

C. (No. 2)

v.

CERN

138th Session

Judgment No. 4901

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr F. C. against the European Organization for Nuclear Research (CERN) on 3 February 2021, corrected on 15 and 25 February 2021, CERN's reply of 16 June 2021, the complainant's rejoinder of 24 September 2021 and CERN's surrejoinder of 27 October 2021;

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

Having examined the written submissions;

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

The complainant challenges his performance evaluation for 2018 rating such performance as "fair".

Facts relevant to this case may be found in Judgment 4900, also delivered in public this day, concerning the complainant's first and fourth complaints. These two complaints stem from a complaint of harassment filed by the complainant, which included the 2018 evaluation of the complainant's performance as part of the alleged harassment incidents.

The complainant entered CERN's service on 1 January 1998. In 2003, he was granted an indefinite contract. Throughout his career at CERN, he has worked in different services and departments of the Organization. At the beginning of 2012, he was assigned to the

Information Technology (IT) Department as a computing engineer, at grade 7. In February 2021, following an internal mobility procedure, he was reassigned to the Site and Civil Engineering (SCE) Department.

At the material time, under Article S II 2.02 of the Staff Rules and Articles R II 2.05, 2.06 and 2.07 of the Staff Regulations, the performance of staff members was appraised in the framework of an annual appraisal report and was recognised in the form of a performance reward, performance payment, promotion and/or financial award. The performance appraisal procedure was detailed in Administrative Circular No. 26 (Rev. 11), entitled “Recognition of merit” (“AC 26”); accordingly, each annual appraisal procedure was known as the merit recognition exercise.

As part of the 2019 merit recognition exercise, for the reference year 2018, the complainant had his annual interview on 25 February 2019 with the Section Leader, who was his direct supervisor during 2018 (Mr G.L.). At that point, following a change in reporting lines, the complainant was no longer under the Section Leader’s supervision, but under that of the Group Leader (Mr T.S.).

The Section Leader who had supervised the complainant during 2018 shared his draft appraisal report with the complainant. On 5 March 2019, the complainant proposed six modifications. The Section Leader incorporated some of the modifications either in full or in part and approved the revised report in CERN’s Electronic Document Handling (EDH) System on 6 March 2019. On the same day, the complainant’s Group Leader also approved the report. On 19 March, the complainant recorded his formal comments in the system, expressing disagreement with certain elements of the appraisal. The Head of the complainant’s department convened a meeting which took place on 8 April 2019, with the participation of, inter alia, all its Group Leaders. The surrejoinder states that the performance of the department’s staff, including that of the complainant, was discussed at that meeting.

By 15 May 2019, the performance appraisal report was marked in the system as “fully authorized”. The payslip of 24 May 2019 constituted the formal notification of the decision to consider the complainant’s performance for the year 2018 as “fair”.

On 19 July 2019, the complainant filed an internal appeal contesting this evaluation, where he claimed that his 2018 performance appraisal included numerous “inaccuracies and misleading comments”, that he had been subjected to overall harassment since 2016 and that his supervisors had “infringed the limits of [...] constructive supervision and evaluation”. On 2 August 2019, the complainant was informed that his internal appeal was deemed receivable only insofar as it was directed against the qualification of his performance for 2018 as “fair”, but not for any harassment claim. Specifically, harassment-related claims were considered to fall outside the scope of an appeal procedure, given that there existed specific procedures for such complaints.

On 11 March 2020, the complainant filed a formal complaint of harassment, which is the subject of the complainant’s above-mentioned first and fourth complaints before the Tribunal.

The Joint Advisory Appeals Board (JAAB) communicated its report to the Director-General on 13 October 2020, recommending the rejection of the internal appeal. By letter dated 3 November 2020 and by email on 6 November, the complainant was informed of the final decision of the Director-General to reject his appeal. This is the impugned decision in this case.

The complainant requests the Tribunal to quash the decision of 3 November 2020, to take a new decision regarding the assessment of his performance and his advancement in the framework of the 2019 merit exercise, and to award him moral damages in the amount of 10,000 euros. He further requests the award of 10,000 euros in legal costs.

CERN asks the Tribunal to dismiss the complaint as irreceivable in part and entirely unsubstantiated.

CONSIDERATIONS

1. In his second complaint, the complainant challenges the qualification of his performance as “fair” for the year 2018. He argues that the process was vitiated due to procedural flaws and errors of fact. Amongst other things, he maintains that this evaluation was the result of an institutional harassment against him.

2. The complainant seeks oral proceedings. But given the complete written submissions made by the parties in their pleadings and through the filing of their supporting documents, the Tribunal considers that oral proceedings are unnecessary. This request is therefore rejected.

3. The Organization raises as a threshold issue that the complaint is irreceivable in part inasmuch as it concerns the allegations of harassment referred to by the complainant in his other proceedings.

These allegations of harassment have been the subject of two separate internal appeals that led to two separate complaints filed before the Tribunal by the complainant, and which are the subject of a separate judgment also delivered in public this day (Judgment 4900). In this connection, it is noteworthy that the complainant is not putting to the Tribunal an independent claim regarding harassment allegations as such in the present complaint. Rather, he brings up his alleged harassment in arguing the grounds for unlawfulness of his 2018 performance evaluation, inferring that it was based on extraneous improper considerations. It is therefore appropriate for the Tribunal to examine this argument, although only to the extent that it is strictly related to the legality of the specific decision challenged in the case at hand (see, for example, Judgments 4149, consideration 7, 3688, consideration 1, 3617, consideration 2, and 2837, consideration 3).

No issue of irreceivability arises in this regard.

4. CERN further submits that an argument raised by the complainant for the first time before the Tribunal, to the effect that the appraisal of his performance in 2018 was not made by his direct supervisor, should not be considered because it was not raised in his

internal appeal. But while it is true that the Tribunal's case law establishes that the claims of a complainant must not exceed in scope the claims submitted during the internal process, it has however recognized that a complainant is not precluded from advancing new pleas (see Judgments 4547, consideration 11, and 4522, consideration 3).

As a result, contrary to the assertion put forward by CERN, the complaint is not irreceivable to that extent.

5. With respect to the performance appraisal and qualification of staff members like the complainant at CERN, Articles R II 2.05, 2.06 and 2.07 of the Staff Regulations indicate the following:

“Art. R II 2.05

The performance of staff members shall be appraised in the framework of an annual appraisal report transmitted to them, to which they may add any comments they consider appropriate.

[...]

Art. R II 2.06

In the context of the annual appraisal, the staff member's performance shall be qualified as one of the following:

- a) insufficient,
- b) fair,
- c) strong, or
- d) outstanding.

Art. R II 2.07

The annual performance of staff members shall be rewarded as follows:

- a) for staff members whose performance is qualified as fair, strong or outstanding, a salary increase; and
- b) for staff members whose performance is qualified as strong or outstanding, a performance payment.

Both rewards are calculated as a percentage of the midpoint salary of the staff member's grade level.

The applicable percentages are defined by the Director-General.

Staff members may also be granted *ad hoc* performance rewards, at specific points in their career.”

6. These provisions are completed by Administrative Circular No. 26 (Rev. 11), entitled “Recognition of merit” (“AC 26”), which details the performance appraisal procedure and the performance qualification. Of particular relevance to the complaint are paragraphs 18 and 19 pertaining to the interview and the objectives setting, paragraphs 24, 25, 26 and 29 pertaining to the performance appraisal, and paragraphs 30 and 31 dealing with the performance qualification, which state as follows:

“A. Interview and objectives setting

18. At the beginning of each annual exercise, an interview (the ‘annual interview’) shall be organised between the staff member and their supervisor, in accordance with Annex II.
19. The purpose of the annual interview is to discuss:
 - a) the staff member’s functions, and to review them if needed,
 - b) the staff member’s global performance during the reference year; and,
 - c) the staff member’s objectives during the current year.

[...]

B. Performance appraisal

24. After the annual interview, the supervisor shall assess the global performance of the staff member during the reference year. The assessment should take into account the staff member’s objectives and also the execution of their functions.
25. Where appropriate, the supervisor shall obtain signed information from other supervisors belonging to a different hierarchy under whose instructions the staff member has been working.
26. The supervisor shall carry out this assessment following discussion with his hierarchy.

[...]

29. The report (together with any annexed documents) shall be forwarded successively to:
 - a) the Section Leader, if applicable, who shall ensure coherence between the performance appraisals within the section, and endorse the report;
 - b) the Group Leader, who shall ensure coherence between the performance appraisals within the group, and endorse the report; and

- c) the staff member, who, within ten working days from the date of receiving it, shall sign, certifying that they have read it and may add any comments. Beyond this time limit, the staff member shall be deemed to have taken note of the report unless materially unable to do so.

C. Performance qualification

- 30. On the basis of the appraisal report, the Head of Department shall qualify the staff member's performance as insufficient, fair, strong, or outstanding, and include it in the report.
- 31. The Head of Department shall, in rating the staff member's performance, take account of the performances of all staff members within the Department and shall consult:
 - a) the Group Leaders and the representative of the Human Resources Department collegially for staff in grades 1 to 7;
 - b) certain senior staff members of the Department, whom the Head of Department shall appoint at the beginning of the annual exercise, as well as the representative of the Human Resources [(HR)] Department, for staff in grades 8 to 10."

7. The record indicates that, for the 2019 merit recognition exercise conducted for the year 2018, the complainant had an interview with his 2018 supervisor on 25 February 2019 and with the Group Leader, who was his supervisor as of 2019, on 28 February 2019. Following the interviews, a draft appraisal report was shared with the complainant prior to recording its content in CERN's Electronic Document Handling (EDH) System. The complainant proposed six modifications that were added almost in their entirety to the report. The Group Leader approved the revised report in EDH on 6 March 2019. The complainant recorded his comments on the report in EDH on 19 March 2019, expressing his disagreement with some elements of the appraisal. On 15 May 2019, the performance appraisal report was marked as "fully authorized" in the system and the qualification of the complainant's performance for the reference year 2018 as "fair" was notified to the complainant on 24 May 2019.

8. In the internal appeal that he filed on 19 July 2019, the complainant indicated that he was contesting his performance evaluation of 2018 "for its numerous inaccuracies and misleading

comments conveying an overall negative impression of [his] performance, which seems also partly biased as a result of possibly unintended moral harassment”. He insisted upon the pattern of moral harassment that he said he was the victim of and on the misuse of authority of the Administration, suggesting that his supervisors “have infringed the limits of what constructive supervision and evaluation allow”.

9. The internal appeal process was conducted before the Joint Advisory Appeals Board (JAAB). The latter notably held an in-person hearing, where it heard the testimonies of the supervisor of the complainant, the Group Leader and the Information Technology (IT) Head of Department.

The Tribunal observes that, in the report it submitted to the Director-General on 13 October 2020, the JAAB noted that “[...] it is clear that the [merit] procedure for the reference year 2018, in the IT Department, and in particular concerning [the complainant], was carried out in a compliant manner. The annual interview took place normally, the results were regularly appraised by the supervisor, the qualification of the performance and the resulting salary increases were decided in a concerted and collegial manner between the Head of Department, the Group Leaders and [a] HR representative, in accordance with Administrative Circular No 26. [...]”.

The JAAB did not find a procedural error calling into question the performance appraisal of the complainant and therefore recommended unanimously that the internal appeal be dismissed. In the impugned decision of 3 November 2020, the complainant was notified of the decision of the Director-General to follow this recommendation.

10. In his complaint before the Tribunal, the complainant insists upon six arguments. First, he complains that pursuant to AC 26, his direct supervisor must perform the evaluation and the role of the Group Leader is limited to ensuring coherence between the performance appraisal within the Group. As a result, he considers that any modification to his appraisal report should have been discussed with the

direct supervisor such that a consultation with the Group Leader before drafting the performance appraisal amounted to a procedural defect. In this regard, he also stresses that only the Head of Department rated his performance. Second, he maintains that the Head of Department failed to consider the comments he made. Third, he alleges an absence of collegial consultation. Fourth, he points to the fact that CERN recognized that he was not responsible for the delays in the implementation of his objectives. Fifth, he argues that the imposition of quotas of ratings within the Organization is inherently inequitable and arbitrary. Finally, sixth, he considers that there was an abuse of authority by CERN in conducting his supervision and evaluation for the year at issue.

11. The Tribunal's case law has long recognized the limited power of review that it exercises in matters of staff appraisals. In this regard, in Judgment 4564, considerations 2 and 3, the Tribunal stated the following:

“2. [T]he Tribunal observes that, in requesting that the Tribunal should itself determine the new ratings to be awarded under the various headings of the staff report concerned, the complainant plainly misunderstands the nature of the review with which the Tribunal is tasked. It is not for the Tribunal, whose role is not to supplant the administrative authorities of an international organisation, to conduct an assessment of an employee's merits instead of the competent reporting officer or the various supervisors and appeals bodies which may be called upon to revise that assessment. Consequently, as it is framed, the request for the staff report concerned to be amended can only be dismissed (see, to that effect, Judgment 4258, considerations 2 and 3, and the case law cited therein).

The Tribunal may only set aside that staff report at the same time as the impugned decision and remit to the [organization concerned] the task of reviewing the assessment concerned in light of the grounds of its judgment, if it considers it necessary to make such an order within the limits of the restricted power of review which the Tribunal may exercise in this area, the scope of which will be reiterated below.

3. As the Tribunal has repeatedly held, 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. Of course, it must ascertain whether the ratings given to the employee have been determined in full

conformity with the rules, but it cannot substitute its own opinion for the assessment made by these bodies of the qualities, performance and conduct of the person concerned. The Tribunal will therefore intervene only if the staff report was drawn up without authority or in breach of a rule of form or procedure, if it was based on an error of law or fact, if a material fact was overlooked, if a plainly wrong conclusion was drawn from the facts, or if there was abuse of authority. [...]"

(See also Judgments 4787, consideration 5, 4786, consideration 4, and 4713, consideration 11.)

12. The Tribunal considers that in view of its limited power of review under its settled case law, the arguments raised by the complainant misconstrue the Tribunal's role in this respect and cannot be maintained. The complainant did not establish that the impugned decision pertaining to his 2018 performance appraisal, an exercise which involves a value judgement requiring deference, was taken without authority, was drawn up in breach of a rule of form or procedure, was based on an error of law or fact, overlooked a material fact or drew a plainly wrong conclusion from the facts or resulted from an abuse of authority (see Judgment 4267, consideration 4).

13. First, as the JAAB rightly concluded, the detailed merit recognition procedure in place at CERN was duly complied with. In accordance with paragraph 26 of AC 26, the complainant's supervisor assessed his performance following discussions with his hierarchy. The record does not support the suggestion that the Group Leader bypassed the complainant's supervisor in the appraisal of the latter's performance. The fact that the Group Leader proposed a performance qualification based on the supervisor's assessment prior to finalizing the merit report does not establish any procedural violation of the applicable rules. The Tribunal disagrees that the consultation of the supervisor with the Group Leader before drafting the performance appraisal amounted to a procedural error that vitiated the performance appraisal of the complainant on the basis that the draft evaluation should have been prepared by the direct supervisor alone.

To the same extent, the allegations of the complainant that his Group Leader decided to rate the complainant's performance on his own while such had to be done by the Head of Department pursuant to the applicable rules are unfounded. The record rather indicates that at no point did the Group Leader act unilaterally in qualifying the complainant's performance and that the supervisor, the Group Leader and the Head of Department involved, each acted in accordance with the procedures set forth in paragraphs 29, 30 and 31 of AC 26.

14. Second, the assertion of the complainant to the effect that the Head of Department did not take into account the comments he made in his appraisal report is not supported by the record. The Tribunal observes that the JAAB heard and considered the testimonies of the complainant's supervisor, the Group Leader and the Head of Department in preparing its report and concluded that the qualification of the complainant's performance was carried out in compliance with the applicable rules and procedures. A reading of the JAAB report indicates that the latter properly balanced the evidence that was presented before it. The complainant points in this regard to one passage of the JAAB report recording that the Head of his department stated that he did not read in detail all comments by each of the numerous staff members of his department on their respective performance appraisals. The Head of Department further explained that the HR representative assisting in the evaluations, as well as the Group Leaders and Section Leaders, would read all such comments and bring them specifically to his attention whenever a staff member's comments revealed a pattern of discontent. Given that the complainant expressed indeed dissatisfaction with the assessment of his performance by his hierarchy, the procedures described would normally have resulted in the complainant's comments being pointed out to the Head of Department, who would then examine and consider them before making a final decision on the qualification of the complainant's performance. There is nothing in the record to suggest that this was not done in the case at hand.

15. Turning to the third argument of the complainant pertaining to an absence of a collegial consultation in violation of paragraph 31 of AC 26, the record rather indicates that a first collegial meeting of the Head of Department with the Group Leaders and the HR representative took place on 13 February 2019 while a second collegial meeting followed on 8 April 2019. The qualification of the complainant's performance by the Head of Department followed these collegial meetings. The alleged violation of the procedural step contemplated at paragraph 31 of AC 26 upon which the complainant relies has not been established either.

16. The fourth argument of the complainant to the effect that he was not responsible for the delays in the implementation of his objectives is not sufficient to convince the Tribunal that his performance evaluation was, as a result, tainted by a procedural flaw important enough to entail the setting aside of this evaluation.

17. In his fifth argument, the complainant maintains that his performance appraisal was the result of the imposition of quotas of ratings which was inequitable and arbitrary. But before the JAAB and as noted in its report at page 5, the Head of Department indicated that while his department may have had instructions not to exceed their performance rewards budget, and that those limits were taken into account, there were no quotas as such applicable with regard to the allocation of performance qualifications and that, in the situation of the complainant, this qualification was arrived at on the basis of the evaluation of his performance, nothing else. The Tribunal sees no reason to doubt the truthfulness of this statement.

18. Finally, the Tribunal considers that the last argument of the complainant pertaining to an alleged abuse of authority on the part of the Organization is also unsubstantiated and should be discarded. The Tribunal's case law has often emphasized that a staff member alleging abuse of authority bears the burden of establishing the improper purposes for which the authority was exercised (see, for example, Judgments 4618, consideration 10, 4382, consideration 13, and 4146,

consideration 10). The complainant has clearly not discharged this burden in this regard.

19. Accordingly, the Tribunal concludes from the above considerations that the complaint is unfounded and must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

JACQUES JAUMOTTE

CLÉMENT GASCON

MIRKA DREGER