

K.-G.

v.

CERN

129th Session

Judgment No. 4212

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. K.-G. against the European Organization for Nuclear Research (CERN) on 22 October 2017 and corrected on 26 February 2018, CERN's reply of 14 June, the complainant's rejoinder of 8 October, corrected on 19 October 2018, and CERN's surrejoinder of 23 January 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

Considering that the facts of the case may be summed up as follows:

The complainant contests the decision to terminate his contract at the end of the probation period for unsatisfactory service.

Following his selection for the position of Professional Fire Officer in CERN's Fire and Rescue Service (CFRS), the complainant was offered, effective 1 September 2016, a five-year limited-duration contract, which was subject to a one-year probation period. The complainant's mid-probation interview was held on 14 February 2017. In his mid-probation report of the same date, his supervisor noted under the heading "Overall conclusion" that the overall results were not satisfactory, as the complainant had demonstrated little progress towards achieving objectives. The supervisor also noted that the complainant needed

significant support and had not reached the level of autonomy expected from an officer in his position. He added that without significant improvements, the complainant's contract could be terminated at the end of the probation period. In his comments on his mid-probation report, the complainant sought to provide additional information on his role and the context in which he was expected to discharge his functions.

The complainant's end-probation interview was held on 27 June 2017. In his end-probation report of the same date, his supervisor noted under the heading "Conclusion" that the complainant had demonstrated that he was not able to fulfil his Training Fire Officer function, although his responsibilities had been significantly reduced and he had received significant support. In light of this, his supervisor recommended that the complainant's contract be terminated at the end of the probation period. In his comments on his end-probation report, the complainant rebutted his supervisor's conclusions and recommendation.

By a letter of 21 July 2017, which constitutes the impugned decision, the Director-General informed the complainant of her decision to terminate his contract on 31 August 2017. Responding to specific comments made by the complainant on his end-probation report which, in her view, alluded to workplace harassment, the Director-General referred the complainant to Operational Circular No. 9, entitled "Principles and Procedures Governing Complaints of Harassment". Prior to his separation, the complainant lodged a complaint of harassment pursuant to that circular. However, in October 2017 he was informed that his harassment complaint was unsubstantiated and thus irreceivable.

The complainant claims twelve months' salary in compensation for unjustified termination; 13/30 of his monthly salary at CERN in compensation for the late notification of the termination decision; four months' salary in compensation for workplace harassment; four months' salary in compensation for loss of health; and 270 euros for the medical costs he incurred as a result of "workplace issues". He also claims moral damages equal to nine months' salary for damage to his family life and his professional reputation. He seeks costs in an amount to be determined by the Tribunal. He asks the Tribunal to order CERN to provide him

with a work certificate in the form requested by him and to offer him a written apology.

CERN asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant impugns the Director-General's 21 July 2017 decision to terminate his five-year limited-duration contract at the end of his probation period on 31 August 2017. In her decision, the Director-General observed that the complainant's mid-probation report indicated that he "[had] not demonstrated adequate progress towards achieving [his] objectives"; he was informed that "improvements were needed, in particular in terms of autonomy and methodology"; and that in the absence of specific improvements in these areas, the complainant's contract would be terminated at the end of his probation period. The Director-General also observed that in the complainant's end-probation report, his supervisor stated that "despite [the complainant's] hard work, [he was] still not able to fulfil his objectives".

2. CERN does not take issue with the receivability of the complaint filed against the decision to terminate his employment. However, CERN disputes the receivability of any claims advanced by the complainant concerning his allegations of harassment and unemployment benefits. Regarding the allegations of harassment, the complainant lodged a harassment complaint pursuant to Operational Circular No. 9 entitled "Principles and Procedures Governing Complaints of Harassment". The complainant's harassment complaint was rejected on the ground that it was irreceivable. Although Operational Circular No. 9 sets out a procedure to challenge that decision and the complainant was informed of his right to do so, he did not challenge that decision. As the complainant has not exhausted the internal means of redress as required in Article VII, paragraph 1, of the Tribunal's Statute, his harassment claims are irreceivable. As to the complainant's claims concerning unemployment benefits, CERN notes that an appealable administrative decision was not taken in this regard and, even if a decision had been taken, the complainant did not exhaust the internal means of redress.

It follows that any claims in relation to unemployment benefits are also irreceivable.

3. By way of background, the complainant took up the position of Professional Fire Officer in the CFRS, a senior role with both operational and managerial duties. The complainant's selection for the position was based on the fact that he was a professional firefighter with extensive high-level experience as a training officer and as a fire tactics training manager. Despite certain shortcomings, including his French language skills, the Selection Board unanimously concluded that the complainant would be able to fill the role successfully. In arriving at this conclusion, the Selection Board stated:

“On the basis of the interview and workshops, [the complainant] gave evidence to the board that he has the required skills and potential, which with appropriate support and management will enable him to integrate the [CFRS] as a firefighter officer and make an effective contribution to the role.”

4. The complainant submits that CERN did not fulfil its obligations to guide and support him in a timely and meaningful manner through the probation period, as provided in CERN's Staff Rules and Regulations and the Tribunal's case law. Before turning to the complainant's specific arguments, it is useful to recall that the purpose of probation is to permit an organization to assess the probationer's suitability for a position. For this reason, the Tribunal has consistently recognized:

“[...] that a high degree of deference ought to be accorded to an organisation's exercise of its discretion regarding decisions concerning probationary matters including the confirmation of appointment, the extensions of a probationary term, and the identification of its own interests and requirements. The Tribunal stated in Judgment 1418, under 6, that a discretionary decision of this kind will only be set aside 'if taken without authority or in breach of a rule of form or of procedure, or if based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority'. It also reaffirmed that 'where the reason for refusal of confirmation is unsatisfactory performance, [it] will not replace the organisation's assessment with its own.'”

(Judgment 2646, consideration 5; see also, for example, Judgments 3913, consideration 2, 3844, consideration 4, and 3085, consideration 23).

5. As well, an international organization's obligations regarding a staff member's probation period are well settled in the case law. For example, in Judgment 3866, consideration 5, the Tribunal observed:

"In Judgment 2788, consideration 1, the Tribunal identified the applicable principles as follows:

'[I]t is useful to reiterate certain principles governing probation that are of particular relevance to the present case. Its purpose is to provide an organisation with an opportunity to assess an individual's suitability for a position. In the course of making this assessment, an organisation must establish clear objectives against which performance will be assessed, provide the necessary guidance for the performance of the duties, identify in a timely fashion the unsatisfactory aspects of the performance so that remedial steps may be taken, and give a specific warning that the continued employment is in jeopardy (see Judgment 2529, under 15).'"

Lastly, as stated in Judgment 3678, consideration 1, a probationer is "entitled to have objectives set in advance so that she or he will know the yardstick by which future performance will be assessed".

6. In support of his position that CERN did not fulfil its obligations, the complainant advances a number of arguments that will be dealt with in turn. However, the complainant also makes a number of assertions concerning the manner in which he was treated during his probation period for which he does not provide any supporting evidence, in fact, in most instances there is evidence to the contrary. Some of these assertions, even if supported by some evidence, are irrelevant in relation to the lawfulness of the impugned decision and will not be addressed in these reasons.

7. First, the complainant submits that adequate induction was not provided when he started working at CERN. He contends that he should have received the almost month-long extensive induction program that he claims Firefighter Officers received. As to the induction interview he attended on 7 October 2016, the complainant observes that it lasted one hour and consisted of a very general discussion. He notes that at the interview he received a document "stating very general features of [his] role", however, "[t]here was no particular emphasis put on any part of this description" during the course of the discussion and no specific

expectations, tasks or deadlines were provided. The complainant acknowledges that his supervisor, Mr M., read the induction report to him and asked him whether he understood its contents, which he confirmed.

8. As CERN explains, the CFRS induction consists of two parts: first, there is generalised training that provides administrative support and the required technical information concerning safety at work and access permissions, which the complainant received. The second part of the induction is designed for new junior firefighters and not for officers recruited at a higher level of knowledge and experience for whom this part of the operational training would be superfluous. Turning to the induction interview, paragraph 35 of Administrative Circular No. 2 (Rev. 7) provides that “[t]he objectives to be achieved during the probation period shall be specified in writing during an induction interview”. It is observed that the induction report subsequently signed by the complainant, his supervisor and other senior CERN officials identified and described in detail the principal functions of the complainant’s position. The induction report listed the three specific work objectives assigned to the complainant for completion during the probation period, namely, to: (a) create a comprehensive development plan for the CFRS, (b) undertake the role of coordinator for emergency drills, and (c) develop an induction programme for new officers and firefighters, and the report detailed how each of these three objectives was to be achieved. The report also assigned development objectives to the complainant that relevantly included “work[ing] towards a level of proficiency in Technical French to better understand and communicate work requirements”. It is observed that in addition to clearly articulating the complainant’s objectives and detailing how the objectives were to be achieved, the induction report provided the names of staff members with whom the complainant should establish a close liaison in order to succeed. Additionally, at the induction interview, the complainant had an opportunity to discuss the objectives with his supervisor and he did not raise any concerns regarding the assigned objectives. The Tribunal concludes that the induction report complied with the requirement in paragraph 35 of Administrative Circular No. 2 (Rev. 7) and the relevant case law.

9. Second, the complainant submits that he did not receive guidance or adequate support and despite his repeated requests, he did not receive clear answers or support to improve his work. This submission is unfounded. In this context, the complainant contends that his objectives, obligations and duties were “not exactly defined” and that when he tried to get more information, he did not receive a clear answer. It is observed that in his pleadings the complainant did not identify any specific requests, oral or otherwise, or adduce any evidence upon which the Tribunal could make a finding regarding the complainant’s submission. It must also be added that in its pleadings CERN adduced extensive credible evidence that the complainant’s supervisors, the CERN hierarchy and the complainant’s colleagues did their utmost both before and after the mid-probation report to assist the complainant in achieving his assigned objectives. In particular, the complainant was given feedback and was informed of the deficiencies in his performance; clear expectations regarding his performance and deadlines to complete his assigned work; strategies to improve his performance; and the names of individuals who could assist him with technical difficulties. His supervisors established follow-up meetings with the complainant to discuss his work, to give him support and to check on the progress in his assigned work.

10. Third, the complainant asserts that he was never given a clear statement that his performance was in jeopardy prior to his end-probation interview on 27 June 2017. This assertion is rejected. At his mid-probation interview, the complainant was informed that his performance was unsatisfactory and that if he did not show substantial progress his contract could be terminated. Moreover, the complainant’s mid-probation report stated that “without sufficient improvements and in accordance with [Administrative Circular No. 2 (Rev. 7)], his contract could be terminated at the end of his probation period”.

11. As the complainant has failed to establish any contravention of CERN’s Staff Rules and Regulations or failure to adhere to the principles found in the Tribunal’s case law, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ