

The Administrative Tribunal,

Considering the first complaint filed by Mr K.A. B. against the Energy Charter Conference (hereinafter the organisation) on 11 October 2004, the organisation's reply of 26 January 2005, the complainant's rejoinder of 4 March and the organisation's surrejoinder of 13 May 2005;

Considering the third complaint filed by the complainant against the Energy Charter Conference on 21 April 2005, the organisation's reply of 8 June, the complainant's rejoinder of 5 July and the organisation's surrejoinder of 25 July 2005;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Bulgarian national born in 1959, joined the Energy Charter Secretariat – the secretariat of the Energy Charter Conference – on 1 January 2004 as Director for Transit and Trade under a three-year fixed-term contract subject to a six-month probationary period. Shortly after he assumed his functions, his title was changed to that of Director for Transit, Trade and Relations with Non-Signatories, additional functions having been assigned to his post.

On 8 April 2004 his supervisor, the Secretary-General of the Secretariat, met with the complainant to assess his performance over the first half of his probationary period. That same day, she sent the Head of Administration and Finance a note containing her assessment, in which she stated that the complainant was “on a promising track”, but that his “knowledge of substance still need[ed] to be expanded and improved”.

In an e-mail of 30 May 2004 the Secretary-General informed the same official that developments since that appraisal had led her to the conclusion that confirmation of the complainant's appointment was not justified. She gave examples of what she considered to be his professional shortcomings and asked the Head of Administration and Finance to launch the procedure for prolonging the complainant's probationary period by six months. This e-mail was copied to the complainant.

By a letter of 7 June 2004 the Secretary-General requested the advice of the Advisory Board, in accordance with Staff Regulation 10, on her proposal to prolong the complainant's probationary period. She attached a copy of her e-mail of 30 May, which, she said, “include[d] an assessment of [the complainant's] performance”. However, she informed the complainant on 11 June that she would provide him with a more formal appraisal report by 14 June, before the Advisory Board met to examine the prolongation proposal.

On 15 June the complainant sent an e-mail to the Secretary-General stating that he had not received the expected report. The Secretary-General replied the following day that although it had initially been her intention to use her e-mail of 30 May merely as “an internal element to launch the process”, that e-mail was apparently considered to be adequate for the purposes of the prolongation procedure, and she would therefore submit no additional written report.

The Advisory Board met on 16 June to examine the prolongation proposal and invited the complainant and the Secretary-General to express their views. The complainant requested that the meeting be postponed on the grounds that he had not had sufficient time to prepare himself. He explained that he had only been told at the last minute that the Board's proceedings would be based on the content of the Secretary-General's e-mail of 30 May, and not on the formal appraisal report he had expected to receive. His request was denied by the Board, which noted that 17 days had elapsed since he had received that e-mail. In the course of the meeting, the complainant, who

disagreed with the appraisal on which the prolongation proposal was based, stated that he would be willing to resign “in the interest of the organisation”.

By a letter of 17 June 2004 the Chairman of the Advisory Board informed the Secretary-General that the Board agreed with the prolongation proposal. The Secretary-General forwarded the Board’s advice to the complainant the following day and proposed that they “discuss [his] contract situation in detail” at a meeting on 21 June. At that meeting, the Secretary-General invited the complainant to consider over the next few days the possibility of resigning, to which he had referred before the Board. On 25 June the complainant informed her that he did not intend to resign.

Between 25 and 29 June the Secretary-General consulted the Senior Management officers with regard to the prolongation proposal, in accordance with Staff Rule 25.1. The four officers in question all supported the proposal, though one expressed the view that the Secretary-General ought to have consulted them before seeking the advice of the Advisory Board.

On 29 June 2004 the Secretary-General wrote to inform the complainant that she had decided to extend his probationary period by six months, until 31 December 2004. By a letter of 9 July 2004 the complainant, referring expressly to Rule 25.2 concerning the Advisory Board, asked the Secretary-General to modify or withdraw her decision on the grounds that neither she nor the Advisory Board had followed the proper procedure for extending a probationary period. He also asked to be provided with copies of the minutes of the Advisory Board’s meeting of 16 June, as well as the conclusions of the Senior Management officers consulted on the matter. The Secretary-General replied, in a letter dated 15 July, that she did not agree either to withdraw or to modify her decision of 29 June. She expressly rejected the complainant’s allegation that the proper procedure had not been followed. With regard to his requests for documents, she stated that there was no provision in the Staff Rules for disclosure of the minutes of the Advisory Board’s meetings, but that the views expressed by the Senior Management officers were recorded in his personnel file, which he was entitled to consult.

In circumstances described in Judgment 2502, also delivered this day, the complainant’s appointment was terminated, with effect from 31 August 2004, by a decision of 27 July 2004 which the Secretary-General confirmed on 24 August. That decision is the subject of his second and fourth complaints.

On 8 October 2004 the complainant submitted to the Advisory Board a request for advice regarding the decision of 15 July by which the Secretary-General had maintained the prolongation of his probationary period. On 11 October he filed his first complaint with the Tribunal, impugning that same decision of 15 July 2004.

By a letter of 21 October the Chairman of the Advisory Board informed the complainant that the Board would meet on 2 November to examine the Secretary-General’s decision of 15 July. On 22 October the complainant wrote to the Chairman expressing reservations as to the impartiality of the Board. He invited the Board to resign and to allow the Secretary-General and the Staff Committee to appoint “an impartial body”.

On the morning of 2 November, prior to the meeting of the Advisory Board, the complainant phoned the Head of Administration and Finance to enquire whether the composition of the Board had changed. Having been told that it had not, he wrote to the Secretary-General to inform her that he refused to participate in the Board’s meeting that day, because the Board did not meet the requirement of impartiality.

Following the Board’s meeting, the Chairman of the Board informed the complainant, in a letter dated 2 November 2004, that the Board had examined and rejected his challenge to its impartiality. On 4 November the complainant sent a “formal protest on the way the Advisory Board [...] is operating” to the Chairman of the Board, with a copy to the Secretary-General. He objected to the fact that at the meeting of 2 November, contrary to the information given to him by its Chairman on 21 October, the Board had examined his challenge to its impartiality, and not the decision to prolong his probationary period. He asserted that, had he known of this change of agenda, he would have done everything possible to attend the meeting.

By a letter of 5 November the Secretary-General informed the complainant that, since she shared the Board’s view that he had not established that any of its members lacked impartiality, she did not accept his invitation to appoint a new Advisory Board.

In reply to the complainant’s protest, the Chairman of the Board stated, in a letter dated 9 November 2004, that his

challenge to its impartiality was “a preliminary question which clearly had to be dealt with before the Board could proceed to deal with the merits of [his] request”. Emphasising that the Board was under no obligation to reconvene, the Chairman added that it was nevertheless willing to do so if he wished to present arguments orally in support of his challenge to its impartiality. The complainant declined this invitation.

The Advisory Board met on 20 January 2005 and issued its advice that same day. As regards the prolongation of his probationary period, it maintained the position it had expressed in June 2004. By a letter of 11 February 2005 the Secretary-General informed the complainant that, in the light of the Advisory Board’s advice, she had decided to maintain her decision of 29 June 2004 to prolong his probationary period. On 21 April 2005 the complainant filed his third complaint, impugning the decision of 11 February 2005.

B. The pleas and claims put forward by the complainant in his first and third complaints are, *mutatis mutandis*, identical. He submits that by failing to prepare a “true and substantive” appraisal report, and by misleading him as to the nature of her e-mail of 30 May 2004, the Secretary-General violated Staff Rule 10.2(b), which provides that the supervisor of an official shall draw up a report on the latter’s “competence, efficiency and conduct”. He points out that under Rule 25.2(a)(i) the Advisory Board must meet within ten days of receipt of the Secretary-General’s request for consultation, whilst Rule 25.2(e) stipulates that the official concerned shall have the right to present his case to the Board orally and in writing. According to the complainant, the organisation violated these rules and denied him due process by informing him only on the day of the Advisory Board’s meeting that the e-mail of 30 May was to be considered as the report required under Rule 10.2(b).

The complainant alleges that the decision to extend his probationary period, and the Advisory Board’s advice on this issue, were based on a flawed appraisal of the facts, which, he argues, constitutes an error of law invalidating both the advice and the decision. He adds that he was not given the opportunity to contest the performance appraisal on which the decision to extend his probationary period was based. Referring to Judgment 2172, he submits that under such circumstances he ought to have been confirmed in his post.

The complainant also considers that the organisation violated Rule 25.1, concerning the Secretary-General’s duty to consult the Senior Management officers prior to taking “personnel decisions” and the requirement that the conclusions of those consultations be recorded in writing. He submits that in order for that rule to be meaningful, the consultation must be explicit and the reasons underlying the intended decision must be clearly stated. In this case, he points out, the notes sent to the Senior Management officers requesting their views did not indicate those reasons, and, except in one case, the brief replies they gave hardly constituted conclusions within the meaning of Rule 25.1. Moreover, their views were obtained after the Advisory Board had been consulted, whereas they were a factor which the Board ought to have taken into account at the time when it gave its advice.

Lastly, the complainant contends that his right of defence was violated because he was invited not to appeal. He asserts that shortly before the meeting of the Advisory Board on 16 June 2004, the Board’s Chairman asked him to accept the Secretary-General’s decision to prolong his probationary period because otherwise his contract would “collapse”, and that on 21 June the Secretary-General invited him to resign “and not to discuss her decision”.

In his first complaint, he asks the Tribunal to set aside the decision of 15 July 2004 by which the Secretary-General refused to modify her decision of 29 June 2004 to extend his probationary period. Subsidiarily, he claims “an indemnity equal to the remaining three years term” stipulated in the Secretariat’s initial offer of employment dated 3 September 2003. He also claims costs.

In his third complaint, he asks the Tribunal to set aside the decision of 11 February 2005 by which the Secretary-General maintained her decision to extend his probationary period. Subsidiarily, he claims the same indemnity as in his first complaint. Again, he claims costs.

C. In its reply to the complainant’s first complaint, the Energy Charter Conference contends that the complaint in question is irreceivable under Article VII of the Statute of the Tribunal, because the complainant filed it without having exhausted all internal means of appeal in respect of the impugned decision of 15 July 2004, which was therefore not a final decision.

On the merits the defendant begins by recalling that, according to the Tribunal’s case law, the decision not to renew a staff member’s appointment is discretionary, and that the Tribunal will exercise great caution in reviewing a decision not to confirm the appointment of a probationer.

It asserts that the decision to extend the complainant's probationary period was not tainted with any procedural irregularity. In accordance with the Staff Rules the Secretary-General drew up a report covering the three elements mentioned in Rule 10.2(b) – namely, competence, efficiency and conduct – and e-mailed it on 30 May 2004 to the Head of Administration and Finance, recommending an extension. She then consulted both the Advisory Board and the Senior Management officers before finally taking her decision.

The organisation considers that the complainant had sufficient time to prepare for the Advisory Board's meeting on 16 June, because the reasons for the prolongation proposal had been made known to him orally as early as 17 May and in writing on 30 May. It submits that he was not adversely affected by the fact that the Secretary-General did not issue a more formal appraisal report, since the Board took into account only the content of the e-mail of 30 May and the oral presentations given by the complainant and the Secretary-General at its meeting.

The defendant points out that the Staff Regulations and Rules do not require Senior Management officers who are consulted on personnel matters to state the justification or reasoning behind the conclusions they reach. Nor do the relevant rules indicate the order in which the Advisory Board and Senior Management officers are to be consulted. The only requirement, it submits, is that both consultations take place, which they did.

It explains that the Secretary-General did not invite the complainant to resign on a "take it or leave it" basis, but merely sought clarification of his statement that he was ready to resign in the interest of the organisation. It reiterates the professional shortcomings that were brought to the complainant's attention, which it views as justifying the impugned decision, and concludes that he has not demonstrated that any material fact has been overlooked, or that any clearly wrong conclusion has been drawn from the evidence, or that there was abuse of authority or a mistake of law.

With regard to the relief claimed by the complainant, the organisation submits that his claim for damages is unsubstantiated and disproportionate, given that the three-year duration of his appointment was subject to satisfactory performance and confirmation after the six-month probationary period.

In its reply to the third complaint, the defendant refers the Tribunal to the facts and arguments presented in its reply to the first complaint. It accepts that the third complaint is receivable, the complainant having exhausted the internal remedies in respect of the decision of 11 February 2005. Indeed, it points out that, since he has been able to argue his case before the Advisory Board, his allegation that he was not given the opportunity to contest his performance appraisal is now unsustainable.

D. In the rejoinder relating to his first complaint, the complainant argues that according to the Staff Regulations and Rules the Secretary-General's decision of 15 July 2004 was a final decision. He explains that under Regulation 10(b) the Secretary-General must consult the Advisory Board before deciding to prolong an official's probationary period. Rule 25.3(b), concerning the Board's procedure, provides that in cases relating to consultation in respect of Regulation 10(b) the Board shall give its advice to the Secretary-General no later than ten days after the latter's request to the Chairman of the Board. Rule 25.3(c) states that "[t]he final decision in the matter, which shall be taken by the Secretary-General within 60 days after the Board has transmitted its report to him or her, shall be notified to the official concerned, who shall at the same time be sent a copy of the Board's advice". According to the complainant, no other "final decision" is mentioned by the Staff Regulations and Rules. Consequently, in order to challenge a decision regarding the extension of a probationary period, the official concerned does not have to follow the ordinary internal appeal procedure provided for in Rule 25.2, which, he asserts, applies to all cases other than requests for consultation under Regulation 10(b).

The complainant presses his pleas on the merits in the rejoinders relating to his first and third complaints, respectively, whilst emphasising that he is challenging not the Secretary-General's right to prolong his probationary period, but the way in which it was done.

E. In its surrejoinder relating to the complainant's first complaint, the organisation reiterates its objection to receivability. It points out that the logical consequence of the complainant's interpretation of the Staff Regulations and Rules would be that officials on probation would have no internal means of appeal, which would be contrary to general principles of fairness and equality. It maintains its position on the merits in its surrejoinders to both complaints.

CONSIDERATIONS

1. As from 1 January 2004 the complainant was employed by the Energy Charter Secretariat as Director for Transit and Trade, and subsequently as Director for Transit, Trade and Relations with Non-Signatories, under a three-year fixed-term contract subject to a six-month probationary period. On 29 June 2004 his probationary period was extended by six months by decision of the Secretary-General and on 27 July 2004 his appointment was terminated with effect from 31 August. In two complaints, filed with the Tribunal on 11 October 2004 and 21 April 2005 respectively, the complainant asks the Tribunal to set aside firstly the decision of 15 July 2004 by which the Secretary-General refused to modify the decision of 29 June 2004 extending his probationary period and, secondly, the decision of 11 February 2005 rejecting his appeal, in accordance with the Advisory Board's opinion of 20 January 2005, and informing him that it was a "final decision".

2. These complaints are joined to form the subject of a single ruling since they both concern the lawfulness of the decision to extend the complainant's probationary period.

3. The organisation submits that the first complaint is not receivable on the grounds that the decision of 15 July 2004, impugned by the complainant, was not a final decision in the meaning of Article VII, paragraph 1, of the Statute of the Tribunal, since when the complainant filed his complaint he had not exhausted all internal means of appeal available under the Staff Regulations and Rules. The complainant, on the other hand, considers that the rules of procedure governing the prolongation of the probationary period are contained in Regulation 10(b)(ii), according to which the Advisory Board is to be consulted prior to a prolongation decision, and Rule 25.3(c), which states that the Secretary-General's decision following such consultation is "final". According to the complainant, the combined effect of these rules is that the application of the general provisions concerning the settlement of disputes, which provide that the Advisory Board is to be consulted at the request of the official concerned (Rule 25(a)(i)) in the event of a dispute arising from a decision of the Secretary-General, is excluded where the disputed decision concerns the prolongation of a probationary period, since such decisions are already preceded by consultation of the Advisory Board.

4. The Tribunal agrees that the combination of these rules leaves scope for interpretation, because of the fact that Rule 25.3 states that decisions taken after consultation of the Advisory Board are "final", without distinguishing between consultations requested by the Secretary-General and those requested by officials. However, it appears from Regulation 25 and Rule 25.2, which are very general in scope, that the internal appeal procedure available to officials requires that any dispute arising from a decision of the Secretary-General be referred to the Advisory Board by the official concerned. It is only when this internal appeal procedure has been completed that the dispute can be referred to the Tribunal in accordance with its Statute. The first complaint must therefore be dismissed as irreceivable because it was filed before the expiry of the period of time allocated to the Advisory Board, to which the appeal against the decision of 15 July 2004 was submitted on 8 October 2004.

5. On the other hand, the third complaint filed by the complainant, challenging the decision of 11 February 2005 which, following consultation of the Advisory Board, confirmed the earlier decision to prolong the complainant's probationary period, is receivable.

6. In support of his claim to have this decision quashed, the complainant puts forward several pleas concerning issues of both form and substance. He argues that the defendant breached several rules of procedure when it consulted the Advisory Board, which agreed on 16 June 2004 to the proposal to prolong his probationary period, and when it consulted the Senior Management officers as required by Staff Rule 25.1. He also accuses the defendant of committing a manifest error in the appraisal of the facts on which the decision to prolong his probationary period was based and of bringing pressure to bear on him to resign and to forfeit his appeal.

7. According to Regulation 10, the first six months of service of officials, who are appointed for a fixed term, constitute a probationary period. At the end of this period, the Secretary-General decides either to confirm the appointment or, exceptionally, with the consent of the official concerned and after consultation with the Advisory Board, to prolong the probationary period for a further period of not more than six months, or, after consultation with the Advisory Board, to terminate the appointment with one month's notice. According to Rule 10.2(b), during the fifth month of any probationary period, an official's immediate superior must draw up a report on his or her competence, efficiency and conduct, recommending either that the appointment be confirmed, or that the probationary period be extended or that the appointment be terminated.

The complainant contends that this procedure was not complied with as he was not given an opportunity, prior to the consultation of the Advisory Board, to contest the appraisal report drawn up by his supervisor, i.e. by the Secretary-General, recommending the extension of his probationary period. He was under the impression that the report was still being prepared when he was invited on 11 June 2004 to attend the meeting of the Advisory Board. But he was informed only on 16 June, that is, on the day of the meeting, that no report would be submitted to the Board other than that contained in an e-mail sent on 30 May 2004 by the Secretary-General to the Head of Administration and Finance, which the complainant received the same day. The latter rightly points out that he had been given to understand that another appraisal report was to be prepared, but it appears from the submissions that this e-mail of 30 May 2004, drawn up at the end of the complainant's fifth month of probation, indicated very clearly the negative aspects of his supervisor's appraisal of his performance and concluded that confirmation of his appointment would be neither justified nor in the interest of the organisation and that "the procedure for prolongation of the probation period for another six months" should be "formally launch[ed]". On the day the complainant was sent this e-mail, the Secretary-General told him, in another e-mail, that this request to prolong the probationary period represented "a new chance" for him, the only alternative available to her being non-confirmation of his appointment. In other words, the complainant was aware, as from 30 May 2004, of the assessment by his supervisor which had led the latter to launch the prolongation procedure. He therefore had an opportunity to submit his comments to the Advisory Board and cannot justifiably complain, in the circumstances, that his right of defence was violated.

8. According to Rule 25.1, the Secretary-General must consult with Senior Management officers before personnel decisions are taken, in particular regarding probation, and the conclusions of these officers must be recorded in writing. The complainant accuses the defendant of having breached this rule on the grounds that the consultation of the Senior Management officers took place after that of the Advisory Board, that is, between 25 and 29 June 2004, on the basis of a request that did not indicate the reasons for the proposed decision, and that the replies of the said officers likewise contained no reasons. This plea fails: there is no specific requirement in the rules that were applied stipulating an order of precedence for consultation between the Advisory Board and the Senior Management officers; the latter were sent a note asking them for their views on the Secretary-General's proposal to extend the complainant's probationary period, and they were legally entitled to simply express their agreement in writing without stating any reasons.

9. It must be concluded from the above that the consultation procedure was duly followed. The complainant asserts that pressure was brought to bear on him to resign, but he had himself, at one stage of the procedure, offered to resign, after stating that he was willing to accept a prolongation of his probationary period, though not on the grounds of lack of professionalism. There is nothing in the submissions to indicate that the complainant was subjected to pressure before the decision to prolong his probationary period was taken, even though it seems clear that he was advised not to challenge a decision that was more favourable to him than a decision to terminate his appointment.

10. On the merits, in the account of the facts he submits to the Tribunal, the complainant provides a lengthy rebuttal of the assessments made by the Secretary-General regarding his alleged shortcomings in leading the groups he was in charge of, in the preparation of certain meetings and in the dispatch of a report to the Russian authorities. As the Tribunal has consistently held, it will not review assessments made of the performance of an official on probation, provided that they are not based on an error of fact or of law, that they do not rest on clearly mistaken conclusions and that they are not tainted with abuse of authority. In the absence of any flaw affecting either the performance appraisal or the procedure leading to the prolongation of the complainant's probationary period, the latter's reference to Judgment 2172, delivered by the Tribunal in a case where the appraisal procedure was flawed, is not relevant.

11. Since none of the pleas of the third complaint submitted by the complainant succeeds, his claims for annulment and for the payment of an indemnity must be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 3 November 2005, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2006.