I.

v.

ITER Organization

125th Session **Judgment No. 3911**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Y. I. against the ITER International Fusion Energy Organization (ITER Organization) on 17 February 2016, the ITER Organization's reply of 9 June, the complainant's rejoinder of 6 September, corrected on 28 September 2016, and the ITER Organization's surrejoinder of 9 January 2017;

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 to terminate his appointment for unsatisfactory performance.

The complainant joined the ITER Organization under a five-year contract on 10 September 2012 at grade P5. His probationary performance reports were satisfactory, as was his appraisal report for 2013, dated 15 May 2014. However, his appraisal report for 2014, which was issued on 22 May 2015, was unsatisfactory.

In July 2015 the complainant was informed that, in light of the 2014 appraisal report, the Director-General intended to terminate his contract for professional inadequacy in accordance with Article 6.3(a)(ii) of the Staff Regulations, but that he would be given an opportunity to

express his views on the matter in a meeting to be held two days later with the Human Resources Department and his line management.

Following that meeting, the Director-General notified the complainant on 3 August that he had decided to terminate his contract for professional inadequacy. In accordance with Article 6.3(a)(ii) of the Staff Regulations, his last day of employment would be 2 November 2015.

The complainant filed an appeal with the Director-General against that decision in September. He argued that he had faced, from the beginning, a hostile atmosphere that could be seen as harassment. His appraisal reports for 2012 and 2013 had been good and, without any warning, he had received an unsatisfactory appraisal report for 2014. He asked that efforts be made to reassign him "before the dismissal notice", stressing that he was willing to take a position in another division and would consider a different grade. In the event that reassignment was not possible, he asked the Director-General to modify the reason given for terminating his contract by stating that his contract was terminated due to a change in the duties of the post.

The Director-General rejected the appeal on 6 October 2015.

On 12 October the complainant submitted a request for mediation, and the matter was referred to the Mediator on 19 October. In the report that he submitted to the Director-General on 27 November, the Mediator noted serious procedural flaws. In particular, he found that the complainant had not been given a timely warning that his appointment might be terminated for professional inadequacy if his performance did not improve, and that no steps had been taken to help him achieve the necessary improvement through the implementation of an Improvement Plan. The Mediator recommended that the Director-General revoke his decision to terminate the complainant's contract and that the complainant be paid the salary and allowances due to him as from the date of separation up to the date of the decision that is recommended by the Mediator. He also recommended that the Human Resources Department be requested to explore with the complainant possibilities for reassigning him within the ITER Organization at his grade or, in the event that no position at that grade was available, at a lower grade. If a suitable position was found, the Director-General should reinstate the

complainant and ensure that the costs of any travel, removal and other measures needed to enable his return were met by the ITER Organization. If no suitable position was found or accepted by the complainant, the ITER Organization should make a settlement proposal to him.

By letter of 10 December 2015 the Director-General informed the complainant that he had decided not to follow the recommendation of the Mediator and to confirm his decision to terminate the complainant's contract on the ground that he had been unable to reach the required level of performance for his position. His appraisal report for 2014 was "very unsatisfactory", and he was well aware, as were all staff members, that unsatisfactory performance could lead to termination. The Director-General added that further to the recommendation of the Mediator he had instructed the Human Resources Department to look for a possible reassignment within the ITER Organization, but at that time only ten positions were available, none of which corresponded to the complainant's specific skills. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. He also asks to be reinstated with retroactive effect (and up to the expiration of his 5-year contract) in his former position or any other position appropriate to his experience and qualifications, and to be paid all salary and allowances due to him from the date of separation up to the date of reinstatement. In the alternative, he asks to be paid salary and allowances in lieu of the prescribed notice period of six months, and the indemnity for loss of job applicable to termination due to change in the duties of the budgeted post. He further claims moral damages, and costs in the amount of 5,000 euros.

The ITER Organization asks the Tribunal to reject any plea relating to the complainant's 2014 appraisal report as irreceivable for failure to exhaust internal means of redress. It also asks the Tribunal to dismiss the complaint as ill-founded. It emphasises that it is opposed to reinstatement as the complainant's performance was truly inadequate.

CONSIDERATIONS

1. The complainant, who joined the ITER Organization on 10 September 2012 under a five-year contract, was notified on 3 August 2015 of the Director-General's decision to terminate his contract on 2 November 2015 for professional inadequacy. In the impugned decision, dated 10 December 2015, the Director-General confirmed that decision notwithstanding that the Mediator had found that there were serious flaws in the process which led to the termination. The Mediator had recommended that the termination decision be revoked, that the possibility of reassigning the complainant be considered and that the Organization should reach a settlement with the complainant failing a successful reassignment.

2. The complainant challenges the decision to terminate his contract and the impugned decision on the following grounds:

(1) his 2014 appraisal report was not reliable;

(2) he was unable to exercise his right to an adversarial process during the appraisal;

(3) the 2014 appraisal report was not the only basis on which the decision to terminate his contract was made;

(4) there was no job description or appraisal of his performance in 2015;

(5) the provisions which required an Improvement Plan were disregarded;

(6) he was not given a prior written warning that his employment was at risk of being terminated unless his performance improved; and

(7) the Organization had violated its duty of good faith and duty of care towards him.

3. Precedent has it that in terminating a staff member's employment, an international organization must follow its own rules. Accordingly, the Tribunal has stated that it would set aside an adverse decision, such as the one in the present case which terminated the complainant's employment, where the decision was made on the basis of an unsatisfactory rating in an appraisal report for which the

applicable procedural rules were not followed (see Judgment 3239, consideration 18).

4. In ground 1, the complainant is primarily challenging the merits of his 2014 performance appraisal. He urges the Tribunal to contrast the information and considerations included in his 2014 appraisal report with those contained in his earlier appraisal reports. He argues that in view of the many positive remarks in the earlier appraisals, it was unbelievable that the overall assessments in his 2014 appraisal suddenly became *"unsatisfactory"*. He states that a careful analysis of the contents of his 2013 and earlier appraisals shows no hint of the issues which emerged in his 2014 appraisal and that "[t]he striking contrast between the 2013 and the 2014 evaluations makes [his] supervisor's views altogether completely unreliable". He insists that there are passages in his 2014 appraisal which are objectionable either because they are irrelevant to an appraisal or inaccurate, or because his achievements were completely disregarded. He asserts that there are instances in his 2014 appraisal report in which his supervisor made comments to the effect that he (the complainant) was unsuitable for his post, which was not an object of the appraisal.

5. These arguments call into question the lawfulness of the complainant's 2014 appraisal report. Precedent however has it that where a staff member fails to challenge an appraisal report by lodging an internal appeal against it within the stipulated time, the report becomes final and may not be called into question, even with regard to its lawfulness (see, for example, Judgments 3059, under 7, and 3666, under 7).

The Tribunal observes that the complainant's 2014 appraisal report was done in May 2015. At that time the applicable guidelines for challenging an appraisal were contained in the Employee Development Policy of ITER Staff Members, which was approved in January 2015. Among other things, it states as follows:

> "The final staff appraisal report of the year, as well as the final decision taken by the Director-General on promotions, advancements and awards are administrative decisions and as such, can be appealed, as the case may arise, under the conditions set forth by Article 26 of the Staff Regulations."

6. Article 26.1(b) of the Staff Regulations required the complainant to submit an appeal challenging the 2014 appraisal "to the Director-General within 40 working days of the challenged decision". Since he did not do so, that appraisal report became final and its lawfulness became immune from challenge. The result is that the only matter that is properly before the Tribunal in this complaint is the lawfulness of the actual decision to dismiss the complainant (see Judgment 3126, under 11). Accordingly, ground 1, as well as grounds 2, 3 and 5, which also challenge the lawfulness of the complainant's 2014 appraisal report, rather than the lawfulness of the decision to terminate his contract, are irreceivable as he has failed to exhaust internal remedies in relation to that appraisal report as Article VII, paragraph 1, of the Tribunal's Statute requires.

7. It is noted that Article 6.3(a)(ii) of the Staff Regulations permits the Director-General to terminate the appointment of a staff member for "professional inadequacy [...] taking into consideration the annual evaluation reports and process, according to Article 20 [of the Staff Regulations]". This was done in the present case.

8. With regard to ground 6, in which the complainant contends that he received no warning that his contract was at risk of being terminated for professional inadequacy, the parties are at odds as to whether the Organization was obliged to issue such a warning. The complainant insists that it was so obliged. He relies on the Mediator's reasoning, which is based on Judgments 1484, 3070 and 3085 of the Tribunal.

9. The Mediator had relied on the Tribunal's statement in Judgment 3070, consideration 9, to the effect that a staff member whose service was considered unsatisfactory is entitled to be warned in a timely manner of the unsatisfactory aspects of it to enable her or him to be in a position to remedy the situation. He had also relied on the Tribunal's statement in Judgment 1484, consideration 9, that a timely warning was a "warning that was recognisable as such of the Organization's intention of ending [the staff member's] appointment before expiry". He also relied on the statement in Judgment 3085,

consideration 20 [*recte* 21], that "[g]iven the acknowledged importance of a timely warning of deficiencies in performance, it would be expected that a document such as a note for the record would be signed and dated".

The Mediator noted that Judgment 3085 was concerned with a warning in the context of a probation period and concluded that inasmuch as probation was "inherently precarious" the fact that the present complainant held a five-year contract made it even more necessary that he should have been given a clear and timely warning in writing. The Mediator concluded that the complainant was not given such a warning, noting that the first document which notified him that his service was considered unsatisfactory and could possibly have led to termination was contained in an email of 8 July 2015. This was less than a month before his contract was actually terminated.

10. The Organization disputes that it was obliged, "by virtue of a procedural rule, to warn [the complainant] specifically and in writing [...] that he could be dismissed if he did not improve his performance". The Organization accepts that it is required to abide by its internal rules and the general principles of law applicable to the international civil service and applied by the Tribunal. It points out that, unlike in some organizations, its internal rules impose no obligation on it to give a staff member a timely written warning before dismissing her or him for professional inadequacy. The Organization relies on the statements in Judgment 1484, consideration 7, and Judgment 1546, consideration 18. It submits, in effect, that these statements provide authority for the proposition that the right of a staff member of an international organization to receive a prior written warning that she or he was at risk of being dismissed for professional inadequacy derives only from its internal rules and not from a general principle of law. It submits that the statements in these judgments support its assertion that, in the absence of such an internal rule, a staff member's right is not to a prior written warning. Rather, her or his right is to be heard before termination of appointment for professional inadequacy.

It is noteworthy that this reasoning reflects in part the statement in the impugned decision that the complainant was "duly aware, as are all staff members, that unsatisfactory performance could be a cause for

termination of a contract of employment, in accordance with the Staff Regulations and the Employment Development Policy".

These are however mistaken conclusions.

11. In the first place, the Tribunal made no distinction in those statements between instances in which the right to a prior written warning was mandated by an international organization's written rules and instances in which, in the absence of such rules, the general principles of law conferred on a staff member only a right to be heard before dismissal for unsatisfactory performance. In Judgment 1484, consideration 7, having noted that the right to a prior written warning was conferred by WHO's Staff Rules 1070.1 and 1070.2, the Tribunal stated that these rules "mean that an appointment may not be terminated before the date of expiry on the grounds of unsatisfactory performance or unsuitability unless the staff member has had a written warning and been allowed enough time in which to improve". In consideration 8, the Tribunal then reiterated the principle that an organization may not take action which affects a staff member's status before she or he is heard. It stated as follows:

> "Besides, according to general precepts of administrative law and the law of the international civil service an organization may not unilaterally take action that affects a staff member's status before letting him have his say: Judgment 1082 […] affirmed that rule in 18:
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> > 'By virtue of their contractual relationship and the trust that therefore prevails between them, an organisation owes its employee a duty to declare its intention of dismissing him and to let him plead his case.'
>
> The same principle was set out in Judgments 1212 [...] under 2 to 4 and 1395 [...] under 6."

12. The Tribunal's statement in Judgment 1546, consideration 18, upon which the Organization relies, is no authority for the Organization's proposition that, in the absence of such an express provision which confers a right to a prior written warning, a staff member's right under the general principles of law is merely a right to be heard before dismissal for unsatisfactory performance.

13. In the second place, while the right to a prior written warning may be conferred by an organization's internal rules, the Tribunal has also stated that it may arise from a general principle of law based on the organization's duty of good faith and duty of care to its staff members. The complainant also pleads this in ground 7.

14. It is noteworthy that the decision in Judgment 2529, consideration 15, was made in reliance on the following statement of principle in Judgment 2414, consideration 23:

> "15. The Tribunal's case law is voluminous and consistent to the effect that an organisation owes it to its employees, especially probationers, to guide them in the performance of their duties and to warn them in specific terms if they are not giving satisfaction and are in risk of dismissal. (See Judgment 1212.) More recently, in Judgment 2414 the Tribunal held that:
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> '23. [...] A staff member whose service is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation. Moreover, he or she is entitled to have objectives set in advance so that he or she will know the yardstick by which future performance will be assessed. These are fundamental aspects of the duty of an international organisation to act in good faith towards its staff members and to respect their dignity. That is why it was said in Judgment 2170 that an organisation must 'conduct its affairs in a way that allows its employees to rely on the fact that [its rules] will be followed'."

15. The Organization suggests that the complainant was adequately warned through his supervisor in several discussions about deficiencies in his performance. The Mediator noted in his report that the Organization's evidence concerning this refers to the last four months in 2014 and to single incidents rather than to the complainant's assessment as a whole. He concluded that while there were signs that the complainant's supervisor may have been dissatisfied with his performance, there was nothing which constituted a warning to him that he risked termination for professional inadequacy if his service did not improve. According to the Mediator, the first document which warned the complainant in this way was an email of 8 July 2015. The Tribunal has seen no evidence in the file which would lead to a different conclusion. It is noted that the complainant received a further written

warning by email dated 27 July 2015. He was again invited to a meeting on 29 July 2015 with the Human Resources Department and his line management to give his views on the Director-General's intention stated in the emails. It is also noted that less than a month after the email, on 3 August 2015, he was informed of the decision to terminate his contract. There is no evidence that he was given an opportunity to improve his performance after he received the written warning.

16. In the foregoing premises, the complaint is well founded on ground 6 as the complainant did not receive timely or adequate warning that he risked termination of his appointment if his performance did not improve. By extension, it is also well founded on ground 7, particularly as it is apparent that the complainant was subjected to actions and circumstances which did not show the respect for his dignity which an international organization is required to accord its staff members.

In this latter regard, it is noted that although not reflected in any of his appraisal reports or any other document, the minutes of the meeting of 29 July 2015 record that the complainant was told that staff in his section were resigning because of his professional inadequacy or lack of guidance. No proper basis for this allegation has been revealed in these proceedings, which bears out the complainant's claim in ground 3 that the appraisal procedure was not the only basis for the decision to terminate his appointment. On 2 April 2015, the complainant was "temporarily assigned" to act as Computer Aided Design (CAD) Production Responsible Officer in the Design Office Division in a revised organizational structure without a job description. This is also the basis of his plea in ground 4, which is therefore well founded. He states, and the Organization does not deny it, that he was not informed of his re-assignment until it was announced in front of "all PSE staffs". He also states that on 23 June he was told by a colleague that he would have to move to another room. The complainant complains that this affected his dignity, as did his being moved from the single room which he occupied to a shared room. The Organization seems to misapprehend that these allegations are concerned with the manner in which the complainant was notified of his move and the circumstances. The Tribunal's view is that the Organization does not relevantly respond to

these allegations when it states that the complainant "does not pretend that it would have affected his performance" and, further, that he does not explain why his dignity would have been affected while the majority of the Organization's staff members work in shared rooms and that matter is clearly unrelated to the impugned decision.

17. In short, the decision to terminate the complainant's appointment is vitiated by error of law and the decision to terminate his appointment and the impugned decision will be set aside. The Organization also violated its duty of good faith and duty of care towards him thereby entitling him to moral damages which are assessed at 20,000 euros. He is also entitled to costs in the amount of 5,000 euros.

18. Having regard to all of the circumstances of this case, the Tribunal will not order the complainant's reinstatement. The Tribunal will order that the ITER Organization pay him material damages in an amount equivalent to all salary, allowances and other benefits that he would have received from 3 November 2015 to 9 September 2017, save for home leave and related allowances, together with interest at the rate of 5 per cent per annum calculated from the monthly due date to the date of final payment. From this amount will be deducted the complainant's net earnings from other employment sources during the period 3 November 2015 to 9 September 2017. The complainant must give account of those net earnings.

DECISION

For the above reasons,

1. The Director-General's decision of 10 December 2015 and his earlier decision of 3 August 2015 to terminate the complainant's contract are set aside.

2. The ITER Organization shall pay the complainant compensation as detailed in consideration 18, above, as material damages.

3. The ITER Organization shall pay the complainant moral damages in the sum of 20,000 euros.

4. The ITER Organization shall pay the complainant costs in the amount of 5,000 euros.

5. All other claims are dismissed.

In witness of this judgment, adopted on 26 October 2017, Mr Giuseppe Barbagallo, 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 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ