

L. R. (No. 2)

v.

GCF

140th Session

Judgment No. 5012

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr R. L. R. against the Green Climate Fund (GCF) on 25 September 2021, the GCF's reply of 28 February 2022, the complainant's rejoinder of 1 April 2022 and the GCF's surrejoinder of 27 July 2022;

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 contests the GCF's decision not to confirm him in his post and to terminate his appointment at the end of his extended probationary period.

The complainant joined the GCF on 1 May 2018 as an Evaluation Adviser, Corporate and Thematic Evaluations Work Stream, Independent Evaluation Unit (IEU). He was granted a three-year fixed-term appointment, with a probationary period of one year. Ms P., Head of the IEU, was his first-level supervisor.

On 3 October 2018, the IEU communicated to the Human Resources Department four global objectives for IEU staff which would be reflected in the Performance Management and Development System (PMDS) and to which IEU staff would then add "individual objectives".

In December 2018, the complainant inserted his objectives for 2018-2019 in the PMDS system for Ms P.'s approval. Following in-person meetings and several email exchanges with Ms P., the complainant revised his objectives, as per Ms P.'s feedback, while Ms P. provided him with a "mid-probationary period form that ha[d] been customised a bit" as a basis for him to lay out the performance improvement plan they had discussed. The complainant submitted a performance improvement plan, which was also revised as per Ms P.'s feedback, along with a Request for Approval of a Staff Development Initiative to enable him to undergo coaching.

On 8 May 2019, Ms P. forwarded to the complainant a Performance Enhancement Action Plan, informing him that she had prepared notes specifically identifying the areas in which it would be important for him to show enhanced performance over the next six months. She added that, while she had not attached specific measurable outputs with the Performance Enhancement Action Plan, she had alluded to them in the text, and she offered him the possibility to discuss "these specific verifiable outputs" should he wish to do so. The complainant responded on 23 May 2019 that he did not share Ms P.'s views, that her notes were unfair or incorrect, and that her assessment did not take account of his achievements.

Following further email exchanges in which Ms P. criticised the complainant's performance and behaviour, on 29 May 2019, she informed him that she would request an extension of his probationary period by six months to ensure the attainment of the objectives expected of him. The complainant responded on 15 June 2019 requesting that Ms P. reconsider the decision to extend his probationary period. On 12 July 2019, the complainant received an automated email informing him that his probationary period had been extended to 31 October 2019. Prior to that, on 23 July 2019 and while he was on sick leave, Ms P. forwarded to him a revised Performance Enhancement Action Plan and invited him to arrange a meeting to discuss his work objectives for the following months.

On 30 July 2019, the complainant wrote to the Executive Director requesting clarifications on the Administrative Review and Appeals Procedure, in particular to whom a staff member should direct a grievance review request when the decision-maker and immediate (first-level) supervisor was the Head of an Independent Unit, namely a Board-appointed official (such as the Head of the IEU), and there was no next-in-line (second-level) supervisor. On 2 August 2019, the Executive Director replied that, in such cases, an appeal could be filed directly with the Appeals Committee and the formal grievance review would be deemed to have been exhausted for the staff member concerned.

On 10 August 2019, the complainant filed an appeal with the Appeals Committee (registered as appeal AC/003/2019) contesting in the main Ms P.'s 12 July 2019 decision to extend his probationary period.

On 22 October 2019, Ms P. met with the complainant. Soon after, on 24 October 2019, Ms P. communicated to him the "End of Probation Period Performance Review" form and a memorandum of the same date, entitled "Notice of intention to not confirm appointment", by which she informed him that her overall assessment of his performance was that he did not meet the standard expected of a staff member at his level of seniority, and that she intended not to confirm his appointment and to proceed with its termination. Ms P. invited the complainant to provide his written comments, which he did on 31 October 2019.

On 1 November 2019, after a meeting with the complainant which was attended by Human Resources and staff representatives, Ms P. sent a letter to the complainant informing him of her decision not to confirm him in his position, to terminate his appointment with immediate effect, and to pay him compensation in lieu of notice. On 1 December 2019, the complainant filed a second appeal with the Appeals Committee (registered as appeal AC/005/2019), contesting (i) Ms P.'s 1 November 2019 decision not to confirm him in his post; and (ii) Ms P.'s decision of the same date to terminate his appointment with immediate effect.

On 3 December 2019, in response to the complainant's request for interim relief and protection from retaliation pending the resolution of his appeals, Ms P. informed him that his separation date had been postponed to 1 February 2020, as per the Independent Integrity Unit's request, and that he would be placed on administrative leave with pay during this period.

On 14 July 2020, the Office of the General Counsel provided a legal opinion, according to which the Administrative Instruction on the "Performance Management Development System" was not applicable to the staff of the Independent Units, including the IEU, while the Administrative Instruction on "Administrative Review and Appeals Procedure" was applicable to the staff of those units.

By a memorandum of 21 May 2021, the Appeals Committee submitted to the Executive Director its report on appeal AC/005/2019. The Appeals Committee found that the complainant had obtained partial satisfaction with regard to his request that Ms P.'s "assessment", third performance evaluation, and decision concerning his non-confirmation and the termination of his appointment be expunged from his record. The Appeals Committee also found that the Administration had breached Section F.I(3.4) and (7) of the Administrative Guidelines on Human Resources (HR Guidelines) by failing to give the complainant proper notice of termination of appointment, and that it had also breached its duty of care by failing to properly follow up with him thereafter. It unanimously recommended awarding the complainant one month's salary for the "initial immediacy of termination" of his appointment, as well as one month's salary for the additional pain, suffering, and loss of amenity as a consequence of work-related illness.

By a letter of 2 July 2021, the ad interim Head of the IEU (being the title ascribed to this office within the GCF) informed the complainant that he had decided to depart, to a limited extent, from the Appeals Committee's recommendation and to allow the appeal in part. Specifically, affirming his authority to make the final decision on the complainant's appeal, the ad interim Head acknowledged that the GCF had breached Section F.I(3.4) and (7) of the HR Guidelines and the complainant's right to a notice period, insofar as the 1 November 2019

letter terminated his appointment with immediate effect, and that it had also failed to strictly abide by its duty of care towards the complainant, owing to the delayed follow-up after the notification of the 1 November 2019 letter. For these breaches, the ad interim Head decided to award the complainant damages in an amount equivalent to one month's salary. He also acknowledged that the explicit warning provided to the complainant in the memorandum of 24 October 2019 was not notified in a timely fashion and, although the complainant was well aware that the confirmation of his appointment was in jeopardy, he was not provided with a formal written warning before the said memorandum. The ad interim Head considered that, while these two flaws affecting the lawfulness of the decision not to confirm the complainant's appointment did not warrant his reinstatement, they entitled him to moral damages in the amount of 3,000 United States dollars. The ad interim Head also decided that the complainant's performance evaluations conducted during his probationary period would be sealed from reference checks and would remain accessible within the GCF only to the Head of Human Resources. This is the impugned decision.

The complainant asks the Tribunal to set aside the decision not to confirm him in his post and to terminate his appointment, and to order that that decision, along with Ms P.'s "assessment" and third evaluation of his performance be expunged from his personnel file. He also asks the Tribunal to order the GCF to correct his personnel file and to properly acknowledge, recognise and give credit for his contribution to the IEU's and the GCF's work products (with corrigendum notices where these have been published outside the GCF), and to provide him with a reference in this regard. He claims material damages in an amount equivalent to twenty-one months' salary for the GCF's failure to allow him to complete his three-year contract and for the damage to his career progression and overall reputation. He also claims material damages for the loss of his children's education benefits and the opportunity for them to join the intended school as a consequence of the failure to confirm him in his post. He claims moral damages in an amount equivalent to six months' salary for the damage to his health as a consequence of work-related illness. He also claims 70,000 United States dollars in moral damages for the suffering caused to him by the

impugned decision and the process leading up to that decision; and 50,000 dollars for the pain and suffering he endured due to the unlawfully prolonged duration of the appeal process (nearly twenty months from the submission of his appeal on 1 December 2019 until the final decision on 2 July 2021). Lastly, he claims the legal fees he incurred for the internal appeal and the present complaint in the amount of 10,000 dollars, and such other relief the Tribunal may deem as being in the interest of justice.

The GCF asks the Tribunal to dismiss the complaint as partly irreceivable, partly moot, and unfounded in its entirety.

CONSIDERATIONS

1. In his internal appeal of 1 December 2019, which underlies this complaint, the complainant challenged the “Administrative Decision [...] (i) not [to] confirm [his] post (the ‘Non-Confirmation Decision’); and (ii) [to] terminate his employment with immediate effect (the ‘Termination Decision’, together, the ‘Impugned Decision’), made and communicated by Ms [P.] [...] on 1st November 2019”. At the material time, Ms P. was the complainant’s first-level supervisor and the Head of the IEU, in which he was employed. The complainant also requested “a hearing in [the] matter, as it [was] likely to encompass testimony from witnesses who [would] need to be heard in person”, as he considered the documents “insufficient to permit fair and just deliberation”, and it was necessary to ask Ms P. and relevant witnesses further questions and test their evidence. He also stated that he was willing to answer questions.

2. In the impugned decision, dated 2 July 2021, the ad interim Head of the IEU accepted the Appeals Committee’s finding that the Administration had breached Section F.I(3.4) and (7) of the HR Guidelines in that it had failed to give the complainant proper notice of termination of his appointment, and that it had also breached its duty of care by failing to properly follow up with the complainant after the notification of 1 November 2019. The Appeals Committee unanimously

recommended awarding the complainant one month's salary "due to the initial immediacy of termination" of his appointment. In addition to accepting these findings, the ad interim Head acknowledged that the explicit warning provided to the complainant in the memorandum of 24 October 2019 was not notified in a timely fashion. The ad interim Head also acknowledged that the complainant was not provided with a formal written warning before the 24 October 2019 memorandum and that, in the final decision on the internal appeal underlying his first complaint, he (the complainant) had not been provided with a workplan at the start of his probation period. The ad interim Head then added that "[w]hile these two flaws in the probation process ha[d] affected the lawfulness of the decision not to confirm [the complainant's] appointment upon completion of the probationary period, they [did] not warrant [his] reinstatement, given the shortfalls identified in [his] performance and conveyed to [him] through continuous feedback, and given that [he had] failed to improve [his] performance despite this feedback". The ad interim Head decided that these two flaws entitled the complainant to moral damages in the amount of 3,000 United States dollars. The ad interim Head also decided that the complainant's performance evaluations conducted during his probationary period would be sealed from reference checks and would remain accessible within the GCF only to the Head of Human Resources.

3. The Tribunal will address two preliminary issues. The first is the GCF's application for the joinder of this complaint with the complainant's first complaint. The application is rejected for the reasons stated in consideration 6 of Judgment 5011 on the complainant's first complaint, which is also delivered this day. The second issue is the GCF's application for the disclosure of certain annexes to the complaint, which the complainant submitted to the Tribunal under confidential cover. This application is rejected for the same reasons stated in consideration 7 of Judgment 5011 on the complainant's first complaint.

4. In seeking to set aside the impugned decision, the complainant requests the following orders in this complaint:

- (i) Set aside the decision not to confirm him in his post and to terminate his employment;
- (ii) Order that the contested and damaging comments in Ms P.'s "assessment" and decision concerning the non-confirmation and termination of his appointment, as well as the third evaluation be expunged from his record;
- (iii) Order that his record be corrected to properly acknowledge, recognise, and fairly attribute credit for his contribution to the IEU's work products and to the GCF (with corrigendum notices where these have been already published outside the IEU or the GCF);
- (iv) Order that he be provided with a reference that accurately recognises his contributions, rather than bearing the current inaccurate content authored by Ms P.;
- (v) Award him material damages in an amount equivalent to twenty-one months' salary for the GCF's failure to allow him to duly complete his contract and for the damage to his career progression and overall reputation;
- (vi) Award him compensation in an amount equivalent to six-months' salary for the damage to his health as a consequence of work-related illness;
- (vii) Award him compensation for the loss of his children's education benefits and the opportunity for them to join the intended school as a consequence of the failure to confirm him in his post (amount to be assessed by reference to such benefits for both school years);
- (viii) Award him 70,000 United States dollars in moral damages for the suffering caused to him by the impugned decision and the process that led to it;
- (ix) Award him 50,000 United States dollars in moral damages for the pain and suffering he endured due to the "unlawful prolonged duration of the appeal process from the submission of his appeal on 1 December 2019 and until the decision was issued on 2 July 2021, nearly twenty months later";

- (x) Reimburse him the legal fees he incurred for the preparation of the internal appeal and the present complaint in the amount of 10,000 United States dollars;
- (xi) Award him any other relief the Tribunal deems as being in the interest of justice.

5. The GCF contends, in effect, that some of these requests for relief are partly irreceivable or partly moot.

The Tribunal rejects the GCF's submission that the complainant's requests in consideration 4(ii) and 4(iii) above, pertaining to the complainant's record, are moot. In particular, its assertion that the ad interim Head of the IEU has already satisfied these claims with the impugned decision so that granting them would serve no additional practical purpose is misleading. The ad interim Head had therein only decided that the complainant's performance evaluations conducted during his probationary period "shall be sealed from reference checks and remain accessible within the GCF only to the Head of Human Resources".

The Tribunal also rejects the GCF's plea of irreceivability regarding the complainant's request in consideration 4(ii) above, namely for an order that the contested and damaging comments in Ms P.'s "assessment" concerning the non-confirmation and termination of his appointment, and the third evaluation be expunged from his record. This is a consequential order the Tribunal may make on this complaint if it determines that the impugned decision was unlawful. In that event, the Tribunal will also order that the GCF include a copy of this judgment in the complainant's personnel file.

The complainant's requests in consideration 4(iii) and 4(iv) above, respectively for an order that his record be corrected to properly acknowledge and fairly attribute credit for his overall contribution to the IEU's work, *et cetera*, and that he be provided with a reference that accurately recognises his contribution are irreceivable, as it is not within the Tribunal's competence to issue such orders.

The complainant's requests in consideration 4(v), 4(vi) and 4(vii) above, respectively seeking compensation for the GCF's failure to allow him to complete his contract, the damage to his health as a consequence of work-related illness, and the loss of his children's education benefits are receivable and will be dealt with on the merits.

The Tribunal rejects the GCF's submission that the complainant's requests in consideration 4(v) and 4(vii) above are irreceivable because they duplicate similar requests the complainant made in his first complaint. It is clear however that, insofar as his requests in consideration 4(v) and 4(vii) arise as direct consequences of the decision not to confirm the complainant in his post and to terminate his appointment, these claims are properly made in the context of the present complaint.

The complainant's allegations of harassment, retaliation and a toxic work environment are receivable, because it is clear that the complainant raises them merely as pleas to support his contention that the decision which he challenges in this complaint was unlawful, though ultimately it will be unnecessary to deal with these allegations.

6. The complainant proffers a number of pleas to support his contention that the decision he challenges is unlawful. He contends, in effect, that the impugned decision and the earlier decision not to confirm him in his post and to terminate his appointment were unlawful and should be set aside, because there was a series of failures and gross negligence in evaluating his performance and "massive irregularities in the internal grievance process".

7. To support this contention, the complainant submits that the initially challenged decision and the impugned decision are *ultra vires*, as they were respectively made by the former Head and the ad interim Head of the IEU, who did not have the authority to make them. He further submits that the impugned decision was predetermined; he was denied due process; his set work objectives were impossible to fulfil; he was progressively marginalised; and his observations were not taken into account. As well, he submits that he was not given a specific

warning that he could have been dismissed and the extension of his probationary period could not in itself be considered as a warning that his employment was at risk. He points out, additionally, that the final decision recognised that the 24 October 2019 warning was not notified in a timely fashion. He also submits, in effect, that the decision he challenged in his internal appeal was in itself unlawful because it was founded on the prior decision to extend his probation and to place him on a Performance Enhancement Action Plan; that the challenged decision was based on incorrect facts and bias; that the GCF acted in breach of its duty of care towards him; that the “immediacy” of the termination was procedurally irregular, retaliatory, and punitive in nature; that there were violations of confidentiality and interference with potential witnesses; that the internal appeal process was tainted by conflicts of interest and inordinate delays in issuing the Appeals Committee’s recommendations and the impugned decision, which were part of an ongoing toxic work environment and harassment.

8. Consideration 2 of this judgment shows that in the impugned decision, the ad interim Head of the IEU accepted the Appeals Committee’s conclusions regarding certain flaws in the initial decision of 1 November 2019 not to confirm the complainant in his post and to terminate his appointment. Notably, the complainant repeats some of these in his submissions notwithstanding that they had been acknowledged. However, when the ad interim Head decided to award the complainant damages for those flaws, he should also have set aside the 1 November 2019 decision, but did not. The Tribunal will therefore set aside the 1 November 2019 decision and it will also set aside the impugned decision to the extent that the ad interim Head failed to do so. The Tribunal finds that by failing to give the complainant adequate notice of its decision not to confirm him in his post and to terminate his appointment, and by failing to properly follow up afterwards, the GCF violated its own rules and its duty of care towards the complainant. This warrants the setting aside of the impugned decision as well, and it possibly warrants the award of compensation (see, for example, Judgments 3911, considerations 13 and 14, and 3224, considerations 9 and 10).

9. The complainant claims material damages for the GCF's failure to allow him to complete his contract and for the damage thereby caused to his career and reputation (consideration 4(v) above). The complainant also claims material damages for the loss of his children's educational benefits (consideration 4(vii) above). However, as it cannot be certain that but for the flaws in the challenged decision, the complainant would have completed his contract, his entitlement to material damages is to be assessed on the basis that the flaws denied him the valuable opportunity to have his appointment confirmed at the end of the probationary period. The Tribunal decides that the loss of opportunity will be fairly compensated by the award of 20,000 United States dollars, in addition to the compensation which the ad interim Head of the IEU awarded the complainant in the impugned decision.

10. Inasmuch as it cannot be ascertained that the complainant suffered damage to his health as a result of the decision to extend his probation, his claim for moral damages in this regard (consideration 4(vi) above) is rejected. He has failed to provide evidence to prove that there was a nexus between the decision not to confirm him and to terminate his appointment and the damage to his health he alleges.

11. Inasmuch as the complainant has not established to the Tribunal's satisfaction a causal link between the subject unlawful decision and the injury caused to him thereby (see, for example, Judgment 4867, consideration 6), the Tribunal will not determine whether he is entitled to moral damages on that basis.

12. Regarding his claim for moral damages for breach of his right to due process, the complainant stated, in his internal appeal, that the documents alone were insufficient to permit a fair hearing of his case. He requested the Appeals Committee to conduct an oral hearing to hear and test evidence from witnesses he wished to be heard, including himself, but the Appeals Committee refused this request. There is nothing in the Appeals Committee's report that indicates that it addressed the question of conducting an oral hearing.

13. The complainant states that an oral hearing before the Appeals Committee is guaranteed by section X(37) of the Administrative Instruction on Administrative Review and Appeals Procedures, which at the relevant time stated as follows:

“The Appeals Committee will, in addition to receiving written submissions, provide an oral hearing when considering an appeal, except in the following circumstances when consideration will be based solely on written submissions:

- (a) It appears that there is no substantial issue of fact;
- (b) The appeal is submitted by a staff member currently away from [the] Fund Headquarters. Oral hearings, in this case, will take place only in exceptional cases; and/or
- (c) The staff member who submitted the appeal failed to make himself available for an oral hearing.”

14. This provision essentially guarantees a staff member the right to an oral hearing unless an exception applies. The parties seem to agree that the possible operative exception is that contained in subsection X(37)(b). It is apparent that the exceptions in subsections X(37)(a) and X(37)(c) were inapplicable so as to detract from the complainant’s right to an oral hearing, because the case involved substantial issues of fact and the complainant was willing to make himself available for an oral hearing. The Tribunal accepts the complainant’s submission to the effect that the requirement for the application of the exception in subsection X(37)(b) to detract from his right to an oral hearing was not met because, but for the unlawful decision to terminate his appointment with immediate effect, he would have been at the GCF Headquarters at the material time. In these particular circumstances, this clearly constitutes an exceptional case, as provided for in section X(37)(b). The Tribunal, therefore, holds that by not conducting the oral hearing the complainant requested (and providing no reason for not doing so), the Appeals Committee violated the complainant’s right to due process, which entitles him to moral damages. For this, he will be awarded 6,000 United States dollars, in addition to the 3,000 dollars the ad interim Head of the IEU awarded him in the impugned decision.

15. The complainant's claim for moral damages for the delay in the internal appeals procedure is rejected, as he has not articulated the injury or adverse consequences which the delay had upon him, as the Tribunal's case law requires (see, for example, Judgment 4493, consideration 8).

16. The complainant's claim for the costs he incurred in the internal appeals procedure is rejected, as he does not show that there were exceptional circumstances that would attract such an order (see, for example, Judgments 4220, consideration 15, 4217, consideration 12, 4157, consideration 14, and 4156, consideration 9). However, as he succeeds in his claim to have the non-confirmatory and termination decisions set aside and the impugned decision to that extent, he will be awarded 10,000 United States dollars in costs in these proceedings.

DECISION

For the above reasons,

1. The initial decision of 1 November 2019 not to confirm the complainant in his position and to terminate his appointment is set aside, as is the impugned decision of 2 July 2021 to the extent stated in consideration 8 of this judgment.
2. The GCF shall pay the complainant material damages in an amount of 20,000 United States dollars, in addition to the compensation which the ad interim Head of the IEU awarded him in the impugned decision.
3. The GCF shall place a copy of this judgment in the complainant's personnel file.
4. The GCF shall expunge from the complainant's personnel file Ms P.'s "assessment" and decision concerning the non-confirmation and termination of his appointment, as well as the third performance evaluation.

5. The GCF shall pay the complainant moral damages in the amount of 6,000 United States dollars, in addition to the 3,000 dollars he was awarded in the impugned decision.
6. The GCF shall pay the complainant 10,000 United States dollars in costs.
7. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2025, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 3 July 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

RENÉ M. VARGAS M.