

The Administrative Tribunal,

Considering the complaint filed by Mr M. S. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 28 June 2007, the Commission's reply of 7 September, the complainant's rejoinder of 15 October and the Commission's surrejoinder of 21 November 2007;

Considering the applications to intervene filed by Mr F.J. F. and Ms T.K. N.-F. on 25 October 2007, by Mr M.P. C. on 19 November 2007, by Mr T.L. H. on 15 January 2008 and the Commission's observations thereon of 4 December 2007 and 8 February 2008;

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 is a Slovak national born in 1949. He joined the Provisional Technical Secretariat of the Preparatory Commission on 30 September 1997 as an external relations officer at grade P-4, under a three-year fixed-term appointment, which was subsequently extended several times.

On 8 July 1999 the Commission issued Administrative Directive No. 20 (Rev.2) concerning recruitment, appointment, reappointment and tenure of staff. This Directive embodies a policy whereby staff members appointed to the Professional and higher categories and all internationally recruited staff should not, except in certain limited exceptions, remain in service for more than seven years. It provides in paragraph 4.2 that exceptions to the period of seven years may be made because of the need to retain essential expertise or memory in the Secretariat and shall be kept to an absolute minimum compatible with the efficient operation of the Secretariat.

In Judgment 2315 delivered on 4 February 2004 the Tribunal held that the seven-year policy was not applicable to a staff member until it had been incorporated into his or her contract as a term or condition. Following the delivery of that judgment, the Commission wrote to the complainant on 19 April 2004 to offer him a further extension of his appointment for a period of two years, that is to say until 29 September 2006. It stipulated that the offer was subject to the provisions of the Staff Regulations and Rules and Administrative Directives. The complainant accepted the offer the following day.

By a memorandum of 5 May 2004 the Chief of the External Relations Section informed the Executive Secretary of the new repartition of work within his Section following the arrival of a new external relations officer – he indicated therein that the complainant was assigned the regions of Eastern Europe, and Middle East and South Asia.

On 19 September 2005 the Executive Secretary issued a Note setting out one part of a system for implementing the service limitation provisions of Administrative Directive No. 20 (Rev.2). It provided that exceptional extensions could be granted either on the sole basis of the provisions of Administrative Directive No. 20 (Rev.2) or by amending a staff member's contract through a "rider", which would include a reference to the above-mentioned Note and which must be agreed to by the staff member concerned. The Note sets out a system whereby approximately one year before the expiry of a contract taking the period of service of a staff member to seven years or more, the post shall be advertised in parallel to considering the incumbent for exceptional extension in accordance with the Directive. The possibility for an incumbent to gain an exceptional extension, because of the need to retain essential expertise or memory in the Secretariat, will be judged against what the general job market can offer. The complainant signed the rider on 10 October 2005, thereby agreeing to the incorporation of the Note into his contract as a term or condition.

In November 2005 a vacancy announcement was issued with regard to the complainant's post; it was corrected in January 2006. According to the vacancy announcement, the duties and responsibilities of the position included

liaising with States Signatories and non-Signatories “in particular in the geographical regions of the Middle East and South Asia, South East Asia, the Pacific and the Far East”. In the meantime – on 15 December – the complainant was offered a two-month extension of his contract, until 28 November 2006, but he declined this offer.

On 6 March 2006 the Executive Secretary appointed six individuals to serve as members of two Personnel Advisory Panels. Five of them, including the Director of the Legal and External Relations Division – the complainant’s Director – were responsible for conducting the interviews of shortlisted candidates for the position of external relations officer while the Panels, with the six members, would assess the outcome of the interviews and examine the possibility of granting an exceptional extension to the incumbent.

By a memorandum of 23 March the complainant’s Director informed the Personnel Section that he was not in a position to propose an exceptional extension of his appointment as his tasks could “still be carried on by a staff with good qualifications and related experience”. In another memorandum bearing the same date the complainant’s Director informed the Personnel Section that following the interviews of the shortlisted candidates he believed that three external candidates could join the Commission without difficulty. The members of the Panels met the following day to assess both the outcome of the interview results and the possible granting of an exceptional extension to the complainant. In the report of 4 April they unanimously held that, having considered the interview results, the supporting documentation on the external candidates and the complainant as well as the Director’s proposal, they supported the latter’s recommendation to offer the post to one of the external candidates.

By a memorandum of 20 April 2006 the complainant was informed that the Executive Secretary had decided, after consideration by a Personnel Advisory Panel, that there was no basis for granting him an exceptional extension based on the need to retain essential expertise or memory in the Secretariat. He had therefore decided not to extend his fixed-term appointment beyond its expiry date of 29 September 2006. The complainant requested a review of that decision on 16 May 2006, but the Executive Secretary maintained it, pointing out in a letter of 19 June that the service limitation provisions applied to the complainant and that an exceptional extension was not justified in his case. He acknowledged that the complainant had not been informed six months in advance of the decision not to extend his appointment, but stressed that he had offered to extend his contract until 28 November 2006 in order to allow the process enough time for ensuring notification within the prescribed six-month period. That offer had been turned down by the complainant. The Executive Secretary reiterated his proposal to extend the complainant’s contract for a short period of time, until 31 December 2006.

The complainant filed an internal appeal with the Joint Appeals Panel on 17 July 2006 against the decision not to grant him an exceptional extension of his fixed-term appointment. He separated from service on 29 September 2006.

In its report of 27 April 2007 the Joint Appeals Panel concluded that the Executive Secretary’s decision not to extend the complainant’s appointment was vitiated by a procedural error. Indeed, it considered that the complainant had not been given a fair chance to be compared with external candidates because the vacancy referred to geographical regions for which he had not been responsible. It recommended that the decision be set aside and that the complainant be granted an extension of his contract, or an equivalent indemnification.

By a letter of 11 May 2007 the Executive Secretary informed the complainant that he had decided not to follow the Panel’s recommendation on the grounds that it overlooked important factual elements. He pointed out that the post the complainant had held had been advertised based on exactly the same definition of geographical regions as in the vacancy announcement against which he had originally been hired, and that his job description had reflected those same regions throughout his tenure. He added that the complainant’s record had been assessed on the basis of the work he had done and that his successor’s suitability for the job had been assessed against her ability to take over his responsibilities. He concluded that the complainant had not been deprived of his right to have his expertise or memory assessed against the needs of the Commission and against what the outside market could offer. That is the impugned decision.

B. The complainant contends, firstly, that the decision not to extend his appointment is procedurally flawed as he was not given a fair chance with regard to the assessment of his abilities compared to those of external candidates. He points out that the vacancy announcement advertising his post had been changed considerably compared to his job description; it referred to regions for which he had not been responsible. He also argues that the Personnel Advisory Panel that was convened to assess the outcome of the interviews in respect of the

advertised post and the possibility of granting him an exceptional extension of appointment, merely adopted the recommendation of the Director of the Legal and External Relations Division without providing an independent analysis. He adds that the Director did not provide reasons for recommending three external candidates and not him. The Executive Secretary's decision being based on the Panel's recommendation, the complainant alleges that it is flawed by misappraisal of facts. Concerning the composition of the Panel, he points out that the grade P-5 staff member nominated by the Staff Council participated only in the last meeting and not from the outset of the selection process.

Secondly, the complainant submits that the decision not to extend his appointment is tainted with errors of law insofar as it is based on the seven-year policy. According to him, paragraph 4.2 of Administrative Directive No. 20 (Rev.2) applies only to staff members who are reaching seven years of service. Since he had served the Commission for eight and a half years at the material time, that provision did not apply to him.

In the event that the Tribunal considers that the seven-year policy applied to him, he contends that the aforementioned Directive was unlawfully amended by the Executive Secretary's Note of 19 September 2005. In his view, the Note should have been incorporated into Administrative Directive No. 20 (Rev.2) and then submitted to the Staff Council for its consideration and comments before being brought into effect, as required by the Staff Regulations and Rules. He adds that the Note contravenes the provisions of the Administrative Directive in that it imposes a service limitation period of nine years whereas the Directive provides for a seven-year limitation. He therefore considers that the Commission has failed to comply with the hierarchy of norms. He further argues that the Note is ambiguous and that the Administration did not act in good faith with respect to the implementation of the procedure defined therein.

The complainant asks the Tribunal to quash the impugned decision, to order his reinstatement and to award him material damages in an amount equivalent to the salary and benefits he would have earned had his contract been extended from 29 September 2006 until "a new decision is taken". He also claims moral damages in the amount of 15,000 euros and costs.

C. In its reply the Commission submits that it considered the possibility of granting an exceptional extension to the complainant in a fair and objective manner. Thus, the complainant's right to be considered for an exceptional extension was respected. It argues that the duties and responsibilities officially assigned to him since his entry into service were, in their material particulars, the same as those which appeared in the vacancy announcement at issue.

It considers that the complainant shows bad faith in asserting that paragraph 4 of Administrative Directive No. 20 (Rev.2) does not apply to him. It points out that he agreed to his letter of extension of 19 April 2004, in which his attention was drawn to the fact that "the provisions on length of appointments and tenure in the Staff Regulations, Staff Rules and Administrative Directives appli[ed] to [his] appointment".

According to the defendant, the Executive Secretary's Note does not amend the terms of Administrative Directive No. 20 (Rev.2), rather it provides a mechanism for its implementation. The Executive Secretary has "inherent authority" to develop and apply implementation mechanisms concerning the seven-year policy. Moreover, by signing his last contract the complainant agreed that the Note applied to him, and he is consequently estopped from claiming that it constitutes an unlawful amendment to the terms of the Directive, to which his contract also referred.

The Commission further asserts that the Note does not conflict with the Directive or the Staff Regulations and Rules. In its view, the complainant's contention in that respect is unsubstantiated. It denies that the terms of the Note are ambiguous and stresses that if the complainant had difficulty in understanding them he should have asked for clarifications before accepting their inclusion in his last contract.

Concerning the allegation of bad faith, it submits that, in accordance with the Tribunal's case law, such an allegation must be proved. In its view, the complainant has produced no evidence showing that the decision not to extend his appointment was motivated by malice, ill will, fraud or similar dishonest purpose. It asserts that the impugned decision was taken by the Executive Secretary in the exercise of his discretionary authority and in the interest of the Commission. It recalls that a fixed-term appointment carries no expectation of extension. It adds that the complainant has no legitimate cause of action since he declined two offers of extension of his fixed-term appointment.

D. In his rejoinder the complainant indicates that the Commission's offer to extend his appointment until late

2006 coincided with the date on which his successor was to be appointed. He contends that his job description was out of date at the time his post was advertised and that, according to the case law, job descriptions must be accurate and up to date prior to the posting of a vacancy announcement.

He maintains that the Commission “misapplied” the seven- year service limitation laid down in Administrative Directive No. 20 (Rev.2). He explains that the Directive provides for a “general service limit of seven years” and not for a mandatory limitation. According to him, the decision to extend a staff member’s appointment may be based on the need to retain essential expertise or memory; however, this criterion is not exclusive. He adds that at the material time he had no choice but to agree to the rider. Indeed, he had received a memorandum stating that it would be “contrary to expectations” not to sign the rider.

E. In its surrejoinder the Commission points out that at the time it offered to extend the complainant’s appointment, namely on 15 December 2005, the vacancy announcement for his post had not yet been issued; there could therefore be no link with the date of entry into service of the complainant’s successor and the proposal to extend the complainant’s contract for a short period of time.

With regard to the complainant’s job description, it stresses that he has never asked for it to be updated. In its view, the absence of an updated job description had no substantive effect on him as his expertise and memory were comprehensively assessed by his Director, the Personnel Advisory Panels and the Executive Secretary. It further contends that the complainant has distorted the wording of paragraph 4 of Administrative Directive No. 20 (Rev.2), which should be read as meaning that the Executive Secretary may grant an exceptional extension provided that a staff member possesses essential expertise or memory, which it is necessary to retain within the Secretariat. It denies that it misrepresented the choices available to the complainant and argues that it made sure that he had understood the effect of the rider and the alternative option.

CONSIDERATIONS

1. The complainant joined the Preparatory Commission as an external relations officer at grade P-4 in 1997. His initial fixed-term appointment for three years was subsequently extended on several occasions.
2. By a memorandum of 20 April 2006 the complainant was notified of the Executive Secretary’s decision not to extend his appointment, which was due to expire on 29 September 2006. By letter of 19 June 2006 the Executive Secretary informed him that having considered his request for a review of the decision, he had decided to maintain his decision.
3. The complainant appealed the Executive Secretary’s decision to the Joint Appeals Panel. In its report of 27 April 2007 the Panel concluded that the complainant had not been given a fair chance to be compared to the external candidates in accordance with “the procedure stipulated in the Note from the Executive Secretary”.
4. Specifically, the Joint Appeals Panel found that as the geographical regions of responsibility in the vacancy announcement were not regions for which the complainant had actually been responsible, it was impossible to compare him to external candidates having completely different qualifications from his. It found that the failure to uphold the guarantee stipulated in the rider, namely that the complainant would be compared to the external candidates, rendered the Executive Secretary’s decision void. It declined to consider the other issues raised by the complainant. It recommended that the decision not to grant an exceptional extension be set aside and that the complainant be granted an extension or equivalent indemnification.
5. By letter of 11 May 2007 the Executive Secretary informed the complainant that he had decided not to follow the Joint Appeals Panel’s recommendations. He noted that the Panel had overlooked certain factual elements, namely, that the vacancy announcement included the same geographical regions of responsibility as the vacancy announcement under which the complainant was hired. Further, his job description included those regions the entire time he was with the Commission.
6. The Executive Secretary recognised, however, that despite the language in the vacancy announcements the complainant was primarily responsible for the Eastern European region. The Executive Secretary acknowledged that there was an error in the vacancy announcement for the complainant’s post as it included South-East Asia, the Pacific and the Far East. However, since the person who was hired took over the complainant’s responsibilities and,

in particular, his responsibilities for Eastern Europe, the error was of no consequence in relation to the assessment of whether the complainant possessed essential expertise or memory that needed to be retained by the Secretariat. That is, the complainant was assessed on the basis of the work he had done and the external candidate's suitability was assessed against her ability to take over the complainant's responsibilities including those in relation to Eastern Europe. For these reasons, the Executive Secretary concluded that the complainant had not been deprived of his right to have his expertise or memory assessed against the needs of the Commission and against what the outside market could offer. This is the impugned decision.

7. The complainant submits that in its application of the seven-year policy, the Commission committed procedural errors, errors of law, and failed to act in good faith.

8. The complainant contends that he was not treated fairly in his comparison with external candidates due to the fact that the vacancy announcement for his post included regions for which he had no responsibility and did not mention the primary responsibility assigned to him, namely Eastern Europe.

9. The defendant submits that the duties and responsibilities officially assigned to the complainant upon his entry into service with the Commission were materially the same as those appearing in the vacancy announcement. While acknowledging that the description of the duties and responsibilities of a post in a vacancy announcement or in a job description are neither exhaustive nor conclusive of the functions actually exercised in the post, the Commission observes that the complainant himself did not mention his responsibilities for Eastern Europe in his appraisal reports for the period from 30 September 2004 to 29 September 2005 and for the period from 1 October 2005 to 29 September 2006. The Commission points out that the candidate selected to replace the complainant had in fact taken over all of the duties and responsibilities previously exercised by the complainant. Thus, in the Commission's view, it is evident that the contents of the vacancy announcement did not have any bearing on its assessment of whether the complainant possessed essential expertise or memory to be retained in the Secretariat.

10. The Tribunal rejects the argument advanced by the defendant. To implement its seven-year policy, the Commission adopted the procedure described in the Note which incorporates the provisions of paragraph 1 of Administrative Directive No. 20 (Rev.2). This paragraph sets out the procedures for the preparation of vacancy announcements for established posts. It provides that requests for recruitment action must include a job description and a draft vacancy announcement. Based on this information, the classification of the post is reviewed and the contents of the draft vacancy announcement are re-examined to ensure, among other things, that the required qualifications are job-related.

11. In the present case, the Executive Secretary acknowledged that an error had occurred in the preparation of the vacancy announcement, but concluded that it was not material since the external candidate was assessed against her qualifications and the complainant was assessed on the basis of the work he had done.

12. As stated in the Note, the purpose of the procedure is to establish whether a position should be offered to someone other than the incumbent or whether an exceptional extension should be granted. It provides that the post is to be advertised in accordance with the provisions of Administrative Directive No. 20 (Rev.2) and that an incumbent will be considered without the need to submit an application or to be interviewed. After the external candidate interviews are completed, the incumbent's Director is required to submit his proposal regarding the incumbent's possible reappointment. Lastly, the Personnel Advisory Panel meets to decide the recommendation it will submit to the Executive Secretary. In making the recommendation, the Panel is required to take into account the outcome of the round of interviews and the information on the incumbent.

13. As stated by the Executive Secretary at the time the procedure was introduced, the possibility of granting an exceptional extension is to be judged against what the general job market can offer. Thus, it can be seen that the procedure by which the Commission may grant an exceptional extension is not considered in isolation. It is also linked to what the general job market can offer the Commission. This aspect of the process can only be accomplished through an advertising and screening process based on a vacancy announcement that accurately reflects the duties and responsibilities of the position.

14. In Judgment 2658, under 9, the Tribunal held that Administrative Directive No. 20 (Rev.2) requires that both the vacancy announcement and the job description must be accurate and up to date prior to the posting of a vacancy announcement. Although the issue in that case differed from the issue now being discussed, the underlying principle is equally applicable to the present case. In these circumstances, a meaningful assessment of what the

general job market could offer was not possible.

15. The Tribunal wishes to stress that under the seven-year policy an incumbent has only the possibility of reappointment, not a right to reappointment. However, as the Tribunal has stated in many cases, a staff member is entitled to have the question of reappointment determined in accordance with the rules of procedure established by the Commission.

16. The fact that the successful candidate was able to assume the responsibilities of the post is an irrelevant consideration and does not serve to remedy an already flawed process. As to the Commission's submission that the complainant himself did not mention Eastern Europe in his performance appraisals, to suggest that Eastern Europe was not part of his primary responsibilities is without merit in light of the memorandum in which Eastern Europe was specifically assigned to the complainant.

17. The complainant also submits that the Executive Secretary committed a number of errors of law in reaching his decision.

18. First, the complainant contends that having regard to the wording of paragraph 4.2 of Administrative Directive No. 20 (Rev.2), the seven-year policy did not apply to him since at the time his contract extension was being considered he had eight and a half years of service with the Commission. Further, the use of the words "would" and "may" in paragraphs 4.1 and 4.2 of the Directive suggests that the time limit is not mandatory and that the granting of an extension is not limited to the need for essential expertise or memory. The complainant also states that he never consented to an application of a nine-year service limitation.

19. Second, the complainant submits that the Note unlawfully amended Administrative Directive No. 20 (Rev.2) since it did not comply with Staff Rules 4.1.01, 8.1.01(c) and (e) and Staff Regulations 8.1 and 8.2.

20. Third, the complainant argues that since the Note is subordinate to the Staff Regulations and Rules and Administrative Directives, it cannot, as it purports to do, contradict, amend, or further their reach.

21. Fourth, the complainant submits that the content of the Note is ambiguous and that it contains no guidance regarding the considerations that should inform the analysis of assessing the incumbent's expertise against what the outside job market could offer.

22. The Tribunal rejects these arguments. By signing the rider to his letter of appointment, the complainant specifically agreed to the incorporation of the provisions regarding length of appointments and tenure in the Staff Regulations and Rules, Administrative Directives and the Note into his contract. He cannot now argue that the provisions have no application. Further, the interpretation of paragraphs 4.1 and 4.2 of Administrative Directive No. 20 (Rev.2) advanced by the complainant strains the clear meaning of the provisions that the policy is mandatory and that an exception to the policy is limited to the need to retain essential expertise or memory.

23. The Tribunal accepts the Commission's submission that the Note simply provides a mechanism for the implementation of the seven-year policy and does not amend nor does it purport to amend Administrative Directive No. 20 (Rev.2). Finally, there is no merit to the assertion that the Note is ambiguous nor is there any legal foundation for the complainant's argument that the Note is deficient because it does not provide sufficient guidance.

24. The complainant also alleges that the Commission acted in bad faith. In support of this assertion, the complainant states that the selection process was not taken seriously and that he was induced into signing the rider to his contract. This allegation must also be rejected. In the present case, there is no evidence of malice, ill will, improper motive, or other dishonest purpose on the part of the Commission. The fact that the process was procedurally flawed does not support a finding of bad faith. Further, there is no evidence to support the assertion that the complainant was improperly induced into signing the rider to his contract.

25. The Tribunal concludes that as the Commission failed to abide by its own rules of procedure and, in turn, the Executive Secretary's decision was based on a procedurally flawed process, his decision must be set aside.

26. The complainant asks the Tribunal to order his reinstatement and seeks compensation in an amount equivalent to that which he would have earned from the date of his separation from the Commission on 29 September 2006 until a "new decision is taken". He submits that he could easily reintegrate into the Commission

and render valuable services until his retirement date in October 2011.

27. Given the length of time that has elapsed since the complainant's separation from the Commission, the Tribunal will not order the complainant's reinstatement, nor will it remit the matter for a redetermination.

28. However, the complainant is entitled to compensation in an amount equivalent to 12 months' salary and allowances based on his last salary together with moral damages in the amount of 5,000 euros. Having succeeded in part, he is also entitled to costs which the Tribunal fixes at 3,000 euros.

29. Four staff members of the Commission applied under Article 13.1 of the Tribunal's Rules to intervene in this complaint. To the extent that the present complaint is dismissed, the applications for intervention must also be dismissed. To the extent that the complaint is allowed, there is nothing to suggest that the interveners are in the same position in fact and in law as the complainant. It follows that the applications for intervention must be dismissed.

DECISION

For the above reasons,

1. The decision of 11 May 2007 of the Executive Secretary is set aside.
2. The Commission shall pay the complainant compensation equivalent to 12 months' salary and allowances based on his last salary.
3. It shall also pay him compensation in the amount of 5,000 euros for moral injury.
4. The Commission shall pay the complainant 3,000 euros in costs.
5. All other claims are dismissed.
6. The applications to intervene are dismissed.

In witness of this judgment, adopted on 16 May 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet

