

C. (No. 3)

v.

CERN

138th Session

Judgment No. 4902

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr F. C. against the European Organization for Nuclear Research (CERN) on 4 August 2021 and corrected on 19 August 2021, CERN's reply of 5 December 2021, the complainant's rejoinder of 19 January 2022 and CERN's surrejoinder of 25 February 2022;

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 2019 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 2019 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 to be 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.

On 28 February 2019, the complainant had a meeting with his Group Leader, Mr T.S., under whose supervision he had recently been placed, to discuss his functions and objectives for 2019. A series of objectives were set. At that time, the possibility of the complainant being assigned to a different Group was being explored. A second meeting took place on 26 June 2019, at which additional objectives were set to be achieved in the second half of 2019.

As part of the 2020 merit recognition exercise for the reference year 2019, the complainant had his annual interview on 25 February 2020 with his supervisor for that year (Mr T.S.). At that point, following a change in reporting lines, the complainant was under the supervision of a different manager (Ms B.L.), whom he met for another interview on 28 February 2020 to discuss his objectives for 2020.

On 11 March 2020, the complainant filed a formal complaint of harassment, including against his supervisor for 2019 (Mr T.S.), in which he claimed being notably subject to institutional harassment by the Organization. This complaint of harassment is the subject of the complainant’s above-mentioned first and fourth complaints before the Tribunal.

On 13 March 2020, the complainant’s supervisor for 2019 (Mr T.S.) recorded his appraisal in CERN’s Electronic Document Handling (EDH) System. On the following day, the Section Leader (Mr G.L.) approved the appraisal.

On 24 March 2020, a discussion between the IT Head of Department and the Group Leaders was held. The Human Resources (HR) representative could not attend due to technical problems but discussed the complainant's performance for 2019 with the Head of Department later that day.

On 26 March 2020, the complainant recorded his comments on the appraisal report in EDH, expressing his disagreement and providing his evaluation of his objectives and performance.

On 16 May 2020, the performance appraisal report was marked as "fully authorized" in the system. The payslip of 21 May 2020 constituted the formal notification of the decision to consider the complainant's performance for year 2019 as "fair".

On 17 July 2020, the complainant filed an internal appeal contesting this evaluation, where he claimed that his 2019 performance appraisal included numerous "inaccuracies and misleading comments", that the overall appreciation of his supervisor was "disparaging and baseless", and that there was no evidence that the Head of Department had collegially consulted the Group Leaders and HR representative and, even if he had, the "outcome could only be biased" given the incorrect comments of his supervisor. On 17 August 2020, the complainant was informed that his internal appeal was deemed receivable.

The Joint Advisory Appeals Board (JAAB) communicated its report to the Director-General on 30 March 2021, recommending the rejection of the appeal. By letter dated 29 April 2021, the complainant was informed of the final decision of the Director-General to follow this recommendation and to reject his appeal. This is the impugned decision in the present case.

The complainant requests the Tribunal to quash the decision of 29 April 2021, to take a new decision regarding the assessment of his performance, 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 third complaint, the complainant challenges the qualification of his performance as “fair” for the year 2019. He argues that the process was vitiated due to procedural flaws and errors of fact. Amongst others, 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 proceedings. In this third complaint, the complainant has particularly emphasized that it is highly unusual for any staff member at CERN to receive for the second consecutive year a performance evaluation marked as being only “fair”, since this qualification is given to less than three to four per cent of the staff each year.

In this regard, the complainant maintains that the overall evaluation of his objectives for 2019 seems to be the result of “diffuse institutional harassment” and of an absence of proper investigation, which has been challenged in two separate complaints brought before the Tribunal. In the present complaint, the complainant alleges that because of this institutional harassment, he has suffered moral damage resulting from the accumulation of various events since 2016 relating to it.

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, which are the subject of Judgment 4900, also delivered in public this day. 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 2019 performance evaluation, inferring that it was based on extraneous improper considerations. It is therefore appropriate for the Tribunal to examine this plea, 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, 2837, consideration 3, and 3617, consideration 2).

As for the references made by the complainant to his performance qualification for the year 2018 in order to draw a link between his performance qualifications for the years 2018 and 2019, even though the performance qualification of the complainant for the year 2018 is the subject of a separate complaint and of the additional Judgment 4901 also delivered in public this day, drawing a parallel between successive events may assist in trying to show or understand a pattern. It remains, however, that this case clearly is aiming at the 2019 performance evaluation.

The grounds of irreceivability raised by CERN must be rejected.

4. With respect to performance appraisal and qualification of staff members like the complainant at CERN, in Judgment 4901, also delivered in public this day, on the second complaint pertaining to his performance evaluation for the preceding year, 2018, the Tribunal cited at length the relevant provisions of the Staff Rules and Regulations and of the Administrative Circular No. 26 (Rev. 11), entitled “Recognition of Merit” (“AC 26”). The Tribunal refers to considerations 5 and 6 of that judgment which contain those provisions, making it unnecessary to reproduce them in the present judgment.

For the purposes of the present dispute though, it is also relevant to add paragraphs 20, 22 and 23 of AC 26 pertaining to the interview and objectives setting of the performance appraisal procedure, which state as follows:

“A. Interview and objectives setting

[...]

20. The objectives to be achieved during the current year shall be set by the supervisor, taking into account the staff member’s benchmark job and functions, and shall include not only work but also, where applicable, development and supervisory objectives.

[...]

22. A specific interview shall be conducted within six weeks of the following events, in order to determine the objectives for the rest of the current year:
- a) the staff member's functions are substantially modified;
 - b) the percentage of time allocated to the functions is substantially modified;
 - c) the staff member returns to work after an absence of 16 consecutive weeks or more, except in the case of absence for maternity leave;
 - d) the staff member's probation period terminates between 1 May and 31 December.
23. This specific interview may be replaced by the annual interview if the latter is held within six weeks following one of the above-listed events.

[...]"

5. In the internal appeal that he submitted on 17 July 2020, the complainant pointed to the fact that his performance evaluation of 2019 contained many inaccuracies and misleading comments that conveyed an overall negative impression of his performance, that the overall assessment of his supervisor was disparaging and baseless, that the organization had no authority to impose new additional objectives to an ongoing evaluation period as it allegedly did, and that there had been an absence of collegial consultation despite the requirements of paragraph 31 of AC 26, as well as no final discussion of his performance qualification after the submission of his own comments.

6. On 5 March 2021, the Joint Advisory Appeals Board (JAAB) held an in-person hearing as part of the internal appeal process. It requested the participation of a Human Resources (HR) expert on questions relating to the merit exercise, as well as that of the Group Leader (Mr T.S.), the Section Leader (Mrs B.S.) and the HR representative for the Information Technology (IT) Department at the time the merit exercise relevant to the present complaint took place (Ms M.L.F.). In the report that the JAAB submitted to the Director-General on 30 March 2021, it unanimously concluded that the performance qualification procedure was carried out in accordance with the

applicable rules and that the contested administrative decision was taken in accordance with the procedures in force. The JAAB recommended the rejection of the complainant's appeal in its entirety.

7. The Tribunal observes that in the lengthy report that it submitted, the JAAB summarized in detail the arguments of both the complainant and the Organization, the statements of the four witnesses heard in the conduct of its hearing, as well as the submissions of both parties presented to the JAAB. The Tribunal further notes that at the end of the considerations expressed by the JAAB, the latter indicated the following:

“The [JAAB] raises that if objectives are set for less than a year, this should be indicated clearly in the MERIT form.

Some unfortunate factual inaccuracies in the Observations may have been avoided.

It appeared clearly that [the complainant] could not expect an appropriate professional and personal development within the IT Department, which is why the [JAAB] welcomes his recent assignment to a new position in the Service Management and Support Unit of [the Site and civil engineering (SCE)] Department [...]

8. The complainant raises five arguments to contest the evaluation process followed by CERN for the merit performance appraisal of 2020 pertaining to the reference year 2019. First, the complainant maintains that his supervisor made two incorrect statements on the results achieved in the appraisal report. Second, the complainant argues that CERN had no authority to impose new additional objectives to an ongoing evaluation period during the reference year at issue. Third, the complainant alleges that there was an absence of collegial consultation by the Organization despite the requirements of paragraph 31 of AC 26. Fourth, the complainant argues that the final discussion of his performance qualification took place before the submission of his comments as supervisee, which was contrary to the applicable rules and procedure. Finally, as stated before, he relies on his alleged harassment in arguing the grounds for unlawfulness of his 2019 performance evaluation.

9. With respect to the first argument raised by the complainant, the latter maintains that the rating of his performance for the year 2019 as merely “fair” rests only on two negative assessments of assigned objectives that were proven factually incorrect.

But, in this regard, the Tribunal observes that the JAAB, after a hearing where the complainant’s supervisor was heard as a witness, stated in its report that, even though some unfortunate factual inaccuracies could have been avoided, it was satisfied that the complainant’s performance assessment corresponded to the definition of “fair” in the promotion guide and that the latter had not provided substantial elements to justify that this performance should have been qualified differently.

To that end, the Tribunal also observes that in the summary of the evidence given by this supervisor at the hearing before the JAAB, he explained why, in his view, the goals set for the complainant were not achieved as expected from someone of his experience at grade 7, and why, as a result, he considered this performance as being “fair” rather than “strong” as the complainant would have preferred.

Given the limited scope of the power of review of the Tribunal on performance appraisals as constantly indicated in the Tribunal’s case law (see, for example, Judgments 4787, consideration 5, 4786, consideration 4, 4713, consideration 11, and 4564, considerations 2 and 3, and the case law cited therein), the fact that the complainant’s view of his performance is different than that of his supervisor is clearly not sufficient to set aside this evaluation and order that another one be undertaken.

This ground of contestation is therefore unfounded. In fact, the gist of the argumentation of the complainant is rather focused on the other arguments that he raised and to which the Tribunal now turns.

10. In his second argument, the complainant maintains that his supervisor had no authority to decide upon additional objectives that were added in the middle of the reference year, that is in June 2019. He considers that the merit interview of 26 June 2019 during which new objectives were added to the initial objectives for the reference year

does not fall under any of the categories listed in paragraph 22 of AC 26 for a specific interview to be conducted following the initial interview. He adds that there was no indication in the merit appraisal form that the initial objectives were meant to be completed within six months, as argued by CERN. For him, the claim of the Organization that the initial objectives were clearly meant to apply for only six months given the wish of the complainant to leave the department was misleading and incorrect. He in fact maintains that it was a sign of bad faith for the Organization to use the negative assessment of these additional objectives to lower the level of qualification of his global performance for the year.

11. Concerning the complainant's objectives, the Tribunal notes that the initial interview with his new supervisor for 2019, Mr T.S., was held on 28 February 2019. In the 2019 merit appraisal form, these objectives were then identified regarding the following specific tasks, namely "[a]d-interim: CDA [Collaboration, Devices and Applications] cross-group resource tracking and billing". In his testimony before the JAAB, this supervisor explained that such was indicated because of the expected departure of the complainant from the CDA Group given the interest he had expressed in internal mobility opportunities.

The record also shows that a second interview between the complainant and his supervisor was held on 26 June 2019 where, according to CERN, additional objectives for the second half of 2019 were determined. The 2020 merit appraisal form indeed indicates these extra objectives in the dedicated section of the form entitled "Additional Development Objectives (Achieved during the reference period)".

On this precise issue, the Tribunal observes that in his complaint, paragraph 32, the complainant wrote the following:

"As to the performance qualification, the initial objectives assigned for a given year are to be considered the benchmark for the assessment of the overall performance of that year. Since the complainant completed the initially assigned objectives for 2019 not only in a timely manner, but even swiftly enough to take on additional objectives, it can only be concluded that he had completed his objectives to the satisfaction of his supervisor, as he would otherwise not have been given new objectives but rather been asked to improve the results of the original tasks. Therefore, the complainant's

overall performance should already have been qualified as ‘strong’.”
(Emphasis added.)

Furthermore, in his rejoinder, paragraph 11, he added the following:

“It is also no bad faith from the complainant, as asserted by the Organi[z]ation, to challenge additional objectives he had accepted [...] Considering that the complainant had been facing institutional harassment for quite some time and been negatively appraised in the previous years, he felt he had no other choice but to accept the new objective so as to improve his performance. Any refusal might have added to a negative impression of his performance. The complainant actually happily enjoyed the new objective at that time, which demonstrated that he was capable to do more than what was initially assigned to him. The necessity to challenge that new objective only became apparent once it became clear that his performance would again be disparaged and the more so on the basis of that new objective he had actually completed to the initial satisfaction of his supervisor. Contrary to the defendant’s assertion, there is no contradiction in the complainant’s action [...]” (Emphasis added.)

12. The Tribunal considers that no provision of AC 26 specifically precludes a supervisor from assigning additional objectives to staff members during the year. To the contrary, the applicable standard form for the merit recognition exercise at CERN indeed includes a section precisely pertaining to additional objectives. In addition, as it appears from the summary of the testimony of the HR expert during the JAAB hearing, while objectives are normally fixed at the beginning of the year, priorities may change or evolve and there may be a need for an adjustment of the objectives. In support of this assertion, that expert specifically pointed to the line in the merit form document where additional objectives can be added.

Moreover, while paragraph 22 of AC 26 indicates the circumstances where a specific interview must be conducted to determine objectives for the rest of a current year, this does not per se limit the possibility for a supervisor to assign additional objectives in situations where functions are modified, or circumstances evolve or change. Here, it is apparent from the JAAB’s summary of Mr T.S.’s interview that the assignment of additional objectives to the complainant was mainly due to the fact that the initial objectives had been deliberately set for only six months given that the complainant had expressed his intention to

leave the CDA Group. In this regard, the Tribunal notes that the complainant did not contest at the time the assignment of these additional objectives and indeed even proposed some changes to their wording after they were discussed with his supervisor in the 26 June 2019 interview, thereby contributing to their determination.

Finally, the argument of the complainant developed in his submissions, to the effect that he should be given proper credit for having completed rapidly his initially assigned objectives for 2019 and swiftly enough to be able to take on additional objectives, is at odds with the suggestion that such additional assignments amounted to a procedural irregularity on the part of the Organization or constituted a procedural flaw that vitiated his performance appraisal. Further, the Tribunal sees no reason to call into question the explanation provided by the complainant's supervisor, according to which the assignment of additional objectives to the complainant was mainly due to the fact that the initial ones had been deliberately set for only six months given that the complainant had expressed his intention to leave the CDA Group.

The second argument cannot stand and is unfounded.

13. The complainant further maintains that paragraph 31 of AC 26 was violated because the HR representative who was to be consulted for the performance qualification during a collegial meeting was not present at that meeting as contemplated in the applicable procedures.

But, on this other issue, the record indicates that the HR representative stated at the JAAB hearing that during the final collegial consultation meeting of 24 March 2020, she had been unable to attend due to technical problems but that she finally ended up talking to the IT Head of Department later on the same day with regard to this collegial consultation.

While it is true that this discussion did not take place in an ideal collegial manner as a result of this technical problem, the fact remains that a meeting took place, with only one member missing, and that the consultation with the HR representative occurred later on the very same day and allowed the Head of Department to meet the requirements of the procedure set forth in AC 26 in this regard. This was also not the

only consultation conducted in the performance process, and the missing member was the representative of HR, who did not have direct input to give on the appraisal of the performance of the complainant and was rather plausibly there to provide technical expertise.

In sum, even accepting that this constituted a procedural flaw, the Tribunal considers that it does not, in any event, amount to a substantial defect that would render the performance appraisal irregular and justify setting aside the impugned decision on that basis.

This third argument of the complainant is unfounded as well.

14. Fourth, the complainant maintains that the performance qualification was highly irregular since it took place on 24 March 2020, namely before the complainant's comments on his performance appraisal were submitted, which happened on 26 March 2020.

But the complainant is unable to point to any rule or procedure that CERN may have violated in so doing. Paragraph 31 of AC 26 requires the Head of Department to collegially consult the staff member's group leaders and the HR representative prior to qualifying the staff member's performance. This paragraph does not require to discuss the staff member's comments at this collegial consultation. Nothing prevents the staff member's comments to be considered at any point during the performance qualification. In the present case, the JAAB indeed observed that those comments of the complainant dated 26 March 2020 were available to the Head of Department before the final performance qualification, which indeed was only finalized close to two months later, on 16 May 2020.

This other argument is devoid of substance and merit and must be rejected.

15. Finally, the complainant states that various events since 2016, while seeming not correlated, may reveal overall harassment. He stresses in this regard that he is not a programmer, hence his functions did not necessarily fit in a classical position within the CERN Document Server team. The Tribunal, nonetheless, cannot but note that

in the present case, the complainant has not substantiated how the rating of his performance for 2019 would have resulted from harassment.

Accordingly, this last argument must be rejected as well.

16. In the result, all the submissions of the complainant are unfounded, and the complaint 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