

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

N.
v.
FAO

124th Session

Judgment No. 3879

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. N. against the Food and Agriculture Organization of the United Nations (FAO) on 30 June 2014, the FAO's reply of 17 October, the complainant's rejoinder of 2 December 2014 and the FAO's surrejoinder of 24 March 2015;

Considering Articles II, paragraph 5, and VII, 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 may be summed up as follows:

The complainant challenges the decision not to revise the "unsatisfactory" overall rating of his performance.

The complainant joined the World Food Program (WFP) – an autonomous joint subsidiary programme of the United Nations and the FAO – in May 2010 as an Internal Auditor at grade P-4 under a two-year fixed-term contract. In his final Probationary Performance Appraisal Report his performance was rated as "satisfactory". His appointment was subsequently confirmed and renewed.

In March 2011 the planning phase of his Performance and Competency Enhancement (PACE) appraisal was conducted. He was then assigned "Individual Work Outputs" and the competency profile corresponding to his post was determined.

In the mid-term review of August 2011 the complainant's first-level supervisor indicated that he had made progress but that there were several areas where improvement was expected.

On 2 February 2012 the complainant's first-level supervisor signed his 2011 PACE appraisal report and rated his overall performance as "unsatisfactory". In the comments she indicated that the output of his work on audits was not yet at the level she expected from a P-4 Auditor and that this impacted negatively on the Office of Internal Audit's (OSA) achievement of its work plan. She noted that she had discussed this appraisal in depth with the complainant and that he had indicated his willingness to undertake an improvement plan. The complainant added his comments on 27 February 2012, stating that while he had discussed the appraisal with his supervisor, he wished to be given a "few specific examples" of his underperformance. On the same day his second-level supervisor signed the report and endorsed the "unsatisfactory" rating. On 30 March the complainant made his final comments and signed the document. He contested the overall rating, arguing that an unsatisfactory rating should be given "only after deploying, trying and testing an improvement plan".

Meanwhile, the complainant had challenged his overall rating through the PACE Recourse Procedure. In its report a majority of the ad hoc Review Group set up to review the contested appraisal report recommended that the overall rating be maintained on the grounds that concerns about the complainant's performance had been identified in the mid-term review and that areas for improvement appeared to persist at the end of the year. One member recommended that the overall rating be revised to "satisfactory", on the ground that disproportionate weight had been given to the negative aspects of the complainant's performance.

By a memorandum of 18 July 2012 the complainant was informed that the overall rating of his appraisal report was maintained. On 9 October he filed an appeal with the WFP Executive Director, which was rejected by a letter dated 15 November 2012. On 18 December 2012 he lodged an internal appeal with the Appeals Committee. He was separated from service on 3 June 2013 upon the non-renewal of his contract.

In its report of 9 September 2013 the Appeals Committee emphasised that its review of performance appraisals was limited. It did not find any evidence of bad faith or abuse of power on the part of the first-level supervisor, nor evidence that the ratings had been based on errors of fact. However it found that the complainant had not been clearly warned of the risk of receiving an “unsatisfactory” overall performance rating and considered that an Improvement Plan was required before such a rating could be given. Therefore, while it recommended dismissing the complainant’s request to have the overall final rating revised to “satisfactory”, it also recommended that the contested appraisal report be removed from his file and disregarded for subsequent action and that his legal costs be reimbursed.

By a letter dated 1 April 2014 the complainant was informed that the FAO Director-General had decided not to follow the Appeals Committee’s recommendations, considering that, in this case, an Improvement Plan was not required and that issuing a warning would have been premature and inappropriate. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order the revision of his 2011 overall rating to “satisfactory”. In the alternative, he asks that the 2011 appraisal report be removed from his file and disregarded for all subsequent actions. He also asks the Tribunal to quash the decision not to renew his contract and seeks retroactive reinstatement in his position with all the legal consequences that this entails. He claims moral damages and 5,000 euros in costs for the present proceedings as well as for the internal appeal proceedings in WFP and FAO.

The FAO submits that the complaint should be dismissed as entirely unfounded and that the claim for moral damages as well as those relating to the non-renewal of the complainant’s contract should be dismissed as irreceivable for failure to exhaust internal remedies.

CONSIDERATIONS

1. The complainant purports to challenge two decisions. One is the decision not to renew his contract of employment when it eventually

expired on 3 June 2013. That claim is irreceivable under Article VII, paragraph 1, of the Tribunal's Statute, which requires a complainant to exhaust all internal means of redress under her or his organization's applicable rules before filing a complaint in the Tribunal. As the complainant himself points out in his submission, when this complaint was filed the decision not to renew his employment was the subject of another internal appeal in ongoing proceedings.

2. The second decision which the complainant challenges is the "unsatisfactory" overall rating of his performance in 2011 and, ultimately, the Director-General's impugned decision of 1 April 2014 which confirmed that rating. The Appeals Committee had concluded that there was no basis for reversing the "unsatisfactory" rating, but recommended that the contested 2011 PACE appraisal report be removed from the complainant's file and disregarded for subsequent action and that his legal costs be reimbursed. The Appeals Committee had also considered that the complainant was not clearly warned of the risk of receiving an "unsatisfactory" overall performance rating. It considered that an Improvement Plan was required before an "unsatisfactory" overall rating was given. The Director-General rejected these recommendations in the impugned decision.

3. The complainant contends that the impugned decision is tainted by procedural and substantive flaws. He seeks an order to set it aside and to revise the overall PACE rating replacing it with an overall "satisfactory" rating. In the alternative, he asks that the FAO be ordered to remove the contested 2011 PACE from his file and to award him moral damages and costs.

4. As to the claim for moral damages, the complainant states that he is entitled to it "for the prejudicial conduct of the [FAO] in regard to [his] grievances" and for excessive and unreasonable delay in the PACE appraisal and the PACE Recourse procedure, as well as in the internal appeals proceedings. He contends that these delays constituted a breach of the FAO's duty of care to him. The FAO argues that the request for moral damages is irreceivable under Article VII, paragraph 1, of the

Tribunal's Statute because the complainant did not make that request in his internal appeal. This argument fails given the Tribunal's case law, as stated, for example, in Judgment 3080, under 25:

“As far as the award of moral damages is concerned, it must first be pointed out that, contrary to the Organization's submissions, the fact that this claim was not raised before the internal appeal bodies does not make it irreceivable. Consistent precedent has it that the rule laid down in Article VII, paragraph 1, of the Statute of the Tribunal that internal means of redress must first be exhausted does not apply to a claim for compensation for moral injury, which constitutes a claim for consequential relief which the Tribunal has the power to grant in all circumstances (see Judgment 2609, under 10, or Judgment 2779, under 7).”

5. The complainant submits that the length of time which the ad hoc Review Group took to issue its report and for the impugned decision to be issued by the Director-General was excessive, especially considering that the renewal of his contract was at stake. The Tribunal notes that the complainant challenged the overall rating in his 2011 PACE through the Recourse Procedure on 26 March 2012. The ad hoc Review Group met on 7 and 16 May 2012. On 14 May 2012 the complainant submitted his comments for its review. The Group issued its report on 6 July 2012 and the complainant was informed of its recommendations on 18 July 2012. This, in the Tribunal's view, was not excessive and unreasonable delay. As to the internal appeal process, the complainant lodged his appeal with the Appeals Committee on 18 December 2012, after his appeal to the WFP Executive Director was rejected on 15 November 2012. The Appeals Committee met on 2 August 2013 and issued its report to the FAO Director-General on 9 September 2013. The impugned decision was taken on 1 April 2014, almost seven months after that report was issued. This period of almost seven months to issue the impugned decision was excessive and unreasonable, particularly given that it could have potentially affected the renewal of the complainant's contract (see Judgment 3160, under 17). For this, he will be awarded moral damages.

6. The complainant contends that his 2011 PACE appraisal report was substantially flawed in that the recommendation in the PACE

Instruction Booklet to assign a 75:25 percent weighting in the overall rating as between, respectively, the Work Plan Results and Assessment section and the Competency section was not taken into consideration. He made this assertion by reference to the specific regulatory framework for staff evaluation.

7. It is noted that Staff Rule 303.2.6 provides that “[t]he service of a staff member shall be the subject of evaluation reports made from time to time by the supervisor. Such reports, which shall be shown to the staff member, shall form a part of the staff member’s permanent cumulative record.” Guidelines have been issued in an Instruction Booklet entitled “WFP Performance Appraisal System (PACE) – Instruction Booklet”. These guidelines establish a system for performance appraisals and apply to staff members holding fixed-term contracts in the grade which the complainant held.

8. The PACE Instruction Booklet provides three criteria or sections for appraising performance. One is a “Work Plan Results and Assessment” in which the Individual Work Plan outputs of a staff member are linked to the unit work plan which reflects the priority objectives of a unit. The outputs reflect the staff member’s individual inputs to the unit’s work plan. Expectations for performance are based upon the staff member’s personal grade. A second criterion/section is a “Competency Profile” based on the personal grade and job profile provided by the staff member and contains assessment indicators – “skills, knowledge, personal qualities and behaviours needed by the person in the position to be a successful part of the WFP team as well as an individual performer”. These sections contain itemized indicators. Each competency is rated by the supervisor at the end of the cycle. A “Learning and Development Plan” is the third appraisal criterion/section. The PACE Instruction Booklet states that once expectations have been set for the year, it becomes clear where the staff member may need additional learning and/or development to achieve the key outputs. Following discussions with the supervisor, the staff member establishes a learning and development plan. The PACE Instruction Booklet provides, finally, that following discussions with the supervisor, the staff member

inserts all outputs in this section and signs off. The supervisor then signs off – finalizing the planning phase.

9. Under the PACE system, a staff member is subjected to a mid-term review “usually six months after the PACE programme has begun” to discuss with her or his supervisor job performance, and, in particular, to review the progress made towards the staff member’s work plan.

10. The PACE Instruction Booklet further provides for a final review which commences when the supervisor schedules a meeting with the staff member to discuss her or his performance. Out of this “the supervisor prepares a brief, balanced and objective narrative of the staff member’s performance consistent with the Individual Work Plan and the competency assessment, supported with short ‘descriptive examples’. The supervisor also comments on the achievements of the staff member’s planned training and development activities over the year”. At the end of an assessment cycle the supervisor is to rate the staff member’s Work Plan Results as either “achieved”, “partially achieved” or “not achieved” and enter relevant comments. The PACE Instruction Booklet suggests that ratings for competencies should be either “Meets Current Level”, “Needs Development” “[i]f observed behaviours for the staff member do not meet grade level requirements 25 percent of the time or more”, or “Exceeds Current Level” “[i]f the staff member’s observed behaviours are substantially beyond grade level requirements 75 percent of the time or more”.

11. For the overall performance ratings, based on work results and competencies, the PACE Instruction Booklet relevantly provides that the first-level supervisor is to rate the staff member’s performance as “outstanding”, where the staff member has “produced an outstanding result at an ‘outstanding level’ in all areas; performance effectiveness of result, in both quantitative and qualitative terms, far exceeded current grade level requirements”. The supervisor is to rate the staff member’s performance as “successful”, where the staff member has “produced a successful result at the ‘fully satisfactory’ level in all or almost all areas; performance effectiveness of result, in both quantitative and qualitative

terms, fully met current grade level requirements”. The supervisor is to rate the staff member’s performance as “unsatisfactory”, where the staff member has “[a]ttempted but was not successful in producing the expected result; performance effectiveness of result, in quantitative or qualitative terms, did not meet current grade level requirements or standards”. A note in the PACE Instruction Booklet recommends that “at least a 75 percent weight be assigned by supervisors to the Work Plan Results and Assessment section while a 25 percent weight should be assigned to the Competency section”.

12. The observance of this recommendation is no doubt intended, among other things, to provide a measure of consistency in these weightings for all staff members and accordingly cannot be ignored.

The complainant raised the weighting issue in his final comments in his 2011 PACE appraisal report. In its report, the ad hoc Review Group stated, in effect, that its members were uncertain as to how the 75:25 percent weighting should apply and recommended referring the question to the Acting Director of Human Resources (HR) for interpretation. The Group also recommended that the Acting Director HR should take their divergent views on its application into consideration when making the final decision. However, the weighting was not mentioned in the Acting Director’s Memorandum of 18 July 2012 which informed the complainant that the overall “unsatisfactory” rating was maintained. Neither was it mentioned in the letter on behalf of the WFP Executive Director of 15 November 2012 which rejected the complainant’s appeal. The impugned decision only mentioned the issue in passing.

13. The Tribunal considers that it is not sufficient for the FAO to assert that “[w]ithout prejudice to its position that [the] 75:25 ratio is not mandatory, [...] the complainant has not demonstrated that the recommendation of the 75:25 percent weighting ratio was not followed in determining the overall rating [or that] [...], if such a ratio was not applied and was now to be applied, he would have received a better overall performance rating”. The burden is on the FAO to show at least that the supervisor did not ignore the 75:25 percent weighting in the

complainant's 2011 PACE process and that burden has not been discharged. The Tribunal therefore holds that the complainant's 2011 PACE appraisal report is invalid and will set it aside, as well as the impugned decision of 1 April 2014 which confirmed it. The invalid 2011 PACE appraisal report shall be removed from the complainant's file and be disregarded for subsequent action.

14. The complainant contends that the Appeals Committee erred by unjustifiably limiting its own power of review. The Tribunal observes that the Appeals Committee stated the following in the "Deliberations" section of its Report:

"21. With regard to the substance of the appellant's 2011 evaluation, the Committee, recalling that performance appraisals are discretionary and that its review power in such matters is limited, did not find evidence of bad faith or abuse of power on the part of the supervisor; nor did it find that the ratings she had attributed to the [complainant]'s work plan results and competencies, in particular the negative ones, had been based on 'errors of facts' or had constituted 'erroneous conclusions', as claimed by the [complainant]."

15. The Appeals Committee was mistaken in that this was not merely a question of the exercise of administrative discretion in an appraisal but also involved the application of a specific guideline for staff evaluation which was ignored. This also entitles the complainant to moral damages.

16. However, the complainant's claim that his supervisor should have put him on an Improvement Plan is unfounded. As the FAO points out, the PACE Instruction Booklet expressly refers to the Improvement Plan as an optional instrument when there is disagreement between a staff member and her or his supervisor on the problems and the potential solutions, but this was not the case here, as at the beginning of the 2011 PACE cycle the complainant and his supervisor agreed on a Learning and Development Plan to develop his writing skills, among other things. The same needs were identified in his mid-term review and in his final 2011 PACE report. The complainant was thus informed of the unsatisfactory aspects of his performance in a timely manner. His claim that the process was flawed because the objections which he made to

the 2011 PACE report were overlooked is also unfounded. The nature of the PACE evaluation provided him with the opportunity to discuss his performance and to raise his objections, by way of comments inserted in the PACE appraisal report, which became a part of the record.

17. The Tribunal determines that the complainant's contention that there was a failure to follow the adversarial procedure depriving him of the possibility of effectively commenting on the alleged weaknesses in his performance, in breach of the adversarial principle and the principle of due process is unfounded. So too is his further contention that WFP's own rules were breached, as his supervisor failed to provide him with descriptive examples, even after he made a specific request. The record shows that the complainant had his mid-term assessment and discussions thereon with his supervisor. He also had opportunities to discuss and comment on his 2011 PACE appraisal report.

18. The complainant is entitled to an award of costs, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The impugned decision dated 1 April 2014 is set aside, as is the earlier decision of the Executive Director of 15 November 2012.
2. The complainant's 2011 PACE appraisal report is set aside; the FAO shall remove it from the complainant's file and it shall be disregarded for subsequent action.
3. The FAO shall pay the complainant moral damages in the total amount of 10,000 euros.
4. The FAO shall also pay the complainant 1,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ