Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

B. Z. (No. 2)
v.
IFAD

134th Session **Judgment No. 4543**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms R. B. Z. against the International Fund for Agricultural Development (IFAD) on 23 October 2018, IFAD's reply of 5 April 2019, the complainant's rejoinder of 17 July and IFAD's surrejoinder of 30 October 2019;

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 her performance evaluation for 2016.

On 1 February 2014 the complainant joined the IFAD Office in Bujumbura, Burundi, as a Country Programme Officer (CPM) at grade P-4 in the East and Southern Africa Division under a short-term appointment until August 2014. Following a selection process, she was later appointed for a two-year fixed term in the same position from 4 September 2014 until 4 September 2016, and was designated as IFAD Representative in Burundi. Her contract of employment included a description of her duties in Attachment III and stated that she could not have any expectation of continuous employment or conversion to any other type of appointment and that possible extensions of her appointment were conditional on successful performance and satisfactory

conduct, among other factors. In addition, confirmation of her appointment depended on the satisfactory completion of a 12-month probationary period, ending on 4 September 2015. A work plan was drawn up by her regional director and supervisor at the time. It was signed by the complainant on 19 September 2014.

At the end of the first five months of her probationary period, the complainant received a generally positive mid-point assessment report from her then regional director and supervisor, which she signed on 1 February 2015. However, her supervisor pointed out various shortcomings in the complainant's performance, including insufficient knowledge of new concepts in sustainable and effective rural transformation, leadership skills, and the ability to balance detail with a high-level, overall view of her duties.

From May 2015 the complainant, who was worried about the political uncertainty in Burundi caused by a failed coup d'état on 15 May 2015 and the upcoming presidential elections on 15 July 2015, carried out various missions away from her usual duty station in Bujumbura, with her managers' agreement. In July 2015, in view of the deterioration in her health as assessed by the Chief Medical Officer of the United Nations Food and Agriculture Organization (FAO) on 9 July 2015 and confirmed by her doctor in Bujumbura, the complainant requested permission from her new regional director and supervisor, in post since 1 April 2015, to return to IFAD headquarters in Rome. Her supervisor agreed to this request on an exceptional basis, stating that he would discuss the situation with her when she arrived. A meeting was held on 23 July 2015 at which the complainant was asked to confirm in writing that she would remain in Bujumbura unless ordered to evacuate by the United Nations Department of Safety and Security, in accordance with the applicable rules for IFAD. On 29 July 2015 her supervisor, explaining that he had received instructions to this effect from his managers, asked her to return to her usual duty station at the end of her annual leave, due to finish on 17 August. The complainant replied that she had already arranged her return tickets to Bujumbura. She confirmed that she agreed to deal with the insecurity in Burundi and to remain at her duty station in Bujumbura unless an evacuation order,

as referred to above, was issued or she was duly authorised by her managers to travel.

On 6 August 2015 her supervisor sent her the probationary report, in which he proposed that the probationary period be extended by six months, until 4 March 2016. The complainant inserted her observations and the report was finalised. She explicitly agreed to a six-month extension of her probationary period. On 28 September 2015 her supervisor sent her a performance improvement plan (PIP) for the six-month period from 5 September 2015 to 4 March 2016. This plan, which was dated 22 September 2015 and provided for continuous feedback on her performance and the delivery of monthly progress reports, was duly signed and approved by the complainant. On 2 October the complainant sent her supervisor a detailed work plan covering the rest of 2015. She received a copy of this first finalised PIP by email on 30 October 2015.

Shortly before, on 29 July 2015, the complainant had received a draft mid-term performance review for 2015. This was later removed from her personal file, as she was still on probation at the time and had been placed on a PIP.

A probationary report was drawn up at the end of the 18-month period. It was signed on 16 May 2016 by the complainant's supervisor and on 26 May 2016 by her head of department. Given that the probationary period had come to an end and the prescribed maximum duration had been reached on 4 March 2016, the complainant's appointment was confirmed on that date pursuant to IFAD Staff Rule 2.5. However, in view of the weaknesses identified in crucial competencies required for the role of CPM and the fact that, under the applicable rules, the probationary period could not be further extended, it was decided that the complainant would be placed on a new PIP from the date of confirmation of her appointment until 3 March 2017.

In June 2016 the complainant submitted a request for facilitation.

By letter of 23 September 2016, forwarded to the complainant the following day, the facilitator notified her that the facilitation process had failed. However, she informed the complainant that several points had been or were being deleted from her probationary report and that

her mid-term performance review for 2015 would be removed from her personal file as it should not have been drawn up.

The Joint Appeals Board (JAB), with which the complainant lodged an internal appeal, delivered its report on 31 January 2017. It found that the appeal was irreceivable *ratione temporis* because it had not been sent to the competent authority in good time and was time-barred. It also considered that the appeal was partly irreceivable because it was, inter alia, directed against a decision which was still under discussion between the parties, namely the second PIP, eventually signed on 2 and 15 September 2016 by the supervisor and the complainant and covering the period from 4 September 2016 to 3 March 2017. The JAB further considered that the appeal was unfounded in any event, and therefore recommended that it be rejected. The President of IFAD endorsed those recommendations in a letter of 20 February 2017.

In her first complaint, filed with the Tribunal on 6 June 2017, the complainant requested the setting aside of that decision of 20 February 2017 dismissing as irreceivable the complainant's appeal, which was directed – apart from a point which has become moot – against the imposition of a second PIP and the extension of her appointment by only six months. The complainant also sought the setting aside of several documents drawn up prior to that decision, namely the probationary report of 16 May 2016, the first PIP and the probationary report of 22 August 2015.

That complaint was dismissed in Judgment [4542], also delivered in public today.

In the meantime, on 7 July 2016, in the complainant's mid-term review, her supervisor stated that her performance had remained unsatisfactory over the previous six months and he had therefore decided to place her on a new PIP. A draft PIP, dated 5 August 2016, was sent to the complainant for comment on 11 August 2016, and she was informed that a possible extension of her appointment from 3 September 2016 to 3 March 2017 was under consideration. A telephone conversation took place about the aforementioned PIP on 23 August. In an email sent the following day, her supervisor stated that the conversation in question constituted the monthly performance review

conversation required by the PIP. He awaited her comments on the draft second PIP and the minutes of the meeting. On 27 August the complainant expressed her disagreement with the imposition of the second PIP and its content. Her supervisor agreed to change the timeframe of the plan (stating that it would run from 4 September 2016 to 3 March 2017) and informed her that he considered the amended PIP final. The final version of the second PIP was signed by the supervisor on 2 September 2016 and by the complainant on 15 September 2016. However, the complainant specified that her signature was subject to the taking into consideration of her comments on the PIP, with which she had expressed her disapproval in the emails of 27 August and 2 September. By letter of 2 September 2016, the complainant was also notified of the decision of the Director of the Human Resources Division (HRD) to extend her appointment, due to expire on 4 September 2016, by six months until 3 March 2017 so as to cover the period of the second PIP. As when she took up her initial appointment, the complainant was informed that any further extension of her appointment was conditional on successful performance and satisfactory conduct, among other factors.

On 31 October 2016 the complainant submitted a request for facilitation concerning the decision to extend her appointment. A letter of 9 November 2017 stated that the facilitation procedure had failed. On 8 December 2017 the complainant challenged before the JAB the decision to extend her appointment by only six months. In particular, she requested that her appointment be renewed for three years or at least two years, which corresponded to the length of her initial appointment. In its reply, the administration argued that the appeal was rendered moot by the decision not to renew the complainant's appointment, which had been taken on 4 July 2017.

On 21 February 2017 the complainant was sent the final performance evaluation report (known as the Performance Evaluation System or PES document) for 2016. As she acknowledges, she had already received it by email on 10 January 2017. The report stated that her overall performance was "partially satisfactory", after the departmental Management Review Group (MRG) had reviewed the supervisor's performance evaluation and awarded the complainant a final overall

rating of 2, corresponding to “partly satisfactory” performance. On 27 February 2017, at the last monthly review meeting under the second PIP, the supervisor informed the complainant that he was recommending that her appointment not be extended as her overall performance was deemed unsatisfactory.

By letter of 3 March 2017, the Director of HRD informed the complainant that her appointment would not be renewed owing to underperformance. Referring to the six monthly review meetings and reports related to the second PIP covering the period from 4 September 2016 to 3 March 2017, the Director told the complainant that she had unfortunately not achieved the expected level of improvement in the main competencies and overall skills required for the post of CPM. She was reminded that three months’ notice was incorporated in the period covered by the second PIP, as specified in the original draft dated 5 August 2016, but that she had been granted a one-month extension, until 3 April 2017, during which time she would be placed on special leave with full pay for the purpose of facilitating her repatriation to her home country. The complainant was re-sent all of the monthly progress reports by an email of 9 March 2017, which stated that she had already received each report from her supervisor after each review meeting.

On 22 March and 8 April 2017 the complainant lodged two internal appeals in which she requested the Director of HRD to reconsider the decision of 3 March 2017 and her PES document for 2016. By decision of 4 July 2017, which she states she received on 12 July, the complainant was informed that her final PES rating for 2016 was confirmed. On 11 August 2017 she lodged an appeal with the JAB seeking, inter alia, the withdrawal of her PES document, a new performance evaluation, and compensation for injury suffered. In the appeal, she emphasised, amongst other things, that an examination of the various evaluations of her performance revealed a deliberate intention to undervalue and criticise her work, to jeopardise her future in the Organisation, to manipulate any party who might have dealings with her in her work and to destroy her career, all driven by gender discrimination. She further argued that she had achieved the objectives set for this period and also initiated other activities.

The decision not to renew the complainant's appointment was confirmed by the same decision of 4 July 2017. On 11 August 2017 she also referred this dispute to the JAB, seeking to be awarded a new three-year appointment with IFAD.

With the complainant's agreement, the JAB decided to join the three appeals and delivered a single report on 4 June 2018. The JAB found that the complainant's alleged underperformance had not been properly substantiated. It recommended that the PES document for 2016 be considered invalid, that it therefore be removed from the complainant's personal file, and that the decision not to renew her appointment be rescinded. As an alternative, it recommended that the complainant be awarded appropriate compensation. The report did not mention the six-month extension of the appointment from 4 September 2016 to 3 March 2017, which had been decided on 2 September 2016.

By letter of 25 July 2018, the President informed the complainant of his decision not to endorse the JAB's recommendations and to reject her three appeals as unfounded. He stated that her performance, although satisfactory at the beginning, had declined as time went by, a fact that had been noted by her managers and highlighted by her placement on a PIP. There were therefore sufficient reasons to maintain both her PES document for 2016 and the decision not to renew her appointment.

In the present complaint, the complainant asks the Tribunal to set aside the President's decision of 25 July 2018 in that it maintains her PES document for 2016. She also claims compensation for all the injury she considers she has suffered, which she assesses at 25,000 euros at least, and an award of 7,000 euros in costs for the internal proceedings and proceedings before the Tribunal.

IFAD requests the Tribunal to dismiss the complaint as unfounded and to order the complainant to cover her own costs.

CONSIDERATIONS

1. The complainant seeks the setting aside of the decision of the President of IFAD of 25 July 2018 to maintain her PES document for 2016 and the initial decision concerning that evaluation.

2. The complainant firstly submits that the refusal to allow her to submit her internal appeal to the JAB in French undermined her right to an internal appeal and the fairness of the appeal procedure. IFAD observes that section 9.9(iii) of Chapter 9 of the Human Resources Implementing Procedures, in the version applicable at the material time, expressly requires the parties to use English in their submissions in connection with an internal appeal to the JAB. IFAD further submits that the right to be represented by a lawyer of one's choice does not imply that the complainant and her counsel may use a language other than English in such internal appeal proceedings.

The Tribunal notes that, as IFAD contends, section 9.9(iii) of Chapter 9 of the Implementing Procedures, in the version applicable at the material time, is expressed in mandatory, restrictive terms and was correctly applied in the present case. Similarly, the right to be represented by a lawyer of one's own choice in internal proceedings does not allow a rule or regulation that requires use of a particular language in those proceedings to be overridden. It is immaterial that the Rules of the Tribunal allow English or French to be used during proceedings before it.

The complainant's first plea is unfounded.

3. The complainant further contends that the decision of the Director of HRD of 4 July 2017 in response to her requests for review of 22 March and 8 April 2017, mainly concerning her PES document for 2016, is unlawful. She submits that, contrary to section 9.3(ii) of Chapter 9 of the Implementing Procedures, the Director did not inform the manager who drew up the PES document that it had been challenged and that manager did not in turn take the initiative to open a dialogue with the complainant about her request for review.

In this case, the Director of HRD stated as follows: "In accordance with section 9.3 [of Chapter 9] of [the] Implementing Procedures [...], a [mandatory administrative review] has been carried out, in which [the question of the PES document for 2016 has] been reviewed together with the additional information that you submitted. As a result of the [mandatory administrative review], [the PES document for 2016 has] been confirmed."

In any event, it is apparent from this reasoning and the circumstances of the case that a dialogue with the complainant did take place, in particular by means of the manager who drew up the PES document for 2016 taking into consideration the additional information she provided.

The decision also states that the procedure was carried out in accordance with section 9.3 of Chapter 9 of the Implementing Procedures, and IFAD confirms that the manager who drew up the PES document "was in fact duly notified".

The complainant's plea is unfounded.

4. The complainant also contends that IFAD breached the rules on performance evaluation and the principle of good faith. In essence, she argues that IFAD did not inform her in a timely fashion of the shortcomings in her work or give her a real opportunity to address them. The complainant also submits, concerning the first PIP on which she was placed from 5 September 2015 to 4 March 2016, that monthly feedback on her work was not given and a final report was not drawn up, contrary to the requirements of section 5.1.8(v) and (vi) of Chapter 5 of the Implementing Procedures. Similarly, the second PIP on which she was placed from 4 September 2016 to 3 March 2017 was not implemented until September 2016 and no monthly progress reports were issued, contrary to the requirements of section 5.1.8(vi) of Chapter 5 of the Implementing Procedures.

First of all, the Tribunal recalls that under its settled case law, assessment of an employee's merit during a specified period involves a value judgement; for this reason, the Tribunal must recognise the discretionary authority of the bodies responsible for conducting such an

assessment. The Tribunal will set aside a performance evaluation report only if there is a formal or procedural flaw, a mistake of fact or law, or neglect of some material fact, or misuse of authority or an obviously wrong inference drawn from the evidence (see, in particular, Judgments 3692, consideration 8, 3842, consideration 7, and 4010, consideration 5).

The Tribunal considers that it is clear from the above statement of the facts and the various documents in the complainant's personal file that the criticisms directed against her PES document for 2016 are unfounded.

The complainant was in fact repeatedly informed in good time of the weaknesses in her work and given a real opportunity to address them.

Similarly, the complainant's general assertion that no significant shortcomings in her performance were established is devoid of specific criticism and contradicted by a careful reading of the file. It is clear that the Organisation could reasonably consider, on the basis of the numerous examples provided in these documents, that the complainant had not demonstrated crucial competencies required for the post of CPM.

Regarding the second PIP, the Tribunal further notes that the implementation of this plan was in fact discussed in monthly review meetings between the complainant and her supervisor, the last of which took place on 27 February 2017. Moreover, contrary to the complainant's contention, no provision in the Implementing Procedures states that two PIPs should necessarily follow on from each other without interruption or that a PIP cannot start during the course of a year.

Lastly, regarding the evaluation of an IFAD official's overall performance during a given period, nothing in the provisions referred to by the complainant in support of her various contentions prohibits the authority from taking into account both the annual PES document and the steps taken by the official in response to a PIP. On the contrary, section 5.1.8 of Chapter 5 of the Implementing Procedures expressly provides that a PIP may be initiated during a PES cycle.

The plea that IFAD breached the rules concerning performance evaluation is also unfounded.

5. The complainant further submits that the second PIP was adopted by a person who had no authority to do so, namely her supervisor, and not by the head of department.

Under section 5.1.8(viii) of Chapter 5 of the Implementing Procedures, "[w]here substantial improvement has been made but the performance is not at a fully satisfactory level [corresponding to a final rating of] (3), the supervisor in consultation with the Division Director/Unit Head and the Director, HRD, may recommend to the Head of Department an extension of the performance improvement period". In the present case, the probationary report of May 2016 in which the decision was taken concerning a new PIP was signed by both the complainant's supervisor on 16 May 2016 and her head of department on 26 May 2016.

This plea is therefore unfounded.

6. It follows from all the foregoing that the complainant's pleas challenging her PES document for 2016 and the second PIP are unfounded.

7. The complainant submits that the President's decision of 25 July 2018 is unlawful because it fails to provide adequate reasons to justify the President's decision not to endorse the recommendations made by the JAB in its report of 4 June 2018.

The Tribunal recalls its settled case law under which "the executive head of an international organization, when taking a decision on an internal appeal that departs from the recommendations made by the appeals body, to the detriment of the employee concerned, must adequately state the reasons for not following those recommendations" (see, for example, Judgment 4062, consideration 3, and the case law cited therein).

The Tribunal finds that the President explained the reasons for his decision to the contrary in a manner that satisfies the requirements of the Tribunal's case law on this point. Firstly, the President expressly referred to the assessments made by the complainant's supervisors of her performance, thereby explicitly endorsing them. Secondly, he expressly mentioned the substantial reasons set out in the complainant's

PES document for 2016, which the JAB did not take into account in its reasoning. However, that evaluation, which concluded that the complainant had not demonstrated that she had achieved the required level in many of the crucial competencies for the post of CPM, was the principal factor leading to the decision not to renew her appointment beyond 4 March 2017.

The plea that the President did not provide adequate reasons in his decision of 25 July 2018 is therefore unfounded.

8. The complainant also submits that her supervisor lacked impartiality. She submits that he subjected her to excessive, largely unfair criticism that demonstrated a clear intention to stigmatise her and led to a blatant error of judgment in his evaluation of her performance. She rests this contention on what she describes as her supervisor's obsessive criticism of her journeys away from her usual duty station, Bujumbura, even though they were authorised, and of the involvement of the FAO Chief Medical Officer in her health assessment in July 2015, as well as his multiple serious errors in evaluating her performance.

In considerations 3 to 6, above, the Tribunal has already stated why it has found the complainant's pleas with regard to her PES document for 2016 and the second PIP to be unfounded.

Regarding the allegation of lack of impartiality, the Tribunal recalls that, under settled case law (see, in particular, Judgments 3192, consideration 13, 3314, consideration 9, 3380, consideration 9, and 3914, consideration 7) the complainant bears the burden of proving bias or partiality. Moreover, the evidence adduced must be of sufficient quality and weight to persuade the Tribunal that the allegation is well founded.

The Tribunal observes that, in the probationary report of May 2016, the supervisor founded his evaluation on factors other than the criticisms referred to above by the complainant. Nor were those criticisms raised during the complainant's various subsequent performance evaluations that formed the basis of the decision not to renew her appointment as of 3 April 2017.

It should also be noted that the supervisor's assessments of the complainant were endorsed by other IFAD authorities, including the MRG when it assigned the complainant's final overall rating in her PES document for 2016, and that a human resources officer attended all the monthly review discussions between the complainant and her supervisor during the implementation of the second PIP.

It follows from the above that the complainant has not established that her supervisor lacked impartiality.

9. In her rejoinder, the complainant submits a new plea, alleging an abuse of authority. She submits that, in view of the Organisation's arguments in response to her various complaints to the Tribunal, there are grounds to consider that IFAD abused its authority by artificially creating, throughout the procedure followed, circumstances that would enable it to retain her in employment but eventually, at its end, to inform her of the "decision, held in reserve, to terminate her contract".

The Tribunal finds that this last plea is plainly unfounded in the light of its examination of the complainant's other contentions in support of her complaint.

10. It is apparent from the foregoing that the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ