



ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 3 December 2014

JUDGEMENT IN CASE N° 77

XXX

v/ Secretary General

Translation (the French version constitutes the authentic text).

JUDGEMENT IN CASE No 77 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Friday 14 November 2014
at 14.30 p.m. in Château de la Muette,
2 rue André-Pascal in Paris

The Administrative Tribunal consisted of:

Mrs. Louise Otis, Chairman,
Mr. Luigi CONDORELLI,
and Mr. James R. Crawford,

with Mr. Nicolas FERRE and M. Jean LE COCGUIC providing Registry services.

The Tribunal heard:

Mrs. XXX, Counsel for the applicant

Mr. Nicola Bonucci, Head of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General.

It handed down the following decision:

Introduction

1. The applicant was a permanent official at the Organisation for Economic Co-operation and Development (hereafter referred to as the "Organisation") since 9 February 1987.
2. On 1 August 2013, the applicant was notified of the intention to terminate her appointment, and the decision was confirmed in writing on 1 October 2013 in a letter sent by the Head of Human Resources Management on behalf of the Secretary-General, after having consulted the Staff Review Board who confirmed that the procedure was in order.
3. In a letter dated 26 November 2013 addressed to the Secretary-General, the Applicant filed a preliminary request to withdraw the decision to terminate her appointment, alleging that this decision was unfounded.
4. On 20 December 2013, the Applicant was notified of the refusal of her preliminary request by the Executive Director on behalf of the Secretary-General.
5. Consequently, the Applicant appealed to the Administrative Tribunal of the OECD and submitted an application (No. 77) dated 17 March 2014, asking the Tribunal to accept her request and to declare it as well-founded, to request the Organisation to pay €500,000 as a compensation for professional and financial damages, €100,000 in compensation for moral

damage, €25,000, corresponding to the Applicant's full salaries that she should have perceived, €104,400 equivalent to the 10-month notice and €5,000 for the reimbursement of fees.

6. Two months before the hearing and within the case management, the Tribunal informed the Applicant's legal counsel that testimonial evidence is the first rule of evidence, especially in cases where credibility is a factor of assessment of dispute. The possibility of presenting evidence by affidavit or solemn affirmation was then discussed. The Applicant's counsel chose not to present any witnesses.
7. Before referring to the Tribunal, the Applicant did not request a hearing before the Joint Advisory Board, she has neither requested mediation nor assistance from the Staff Association. In addition, the Applicant neither appeared to the hearing of 14 November 2014, nor has she requested a postponement of the hearing. Finally, the Applicant's legal counsel presented no witnesses before the Tribunal. Consequently the file, as constituted by the Applicant, includes only documentary evidence.
8. The Tribunal requested the presence of the Applicant and of Mrs X. Only the latter came and testified before the Tribunal.

The facts

9. The Applicant's appointment was terminated for unsatisfactory performance, as documented in the performance evaluation of 2012 and the Performance Improvement Plan of 31 May 2013.¹ According to Article 11h), the Secretary-General exempted the Applicant from working during the termination notice period and paid her instead, emoluments and allowances corresponding to the notice period of 10 months.²
10. In 2008 and 2009, although the performance evaluation reports prepared by the former Head of the Interpretation Division, Mr. X, demonstrate satisfactory performance, we can note remarks regarding the Applicant's concentration and punctuality.
11. The uneven quality of the Applicant's performance was also raised in November 2010 and early 2011. The Applicant acknowledged that she experienced some difficulties to "do some effort".³
12. In the performance evaluation of 2011, "the work on consistency and reasoning while interpreting" has been identified as a priority for the Applicant given that "the interpretation of X lacks logical connections and requires extra effort in terms of concentration and coherence".⁴
13. To improve her performance, the Applicant agreed with her line managers X (Head of the Interpretation Division) and X, on accepting "an independent evaluation and proposed

¹ Annexes 12 and 30 of the Application. .

² Annex 4 of the Application.

³ Annex 3 of the Comments in reply.

⁴ *Ibid.* Annex 4, page 2.

practicing with her colleagues and having their feedback".⁵ In addition, several measures were implemented in 2011 – "quality control, training sessions, including with supervisors, and assessment sheets".⁶

14. The end of year evaluation of 2011 notes that "... she often lacks concentration, thus her interpretation is compromised by that – lacking connection of ideas and logical sequence. [...] The overall quality of her services is often unsatisfactory, despite an improvement noted in October."⁷
15. This evaluation was completed electronically on 4 May 2012 bearing the mention: "fully meets requirements." On 10 May, an amendment was made by the Administration stating: "requires improvement".
16. The Applicant expressed her opposition to this modification, alleging harassment and fraudulent tactics.⁸
17. In 2012 the Applicant was informed that her performance was still unsatisfactory. On 12 September 2012, the Head of Human Resources Management (HRM) notified her of a Performance Improvement Plan (PIP), in accordance with the procedure stated in Annex XXVI of the Staff Regulations.⁹
18. The PIP was for a period of six months, from 15 September 2012, to 15 March 2013 and aimed to:

« Enable X to develop consistency and reliability in providing an interpretation service commensurate with the expectations of the Organisation, i.e. accurate rendition using correct terminology and this at all times. Careful preparation of meetings with a view to understanding subject matter and discuss issues at stake ».¹⁰
19. During the PIP period, the Applicant had to skip work three times, from 22 September to 6 November 2012, from 4 January to 11 January 2013 and from 5 April until the termination of her appointment on 1 August 2013¹¹, due to illness (anxiety and depression), as noted by the treating physician.¹²
20. Because of her absence, the Administration postponed (not extended for repoussé) the PIP period twice, and finally decided to terminate it on 5 May 2013, about three months before the end of the 6-month period. At that time, the Applicant was on sick leave. The PIP final report was sent to her on 3 June 2013.¹³

⁵ *Ibid*, Annex 3.

⁶ *Ibid*. Annex 4, page 5.

⁷ *Ibid*.

⁸ Annex 19 b), 19 a) of the Application. .

⁹ Annex 17 of the Application. .

¹⁰ Annex 17, page 4 of the Application. .

¹¹ Comments in rejoinder, page 2.

¹² Annex 16 of the Application.

¹³ Annex 30 of the Application.

21. During the PIP period, the Applicant attended five monthly meetings with her line managers and an HRM representative (on 12 November and 18 December 2012 and 25 January, 25 February, and 4 April 2013) which aimed at evaluating her performance progress in comparison to the defined objectives.¹⁴

22. The report of the last meeting held on 25 February 2013, revealed the persistence of problems related to the reliability of the interpretation "... interpretation into English was not at the required professional level...interpretation into French was variable in quality and therefore her performance was not sufficiently reliable ».¹⁵

23. It was then agreed to consult external independent interpreters that would evaluate the work of the Applicant. The two experts, one of whom is the Director of the interpretation section at the *École Supérieure d'interprétation et de traduction (ESIT)*, attended different interpretation sessions delivered by the Applicant, without knowing the identity of the person evaluated. Both reports conclude that the interpretation is poor and unprofessional.

24. The recommendations in the PIP final report were as follows:

« CSL and HRM have reviewed the PIP set up for X and have concluded that her performance remains unsatisfactory. Ms. X has not delivered accurate, reliable interpretation into French or into English. Her interpretation is often misleading, confusing and imprecise. The independent examiners consulted judged her work as not being of a professional standard. In conclusion, she has not met the objectives set out in the PIP. The Director therefore intends to recommend termination of her appointment ».¹⁶

25. The performance evaluation report for the period of January to December 2012 also concludes "unsatisfactory performance". More precisely, the report states the following:

"The objective for the German language seems to be reached. ... X is now very punctual. She prepares for the meetings especially the terminology part. She is more attentive during meetings. Following several evaluations conducted earlier this year, a personal improvement plan was conducted in order to support her efforts in improving accuracy, concentration and comprehension [of the message]. The evaluation carried out during the training sessions led us to ask X to interpret only into French for the time being. The quality of her interpretation into English was deemed insufficient.

...

Her concentration is sometimes acceptable, but is not reliable and varies over time. The interpretation into English is insufficient".¹⁷

¹⁴ *Ibid.*

¹⁵ *Ibid*

¹⁶ Annex 30, page 6 of the Application.

¹⁷ Annex 12 of the Application, pages 2 et 3.

Law

On the performance evaluation process

Performance evaluation of 2011

26. No evidence was brought forward by the Applicant to support the allegation of impropriety since the Administration has rectified the final mention of her evaluation of 2011 a few days later (see paragraph 15). The letter of 6 July 2012 addressed by Mr. X (CSL) states "As I informed you during our meeting on 9 May, the mention "fully meets requirements" was written by error and was then corrected because "your performance evaluation for 2011 could not have been superior to *"requires improvement"* (in italic in the text).¹⁸
27. The file shows that several measures were agreed upon and implemented, in agreement with the Applicant, during the year 2011 to improve her performance, primarily in terms of consistency of the interpretation and concentration - (quality control, trainings sessions with supervisors and assessment sheets).¹⁹
28. The file reveals that regular evaluations were conducted for all interpreters of the Division during the first part of 2011, even before the appointment of Ms. X as Head of the Interpretation Division. The uneven quality of the Applicant's performance was noted during these evaluations. The evidence in the file shows that the Applicant's shortcomings have been communicated to her in person²⁰ and in writing since the mid-term report of 2011.²¹ The Tribunal also notes that concentration problems were also identified by her former superior, Mr. X in the Evaluation Reports of 2008 and 2009.²² Despite the Applicant's efforts, her performance was found insufficient and the last evaluation was estimated as "requires improvement".
29. Consequently, the Tribunal cannot conclude the existence of fraudulent manipulation or intention of harassment based on the modification of the electronic form of the evaluation, which only aimed at correcting a simple mistake.
30. In the absence of contrary evidence produced before the Tribunal, it is not up to the Tribunal to question the Administration's evaluation of the Applicant's work. According to the jurisprudence of International Tribunals, "merit evaluation of an official during a specific period involves value judgment, which requires the Tribunal to recognize the discretionary power of the responsible bodies for conducting such an evaluation".²³ Thus, "[if] the Applicant submits that, contrary to her line managers' assessment, her performance was satisfactory, the judge's decision whether the Applicant's performance was satisfactory or

¹⁸ Annex 18 of the Application.

¹⁹ Annex 1 of the Comments in reply, page 5.

²⁰ Annex 3 of the Comments in reply.

²¹ Annex 1 of the Comments in reply, page 2.

²² Annex 1 of the Comments in reply, page 1- 3 . In the 2008 report, we read: « [w]e have on occasion discussed a tendency to distraction while working which she must (sic) continue to fight against .» The 2009 evaluation report states « X does occasionally need to work on punctuality (efforts already made and appreciated, but more of the same please) and on a slight tendency to distraction in the booth.

²³ ILOAT Judgment 3268 (2014), Applicant 9.

not, can be reduced to manifest error, because it is not up to the Tribunal to substitute the Administration's judgment".²⁴

31. Given the above information, the Tribunal concludes that the Administration has acted according to the rules and regulations while applying the performance evaluation in 2011. In addition, we note that the Applicant did not formally contest the global evaluation of 2011, according to the procedure figuring in Annex XXVI of the Staff Regulations.²⁵

Performance evaluation of 2012 and the Performance Improvement Plan

32. The Tribunal notes that the insufficient performance recorded in 2011 was repeated beginning of 2012, as mentioned in the evaluation report. The Administration's decision to impose a PIP of six months was therefore founded and applied according to Article 29 of Annex XXVI of the Regulations, which states:

"29. A Performance Improvement Plan (PIP) shall be implemented for a period of three to six months if, at the end of the performance management cycle, the performance of an official is rated as «Unsatisfactory performance» by his Director and consequently a termination of appointment is envisaged. Furthermore, when, during the performance management cycle, the Director considers that the performance of an official risks being judged unsatisfactory at the end of the annual cycle unless substantial improvement is made, he may implement a PIP using the same procedures."²⁶

Annex XXVI of the Regulations also explains the procedure to follow while implementing a PIP:

"30. When a decision to implement a PIP is taken, the official shall be immediately informed in writing by his manager who shall indicate the areas in which the official's performance must be improved. The manager and the official concerned shall together consider the means which can be implemented to help the official improve his performance. The PIP form shall be signed by the Director, the manager of the official, the official concerned and a representative of the Human Resource Management Service and the official shall receive a copy of this form. The official shall also be informed that failure to improve his performance with respect to the objectives set in the PIP may result in a recommendation being made to the Secretary-General that his appointment be terminated pursuant to Regulation 11a) i) of the Staff Regulations."

"31. During the PIP, the manager or Director of the official shall meet with the official on a monthly basis to take stock of progress. The manager or Director of the official shall make written comments on these meetings on the PIP form, as may the official."

33. During the PIP, the Applicant attended five monthly meetings with her line managers. The PIP report mentions in detail, the different measures adopted and the follow up made to observe and evaluate the Applicant's progress during this period.²⁷ The Tribunal also notes that in addition to the internal follow-up, the Applicant's interpretation was evaluated by

²⁴ UNDT Judgment 013 (2011), Applicant 53.

²⁵ para. 11 and following.

²⁶ Annex XXVI of the Regulations, article 30.

²⁷ Annex 30 of the Application.

two external experts. The reports of both experts show that the Applicant's interpretation was unsatisfactory. They concluded that the "interpretation was often incoherent, therefore the understanding was difficult, or even impossible for the listeners. The work presented by the interpreter was not professional".²⁸

34. Despite several improvements noted in the PIP, the overall conclusion was : "performance remains unsatisfactory. Ms. X has not delivered accurate, reliable interpretation into French or into English. Her interpretation is often misleading, confusing and imprecise"²⁹. The performance evaluation of 2012 was "unsatisfactory". According to the Regulations, "such an evaluation can be attributed when an official has not accomplished most of the set priority objectives and has not taken the necessary measures to accomplish the other objectives".³⁰
35. The Applicant also claims that several training sessions and evaluations were conducted in an abusive manner in order to destabilise her and eject her from her position.
36. As underlined by the ILOAT in a recent affair, "determining whether the case is a matter of harassment or not can be done by carefully examining all the objective circumstances of the denounced conduct... the Tribunal's jurisprudence has always recognized that the allegation of harassment must be supported by presenting specific facts and evidence by the official who claims to have suffered."³¹
37. The Tribunal notes that a language stay in an Anglophone country was agreed upon with the Applicant since her interpretation into English was judged unsatisfactory. As mentioned in the PIP, "X agreed that this would be helpful, but could only be away for a week. ... It was agreed that they would work together to find a suitable opportunity"³². We also remark: « [a]dvice was given about English language enhancement. X has sent X an article containing specific tips and guidance on the subject. She urged X to work regularly, organizing either short daily self-training sessions or longer sessions three times a week ». ³³
38. The Tribunal has required the presence of X who testified on the basic facts in dispute including the allegations of harassment. Her testimony, which was not challenged by the Applicant who has chosen not to attend, convinced the Tribunal that the harassment allegation was unfounded.

On the procedure of appointment termination

39. Concerning the PIP, the Tribunal points out that it should be applied for a fixed period of six months, as of 15 September 2012, as mentioned in the memorandum sent by Mrs. X, Head of the Human Resources Management Service³⁴, to the Applicant. Even if Article 29 of Annex XXVI of the Regulations stipulates that the PIP can be conducted for a period of three to six months, it is important to note, in this case, that the Administration expressly decided that

²⁸ Annexes 8 and 9 of the Comments in reply.

²⁹ Annex 30 of the Application. .

³⁰ Annex XXVI, para. 16.

³¹ ILOAT Judgment 3233 (2013), Applicant 6.

³² Annex 30 of the Application, page 3.

³³ Annex 30 of the Application, page 3.

³⁴ Annex 17 of the Application.

the duration of the PIP imposed upon the Applicant would be of 6 months. The Tribunal decided that this period constitutes six months of actual service, without including periods of sick leave. The Applicant was therefore entitled to an actual period of six months in order to prove that she was able to keep her job.

40. The Organisation has decided to terminate the appointment while the PIP, which was convened for a period of 6 months, had not been completed since the Applicant had an authorized sick leave and none of her medical certificates were contested by the employer. That being said, it was concluded that the termination was premature and, therefore, erratic.

41. However, if this irregularity may give rise to compensation, it cannot, in this case justify the cancellation of termination. Given the preponderance of evidence, it is reasonable to assume that even if she had completed the PIP, the Applicant would have not been able to reach satisfactory performance. The unsatisfactory performance of the Applicant persisted since 2011 and the monthly evaluations that took place during the first three months of the PIP did not demonstrate significant progress. Finally, the evaluations of the two independent experts, in March 2013, concluded a non-professional interpretation in terms of quality.

42. The Applicant also claims that she should have been assigned to another position. Given her seniority and her loyal service at the Organisation from 1987 to 2010, it would have been expected to assign the Applicant to a different position in the Organisation. However, her file, once more, is weak. The Applicant chose - through her legal counsel - not to seek the assistance of her Association, not to present any evidence, not to attend the hearing and not to ask for compensation (despite the offer which was presented in this sense). It is therefore impossible for the Tribunal to rule on this ground which is not documented by legally admissible evidence. It is not the written or oral submissions of the lawyers that form the substance of the Tribunal's judgments but rather, the evidence adduced by the parties either through testimonies, solemn declaration, affidavit, or ultimately, by documentary uncontradicted or uncorroborated evidence. The file submitted by the Applicant was very weak. The Tribunal can compromise the stability of law in ruling based on insufficient evidence.

43. Consequently, the Tribunal concludes that the Applicant should have benefited from three additional months of salary, since the Administration was engaged in the PIP. Given the unclear circumstances of the case, the Tribunal limits the legal expenses to €1,000.

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Conclusion

Confirms the decision to terminate the appointment.

Welcomes partially the claim of compensation and requests the Organisation to pay the Applicant three (3) months of salary and € 1,000 for legal expenses.

Louise Otis
Chairman

Nicolas Ferré
Registrar