

C.
v.
IOC

137th Session

Judgment No. 4748

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. C. against the International Olive Council (IOC) on 14 March 2020 and corrected on 14 April, the IOC's reply of 15 September 2020, the complainant's rejoinder of 6 November 2020 and the IOC's surrejoinder of 25 February 2021;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision to terminate his appointment at the end of his probationary period.

The complainant was appointed on 1 December 2018 as Head of the Olive Oil Chemistry Department. His four-year contract was subject to an eight-month probationary period ending on 31 July 2019. Under the applicable rules, a performance evaluation had to be drawn up at least two months before the end of the probationary period. On 6 June 2019, the Head of the Administrative and Human Resources Unit sent an email to the complainant's immediate supervisor to remind her that the complainant's probationary period report was overdue. The supervisor forwarded the message to the complainant and asked him to complete

his part of the report, which he did that same day. The supervisor then added her assessment, in which she noted several shortcomings in the complainant's performance and expressed serious doubts as to his suitability for the post. She rated his global performance as unsatisfactory and proposed that his appointment should not be confirmed.

On 21 June 2019, the finalised probationary period report was sent to the complainant. It showed that his second-level supervisor agreed with the proposal of his immediate supervisor and that the Executive Director had decided to terminate his appointment. On 24 June 2019, the Head of the Administrative and Human Resources Unit informed the complainant in writing that the termination would take effect on 31 July 2019; that he would receive his full salary and would retain his insurance coverage up to that date; that he was to take annual leave from 24 June until 31 July; and that he could retrieve his personal belongings on 24 June but thereafter would not be able to access the organisation's premises without prior authorisation.

The complainant lodged an appeal on 20 August 2019, challenging the decision to terminate his appointment. On 10 September 2019, the Head of the Administrative and Human Resources Unit acknowledged receipt of the appeal and informed him that it was on the agenda of the next meeting of the College of Senior Officials. However, when the complainant enquired two months later as to the progress of his appeal, he was told that the Joint Committee did not then have enough members to examine appeals and that, although its membership was being renewed, it was very unlikely that a final decision would be taken on his appeal before 12 January 2020. The complainant was therefore invited to proceed directly to the Tribunal. When he attempted again in December 2019 to obtain a decision from the Executive Director, he received the same response. He filed this complaint on 14 March 2020 impugning the implied rejection of his appeal of 20 August 2019.

The complainant asks the Tribunal to set aside the decision to terminate his appointment and to award him compensation in an amount equal to the remuneration he would have received had his contract run to its end, with interest at the rate of 5 per cent per annum. He also

claims 45,000 euros in damages for moral and professional injury and 5,000 euros for costs.

The IOC submits that the complaint should be dismissed as entirely unfounded.

CONSIDERATIONS

1. The complainant impugns the IOC's implied rejection of his appeal of 20 August 2019 against the Executive Director's decision of 21 June 2019 to terminate his appointment at the end of his probationary period.

2. In challenging the impugned decision, the complainant puts forward the following pleas:

- (a) the IOC's performance evaluation was tainted with procedural flaws;
- (b) the decision to terminate his appointment was flawed by mistakes of fact and misuse of authority;
- (c) the probationary period report is biased and states false or misinterpreted facts;
- (d) he was denied the opportunity to exercise his right of appeal within the organisation.

3. It is convenient to first address the complainant's fourth plea. He submits that, in view of the inordinate delay in processing his appeal, and the fact that, six months after the challenged decision was taken, there was still no hope that his appeal would be considered by the Joint Committee within a reasonable time, his right to an "effective" internal appeal was breached. The IOC contends that due to the approaching Christmas season, constraints related to the membership of the Joint Committee and the organisation's workload, the Executive Director transparently communicated with the complainant about the challenge in reaching a final decision before the start of the next year. The IOC further submits that it was not easy, due to its very small

workforce, to renew the membership of the Joint Committee; however, the complainant was kept continuously informed.

4. The IOC's internal appeal process is set out in Article 64 of its Staff Regulations. This article relevantly provided that:

- “1. Any staff member of the Executive Secretariat shall be entitled to appeal against decisions he or she receives and against decisions concerning him or her directly and individually.
2. Except in the case provided for in article 55 [concerning serious misconduct of senior officials], the staff member concerned of the Executive Secretariat must appeal first to the Joint Committee.

Appeals shall be lodged with the Joint Committee within two months of the date on which the decision was notified to the recipient.

[...]”

Additionally, Article 50 of the Staff Regulations, entitled “Joint Committee”, relevantly provided, in paragraph 1, that:

“A Joint Committee shall be established with a view to submitting to the Executive Director:

- Any comments or grievances regarding:
 - the staff assessment procedure;

[...]”

5. In the present case, the complainant lodged his appeal on 20 August 2019, within the stipulated two-month time limit. The IOC acknowledged receipt of the appeal on 10 September 2019 through the Head of the Administrative and Human Resources Unit, informing the complainant of its inclusion in the forthcoming meeting of the College of Senior Officials. Yet, the subsequent events illustrate a prolonged period of inactivity that compromised the complainant's ability to exercise effectively his right of appeal against a decision critically affecting him as it involved the termination of his appointment. The IOC failed to establish the Joint Committee as stipulated in Article 50 of its Staff Regulations. When the complainant enquired about the progress of his appeal two months later, he was informed that the Joint Committee did not then have enough members to examine appeals and that, although its membership was being renewed, it was very unlikely

that a final decision would be taken on his appeal before 12 January 2020. Despite his repeated efforts to pursue the appeal process, the IOC recommended that he should proceed directly to the Tribunal. Given the impossibility of having his case examined by the Joint Committee in due time, the complainant, on 23 December 2019, lodged a complaint directly with the Tribunal.

6. It is firmly established in the Tribunal's case law that, as part of their duty of care, organisations have an obligation to maintain a properly functioning appeal system that adheres to the established rules and regulations (see, for example, Judgment 4384, consideration 7). The importance of the internal appeal system is reiterated in multiple judgments, for example, in Judgment 3424, consideration 11, where the Tribunal stated the following:

“(a) First, it should be recalled that, as the Tribunal's case law has long emphasised, the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority (see, for example, [...] Judgments 2781, under 15, and 3067, under 20). This is especially true since internal appeal bodies may normally allow an appeal on grounds of fairness or advisability, whereas the Tribunal must essentially give a ruling on points of law. Consequently, although in this case the complainant himself was mistaken as to his right to resort to the internal appeal procedure, it would be inappropriate to deprive him of the benefit of that procedure.

(b) Secondly, apart from the fact that the review of a disputed decision in an internal appeal procedure may well suffice to resolve a dispute, one of the main justifications for the mandatory nature of such a procedure is to enable the Tribunal, in the event that a complaint is ultimately lodged, to have before it the findings of fact, items of information or assessment resulting from the deliberations of appeal bodies, especially those whose membership includes representatives of both staff and management, as is often the case (see, for example, Judgments 1141, under 17, or 2811, under 11). As rightly pointed out by the defendant, the Appeal Board plays a fundamental role in the resolution of disputes, owing to the guarantees of objectivity derived from its composition, its extensive knowledge of the functioning of the organisation and the broad investigative powers granted to it. By conducting hearings and investigative measures, it gathers the evidence and testimonies that are necessary in order to establish the facts, as well as the data needed for an informed assessment thereof.”

7. The IOC violated its duty of care by failing to maintain a properly functioning appeal system, in breach of the applicable rules established by Articles 50 and 64 of the Staff Regulations, cited above. Denying the complainant the opportunity to exercise his right to an effective internal appeal denied the fundamental safeguards provided by that right. Neither administrative inefficiency nor a lack of resources can excuse this failure. This is particularly important in a case involving the termination of employment, such as the present. If the appeal reveals that the termination decision was flawed, then, if it has been dealt with in a timely way, steps can be taken to reverse the effects of the termination, including reinstating the employee. As time passes, that outcome becomes increasingly difficult, for practical purposes, to achieve. Accordingly, the complainant's fourth plea is well founded.

8. Returning to the complainant's first plea, it is essential to recall the Tribunal's case law that an organisation may not terminate the appointment of a staff member for unsatisfactory performance unless it has complied with its own rules to evaluate that performance. With regard to probationary periods in particular, the Tribunal stated the following in Judgment 4282, consideration 3:

"It is also useful to reiterate an international organization's obligations regarding a staff member's probation period that are well settled in the case law. For example, in Judgment 4212, consideration 5, the Tribunal stated that such a period is to provide an organisation with an opportunity to assess an individual's suitability for a position. In the course of making this assessment, an organisation must establish clear objectives against which performance will be assessed; provide the necessary guidance for the performance of the duties; identify in a timely fashion the unsatisfactory aspects of the performance so that remedial steps may be taken; and give a specific warning where continued employment is in jeopardy. It was also stated in Judgment 3678, consideration 1, that a probationer is 'entitled to have objectives set in advance so that she or he will know the yardstick by which future performance will be assessed'."

9. Article 14 of the IOC's Staff Regulations relevantly provided that the probationary period report "shall be written by the immediate superior of the staff member concerned of the Executive Secretariat and shall be signed by the senior official responsible for the area of activity of

the staff member concerned”. Article 3 of the Probationary Assessment Procedure stated that “[a]t least two months before the expiry of any probationary period carried out by a member of the Executive Secretariat, the immediate superior shall evaluate the performance of the work entrusted to the provisional member of the Secretariat, by means of the final report of the probationary period”. Article 6 of that same Procedure relevantly provided that the staff member being evaluated shall have the right “[t]o be notified, in writing, of the result of [her or his] evaluation, forty days before the end of the trial period”.

10. In the present case, the complainant’s probationary period ended on 31 July 2019. However, it was only on 6 June 2019 that the Head of the Administrative and Human Resources Unit sent an email to the complainant’s immediate supervisor, reminding her that the probationary period report was overdue. The complainant first saw his evaluation when the finalized probationary period report, which included the Executive Director’s decision to terminate his appointment, was sent to him on 21 June 2019. Although the evaluation by his immediate supervisor was late, the complainant was notified of the result of the evaluation within the time limit provided for in Article 6. The Tribunal notes that, under the IOC’s Probationary Assessment Procedure, the staff member concerned is involved only at the initial stage, where she or he has to provide a “report of activities carried out during the trial period” (Article 3, paragraph 2). Thereafter, the staff member is not involved in the evaluation process. She or he is simply entitled to be notified of the result of the evaluation “forty days before the end of the trial period” (Article 6).

11. The complainant submits that he was not granted an opportunity to read his supervisor’s comments, nor the chance to add his own comments or discuss the report with his immediate supervisor or with the Executive Director before the termination decision was taken. However, as the Tribunal noted above, under the IOC’s Probationary Assessment Procedure, he had no right to see or comment on the report before he was notified of the result of the evaluation. Accordingly,

having regard to the specific provisions of the procedure in this case, this did not constitute a procedural flaw.

12. Nevertheless, in the present case, there is no evidence that the complainant was warned, during the probationary period, of the alleged flaws in his performance, which would have given him an opportunity to improve or to take steps to remedy the deficiencies. In its pleadings before the Tribunal, the IOC extensively referenced specific incidents in order to justify the negative appraisal, yet these were not referred to in the probationary report and the IOC has not established that its concerns about the complainant's performance were brought to his attention in a timely manner. Having regard to the case law cited above, the complainant's first plea is well founded and the decision to terminate the complainant's appointment must therefore be set aside, rendering further discussion of his second and third pleas unnecessary.

13. The complainant has not sought reinstatement and, accordingly, it will not be ordered. Instead, he requests compensation equivalent to the remuneration he would have received had his contract run to its end. The Tribunal notes that the complainant's immediate supervisor in the probationary period report raised serious doubts as to his adaptability to the IOC, including "[h]is inability to control emotions within the work environment and to recognize and adhere to the reporting and management structure", his difficulty in "respect[ing] hierarchical relations and the established communication channels", and his errors that "he finds difficult to admit and tends to attribute them to third parties and to react excessively". The complainant was aware that the probationary period was intended to assess his suitability for his post, not just based on the professional qualifications, but also on the personal attributes for the particular post in which he is working. It cannot be said with certainty that the complainant's appointment would have been confirmed, had his appeal right been duly observed and in the absence of the abovementioned irregularities in the probationary assessment process.

14. The Tribunal therefore concludes that the flawed decision to terminate the complainant's appointment essentially deprived him of an opportunity to have his appointment confirmed at the end of the probationary period and possibly extended in due course. In the circumstances of this case, the Tribunal considers that the loss of that opportunity will be fairly redressed by awarding the complainant material damages in the amount of 20,000 euros.

The Tribunal is also satisfied that the unlawful termination decision, coupled with the fact that the complainant was deprived of his right to an effective internal appeal, caused him moral injury, for which he is entitled to moral damages assessed in the amount of 5,000 euros.

As he succeeds, he is also entitled to an award of costs, which shall be set at 3,000 euros. The complainant's other claims are dismissed.

DECISION

For the above reasons,

1. The impugned decision and the decision of 21 June 2019 terminating the complainant's appointment are set aside.
2. The IOC shall pay the complainant material damages in the amount of 20,000 euros.
3. The IOC shall pay the complainant moral damages in the amount of 5,000 euros.
4. The IOC shall pay the complainant 3,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 27 October 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER