

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**A.-M.**

**v.**

**ITU**

**139th Session**

**Judgment No. 4930**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. N. B. A.-M. against the International Telecommunication Union (ITU) on 21 May 2022 and corrected on 20 July 2022 and 24 August 2022, ITU's reply of 20 December 2022, the complainant's rejoinder of 4 March 2023 and ITU's surrejoinder of 8 April 2023;

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 impugns the decision to terminate his appointment at the end of his probationary period.

The complainant joined ITU on 6 January 2020 as an Emergency Telecommunications and Climate Change Coordinator in the Telecommunications Development Bureau at Headquarters, at grade P-3, under a two-year fixed-term appointment subject to a twelve-month probationary period. His direct supervisor was Ms G.

On 18 May 2020, the Human Resources Management Department (HRMD) announced the launch of a new performance appraisal cycle for ITU staff members covering the period from May 2020 to May 2021. Previously, the appraisal cycle usually ran from January to December

of each year according to Service Order 18/06, adopted on 19 April 2018. By email dated 10 June 2020, Ms H., who was replacing Ms G. as the complainant's direct supervisor during the latter's absence on special leave, asked the complainant to draft his "[Performance Management Development System (PMDS)] workplan" based on elements agreed during their previous communications. The complainant's workplan was established in July 2020 covering the period from 1 January 2020 to 31 May 2021. In September 2020, he met with Ms G., who had returned from special leave, to discuss his objectives and workplan.

On 27 October 2020, Ms G. sent an email to the complainant in which she notably raised concerns regarding the progress made on his objective related to climate change. On 5 November 2020, a meeting was held between the complainant, Ms G. and an HRMD representative to "review the [complainant's] workplan, particularly the activities not on track to complete the workplan deliverables on time". A second meeting was held on 26 November 2020 to follow up on the complainant's performance with the participation of his second-level supervisor.

By memorandum dated 3 December 2020, the complainant was notified that his probationary period had been extended for two months, until 5 March 2021, with the aim to provide him further time to improve his performance as necessary. On 21 December, a meeting took place between the complainant, Ms G., his second-level supervisor and an HRMD representative to follow up on the complainant's workplan and, in January 2021, the complainant's supervisors initiated a mid-term review of his performance covering the period from 1 January 2020 to 31 May 2021, which was completed on 21 January. In the mid-term review, Ms G. noted that the complainant "[did] not achieve his work objectives and [was] not on track for the key objective on climate change".

By memorandum dated 2 February 2021, the complainant was notified of the decision not to confirm his appointment and to terminate it at the end of his probationary period due to performance shortcomings. In response to this memorandum, the complainant raised concerns, in

an email of the same day, about the negative impact that the non-confirmation decision would have on his delicate legal situation as he was facing difficulties in renewing his passport due to COVID-19 restrictions. On 19 March 2021, the complainant submitted a request for reconsideration of this decision. Following the Secretary-General's decision to reject his request for reconsideration and to confirm the decision to terminate his appointment, the complainant lodged an appeal with the Appeal Board on 11 April 2021.

In its report dated 13 December 2021, the Appeal Board found, *inter alia*, that the performance management rules had been breached in the assessment of the complainant's performance and that the organization had failed to give him adequate guidance, support, feedback, sufficient time to enable him to improve his performance considering notably "the COVID-19 situation", and adequate warning. The Board also found that "[t]he acceleration of events since November 2020 could be interpreted as bad faith" and recommended that the Secretary-General reinstate the complainant in his previous position or any other suitable position within ITU or, alternatively, consider "appropriate means of compensation" for the complainant. By communication dated 24 February 2022, the complainant was informed of the Secretary-General's decision to reject the Board's recommendation and to dismiss the appeal in its entirety. That is the impugned decision.

The complainant requests the Tribunal to set aside the impugned decision, to reinstate him into his former position or in a P-3 level position acceptable to him and to pay him all salary, benefits, step increases, pension contributions, entitlements and any other emoluments he would have received had he not been separated from service from the date of his separation until the date of reinstatement. Alternatively, the complainant requests the Tribunal to grant him material damages equal to two years' salary at P-3 level, including benefits, step increases, pension contributions, entitlements and any other emoluments he would have received had he not been separated from service. The complainant asks the Tribunal to award him moral damages in the amount of 100,000 Swiss francs for the injury he suffered due to the flawed

decision and the organization's bad faith and breach of its duty of care, as well as costs. Lastly, he claims interest on all amounts awarded at the rate of 5 per cent per annum, as well as any other relief the Tribunal deems fair and necessary.

ITU requests the Tribunal to reject the complaint as unfounded.

### CONSIDERATIONS

1. The following discussion proceeds against the background already set out in the facts described above. In his first, second, and fourth plea, the complainant alleges that the Secretary-General, in the impugned decision, failed to provide clear and cogent reasons for rejecting the Appeal Board's unanimous recommendation to uphold the appeal, to the extent the Appeal Board held that:

- (i) ITU breached sections 7.1.1(a) and 7.3 of Service Order 18/06;
- (ii) ITU failed to provide the complainant with the necessary guidance, feedback, and timely identification of alleged unsatisfactory aspects of performance;
- (iii) ITU's actions "could be interpreted as bad faith".

In his third plea, the complainant alleges that the Secretary-General reached the mistaken conclusion that the Appeal Board did not mention that the complainant was on probation.

In his fifth plea, the complainant alleges that ITU breached its duty of care and caused him significant damages given his exceptional personal situation.

2. At the outset, the Tribunal recalls that Staff Rule 4.14.2 paragraph c) reads as follows:

"A fixed-term appointment is conditioned on a probationary period of a minimum of one year, counting towards the total duration of service under consecutive fixed-term appointments [...] A decision to terminate a fixed-term appointment at the end of the probationary period stipulated in the letter of appointment for reasons of unsatisfactory service is not considered as a termination within the meaning of the Staff Regulations."

The purpose of probation is to permit an organization to assess the probationer's suitability for a position, and, for that reason, the Tribunal has consistently recognized that a high degree of deference ought to be accorded to an organization's exercise of its discretion regarding decisions concerning probationary matters (see Judgments 4851, consideration 4, and 4450, consideration 3). This includes the confirmation of appointment, the extensions of a probationary term, and the identification of its own interests and requirements. Accordingly, it has been consistently stated that a discretionary decision of this nature will only be set aside if taken without authority or in breach of a rule of form or of procedure, or if based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority (see Judgment 4282, consideration 2). In Judgment 4212, the Tribunal also reaffirmed that "where the reason for refusal of confirmation is unsatisfactory performance, [it] will not replace the organisation's assessment with its own". It is also useful to reiterate an international organization's obligations regarding a staff member's probationary 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 organization with an opportunity to assess an individual's suitability for a position. In the course of making this assessment, an organization 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 (see Judgments 4851, consideration 4, and 4215, consideration 12). 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".

3. The Tribunal recalls that the executive head of an organization has an obligation to provide adequate reasons where it rejects the conclusions and recommendations of the appeal body. This

is to ensure that there will be no room for arbitrary, unprincipled, or even irrational, decision-making (see Judgments 4832, consideration 31, 4616, consideration 9, 4307, consideration 15, 3208, consideration 11, and 2699, consideration 24).

In the present case, the Appeal Board concluded as follows:

“a) On the breach of Service Order 18/06 on Performance Management and Development System [(PMDS)]

[...]

ii. There is a breach of Service Order 18/06 (section 7.1.1 a) concerning the deadline for the establishment of the workplan for a new staff who started in January while his workplan was established in July 2020.

iii. There is a breach of section 7.3 of Service Order 18/06 knowing that Supervisor A left without completing an e-PMDS report nor completing a performance evaluation memorandum.

[...]

c) On the lack of adequate guidance, support and feedback

[...]

i. There was a lack of adequate guidance.

ii. There was a lack of adequate support.

iii. There was a lack of adequate feedback.

iv. There was a lack of sufficient time to enable the appellant to improve his performance.

d) On the lack of adequate warning

[...]

i. From January 2020 to the end of August 2020 there was no warning at all.

ii. From September 2020 to 2 December 2020, there were some mentions of shortcomings but no mention about the appellant’s appointment termination.

iii. From 3 December 2020, a clear warning was given to the appellant. The panel concludes that the deadlines were short, due to the lack of time and support to be able to improve the quality of the paper.

e) On the lack of care and good faith

i. The panel concludes that the appellant had not been given sufficient time to improve the quality of the paper, considering the lack of guidance, support, feedback and the COVID-19 situation.

ii. The acceleration of events since November 2020 could be interpreted as bad faith.

[...]”

The impugned decision departed from the Appeal Board's opinion, providing the following reasons:

“The Appeal Board considered that there had been two breaches of certain formal requirements in Service Order 18/06 [...] and, on the substance, that [the complainant] had not been provided sufficient guidance and warning and time to improve the quality of [his] work.

Regarding guidance, it is unclear from the report on what grounds guidance/support was considered insufficient. Instead, it is on record that the manager who took over the Division — hence [the complainant's] supervision — on 1 September 2020 held meetings with [the complainant] for the specific purpose of prioritizing [the complainant's] objectives, as set out in [the complainant's] July 2020 workplan, and following up on progress made on 5 September, 20 September, 27 October, 5 November, 27 November, 3 December, 21 December 2020, while maintaining regular oral and email exchanges with [the complainant], including detailed feedback on various versions of draft documents. HRMD and [the complainant's] second reporting officer were included in the process, and the minutes reflect detailed indications about actions to be undertaken and aspects to be addressed by [the complainant].

As regards warning, the panel appears to give considerable weight to the fact that the memorandum of 3 December 2020 was the first time [the complainant was] informed in writing that continuation of unsatisfactory performance might lead to the end of employment, whereas the contested decision was arrived at in early February 2021. It would seem that the panel understands the duty to give a warning as a duty to point out to the concerned individual of the potential negative consequences that underperformance could entail for him/her personally. This is misconceived. Instead, the duty consists of making the person aware of the existence and seriousness of his/her performance shortcomings, so that s/he has a fair chance to improve his/her performance. The opposite would be tantamount to assuming that a staff member cannot be expected to make efforts to improve performance unless his/her personal interest is concretely compromised.

In the present case, not only [the complainant] had clearly been made aware of performance shortcomings well before 3 December 2020, but a process of regular follow-up had already been taking place for at least two months by then. In these circumstances, it is plain that, by the time the termination decision was made, in February 2021, [the complainant's] performance issues had been repeatedly pointed out to [him] over several months.

Last but not least, the report (in particular the 'Discussion') virtually does not mention that [the complainant was] under a probationary period, which tends to indicate that this very relevant element was not afforded appropriate weight. Notoriously, the very aim of the probationary period is to allow the

employer to assess the adequacy of the staff member for the position in question. It is fully envisageable, and consistent with the probationary period regime, that a staff member's appointment is not confirmed after 13 months of employment without delivering any final meaningful output."

The impugned decision concluded that the analysis relied on by the Appeal Board was "based on certain inaccuracies regarding important aspects of fact and law".

4. A comparison between the impugned decision and the opinion of the Appeal Board demonstrates that the Appeal Board found a breach of sections 7.1.1(a) and 7.3 of Service Order 18/06. It is useful to recall that section 7.1.1(a) sets forth, for staff members starting on new functions (including newly recruited staff) in January, February, and March, that they will have up to three months to prepare and follow up on the approval process of their workplan and that they will join the regular cycle – i.e., they will have their mid-term review in June-July and their evaluation in November-January. In the present case, the complainant was provided with the workplan only in July 2020 and, thus, the Appeal Board found that section 7.1.1(a) was breached and that the complainant was not granted enough time to improve. The Secretary-General stated, in this respect, that the breaches found by the Appeal Board concerned "certain formal requirements", but it did not explain why "formal requirements" could be disregarded and why their breach did not warrant the annulment of the flawed decision. On the contrary, it is firm case law that the principle of *tu patere legem quam ipse fecisti*, prohibits an organization from breaching the rules which it has itself established (see Judgments 4840, consideration 10, and 4796, consideration 10).

In its reply, the organization provides an explanation for the failure to comply with section 7.1.1(a) of Service Order 18/06. It submits that the failure to establish the complainant's workplan within three months, as from 6 January 2020 (i.e. by 6 April 2020), was due to transitory circumstances which concerned all staff. The Secretary-General had decided that the performance appraisal cycle would be shifted from the calendar year to May-to-May as of 2020. As a result, for the year 2020, the complainant's performance appraisal cycle was from 1 January

2020 to 31 May 2021. In ITU's view, in light of these new rules, the complainant's workplan was duly approved in July 2020, within the statutory time limit of three months as from the start of the new performance appraisal cycle.

Even if ITU's contention that the complainant's performance appraisal cycle ran from 1 January 2020 to 31 May 2021 were to be accepted, the organization's action would nonetheless be unlawful. There is evidence in the file that the complainant's workplan, approved in July 2020, was intended to cover the period 1 January 2020 to 31 May 2021. It included, among the work objectives, the one at stake in the present case concerning climate change. With regard to the work objective on climate change, the workplan indicated the "Start date" as 7 January 2020 and the "Target date" as 31 May 2021. Under the heading "Time needed for completion/deadline", the workplan added that this work objective should be achieved "Throughout the reporting period". Thus, if the new May-to-May cycle had to be applied to the complainant, the organization should have granted him time until 31 May 2021 to achieve this work objective, and it failed to do so. In addition, the workplan explained the "Resources required and foreseen constraints" for the work objective on climate change as follows: "Resources: Intern, Fund, External Expert. Foreseen constraints: [...] Lack of financial resources that might result delay in delivering the objective". It is undisputed between the parties that the complainant requested that his supervisors grant him an external expert and that the supervisors denied his request for lack of financial resources. But the workplan had indicated the external expert as a necessary resource and had established that the financial constraints would have justified a delay in the delivery of the objective. In light of these elements, the Appeal Board correctly found that the organization did not grant the complainant enough time to improve.

In this respect, not only did the Secretary-General fail to provide clear and cogent reasons for rejecting the conclusions and recommendations of the appeal body, but he also committed an error of law concerning the time granted to the complainant for improving his performance, having regard to the date in which the workplan was established.

5. The Secretary-General provided reasons for departing from the Appeal Board's opinion with regard to the failure to provide support, guidance, feedback and warning. However, these reasons did not consider the lack of guidance, support and feedback for the first eight months, from January to August 2020, and referred only to the period from September 2020. Thus, the Secretary-General failed in this respect to provide clear and cogent reasons for rejecting the Appeal Board's conclusions that the complainant was not given sufficient guidance and support, also considering the change of his supervisor and the work conditions due to the COVID-19 pandemic.

6. Considering that the impugned decision focused on guidance and support and warning as from September 2020 onwards and not also from January to August 2020, and that the workplan was approved in July 2020, ITU's conclusion that "after 13 months of employment" the complainant had not delivered "any final meaningful output" is not correct. In these circumstances, the Appeal Board's conclusion that "[t]he acceleration of events since November 2020 could be interpreted as bad faith" is not adequately refuted by the impugned decision.

7. The Secretary-General considered that the Appeal Board "virtually does not mention that [the complainant was] under a probationary period", and this fact, in his view, "tends to indicate that this very relevant element was not afforded appropriate weight" by the Appeal Board. But the subject matter of the appeal described by the complainant in his appeal, which plainly would have been known to the Appeal Board, was the non-confirmation of the complainant's appointment at the expiration of the probationary period. Indeed, the Appeal Board, when summarizing the positions of the parties, referred repeatedly in its report to the fact that the complainant was on probation. It was thus clear and uncontroverted that the complainant was on probation and there was no need for the Appeal Board to mention it expressly in the manner suggested by the Secretary-General.

8. Lastly, the Secretary-General concluded that the Appeal Board's analysis was "based on certain inaccuracies regarding important aspects of fact and law", but he did not specify which inaccuracies he had identified.

9. In conclusion, not only did the Secretary-General fail to provide clear and cogent reasons for departing from the Appeal Board's opinion, he also committed an error of law concerning the time granted to the complainant for improving his performance having regard to the date in which the workplan was established. Accordingly, the impugned decision, as well as the decision to terminate the complainant's employment at the end of the probationary period, are unlawful and they will be set aside. Concerning the complainant's claims for reinstatement or, in the alternative, the award of material damages, the Tribunal holds that reinstatement is not appropriate in light of the fact that he had been appointed for a two-year fixed-term contract as from 6 January 2020 and in light of the effluxion of time. The complainant lost a valuable opportunity to successfully conclude his probationary period and to remain in service until the expiry of his two-year fixed-term contract. As a result, he is entitled to an award of material damages which the Tribunal will assess taking into account the possibility that his employment might have been lawfully terminated at the end of his probationary period. The Tribunal finds it fair and just to award material damages in the sum of 50,000 Swiss francs.

10. The complainant is also entitled to moral damages. At the time of the termination of his contract, the complainant had serious difficulties in renewing his passport and flying back to his home country due to the constraints of both the COVID-19 pandemic and his personal situation. As a result, the moral injury suffered is adequately proven and it warrants an award of 20,000 Swiss francs.

11. The complainant is entitled to costs of the present complaint in the amount of 10,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision and the decision to terminate the complainant's fixed-term appointment are set aside.
2. ITU shall pay the complainant material damages in the sum of 50,000 Swiss francs.
3. The organization shall pay the complainant moral damages in the amount of 20,000 Swiss francs.
4. It shall also pay him costs in the amount of 10,000 Swiss francs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 21 October 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER