

106th Session

Judgment No. 2801

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. P. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom hereinafter “the Commission”) on 6 July 2007, the Commission’s reply of 22 August, the complainant’s rejoinder of 20 September and the Commission’s surrejoinder of 28 November 2007;

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, an Italian national born in 1963, is a former staff member of the Commission’s Provisional Technical Secretariat (hereinafter “the Secretariat”). He joined the Commission on 9 January 2000 as a Procurement Officer at level P-3 in the Procurement Section of the Division of Administration. His initial three-year fixed-term appointment was subsequently extended twice, for two years each time, and was due to expire on 8 January 2007, by which time he would have accumulated a total of seven years’ service in the Secretariat.

By Administrative Directive No. 20 (Rev.2) of 8 July 1999, the Commission introduced a seven-year policy which is described in detail in Judgment 2315, delivered on 4 February 2004, under A. The system for implementing that policy is set out in a Note from the Executive Secretary of 19 September 2005, the terms of which were incorporated into the complainant's contract by means of a rider which he signed on 5 October 2005. According to that system, approximately one year before the expiry of a contract taking the period of service of a staff member to seven years or more, the staff member's post is advertised in parallel to considering the possibility of an exceptional extension for the incumbent. Shortlisted candidates are then interviewed by a Personnel Advisory Panel, and the division director submits a proposal on possible "reappointment" of the incumbent. The Panel considers whether the incumbent provides essential expertise or memory to the Secretariat and should therefore be granted an exceptional extension, or whether the post should be offered to one of the interviewed candidates. It then makes a recommendation to the Executive Secretary. In a memorandum accompanying the Note, also dated 19 September 2005, the Executive Secretary underlined that the possibilities for an incumbent to gain an exceptional extension would be judged against what the general job market could offer.

On 17 January 2006 a vacancy announcement was issued in respect of the complainant's post. By memoranda dated 25 and 29 May 2006, two Personnel Advisory Panels with the same six members, including a Staff Council representative, were set up to conduct interviews with shortlisted candidates and to assess their outcome and the possible granting of an exceptional extension to the complainant. The memorandum of 25 May specified that the interviews of shortlisted candidates would be conducted by five members of the Panel, that is without the participation of the Staff Council representative. The memorandum of 29 May informed the six Panel members that attached they would find the Interview Panel report, the proposal by the complainant's division director, the

curricula vitae of interviewed candidates and the complainant's performance appraisal report. The proposal submitted by the division director was dated 30 May 2006. He recommended that the complainant not be granted an exceptional extension. He acknowledged that the complainant had a good record during the seven years he had served in the Secretariat, but considered that essential memory and expertise resident with the other professional staff in the Procurement Section were sufficiently strong to outweigh a conclusion that an exceptional extension was warranted. In its report of 31 May 2006, while taking note of the excellent services the complainant had provided to the Secretariat, the Personnel Advisory Panel unanimously supported the recommendation of the complainant's division director. By a memorandum of 6 June the complainant was informed that the Executive Secretary had decided not to grant him an extension beyond the maximum period of service, and instead to offer the post to an external candidate.

On 20 June 2006 the complainant requested a review of that decision, but the Executive Secretary decided to maintain it. On 2 August 2006 he lodged an appeal with the Joint Appeals Panel, arguing that the Personnel Advisory Panels had not been set up in accordance with the Staff Regulations, Staff Rules and Administrative Directives, that he had not been considered for extension in a fair manner, and that he had not been given a real evaluation in comparison to the general job market. He requested that the decision under appeal be withdrawn and that he be granted an exceptional extension for a period of three years. He also claimed moral damages and costs. Soon after, he tendered his resignation.

In its report of 20 April 2007 the Joint Appeals Panel concluded that the complainant's claims were unfounded. It thus recommended that the Executive Secretary uphold his decision not to extend the complainant's appointment and not to award him any relief. It also brought to the attention of the Executive Secretary a discrepancy between the procedures concerning the setting up of Personnel Advisory Panels laid down in a Personnel Bulletin dated 17 July 2002

and those in the Note of 19 September 2005, which might have created some confusion regarding Staff Council representation, and noted that the Personnel Section should have ensured that all required documentation was provided to the members of the Personnel Advisory Panels in an orderly and timely fashion. By letter of 11 May 2007 the Executive Secretary notified the complainant that he had decided to accept the Joint Appeals Panel's recommendations. That is the impugned decision.

B. The complainant argues that in considering whether he should be granted an exceptional extension, the Administration did not comply with the procedures set out in the Executive Secretary's Note and memorandum of 19 September 2005. Nor did it respect the guarantees it had offered at a meeting of the Joint Consultative Panel regarding the implementation of the seven-year policy. He contends that the Administration failed to consider him fairly for an exceptional extension and disregarded what was purportedly the "central feature of the implementation system", namely that the possibility for an incumbent to gain an exceptional extension is to be judged against the general job market. In his proposal the complainant's division director did not provide a full description of his qualifications, nor did he compare him to external candidates. Despite the fact that his essential memory and expertise were recognised, he was denied an extension on the basis that the memory and expertise resident with other professional staff in the Procurement Section were sufficiently strong. Contrary to the requirements of the Personnel Bulletin of 17 July 2002, which amended Administrative Directive No. 20 (Rev.2), there was no P-5 Staff Council representative on the Personnel Advisory Panel that conducted the interviews of shortlisted candidates, and only one Staff Council representative participated in the last meeting involving both Personnel Advisory Panels, whereas there should have been two. Furthermore, the Personnel Advisory Panels' members were not provided with the required documents in an orderly and timely fashion. Contrary to what was indicated in the Chief of Personnel's memorandum of 29 May 2006, the proposal by the division director

could not have been forwarded to the Panels' members through that memorandum, given that it was not completed until 30 May 2006.

The complainant alleges errors of law. He claims, in particular, that the Executive Secretary's Note of 19 September 2005 is void of legal effect because it violated the Staff Regulations and Rules and the hierarchy of norms, and unlawfully amended the terms of Administrative Directive No. 20 (Rev.2). By introducing rules concerning the composition of the Personnel Advisory Panels, their duties and responsibilities, the Note contravened Staff Rule 4.1.01, which requires that the terms of reference of the Personnel Advisory Panels be determined in an Administrative Directive. Moreover, since the Note implemented fundamental changes to the terms of Administrative Directive No. 20 (Rev.2), thus operating as an amendment thereto, it should have been subject to review and recommendation by the Joint Consultative Panel provided for under Staff Rule 8.2.01. In addition, the Administration should have ensured Staff Council participation in the amendment process, in accordance with Staff Regulations 8.1 and 8.2 and Staff Rules 8.1.01(c) and (e), and 8.2.01. The complainant further asserts that the Joint Appeals Panel's report, on which the impugned decision is based, is tainted with errors of fact and of law, and lack of due process. In that respect, he refers to the Joint Appeals Panel's refusal to interview the Staff Council representative, and its mistaken conclusion that the latter's participation in the Personnel Advisory Panels ensured due process. In his opinion, the Administration's decision demonstrates lack of good faith.

The complainant asks the Tribunal to quash the impugned decision and to order his reinstatement. He seeks material damages in an amount equivalent to the salary he would have earned, including all benefits, had his contract been extended, from the date of his separation until the date of reinstatement. He also seeks moral damages in the amount of 15,000 euros and costs for both the internal appeal proceedings and the proceedings before the Tribunal.

C. In its reply the Commission submits that the decision not to grant the complainant an exceptional extension has a sound legal basis and

does not bear any flaws. Relying on the Staff Regulations and Rules and the Tribunal's case law, it emphasises the discretionary nature of a decision to extend or renew a fixed-term appointment and recalls that such an appointment does not carry any expectation of or right to extension or renewal. It points out that, when considering individual cases, the Executive Secretary is obliged to take into account the fact that the Commission is a non-career organisation, and a staff member does not have an automatic right to be granted an exceptional extension solely because he or she is deemed to possess essential expertise or memory.

The defendant denies any procedural irregularities and states that it considered the possibility of granting the complainant an exceptional extension in a fair and transparent manner in accordance with the applicable rules. It notes that his qualifications were given due consideration by the complainant's division director and that the Personnel Advisory Panel, which assessed the outcome of the interviews of shortlisted candidates and the possible granting of an exceptional extension to the complainant, included a Staff Council representative and was thus set up in accordance with the requirements of Administrative Directive No. 20 (Rev.2). Contrary to the complainant's contention, the need to retain essential expertise or memory, mentioned in the memorandum of 19 September 2005, is not determined solely on the basis of what the general job market can offer, but also on the basis of whether such expertise is available within the Secretariat. It was thus legitimate for the complainant's division director to conclude in his proposal of 30 May 2006 that the availability of such expertise and memory within the Procurement Section was sufficiently strong to negate the need to grant the complainant an exceptional extension.

With regard to the alleged errors of law, the Commission emphasises that the Note of 19 September 2005 did not amend Administrative Directive No. 20 (Rev.2) but merely provided a mechanism for its implementation, which was fully within the Executive Secretary's authority. In addition, the complainant expressly agreed to the incorporation of the Note into his contract, and is

therefore estopped from claiming that the latter constitutes an unlawful amendment of the Directive. According to the defendant, the complainant has not provided any evidence in support of his allegation that the Note conflicts with the Directive, or with the Staff Regulations and Rules, or that it violates the hierarchy of norms.

The Commission denies that the complainant was not afforded due process in the proceedings before the Joint Appeals Panel. The decision not to interview the Staff Council representative on the Personnel Advisory Panels lay well within the discretion conferred on the Joint Appeals Panel by Staff Rule 11.1.02(j). Drawing attention to the fact that the Personnel Advisory Panels unanimously adopted the division director's proposal, the defendant dismisses the allegation of breach of good faith as unsubstantiated. It invites the Tribunal to conclude that the complainant has no legitimate cause of action, since he resigned voluntarily prior to the expiration of his contract and was thus solely and exclusively responsible for his separation from the Commission.

D. In his rejoinder the complainant asserts that his resignation had no legal effect on the decision he is challenging before the Tribunal. He argues that there is no provision in the Staff Regulations and Rules to support the contention that by tendering his resignation he waived his right of appeal or rendered his complaint moot. He indicates that he remains unemployed and that a second appeal regarding the circumstances which forced him to resign is currently pending before the Joint Appeals Panel. He reiterates his pleas on the merits and suggests that the Executive Secretary's Note of 19 September 2005 is not enforceable because his agreement to its incorporation in his contract was procured by misrepresentations. He elaborates on his plea of lack of good faith, arguing that as a result of the Administration's failure to make good its promises and contractual obligations, he lost a valuable opportunity to be granted an exceptional extension.

E. In its surrejoinder the Commission maintains its position. It rejects as spurious the complainant's claim that he should be relieved from any obligations prescribed in the Executive Secretary's Note of 19

September 2005, on the basis of misrepresentation, asserting that this claim cannot be entertained as it was raised for the first time in the rejoinder.

CONSIDERATIONS

1. The complainant impugns the decision of the Executive Secretary of the Commission, expressed in a letter dated 11 May 2007, to accept the recommendations of the Joint Appeals Panel not to extend his fixed-term appointment beyond its expiration on 8 January 2007, and not to award him any of the remedies he requested.

2. He submits that the impugned decision is tainted with procedural errors and errors of law; that the Joint Appeals Panel breached his right to due process and that its conclusions were based on errors of fact and of law; and that the Administration breached its obligation of good faith.

3. The complainant's main argument is that he was not fairly considered for an exceptional extension in accordance with Administrative Directive No. 20 (Rev.2), the Note from the Executive Secretary and the accompanying memorandum – both dated 19 September 2005 – and the applicable Staff Regulations and Rules. He contends that the Commission acted in breach of the memorandum of 19 September 2005 which provides that “[t]he central feature of the implementation system is that the possibilities for an incumbent to gain an exceptional extension, because of the need for the [Secretariat] to retain essential expertise or memory, are judged against what the general job market can offer the [Secretariat]”. In support of his contention he quotes the proposal by his division director of 30 May 2006, which stated inter alia that “essential memory and expertise resident with the other professional staff of the Section are sufficiently strong that they outweigh a conclusion that an exceptional extension of [the complainant]’s service is warranted”, and considers that statement as proof that he was not compared against the general job market, but was instead only considered against his colleagues within the

Procurement Section. This conclusion is mistaken. In his proposal, the complainant's division director noted: "Having considered the results of the interview process for the Procurement Officer [vacancy] and the qualifications of the incumbent [...], I propose that [the complainant] not be granted an exceptional extension to his contract due to the need to retain essential memory or expertise". He then provided his assessment of the interviewed candidates, which clearly showed that the general job market was considered. It is important to note that in order to grant an exceptional extension to the seven-year service limitation, the Commission must not only take into account the recommendation of the Personnel Advisory Panels, but must also be satisfied that there is a need for the essential experience or memory of the incumbent. In this case it was assessed that that need did not exist, in view of the "essential memory and expertise resident with the other professional staff of the Section" and the qualifications of some of the external candidates interviewed. It was thus reasonable for the Executive Secretary to decide that the complainant's expertise and memory were not essential and there was no need for the Commission to extend his contract. Therefore the complainant's plea fails.

4. The complainant contends that the Note of 19 September 2005 unlawfully amended Administrative Directive No. 20 (Rev.2). The contention is based upon the composition of the Personnel Advisory Panels, which were set up to consider the appointment of candidates to the post the complainant occupied and the possibility of granting him an exceptional extension. Paragraphs 2.3 and 3.3 of Administrative Directive No. 20 (Rev.2) require the establishment of separate Personnel Advisory Panels to make recommendations concerning appointment and possible "reappointment" respectively. The Tribunal observes that the Note requires that the two Panels "shall have the same members" and that they shall hold a "unique meeting" with the participation of a Staff Council representative. Neither that requirement nor the requirement for identical membership of the Personnel Advisory Panels derogates from Administrative Directive No. 20 (Rev.2); they are both entirely consistent with it and provide an additional safeguard for staff members. Accordingly, the Note does not

amend nor does it purport to amend Administrative Directive No. 20 (Rev.2). For this reason, the plea fails.

5. The complainant contends that there was an error in the composition of the Personnel Advisory Panels. He argues that the Panels did not include a Staff Council representative. He points out that under the Personnel Bulletin of 17 July 2002, which he believes amended Administrative Directive No. 20 (Rev.2), the Executive Secretary must appoint one member of the Panels from a list of five professional staff members at level P-5 provided by the Staff Council. He concludes that “[t]he interview panel should have initially contained a P-5 staff member appointed from a list of 5 provided by the Staff Council” and that this staff member “should then have participated in the interviews of short-listed candidates”. In his view, the Panel that met in the final “unique meeting” to decide whether an exceptional extension would be recommended should have had two members appointed from a list provided by the Staff Council because the Personnel Bulletin of 17 July 2002 amended Administrative Directive No. 20 (Rev.2). That argument is erroneous. According to the Bulletin, the Executive Secretary approved a recommendation from the Joint Consultative Panel that one member of the Personnel Advisory Panel appointed by him be chosen from a list of five staff members at level P-5 proposed by the Staff Council. It is also stated in the Bulletin that Administrative Directive No. 20 (Rev.2) would be revised to reflect this new procedure. However, the Directive has not been amended as envisaged.

As the Personnel Advisory Panels were set up in accordance with Administrative Directive No. 20 (Rev.2) and the Note from the Executive Secretary of 19 September 2005, the plea that their composition was tainted with an error of law is unfounded.

6. The complainant submits that the Joint Appeals Panel proceedings were flawed because the Panel refused to interview the Staff Council representative on the Personnel Advisory Panels. The plea is without merit. The Joint Appeals Panel did not request interviews or further documentation as it clearly was of the view that

the Staff Council representative had the opportunity to voice his concerns at the meeting of the Personnel Advisory Panels. Furthermore, the recommendation of the Personnel Advisory Panels was unanimous and the complainant provides nothing to suggest that any evidence that might have been forthcoming would have been of relevance to any of the issues to be decided. The Tribunal considers that the Joint Appeals Panel's rejection of the complainant's request was reasonable and constituted a proper exercise "of the broad discretion that internal appeals bodies must enjoy in this area" (see Judgment 2558, under 5(b)). Accordingly, the plea must be rejected.

7. Regarding the plea of breach of good faith, the complainant specifies that "[b]reach or lack of good faith flows in this case from the failure of the organization to make good on its promises and contractual obligation to consider [him] for possible extension against the outside job market". He claims that as a consequence, he lost a valuable opportunity "for consideration of a possible exceptional extension". However, the complainant does not refer to any specific fact but only generally complains of the loss of an opportunity for an exceptional extension. As pointed out above, the procedures were conducted in accordance with the applicable law, and the possibility for the complainant to be granted an exceptional extension because of the Commission's need for essential experience or memory was considered against what the general job market could offer the Secretariat. That plea therefore also fails.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet