Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

107th Session **Judgment No. 2836**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms V. R. against the International Labour Organization (ILO) on 7 May 2008 and corrected on 19 June, the Organization's reply of 18 September, the complainant's rejoinder of 24 October 2008 and the ILO's surrejoinder of 23 February 2009, including additional comments dated 25 March 2009;

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 French national born in 1970, joined the International Labour Office, the Organization's secretariat, on 8 September 2003, as a senior secretary at grade G.5 in the InFocus Programme on Safety and Health at Work and the Environment. She was recruited following a competition, in which she participated as an external candidate, and was granted a two-year fixed-term contract with a probationary period.

On 30 April 2004 the complainant had an informal discussion with, among others, her supervisor – the Programme Director – during which both positive aspects of her work and areas calling for improvement were identified. On 28 July 2004 she signed without comment her first performance appraisal report covering the period from 8 September 2003 to 31 May 2004. In the report the Director, acting as her responsible chief, criticised her "less than ideal" working relations with her colleagues. In a minute dated 13 September 2004 the Reports Board indicated that it expected to see significant improvement in the competencies where weaknesses had been identified, failing which it might be necessary to extend the complainant's probationary period or to consider not extending her contract of employment. The complainant was on sick leave from 27 June 2005 to 13 February 2006. Her contract, which expired during that period, was extended until 7 December 2005 and then until 7 October 2006.

The second performance appraisal report, covering the period 1 June 2004 to 28 February 2005, constituted the complainant's probationary report. The Programme Director again criticised, inter alia, the complainant's inability to work in a team and maintain good relations with her colleagues. He considered that she was unsuited for permanent employment in the senior secretary post to which she had been assigned. On 27 February 2006 the complainant signed this report and added several comments; she attached further comments on 14 March. On 29 May the complainant and the Director were invited to appear separately before the Reports Board. By a letter of 3 October the Director of the Human Resources Development Department informed the complainant that the Director-General had approved the Reports Board's recommendation and had decided not to extend her appointment beyond her probationary period. The complainant's appointment therefore ended on 7 October 2006 and she received two months' salary in lieu of notice.

On 7 February 2007 the complainant filed a grievance which was rejected by the above-mentioned Department. On 4 June she referred the matter to the Joint Advisory Appeals Board and asked it to recommend the cancellation of the decision not to extend her contract

and her retroactive reinstatement. In its report of 10 December 2007 the Board recommended dismissal of the grievance. By a letter of 8 February 2008, which constitutes the impugned decision, the Executive Director of the Management and Administration Sector informed the complainant that her grievance had been dismissed as unfounded. The complainant says that she received this letter on 13 February 2008.

B. Relying on Judgment 2558, the complainant contends that since the Executive Director of the Management and Administration Sector has not furnished proof of a delegation of authority or of a signature by the Director-General, the impugned decision was not taken by the competent authority and must therefore be set aside. In her view, "the Director-General and his Office" should have taken this decision because the Executive Director was "already involved in various ways in the internal procedure". She infers from this that the spirit of the Collective Agreement on Conflict Prevention and Resolution entered into by the International Labour Office and the ILO Staff Union on 24 February 2004 has not been respected.

The complainant argues that the adversarial principle was disregarded because she was not present when her supervisor was heard by the Reports Board. He was invited to appear after her and therefore had the last word. In her opinion, the breach of that principle is all the more serious for the fact that the Reports Board is the only body with the competence to assess the performance and conduct of an official, since the Joint Advisory Appeals Board and the Tribunal have only a limited power of review.

The complainant considers that she has proved in several instances that the "guidelines on performance appraisal" were not followed in her case. She contends that she told the Reports Board that she had not been previously informed of many of the criticisms contained in her second performance appraisal report and that her supervisor had based his assessment on mere rumours, and she drew attention to a number of inconsistencies and inaccuracies, but the Board does not appear to have examined these arguments thoroughly. This situation, she says, is attributable to the fact that the Board in question did not consist of

representatives of staff and management but only of "high-level directors".

Moreover, the complainant takes her supervisor to task for not ensuring a healthy working environment. She explains that she was in charge of a group of secretaries holding permanent appointments, although she was still a probationer and that, instead of supporting her in this "difficult context", her supervisor sided against her. In her opinion, he made up his mind about her in 2004 and never intended to give her any chance to improve. In support of her allegations she produces a document which she found on her supervisor's desk in 2004. The conclusion reached in this document, which records her colleagues' individual opinions about her, is that her skills are inadequate for her post.

The complainant requests the setting aside of the impugned decision, compensation for the injury suffered and costs in the amount of 5,000 Swiss francs.

C. In its reply the ILO asserts that the complaint is irreceivable because the complainant, having received the letter of 8 February 2008 on 13 February, should have filed a complaint with the Tribunal by 13 May at the latest, whereas, according to the complaint form, she did so only on 16 May 2008.

Regarding the form of the impugned decision, the Organization explains that its wording makes it quite clear that it was indeed taken by the Director-General, who authorised the Executive Director to inform the complainant thereof. This has been the practice followed consistently since the entry into force of the Collective Agreement of 24 February 2004. The reference to Judgment 2558 is therefore not pertinent.

On the merits the Organization points out that, in accordance with its case law, the Tribunal will set aside a decision not to extend a contract only on certain conditions – which are not met in this case – and that it will not substitute its own assessment for that of an official's supervisors when the appraisal procedure has been respected. It considers that this procedure has been duly followed, since the

complainant was given the opportunity to remedy the difficulties noted.

Recalling the various steps of the procedure before the Reports Board, the Organization asserts that the complainant was not deprived of her right to be heard by the Board. She had been previously notified of all of the criticisms contained in her second performance appraisal report, and the alleged inconsistencies contained in her reports merely prove that the assessment had been completely objective. In the Organization's opinion there is nothing to indicate any kind of personal prejudice on the part of the Programme Director. In fact, far from proving personal prejudice, the document dating from 2004, which the complainant appropriated despite the fact that it was confidential, shows on the contrary that the Director acted diligently by contacting the complainant's colleagues in the department. Lastly, the Organization considers that the complainant's other arguments are too vague to determine their purport.

D. In her rejoinder the complainant produces the letter which she received from the Registrar of the Tribunal acknowledging receipt of her complaint and stating that it was filed on 7 May 2008. She asserts that the complaint is therefore receivable.

On the merits the complainant reiterates her arguments. She contends that her probationary period took place in abnormal conditions and alleges that she was mobbed by some of her colleagues who were jealous of her appointment. She is of the opinion that the Reports Board accepted her supervisor's point of view without ascertaining whether his assessment had been impartial. She says that she decided to produce the document from 2004 because it is one of the few items of evidence proving the personal prejudice and harassment to which she was subjected.

E. In its surrejoinder the Organization reiterates its position. With regard to receivability it produces the covering letter which the Registrar sent to the Director-General when she forwarded the complaint to him and which states that the filing date was 16 May 2008. On the merits it contends that the accusations of harassment are

unsubstantiated. It queries whether evidence obtained by unlawful means is admissible before the Tribunal.

By a letter of 13 March 2009 to the Organization's Legal Adviser, the Registrar of the Tribunal explained that the misfiling of the postal receipt slip had led her to indicate an incorrect filing date when forwarding the complaint, which had indeed been filed on 7 May 2008. In response to the invitation contained in that letter, the ILO submitted additional comments on 25 March 2009 in which it withdrew its objection to receivability *ratione temporis*, but maintained its position on the merits.

CONSIDERATIONS

1. The complainant was recruited by the ILO on 8 September 2003 as a senior secretary at grade G.5 in the InFocus Programme on Safety and Health at Work and the Environment. She was given a two-year contract, corresponding to a probationary period in accordance with Article 5.1 of the ILO Staff Regulations.

On 30 April 2004 the complainant had an informal meeting with her responsible chief, in the presence of a number of other officials from her department and representatives of the Human Resources Development Department, to discuss the assessment of her performance. On that occasion she was told that although her performance was satisfactory in some respects, she would have to make progress in various areas and in particular endeavour to entertain more cordial working relations with her colleagues.

The complainant's performance between 8 September 2003 and 31 May 2004 was subsequently appraised in a first report which again mentioned her relational difficulties. In accordance with the procedure established by Article 6.7 of the Staff Regulations, this document was then transmitted to the Reports Board which is responsible within the Office for reviewing officials' performance appraisals and, if they are probationers, for recommending whether or not to confirm their appointment. On 13 September 2004, after examining this first report, the Board considered that the complainant lacked certain core

competencies required for a secretarial post. It concluded that if no significant improvement had been made by the time of her second performance appraisal report, it might be necessary to extend her probationary period or quite simply not to extend her appointment.

2. Her initial contract having been extended owing to her being placed on sick leave until 7 October 2006, the complainant received her second performance appraisal report in February 2006. This report, covering the period 1 June 2004 to 28 February 2005 and in which her responsible chief again expressed serious doubts about her suitability for the job, prompted two sets of comments from the complainant dated 27 February and 14 March 2006, respectively.

After examining the whole of the file and hearing both the complainant and her responsible chief on 29 May 2006, the Reports Board supported his recommendation not to extend the complainant's appointment on the grounds that on balance her probationary period was deemed to be unsatisfactory. The complainant was notified in a letter dated 3 October 2006 from the Director of the Human Resources Development Department that the Director-General had approved this recommendation and that her contract would therefore end on 7 October.

3. Having filed a grievance against this decision, which was dismissed on 8 May 2007, the complainant referred the matter to the Joint Advisory Appeals Board in accordance with Article 13.3 of the Staff Regulations.

In its report of 10 December 2007 the Board unanimously recommended that the complainant's grievance should be dismissed as unfounded.

By a letter of 8 February 2008 the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had decided in accordance with that recommendation to confirm the non-extension of her contract.

4. It is that decision that the complainant is now impugning before the Tribunal. She requests that it be set aside and she seeks compensation for the injury she claims to have suffered, as well as an award of costs.

5. As the Tribunal has consistently held, a decision not to renew a fixed-term contract, being discretionary, may be set aside only if it was taken without authority, or in breach of a rule of form or of procedure, or was 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. These criteria, which are applicable to all discretionary decisions, must be applied with particular circumspection in the case of a decision not to confirm the appointment of a person on probation (see, in particular, Judgments 1052, under 4, and 2724, also under 4).

6. In the instant case, the complainant essentially submits that the impugned decision was taken without authority, that the proceedings before the Reports Board did not comply with the adversarial principle, that the assessment of her performance by her responsible chief was flawed in several respects and that she was the victim of personal prejudice on his part.

7. With regard to the authority of the author of the impugned decision, the complainant emphasises that the decision was signed by the Executive Director of the Management and Administration Sector, whereas the person with authority to take such a decision is the Director-General, and that the Executive Director has not furnished any proof that the Director-General has delegated to her the authority to take or sign such decisions.

This plea is devoid of merit. Admittedly Article 13.3 of the Staff Regulations lays down that the decision on a grievance filed with the Joint Advisory Appeals Board must be taken by the Director-General, but in this case the letter of 8 February 2008 from the Executive Director merely stated that, “having examined the [Board’s] report, the Director-General [had] asked [her] to inform [the complainant] of his

decision concerning [her]" in the following terms: "The Director-General takes note of the conclusions contained in the [Board's] report and approves its recommendations. In the light of the foregoing, [the] grievance is therefore dismissed as unfounded." The very wording of this letter shows that its purpose was not to announce a decision taken by the Executive Director but to notify a decision adopted by the Director-General – according to a procedure frequently used by the Office in such circumstances. The lack of a delegation of authority to the signatory of this letter is therefore irrelevant and the case law on which the complainant relies in this connection does not apply here.

Moreover, the complainant's subsidiary argument that the Executive Director could not have taken an impartial decision on her grievance is also rendered moot by this finding. Since the decision in question came from the Director-General and not from the Executive Director, the objection raised in this respect is of no avail.

8. With regard to the lawfulness of proceedings before the Reports Board, the complainant contends that they were conducted in breach of the adversarial principle. She takes the Board to task for hearing her responsible chief after it had heard her, which enabled him to make critical remarks about her without her being able to reply to them effectively.

The Tribunal will not entertain this plea either. As it found in Judgment 2468 in respect of proceedings before the Reports Board of the ILO, the procedures used to assess the performance of international civil servants must be both transparent and adversarial. But this Board, which was set up by the Director-General to exercise the above-mentioned functions of carrying out reviews and making recommendations and which is empowered by Article 10.3 of the Staff Regulations to establish its own procedure, cannot be regarded as either an internal appeal body or a judicial body. Hence, as the Tribunal noted in Judgment 2724, where an official has had the opportunity to state his or her point of view and to comment on the relevant supervisors' assessments of his or her performance and conduct, the adversarial principle can reasonably be deemed to have been observed.

This was the situation in this case. The complainant, who duly received her performance appraisal reports, was able to submit her written comments to the Reports Board – which she did, as stated above, on 27 February and 14 March 2006 – and she was also able to present comments at her hearing by the Board on 29 May 2006. She thus had the opportunity to challenge the assessment of her performance, and the fact that her responsible chief was heard after her is insufficient reason to hold that the adversarial principle was breached. The position would be different if, during his own hearing, this supervisor had produced completely fresh evaluation data of which the complainant had not yet been apprised, but the submissions show that this did not happen.

9. As for the alleged flaws in the assessment of the complainant's work, she asserts that her performance appraisal reports did not meet the essential requirements of objectivity, transparency and rigour and that they disregarded the relevant guidelines in force within the Organization. She submits in particular that the disputed evaluation rested partly on inaccuracies, or even on mere "rumours", that she had not been informed earlier about some of the unfavourable assessments in her second performance appraisal report and that this report was inconsistent with that covering the first evaluation period.

This line of argument does not, however, convince the Tribunal.

10. By alleging that inaccurate information was relied upon, the complainant intends in fact to challenge the evaluation of some aspects of her performance, such as the drafting of documents in English or ensuring telephone attendance at all times, which formed part of her duties. As the Tribunal has consistently held, when faced with such pleas it will not substitute its own assessment for that of the Organization's Administration (see, for example, Judgments 516 and 1052). As explained above in consideration 5, the evaluation thus criticised could be set aside only if it were clear from the submissions that it contained a manifest error. It must be concluded that this is not the case here.

11. By asserting that the disputed assessment rested partly on rumours, the complainant in fact intends to criticise her responsible chief for taking into account the opinions expressed on her work by various other officials in the department. The Tribunal considers that it is not *per se* unlawful for supervisors who have to assess an official's performance and recommend whether or not to confirm his/her appointment to ask colleagues of the person in question how they rate his/her work, as a means of helping them to form their own judgements. A supervisor must of course exercise the requisite caution and discernment when taking such opinions into account, but there is nothing in the submissions to suggest that this requirement was not satisfied in this case.

12. Nor has the complainant any grounds for arguing that the second performance appraisal report records criticisms of which she had not previously been informed. Indeed, the evidence on file shows that the few criticisms of which she had not previously been informed were very minor, and that the others had already been mentioned in her first performance appraisal report, or during the meeting with her responsible chief on 30 April 2004, or at another meeting on 23 June. Furthermore, although the Tribunal's case law requires that an official on probation be warned in a timely manner that his/her appointment might not be confirmed, it does not require that a decision not to renew a contract should rest on exactly the same criticisms as those of which the person concerned had previously been notified (see Judgments 1546 and 2162). In the instant case the complainant had been sufficiently warned of the risk that her contract would not be extended. It is therefore of little importance that some criticisms might have been contained only in her last performance appraisal report.

13. The inconsistencies identified by the complainant in the first and second performance appraisal reports can be easily explained by the fact that her performance varied during her probationary period. Moreover, the Tribunal has already had occasion to underline that, generally speaking, it is not necessarily contradictory for performance

to be rated differently from one reporting period to the next (see, for example, Judgment 2162, under 3).

14. Lastly, the complainant submits that her appraisal was coloured by her responsible chief's personal prejudice against her.

However, the Tribunal is bound to observe that this allegation is not corroborated by any of the evidence on file. Although the overall tenor of the two performance appraisal reports drawn up by that supervisor is unfavourable, they do contain some positive comments about certain aspects of her work. In addition, the fact that her responsible chief took account of the opinions of other officials in the department and that some assessments changed between the first and second reports – which the complainant herself stresses elsewhere in her argument – tends to demonstrate her supervisor's concern to assess her performance objectively and to rule out the possibility of a decision based on preconceived ideas. Moreover, the Tribunal notes that the complainant does not dispute the fact that, as her responsible chief pointed out to the Reports Board, there had not been any direct conflicts between them; this renders the allegation that the disputed assessment was coloured by personal prejudice against her even less credible.

15. Since none of the complainant's pleas succeeds, her complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 April 2009, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet