Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

117th Session **Judgment No. 3321**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr B. Q. against the International Labour Organization (ILO) on 7 November 2011 and corrected on 5 December 2011, the ILO's reply of 28 February 2012, the complainant's rejoinder of 4 May and the ILO's surrejoinder of 1 August 2012;

Considering the letter of 12 February 2014 in which the Registrar, acting at the Tribunal's request, asked the ILO and the complainant to produce a document related to the disciplinary sanction applied to the complainant in the year 2000, the ILO's reply of 13 February 2014 that, as the warning received by the complainant had been withdrawn from his personal file, it was unable to produce any documentary evidence of it and the complainant's letter of 14 February 2014 enclosing a copy of the warning in question;

Considering Article II, paragraph 1, 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 and the pleadings may be summed up as follows:

A. The complainant challenges the Director-General's decision not to grant him personal promotion in the context of the 2008 exercise.

Office Procedure IGDS No. 125 (Version 1) of 22 October 2009 (hereinafter "IGDS No. 125") governs the personal promotion system in the International Labour Office, the ILO's secretariat. The objective of this system is to offer the possibility of promotion to officials who, in terms of their seniority and record of service, have made a significant contribution to the work of the Organization, but who have not been able to achieve career advancement through the normal career development procedures. IGDS No. 125 states that this system allows a change in grade following one of two possible tracks, the first being provided for under Article 6.8.2, paragraph 2, of the Staff Regulations and the second under paragraph 3 of the same article.

Article 6.8.2, paragraph 2, reads as follows:

> "Subject to the criteria, procedures and numerical limits determined by the Director-General after consulting the Joint Negotiating Committee, officials [in the Professional category below the grade of P.5] shall be promoted to the next higher grade of their category if:
>
> (a) their conduct has been fully satisfactory and their performance of duties has been consistently superior to that normally associated with the level of responsibilities of their job; and
>
> (b) they have served or are deemed, in accordance with the criteria established, to have served at least 13 years in their present grade."

Paragraph 3 of that article reads:

> "Officials [in the Professional category below the grade of P.5] shall be promoted to the next higher grade of their category if:
>
> (a) their conduct and their performance of duties in their present grade have been satisfactory; and
>
> (b) they have served at least 25 years in the Office, the United Nations or another specialized agency with at least 13 years in their present grade."

IGDS No. 125 also stipulates that, having reviewed the files of officials eligible for personal promotion under the first or second track, a joint panel (hereinafter "the Joint Panel") must submit its report and recommendation concerning personal promotion to the Director-General.

Information regarding the career of the complainant, who retired in January 2012, may be found in Judgment 2468, delivered on 6 July 2005, on his first complaint. He joined the International Labour Office in September 1982, as an Arabic translator, at grade P.3. He obtained an appointment without limit of time with effect from 1 July 1989 and was promoted to grade P.4 as a translator/reviser in April 1993. In his first complaint he impugned the Director-General's decision to terminate his appointment as of 31 October 2003 for unsatisfactory services. In Judgment 2468, the Tribunal found, however, that the reasons given to establish that the complainant's abilities and performance were unsatisfactory did not suffice to justify terminating his appointment and therefore decided to set aside that measure and to order his reinstatement as from 1 February 2004.

By a letter of 10 August 2010, the Chief of the Staff Operations Branch informed the complainant that the Director-General, acting on the Joint Panel's recommendation, had decided not to grant him personal promotion in the 2008 promotion exercise. It was explained that, in view of his performance appraisals for 1997-1999 and 2001-2003, the Joint Panel had been unable to recommend his promotion in the 2008 exercise, but that it had decided to re-examine his file for the 2011 promotion exercise. On 8 November 2010 the complainant filed a grievance challenging this decision with the Human Resources Development Department. This grievance was dismissed on 2 February 2011. On 1 March he referred the matter to the Joint Advisory Appeals Board which, in its report dated 23 June 2011, recommended that the Director-General should dismiss the grievance as groundless. The complainant was informed by a letter of 9 August 2011 that the Director-General had endorsed the Board's recommendation. That is the impugned decision.

B. The complainant contends that the Joint Panel examined his file only under track one, whereas it should also have considered it under track two. He stresses that pursuant to Article 6.8.2, paragraph 3, of the Staff Regulations, an official is entitled to personal promotion if his or her conduct and the performance of his or her duties in his or her current grade have been satisfactory, and he asserts that his

performance appraisals were always “excellent”, except those covering 1997-1999 and 2001-2003 which, “in the light of Judgment 2468”, he deems to be highly questionable. In his opinion, the presence of “a few negative factors” in some of his performance appraisals should not call into question the “generally satisfactory or even excellent” quality of his work during his 30 years of service with the ILO. In addition, he takes the Organization to task for not drawing up appraisals of his performance between 2003 and 2007, which prevented the Joint Panel from formulating an “informed” recommendation. In his view this “lack of a performance appraisal” constitutes a substantive flaw which should lead to the cancellation of the 2008 promotion exercise.

The complainant seeks the setting aside of the impugned decision, the cancellation of the 2008 promotion exercise, compensation for the injury suffered and an award of costs in the amount of 2,000 Swiss francs.

C. In its reply the ILO submits that the claim that the 2008 promotion exercise should be cancelled is irreceivable, because internal remedies have not been exhausted, given that the complainant did not raise this claim in the context of his internal appeal.

On the merits the ILO emphasises that, in accordance with the Tribunal’s case law, the grant of personal promotion is an “optional and exceptional measure” which is subject to only limited review by the Tribunal, and it states that the complainant has not proved the existence of any flaw which might justify the setting aside of the impugned decision. Moreover, the ILO observes that it is obvious from the Joint Panel’s report, of which it supplies a censored version, that the Panel examined the complainant’s file under both tracks. It also submits that the complainant plainly did not satisfy the criteria concerning conduct and performance defined in Article 6.8.2, paragraph 2, of the Staff Regulations, nor did he satisfy those of paragraph 3 of that article, since his performance had been regarded as unsatisfactory in two appraisals covering the periods 1997-1999 and 2001-2003, the soundness of which the Tribunal did not question in Judgment 2468. It observes that neither the Staff Regulations nor

IGDS No. 125 require that the period of service taken into account when examining a personal promotion file should be fully covered by performance appraisals. It also explains that, according to current ILO practice, in the absence of a performance appraisal, an official's service is deemed to be satisfactory. The fact that the complainant received no appraisals between 2003 and 2007 does not therefore constitute a flaw which would justify the cancellation of the 2008 promotion exercise.

D. In his rejoinder the complainant withdraws his claim that the 2008 promotion exercise should be cancelled. He points out that, had he been given performance appraisals for the period 2003-2007, his conduct and performance might have been rated satisfactory within the meaning of Article 6.8.2 of the Staff Regulations and the "wrong impression" left by his two unfavourable performance appraisals might have been offset. In addition, he submits that the warning he received in the year 2000 ought to have been withdrawn from his personal file in accordance with the provisions of Chapter XII of the Staff Regulations. In his opinion, the withdrawal of this warning was "very important", as the decision not to grant him personal promotion was based solely on his conduct. Lastly, he submits that the Joint Panel's report does not contain adequate reasons to support its recommendation not to give him personal promotion.

E. In its surrejoinder the ILO maintains its position. It states that the complainant received not a warning but a censure, a sanction which, pursuant to Article 12.5 of the Staff Regulations, is not withdrawn from an official's personal file. In its opinion, it was legitimate and lawful to bear that censure in mind when examining the complainant's file. Lastly, it explains the Joint Panel's reasoning behind its recommendation was in one of the censored paragraphs of the report which it had enclosed with its reply. In order to "dispel any doubts" it provides a clean version of the paragraph in question.

F. In order to determine the precise nature of the sanction imposed on the complainant on 20 April 2000 and the legal consequences of

resolving this issue of fact, the Tribunal ordered further submissions by requesting the ILO and the complainant to produce a document related to this sanction. In its answer the ILO states that it was a warning but that, as it had been withdrawn from the complainant's file, it was unable to produce any documentary evidence thereof. The complainant supplied a copy of the warning in question.

CONSIDERATIONS

1. The complainant, who was recruited by the ILO in 1982, at grade P.3, as an Arabic translator, was promoted to grade P.4 in 1993.

His appointment was terminated for unsatisfactory services pursuant to a decision of the Director-General of the International Labour Office of 27 October 2003. This measure, which was taken in the context of a bitter dispute between the complainant and his immediate supervisor, was set aside by the Tribunal in Judgment 2468, delivered on 6 July 2005. As a result, the complainant was reinstated in his post as from 1 February 2004.

2. The complainant was informed by a letter of the Chief of the Staff Operations Branch of 10 August 2010 that the Director-General had decided to follow the recommendation of the Joint Panel set up under Office Procedure IGDS No. 125, not to grant him personal promotion in the 2008 exercise.

On 9 August 2011, following the Joint Advisory Appeals Board's examination of the grievance which the complainant had filed against the aforementioned decision, the Director-General decided to dismiss this grievance. That is the decision which is now impugned before the Tribunal.

The complainant requests not only the setting aside of this decision, but also an award of damages to redress the moral and material injury which he considers he has suffered and an award of costs.

3. The Tribunal's case law has established that, by its very nature, the decision to grant personal promotion lies at the discretion

of the executive head of an international organisation and is therefore subject to only limited review. For this reason, it may be quashed only if it was taken without authority, or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the evidence, or if there was abuse of authority (see, for example, Judgments 1815, under 3, 2668, under 11, or 3084, under 13).

4. Contrary to the complainant's submissions, it is plain from the evidence in the file that the Joint Panel did study the possibility of granting him personal promotion under both of the tracks provided for in Article 6.8.2, paragraphs 2 and 3, of the Staff Regulations and that the examination made under the second track was based on the applicable criteria – which were less stringent in terms of professional merit. In addition, the complainant is wrong to contend that no reason was given for the recommendation not to grant him such promotion, since the Joint Panel's report, which was produced by the ILO during the proceedings, clearly explains the grounds for this position.

5. The complainant's submission that the Panel based its opinion that he did not fulfil the dual conditions of "satisfactory" conduct and performance, which were required for promotion under the second track, on an assessment which was not conducted in the correct manner is a much more convincing argument.

6. It is plain from the evidence in the file that the Joint Panel's unfavourable recommendation was grounded mainly, if not exclusively, in the assessment of the complainant which was contained in two performance appraisals for the periods June 1997 to May 1999 and June 2001 to May 2003.

These appraisals, prepared in the context of the above-mentioned bitter conflict between the complainant and his immediate supervisor, are precisely those which formed the basis of the termination of appointment which the Tribunal set aside in Judgment 2468, on the grounds that "the reasons given to establish that the complainant's

abilities and performance were unsatisfactory did not suffice to justify terminating his appointment for unsatisfactory services".

7. When these documents were drawn up the Reports Board, which clearly doubted the objectivity of the assessments that they contained, took the very unusual step of instructing an independent expert in turn to assess the quality of the complainant's work. The fact that this expert's report had itself been prepared in breach of the complainant's right to an adversarial procedure was one of the main reasons why the Tribunal set aside the disputed termination of the complainant's appointment.

However, contrary to the ILO's contentions, it may not be inferred from this, that the Tribunal recognised the soundness of the assessments contained in the above-mentioned performance appraisals, which the Reports Board had regarded as questionable from the outset. On the contrary, in Judgment 2468 the Tribunal expressly cast doubt on the objectivity of one of these reports, and it took care to state that the above-mentioned finding that the disputed termination of the complainant's appointment could not lawfully be based on his unsatisfactory abilities and performance stemmed "from all the circumstances of the case".

8. Notwithstanding this fact, the Tribunal did not set aside these .performance appraisals, nor did the complainant request it to do so, and the Organization was therefore right to retain them in the complainant's personal file. In the particular circumstances of the case, however, the Joint Panel should have treated these documents with a degree of caution when assessing the complainant's performance and they should at least have been compared with later performance appraisals.

9. It has been established that for four years thereafter, from June 2003 until June 2007, i.e. the precise period immediately preceding the 2008 promotion exercise, the Organization refrained from undertaking any appraisal of the complainant's professional merits.

10. The ILO, which offers no explanation for this bizarre and irregular situation, tries to argue that neither the provisions of Article 6.8.2 of the Staff Regulations nor those of IGDS No. 125 require performance appraisals covering the whole period of service to be taken into account for the purposes of personal promotion.

This argument is completely devoid of merit. Paragraph 12 of IGDS No. 125 states that "[u]nder the second track, the assessment of merit will be based entirely on the staff member's personal file […]". It must therefore be concluded that performance appraisals necessarily constitute the main, if not the sole factor on which the Joint Panel can base itself in order to arrive at an informed opinion as to whether the performance of staff members eligible for personal promotion under this track is satisfactory.

11. Although the Organization says that it is its practice, in the absence of a performance appraisal, to deem the services of the official in question to be satisfactory during the relevant year in order to ensure that this situation cannot adversely affect that person, as the complainant rightly comments, this solution is only a partial remedy for this shortcoming since, in fact, this purely theoretical presumption cannot possibly leave such a positive impression on the minds of Joint Panel members as that which would result from reading expressly favourable assessments in a performance appraisal. In the instant case this drawback was all the more serious because it made it impossible for the complainant to refute earlier unfavourable assessments of his service which were of dubious objectivity owing to the circumstances in which they had been made.

12. In addition to the anomalies just highlighted, which chiefly concern the conditions under which the complainant's performance was examined, a further aberration was such as to undermine the lawfulness of the assessment of his conduct.

In his rejoinder the complainant draws attention to the fact that on 20 April 2000 he received a warning, which ought to have been withdrawn from his personal file after three years, in accordance with

Article 12.3 of the Staff Regulations, and he contends that it would therefore not have been lawful to take account of this sanction in the disputed promotion exercise.

In its surrejoinder the ILO, far from saying that the document in question had in fact been withdrawn from the complainant's file, submits that this sanction was not a warning but a censure – which it was not obliged to withdraw from his file – and that, for this reason, "[i]t was not only legitimate but also lawful to take it into consideration".

It transpires from the additional submissions requested by the Tribunal on this point that the sanction in question was indeed a warning, as mentioned in Judgment 2468.

Having been asked to clarify this matter, the ILO states in its final submissions that the sanction was indeed removed in 2003. However, given the confusion surrounding this issue, it must be found that the removal of the sanction from the complainant's file prior the Joint Panel's deliberations cannot be regarded as a formally established fact.

13. It follows from the foregoing that the impugned decision and that of 10 August 2010 were taken on the basis of a recommendation prepared in unlawful circumstances and are therefore tainted with a procedural flaw. It follows that they must be set aside on these grounds.

14. However, there is no reason for the Tribunal to order the grant of personal promotion requested by the complainant, nor is it appropriate, in the circumstances of this case, to refer the matter back to the Organization for review.

It is clear from the submissions in the file that, between 2000 and 2003, the complainant's attitude towards his immediate supervisor had been one of insubordination and open animosity which, as the Tribunal already noted in the above-mentioned Judgment 2468, was not what might be expected of an international civil servant. The deletion of the sanction imposed on the complainant on 20 April 2000

cannot *per se* disguise the existence of this unacceptable conduct, which remains a fact. Since the applicable provisions require satisfactory conduct on the part of the official in his or her last grade, this factor alone manifestly prevented the grant of personal promotion to the complainant in the 2008 exercise.

15. As, at all events, the complainant could not therefore have received the additional salary accompanying the new grade to which he aspired, the unlawful nature of the impugned decision caused him no material injury in the instant case.

16. On the other hand, the fact that the Joint Panel examined his situation in unlawful circumstances did, in itself, cause him moral injury for which he will receive fair compensation by ordering the Organization to pay him 10,000 Swiss francs.

17. As he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 1,000 francs.

DECISION

For the above reasons,

1. The decision of the Director-General of the International Labour Office of 9 August 2011 and that of 10 August 2010 are set aside.
2. The Organization shall pay the complainant compensation in the amount of 10,000 Swiss francs for moral injury.
3. It shall also pay him 1,000 francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

CLAUDE ROUILLER
SEYDOU BA
PATRICK FRYDMAN

DRAŽEN PETROVIĆ