

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

Z.

v.

Interpol

136th Session

Judgment No. 4666

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. Z. against the International Criminal Police Organization (Interpol) on 8 October 2019 and corrected on 16 October, and Interpol's reply of 7 February 2020, the complainant having chosen not to file a rejoinder;

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 his negative performance assessment and the termination of his fixed-term appointment for unsatisfactory service.

After working for Interpol as an intern from November 2012 and then as a consultant from March 2013, the complainant joined the Organization on 16 July 2014 as a grade 7 "project assistant" for the Firearms Programme in the Police Forensics Sub-directorate under a short-term appointment due to expire on 31 December 2014, which was subsequently extended until 30 September 2016. Following a selection procedure, on 19 April 2016 he was informed of his appointment to the grade 6 post of "principal assistant" with effect from 1 May 2016 and

the conversion of his appointment to a fixed-term contract, extended until 31 December 2016.

In a memorandum of 9 December 2016, the complainant's immediate supervisor and coordinator informed senior management that the complainant had demonstrated professional shortcomings in four areas of his work and conduct since he took up his new post. The supervisor therefore suggested that the complainant's contract be extended for only one year instead of three, as had been initially approved, and the introduction of a performance improvement plan (PIP). On 13 and 21 December 2016 the complainant met his supervisor to discuss various matters including the PIP, which was to cover a six-month period from January to June 2017. The PIP set the three objectives to be achieved in the areas of communication with his chain of command, professional conduct towards colleagues and ability to meet deadlines. It also stipulated that a monthly follow-up meeting should take place. The complainant received the PIP form, which he signed, and a copy of the memorandum of 9 December, on which he provided his comments on 12 January 2017.

The PIP began in January 2017 and was extended until August owing to the complainant taking unpaid leave from 13 March to 12 May 2017. Every month an assessment report was completed and sent to the complainant for signature. For the July and August reports, the complainant, who did not agree with their content, submitted comments and refused to sign them, considering that they were incomplete.

On 9 October 2017, following the finalisation of the periodic annual assessment report covering the period from 1 May 2016 to 30 April 2017 and giving an overall negative assessment as well as the end of the PIP, the complainant had a meeting with his immediate supervisor and an official from the Human Resources Directorate, which he himself had requested with a view to contesting the assessments made of him. During the meeting, he was told that his performance was still unsatisfactory and that his appointment would be terminated when his current contract expired on 31 December 2017. In an email of the same day, he received the formal decision to "terminate" his fixed-term appointment on the grounds of unsatisfactory performance,

pursuant to Staff Regulation 11.1(3)(a). He was informed that he was released from his duties from that day onwards, but that he would continue to receive his salary until his contract expired.

On 8 November 2017 the complainant submitted a request for review of that decision and of the decision to suspend him from duty. He requested that the decisions be withdrawn and that he be paid compensation for the serious injury he considered he had suffered. As he did not receive a reply from the administration, on 15 February 2018 he lodged an internal appeal against what he regarded as the implied decision rejecting his request for review and asked to be reinstated and awarded costs. On 21 February 2018 he was told that his internal appeal was premature as his request for review was still being considered. On 5 March 2018 he received an explicit reply to the request for review, which confirmed the decision of 9 October 2017. Although he argued that this notification was late, he nevertheless decided to complete his internal appeal by submitting a supplementary memorandum on 30 March 2018, in which he requested the withdrawal of the “contested decisions”, namely the non-renewal and suspension of his appointment (which were “tantamount to disciplinary dismissal”), the PIP and the periodic annual performance assessment report, his reinstatement within the Organization, compensation for the material and moral injury suffered, and an award of costs.

In its opinion of 18 June 2019 the Joint Appeals Committee found that the rules concerning performance assessment and termination of appointment had been correctly followed and that the Organization had not acted in bad faith. In a letter of 10 July 2019, which constitutes the impugned decision, the complainant was notified by the Secretary General that his appeal had been rejected.

The complainant asks the Tribunal to set aside the impugned decision as well as the initial decision of 9 October 2017, the implied decision rejecting his request for review and the explicit decision of 5 March 2018. He also seeks compensation for the material injury he considers he has suffered, which he assesses as equivalent to all the sums, salaries and other financial benefits that he should have received had his appointment continued for a further two years until 31 December

2019, as well as for the moral injury resulting, according to him, from the “brutal and humiliating” treatment that the Organization subjected him to, amounting to at least 30,000 euros. Lastly, he claims 10,000 euros in costs.

Interpol asks the Tribunal to reject the complaint in its entirety.

CONSIDERATIONS

1. In substance, the complainant seeks an order setting aside the Secretary General’s decision to terminate his fixed-term appointment for unsatisfactory performance.

2. He contends in this regard that several irregularities were committed throughout the procedure leading to the final decision, each of which constitutes, in his view, a serious defect such as to warrant the decision’s setting aside.

3. The alleged irregularities relate, firstly, to the way his periodic performance assessment was conducted and periodic assessment report drawn up for the period from 1 May 2016 to 30 April 2017 and, secondly, to the lawfulness of the performance improvement plan (PIP) process which he underwent.

4. With regard to these first two sets of arguments, the Tribunal recalls first of all that, under its settled case law, the assessment of an employee’s merit during a specified period involves a value judgement and it cannot substitute its own opinion for the assessment made by the competent bodies of the qualities, performance and conduct of the person concerned. The Tribunal will interfere only if a decision was taken in breach of applicable rules on competence, form or procedure, if it was based on a mistake of law or of fact, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 4543, consideration 4, 4169, consideration 7, 4010, consideration 5, 3268, consideration 9, and 3039, consideration 7).

An examination of a staff member's assessment report before taking any decision not to renew that person's contract on the basis of unsatisfactory performance is a fundamental obligation, non-compliance with which constitutes a procedural flaw that has the effect of an essential fact being overlooked (see, in particular, Judgments 2992, consideration 18, 2096, consideration 13, and the case law cited therein).

5. The periodic performance assessment of an Interpol official and the application of a PIP are governed by various provisions of the Staff Manual (Staff Regulation 3.2(1) and Staff Rules 3.2.2 and 3.2.4), as well as by the Secretary General's Staff Instruction No. 2006.04 on the "Performance Assessment System", which came into force on 1 May 2006.

With regard to Staff Instruction No. 2006.04, the Tribunal points out that this is in fact the staff instruction that should be taken into consideration in the present dispute given that the complainant held a fixed-term appointment, and not Staff Instruction No. 2007.02 of 1 January 2007 to which the Joint Appeals Committee erroneously referred in its opinion of 18 June 2019, since Staff Instruction No. 2007.02 is only applicable to officials holding short-term contracts, which the complainant no longer did at the material time.

6. In the present case, the Tribunal observes that the complainant's performance during the relevant period was assessed simultaneously from the point of view of the periodic annual assessment and the application of a PIP that had set precise objectives to be achieved during a given period. It is therefore inevitable that information gathered in the context of one of these performance evaluation processes may have influenced the way in which the other process was carried out. The Tribunal will determine whether the decision taken at their end was lawful by taking account of the combination of both processes, with particular reference to the content of the safeguards afforded to the complainant.

7. It is apparent from the evidence that, although the complainant's performance initially appears to have been positively assessed, the way in which he subsequently performed his duties posed difficulty to his chain of command from the start of the disputed assessment period, i.e. from May 2016.

Thus, in an email sent to the Firearms Programme Coordinator, Mr H., on 21 September 2016 the complainant's immediate supervisor, Mr C., stated that he had met the complainant the previous day to inform him of a number of shortcomings in his performance and behaviour. These shortcomings were of four types: failure to communicate with Mr C. concerning progress in completing tasks; failure to behave professionally and infringement of professional ethics, particularly in his relationships with his colleagues; failure to report on time, with the complainant sheltering behind the argument that he worked flexitime; and lack of cleanliness in the office shared with other colleagues. It should be noted in that regard that Mr C., having noted these various failings, also observed that he had the impression that the complainant was in denial and did not seem to accept any responsibility for the various shortcomings identified.

In a memorandum dated 9 December 2016, Mr H. informed his chain of command that the complainant's performance had not really improved and that his work had been "sporadic at best", especially after his return from sick leave. This was followed by a long list of Mr H.'s specific criticisms of the complainant. Mr H. therefore proposed, as he had previously informed the complainant, that the complainant's appointment be renewed for only one year and that he be subjected to a PIP for six months. In the same memorandum, Mr H. also stated that he had discussed these issues with the complainant on several occasions, but without any tangible results.

Two further meetings took place on 13 and 21 December 2016 between the complainant and Mr H., during which the complainant was informed of Mr H.'s intention to propose that his appointment be renewed for one year only and to suggest that a PIP be put in place containing three specific objectives to be achieved between 1 January and 30 June 2017.

The PIP form was signed by the complainant on 21 December 2016.

Under the PIP, the complainant had also monthly assessment meetings with Mr H. to discuss progress in its implementation.

As the complainant then received unpaid leave between 13 March and 12 May 2017 at his request, the PIP was accordingly extended for two months, until the end of August 2017. The complainant submitted his criticisms regarding the two assessment reports for July and August 2017, but these criticisms were refuted by Mr H.

During a meeting held on 9 October 2017, the complainant was informed by Mr H. verbally and in a memorandum delivered the same day of the outcome of the PIP, which was negative. According to the Administration, none of the three objectives set out in the plan had been achieved, although progress had been made on one of them. At the same meeting, after an exchange of views on the matter, Mr H. informed the complainant of the results of the periodic assessment process, carried out at the same time as the PIP. According to Mr H., the complainant refused to sign the form, in which it had been concluded that he had not satisfied the requirements of his post during the period under review.

It was against this background that the complainant was informed also on the same day that, in view of the negative assessments made both under the PIP and during the periodic performance assessment process, his appointment would end on 31 December 2017 and that he would be released from his duties but would continue to be paid until that date. The official decision to this effect was sent to the complainant by the Executive Director for Resource Management on the same day.

8. In view of the foregoing, the Tribunal finds that the complainant's various claims in respect of the PIP are unsubstantiated. The meetings held with the complainant and the three specific objectives set for him in the PIP enabled him to understand what was expected from him under that plan; the fact referred to by the complainant in his submissions that the initial monthly assessment reports were more positive than the last ones does not alter the fact that the Organization could consider that the objectives of the PIP had not

been achieved, particularly on the basis of the reports for July and August 2017; the monthly meetings required by the PIP did take place, albeit somewhat belatedly at times; the complainant was able if he so wished to raise objections to the content of the various reports drawn up under the PIP, as he did in relation to the reports for July and August 2017; the complainant had the opportunity to state his point of view on various occasions before his final performance assessment was drawn up at the end of the PIP; and nothing in the evidence establishes that some criticisms directed at the complainant in the PIP assessment were “unfair” or “inordinate”.

9. The Tribunal further finds that, while it is certainly apparent from the evidence that particular provisions relating to the annual performance assessment procedure were not formally complied with, none of those irregularities constitutes a serious defect in the circumstances of the present case and having regard to the PIP procedure that was simultaneously conducted.

In particular, the Tribunal observes that the complainant was informed on various occasions of the shortcomings in his performance, that he had the opportunity to assert his point of view at various meetings and following the communication of interim reports concerning his performance assessment, and that he was duly informed of the reasons for his final negative assessment.

It follows from the foregoing that the manner in which the Organization came to the conclusion that the complainant’s performance had been unsatisfactory since May 2016 was lawful.

10. The complainant submits that the Administration seriously breached his right to an effective internal appeal by taking more than four months to respond to his request for review.

11. Apart from the fact that the recognition of such a claim would at most persuade the Tribunal to acknowledge the existence of moral injury that warranted redress (see, for example, Judgments 3531, consideration 4, and 3528, consideration 3) without the impugned

decision being declared unlawful on that account, the Tribunal considers that the period of three months and one week which the Organization took to respond to the request for review cannot be regarded as obviously excessive in the circumstances of the case.

12. The complainant also submits that various serious flaws taint the procedure followed by the Joint Appeals Committee when examining his internal appeal, constituting a further serious breach of his right to an effective internal appeal.

He argues firstly that the Committee misconstrued the scope of its competence in finding that it was not for it to reconsider whether his performance assessment and the decision to terminate his appointment were well founded. However, the Tribunal notes that, although the general wording of its opinion may appear awkward in certain respects, the Committee, in this case, in accordance with Staff Rule 13.3.4(2) and (3), checked whether the proper procedure was followed for taking the decision contested before it, verified the facts invoked by the official or the Secretary General, took account of any other fact that was pertinent to the settlement of the internal appeal brought before it and adequately responded to the pleas concerning the merits of the case, as submitted to it. It thus carried out its duties properly.

Although the complainant also accuses the Committee of a lack of impartiality, it must be noted that this charge is not supported by any *prima facie* evidence or persuasive arguments.

13. The complainant alleges that the Secretary General also committed several serious breaches when he took the impugned decision of 10 July 2019: (1) he was inconsistent in stating the grounds for his decision in that he referred both to a dismissal and a non-renewal of an appointment that had reached its expiry; however, these are two different decisions that are not governed by the same legal rules, and the confusion thus created seriously breached the complainant's right to an effective internal appeal and offended his dignity; (2) the Secretary General did not properly assess the complainant's performance because he relied on an assessment procedure that was itself invalid

owing to the serious flaws that tainted it; (3) the decision to separate the complainant from service was unlawful in that he had not been warned in clear language that, if his performance did not improve, his appointment could be terminated, which constitutes a breach of the general principle of law based on the obligation of every international organisation to act in good faith and a breach of its duty of care towards its staff; (4) the impugned decision was taken without the complainant first having been heard and given an opportunity to state his case, in breach of the general principle of law applicable in the present case.

14. In view of what is stated above, the Secretary General cannot be charged with basing the impugned decision on a procedure for assessing the complainant's performance that was itself invalid owing to serious irregularities.

15. Contrary to what the complainant alleges, it is clear that he was advised in good time of his shortcomings; that, in view of the fact that the Organization had put a PIP in place for him, he must have been aware that those shortcomings were likely to lead to his appointment being terminated if the plan failed; and that he was also heard on various occasions under the PIP, just as he had the opportunity to state his case, as can be seen from his written criticisms of the monthly assessment reports for July and August 2017. The claims based on a breach of the Organization's duty to act in good faith, its duty of care and the complainant's right to be heard and to state his case are therefore not substantiated.

16. The complainant argues that, although he had been told during the meeting held on 9 October 2017 concerning his performance that his appointment would be terminated on the date of expiry of his current contract, which appeared to involve a mere non-renewal of that contract, the decision taken on the same day, subsequently confirmed by the decision of 5 March 2018 and by the impugned decision of 10 July 2019, in fact ordered that his appointment be terminated pursuant to Staff Regulation 11.1(3)(a). The Tribunal observes that the Organization may indeed be taken to task for having confused the two

types of decision throughout the proceedings. However, an examination of the three successive decisions, and in particular the impugned decision in which the Secretary General endorsed the opinion of the Joint Appeals Committee, shows that each envisaged the termination of the complainant's appointment. This confusion, regrettable though it may be, thus had no practical consequences. This plea will therefore be dismissed.

17. Lastly, the complainant seeks compensation for moral injury arising from the fact that the Joint Appeals Committee was, in his view, unjustifiably slow in examining his internal appeal by taking more than nine months to issue its opinion. However, given the dates on which submissions were exchanged before the Committee, the Tribunal considers that, in the present case, the length of those proceedings cannot be regarded as unreasonable. It is therefore not appropriate to order the Organization to pay the complainant compensation under this head.

18. It follows from the foregoing that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2023, 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 7 July 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ