the performance appraisal procedure. The Tribunal notes that Mr Z., Ms O'D. and Mr A. were asked to complete performance appraisals for the relevant periods in which the complainant had worked under their supervision in accordance with Article 7.4(a) of the Staff Regulations of the Centre, which provides in relevant part that “[t]he appraisal shall be carried out by the official’s responsible chief who may obtain the views of a subordinate supervisor or where appropriate any other official under whose supervision the official has worked during the period under review”. Moreover, the Tribunal notes that the signatures of Mr Z., Ms O'D. and Mr A. on the performance appraisal report do not fall under the provision of Item 16 of the Guidelines for completion of performance appraisals. That provision relevantly provides as follows: “The higher level chief is the official to whom the responsible chief reports. If he decides to add any comments unfavourable to the official, he should discuss the report with the official and his chief.” In this case, they were not signing as higher level chiefs, despite their official status. The only person who signed as the higher level chief in accordance with the above-cited provision was the Deputy Director, Mr C., who signed the report without adding any comments. Thus, there was no need for further discussion with the complainant. Considering the submissions, the Tribunal is satisfied that the complainant’s supervisor, Mr B., met with the complainant to discuss the report and gave the complainant opportunities to submit his comments.

6. To address the issue of the limits of the Tribunal’s power of review it is convenient to cite the relevant parts of Judgment 4010, considerations 5 and 8, which read as follows:

“5. [...] The Tribunal recognises that ‘assessment of an employee’s merit during a specified period involves a value judgement; for this reason, the Tribunal must recognise the discretionary authority of the bodies responsible for conducting such an assessment’ (see Judgment 3945, consideration 7). The Tribunal will set aside a report only if there is a formal or procedural flaw, a

mistake of fact or law, or neglect of some material fact, or misuse of authority or an obviously wrong inference drawn from the evidence (see, for example, Judgments 3842, consideration 7, 3692, consideration 8, 3378, consideration 6, 3006, consideration 7, and 2834, consideration 7).

[...]

8. [...] [T]he complainant's analysis does not reveal any factual errors that might have had a material effect on the ultimate conclusions about his performance. While the analysis reflects the complainant's view, understandably favourable to him, of how he had performed in relation to those seven activities, it does not reveal an error of the type that would warrant intervention by the Tribunal having regard to the principles discussed in consideration 5 above. The complainant's supervisor was entitled to form the view he had of the complainant's performance and it was not flawed by any material factual error. It was a view based on evaluation and assessment of available material. While the complainant disagrees with that evaluation and assessment, it was within the supervisor's discretionary power to make that evaluation and assessment, and there is no basis established by the complainant for reviewing the exercise of that power and for setting aside the performance appraisal which was, in part, based on it."

7. The complainant argues that the examination of his case by the Reports Committee was tainted by procedural errors as the documentation provided by HRS was incomplete; he was not heard by the Committee; the Committee did not conduct a "careful" evaluation; and the evaluations made by Mr Z., Ms O'D. and Mr A. were contrary to current standards in the international civil service and were biased.

8. The Tribunal finds that the Reports Committee conducted a thorough examination of the complainant's performance appraisal report, which shows none of the above-mentioned flaws. Regarding the complainant's allegation that the documentation provided by HRS to the Reports Committee was incomplete, the Tribunal observes from the submissions that HRS had removed annexes provided by the complainant which contained personal and private third-party information unrelated to the complainant's performance of his duties, as well as unauthorized copies of official and confidential information. HRS, however, did attach the full list of the documents and offered to provide the documents themselves at the request of the Reports Committee, subject to the explicit authorization of the persons concerned. The

Reports Committee agreed with the position of the Chief of HRS not to circulate all the files containing personal and private information as they could not be disclosed without the prior consent of the officials concerned. It noted that “[w]hile it was the official’s right to add his observations to the appraisal as foreseen by the Staff Regulations and procedures, its submission should also respect the Centre’s rules and procedures”. The Tribunal considers that the documents which were not forwarded were irrelevant to the question of the validity of the complainant’s performance appraisal report.

9. The complainant submits that the fact that he was not heard by the Reports Committee vitiates the impugned decision. The Tribunal notes, however, that according to its own rules of procedure, the Reports Committee is under no obligation to conduct hearings. In any event, the complainant submitted full written documentation regarding the review of his performance appraisal report. In its recommendations to the Director of the Centre, the Reports Committee noted that the complainant was invited to be interviewed, but as he was absent on leave it then asked that he submit his observations in writing. The complainant requested a later deadline for submission, but then did not submit anything within the extended deadline. This, in the Tribunal’s view, satisfied the requirement for due process. This plea is therefore unfounded.

10. The complainant argues that the Reports Committee’s statement that “the issue of behaviour and of underperformance was highlighted by all current and past responsible chiefs” shows that the examination by the Committee was not “careful” because the evaluation made by his current supervisor, Mr B., was favourable to him. The Tribunal notes that the Reports Committee’s statement referred to section 3 b) of the performance appraisal report, regarding elements to be improved, where it was stated that the complainant needed to work on integrating with the team and overcoming past relationship issues with colleagues and to re-establish a better working relationship with staff. As this section was not signed specifically by Mr Z., Ms O’D. or Mr A., it can be inferred that it was written by Mr B. who prepared the report.

11. The plea that the evaluations made by Mr Z., Ms O'D. and Mr A. were contrary to current standards in the international civil service and were biased is unfounded. The complainant has not provided any convincing evidence to support this plea.

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

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