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

111th Session **Judgment No. 3039**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. P. against the International Labour Organization (ILO) on 9 June 2009, the ILO's reply of 9 September, the complainant's rejoinder of 15 December 2009 and the Organization's surrejoinder of 12 February 2010;

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. The complainant is a national of Ukraine born in 1957. At the material time he was Chief of the Payment Authorisation Section, at grade P.5. On 4 December 2006 the Director of the Financial Services Department, who was his responsible chief during the period from 1 August 2003 to 31 July 2005, sent him the draft performance appraisal which he had drawn up on the simplified appraisal form that they had decided to use. The complainant, having stated that he disagreed with some of the appraisals, asked his chief, during a

meeting on 13 December 2006, to use the "standard" appraisal form, and this was agreed.

On 15 October 2007 the responsible chief signed the final version of the complainant's appraisal report for the above-mentioned period. On 24 October the complainant, who remained in disagreement with some of the appraisals, annexed his comments to the report. On 26 October 2007 the Executive Director of the Management and Administration Sector, as the higher level chief, expressed concern at this dispute and stated that in her view the complainant's "very negative reaction" was unwarranted because, overall, the appraisal was positive. As the Reports Board suggested that the complainant and his responsible chief should have a "detailed discussion" about the particular issues raised, a meeting took place on 28 January 2008. The appraisal report was then placed in the complainant's personal file.

On 14 April the complainant submitted a grievance, alleging that his performance appraisal report gave an "inaccurate picture" of his work, was not "in conformity with the relevant rules" and was "incompatible with [his] terms and conditions of employment". His principal request was for the report to be withdrawn from his personal file. Having been informed that the Human Resources Development Department considered his grievance to be groundless, on 12 August 2008 he appealed to the Joint Advisory Appeals Board. The latter issued its report to the Director-General on 8 January 2009, recommending that the complainant's request be rejected. By a letter of 9 March 2009 the Executive Director of the Management and Administration Sector informed the complainant that the Director-General had decided to adopt this recommendation. That is the impugned decision.

B. The complainant contends that the Guidelines for Completion of Performance Appraisals were infringed in several respects and that the violations are so serious "that they deny the very essence of the appraisal process and constitute a procedural flaw". He states that, although these Guidelines specify that "[t]he written judgement should not come as a surprise to the official at the end of a review period", the criticisms contained in his performance appraisal report were

"a total surprise" for him, since there had been no prior discussion of them. He refers to the requirement in the Guidelines that "[t]he […] performance appraisal is to be completed and returned to the Personnel Department within two months from its date of issue" and points out that the draft appraisal was submitted to him in December 2006 and the final version of the report in October 2007, that is, 16 and 26 months respectively after the end of the review period.

He also mentions that, contrary to the Guidelines, some of the boxes in the report form were not filled in. On the other hand, his responsible chief completed some boxes which could have been left blank, even though the conditions for doing so were not met, which resulted in his giving "unjustified, undocumented, inaccurate information which contradicted previous appraisal reports". He emphasises that, according to the Guidelines, it is "important" that the parties "agree to the information provided" in item 12 of the report, relating to the staff member's work assignments, and he challenges the summary prepared by his responsible chief, on the basis that it does not list his main tasks. He complains that his chief did not comply with the Guidelines relating to item 13 of the report, entitled "Appraisal of Performance", because he sent him the final version of the report without giving him a chance to discuss matters not covered in the initial draft. Nor did his responsible chief consult him before completing item 15(b) of the report, referring to desirable changes in the official's performance. The objectives set for him in that light, which he would be expected to attain "in the future reporting period", were in fact brought to his notice two and a half months after the end of that period. He states that his responsible chief had not mentioned any of the shortcomings revealed in his performance or in his attitude to work. Lastly, he observes that, according to the Guidelines, he should himself have completed item 21 of the report, whereas it was in fact his responsible chief who had completed it, giving inaccurate information about the number of staff supervised by him.

The complainant, on the basis of the above-mentioned Guidelines, accuses his responsible chief of a lack of communication

and dialogue, resulting in an "inaccurate picture" of his duties which minimised his personal contribution to the establishment of a new resource information system, known as IRIS. He states that the "detailed discussion" suggested by the Reports Board did not take place at the meeting of 28 January 2008.

Lastly, the complainant asserts that his responsible chief retroactively made "unwarranted and undocumented" criticisms of his work, which deprived him of the opportunity to "prepare specific responses". In his view, there were too many of these criticisms by comparison with the positive appraisals. The fact that he was the only official in his section to receive a performance appraisal report containing negative comments, and that he was therefore "more affected than [his] colleagues", is in his view evidence of harassment.

The complainant requests the setting aside of the impugned decision, compensation for the harm suffered and 2,000 Swiss francs for costs.

C. In its reply the ILO states that it complied with the Guidelines to which the complainant refers, with the procedure laid down in Article 6.7 of the Staff Regulations of the International Labour Office and with ILO Circular No. 392, Series 6, on performance appraisals, except as regards the time limit for submitting the report. It admits that there was a delay in compiling the report, caused by "a number of factors relating to the organisation of the department". It points out, however, that according to the case law a delay in compiling a performance appraisal report does not in itself vitiate the report, especially where no harm has been caused to the staff member concerned, which is in fact the case. It states that the criticisms in the report had already been brought to the complainant's notice, particularly through e-mails sent to him in 2005 and 2007, and that the issue of desirable changes in his performance had also been raised at that time. It also claims that the above-mentioned Guidelines made provision for not filling in the boxes which, according to the complainant, should have been filled in. In reply to the argument that information concerning the complainant's work assignments had not been agreed upon, it alleges that the complainant had had the

opportunity on several occasions to review the information, including through an adversarial procedure. It points out, in particular, that a request made in his comments of 24 October 2007 for his own job description to be annexed to his report was accepted. It also states that the appraisal contained in item 13 of the report was preceded by a meeting – the one that took place on 13 December 2006 – and that, since the Guidelines make no provision for another interview if the initial draft appraisal is revised, it had followed the applicable procedure. It emphasises that the comments made by the complainant during the meeting in question were taken into account, since one of the criticisms which had featured in the initial draft was deleted from the final version of the report.

The defendant contends, giving a number of examples, that the responsible chief had established regular communication with the complainant and had invited him to come and discuss his performance appraisal report with him. That discussion took place on 28 January 2008.

According to the Organization, the report is positive overall, even though it contains some constructive criticisms which were framed objectively and in the interest of the service, and could not be construed as harassment. It points out that the Tribunal exercises only a limited power of review over performance appraisals, and argues that the complainant has not provided any evidence that the report has any of the flaws which would warrant the Tribunal's censure.

D. In his rejoinder the complainant reiterates some of his pleas. As the Organization has not, in his view, shown that his responsible chief had engaged in a dialogue with him about the quality of his work, he considers that there has been a violation of the provisions of Circular No. 392, Series 6. He also considers that the ILO has not proved that the criticisms in his performance appraisal report were justified. He seeks to show that the delayed preparation of the report was harmful to him, and that the e-mails of 2005 and 2007 to which the Organization refers were sent after the end of the review period and do not bear out the criticisms in any way.

E. In its surrejoinder the defendant maintains its position in full. It produces a series of e-mails to show that during the period in question the complainant had regular discussions with his responsible chief regarding his work assignments, and that in this respect the provisions of the above-mentioned circular were complied with. It contends that the complainant confuses the harm allegedly arising from the fact that there was a delay in compiling his appraisal report, with the harm caused by the content of the report itself. In its view, the complainant has not proved that the criticisms levelled at him were framed in bad faith or with the intention of harming him.

CONSIDERATIONS

1. The complainant is an official of the International Labour Office at grade P.5, who was Chief of the Payment Authorisation Section at the material time.

2. With a view to the preparation of his performance appraisal report for the period from 1 August 2003 to 31 July 2005, he had agreed with the Director of the Financial Services Department, who was his responsible chief during the period in question, that the simplified appraisal form would be used instead of the "standard" one. However, when the complainant received the draft appraisal report on 4 December 2006, he noted his disagreement with the appraisals given by his responsible chief. He made a request for the "standard", more detailed form, to be used, and this was done.

On 15 October 2007 his responsible chief signed the final version of the appraisal report, which mentioned, among other things, certain shortcomings in the complainant's work when IRIS was set up. On 24 October the complainant again noted his disagreement with the appraisals of his work, and annexed his own comments to the report in question.

On 12 December 2007 the Reports Board suggested to the complainant's responsible chief that he should have a "detailed

discussion" with him about certain matters in the report. A meeting accordingly took place between them on 28 January 2008.

The appraisal report was then placed in the complainant's personal file.

3. As the grievance filed by the complainant on 14 April 2008 in order to have the report removed from his personal file was dismissed as groundless, he then appealed to the Joint Advisory Appeals Board. The Board, while noting "regrettable irregularities", recommended that the Director-General reject the complainant's request.

By a letter of 9 March 2009, which constitutes the impugned decision, the complainant was informed that the Director-General had decided to endorse that recommendation.

4. The complainant is asking the Tribunal to set that decision aside, compensate him for the harm suffered and award him 2,000 Swiss francs for costs.

In support of his claims, he contends that the Guidelines for Completion of Performance Appraisals were violated, that there was neither communication nor dialogue between himself and his responsible chief, and that the latter made "unwarranted and undocumented" criticisms of his work.

5. The defendant submits that the complaint should be dismissed in its entirety, all the complainant's claims being groundless.

6. The provisions relevant to this case which were in force at the material time read as follows:

Article 6.7 of the Staff Regulations

"*Performance appraisals*

1. The performance of each official shall be appraised on a form prescribed by the Director-General after consulting the Joint Negotiating Committee. The appraisal shall be carried out by the official's responsible chief […].

2. The appraisal shall be communicated to the official, who shall initial and return it within eight days of its receipt, attaching to it any observations he may wish to make. These observations shall be filed with the appraisal unless the Director-General decides otherwise. The appraisal, together with any observations which may have been made by the official, shall then be transmitted to the official to whom the responsible chief reports, who may add his observations to it, in which case it shall be returned to the responsible chief and to the official for initialling. It shall then be transmitted to the secretary of the Reports Board for appropriate action.

3. A performance appraisal shall be established on the completion of an official's first nine months of service, after 18 months, after 33 months, after 45 months, and at the end of every two-year period thereafter. […]"

Circular No. 392, Series 6

"Performance Appraisals

[…]

5. In order to provide a sufficient period of time for the formulation of objectives and the thorough evaluation of the official's ongoing work over the course of its phases, responsible chiefs shall be required to complete a performance report for each of their subordinates according to the following schedule: after the completion of the official's first nine months of service, after 18 months (probation report), after 33 months, after 45 months, and at the end of every two years thereafter.

[…]"

Guidelines for Completion of Performance Appraisals

"1. The preparation of the performance appraisal should be the occasion for discussion between the supervisor and the official of the official's future assignments or objectives, and of suggestions the official might have regarding his work or that of the unit. Moreover it should be borne in mind that the formal appraisal is only one stage in a continuing dialogue. The written judgement should not come as a surprise to the official at the end of a review period. Effective performance reporting depends on strengths and weaknesses being identified and brought to the official's attention at an early stage.

2. The ILO performance appraisal is to be completed and returned to the Personnel Department within two months from its date of issue.

[…]"

7. According to firm precedent, staff reports are essentially discretionary, and the Tribunal will set aside or amend a report only if there is a formal or procedural flaw, a mistake of fact or of law, or

neglect of some material fact, or misuse of authority, or an obviously wrong inference from the evidence (see Judgment 2064, under 4, and the case law cited therein).

It is therefore for the complainant to provide evidence to show that the impugned decision is challengeable on one of the above grounds.

8. In this case the complainant argues, as his first plea, that the scale and significance of the violations of the Guidelines for Completion of Performance Appraisals are such "that they deny the very essence of the appraisal process and constitute a procedural flaw". In particular, he alleges that the criticisms in his appraisal report came as a "total surprise" to him, whereas the Guidelines stipulate that the written judgement "should not come as a surprise to the official at the end of a review period", and that for performance reporting to be effective, strengths and weaknesses should be identified and brought to the official's attention at an early stage. He states that his responsible chief did not send him the draft appraisal report for the period from 1 August 2003 to 31 July 2005 until December 2006, that is, 16 months after the end of the period in question, and that he signed the final version of the report only on 15 October 2007, i.e. 26 months after the end of that period, which was therefore a violation of the rules in force.

He also states that the appraisal form was not filled in completely and correctly, and that he had made clear that he was not in agreement with some of the information given by his responsible chief, especially as regards his "work assignments".

He emphasises that the final version of the report mentions issues which had not been raised beforehand in discussions between his responsible chief and himself, and that his attention had not been drawn to the shortcomings revealed in his performance or in his attitude to work.

9. The Tribunal finds, on examining the file, that the time limits laid down in Circular No. 392, Series 6, and in the Guidelines for Completion of Performance Appraisals, were not adhered to, resulting

in a considerable delay in preparing the disputed report. Admittedly, as the Tribunal stated in Judgment 2064, under 5, performance reports continue to be useful even if deadlines have not been respected, and failure to meet a deadline cannot on its own be a reason for setting aside reports. However, depending on the case, the effect that the delay has on the report's content will be taken into account.

In this case, the defendant has not supplied any valid justification for the considerable delay that occurred. It merely refers to "a number of factors relating to the organisation of the department", without giving any further details.

10. The Tribunal also notes that some of the requirements relating to dialogue between the official and his responsible chief, especially paragraph 3 of the circular, which calls for a meeting at least once each year, were not strictly observed. The circular aimed at "encouraging constructive dialogue between officials and their responsible chiefs". Such dialogue was all the more necessary because the second half of the review period covered the initial phase of implementation of IRIS, which, according to the defendant itself, involved "intensive dialogue about staff roles and responsibilities" within the Financial Services Department.

11. Contrary to the view taken by the Joint Advisory Appeals Board, the Tribunal considers that these irregularities may have resulted in the appraisal being slanted in a direction unfavourable to the complainant.

As the appraisal process was flawed in this sense, the complainant is justified in requesting removal of the contested appraisal report from his personal file. The impugned decision must therefore be set aside.

12. The complainant, who suffered moral injury arising from the irregularities in the appraisal process, is entitled to compensation in the amount of 2,000 Swiss francs.

13. As he succeeds, he is entitled to the amount of 2,000 francs for costs.

DECISION

For the above reasons,

1. The Director-General's decision of 9 March 2009 is set aside.
2. The contested appraisal report shall be removed from the complainant's personal file.
3. The ILO shall pay the complainant the sum of 2,000 Swiss francs in compensation for moral injury.
4. It shall also pay him the sum of 2,000 francs for costs.

In witness of this judgment, adopted on 12 May 2011, Mr Seydou Ba, Vice-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 6 July 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet