

108th Session

Judgment No. 2873

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. W. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom hereinafter “the Commission”) on 14 August 2008 and corrected on 26 September, the Commission’s reply of 4 November, the complainant’s rejoinder of 22 December 2008 and the Commission’s surrejoinder of 18 February 2009;

Considering Articles II, paragraph 5, and VII 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 Dutch national born in 1959, is a former staff member of the Commission’s Provisional Technical Secretariat (hereinafter “the Secretariat”). He joined the Commission on 3 July 2000 as Chief of the Computer Infrastructure Section, at grade P-5, in the International Data Centre Division (hereinafter “the IDC Division”). His initial three-year fixed-term appointment was extended twice, for a period of two years each time, and was due to expire on 2 July 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 tenure policy which is described in detail in Judgment 2690, under A. A 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 in the complainant's contract by means of a rider that he signed on 4 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 post is advertised in parallel with considering the possibility of an exceptional extension for the incumbent. A Personnel Advisory Panel is set up to interview the shortlisted candidates and another Panel, comprised of the same members, assesses the possibility of granting an exceptional extension to the incumbent. Once all interviews have been conducted, the division director submits a proposal on possible reappointment of the incumbent. The Panels hold "a unique meeting" in order to consider 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. They then make a recommendation to the Executive Secretary. In a memorandum accompanying his Note, 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 19 May 2006 a vacancy announcement was issued for the position of Chief of the Network and Systems Support Section, at grade P-5, in the International Monitoring System Division (hereinafter "the IMS Division"). On 25 May the complainant wrote to the Executive Secretary, seeking clarification on the vacancy announcement which, he argued, concerned a position entailing almost identical responsibilities and functions to those he was performing as Chief of the Computer Infrastructure Section in the IDC Division. He considered that the vacancy announcement did not publicise a new

position but rather announced that the relevant post was being moved to a different section, in the context of the Secretariat's restructuring, and he deemed it unacceptable not to be asked to lead that section during the last year of his appointment and be given the possibility of being considered for an exceptional extension.

A Personnel Bulletin issued on 2 October 2006 notified staff of the Executive Secretary's decision of 12 September 2006 to approve a restructuring of the IMS and the IDC Divisions. There was no mention in the Bulletin of the post of Chief of the Computer Infrastructure Section but it indicated inter alia that the complainant was reassigned to the position of Planning Officer of the Joint Projects of the IMS/IDC Divisions. The complainant wrote to the Executive Secretary on 5 October requesting a review of the decision to abolish his post and to create that of Chief of the Network and Systems Support Section. By memorandum of 31 October the Personnel Section informed him that, under the implementation system set out in the Note from the Executive Secretary, he would be accorded the opportunity to be considered for an exceptional extension of his appointment in connection with the filling of the post of Chief of the Network and Systems Support Section in the IMS Division. The complainant was subsequently advised by letter of 6 November that, in light of the aforementioned memorandum, the Executive Secretary assumed that his request for review of the decision of 12 September 2006 had become moot.

On 24 November the Executive Secretary appointed the members of the Personnel Advisory Panel for the advertised post. The Directors of the IDC and the IMS Divisions submitted a joint proposal on 27 November, recommending that the complainant should not be granted an exceptional extension; and in a report issued that same day, the Panel unanimously supported their recommendation.

By memorandum of 21 December 2006 the complainant was informed that, as there was no basis for granting him an exceptional extension, the Executive Secretary had decided not to extend his appointment beyond its expiration date and instead to offer the post of Chief of the Network and Systems Support Section to an external

candidate. On 11 January 2007 the complainant requested a review of that decision, but by letter of 29 January the Executive Secretary decided to maintain it. On 14 February 2007 the complainant lodged an appeal with the Joint Appeals Panel against the Executive Secretary's decisions to abolish the post of Chief of the Computer Infrastructure Section, not to assign him to the post of Chief of the Network and Systems Support Section and subsequently to appoint an external candidate to that post, and not to extend his contract beyond its expiration date. He requested the setting aside of the Executive Secretary's decision of 29 January 2007 and claimed material and moral damages and costs. In its report of 17 April 2008 the Joint Appeals Panel recommended that the Executive Secretary uphold his decision not to extend the complainant's appointment, that he dismiss the claim for material damages, but that he award the complainant moral damages in the amount of 15,000 United States dollars on the grounds that the latter had received contradictory and inconsistent communications, which might reasonably have created in him a perception of lack of good faith on the part of the Administration. By a letter dated 16 May 2008, the Executive Secretary notified the complainant that he had decided to uphold his decision not to extend his appointment beyond its expiration date and to dismiss his claims for material and moral damages. That is the impugned decision.

B. The complainant contends that the decision not to extend his appointment is vitiated by procedural flaws and breach of contract, resulting in particular from the Administration's failure to comply with the procedures set forth in Administrative Directive No. 20 (Rev.2) and the Executive Secretary's Note of 19 September 2005 or the terms of his contract. He points out that, since he was never assigned to the post of Chief of the Network and Systems Support Section, he was not in fact the incumbent of the post in relation to which his exceptional extension was considered. Furthermore, contrary to the Executive Secretary's Note, there was no "parallel" consideration of the possibility of granting him an exceptional extension. Indeed, the post was advertised as a non-rider position in May 2006, well before he was informed that he would be considered

for an exceptional extension. Moreover, the interviews of shortlisted candidates were conducted some ten days before the Personnel Advisory Panel was formally constituted. As for the proposal concerning his possible reappointment, this was submitted jointly by the Directors of the IDC and the IMS Divisions, whereas, according to Administrative Directive No. 20 (Rev.2) and the Executive Secretary's Note, it ought to have been submitted by the Director of his Division, the IDC.

Referring to an argument raised by the Commission in the course of the internal appeal, namely that he is estopped from objecting to the fact that he was considered for an exceptional extension in relation to a post of which he was not the incumbent, because he failed to do so, after having been informed that the Administration intended to proceed in that way, the complainant asserts that there are no grounds for the Commission to construe his silence as consent to or acceptance of the proposed departure from the terms of his contract or the provisions of Administrative Directive No. 20 (Rev.2) and the Executive Secretary's Note.

He also contends that the review by the Personnel Advisory Panel set up to consider the possible extension of his appointment was tainted with lack of due process and prejudice. The fact that he was not assigned to the advertised post prevented him from demonstrating his qualities as the incumbent, and since the Panel members were aware that he had not even been assigned to the post on a temporary basis, it was reasonable for them to conclude that he was not qualified for the post. Furthermore, the Panel was provided with appraisal reports relating to his performance in his former post and was therefore not in a position to make a correct evaluation. He accuses the Commission of having breached its duty to act in good faith and in a transparent manner and of having injured his dignity and professional reputation.

The complainant asks the Tribunal to set aside the impugned decision. He claims material damages equivalent to what he would have earned had his contract been extended for a period of three years from 3 July 2007, including allowances, emoluments and entitlements,

together with interest from due dates, as well as moral damages in the amount of 25,000 euros. He also claims costs for the internal appeal proceedings and the proceedings before the Tribunal in the amount of 15,000 euros.

C. In its reply the Commission submits that the complaint is receivable only to the extent that the complainant's appeal before the Joint Appeals Panel was receivable, that is insofar as it concerned the Executive Secretary's decision of 21 December 2006 not to extend his contract beyond its expiration date – the only decision that was challenged by the complainant within the applicable time limits.

Relying on the Staff Regulations, 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 the Executive Secretary is obliged, when considering individual cases, to take full account of the Commission's non-career nature and it observes that 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 explains that, although the complainant was not the incumbent of the post of Chief of the Network and Systems Support Section and should therefore not have been considered for a possible reappointment, he was nevertheless given the opportunity to be assimilated to the incumbent of the said post for the purpose of deciding whether or not he should be granted an exceptional extension as a matter of fairness. In light of the fact that he tacitly agreed or at least acquiesced to that assimilation, he is now estopped from raising an objection to that course of action. Besides, even if there had been a decision not to assign him to the new post, he failed to challenge it in accordance with the relevant Staff Regulations and Rules.

The Commission rejects the complainant's allegations of prejudice and lack of due process on the part of the Personnel Advisory Panel and submits that his allegation of breach of good faith is unsubstantiated. It asserts that the complainant was duly considered for

an exceptional extension in a manner as fair and transparent as possible in the circumstances, and in accordance with the applicable procedures. The Executive Secretary approved the composition of the Panel as early as 23 September 2006, that is well before interviews were conducted. Furthermore, it was quite appropriate for the Directors of the IDC and the IMS Divisions to submit a joint proposal with regard to the complainant's possible reappointment, given that at the material time he occupied the post of Planning Officer of the Joint Projects of the IMS/IDC Divisions. Similarly, it was appropriate for the Panel to be provided with performance appraisal reports which reflected the duties and responsibilities of the post he occupied.

The Commission dismisses the allegation of breach of good faith as unsubstantiated and invites the Tribunal to conclude that the complainant has failed to prove that the impugned decision was tainted with any vitiating flaw or that he suffered prejudice as a result of the Commission's wrongdoing.

D. In his rejoinder the complainant elaborates on his pleas. He argues that, although cognisant of the procedural requirements contained in the Executive Secretary's Note, the defendant has failed to explain the reasons why it did not assign him to the post in respect of which he was to be considered for an exceptional extension. From this he infers that the Commission's intention was to fill the post through the normal recruitment procedure with no regard for the system set forth in the Executive Secretary's Note.

E. In its surrejoinder the Commission maintains its position in full.

CONSIDERATIONS

1. The complainant claims that the decision of the Executive Secretary dismissing his internal appeal should be set aside and that he should be awarded material and moral damages by reason of the non-extension of his contract as an exception to the seven-year rule. A process, known as the "rider process", was established by Note of the Executive Secretary of 19 September 2005 to determine whether

exceptional extensions should be granted to those persons in whose contracts the Note had been incorporated. It is not disputed that the Note was incorporated in the complainant's contract. Nor is it disputed that the rider process was not fully observed in his case. However, the defendant claims that the complainant was not entitled to be considered for an exceptional extension in accordance with that process but that, because of the special circumstances in which he was placed, it was applied as far as practicable and he cannot now be heard to complain that it did not result in an exceptional extension.

2. Until October 2006 the complainant occupied the post of Chief of the Computer Infrastructure Section in the IDC Division. As a result of restructuring, that post was abolished and a new post, that of Chief of the Network and Systems Support Section, was created in the IMS Division. It is not disputed that, save for its location, the new post was substantially the same as that previously occupied by the complainant. On 5 October 2006 he wrote to the Executive Secretary seeking review of the decision to abolish his post and to create the new post, and stating in particular:

“I regard it to be unacceptable that [...] I am not considered to lead [the Network and Systems Support] Section during the last year of my contract which ends in July 2007 and possibly being considered for exceptional extension, based on the rider-process.”

3. As it happened, the complainant was reassigned to the position of Planning Officer of the Joint Projects of the IMS/IDC Divisions, and the new post remained vacant. However, the Personnel Section informed the complainant on 31 October 2006 that he would “be accorded the opportunity to be considered for an exceptional extension” in connection with the new post and in accordance with the rider process. On 6 November the Executive Secretary wrote to the complainant stating that, in view of the memorandum from the Personnel Section, he assumed that the request for review of his decision to abolish the complainant's post had become moot. The complainant did not indicate to the contrary and he neither lodged an internal appeal with respect to the abolition of his post nor pursued the question of appointment to the new post.

4. The rider process requires that, approximately one year before the expiry of a contract taking the period of service to seven years or more, the incumbent's post be advertised "in parallel to considering the incumbent for exceptional extension". Interviews are to be conducted with the shortlisted candidates by a Personnel Advisory Panel appointed "to assess the possible granting of an exceptional extension to the incumbent". The division director's proposal on "possible reappointment of the incumbent" is to be made after all interviews have been conducted. Thereafter, there is to be "a unique meeting" of the Personnel Advisory Panels to decide whether "the incumbent can be considered to provide essential expertise or memory [...] and therefore should be granted an exceptional extension, or whether one of the candidates interviewed should be offered the position". Their recommendation is then forwarded to the Executive Secretary.

5. The complainant correctly raises a number of procedural matters in relation to the process that was followed with respect to the question of his exceptional extension. First, the new post was advertised as a non-rider position in May 2006 and candidates were shortlisted in September 2006, well before he was informed that he would be considered for a possible extension and, thus, there was no "parallel" consideration of that question. Second, the Personnel Advisory Panel established to consider the possible extension of his contract was not formally constituted until after the shortlisted candidates had been interviewed, again indicating a lack of "parallel" consideration. Third, the complainant notes that the proposal with respect to his possible exceptional extension was a joint proposal from the Directors of the IDC and the IMS Divisions, rather than from "the division director", as required by paragraph 3.2 of Administrative Directive No. 20 (Rev.2). Lastly, the complainant contends that he was denied procedural fairness in that the Personnel Advisory Panel was provided with performance appraisal reports relating to his former post and therefore could not make a proper evaluation of his memory and/or expertise. These procedural anomalies resulted, in large part, from the more fundamental difficulty that the complainant was not the

incumbent of the post in relation to which his exceptional extension was being considered.

6. The Commission argues that the complainant is estopped from making an argument based on the fact that he was not the incumbent of the new post. In this regard, it claims that it proceeded to “assimilate” him to the incumbent of the new post “to be fair [...] or [...] to give him the benefit of any doubt that could possibly have existed”. It contends that the complainant “tacitly agreed [...] or otherwise acquiesced” to that course. Moreover, it points out that, if there was a decision not to assign the complainant to the new post, it was not challenged in accordance with the internal appeal procedures. Accordingly, it is said, the complainant cannot rely on his non-assignment to that post to advance his case.

7. The Commission’s argument of estoppel must be rejected. The essence of estoppel is the making of a statement or representation in reliance upon which a person acts to his or her detriment. Of course, silence may constitute a representation if the circumstances are such as to require an answer. At most, the complainant’s silence could only be construed as a representation that review of the administrative decisions to abolish his post, to create the new post and, possibly, not to assign him to the new post was moot. And if it were to be so construed, it could only be construed in that manner after the time for filing an internal appeal had lapsed. There is nothing to suggest that the Commission acted on a representation of that kind or, indeed, that it altered its position to its detriment in relying on it. Of its own initiative, the Personnel Section indicated that the complainant would be “accorded the opportunity to be considered for an exceptional extension” several days before there was even an opportunity to register an objection to the assumption that his request for review had become moot. Indeed, there is reason to think that, if anyone acted to his detriment in relying upon a representation, it was the complainant in not pursuing an internal appeal. However, he makes no claim in that regard and the matter need not be pursued.

8. Once the Personnel Section indicated that the complainant would be given the opportunity to be considered for an exceptional extension in relation to the new post and in accordance with the rider process, the Commission was bound, as a matter of good faith, to pursue that course. It may here be noted that the memorandum from the Personnel Section made no reference to the rider process being applied on the basis that the complainant was to be “assimilated” to a non-existent incumbent. It said simply that he would be accorded that opportunity “under the implementation system set out in the Note from the Executive Secretary of 19 September 2005”. It is not to the point that that could not be done unless the complainant was appointed to the new post. That was a matter that the Personnel Section ought reasonably to have known and, as a matter of good faith, ought not to have said, in effect, that the rider process would be applied when, in substance, that was impossible. In this last regard, the Joint Appeals Panel was correct to point out that the complainant did not have the advantages that would normally accrue to an incumbent because he had not had “the opportunity to demonstrate his qualities as an ‘incumbent’ of the position”. And as the Joint Appeals Panel also pointed out, the fact that he was not assigned to the new post “could appear as an implicit conviction of the Administration that [he] did not possess memory or expertise enough to run the Section even on an acting basis”.

9. It may be accepted, as the Commission claims, that it “assimilated” the complainant to an incumbent as a matter of goodwill and fairness. Certainly, there is no evidence to the contrary. However, and because the complainant was not the incumbent of the new post and the rider process could not properly apply, the complainant lost a fair opportunity to be judged against the general job market, that being the purpose of the rider process as explained in the Executive Secretary’s Note of 19 September 2005. He lost that opportunity not only in relation to the post of which he was not the incumbent but also, for reasons that have not been explained, in relation to the post of Planning Officer of which he was the incumbent.

10. Because the Executive Secretary failed to appreciate that the complainant had been denied a fair opportunity to be judged against the general job market, both with respect to the new post and the post he, in fact, occupied, he erred in law in dismissing the internal appeal. It follows that the Executive Secretary's decision of 16 May 2008 must be set aside. However, it does not follow that the complainant is entitled to material damages calculated on the basis that he would have been granted an exceptional extension. He is entitled to material damages only for the loss of a valuable opportunity to be considered for an exceptional extension in accordance with the rider process. The Tribunal assesses those damages at 20,000 euros. Additionally, he is entitled to moral damages in the amount of 5,000 euros.

11. The complainant is entitled to costs which the Tribunal fixes at 4,000 euros.

DECISION

For the above reasons,

1. The decision of the Executive Secretary of 16 May 2008 is set aside.
2. The Commission shall pay the complainant material damages in the amount of 20,000 euros, moral damages in the amount of 5,000 euros, and costs in the amount of 4,000 euros.
3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 30 October 2009, Ms Mary G. Gaudron, 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 3 February 2010.

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