

The Administrative Tribunal,

Considering the complaint filed by Mr E. B. against the International Labour Organization (ILO) on 16 June 2006, the Organization's reply of 16 October 2006, the complainant's rejoinder of 3 January 2007 and the ILO's surrejoinder of 31 January 2007;

Considering Articles II, paragraph 1, 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, a former official of the ILO, is a German national born in 1950. He joined the International Labour Office, the secretariat of the ILO, in April 1998 as a Senior Employer Specialist at grade P.4 in the Eastern European and Central Asian Multidisciplinary Advisory Team (MDT) based in Moscow. He was offered a two-year fixed-term appointment, under the terms of which his promotion to grade P.5 within 18 months from the date of his appointment was made contingent on a fully satisfactory performance appraisal and a joint recommendation from the Director of the Bureau for Employers' Activities (ACT/EMP) and the Director of the MTD in Moscow – who was also Director of the ILO's Area Office in Moscow (hereinafter “the Moscow Office”) – confirming that he was able to carry out all the duties at the P.5 level. In December 1999 he was promoted to grade P.5 with effect from 1 October of that year. Soon afterwards, on 16 February 2000, his appointment was extended until 31 March 2002. With effect from 1 February 2002, he was appointed Deputy Director of the MTD in Moscow while retaining his position as Senior Employer Specialist. Around the same time his appointment was again extended until 31 March 2004.

In a letter of 25 July 2003 the Director of the Human Resources Development Department (HRD) informed the complainant of the Office's decision to relieve him of his duties as Deputy Director and to revert to the previous system of rotation among Professional Staff. The reasons were that a formal Deputy Director post did not “accurately reflect the [...] organizational needs of the Office” and that the complainant had not been able “to satisfactorily carry out [his] dual functions in such a manner that each receive[d] the attention it deserve[d]”. The Director of HRD also acknowledged the complainant's wish for a career move and assured him that the Office “[was] actively working to identify another assignment for [him]”.

In a meeting that was held in September 2003, the Director of ACT/EMP highlighted a number of areas of the complainant's performance that were of concern to him and his Deputy and in which improvement was expected. As a follow-up to that meeting, the Director of ACT/EMP sent the complainant a document summarising the areas in which improvement was necessary and indicating that a progress review would be carried out in the beginning of 2004. The review took place on 15 March. A summary of it was the subject of a letter to the complainant dated 23 March 2004 and signed by the Director of ACT/EMP. The conclusion was that “progress [was] far from being sufficient” and that an additional progress review would be carried out in September 2004.

The complainant's performance appraisal report for the period from 1 January 2002 to 31 December 2003 was prepared by his then immediate supervisor, the new Director of the Moscow Office, who signed it on 12 March 2004. She expressed strong criticism of his work, in particular his planning, technical skills and knowledge of other areas of the Office's work, and characterised his overall performance as being “below average” and his conduct as “a liability to the [O]ffice”. She recommended that he be transferred to a position where “his technical skills and general behaviour c[ould] be monitored before the [O]rganization decide[d] on his long-term future”. In his comments on it, the complainant contested the appraisal made by his supervisor, considering the criticism voiced therein as unjustified. The complainant's second-level supervisor, the Regional Director for Europe and Central Asia (hereinafter “Regional Director for Europe”), also made critical comments concerning the complainant's performance and conduct.

By a covering minute dated 19 April 2004 the Regional Director for Europe transmitted the performance appraisal report to the Reports Board, noting that, although it was not recommended to extend the complainant's appointment in his present duty station, in keeping with the rules, the Office had granted a further two-year extension so that a new duty assignment could be identified for him. He nonetheless suggested that the complainant's behaviour and performance should be monitored while still on duty in the Moscow Office. Having reviewed the appraisal, the Reports Board sent its comments to the complainant through his two supervisors in a minute of 6 May 2004. It endorsed the proposal for a further review of the complainant's performance, stating that it expected to see significant improvement in the next appraisal. On 12 November 2004 the Director of ACT/EMP communicated to the complainant the follow-up performance appraisal which was prepared by ACT/EMP for the period from March to the end of October 2004. The appraisal concluded that none of the recommendations made at the meeting in September 2003 had been "fully implemented" and that there had been no significant improvement. The complainant contested the appraisal by an e-mail sent to his supervisors on 26 January 2005. The Reports Board met on 2 February 2005 to review the follow-up performance appraisal and heard the complainant as well as his supervisors. It concluded that despite the efforts made by his supervisors to train him and give him feedback, the complainant had failed to meet expectations and that his profile did not match the requirements of any other position in the ILO. It recommended that the complainant's employment be terminated for unsatisfactory services, as stipulated in Article 11.4(c) of the Staff Regulations.

By a letter dated 30 May 2005 the Director of HRD informed the complainant that the Director-General had approved the Reports Board's recommendation and was proposing to terminate his employment as of 1 July 2005. The complainant appealed against this proposal with the Joint Advisory Appeals Board (hereinafter the "Appeals Board") on 4 July 2005. In its report of 8 March 2006 the Appeals Board recommended that the appeal be dismissed on the grounds that the procedures concerning performance appraisals had been correctly applied by the Reports Board, that there was no evidence of error of fact and that the procedure for termination of employment had been correctly followed. In a letter of 23 March 2006 the Executive Director of Management and Administration informed the complainant that, in line with the recommendation of the Appeals Board, the Director-General had decided to terminate his employment for unsatisfactory services at the expiration date of his contract, namely 31 March 2006. That is the impugned decision.

B. The complainant contests the Director-General's decision to terminate his employment for unsatisfactory services. He argues that the proceedings before both the Reports Board and the Appeals Board were not conducted according to the applicable rules. He was not informed of the statements made before the Reports Board by the Director of the Moscow Office and the Director of ACT/EMP until after the proceedings before that body had been concluded and when the case was already before the Appeals Board. In his opinion, the fact that he was not given an opportunity to respond to these "false" statements before the Reports Board means that the latter did not apply in a fair manner the rules and procedures concerning the review of performance appraisals.

He contends that the findings of the Appeals Board that "special assistance [...] had been given to him using available extra-budgetary funds" and that "he continued at all times to receive the same secretarial and clerical support as was enjoyed by other members of the MDT" are erroneous. With regard to the former contention, he submits that he had a part-time assistant until October 2003, after which he only received assistance in autumn 2004, that is, after the conclusion of the two additional progress reviews, and that for the most part during the review period, he had no assistance at all. Concerning the latter contention, he asserts that the Specialist in Workers' Activities, a post comparable to his, received full-time secretarial assistance. He also refutes the Appeals Board's finding that the comment made by the Director of ACT/EMP in connection with his performance appraisal report for 2001, that future appraisals should include "remarks on programme delivery and impact in terms of ACT/EMP's operational objectives", was directed at him, arguing that it was addressed to the Director of the MDT, who ought to have acted accordingly.

In response to the comments concerning his performance, the complainant submits that his "delivery" and the rate of "successful implementation" of the ACT/EMP programme were high in the period under review. He points to his successful international career with employers' organisations and other international organisations and bodies prior to his appointment with the ILO, and draws the Tribunal's attention to the papers he wrote and the contributions he made both during that period and the period under review. He refers to the good performance appraisals he received in the period between 1 January 2001 and 31 December 2002, and underlines the fact that he was promoted twice, first to a P.5 position, already during his probationary period, and subsequently to the position of Deputy Director of the Moscow Team with effect from 1 February 2002. In that context, he also contends that the Organization failed to produce any evidence of misconduct.

Lastly, he pleads unfair treatment in that the promise to transfer him was not kept. He states that when he joined the ILO, he was assured that, in line with the established practice, he would be transferred to Geneva after three to four years of service at the Moscow Office. In that regard he submits that the Director of HRD had repeatedly promised him that a transfer would be arranged, and that even the Regional Director for Europe had made a statement to that effect. He also points to the fact that all other senior specialists had been transferred to Geneva.

The complainant asks the Tribunal to set aside the impugned decision and to order the Organization to reinstate him with effect from 1 April 2006 or, alternatively, to pay him the equivalent of the salary, "social contributions" included, from that date until February 2012, when he will reach retirement age. He also claims 15,000 Swiss francs in costs.

C. In its reply the Organization submits that the Director-General's decision of 23 March 2006, which is subject to limited review, is "appropriate and fully supported by evidence". It asserts that the complainant was given ample warning of his shortcomings and sufficient time and assistance to correct them.

Regarding the complainant's allegation of unfair treatment, it asserts that, as it was not presented before the Appeals Board, it is irreceivable for failure to exhaust internal remedies. In any event, it points to the Appeals Board's conclusion that there is no evidence of the alleged promise, emphasising that "transfer cannot be considered a valid option in a situation where it is proposed to terminate a contract for unsatisfactory services".

In response to the complainant's plea that the statements by the Director of ACT/EMP and the Director of the Moscow Office before the Reports Board were only brought to his attention during the proceedings before the Appeals Board, the Organization argues that these statements neither altered nor added to the substance of the material that was considered by the Reports Board, and points to the comment made by the Appeals Board to the effect that the statement of the Director of the Moscow Office had not determined its recommendation. The ILO further submits that in the proceedings before the Appeals Board the complainant was at all times given the opportunity to reply to the written and oral comments of his supervisors. In the Organization's opinion, "the mere fact that certain marginal oral comments may not have been fully communicated to the [c]omplainant in his interview with the Reports Board is not sufficient to vitiate a procedure that was thorough and transparent".

Regarding the complainant's allegation that the findings of the Appeals Board concerning the administrative support he received are erroneous, the Organization submits that the complainant has misread the Board's statements on this issue. The Board in fact confirmed what the complainant contended in his submissions, namely that he did not enjoy administrative support as from September 2003 and that he only received "special assistance" afterwards, as of autumn 2004. With regard to the alleged inaccuracy of the statement that he received at all times the same support as other members of the MDT, the Organization contends that the complainant has not provided any evidence that he did not in fact receive the same level of secretarial and clerical support. In the same vein, the ILO dismisses the allegation that the comment of the Director of ACT/EMP conveying his expectation concerning future appraisals was not directed to the complainant, arguing that as the Senior Employer Specialist in the Moscow Office, the complainant was the official responsible for "programme delivery and impact in terms of ACT/EMP's operational activities".

Lastly, the Organization draws attention to the fact that, in reaching their conclusions concerning the complainant's performance and conduct, both the Reports Board and the Appeals Board considered a large amount of evidence provided by three high-level officials, all of whom were supervisors of the complainant. It also observes that an earlier successful career cannot serve as guarantee of continuous good performance.

D. In his rejoinder the complainant maintains that the proceedings were tainted with procedural flaws, in particular because the ILO failed to respect the rules of adversarial procedure. At no point before the issuance of the performance appraisal report for the period from 1 January 2002 to 31 December 2003 did his Director communicate to him any criticism concerning his performance, and the formal reason he was given by the Director of HRD in his letter of 25 July 2003 for being relieved from the responsibilities of Deputy Director was that the position did not reflect the needs of the Office. He argues that a constructive working relationship between himself and the Director of the MDT had proven very difficult because of his desire to act in accordance with the Organization's rules and a lack of cooperation on her part.

The complainant further submits that the procedures used to assess his performance lacked transparency, given that the standard reporting schedule was not observed. He argues that in breach of the Staff Regulations, his

appointment was effectively suspended several months before the Appeals Board formulated its recommendation, and in a way that enabled the Organization to make the termination of his employment coincide with the non-extension of his contract. He considers that these “delaying tactics” amount to abuse of authority.

E. In its surrejoinder the ILO reiterates that the complainant has failed to provide any evidence that the Director-General’s decision to terminate his appointment for unsatisfactory performance is mistaken in law or in fact, procedurally flawed or that it involves an abuse of authority. It rejects the complainant’s plea that his suspension was effected in breach of the Staff Regulations as irreceivable for failure to exhaust internal remedies to the extent that it is presented as a separate claim. In any case, it dismisses the argument as devoid of merit, and asserts that in placing him on special leave the Organization merely acted under Article 7.7 of the Staff Regulations. Furthermore, it considers the complainant’s reliance on the “neutral language” employed by the Director of HRD in his letter of 25 July 2003 as “non probative” of the argument he puts forward. Having only been raised in the rejoinder, the ILO also dismisses as new and hence irreceivable the argument that the complainant’s performance appraisals were neither transparent nor adversarial. In the Organization’s view there were no procedural irregularities in the evaluation of the complainant’s performance, and hence the argument must be rejected as unfounded.

## CONSIDERATIONS

1. The complainant challenges the decision of 23 March 2006 to terminate his employment for unsatisfactory services. He seeks to have that decision set aside; to be reinstated with effect from 1 April 2006 or, alternatively, to be awarded an amount equivalent to the salary, “social contributions” included, he would have received from that date until the date of retirement had he retained his post. He also claims costs.

2. Before addressing the complainant’s arguments, it is worth reiterating the well-established principle that where services are terminated for unsatisfactory performance the Tribunal will not replace the organisation’s assessment of the complainant’s fitness for his duties with its own.

3. The complainant’s main pleas are: denial of due process, errors of fact and of law, and unfair treatment. The complainant also raised additional matters in his rejoinder that will be addressed separately.

### *Denial of due process*

4. The complainant submits that he was only made aware of certain important information that was provided to the Reports Board after the latter had completed its deliberations. In particular, he refers to the statements made by the Director of the Moscow Office and the Director of ACT/EMP before the Reports Board concerning his performance and his conduct. In his view, although false or at least incorrect, these statements were critical in the examination of his case by the Appeals Board since they were one of the main factors underlying its recommendation to reject his appeal.

5. The complainant contends that the failure to inform him of these statements constitutes a breach of due process. He relies on the Tribunal’s view in Judgment 1815 that “[t]o ensure due process both in internal proceedings and before the Tribunal the staff member must get any items of information material to the outcome”.

6. Turning first to the statements of the Director of the Moscow Office, as pointed out by the Appeals Board in its report, although she did make strong statements concerning the complainant’s behaviour, they were not inconsistent with her earlier appraisal of the complainant’s performance and simply served as illustrations. The Appeals Board also considered whether these statements were determinative of the Reports Board’s conclusion and recommendation and found that they were not material. The Tribunal agrees.

7. However, it should be noted that concerns regarding the complainant’s performance and conduct were already expressed in his performance appraisal report for the period from 1 January 2002 to 31 December 2003.

8. Given that at all times the complainant was aware of the concerns relating to his performance, the Tribunal concludes that there was no denial of due process.

### *Errors of fact and of law*

9. The complainant submits that two of the Appeals Board's findings regarding the administrative support he was provided are erroneous. He denies that "special assistance [...] had been given to him using available extra-budgetary funds" as stated in the report of the Board. He maintains that this was only the case from the autumn of 2004 onwards. The Tribunal accepts the Organization's submission that the complainant appears to have misread the Board's findings. It seems that the Board's mention of "special assistance" was a reference to the assistance given to the complainant because of his difficulty communicating in Russian and which was discontinued when there was no longer any funding. The Board acknowledged that this assistance ended in 2003, which is in substantial agreement with the position taken by the complainant that up until 2003 he had a half-time assistant.

10. He also asserts that the Appeals Board's finding that he received the same secretarial and clerical support as other members of the MDT is wrong. Other than a general comment that a colleague who was a Specialist in Workers' Activities had a full-time assistant at all times, the complainant did not provide any material to the Tribunal in support of his assertion.

11. The complainant further argues that the Appeals Board erroneously concluded that the comment made by the Director of ACT/EMP concerning the content of future appraisals was directed at him when, in fact, it was addressed to the Director of the MDT. Given that the comment was taken from the complainant's performance appraisal in the context of future expectations in terms of his work, the Tribunal finds this argument to be unfounded.

12. The complainant relies on Judgment 2468 as authority for the proposition that "termination within a running two-year fixed-term contract needs more vigilant reasons [than] 'only' bad performance". In advancing this argument, he does not resile from the position that despite the handicap of not having adequate administrative support, his work was "excellent" or that it at least met the minimum standard required for the post he occupied. The complainant points to his experience as an expert within the European Commission and the fact that he has an MBA degree as evidence of the quality of his work. He rejects the assertion that the dynamics of the Moscow Office had changed to the extent that he could not adapt and continue as a valuable employee.

13. The Tribunal finds that the complainant's reliance on Judgment 2468 is misplaced. In that case the Tribunal found several manifest errors and for that reason the impugned decision was set aside. It also emphasised that in those cases involving dismissal for unsatisfactory performance at the end of a probationary period or the non-renewal of a fixed-term contract, the Tribunal would carefully scrutinise the record for reviewable error. There is nothing in that judgment from which it could be inferred that something more than unsatisfactory services, such as misconduct, was a condition precedent to dismissal.

#### *Unfair treatment*

14. The complainant takes issue with the refusal to transfer him to ILO headquarters. He contends that this refusal amounts to unfair treatment. He puts forward two arguments. First, he asserts that the statement made by HRD in its letter of 25 July 2003 that the Office "[was] aware of [his] desire for a career move, [...] and [was] actively working to identify another assignment" reflects a concrete commitment for a promotion and a transfer. He points to the statement made by the Regional Director for Europe in his minute of 19 April 2004 that an extension of the complainant's contract would give HRD and ACT/EMP the possibility of identifying a new duty assignment as further evidence of the intention to transfer him. Second, the complainant submits that all other senior specialists were transferred to Geneva and that it is the common practice of the ILO and other organisations of the United Nations system to give such transfers.

15. The Organization considers that the complainant's allegation of unfair treatment resulting from the denial to grant his request for a transfer is being raised for the first time before the Tribunal and is therefore irreceivable for failure to exhaust internal remedies.

16. While it is not entirely clear whether in the course of the internal proceedings the complainant contended that the Organization's non-consideration of his request for a transfer constituted unfair treatment, it is clear that he did raise the issue of a promise of a transfer. Accordingly, this issue will be considered on its merits.

17. The Tribunal finds that the contents of the letter of 25 July 2003 cannot be reasonably interpreted as a commitment or a promise on the part of the Organization to transfer the complainant. It is no more than an acknowledgement of the Organization's attempt to accommodate the complainant. Nor does the Regional

Director's minute of 19 April 2004 evidence an intention to transfer him. Given the wording of the statement, namely, that a renewal of the complainant's contract was not recommended but that his contract had been extended as required by the rules, there is no evidence of a promise or commitment to transfer him. Instead, it is no more than a comment regarding the possibility of finding a new position for the complainant due to the additional time afforded by the extension of his contract.

18. Concerning the complainant's allegation of unfair treatment because, contrary to the established practice, he was not offered a transfer after having served for a number of years at the Moscow Office, the Tribunal observes that this argument is premised on the complainant's view that his work was satisfactory. As the evidence before the Tribunal does not support the underlying premise, there is no need to consider this argument further.

#### *Subsidiary matters*

19. Subsidiarily the complainant raises a number of matters regarding erroneous statements made by his superiors at different times in various documents concerning his performance and conduct. As it is not the role of the Tribunal to engage in a reassessment of the complainant's performance, these matters will not be considered.

20. Also, he advances additional arguments with regard to procedural errors. Relying on Article 6.4 of the Staff Regulations, the complainant argues that where an employee has been given an unsatisfactory performance appraisal, the first step is the withholding of an increment. It is only after a second negative appraisal that a proposal for termination of contract may be made. In the Tribunal's view, this argument ignores the discretionary language of the provision, namely, that an increment "may" be withheld and, for this reason, it must be rejected.

21. Moreover, the complainant submits that the assessment of his performance was neither "transparent nor adversarial". In particular, he states that his first assessment covered a period prior to that for which an appraisal was normally due and that according to the Reports Board the second appraisal ought to have been from March to September 2004 and not from March to November 2004. Neither of these matters is relevant to the issue of whether or not his work performance was satisfactory.

22. The complainant alleges that he was illegally suspended "on a basis that is not covered by the Staff Regulation[s]" and that his suspension "came at the end of the internal procedures" so that "non-extension [of contract] and termination [of employment] fell together". He characterises this as an abuse of authority. To the extent that the complainant is advancing this argument in the context of the propriety of the overall termination process, the Tribunal notes that there is no evidence that the complainant was ever suspended from his duties. Rather, as contemplated by the Staff Regulations, he was placed on leave with pay. If it is being advanced as a new claim, it is irreceivable because the complainant has not exhausted internal remedies.

23. In conclusion, the Tribunal finds that the complainant was informed in a timely manner of the shortcomings of his performance, that he was advised of the Organization's expectations and that he was given ample opportunity to remedy the situation. Further, he has failed to establish any erroneous findings of fact, error of law, breach of due process or violation of the Staff Regulations that would warrant interference with the impugned decision.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2007.