

The Administrative Tribunal,

Considering the second complaint filed by Mr K.A. B. against the Energy Charter Conference (hereinafter the organisation) on 22 October 2004, the organisation's reply of 31 January 2005, the complainant's rejoinder of 16 March and the organisation's surrejoinder of 13 May 2005;

Considering the fourth complaint filed by the complainant against the Energy Charter Conference on 27 April 2005, the organisation's reply of 21 June, the complainant's rejoinder of 19 July and the organisation's surrejoinder of 15 September 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. Facts relevant to this case are to be found in Judgment 2501, also delivered this day. It may be recalled that the complainant was employed by the Energy Charter Secretariat – the secretariat of the Energy Charter Conference – as Director for Transit, Trade and Relations with Non-Signatories, under a three-year fixed-term contract subject to a six-month probationary period.

His supervisor, the Secretary-General, made a first assessment of his performance after three months of service. She considered that he was “on a promising track”, but that his “knowledge of substance still need[ed] to be expanded and improved”. By the end of May 2004, however, she had reached the conclusion that confirmation of his appointment was not justified. She informed the Head of Administration and Finance accordingly by an e-mail of 30 May 2004, which contained her second assessment of the complainant's performance. After having consulted the Advisory Board and the Senior Management officers, she decided to extend his probationary period by six months, until 31 December 2004. She informed the complainant of this decision by a letter of 29 June 2004, in which she indicated that, in view of the Secretariat's work schedule for the remaining part of the year, she intended to come to a final evaluation of his performance before the summer recess. She also reminded him that his contract could be terminated by either party with one month's notice. The prolongation decision, which the Secretary-General confirmed on 15 July 2004, was challenged by the complainant and is the subject of his first and third complaints, on which the Tribunal ruled in the above-mentioned Judgment 2501.

On 5 July the complainant submitted an application for annual leave covering the period 19 July to 9 August 2004. At a meeting on 8 July the Secretary-General reminded him that she intended to take a decision on his contract before the end of July and suggested that he postpone his holidays, given that the Advisory Board, which she would consult on the matter, was likely to meet before the end of the month. The complainant, however, maintained his leave request, which was duly approved. The Secretary-General invited the complainant to a meeting on 16 July to discuss his contract, but the latter was absent on sick leave from 13 to 16 July inclusive, and the proposed meeting did not take place.

On 16 July the Secretary-General drew up a performance appraisal in which she recommended that the complainant's appointment be terminated with effect from 31 August. By a letter dated 19 July, which was forwarded to the complainant's holiday destination, she informed him that she would shortly consult the Advisory Board on this matter, which she did that same day, attaching a copy of the performance appraisal of 16 July for the Board's attention. The Head of Administration and Finance sent the complainant a copy of the appraisal on 20 July and informed him that the Board had scheduled a meeting for 26 July.

The complainant did not attend that meeting but protested to the members of the Board, in a letter dated 26 July, that he had not been given time to comment on his performance appraisal, and that the termination procedure had

been initiated at short notice while he was on authorised annual leave. He also contested the Board's impartiality. That same day, the Chairman of the Advisory Board replied that the Board considered his allegation of lack of impartiality to be unsubstantiated, adding that the Secretary-General would notify him in due course of her decision on his contract.

Having been advised, on 26 July, that the Board did not object to her termination proposal, the Secretary-General informed the complainant, by a letter of 27 July 2004 to which a copy of the Board's advice was attached, that she had decided to terminate his appointment with effect from 31 August 2004.

The complainant challenged the termination decision in a letter faxed to the Secretary-General on 31 July, emphasising that only 15 days had elapsed between the start of the extension to his probationary period and the drafting of the appraisal of 16 July. He reiterated his allegation that the members of the Advisory Board were not impartial, adding that he had not had time to substantiate his arguments in that regard. The Secretary-General replied on 24 August, maintaining her decision to terminate the complainant's appointment.

On 22 October the complainant wrote to the Chairman of the Board enclosing a detailed explanation of his reservations regarding 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". He also requested that the Chairman forward to "this new Board" a request for advice on the termination decision of 27 July, which had been confirmed on 24 August. That same day, however, he filed his second complaint with the Tribunal, impugning the decision of 27 July.

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 5 November 2004 the Secretary-General wrote to inform 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.

The Board met on 20 January 2005 and issued its advice that same day. With regard to the termination of the complainant's appointment, it maintained the position it had expressed in July 2004. By a letter of 11 February 2005, the Secretary-General informed him that in the light of the Advisory Board's advice she had decided to maintain her decision of 27 July 2004 to terminate his contract. On 27 April 2005 the complainant filed his fourth complaint, impugning the decision of 11 February 2005.

B. The pleas and claims put forward by the complainant in his second and fourth complaints are, *mutatis mutandis*, identical. He submits that the decision to terminate his contract was taken in breach of due process and of "the general rules of procedure", and that it contravenes the letter and spirit of Rule 10.2(b), in that the period of time that elapsed between the appraisal on the basis of which his probationary period was prolonged and that which served to justify the termination of his appointment was far too short to give him a genuine opportunity to demonstrate his skills in his post. He points out that in Judgment 1246 the Tribunal held that a period of less than three months was not sufficient for that purpose.

He also considers that the termination decision was taken in breach of Rule 25.2(c) [*recte* 25.2(e)], in that the period of time between his receipt of the appraisal report at his holiday address and the meeting at which the Advisory Board discussed the termination proposal was too short to enable him to present his case "orally and in writing". He adds that under Rule 10.2 he ought to have been given 30 days to consider and comment on the report.

The complainant sees a breach of the organisation's duty of care and a violation of his right of defence in the fact that, after having authorised him on 8 July to take annual leave as from 19 July, the Secretary-General drew up an appraisal report on 16 July, which he received only on 22 July, requested a meeting of the Advisory Board, which took place on 26 July, and terminated his appointment on 27 July.

He also asserts that the organisation has breached its "duty to motivate any decision causing prejudice to a civil servant". In his view, the termination decision ought to have contained reasons pertaining to his performance during the extension of his probationary period. Instead, he says, the decision refers in particular to major deficiencies in his performance in relation to two specific tasks which could not have arisen in the few days between the start of the extension of his probationary period and the decision to terminate his appointment.

The complainant draws attention to the fact that the termination decision was taken partly on the basis of his own decision not to consent to an extension of his probationary period. He submits that by considering that he had no right to dispute that extension, and that the exercise of such a right was a cause for termination of his appointment, the Secretary-General violated his right of defence.

He argues that under Rules 25.2(a)(i) and 10(b) the Advisory Board has to give an opinion before the Secretary-General can decide to terminate an appointment, and that that procedure is vitiated where the members of the Board are not impartial. In this regard he points out, inter alia, that the Chairman of the Board and the Secretary-General were colleagues in another organisation prior to joining the Secretariat, and that the other members of the Board included the Deputy Secretary-General, who had been involved in the decisions on which the Board was asked to give its advice.

Lastly, the complainant submits that, whereas he was entitled to expect “reasonable working conditions” throughout his probationary period, the Secretary-General put increasing pressure on him, disavowed him in public and copied to his subordinates the negative comments she addressed to him. He asserts that this failure to respect his dignity caused him moral injury.

In his second complaint he asks the Tribunal to set aside the decision of 27 July 2004 by which the Secretary-General terminated his appointment. Subsidiarily, he claims “an indemnity equal to the remain[der] of the five years term [of employment] which was [his] legitimate expectancy [...] according to the contract letter of 3rd September 2003”. In addition, he claims an indemnity equal to six months’ remuneration for moral damage, and costs.

In his fourth complaint he asks the Tribunal to set aside the Secretary-General’s decision of 11 February 2005 and claims the same indemnities as in his second complaint, as well as costs.

C. In its reply to the complainant’s second complaint, the organisation 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 27 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 termination of a staff member’s appointment is a discretionary decision which the Tribunal will set aside only on limited grounds, and that the Tribunal will exercise great caution in reviewing a decision not to confirm the appointment of a probationer.

It asserts that the impugned decision involved no procedural irregularity. Termination with one month’s notice, after consultation of the Advisory Board, is one of the possibilities provided for in Regulation 10(b) concerning the end of a probationary period. Having considered the complainant’s performance throughout his entire period of employment at the Secretariat, and after having consulted both the Senior Management officers and the Advisory Board, the Secretary-General gave the complainant the required notice of termination. According to the defendant, the complainant refused to accept a prolongation of his probationary period which would have given him an opportunity to prove his skills, and consequently the Secretary-General had no other option than to terminate his appointment. It emphasises that the Secretary-General took into account not only his refusal to accept the prolongation, but also his performance throughout his initial probationary period and thereafter, and notes that his attitude and performance after 29 June, when the prolongation decision was taken, were not consistent with a good faith effort to improve his performance.

The organisation rejects the allegation that it failed to give the complainant enough time to demonstrate his skills following the decision to prolong his probationary period. It points out in this regard that his shortcomings were brought to his attention throughout his initial probationary period, especially at a meeting with the Secretary-General and her Deputy on 17 May 2004, and that he had written notice of specific deficiencies as from 30 May.

It also argues that the decision to extend the complainant’s probationary period did not mean that the Secretary-General had to wait for the extension period to end before appraising his performance in order to reach a decision on his contract. Indeed, the Secretary-General had made it clear that she intended to do so before the summer recess, and the prolongation decision itself expressly indicated that his appointment could be terminated with one month’s notice.

With regard to the complainant's allegation that he was not given sufficient time to rebut the performance appraisal of 16 July and to present his case to the Advisory Board, the organisation points out that he was warned that a decision on his contract would be taken during the period when he planned to take annual leave, but that he chose to maintain his holiday plans, without requesting that the Secretary-General postpone her consultation of the Board until his return.

It asserts that he has produced no evidence to support his allegation that the members of the Advisory Board were not impartial, and concludes that he has not demonstrated that any mistake of fact or of law was committed, or that the Secretary-General overlooked a material fact, or drew a clearly wrong conclusion from the evidence, or that the Secretariat's decision discloses an abuse of authority.

With regard to the relief sought by the complainant, it submits that the damages claimed are unsubstantiated and disproportionate, particularly since any legitimate expectation he may have had as to the duration of his employment was subject to satisfactory performance.

In its reply to his fourth complaint, the defendant refers the Tribunal to the facts and arguments presented in its reply to his second complaint. It accepts that the fourth complaint is receivable, the complainant having exhausted the internal remedies in respect of the decision of 11 February 2005. It also points out that in this complaint he is in effect claiming damages for an alleged breach of a defence right which he has in fact exercised, particularly during the internal appeal proceedings.

D. In the rejoinder relating to his second complaint, the complainant argues that according to the Staff Regulations and Rules the Secretary-General's decision of 27 July 2004 was a final decision. He explains that under Regulation 10(b) the Secretary-General must consult the Advisory Board before deciding to terminate an official's appointment at the end of the 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 to terminate an appointment at the end of the 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 second and fourth complaints, respectively, whilst emphasising that he is challenging not the Secretary-General's right to terminate his appointment, but the "illegal" way in which it was done.

E. In its surrejoinder relating to the complainant's second complaint the organisation reiterates its objection to receivability. It points out that the logical consequence of the complainant's interpretation of the Staff Regulations 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. The complainant, a former Director for Transit, Trade and Relations with Non-Signatories in the Energy Charter Secretariat, was given a six-month extension of his probationary period, from 1 July to 31 December 2004, by decision of the Secretary-General. He challenged the lawfulness of this decision before the Tribunal, which, in a judgment also adopted this day, dismissed both of the complaints he had filed concerning this issue (see Judgment 2501). In her letter of 29 June 2004 informing the complainant that his probationary period would be extended, the Secretary-General wrote that she had indicated to him those areas where she saw deficiencies in his performance and that significant and positive changes in that respect were needed to allow her to confirm his appointment. She added: "I would also like to inform you that, given our Programme of Work for 2004 and the need to prepare for the important events in autumn of this year, it is my intention to come to a final evaluation of your performance before the summer recess." On 12 July 2004 the Secretary-General already reminded the complainant by e-mail that she intended to reach a final decision on his contract, in the interest of the organisation, before the summer

recess, and she invited him to attend a meeting on 16 July. The complainant replied that he did not see what there was to discuss regarding his contract and he did not attend the proposed meeting. He was absent on sick leave from 13 to 16 July, but that does not seem to have been the reason why he refused the invitation. On 17 July he travelled to his country for a holiday.

On 15 July 2004 the Secretary-General had written to him, in reply to a letter of 9 July in which he challenged the decision she had taken on 29 June 2004 to extend his probationary period by six months, that she intended neither to withdraw nor to modify her decision. On the following day, that is on 16 July, the date on which the proposed meeting with the complainant was to have taken place, she signed a performance appraisal reiterating and elaborating on the criticism she had expressed previously and concluding that it was in the interest of the organisation to terminate the complainant's appointment at the end of July with one month's notice, that is, with effect from the end of August.

2. The Secretary-General consulted with the Senior Management officers of the organisation regarding her proposal to terminate the complainant's contract and informed the latter that she would be consulting the Advisory Board. The Board met on 26 July 2004 and agreed with the proposal to terminate the complainant's contract. On 27 July the Secretary-General informed the complainant of her decision to terminate his contract on the grounds that he had refused an extension of his probationary period and that he had continued to demonstrate major deficiencies in his professional performance.

3. In his second complaint, filed on 22 October 2004, the complainant requests the annulment of the decision of 27 July 2004 confirmed on 24 August 2004. In his fourth complaint, filed on 27 April 2005, he seeks the annulment of the decision of 11 February 2005 by which the Secretary-General, having obtained the Advisory Board's opinion on 20 January 2005, confirmed the impugned contract termination.

4. These complaints are joined to form the subject of a single ruling since they both concern the lawfulness of the decision to terminate the complainant's appointment.

5. The defendant submits that the complainant's second complaint is not receivable on the grounds that all internal means of appeal were not exhausted. For similar reasons, *mutatis mutandis*, to those given in Judgment 2501, the Tribunal considers that the complainant had not exhausted the internal means of appeal when he filed that complaint, that is, on the very day he also referred the matter to the Advisory Board.

6. His fourth complaint, however, which was filed after the internal means of appeal against the confirmative decision of the Secretary-General were exhausted, is receivable; the complainant, who challenges the decision to reject his appeal against the decision to terminate his appointment, is entitled to contest the lawfulness of that termination by whatever means he deems appropriate. None of the pleas submitted in support of the complaint may be regarded as baseless, contrary to the view put forward by the defendant, which is validly represented in this case.

7. The charge of a lack of impartiality and independence on the part of the members of the Advisory Board is unfounded, since the Tribunal finds nothing in the submissions to substantiate the complainant's allegations in this respect. On the other hand, the way in which the performance appraisal of 16 July 2004, which served as a basis for the termination decision of 27 July 2004, was drawn up and notified to the complainant shows serious failures on the part of the organisation.

8. Firstly, the performance appraisal of 16 July was issued just as the complainant was beginning a new probationary period, which had started on 1 July. Even though the complainant was challenging the decision to prolong his probationary period, which he was perfectly entitled to do, that decision was meant to give him a new chance to improve his performance. However, on 13 July he left on sick leave, and it is hard to see how his supervisor could have assessed any improvement he might have made over a period of 12 days. The performance appraisal, which is in fact well documented and thorough, essentially reiterates the criticism that had been levelled at him in the assessment contained in an e-mail of 30 May 2004, on which the decision to extend the probationary period was based. It is true that the Secretary-General had warned the complainant that she intended to make a final evaluation of his performance before the summer recess, but that warning was in total contradiction with the fact that at the very same time she was deciding to extend his appointment, albeit on a probationary basis, by six months. Moreover, the defendant cannot criticise the complainant for having decided, for reasons of personal convenience, to take annual leave from 19 July 2004, considering that he had been authorised to do so on 8 July,

despite the objections initially voiced by his supervisor. In the circumstances, the complainant had no opportunity to demonstrate that he could improve his performance during the further period of six months which was theoretically available to him, and it is clear that his supervisor did not believe any such improvement was possible.

9. Secondly, the complainant was not given a proper opportunity to challenge the performance appraisal of 16 July, since, owing to the fact that he was in Bulgaria on authorised annual leave, he received a copy of the appraisal only on 22 July, while the Advisory Board was convened for 26 July and the decision to terminate his appointment was taken on 27 July. It is quite clear that in those particular circumstances the complainant was not in a position to defend his interests.

10. Lastly, the reasons given for the termination decision are ambiguous: the decision is based on the one hand on the fact that the complainant did not consent to an extension of his probationary period, and on the other hand on the increasingly major deficiencies in his professional performance. On the first point, although the complainant had indeed requested on 9 July that the decision to extend his probationary period be withdrawn or modified, the Secretary-General had expressly rejected that request on 15 July, and it is hard to see how she could in effect deny the existence of that probationary period, the lawfulness of which she has defended before the Tribunal (see Judgment 2501), by deciding to terminate his appointment. Furthermore, she could hardly justify the decision to terminate the complainant's appointment on the grounds that he had not improved his performance on the basis of an assessment covering such a limited period, as noted above.

11. Thus, even though the decision prolonging the complainant's probationary period until 31 December 2004 did mention that his contract could be terminated during that period with one month's notice, the Tribunal considers that in view of the flaws in the termination procedure the decision of 11 February 2005 confirming the decision of 27 July 2004 must be set aside. Taking into account all the circumstances of this case, the Tribunal concludes that it would not be appropriate either to order the reinstatement of the complainant or to grant him an indemnity corresponding to the remainder of the five-year term of employment which, according to him, he was entitled to expect; however, the material damage he incurred may be fairly compensated by the award of an indemnity equal to the remuneration and benefits he would have received had he remained in his post until 31 December 2004. Since the organisation has breached the rights of the complainant, the latter is also entitled to an award of moral damages, which the Tribunal assesses at 5,000 euros.

12. The defendant organisation shall pay the complainant 5,000 euros in costs.

DECISION

For the above reasons,

1. The Secretary-General's decision of 11 February 2005 confirming the decision of 27 July 2004 is set aside.
2. The organisation shall pay the complainant an indemnity for material injury calculated as indicated under 11 of this judgment, as well as an indemnity for moral damage amounting to 5,000 euros.
3. It shall also pay him 5,000 euros in costs.
4. All other claims 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.