

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

112th Session

Judgment No. 3070

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A. R. against the International Office of Epizootics (OIE) – also known as the World Organisation for Animal Health – on 6 October 2009 and corrected on 26 October, the Organisation's reply of 27 November, the complainant's rejoinder of 22 December 2009, the OIE's surrejoinder of 28 January 2010, the complainant's further submissions of 4 June and the Organisation's final comments thereon of 24 June 2010;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Rwandan national born in 1981, joined the Organisation on 2 February 2009 on a two-year fixed-term contract as a *chargée de mission* in the Animal Health Information Department. Her letter of appointment of 13 January 2009 provided for a six-month probationary period. On 10 July her supervisor, who was at the time acting Director General, informed her orally of the decision

to terminate her contract. On 12 July she sent an e-mail to the Deputy Director General asking her to take steps “to stop this possible cancellation of contract which appears to be abusive and unlawful”. By a letter of 7 July 2009, which the complainant says she received on 20 July, the Director General advised her that, since her “supervisors” considered that her probationary period had been unsuccessful, her appointment would be terminated on 31 July 2009. That is the impugned decision.

On 24 July the complainant challenged the lawfulness of her dismissal and asked the Director General to reinstate her immediately. Subsidiarily, she proposed, pursuant to the second paragraph of Article 10.1 of the Staff Regulations, that the dispute be submitted to an independent person designated by the President of the Tribunal. In his reply of 30 July the Director General suggested that she should contact a lawyer, legal advisor for the Organisation.

B. The complainant enters four pleas. First, she contends that Article 40.12(a) of the Staff Rules was breached in that she received no performance appraisal during her probationary period. In her opinion, the absence of an appraisal deprived her of the possibility of commenting on any shortcomings and makes it impossible for the Tribunal to examine the reasons for the termination of her contract on the basis of objective and reliable evidence. She also emphasises that her professional abilities were never questioned during her appointment.

Secondly, she submits that the Organisation did not inform her of its intentions prior to her dismissal and gave her no opportunity to put her case and defend her interests. She contends therefore that her right to be heard, as required by the Tribunal’s case law, has not been respected.

Thirdly, she states that the clause in her letter of appointment providing for a six-month probationary period is contrary to Article 40.6(c) of the Staff Rules, which limits the duration of probationary periods to three months for holders of fixed-term

appointments. She argues that her probationary period had therefore expired when she was dismissed and that the Organisation should therefore have complied with Article 80.2 of the Staff Rules, governing the termination of appointments, which stipulates that advance notice must be given, the length of which in her case ought to have been at least three months, or that an indemnity must be paid if no notice of termination is given within the prescribed period. She also considers that she should have received an indemnity on termination under Article 80.3.

Fourthly, she submits that a “false reason” was given for her dismissal and that in reality the “employment relationship was terminated” on account of her supervisor’s “disparagement and extremely pernicious behaviour”. In this connection, she asserts that he bullied her and she complains that the Organisation took no action to deal with this stressful situation, although she had informed the Deputy Director General of it by her e-mail of 12 July 2009.

The complainant further contends that, owing to her appointment with the OIE, she abandoned her studies and a training course, thereby missing an opportunity to acquire additional qualifications and professional experience.

The complainant asks the Tribunal to set aside the impugned decision. She claims an indemnity equivalent to the remuneration which she should have received until the end of her appointment on 2 February 2011 as compensation for the injury caused by the wrongful cancellation of her employment contract, an indemnity in lieu of notice and an indemnity on termination, each amounting to 8,428.86 euros, an indemnity of 13,464 euros for “loss of opportunity” and payment of the same sum as compensation for moral injury. She also claims costs in the amount of 3,000 euros.

C. In its reply the Organisation submits, with regard to the complainant’s first and second pleas, that her performance was in fact appraised, because in her e-mail of 12 July 2009 she referred to two appraisal interviews, the first of which had been held at the end of the

first three months of her contract, and the second, during which she was given the opportunity to respond to the criticisms levelled at her, on 2 July 2009.

Concerning the third plea, the Organisation says that the incorrect statement in the complainant's letter of appointment, that she would be subject to a six-month, rather than a three-month, probationary period, as laid down in Article 40.6(c) of the Staff Rules, was due to a clerical error. It recognises that this error affected the lawfulness of the procedure for terminating her contract and it therefore offers to pay the complainant an indemnity in lieu of notice equivalent to three months' salary less the sum it has already paid her for the period 10 to 31 July 2009, i.e. a sum of 5,211.97 euros, and an indemnity on termination of 6,621.75 euros. It maintains, however, that in the light of the complainant's letter of appointment, the Director General believed in good faith that she was still serving a probationary period when he decided to terminate her contract. The dismissal was nonetheless objectively justified, because the complainant had not displayed the requisite competence, particularly because she had made numerous mistakes, as recorded in the document entitled "Evaluation of reports" annexed to the reply.

With regard to the fourth plea, the OIE points out that the complainant never complained about her supervisor's behaviour before her contract was terminated and it submits that she has furnished no evidence in support of her accusations.

Lastly, the Organisation points out that the complainant may not rely on a possible loss of opportunity since, on signing her letter of appointment, she abandoned her studies "advisedly" and she has shown no wish to resume them since the termination of her contract. Furthermore, she informed the OIE in October 2009 that she had already found two part-time jobs.

D. In her rejoinder the complainant comments that the Organisation is late in acknowledging its error regarding the length of her probationary period and she takes it to task for not having seized the

opportunity of correcting this mistake on 24 July 2009. She submits that the document entitled “Evaluation of reports”, which is unsigned and undated, cannot constitute a report on a staff member within the meaning of Article 40.12 of the Staff Rules and was clearly “contrived”.

E. In its surrejoinder the OIE emphasises that the document entitled “Evaluation of reports” is an internal management document which is not communicated to the staff member concerned.

F. In her further submissions the complainant points out that the Director General awarded her a “merit” bonus for 2009 which, she says, is indubitable proof of her professional ability.

G. In its final comments the OIE explains that the “merit” bonus is a benefit automatically awarded to all its members of staff at the end of every calendar year in accordance with a decision of the Director General of 1 March 2002.

CONSIDERATIONS

1. The complainant, who applied for a vacant post of *chargé de mission* in the Animal Health Information Department of the OIE, was recruited as from 2 February 2009 under a renewable two-year fixed-term contract. Her letter of appointment, dated 13 January 2009, stipulated that she would undergo a six-month probationary period and that if, at the end of that period, her appointment was confirmed, the period of notice in the event of termination of the appointment, non-renewal of contract or resignation, would be three months.

2. The complainant was informed of the termination of her contract by a letter of 7 July 2009 from the Director General, which she says she received on 20 July. This letter reads in relevant part:

“I refer to my letter of 13 January 2009 notifying you of a six-month probationary period starting on 2 February 2009.

As your supervisors consider that this probationary period has been unsuccessful, I regret to inform you hereby that your contract with the OIE will be terminated as of 31 July 2009.”

3. On 24 July 2009 the complainant wrote to the Organisation to request her immediate reinstatement. Failing that, she proposed that the dispute should be submitted to an independent person designated by the President of the Tribunal in accordance with the second paragraph of Article 10.1 of the Staff Regulations.

Contacts between the parties failed to produce an amicable settlement of the dispute. The complainant ultimately decided to lodge a complaint with the Tribunal.

4. In her complaint filed on 6 October 2009 she asks the Tribunal to set aside the decision of the Director General of the OIE “dated 7 July 2009 effective as of 31 July 2009”. She accordingly asks it to order the OIE to pay her indemnities amounting to 40,392.72 euros as compensation for the injury suffered as a result of the cancellation of her contract, 13,464 euros for “loss of opportunity” and 13,464 euros for moral injury. She also claims “at all events” an indemnity in lieu of notice and an indemnity on termination, each amounting to 8,428.86 euros, and costs in the amount of 3,000 euros.

In support of her complaint, she argues that her performance was not appraised during her probationary period and that she was not given an opportunity to put her case prior to the adoption of the decision to terminate her contract. She also submits that setting the length of her probationary period at six months was contrary to Article 40.6(c) of the Staff Rules and that the decision of 7 July 2009 was not taken in accordance with the applicable procedure and disregarded the safeguards provided for in her letter of appointment. Lastly, she takes issue with the fact that the Organisation based her dismissal on a “false reason”.

5. The Organisation admits that it made a mistake when setting the length of the complainant’s probationary period. It emphasises, however, that this was simply a clerical error. As this error affected the

lawfulness of the procedure for terminating the complainant's contract, it offers to pay her certain indemnities, but it makes it clear that in any case it would have cut short her contract since she was not suitable for her post.

6. The Tribunal will not accept these arguments. According to Article 40.6(c) of the Staff Rules of the OIE:

“A fixed-term appointment shall be subject to a probationary period of three months.”

Consequently, as the Organisation itself admits, the complainant's contract could not provide for a six-month probationary period. This clause, which was therefore illegal, could not produce any legal effect. Hence the complainant, who had been employed since 2 February 2009, was no longer on probation when she was notified of the termination of her fixed-term contract, and this termination must be regarded as dismissal before the expiry of that contract. This dismissal should therefore have complied with the rules in force within the Organisation, as well as the principles identified in the case law.

7. The complainant takes the OIE to task for having breached her right to be informed of its intentions regarding her dismissal, thereby preventing her from putting her case and defending her interests, and for not appraising her performance.

8. It is plain from the wording of the letter of 7 July 2009 that the reason for terminating the complainant's appointment was that her probationary period had been unsatisfactory.

However, as earlier indicated, the complainant was no longer on probation in July 2009. It must therefore be found that the complainant was dismissed because her supervisor did not regard her service as satisfactory.

9. According to the Tribunal's case law, 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 as to be in a position 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 (see Judgment 2414, under 23). Precedent also has it that the procedure used for drawing up a performance appraisal forming the basis of a dismissal decision must always be adversarial (see, in particular, Judgments 2468, under 17, and 2515, under 18).

10. In this case the evidence on file reveals not only a failure to respect the complainant's right to be informed of her employer's intentions before the adoption of the decision to dismiss her, in that she was not formally advised of the unsatisfactory aspects of her work and received no warning in order that she might improve the quality of her work, but also a lack of any appraisal by means of an adversarial procedure complying with the applicable rules.

11. It must be concluded from the foregoing that the impugned decision must be set aside without there being any need to rule on the complainant's other pleas.

12. The complainant claims damages for the cancellation of her contract, which she estimates as a sum corresponding to the remuneration she should have received until the end of her appointment, that is 2 February 2011.

The Tribunal considers that, in view of the circumstances of the case, for the material injury caused by the termination of her contract before its expiry, the complainant is entitled to an indemnity equivalent to the salary and allowances which she would have received between the effective date of her separation from service and the date on which her contract should have expired, less any remuneration that she received during the period in question, in particular her salary from the part-time jobs mentioned in the file.

13. The complainant draws attention to the fact that she had to abandon her studies and a training course in order to take up her

appointment with the OIE and she claims damages for the fact that she thus lost an opportunity to acquire additional qualifications and professional experience.

The Tribunal is not convinced by the arguments put forward by the complainant in support of this claim, because she applied for a vacant post of her own free will and freely accepted the offer of appointment that was made to her.

14. The complainant claims damages for the moral injury caused by the bullying she allegedly suffered from her supervisor.

The Tribunal will not grant this claim because the complainant furnishes no evidence in support of her allegations.

15. The complainant also seeks the award of an indemnity on termination and an indemnity in lieu of notice.

The Tribunal considers that she should not be awarded the latter indemnity, because it has been found that the termination of her fixed-term contract before its expiry was unlawful and on this account she has been granted an indemnity equal to the remuneration she would have received until the scheduled date of expiry of her appointment. This compensation for the loss of salary and allowances cannot be awarded in addition to an indemnity in lieu of notice (see, for example, Judgment 1350). Nor will the Tribunal grant the claim for an indemnity on termination, since according to Article 80.3 of the Staff Rules this indemnity is paid only in the cases exhaustively listed therein, which do not include the circumstances in which the complainant was dismissed.

16. The complainant is entitled to costs, which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The decision of 7 July 2009 of the Director General of the OIE is set aside.
2. The Organisation shall pay the complainant an indemnity calculated as indicated under 12, above.
3. It shall also pay her costs in the amount of 3,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 18 November 2011, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet