Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

110th Session **Judgment No. 2991**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. G. T. against the Centre for the Development of Enterprise (CDE) on 27 January 2009 and corrected on 6 May, the Centre's reply of 12 August, the complainant's rejoinder of 16 November 2009 and the CDE's surrejoinder of 17 February 2010;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Cameroonian national born in 1945, entered the service of the Centre for the Development of Industry (CDI), the CDE's predecessor, on 1 June 1986. Throughout his career he was employed on the basis of contracts for a fixed period of time. His last post was that of main expert at level 2.B.

In his assessment report for 2005, which was drawn up on 20 September 2006, he obtained an overall score of 54 per cent, corresponding to a rating of 5, which meant "presence of gaps and

important weaknesses which may lead, in the short term, to insufficiencies in the requirements of the function" and that improvement was needed. He contested this score in his comments on the report. On 14 November the Director of the CDE signed this report and observed inter alia that the complainant had "not understood the Centre's new requirements". On 20 December 2006 he offered the complainant a contract for a fixed period of time from 1 March 2007 to 29 February 2008. He advised him that, if his efforts and future evaluations provided sufficient justification, he might receive a contract for an indefinite period of time, and he encouraged him "to take this period of time in order to make the substantial efforts necessary for having an assurance in [his] continued career within the CDE". The complainant accepted this contract.

In July 2007 the complainant, who had been transferred in the meantime, contested the overall score of 48 per cent contained in his assessment report for 2006. This score meant that his performance was unsatisfactory. When he signed this report, the Director of the Centre observed that the complainant was "overwhelmed by the CDE's requirements".

By a letter of 19 December 2007 the ad interim Director of the CDE notified the complainant of the decision not to renew his contract on the grounds of unsatisfactory performance, having regard to the overall scores he had obtained in his assessment reports for 2005 and 2006 and the fact that the level of his performance had remained inadequate despite "various warnings [issued] in the course of 2007". The complainant was given nine months' salary in lieu of notice.

On 19 February 2008 the complainant lodged an internal complaint under Article 66, paragraph 2, of the Staff Regulations of the CDE. He requested the payment of an additional nine months' salary, compensation for damage to his reputation, the reimbursement of school fees for 2006, the payment of five days of outstanding leave and "the rapid settlement of [his] entitlements in respect of reinstallation and the removal of his personal effects to Cameroon". On 4 April 2008 he drafted an addendum to his complaint in which

he sought his reinstatement, the reconstitution of his career and, subsidiarily, redress for moral and material injury. All but the last two claims contained in the initial complaint were dismissed in a letter of 21 April. The complainant then initiated conciliation proceedings pursuant to Article 67, paragraph 1, of the Staff Regulations of the CDE and its Annex IV, but they failed. In his report the conciliator considered that the decision not to renew the complainant's contract was justified "after a significant period of unsatisfactory performance as recorded in the 2005 and 2006 assessment reports" and a "rather unconvincing performance" in 2007. It is this report, which the complainant received on 4 November 2008, that constitutes the impugned decision.

B. The complainant, who considers that he has been the victim of "unfair and unjustified dismissal", submits that the principle of good faith and the "elementary rules" of assessment have been breached. He taxes the CDE with not having drawn up any genuine assessment reports on him until 2005 and of furnishing no proof that his performance was unsatisfactory. He says that the decision not to renew his contract was not preceded by any formal warning, because his assessment reports for 2005 and 2006 were drawn up with considerable delay. Further, he contends that the offer of 20 December 2006 to extend his appointment constituted an "encouragement" and gave him the legitimate expectation that his contract would be renewed. In his opinion, the failure to take account of his comments on the two above-mentioned reports, which were "untrue and unilateral", infringed his right to be heard. He emphasises that, since his performance in 2007 was not assessed, a serious error was committed in deciding nonetheless not to renew his contract on the grounds of insufficient performance.

In addition, the complainant contends that the reasons given in his assessment reports covering 2005 and 2006 were insufficiently detailed and that, when these reports were drawn up, no objectives were set for him for 2006 and 2007, in breach of the Tribunal's case

law and of point 2.1 of Internal Rule No. R3/CA/05, which defines the principles governing periodic assessment.

The complainant maintains that the decision not to renew his contract is arbitrary, because it rested on an assessment system "invented" by the Centre's former Director. Furthermore, no proper reasons for it were given and it was tainted with abuse of authority on the part of the ad interim Director, who had proposed to the Executive Board that a number of contracts should not be renewed although, in the complainant's view, he was responsible only for managing day-to-day affairs. The complainant is also of the opinion that clearly wrong conclusions were drawn from the file and that the real reason for the above-mentioned decision was the restructuring and downsizing of the organisation. He infers from this that the assessment process was deflected from its prime purpose, because he was "deliberately underrated in order to justify his dismissal".

The complainant draws attention to the fact that under Article 34, paragraph 4, of the Staff Regulations of the CDE, "[i]n the interest of the efficient working of the Centre, a staff member's contract may be terminated in the case of incompetence or unsatisfactory service during the course of employment, in accordance with Article 55", which specifies that "[a]ny failure by a staff member to comply with his obligations […], whether intentionally or through negligence on his part", makes him liable to one of five possible disciplinary measures, the most serious of which is removal from post. In his opinion, Articles 56 and 58 dealing with disciplinary procedure were disregarded and his right to be heard has been flouted.

The complainant further contends that Internal Rule No. R3/CA/05 was not lawfully adopted, that it was applied despite the fact that it was unlawful, but that its provisions were not complied with. In this connection he points out that when his assessment reports were drawn up, he was interviewed by a committee not mentioned in that rule. He says that the committee's membership varied from the interview of one staff member to another and that, in his case, only one of its five members was in a position to judge the quality of his work.

Lastly, the complainant holds that the CDE has breached its duty of care and the principle of sound administration and that it paid no heed to his interests or those of the service. He taxes the organisation with having found "procedural excuses to justify [his] dismissal *ex post*", in particular by disallowing his addendum of 4 April 2008 on the grounds that it had been submitted out of time. He says that his appointment was ended although he had served the CDE "diligently and devotedly" for more than 20 years and was within three years of retirement, which "caused him the deepest professional trauma". He considers that his terms of employment were at all times governed by the Staff Regulations of the CDI adopted on 15 December 1992, and in this regard he maintains that his acquired rights have been violated because, whereas the period of notice corresponded to one month per year of service under those regulations, it is now limited to nine months. In his opinion, a fundamental term of employment, within the meaning of the Tribunal's case law, has thus been altered.

As a preliminary matter, the complainant requests the production of various documents, such as his assessment reports for the years 1986 to 2007 and "all the Administration's files concerning [him]" for the period 2005 to 2007. He seeks the setting aside of the decision adversely affecting him and of his assessment reports for 2005 and 2006. As he considers that he could have obtained a contract for an indefinite period of time, he also requests reinstatement in his former post, or in an equivalent post, and the reconstitution of his career. Subsidiarily, and to redress the material injury suffered, he seeks the payment with interest of compensation equivalent to the three years' salary which he would have received had he worked until the age of 65, or compensation corresponding to 33 months' salary plus the payment of a reinstallation allowance in the amount of 18,278 euros. He claims 78,376.67 euros, plus interest, to redress the moral injury suffered. He asks the CDE to issue an "Attestation of service" stating that the quality of his performance and conduct during his term of service was satisfactory and to defray his repatriation expenses and those of his family to Cameroon. Lastly, he requests an award of costs.

C. In its reply the Centre submits that, since the complainant did not lodge an internal complaint within the prescribed time limits to contest his assessment reports for 2005 and 2006 – which it annexes to its reply – these reports have become final. The complainant's contentions regarding the lawfulness of the said reports are therefore irreceivable. The Centre also disputes the receivability of the complainant's claims for reinstatement, for the reconstitution of his career and for the payment of compensation equal to three years' salary or 33 months' salary, on the grounds that they were submitted for the first time in the addendum of 4 April 2008, which was irreceivable because it was filed six weeks after the expiry of the time limit for lodging the internal complaint.

On the merits, the CDE draws attention to the fact that, according to the case law, the Tribunal exercises only a limited power of review over performance appraisals. It says that in 2005 staff members were informed of the intention to introduce a more objective performance appraisal system. The complainant "could not, or would not, adjust to the Centre's new requirements" and his assessment reports merely reflect that situation. Since the reports in question contained comments which alerted the complainant to his weaknesses, the defendant considers that it treated him with due care and "great patience". The complainant was interviewed by his supervisor, the Deputy Director and the Director and his assertion that no heed was paid to his comments on his reports is pure speculation. The content of the reports was not altered because, despite his explanations, the Director of the CDE, in the exercise of his wide discretionary authority, considered that there was no reason to modify his scores. According to the Centre, the complainant alone is responsible for the late notification of the assessment report for 2005; moreover, he was notified of the report for 2006 "on time" and the decision not to draw up a report for 2007 was consistent with the applicable provisions.

The Centre states that in 2007 the complainant was "particularly unproductive" and that, in these circumstances, he cannot contend that the decision not to renew his contract was taken without reason. The

defendant considers that it offered the complainant every opportunity for improvement, but that he ignored it. It says that the ad interim Director had all the powers of a director, including the authority not to renew a contract.

The CDE explains that since the decision not to renew the complainant's contract stemmed solely from his insufficient performance, there was no need for a disciplinary procedure.

In addition, it submits that seniority does not exempt a staff member from complying with service requirements. In the instant case it was in the interests of the service not to renew the complainant's contract given his consistently poor performance in 2007. In the Centre's opinion the modification of the period of notice cannot be viewed as having altered the complainant's fundamental terms of employment.

The Centre explains that point 3.4(b) of Internal Rule No. R3/CA/05 makes express provision for input by a "Committee composed of Heads of Units" before the finalisation of the assessment reports of members of staff at level 2.B. While the presence of the staff member's supervisor in such a committee is essential, this does not rule out the participation of other heads of units. Far from being arbitrary, this procedure guarantees, on the contrary, greater homogeneity when drafting reports.

The CDE emphasises that "continuing satisfactory performance" is one of the conditions which must be met in order to qualify for a contract for an indefinite period of time and that, since the complainant's scores were declining, they did not justify the award of such a contract. The claims seeking the complainant's reinstatement or compensation equivalent to three years' salary are therefore devoid of merit. The defendant further contends that the claim for compensation corresponding to 33 months' salary is also unfounded and it says that the reinstallation allowance has already been paid to the complainant. As it considers that it has amply taken the complainant's interests into account, it submits that the claim for redress for alleged moral injury is likewise devoid of merit.

D. In his rejoinder the complainant presses his pleas. He also maintains that his assessment reports for 2005 and 2006 may be challenged, because they were drawn up in breach of the general principles recognised by the Tribunal. In this respect he adds that, in view of "the [CDE's] failure to establish internal appeal procedures", he cannot be criticised for not having challenged the two reports in question. He contends that the claims in his addendum of 4 April 2008 were receivable, because he filed it within the prescribed two-month time limit.

E. In its surrejoinder the CDE maintains its position.

CONSIDERATIONS

1. The complainant joined the Centre in 1986. He was employed under a contract for a fixed period of time, which was regularly renewed. In February 2005 his appointment was extended for two years until 28 February 2007.

2. The Staff Regulations of the CDE were adopted on 27 July 2005. They stipulate, inter alia, that the duration of a contract for a fixed period of time "shall be up to two years, renewable twice only, up to a maximum overall period of five years". Under Article 30, "[e]very 12 months, at the end of the calendar year and subject to the internal implementing rules laid down by the Director, the ability, efficiency and conduct of a staff member shall be the subject of an assessment report by his superiors".

3. In his assessment report for 2005 the complainant obtained an overall score of 54 per cent, which denoted the "[p]resence of gaps and important weaknesses which may lead, in the short-term, to insufficiencies in the requirements of the function" and meant that improvement was needed.

By a letter of 20 December 2006 the Director of the CDE informed him that, in view of his assessment report, he was offering

him a one-year contract starting on 1 March 2007 and that, "[i]f [his] efforts and [his] future evaluations provided sufficient justification", he might be given a contract for an indefinite period of time. The complainant accepted this offer without reservations in January 2007.

4. In his assessment report for 2006 the complainant was given an overall score of 48 per cent, which corresponded to a rating defined as "[u]nsatisfactory: does not meet the requirements of the function (or the post)".

By a letter of 19 December 2007 the ad interim Director of the CDE informed him that his "contract [wa]s terminated and w[ould] […] end on the date when it [would] expire, i.e. on 29 February 2008". The complainant was given nine months' salary in lieu of notice and he was released from his duties as from 1 January 2008.

5. On 19 February 2008 the complainant lodged an internal complaint in which he requested among other things the settlement of "all [his] dismissal entitlements" and compensation for damage to his reputation.

On 4 April he submitted an addendum to the ad interim Director in which he entered new claims, namely reinstatement in his former post or in an equivalent post, reconstitution of his career and, subsidiarily, redress for moral and material injury.

On 21 April 2008 the ad interim Director replied to the internal complaint without taking into account the addendum of 4 April. Only two of the claims made in this complaint were accepted.

On 21 May the complainant requested the initiation of conciliation proceedings. In his report of 3 November 2008 the conciliator concluded inter alia that his examination of the case, on the one hand, "[had] not enabled him to endorse [the complainant's] conclusions" and, on the other, "[had] led him to rule out the possibility of proposing any form of settlement to the parties", and that "there [was] no scope for a conciliation solution in respect of […] an understandable and justifiable decision in this case".

The complainant regards this report, which was forwarded to him on 4 November 2008, as the decision impugned before the Tribunal.

6. The complainant presents some "preliminary petitions" requesting the production of certain documents and the convening of a hearing.

The Tribunal will not grant these requests, because the parties have expressed their views *in extenso* on the various aspects of the dispute and it is possible to rule on the points at issue on the basis of the submissions.

7. The complainant principally contends that he has been the victim of "unfair and unjustified dismissal" after more than 20 years spent in the service of the Centre.

He enters several pleas in support of his complaint. In particular, he alleges a "breach of good faith and of the elementary rules of assessment", especially with regard to 2005, 2006 and 2007, misuse of procedure and abuse of authority, breaches of several articles of the Staff Regulations of the CDE and of his right of defence, breach of the duty of care, of the principle of sound administration, of the interests of the service and the interests of a staff member, as well as violation of the principle of non-discrimination.

8. The Tribunal first notes that it is not disputed that it is the decision of 19 December 2007 concerning the non-renewal of the complainant's contract on the grounds of unsatisfactory performance which is being challenged, it being understood that the period for filing a complaint with the Tribunal began to run only as from the date on which the parties were notified, in accordance with Article 67, paragraph 4, of the Staff Regulations of the CDE, that the conciliation procedure had been unsuccessful.

9. Firm precedent has it that a decision of this nature lies within the discretion of the appointing authority and may be set aside only on limited grounds, for example if it is tainted by a procedural

irregularity, if it is based on incorrect facts, if an essential fact has not been taken into consideration, or if clearly wrong conclusions have been drawn from the facts.

10. The complainant taxes the CDE with having taken the decision not to renew his contract in "breach of good faith and the elementary rules of assessment", especially with regard to 2005, 2006 and 2007. He submits that no assessment report was drawn up for 2007 and that the reports covering 2005 and 2006 should be set aside, because his right to be heard was not respected during the assessment process.

11. The Centre submits that, since the assessment reports covering 2005 and 2006 were not contested within the prescribed time limits, they have become final and may not therefore be challenged.

The complainant replies that there is no possibility at the CDE to appeal against assessment reports and that he therefore cannot be criticised for not having contested these reports.

However, the Tribunal draws attention to the fact that an assessment report can constitute a decision adversely affecting the person concerned and, as such, it may be contested by means of an internal complaint lodged within the time limits established by an organisation's rules and regulations. It may even be impugned in proceedings before the Tribunal after internal means of redress have been exhausted.

The complainant, who does not deny that he received the reports in question, took no action to challenge them within the time limit laid down by the existing texts. These reports have therefore become final and may not be called into question in this dispute.

12. As far as 2007 is concerned, it has been established that no report was drawn up.

The defendant justifies this omission by submitting that Article 34, paragraph 2, of the Staff Regulations of the CDE does not oblige it

to wait until a specific number of reports attesting to unsatisfactory performance have been issued before it may adopt a decision not to renew a contract, "[since] the status of a temporary staff member is not comparable with that of an official".

It states that, in the circumstances of the case, it was under no obligation to draw up a third assessment report before taking a decision concerning the complainant, especially as it had given him sufficient warning of the aspects of his work requiring substantial improvement.

It adds that the decision not to assess the complainant's performance in 2007 is consistent with Article 30 of the Staff Regulations of the CDE and that in this instance the decision not to renew his contract was taken on 19 December 2007, i.e. before the end of the calendar year, which is the reference period of each annual assessment according to the above-mentioned Article 30. Moreover, his monthly work records in 2007 revealed inadequacies in several areas of his work, which formed a pattern stretching back to 2005 and 2006.

13. The Tribunal does not share the defendant's point of view. It is a general principle of international civil service law that there must be a valid reason for any decision not to renew a fixed-term contract. If the reason given is the unsatisfactory nature of the performance of the staff member concerned, who is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service, the organisation must base its decision on an assessment of that person's work carried out in compliance with previously established rules (see, for example, Judgments 1911, under 6, and 2414, under 23).

14. In the instant case the impugned decision refers to the complainant's assessment report for 2005 inviting him to improve his performance, to the decision to renew his contract from 1 March 2007 until 29 February 2008, which urged him to make substantial efforts, and to his assessment report for 2006 indicating that his performance was unsatisfactory.

The Tribunal infers from this that this decision was taken because, despite these warnings, the complainant's performance remained unsatisfactory in 2007.

As stated above, the complainant's work during this period had to be assessed on the basis of the existing rules, namely those set out in Article 30 of the Staff Regulations of the CDE and in Internal Rule No. R3/CA/05.

15. As stated earlier, it has been established that no assessment report was drawn up for 2007. However, according to the case law, there is a fundamental obligation to examine the staff member's performance appraisal before a decision is taken not to renew his/her contract. Failure to comply with this obligation constitutes a procedural flaw the effect of which is that an essential fact is not taken into consideration (see, for example, Judgment 2096 and the case law cited therein).

16. The Centre's arguments in support of its contention that it was not obliged to draw up a report covering 2007 must therefore be rejected.

Contrary to the defendant's assertions, the applicable texts, namely Article 30 of the Staff Regulations of the CDE and Internal Rule No. R3/CA/05, draw no distinction between officials and temporary staff members with respect to the requirement that an annual assessment report be drawn up.

The argument that the Centre was obliged to take a decision before the end of the 2007 calendar year in order to be able to give sufficient notice cannot be accepted, because the shorter period of notice given to the complainant could have been compensated financially.

Lastly, the monthly work records on which the defendant relies in order to prove that the complainant had not improved his level of performance did not obviate the need to draw up a proper assessment report in accordance with the established rules.

17. It follows that the impugned decision, which was not taken after consideration of an assessment report covering 2007, is tainted with a procedural flaw and must therefore be set aside, without there being any need to examine the complainant's other pleas.

18. In addition to the setting aside of the impugned decision, the complainant principally seeks his reinstatement in his former post, or in an equivalent post, and the reconstitution of his career. Subsidiarily, he claims redress for material and moral injury, the defrayal of his repatriation expenses and those of his family and reimbursement of his lawyer's fees. Lastly, he requests an Attestation of service "relating to the nature of his duties and the length of his service".

19. The defendant submits that some of these claims were presented not in the initial internal complaint but in the addendum of 4 April 2008 which, in its opinion, was filed out of time.

20. This objection to receivability will not be allowed because, as the conciliator aptly noted, "the claims put forward in the statement of case [were] closely related to the grievances raised in the initial internal appeal".

As the complainant's claims were thus examined during the conciliation proceedings, it may be considered that the requirement that internal means of redress should be exhausted has been observed, and since these claims are closely related to the facts, the Tribunal may rule on their merits.

21. The complainant asks to be reinstated and contends that he could have obtained a contract for an indefinite period of time. However, the Tribunal finds that reinstatement under such a contract may not be contemplated, because the award of this type of contract presupposes compliance with certain conditions, in particular that of "continuing satisfactory performance". It is plain from his assessment reports for 2005 and 2006, which he may no longer call into question, that the complainant does not satisfy the conditions required for the award of a contract for an indefinite period of time.

22. To redress material injury, the complainant requests compensation equal to the salary he would have received had he been given a contract for an indefinite period of time until the age of 65.

However, in view of what is stated under 21, above, he could not be given such a contract. This claim is therefore unfounded and must be dismissed together with the other claims related to it.

23. The complainant shall, however, be awarded damages to redress the injury resulting from the unlawful nature of the impugned decision.

Bearing in mind the circumstances of the case, especially the fact that, as the complainant's contract had been renewed only once as of 1 March 2007, after the entry into force, in 2005, of the Staff Regulations of the CDE, which limit the duration of a contract for a fixed period of time to two years at the most, renewable twice only, up to a maximum overall period of five years, he could still hope to obtain the renewal of his contract for a maximum period of two years.

The Tribunal therefore deems it fair to award him compensation, inclusive of interest, equivalent to the salary and allowances he would have received had his contract been renewed for a one-year period as from 1 March 2008.

It is clear from the submissions that none of the pleas entered by the complainant in support of increased damages for material injury or the granting of damages for moral injury is well founded, particularly as the complainant has not proved that the Centre is guilty of discrimination, bad faith or misuse of procedure.

24. Subsidiarily, the complainant holds that he is entitled to compensation corresponding to 33 months' salary, that is to say 21 months under Article 35(b) of the Staff Regulations of the CDI and 12 months under Article 34, paragraph 6, of the Staff Regulations of the CDE.

The Tribunal considers this claim to be unjustified since, as the defendant points out, the Staff Regulations of the CDI ceased to apply on the entry into force, in 2005, of the Staff Regulations of the CDE.

The complainant's contract was renewed under the latter. Pursuant to Article 34, paragraph 2, thereof the compensation due in lieu of notice is an amount corresponding to a maximum of nine months' salary. The complainant does not deny that the Centre has already paid this sum.

25. Furthermore, he does not deny that, as the defendant says, a reinstallation allowance of 18,278 euros has already been paid to him.

26. With regard to the Attestation of service, the Tribunal considers that, if the Centre has not already done so, it must supply the complainant with such a document, in accordance with the existing rules and regulations.

27. Since he succeeds in part, the complainant is entitled to costs in the amount of 5,000 euros.

DECISION

For the above reasons,

1. The decision of 19 December 2007 of the ad interim Director of the CDE is set aside.
2. The CDE shall pay the complainant compensation, including all interest, equivalent to one year's salary and allowances, as stated under 23, above, to redress the material injury suffered.
3. It shall provide him with an Attestation of service as indicated under 26, above.
4. It shall pay him costs in the amount of 5,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President,

and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Seydou Ba
Patrick Frydman
Catherine Comtet