

115th Session

Judgment No. 3241

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs P. A. against the European Southern Observatory (ESO) on 16 November 2010 and corrected on 21 December 2010, ESO's reply of 5 April 2011, the complainant's rejoinder of 31 May and the Observatory's surrejoinder of 8 August 2011;

Considering Articles II, paragraph 5, and VII 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, an Italian national born in 1964, joined the Observatory in 1994. She was first employed under four successive one-year contracts as a non-established member of the personnel and subsequently under a three-year contract as an International Staff Member. Upon the expiry of her contract on 31 July 2001 she separated from service. With effect from 11 July 2005 she was employed under a three-year fixed-term contract for International Staff Members as an Operations Staff Astronomer at the La Silla Paranal Observatory in Chile; this contract was subsequently extended

for three years until 30 June 2011. Due to health problems, she was offered a reassignment, which she accepted, to the post of Instrumentation Physicist in the Instrumentation Projects Department of the Instrumentation Division at the Observatory's headquarters in Garching, Germany. She took up her new duties in August 2009 and in December 2010 she was offered a second three-year extension of her contract until 30 June 2014.

The complainant's performance review for 2008 was drawn up by her supervisor in November of that year. As she disagreed with its content, she refused to sign the review form and provided her comments in two separate letters dated 25 November 2008. Her supervisor signed the form on 5 December 2008. The complainant met with the Head of her Division on 16 December to discuss the performance review. Her goals and objectives for 2009 were then revised, but she still refused to sign. The Head of Division noted this on the review form, which he signed that same day.

Over the course of the following year the complainant had numerous e-mail exchanges, telephone conversations and meetings with several members of the Administration concerning issues related to her employment, including her performance reviews for 2008 and 2009. In a letter of 19 February 2010 to the Director General she stated that she wished to file an official complaint challenging the Observatory's inability to find a solution regarding, inter alia, the finalisation of her performance reviews for 2008 and 2009, and she requested mediation in this respect.

The Head of Human Resources wrote to the complainant on 5 May 2010, asking her to provide a detailed report of her work activities and related achievements for the period from January to August 2009. He explained that the Director General would forward this to a competent and qualified person who would then review her performance. He indicated that the review would not in itself constitute a decision within the meaning of the provisions of the Staff Rules and Regulations related to disputes and appeals. The complainant subsequently provided the requested report; the Observatory added its comments and provided ratings of "Good" in some sections. With

respect to her overall performance, it was stated that she consistently met her job requirements. On 6 June 2010 the Head of Human Resources signed the report on behalf of the Director General.

By a letter of 18 June 2010 the complainant notified the Director General that she was appealing his failure to take a decision regarding her complaint of 19 February and she asked him to consider her letter of that date as part of her appeal. Referring to the comments she had provided in response to her 2008 performance review, she reiterated that it was tainted with procedural flaws. She stated that her review for 2009 had not been completed but that, as she expected to receive it the following week, she reserved her right to make comments on it in due course.

In a letter of 6 July 2010, appended to which was the complainant's performance review for the period from January to July 2009, the Head of Human Resources informed her that the review process for 2008 was closed and that it had complied with the principles set out in Administrative Circular No. 8. He reiterated that a review of performance was not an appealable decision pursuant to the Staff Rules and Regulations. On 16 November 2010 the complainant filed the present complaint with the Tribunal, indicating on the complaint form that no express decision had been taken in response to her letter of 18 June 2010 and that she therefore impugned the implicit rejection of the claims contained therein.

B. The complainant submits that, pursuant to Article R VI 1.07 of the Staff Rules, the Director General ought to have taken a final decision on her appeal after consulting the Joint Advisory Appeals Board. However, in this case, her appeal was not referred to that body. In addition, before filing her internal appeal with the Director General, she unsuccessfully attempted to resolve her work-related issues by requesting the assistance of the Human Resources Division. In her view, she therefore exhausted the internal means of redress as required by paragraph 1 of Article VII of the Statute of the Tribunal.

Referring to her letters of 19 February and 18 June 2010, the complainant argues that she is entitled to request a second review of

her performance for the year 2008 because the first performance review was flawed. In particular, she had no prior warning that her supervisor would evaluate her performance less favourably than before. Consequently, she was deprived of the opportunity to discuss and correct any behaviour that was considered unsatisfactory, in breach of the basic principles governing the performance review process. Also, one of her agreed work goals was revised without her prior agreement, and she was therefore assessed on the basis of erroneous criteria. She asserts that, after challenging her 2008 review, she was accused of refusing to recognise her supervisor's authority, which she denies. She further submits that her 2009 review was not adequate. In her view, her performance during that period often exceeded requirements and in the past this had resulted in ratings of "Very Good" or "Outstanding", rather than merely "Good". In support of her arguments, she has produced a list of achievements which she alleges were not taken into account as part of her evaluation.

The complainant asks the Tribunal to quash her performance review evaluations for 2008 and for the period from January to July 2009, and to order ESO to carry out new appraisals for those periods.

C. In its reply ESO submits that, according to Article R II 2.02 of the Staff Regulations, a performance review is not open to an internal appeal, and the complainant's contract expressly stipulates that it is subject to the provisions of the Staff Rules and Regulations as well as to all other relevant official instructions. It points out that Administrative Circular No. 8 sets out the procedure applicable to annual performance reviews. The procedure for the complainant's 2008 performance review was completed on 16 December 2008, when the Head of Division added his comments to the form. If she wished to challenge that review, the complainant should have filed a complaint with the Tribunal within ninety days from that date. As she failed to do so, her claims in this respect are time-barred. ESO denies that there was an implicit rejection of her claims. Furthermore, the procedure for the complainant's performance review for the period from January to July 2009 was completed on 6 June 2010 and any claims related to that review are likewise time-barred.

On the merits, the Observatory contends that the assessment of a staff member's performance is at the discretion of her or his supervisor. A staff member may express any disagreement with that assessment by adding comments and by requesting the Head of Division to add comments as well. ESO argues that the complainant does not plead or adduce any evidence that there was a mistake or abuse of authority on the part of her supervisor related to her 2008 performance review. In its view, the same arguments apply with respect to her review for the first part of 2009. Regarding her allegation that one of the goals on her 2008 review was changed, it states that this is not supported by her own comments in the relevant section of the review form. Lastly, it submits that all of the complainant's achievements were considered in assessing her performance, and her activities did not merit a higher rating.

D. In her rejoinder the complainant asserts that her complaint is receivable because it was filed within the prescribed time limits. She develops her pleas and contends that the Observatory refused to consider documents which, in her view, contained evidence of procedural flaws in the performance review procedure.

E. In its surrejoinder ESO maintains its position in full and reiterates that the complaint is irreceivable.

CONSIDERATIONS

1. The complainant, who is presently employed as an Instrumentation Physicist with ESO at its headquarters in Garching, Germany, challenges her performance evaluation reviews for 2008 and for January to July 2009 when she worked as Operations Staff Astronomer at ESO's La Silla Paranal Observatory in Chile. She filed her complaint with the Tribunal and contends that it is receivable under Article VII(3) of the Tribunal's Statute. This, she states, is because the Director General of ESO failed to make a decision on an appeal which she lodged with him on the matter within sixty days after he was notified of her appeal. She states, further, that she

exhausted all other means of redress under ESO's Staff Regulations and had, in fact, even tried to have her concerns settled by mediation with the assistance of the Human Resources Division, without success. She also insists that her challenges to the performance evaluation reviews are meritorious because the evaluation and review processes were tainted with irregularities and were therefore flawed.

2. By way of relief, the complainant asks the Tribunal to quash her performance review evaluation for 2008 and the evaluation for January to July 2009, and to direct that the performance review process should be redone. She does not claim damages or costs.

3. ESO submits that the complaint is not receivable, and insists that, in any event, the complainant's claims are not meritorious.

4. Receivability is therefore a threshold issue, which will first be considered.

5. It is settled law that a complaint may be lodged against a final or implicit rejection of claims of the nature brought by the complainant. Thus it was determined, in Judgment 2991, under 11, that an assessment report can constitute a decision adversely affecting the person concerned and may be impugned in proceedings before the Tribunal after internal means of redress have been exhausted. This is buttressed by the statement of principle in Judgment 466, under 3, that such matters may be so challenged since every official has an interest in the proper establishment of reports on her or his performance, on which her or his career will depend. However, such a decision must be challenged in a timely manner and in accordance with the relevant staff rules and regulations. If not so challenged, the decision becomes final and cannot be reopened (see Judgment 3059, under 7).

6. The complainant contends that there was an implicit decision by the Director General of ESO to reject her appeal against her 2008 and January to July 2009 performance evaluation assessments.

7. According to the complainant, she complained to the Director General, by letter of 19 February 2010, that there were irregularities in the processes of her performance reviews for 2008 and for January to July 2009. As a result of the alleged irregularities, she did not sign the performance review forms and tried to have the matters reviewed by ESO internally. The matters were not resolved and she received no response from the Director General. She therefore sent a further letter, dated 18 June 2010, to the Director General. In that letter she pointed out that he had not replied to her letter of 19 February 2010 within sixty days and, additionally, that the Human Resources Division had taken no action to resolve the issues she had raised concerning her performance review evaluations for 2008 and for January to July 2009. She interpreted these circumstances to be an implicit negative decision on these issues and she asked him to treat her letter of 18 June 2010 as an appeal against that decision.

8. Referring to Chapter VI, Section 1, of the Staff Regulations, the complainant submits that her appeal, by way of the letter of 18 June 2010, had to be decided by the Director General after consultation of the Joint Advisory Appeals Board. She contends that the Administration failed to transmit the matter to the Board and that, as a result, there was an implicit rejection of her appeal. This caused her to file her complaint with the Tribunal on 16 November 2010.

9. In effect, the complainant asserts that her complaint is receivable because the Director General failed to provide her with a decision on her appeal contained in her letter to him dated 18 June 2010 within sixty days after he was notified of her appeal. This accordingly became an implicit negative decision by mid-August 2010. She then had ninety days to file her complaint with the Tribunal, so that her complaint filed on 16 November 2010 was receivable as she had exhausted her internal remedies.

10. ESO submits that the complaint is not receivable because the complainant did not file it in a timely manner.

11. According to ESO, the complainant's performance review for the year 2008 was drawn up in November 2008 and signed by the complainant's supervisor on 5 December 2008. The complainant did not sign the form and submitted comments indicating that she disagreed with parts of her evaluation and some of her goals and objectives. She also asked the Head of her Division to "discuss the problem". ESO states that she met with the Head of Division on 16 December 2008 and that, during the meeting, her goals and objectives for the year 2009 were revised. After that meeting, the complainant tried to discuss her concerns regarding the 2008 and 2009 performance reviews with various persons within ESO, including the Human Resources Division and representatives of the Staff Association.

12. In relation to the complainant's performance review for January to July 2009, ESO states that the complainant received a first draft of her performance review for the first half of 2009 on 11 February 2010. In her letter to the Director General of 19 February 2010, she complained that her activities were not completely reflected in that review. According to ESO, the Director General instructed the Head of Human Resources to discuss this issue with the complainant. ESO further states that, in a letter dated 5 May 2010 to the complainant, the Head of Human Resources confirmed, on behalf of the Director General, that an agreement had been reached with the complainant on the procedure for the preparation of the performance review for January to July 2009. According to that letter, the complainant was to provide the Human Resources Division with a detailed report on her work activities and the results achieved during the period of January to August 2009. The Director General was then to pass that information to a competent and qualified person for an evaluation of the complainant's performance during that period. The letter of 5 May 2010 further states that, according to the Staff Regulations, a performance review does not constitute a decision which may be challenged by an internal appeal. According to ESO, the result was that the complainant presented her report, comments were added and her performance was evaluated as "Good". The overall assessment was that the complainant consistently met her job requirements and

the performance review was signed by the Head of Human Resources on 6 June 2010.

13. ESO draws attention to the fact that Administrative Circular No. 8 provides for those cases in which an employee disagrees with the performance review as signed by the supervisor. The procedure is that the competent Head of Division meets with the staff member and the supervisor and then adds her or his comments to the performance review. According to ESO, the performance review is completed and becomes final on the date when the Head of Division signs the document, and the ninety-day period for a complaint to be filed with the Tribunal runs from the day on which the completed performance review is forwarded to the staff member concerned. ESO submits that the complainant's performance review for 2008 was signed by the Head of Division on 16 December 2008 and handed to her that same day, so that the deadline for filing a complaint against that review expired ninety days after that date.

14. The complainant acknowledges that she met with the Head of her Division on 16 December 2008. However, she insists that he refused to discuss the 2008 evaluation and focused instead upon setting the goals and objectives for 2009. As far as she is concerned, there was no exchange with the Head of Division, as required in Administrative Circular No. 8, with respect to the 2008 performance review. Consequently, she appealed to the Director General concerning that review as well as the review for January to July 2009, by her letter of 18 June 2010, after the problems, as she saw them, were not resolved by the internal process.

15. This is an opportune time to determine two matters that arise from the foregoing submissions. The first is concerned with the question whether an appeal lies to the Director General, in consultation with the Joint Advisory Appeals Board, on matters dealing with performance evaluation reviews. The second is concerned with the question of when a performance review evaluation is completed and becomes final under ESO's Staff Regulations.

16. These issues hinge upon the relevant provisions of those Regulations.

17. Article R II 2.02 of the Staff Regulations, entitled “Performance review”, states as follows:

“The work performed by each staff member shall be appraised annually in an appraisal report (performance review) transmitted to the staff member concerned, to which the latter may add any comments which he considers helpful. This performance review shall not itself constitute a decision under the terms of Staff Regulation VI 1.01 et seq.”

18. Chapter VI of the Staff Regulations, to which the above article refers, is entitled “Disputes and Appeals”. In addition to mandating the Director General to provide facilities for mediation, it confers a right to an internal appeal from an adverse administrative decision upon employees of the organisation. It sets out the time within which such an appeal must be lodged with the Director General. The Director General is mandated to adjudicate the appeal but is required to consult with the Joint Advisory Appeals Board prior to making his decision. Chapter VI also provides for the hearing before the Board and for the Board to submit its recommendation to the Director General, and then for the notification of the decision to an appellant. However, on the wording of Article R II 2.02, a performance review is not a decision which may be the subject of an internal appeal under the provisions of Chapter VI of the Staff Regulations. Whilst the Tribunal considers this exclusion to be regrettable, it follows that ESO’s contention that an internal appeal does not lie from the complainant’s performance evaluation reviews is correct.

19. In the absence of a right of appeal to the Director General, in consultation with the Joint Advisory Appeals Board, it is necessary to establish when a performance review becomes final, since this will determine the time from which the limitation for filing a complaint with the Tribunal runs.

20. Administrative Circular No. 8 relevantly provides that a staff member’s performance is to be documented in an appraisal

report (the performance review) comprising the results of an annual interview between the supervisor and the staff member, a performance assessment by the supervisor and a summary of the agreed objectives for the following year. Once the appraisal report is completed, it is to be sent, together with any related documents, to the staff member. The staff member is to sign it, certifying that she or he has read it. The staff member may add any appropriate comments. Where a staff member has added comments, the supervisor must outline what action has been taken. In the event that there is a disagreement between the staff member and the supervisor, the Head of Division is to meet with them and add her or his comments. As far as it may be discerned from the Circular, this ends the process. It seems reasonable to conclude, therefore, that a complaint with the Tribunal would have to be filed within ninety days after an aggrieved staff member receives the performance review with the comments of the Head of Division following this meeting. This accords with ESO's submissions.

21. It is against the foregoing background that the Tribunal shall consider whether the complaint in this matter was filed in a timely manner.

22. According to the complainant, the event that triggered the time limits provided for in Article VII of the Statute of the Tribunal was her letter of appeal of 18 June 2010 to the Director General. She states that this letter was received by ESO on 21 June, so that the first time limit (the sixty days) towards the implicit refusal commenced on 22 June 2010 and expired on 20 August 2010. The second time limit (the ninety days), under Article VII(2) of the Statute, commenced, in her view, on 21 August 2010 and expired on 19 November 2010. She further asserts that her complaint to the Tribunal was "posted on 15 November 2010" and she therefore complied with the time limit set by Article VII(3) of the Statute. However, leaving aside the fact that the complaint was filed on 16 November 2010 and not, as the complainant appears to suggest, on 15 November 2010, her position on this issue is in any case mistaken, since it presupposes that there is a right of appeal to the

Director General against an adverse performance review. As stated earlier, no internal appeal lies against decisions on such matters under ESO's Staff Regulations.

23. In her rejoinder the complainant contends that ESO's procedures establish that the performance review ends, following the discussion in the meeting with the Head of Division, with "signatures on both sides". ESO notes, however, that the complainant has not specified the procedure to which she refers, and asserts that such a procedure does not exist. The complainant has not brought any evidence to show the existence of this procedure.

24. Under ESO's Staff Regulations, the performance review process ended with the meeting of 16 December 2008. This meeting was occasioned because of the complainant's disagreement with her supervisor's assessment. Her performance review for 2008, which she has produced as an annex to her complaint, shows evidence of that meeting. The supervisor's comments and performance evaluation are entered on the document. The final entry, under the rubric, "Review by the Head of Division", shows the comment entered by the latter. It states that the performance review was discussed on 16 December 2008 and that the modified objectives for 2009 were read to the complainant, but that she refused to sign the document as is.

25. However, the refusal to sign does not keep the review process in abeyance while an appeal, to which there is no entitlement, is pursued. The complainant had ninety days from 16 December 2008 to file her complaint with the Tribunal. By filing it on 16 November 2010, she exceeded that time limit by a considerable margin.

26. The result is that the aspect of the complaint which is concerned with the 2008 performance review must be dismissed because it is not receivable.

27. With respect to the performance review for January to July 2009, ESO states that, after the complainant objected to the initial

draft that she received on 11 February 2010, there was an agreement that the review for that period was to be conducted by a different and “exceptional procedure” because of the complainant’s reassignment from Chile to Germany in August 2009.

28. Details of this agreement may be found in the letter dated 5 May 2010 which the Head of Human Resources wrote to the complainant. It was in reply to the complainant’s letter of 19 February 2010 in which she expressed her concerns and disagreements with her 2009 performance review, among other things. In relation to the 2009 review, the complainant was asked to provide the Human Resources Division with a report of her work and activities for the first period of 2009. It will be recalled that the letter indicated that, on receipt of that report, the Director General would appoint a qualified and competent person to do an evaluation.

29. There is on record a performance review which was done after the complainant’s letter of 19 February 2010. The document was signed by the Head of Human Resources on 6 June 2010. His final note on the document states, in relation to the complainant’s performance for the first half of 2009, that she consistently met job requirements. ESO states that this performance review was given or dispatched to the complainant on 6 July 2010 at the latest. It attaches to its submissions a copy of the letter dated 6 July 2010 from the Head of Human Resources to the complainant. The performance review for the first period of 2009 was appended to that letter.

30. ESO accepts that the letter of 6 July 2010 contained a new decision on the performance review for that period. It contends that it is the decision of that date which triggered the time limit for filing a complaint against the 2009 performance review. In its view, the time limit had expired before the complaint was filed with the Tribunal on 16 November 2010.

31. ESO’s arguments on this issue present some difficulties. The process of performance evaluation for the first period of 2009 was in

fact exceptional, as ESO concedes. The complainant did not object to it. However, as she indicates, it was a procedure which ESO unilaterally put in place. The process that it instituted for the further review should have followed the procedures set out in the Staff Regulations and in Administrative Circular No. 8 for performance reviews, but it did not.

32. When the Head of Human Resources asked the complainant, in his letter of 5 May 2010, to provide the Human Resources Division with a report of her work and activities for the first period of 2009, this set in motion a further performance review. From that time it would have been prudent, in the interest of fairness, to have followed that aspect of Administrative Circular No. 8 which requires a meeting at which the complainant's report and the comments therein were discussed. This was not done.

33. There is no evidence that there was a final meeting to discuss the outstanding issues of concern for the 2009 performance review, with comments, as obtained in the case of the 2008 review, for example. That meeting would have put all parties present in an informed position to write their comments and sign the final performance review document. That act would have finalised the process in accordance with relevant provisions, even if the complainant refused to sign the document.

34. Accordingly, it is important to note the effect of Article R II 2.02 of ESO's Staff Regulations. While it precludes an internal appeal from a performance review, it reaffirms that there is an annual performance review process to which each staff member is entitled. This process is elaborated, in particular, in Section II of Administrative Circular No. 8.

35. When therefore the complainant "appealed" to the Director General, by way of her letter of 18 June 2010, she was, in relation

to her performance review for the first part of 2009, in effect, requesting the completion of the review process for that period. As earlier indicated, the process for her 2008 review was completed on 16 December 2008 when she met with the Head of Division. In order to complete the January to July 2009 performance review process, there should have been, at least, a similar meeting with her Head of Division, possibly attended by the Head of Human Resources as well, to discuss and review the complainant's response to the letter of 5 May 2010.

36. By not responding to the complainant's letter of 18 June 2010 concerning the outstanding issues on her January to July 2009 performance review, the Director General implicitly rejected her request to complete that review process. The implicit rejection crystallised on or about 18 August 2010. The complainant had ninety days from that date to file her complaint with the Tribunal to impugn the performance review for the first part of 2009. As she filed the complaint on 16 November 2010, she filed it within the stipulated time. Her complaint is therefore receivable insofar as it relates to her performance review for that period.

37. In summary, the complainant seeks an order quashing her performance review evaluation for 2008, but that aspect of her complaint is not receivable and is accordingly dismissed. The aspect of the complaint in which the complainant seeks an order quashing her performance review evaluation for the first period of 2009 is receivable. Inasmuch as the process is incomplete, that matter is returned to the organisation for a performance review to be concluded in accordance with the Staff Regulations and Administrative Circular No. 8. The complainant does not seek damages. Although there is no prayer for costs, she is entitled to one half of her costs in these proceedings, which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The matter is remitted to ESO for the complainant's performance review for the first part of 2009 to be concluded in accordance with ESO's Staff Regulations and, in particular, with Administrative Circular No. 8, as advised in paragraph 35, above.
2. ESO shall pay the complainant 2,000 euros in costs.
3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 8 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet