106th Session **Judgment No. 2802**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms F. P. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom hereinafter "the Commission") on 18 August 2007 and corrected on 9 October, the Commission's reply dated 19 December 2007, the complainant's rejoinder of 14 April 2008 and the Commission's surrejoinder of 27 May 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, an Italian national born in 1954, joined the Provisional Technical Secretariat of the Commission on 1 August 1997 as a Senior Officer in the International Monitoring System Division, under a three-year fixed-term appointment. According to a policy introduced by the Commission in Administrative Directive No. 20 (Rev.2) of 8 July 1999, staff members appointed to the Professional and higher categories should not remain in service for

more than seven years. Paragraph 4.2 of the Directive foresees exceptions to that seven-year service limit based on "the need to retain essential expertise or memory". 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 in his or her contract as a term or condition.

With effect from 1 August 2000 the complainant's initial appointment was extended for a period of two years. On 19 April 2002 she was offered the post of Chief of the Radionuclide Monitoring Section for the period from 1 July 2002 until 31 July 2005. A letter dated 22 July superseded the offer of 19 April and established 31 July 2004 as the expiration date. By a letter of 18 September 2003 the complainant was offered an exceptional extension of her appointment until 31 July 2006. This offer, which the complainant accepted, indicated that, in accordance with paragraph 4.2 of Administrative Directive No. 20 (Rev.2), the extension was an exception to the seven-year service limit and that it would be the final extension of her contract.

On 19 September 2005 the Executive Secretary issued a Note setting out part of a system for implementing the seven-year policy. The Note provides that, 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. By e-mail of 27 September the Administration invited the complainant to collect a rider through which the Note would become part of her contract. However, she was not provided with the rider and, on 30 September, she wrote to the Chief of Personnel and asked that it be supplied to her. The Executive Secretary explained to her in a memorandum of 5 October that the e-mail of 27 September had simply been a general notification to staff, and that she would not in fact be offered the rider because her post was to be discontinued as a

result of a restructuring of the Secretariat. On 12 October 2005 the complainant contested the abolition of her post, explaining that it was not in the interest of the Commission. By a memorandum of 30 January 2006 the complainant's division director submitted a proposal to the Chief of Personnel concerning her "reappointment". He pointed out that her post would no longer exist once the restructuring process, that was then developed, had been implemented. Nevertheless, in view of the tasks to be accomplished over the next two years, he considered that the Secretariat would benefit from retaining her services beyond the end of her current contract. On the same day a Personnel Advisory Panel was convened to make a recommendation, as required by paragraph 3.3 of Administrative Directive No. 20 (Rev.2), regarding a "possible reappointment" of the complainant. As the Panel did not reach a consensus, the matter was referred to the Executive Secretary for decision.

On 31 January 2006 the complainant was informed that the Executive Secretary had decided that her contract would not be extended as her post was to be discontinued and there was no justification for granting an exceptional extension based on the need to retain essential expertise or memory. On 27 March she requested that the Executive Secretary review that decision. She claimed that she was no longer subject to the policy set out in Administrative Directive No. 20 (Rev.2) because she had served the Commission for more than seven years and she asked that her appointment be extended for a period of two years. Having been informed by letter of 27 April that the Executive Secretary was maintaining his decision, the complainant filed an appeal with the Joint Appeals Panel on 26 May 2006. In its report of 23 April 2007 the Panel concluded that the decision not to extend her appointment beyond 31 July 2006 had been validly taken. However, it recommended that the complainant be awarded 5,000 United States dollars in moral damages "for the error […] committed by the Administration in relation to the offer made to [her] to sign the rider, which initially raised a false expectation […] that she

may be eligible for a possible extension of her contract". By a letter of 11 May 2007, which is the impugned decision, the Executive Secretary informed the complainant that he had decided to accept the recommendations of the Joint Appeals Panel.

B. The complainant submits that the decision not to extend her appointment is tainted with an error of law as it was taken without legal authority. Referring to Judgment 2315, she submits that the seven-year policy was not applicable to her as Administrative Directive No. 20 (Rev.2) had not been incorporated in her contract as a clear and express term or condition. Indeed, her last letter of extension of 18 September 2003 by which she was offered an exceptional extension referred only to paragraph 4.2 of the Directive. No reference was made to paragraph 4.1 which sets out the seven-year service limit. She adds that the Commission could not have intended to incorporate the entire Directive in her contract by a mere reference to paragraph 4.2 since the letter of extension was issued and accepted before Judgment 2315 was delivered. In this respect the complainant submits that she was subjected to unequal treatment because, "unlike all the other staff members affected by the implementation of […] Judgment […] 2315", she was not offered a two-year extension.

In her opinion, even if Administrative Directive No. 20 (Rev.2) were applicable to her case, the Administration erred in applying it and did not afford her due process. The Directive does not limit the number of exceptional extensions beyond seven years of service. Once an exception based on the need to retain essential expertise or memory has been granted, a staff member should be considered for further extensions based either on ordinary criteria justifying extensions up to seven years, or on evidence showing that the previously-recognised essential expertise and memory are no longer needed.

The complainant affirms that her assignment to the post of Chief of the Radionuclide Monitoring Section in 2002 constituted a new

appointment, since the post was filled as a result of an international recruitment and selection process. According to her, the fact that this appointment was subject to probation is further evidence that the Administration considered it as an initial appointment. Consequently, the seven-year service limit should have been calculated from the date of this new appointment. Therefore, the indication in the letter of 18 September 2003 that the extension of her appointment was to be the last one has no basis. Nor is it relevant since the Administration did in fact subsequently consider whether her appointment could be further extended.

The complainant contends that the Executive Secretary's decision of 31 January 2006 was not properly and clearly justified. According to her, that decision was predetermined in that the Executive Secretary had already decided not to extend her appointment on 5 October 2005. The aforementioned decision and the process that led to it were thus biased and showed a lack of good faith. In support of this contention, the complainant points out that the defendant never publicly acknowledged her service.

Furthermore, she alleges that the decision not to extend her appointment was arbitrary and constituted an abuse of discretion. Firstly, the decision to abolish her post, on which the Administration relied, was not based on the needs of the Commission or on objective and reliable grounds, as required by the Tribunal's case law, but on a mere "speculation that restructuring [would] occur" and before any plan for restructuring was discussed. Secondly, the Commission displayed bad faith in justifying the decision not to extend her appointment by the fact that she did not possess essential expertise and memory. The complainant points out that, on 18 September 2003, she was granted an exceptional extension of appointment on the grounds that she possessed essential expertise and memory and that, in the two following years, there were no substantial changes in the activities of the Radionuclide Monitoring Section. Moreover, on

30 January 2006 her division director recommended her for an exceptional extension. The Administration failed to explain why her expertise and memory were no longer essential.

The complainant submits that the decision not to let her sign the rider because her post would be discontinued also constituted a breach of good faith. She alleges that she suffered unequal treatment, since after her separation other staff members holding positions that were intended to be abolished were given the possibility to sign a rider. Lastly, she contends that the Commission failed in its duty of care by not considering her for alternative employment.

The complainant asks the Tribunal to order the Commission to pay her material damages equivalent to two years of salary including all benefits and emoluments, minus the net earnings she received from her present employment. She also claims 25,000 euros as compensation for the damage caused to her professional dignity, her self-confidence, and her emotional well-being.

C. In its reply the Commission submits that the applicability of paragraph 4.2 of Administrative Directive No. 20 (Rev.2) necessarily implies that of paragraph 4.1. The seven-year service limit consequently applied to the complainant by virtue of the last extension of her fixed-term appointment, which she voluntarily and freely accepted and signed as the final one.

It contends that the limitation on the number of exceptional extensions beyond seven years of service was not arbitrary as it was based on the complainant's acceptance of the exceptional extension of appointment of 18 September 2003. It adds that the title and first sentence of the letter of 22 July 2002 show that her appointment as Chief of the Radionuclide Monitoring Section was not an initial appointment.

Emphasising that a fixed-term appointment entails no contractual right to have it extended, the Commission argues that the complainant was provided with clear and unambiguous reasons for the decision not to extend her appointment. She has not proved that the process

which led to the decision of 31 January 2006 was biased or that it involved a breach of good faith. The restructuring had been envisaged by the competent organs at all material times, as evidenced by several documents. Recalling both the Executive Secretary's discretion in respect of fixed-term appointment extensions under Staff Regulation 4.4 and the non-career nature of the Commission, the defendant also argues that possessing essential expertise or memory is a necessary but not a conclusive requirement to grant an exceptional extension. The Executive Secretary duly assessed whether the complainant possessed essential expertise and memory with regard to any post in the Secretariat as the post she held was going to be discontinued. Moreover, he publicly recognised the contributions of the complainant as well as other staff members who were separated from the Secretariat in a document dated 22 November 2006. This shows that the complainant was not treated in an arbitrary or discriminatory manner. The defendant observes that it had no obligation to consider the complainant for alternative employment because her post was not abolished as such: only the functions of the post were redefined and her appointment expired before the post was discontinued. It contests that it is responsible for any wrongdoing which may have resulted in a prejudice to the complainant.

D. In her rejoinder the complainant reiterates her pleas. She stresses that the offer of 19 April 2002 was for three years, a length typical of initial appointments. Even though she did not have a contractual right to extension, she was entitled to a fair assessment of her case. She argues that the decision not to extend her appointment was not based on the fact that she lacked essential expertise and memory with regard to any other post in the Secretariat, and she points out that she was never contacted or interviewed for that purpose. She denounces the lack of transparency and of fairness in the distinction made by the Administration between redefinition of the functions of the post and abolition of the post. As to the public recognition expressed after her separation from service, it does not remedy in her view the Administration's failure to thank her while she was still serving the Commission.

E. In its surrejoinder the Commission maintains its position in full. It adds that it is obvious that the Executive Secretary assessed whether she possessed essential expertise and memory with regard to any post in the Secretariat other than her own and that, for that purpose, contacting or interviewing the complainant was neither obligatory nor practicable.

CONSIDERATIONS

1. Administrative Directive No. 20 (Rev.2), which was considered by the Tribunal in Judgment 2315, sets out, amongst other things, a seven-year policy. This policy provides that the maximum period of service is seven years but that exceptions may be made "because of the need to retain essential expertise or memory in the Secretariat". In Judgment 2315 the Tribunal held that the Directive had to be incorporated in the contract of a staff member for the seven-year policy to be relied upon for the non-extension of his or her contract.

2. The terms of the complainant's contract were varied on 22 July 2002 to reflect her appointment, as the result of an open competition, to the post of Chief of the Radionuclide Monitoring Section. When her contract was last extended, it was said in the letter of extension, which the complainant accepted on 6 October 2003, that:

> "In accordance with paragraph 4.2 of Administrative Directive No 20 (Rev. 2), this extension is an exception to the seven-year limitation of service and will be the final extension of your contract."

3. On 19 September 2005 the Executive Secretary issued a Note that introduced a mechanism for considering whether an exception should be made to the Commission's seven-year service limit because of the need to retain essential expertise and memory. A memorandum of even date stated that expertise and memory could be judged against what the general job market could offer. That mechanism was applicable to staff members whose contracts were amended by a rider that incorporated the terms of the Note. The complainant was informed on 27 September of that year that she should collect a rider to her

contract. However, the rider was not provided and the Executive Secretary informed her on 5 October 2005 that her post was to be abolished and, in consequence, she was not eligible for the rider.

4. The complainant's division director forwarded a proposal to extend her contract to the Chief of Personnel on 30 January 2006. It was said in that proposal that:

> "Once the restructuring process currently developed in the [Provisional Technical Secretariat] is implemented, the position of Chief of Radionuclide will not exist. However, on the basis of the large number of certifications […] and the complex build-up process of the next two years, I believe the [Secretariat] would benefit from retaining [the complainant's] services beyond her current contract."

The same day, a Personnel Advisory Panel considered the "possible reappointment" of the complainant but was unable to reach a consensus. The next day, 31 January 2006, the Chief of Personnel informed the complainant that the Executive Secretary had decided not to extend her contract beyond 31 July 2006 on the ground that there was no justification for granting an exceptional extension based on the need to retain essential expertise or memory in the Secretariat. The letter referred to "the intention to discontinue [her] post" and "the fact that measures [were] available to ensure continuity of knowledge, expertise and institutional memory".

5. The complainant requested the Executive Secretary to review his decision of 31 January 2006, but she was informed, on 27 April 2006, that he maintained his earlier decision. In so doing, he referred to Administrative Directive No. 20 (Rev.2), the terms of her division director's recommendation and the restructuring that would result in her post disappearing in its then current form. He concluded by saying that it was not intended to fill her post when it became vacant in July.

6. The complainant lodged an appeal with the Joint Appeals Panel on 26 May 2006. So far as is presently relevant, the Panel recommended in its report of 23 April 2007 that the Executive Secretary uphold his decision not to extend the complainant's contract but, because of the way the offer of a rider to her contract had been

withdrawn, it recommended that she be paid moral damages in the amount of 5,000 United States dollars. The Executive Secretary informed the complainant on 11 May 2007 that he accepted that recommendation and that the amount of 5,000 dollars would be transferred to her account without delay. The complainant impugns the decision of 11 May 2007 by challenging the confirmation of the non-extension of her contract.

7. The first of the complainant's arguments is that the seven-year policy was not applicable to her. In this respect, she relies on Judgment 2315 and claims that the terms of Administrative Directive No. 20 (Rev.2) were not incorporated in her contract. She contends that the statement in her last letter of extension of 18 September 2003 was not sufficient to subject her to the seven-year service limit. It is indicated in Judgment 2315 that the terms of Administrative Directive No. 20 (Rev.2) could be incorporated in a staff member's terms of appointment "even […] by reference", including in an extension or a renewal of a contract. The statement in the complainant's last letter of extension that it was granted pursuant to paragraph 4.2 of Administrative Directive No. 20 (Rev.2) as an exception to the seven-year service limit, necessarily incorporated the terms of the Directive in her contract. Were it otherwise, the statement in the letter of extension would be meaningless. Further, and contrary to the complainant's argument, it is of no consequence that the letter of extension was issued and accepted before Judgment 2315 was delivered. So far as is presently relevant, that judgment merely indicated what was necessary if the Commission wished to rely on the seven-year policy as the basis for not extending a staff member's contract. In the present case, the Commission did all that was necessary.

8. Additionally, the complainant contends that she was subjected to unequal treatment in that, "unlike all the other staff members affected by the implementation of […] Judgment […] 2315", she was not offered a two-year extension. The argument is without merit. The complainant was, in fact, offered a two-year extension,

albeit by way of exception to the seven-year service limit. Moreover, unequal treatment involves different treatment of persons who are in the same position in fact and in law. Although not clearly stated in the complaint, it is implicit that those who were granted a two-year extension by reason of Judgment 2315 were persons whose contracts did not incorporate the terms of Administrative Directive No. 20 (Rev.2). However, and as pointed out above, the complainant's last letter of extension did. Accordingly, the argument of unequal treatment must be rejected.

9. In the alternative, the complainant argues that Administrative Directive No. 20 (Rev.2) was incorrectly applied in her case. In this regard, she contends that there is "no nine-year rule" and there is no provision in the Directive that "limits the […] exceptional extensions […] to one only". If that is intended to encompass the suggestion that, once a staff member's contract has been extended beyond seven years, the seven-year policy no longer applies, that suggestion must be rejected. That construction would make the exception provided in paragraph 4.2 of the Directive destructive of the rule laid down by paragraph 4.1. If, on the other hand, the argument is simply that more than one exceptional extension may be granted to a staff member, the argument may be accepted. However, it does not follow, as the complainant contends, that the statement that it was her last extension should not have been included in her last letter of extension. The Commission and the complainant were free to agree as to the terms on which her appointment would be extended, so long as the Staff Regulations and Rules did not expressly or impliedly forbid them. Nor does it follow that, because more than one extension is possible, the decision not to extend the complainant's contract beyond 31 July 2006 involved an error of law. The Executive Secretary did not proceed on the basis that only one extension could be granted. Nor did the memorandum of 31 January 2006 rely on the statement contained in the last letter of extension. Although the Executive Secretary referred to the statement in his letter of 27 April informing the complainant that he maintained his initial decision, he said that "in order to ensure equality of staff [he] did actually consider whether [her] contract

should be extended". Had he relied on the statement, he would not even have considered the possibility of extending her contract.

10. The complainant also contends that Administrative Directive No. 20 (Rev.2) was incorrectly applied in her case because the seven-year service limit should not run from her initial appointment on 1 August 1997, but from 22 July 2002 when she was appointed Chief of the Radionuclide Monitoring Section as a result of an international competition. In this regard, she argues that the fact that the appointment was subject to probation clearly shows that the Administration considered it as an initial appointment for the purposes of the seven-year service limit. There is nothing in paragraph 4.1 of Administrative Directive No. 20 (Rev.2) to support that argument. Moreover, it is inconsistent with the clear statement in that paragraph that "[t]he maximum period of service would be seven years". That phrase refers to any continuous period of seven years commencing with a staff member's appointment.

11. In addition to the arguments with respect to Administrative Directive No. 20 (Rev.2), the complainant contends that the decision not to extend her contract was arbitrary, an abuse of discretion and lacking in good faith. Two of the matters on which the complainant relies concern the discontinuing of her post and it is convenient to deal first with that question.

12. The complainant contends that there was no objective or reliable ground for her post to be discontinued and that, despite her repeated requests, she was not provided with the technical reasons for that decision or any details that would justify that course before the end of 2007. Moreover, she points to her division director's memorandum of 30 January 2006, in which he stated that the Secretariat would benefit from her further services and his view that her post should not be abolished until the end of 2007.

13. There is no doubt that a restructuring process was under active consideration as early as October 2005 when the Executive

Secretary informed the complainant that her post was to be abolished and, thus, she was not eligible for a rider to her contract. Restructuring is, itself, an objective and valid ground for the abolition of a post, provided that it is a genuine restructuring and is not motivated by extraneous considerations such as bias or ill will towards the incumbent of the post. The complainant does not dispute that there was to be a genuine restructuring or that her post was to be discontinued as part of it. Her complaint is with its timing.

14. Although the complainant's division director was of the view that her post should not be abolished until the end of 2007, it was ultimately for the Executive Secretary to decide how and when the restructuring or particular aspects of it should be implemented, provided that staff members' rights were not thereby infringed. The complainant's right was to have the question of the possible extension of her contract considered on the basis of "the need to retain essential expertise or memory in the Secretariat". The discontinuance of her post was directly relevant to that question, as was the fact that it was not intended to fill it when her contract expired – an intention which the Joint Appeals Panel found had been carried into effect.

15. In support of her contention that the decision not to extend her contract further was arbitrary, an abuse of discretion and lacking in good faith, the complainant argues that that decision was not properly substantiated. Instead, she claims that "circular logic" was used and that, it having once been found that she had essential expertise and/or memory, the contrary should not have been found when there was no substantial change in the activities of the Radionuclide Monitoring Section. As earlier indicated, the question whether the complainant's post was to be discontinued was directly relevant to the question that was to be decided and there was no circularity of reasoning in having regard to that fact. Nor is the argument advanced by reference to the unchanged nature of the work of the Radionuclide Monitoring Section. The proposed restructuring would inevitably have the consequence that there would be a change in the way the work was organised. Further, nothing turns on the reference to the "final extension" provision in the

complainant's last letter of extension. Although the Commission relied on that provision by way of argument before the Joint Appeals Panel, as did the Panel itself in making its recommendation, it formed no part of the Executive Secretary's initial decision not to grant an exceptional extension, nor of his subsequent decision maintaining that decision.

16. The complainant also contends that bad faith is to be discerned from the fact that she was denied a rider to her contract. Although there was obviously some confusion about this issue, the complainant's main argument in this regard is that the decision to discontinue her post lacked valid grounds. For the reasons already given, that argument must be rejected. She further contends that the failure to offer her a rider involved unequal treatment because "several vacancy announcements were issued and among them at least two were issued in spite of the fact that the advertised posts, according to ongoing (though unofficial) information […] were intended to be discontinued". The unequal treatment, according to the complainant, consists in these two staff members being offered the opportunity to sign a rider to their contracts, whereas she was not. This argument must also be rejected. It appears that the posts in question were advertised, whereas the complainant's post was not filled and, presumably therefore, not advertised.

17. The final argument advanced by the complainant is that the Commission failed in its duty of care in not considering alternative employment before separating her from service. That argument also fails. The complainant's employment came to an end with the expiry of her contract and her only right was to have the question of a possible exceptional extension considered on the basis of the need to retain essential expertise or memory. That question was not

considered in isolation, it being said in a "Note for the Files" of 31 January 2006 which was appended to the complaint that the complainant did "not possess essential expertise or memory in relation to any other function within the [Secretariat]".

18. None of the other matters relied upon by the complainant, including the failure to acknowledge publicly her service until after her contract had expired, indicates bias, lack of good faith or any other extraneous consideration affecting the decision not to extend her contract further.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 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