

The Administrative Tribunal,

Considering the complaint filed by Mr R. K. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 4 November 2004 and corrected on 3 December 2004, the Commission's reply of 28 January 2005, the complainant's rejoinder of 1 March, and the Commission's surrejoinder of 11 April 2005;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a national of Egypt, was born in 1942. He joined the Preparatory Commission on 28 October 1997 under a three-year fixed-term contract as Director of the International Data Centre (IDC) Division in the Provisional Technical Secretariat, at grade D.1. His contract was extended twice, each time for a two-year period. It was due to expire on 27 October 2004. The complainant attained the age of 62 on 15 April 2004.

The Preparatory Commission issued Administrative Directive No. 20 (Rev.2) on 8 July 1999. Revision 2 embodied a policy, first introduced in May 1999, whereby staff members appointed to the Professional and higher categories and internationally recruited staff should not, except in certain limited exceptions, remain in service for more than seven years.

In February 2003 the Executive Secretary made it known that he intended to replace three Directors, including the complainant. Recommendations regarding the filling of the posts were made to the Preparatory Commission in two Notes by the Executive Secretary dated 28 October 2003. The second of these indicated that the three directors would "reach the seven year service limit during 2004". On 24 December 2003 the complainant's successor accepted the offer of appointment made to him.

In Judgment 2315, delivered on 4 February 2004, the Tribunal ruled on a case filed by another CTBTO PrepCom staff member. That case concerned the seven year policy embodied in Administrative Directive 20 (Rev.2). The Tribunal found that the policy was not applicable to a staff member until it had been incorporated into a contract of employment as a term or condition. On 6 February the Administration issued a Personnel Bulletin on the subject of Judgment 2315. It stated that as a result of that judgment the Executive Secretary would make "new decisions" in cases where staff had been informed that their contracts would not be extended because of the seven-year service limit. The decisions would be made according to the rules on extension of fixed-term contracts contained in Administrative Directive 20 (Rev.2) but would disregard the seven year provision.

At the complainant's request, on 20 February 2004 the Executive Secretary sent him a formal notification of non-renewal, stating that he would let the complainant's contract expire on 27 October 2004. He said that his decision not to extend the complainant's contract was "based on the age limit [of 62 years] in Staff Regulation 9.5", adding that he had found no grounds to extend the age limit in the complainant's case.

The complainant wrote back to the Executive Secretary on 3 March requesting a review of that decision. The Executive Secretary confirmed his decision by a letter of 8 March 2004.

On 6 April the complainant filed an internal appeal against the decision not to extend his contract. The Joint Appeals Panel issued its report on 10 September 2004. It concluded that the decision was "tainted by a material error of law" and recommended paying the complainant compensation for moral injury. On the basis of his record of service, it recommended that he be paid an amount equivalent to three months' salary and allowances. By a letter of 24 September 2004, which constitutes the impugned decision, the Executive Secretary told the complainant that he did not agree with the reasoning that had led the Panel to recommend that payment, and he reaffirmed his

decision not to extend the complainant's contract. He said that he was nonetheless willing to accommodate an amicable solution and was accordingly willing to offer him the salary payment, as recommended by the Joint Appeals Panel.

The complainant replied, requesting a one-year consultancy contract in addition to payment of compensation. The Executive Secretary said he would consider the consultancy, on normal consultancy conditions, but wished to put the matter to the Preparatory Commission at its next session. The complainant then filed his complaint with the Tribunal.

B. The complainant primarily queries the basis for the decision not to extend his contract. Basing his view on the findings of the Joint Appeals Panel, he asserts that while the Executive Secretary cited the age limit of 62 as the reason for non-renewal, there was evidence to show that his decision was in part based on the seven-year service limit. He argues that this amounts to an error of law, justifying the setting aside of the impugned decision.

He also alleges discriminatory treatment. In the Personnel Bulletin issued on 6 February 2004 subsequent to the handing down of Judgment 2315, the Administration stated that "new decisions" would be taken for affected staff members in respect of their contracts without regard to the seven year provision. In his case, however, the Administration did not take a new decision, and he was thus treated in a discriminatory manner. His professional dignity was impaired by such discrimination. The Organization thus failed in its duty to respect his dignity and good name.

He adds that the rule regarding the retirement age is not mandatory and extensions beyond retirement age have been offered in the past. Indeed, his last contract extended six months beyond the official retirement age. The Administration failed to consider whether in his case it was in the Organization's interests to make an exception to the age limit in Regulation 9.5. Because of that he missed a valuable opportunity to have his contract extended for another two-year period.

The complainant seeks the quashing of the impugned decision; material damages, in lieu of reinstatement, in an amount equivalent to two years' salary, allowances and entitlements; moral damages in the amount of 50,000 euros; and costs in the amount of 10,000 euros.

C. In its reply the Commission contends that the complaint is devoid of merit. It considers that the decision not to renew the complainant's appointment was validly taken. It finds the allegation of error of law incongruous, particularly as the Executive Secretary's formal decision was notified to the complainant only after the publication of Judgment 2315 and made no reference to the seven-year limitation on service. The decision was based on the age limit of 62 and was made without regard for the seven-year service limit, which had been declared inapplicable by the Tribunal in Judgment 2315 to contracts of employment in which it had not been incorporated as a term or condition. It constituted a new decision regarding the complainant's case, and it took into account the Tribunal's ruling in that judgment. It had regard for the terms and conditions of his appointment, as well as the applicable Staff Regulations and Rules, and Administrative Directives. Confusion arose because in 2003 the complainant was fully aware of the decision to replace him and might have had the impression that it was motivated by the seven-year service limit. Moreover, the complainant had a fixed-term appointment which conferred no automatic right of renewal.

The Commission claims that there are no grounds for awarding the complainant material or moral damages. He had exceeded the age limit for employment with the Commission and had no entitlement to a further extension of his contract. Any decision to make an exception to the age limit is a discretionary one, and in the absence of any operational reasons, the Executive Secretary decided not to make an exception in the complainant's case. The Commission states that the complainant was treated at all times with due respect, and it rejects his allegation of discriminatory treatment.

Furthermore, it contends that the complainant is estopped from making claims to damages. He was kept fully abreast of the steps taken to find his successor in 2003 and gave his agreement to the course of action taken by the Executive Secretary at that time. It was not until March 2004 that he raised objections concerning the non-renewal of his contract.

D. In his rejoinder the complainant maintains his claims and develops his pleas. He notes that the Commission does not deny that in 2003 the seven year policy was a factor in the decision not to extend his contract.

Contrary to the defendant's arguments, the complainant contends that he is not estopped from asserting his claims. He reiterates that he suffered discriminatory treatment. The only reason that had been given in 2003 for replacing him was the seven year policy. By virtue of his duty of good faith and loyalty to the Organization it was incumbent upon him to support the Organization's policies, even those that adversely affected his interests. He could not therefore have lodged an objection to the selection process put in place to choose his successor. Had he known at the time that the real reason for non-renewal was the retirement age, he would have been in a position to register an objection, because the policy regarding the age limit allows for exceptions to be made.

E. In its surrejoinder the Commission presses its pleas. It reiterates that after Judgment 2315 was published the Executive Secretary reconsidered the decision made in 2003 not to extend the complainant's contract, and his new decision ignored the seven-year rule. It was taken on the basis of the age limit for service with the Commission. In that connection, the complainant has not substantiated on what grounds he might have qualified for an exception to the age limit.

## CONSIDERATIONS

1. The complainant joined the staff of CTBTO PrepCom's Provisional Technical Secretariat in October 1997 under a three-year fixed-term contract as Director of the International Data Centre (IDC) Division. His contract was extended twice – each time for a period of two years – the most recent extension expiring on 27 October 2004.

2. The Preparatory Commission issued tenure provisions in Administrative Directive No. 20 (Rev.2) on 8 July 1999 setting forth a seven-year service limit for all staff in the Professional and higher categories. In mid-2003, a staff member (not the complainant) lodged an appeal with the Tribunal against the decision not to renew his contract based on the tenure policy.

3. On 24 February 2003 the Executive Secretary reported that the Administration intended to replace three Directors, including the complainant, who would reach the seven-year service limit in 2004. Based on the seven year policy, on 28 October 2003 the Executive Secretary recommended the appointment of the candidate who had been selected to replace the complainant; subject to the Commission's approval he would be appointed as of 1 November 2004.

4. On 4 February 2004 the Tribunal delivered Judgment 2315, holding that the seven year policy contained in Administrative Directive No. 20 (Rev.2) could not be applied until such time as it had been incorporated as a term or condition of appointment (which it was not for the complainant in that case). The Tribunal also directed that the Administration take a new decision without regard to the seven year policy.

5. On 6 February 2004 the Administration issued a Personnel Bulletin on the subject of the seven year policy and Judgment 2315. The bulletin stated in part that:

“As a result of the judgment the Executive Secretary will make new decisions in cases where staff members have been notified that their appointments would not be extended because of the seven year service limit in the Directive. In accordance with the judgment such decisions will be made pursuant to the rules on extension of fixed-term contracts in Administrative Directive 20 (Rev.2) but disregarding the seven year provisions.”

6. Following the Tribunal's ruling, on 20 February 2004 the complainant was notified of the “new decision” in his case. He was informed that the decision not to renew his contract was based on the age limit in Staff Regulation 9.5. That regulation provides for normal retirement at age 62 but does not exclude the possibility of contract extensions beyond that age.

7. The complainant appealed the decision through the defendant's internal mechanisms, and the Joint Appeals Panel found that the seven-year rule was a consideration in the “new decision”. The Panel recommended that the complainant be paid a sum equivalent to three months' salary and allowances (or approximately 30,000 euros), based on his most recent salary, as “compensation for the moral injury he has suffered as a consequence of the illegality tainting the decision not to extend his contract, the failure of the Administration to correct that illegality when it had the chance and the discriminatory treatment to which he has accordingly been subject”.

8. On 24 September 2004 the Executive Secretary advised the complainant that he could not agree with the

reasoning of the Joint Appeals Panel, reaffirmed his decision not to extend his appointment, and rejected the finding that the complainant's dignity had been impaired. However, in the letter, the Executive Secretary also offered three months' salary and allowances as a final settlement of the issue. That is the impugned decision.

9. The principal question for consideration is whether, as argued by the Preparatory Commission, the decision of 20 February 2004 not to renew the complainant's contract was based on Staff Regulation 9.5 and was truly a new decision or whether, as submitted by the complainant, it was merely an attempt by the Commission to take the easy way out of a complicated situation by finding a new justification for a decision which had already been made and partially executed.

10. It will be recalled that the Administration initially had decided to replace the complainant and not renew his contract, based on the seven-year service limit, enacted in 1999. The complainant had been in his position since 1997. The Commission announced the appointment of the complainant's successor in November 2003. In the result, the complainant's replacement had already been appointed prior to the Tribunal's ruling in Judgment 2315. It was as a consequence of that judgment that the Administration decided to come to a new decision regarding the complainant's contract renewal. The first step, which was duly taken, was to revoke or set aside the original decision not to grant him an extension and this was in effect done by the Personnel Bulletin of 6 February 2004. That left the Commission in a dilemma, however. If the complainant was to be reinstated in his former position it would have to breach the contract which it had just concluded with the new appointee. Presumably, the Administration was relying on a favourable judgment from the Tribunal, to avoid being put in the position of having two Directors in the same post at the same time. After the negative decision in Judgment 2315, the Commission could not rely on the seven-year limit, which meant that the complainant was still eligible for a renewal of his position as Director even though the Commission had already acted in such a way as to make it impossible for it to extend his contract.

11. The Commission acted as though it had two options at this point: first, to deal openly and in good faith with the complainant and attempt to negotiate/mitigate his damages and do likewise with his successor; second, to come to the same conclusion by different means, thereby avoiding any payment of damages. In fact, the Commission did not have such a choice: only the first of those courses was consistent with its obligation to deal with all its staff members fairly, honestly and in good faith. It had through its actions placed itself in a position of owing conflicting obligations to two staff members, the complainant and his successor, and it was not open to it to favour only the latter at the expense of the former. As was found by the Joint Appeals Panel, by acting as it did, the Commission failed to respect the complainant's dignity and discriminated against him.

12. The Panel also made a finding that the Executive Secretary's decision of 20 February 2004 was not a new decision, but was merely a method of reaching the same result (the replacement of the complainant) through different means. Given that the initial decision to replace him had already been partially implemented, that was a finding that was clearly open to it on the evidence and there is no proper basis on which the Tribunal could interfere with it.

13. The Commission also argues, however, that the fact that the complainant was going to reach normal retirement age in early 2004 and that Staff Regulation 9.5 would apply to him were already considerations in the original decision to replace him. The materials simply do not bear out this contention. The only evidence provided of the Commission's reasoning prior to Judgment 2315, consists of the two Notes by the Executive Secretary, of 28 October 2003. In one of these the Executive Secretary speaks of the fact that three directors "will reach the seven year service limit during 2004" and goes on to say that he is proposing to replace two of them, including the complainant.

14. In the other, the Executive Secretary recommended the appointment of two new Directors, one of them to replace the complainant, and proposed making an exception to the seven-year service limit for the remaining Director. There is no mention of the ages of any of the persons concerned.

15. It is clear from the foregoing that the only consideration underlying the original decision not to extend the complainant's contract was the seven-year service limit. Regulation 9.5, regarding the age limit, is not expressly or impliedly mentioned in either document and was not a consideration in the decision.

16. The Commission also argues that the complainant is estopped from pursuing this matter because he did not object immediately in 2003 when he first learned that it was intended not to reappoint him and to appoint another

person to take his place. This is not, and indeed could not be, an argument about receivability; whether or not the complainant could have contested the 2003 decision, it is clear that he did not do so and that that decision was rescinded by the Commission itself on 6 February 2004, following the Tribunal's ruling in Judgment 2315. Rather, the Commission seems to be suggesting that the complainant ought to have protested and raised objections, instead of collaborating with his employer as he did when the latter set about finding his replacement. The argument is without merit. The complainant owed a continuing duty of loyalty to his employer and it ill becomes the latter to argue now that he should have in some way attempted to sabotage its announced intentions. Furthermore, it was known that the complaint leading to Judgment 2315 was a "test case" for similarly situated employees, including the complainant, and if the Commission chose to forge ahead on the reckless assumption that it was sure to win its case there was nothing he should or could have done to stop it.

17. The complaint must be allowed and the impugned decision must be set aside. It remains, however, that the complainant had already passed normal retirement age at the time his appointment came to an end and the Tribunal considers that it would be reasonable to fix his material damages, for the loss of a valuable opportunity to be considered for an extension of his contract, at the amount that he would have received in salary and other benefits for an additional six months, with the usual proviso that he must account for any net earnings from other employment during that period. He is also entitled to receive moral damages, which the Tribunal fixes at 10,000 euros, and costs of 5,000 euros.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Commission shall pay the complainant his full salary and benefits for a period of six months net of any other earnings.
3. It shall also pay him moral damages of 10,000 euros and costs of 5,000 euros.

In witness of this judgment, adopted on 3 November 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet