

**108th Session**

**Judgment No. 2905**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. R. G. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 15 January 2008 and corrected on 29 January, the Commission's reply of 16 April, the complainant's rejoinder of 8 June and the Commission's surrejoinder of 17 October 2008;

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 is a national of New Zealand born in 1957. He joined the Provisional Technical Secretariat of the Commission in January 2002 as a Communications Officer at level P-3 in the Global Communications Section of the International Data Centre (IDC) Division, with a three-year fixed-term appointment, which was extended several times. As of 23 May 2006 he was reassigned to a P-4 position in the Network and Data Systems Operations Section

within the IDC Division. His appointment was due to expire on 17 January 2009, but on 26 February 2007 he tendered his resignation, effective 8 June 2007. The resignation was accepted by the Executive Secretary.

On 5 June 2007 the complainant received his final performance appraisal report covering the period from January to June 2007. He disagreed with the comments made by the Director of the IDC Division, his second-level supervisor, in part 8 of the report, and on 8 June he submitted a written rebuttal. On 2 July he requested that the matter be referred to a Personnel Advisory Panel, in accordance with paragraphs 7.2 and 7.3 of Administrative Directive No. 2 (Rev.3) concerning the Appraisal of the Performance of Staff Members. The Panel unanimously recommended that the Executive Secretary should not maintain part 8 of the report on the grounds that the opinion expressed therein did not represent an independent and objective appraisal. It held in particular that the comments made by the Director were “emotional and judgmental” and that they were not substantiated. It also found that the proper procedure for completing the performance appraisal report had not been followed. By letter of 3 September 2007 the Executive Secretary informed the complainant that, based on the Panel’s recommendation, he had decided that the first two sentences of part 8 of his performance appraisal report should be deleted and that, in due course, he would be provided with a copy of the revised report for signature.

On 17 September 2007 the complainant wrote an e-mail to the Personnel Section indicating that he had not yet received the revised performance appraisal report and enquiring about its “status”. The Personnel Section replied that same day that it was still expecting the revised report and that it would send it to him as soon as it received it. The complainant wrote again to the Personnel Section on 27 September and 3 October requesting the revised performance appraisal report. On 7 November 2007 he wrote to the Executive Secretary to inform him that he still had not received the revised report despite his repeated requests and asked him to “assist [him] in

this matter”. He also requested that a document produced by the Director of the IDC Division during the rebuttal process, in which a former colleague of his accused him of harassment, be removed from his personnel file on the grounds that he had never seen it before and had not been given the opportunity to respond to it.

Not having received the revised performance appraisal report, the complainant filed a complaint with the Tribunal challenging the implicit rejection of the claim he had notified to the Commission on 17 September 2007. On 22 January 2008, under cover of a letter dated 10 December 2007, the Executive Secretary sent the complainant the revised performance appraisal report, asking him to sign and return it and noting that his decision was an acknowledgement that the section of the report in question had to be modified, but in no way a recognition or acceptance of the accusations the complainant had made against one of his former colleagues in his letter of 7 November 2007. The complainant replied on 4 February 2008, refusing to sign the report on the grounds that it was not an original document and that it had not been “sent officially”. In a letter of 10 March 2008, the Executive Secretary reiterated his request that the complainant sign the revised report and stated that the latter’s comments did not give rise to further action on his part.

B. The complainant argues that the Commission’s refusal to provide him with a revised performance appraisal report, despite the Executive Secretary’s decision of 3 September 2007, amounts to harassment and that this has adversely affected his health. He also argues that he was prevented from obtaining other employment due to the Commission’s inaction, as he was unable to provide a copy of his last performance appraisal report when he was asked to do so during interviews for other positions within the United Nations system.

He also criticises the fact that he was not given the opportunity to respond to a document alleging harassment on his part, which the Director of the IDC Division produced during the rebuttal process. He states that he has received no reply to his letter of 7 November 2007

by which he asked the Executive Secretary to remove the document in question from his personnel file. He consequently considers that the Executive Secretary has implicitly refused to remove it.

The complainant requests that the Commission be ordered to provide him with the “corrected [performance appraisal report] with the offending comments removed”, and to remove the “previously unknown harassment complaint” from his personnel file. He asks that “the option of his reappointment” for a maximum of seven years, at the same grade and step as that which he held prior to his separation from service and in a division not headed by the Director of the IDC Division, be considered. He claims material damages in an amount equivalent to the remuneration he would have received if his appointment had continued until its expiry date. He also claims costs.

C. In its reply the Commission submits that the complaint is irreceivable. It argues that the e-mail of 17 September 2007 was merely a request for information and that it did not notify it of any claim, within the meaning of Article VII, paragraph 3, of the Statute of the Tribunal, on which the Commission had to take a decision. The Commission also submits that the complainant’s claims for removal of a document from his personnel file, material damages, costs and reappointment are irreceivable as he has failed to exhaust internal remedies in respect of these claims, as required under Article VII, paragraph 1, of the Tribunal’s Statute.

The defendant contends that the complaint is moot insofar as it concerns the complainant’s claim for the removal from his performance appraisal report of “offending comments”. It acknowledges some delay in providing the complainant with the revised report, and it explains that this was due to the fact that the officials involved in the rebuttal process were absent. Nevertheless, it did send him the revised report on 22 January 2008 under cover of a letter dated 10 December 2007, by which it asked him to sign the report and return it to the Administration. The Commission points out that, although the first two sentences of part 8 of the initial report were

removed in line with the decision of the Executive Secretary, to date the complainant has not signed the revised report. It adds that, in accordance with paragraph 7.5 of Administrative Directive No. 2 (Rev.3), the actions or decisions taken by the Executive Secretary as a result of the rebuttal process are not appealable. Thus, to the extent that the complaint may be construed as challenging those actions or decisions, it is also irreceivable.

D. In his rejoinder the complainant asserts that his complaint is receivable. He contests the Commission's conclusion that his complaint is based solely on the e-mail of 17 September 2007. He explains that that date, which is indicated on the complaint form as the date on which he notified his claim to the Commission, corresponds to his first attempt to obtain the revised performance appraisal report, and that he clearly indicated in his submissions the various dates on which he had asked to be provided with the revised report. He also explains that he indicated the date of 17 September 2007 in good faith but that the Tribunal can decide which date constitutes the starting point for the application of Article VII, paragraph 3, of its Statute.

He rejects the Commission's argument that his complaint is moot in part. He points out that the revised performance appraisal report was sent to him only after he had filed his complaint. Citing the Tribunal's case law, he argues that the Commission's belated express decision does not alter the substance of the dispute. He states that he is willing to sign the revised report, provided in particular that it is an original and not a copy. Indeed, he asserts that the revised report sent to him is not an original, contrary to the requirements of paragraph 5.3 of Administrative Directive No. 2 (Rev.3).

The complainant alleges that he became aware of the fact that a document containing allegations of harassment against him had been produced during the rebuttal process only after his separation from service; consequently, he did not have the possibility of challenging it internally as he was no longer a staff member. Since no internal means of redress were open to him, he had no choice but to lodge a

complaint with the Tribunal, and the requirements of Article VII, paragraph 1, of the Tribunal's Statute are therefore satisfied. He adds that in fact it was he who was harassed, and he explains that he resigned because he had been "pressured" to take part in actions that would imply "breaches of staff and financial rules", which he did not want to do.

He extends his claim for damages to include moral damages on the grounds that he was denied the right to respond to an allegation of harassment made against him. He explains that he seeks material damages because his reputation has been damaged and his employment prospects compromised.

E. In its surrejoinder the Commission maintains its objection to receivability. It considers that the complainant is not entitled to leave it to the Tribunal to identify and specify the date of notification of his claim for the purpose of Article VII, paragraph 3, of its Statute.

With regard to the document containing the allegations of harassment, the defendant reiterates that the claim made in that respect is irreceivable. It adds that the claim lacks purpose since the document in question is not in the complainant's personnel file and hence cannot be removed from it.

## CONSIDERATIONS

1. The complainant resigned from office with effect from 8 June 2007. Prior to that, on 5 June 2007, he was given his final performance appraisal report covering the period from January to June 2007. He indicated his disagreement with the comments made by his second-level supervisor in part 8 of the report and submitted a written rebuttal. Ultimately the matter was referred to a Personnel Advisory Panel.

2. The Panel unanimously recommended that the Executive Secretary should not maintain part 8 of the report on the grounds that

the opinion expressed therein did not represent an independent and objective appraisal.

3. By letter of 3 September 2007 the Executive Director communicated to the complainant that, in accordance with the recommendation of the Panel, the offending passages of his performance appraisal report would be deleted, and that the new report would be sent to him in due course.

4. After submitting several requests for the new performance appraisal report first on 17 September 2007, and subsequently on 27 September and 3 October 2007, the complainant wrote to the Executive Secretary on 7 November 2007 requesting his assistance in the matter. He also referred to a document, which allegedly had been produced during the rebuttal process and in which a former colleague had accused him of harassment, and requested that it be removed from his personnel file. The complainant filed his complaint with the Tribunal on 15 January 2008, invoking Article VII, paragraph 3, of the Statute and indicating 17 September 2007 as the date of notification of his claim to the Commission.

5. Following the filing of the complaint, other events were also taking place and continued to take place in the administrative proceedings between the parties. A new performance appraisal report was provided to the complainant under cover of a letter dated 10 December 2007, which, however, was apparently sent only on 22 January 2008, as stated in the letter from the Executive Secretary of 10 March 2008.

6. In his letter of 10 December 2007 the Executive Secretary stated that his decision to accept the complainant's claim to delete the two rebutted sentences from the performance appraisal report was in no way a recognition or acceptance of the validity of the "serious accusations" the latter had made against one of his former colleagues in his letter of 7 November 2007.

7. The complainant replied in writing on 4 February 2008, refusing to sign the revised performance appraisal report on the grounds that it was not the original document and that it had not been “sent officially”. He asked the Commission to send him the original report with the offending comments “marked void” or “left for [him] to cancel” and stated that this would be the only way for him to verify that they had actually been deleted.

8. In his letter of 10 March 2008 the Executive Secretary requested again that the complainant sign and return the revised report and concluded that the complainant’s comments did not give rise to further action on his part. He added that “[w]hen [he would be] in receipt of the countersigned original signature page of the performance appraisal report this original [would] be the only one retained as part of [the complainant’s] Official Status File”.

9. The first issue raised by the complaint is whether there was an implied decision, subsequent and contrary to that of 3 September 2007, not to provide the complainant with a revised performance appraisal report. In this regard, Article VII, paragraph 1, of the Statute provides that a complaint shall be receivable only when the decision impugned is “a final decision” and when “the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations”. In the circumstances of the case, a subsequent decision cannot be implied. There was nothing in the correspondence subsequent to 17 September 2007 suggesting that, contrary to what had been said on 3 September, a revised performance appraisal report would not be issued. Moreover, the letter of 10 December 2007 enclosing the revised performance appraisal report clearly indicated that there was no subsequent and contrary decision. There being no subsequent decision, nor evidence that the complainant requested a review of the decision of 3 September 2007, or that he filed an appeal against it pursuant to the applicable regulations and rules, the complaint is irreceivable insofar as it concerns the revised performance appraisal report, for failure to



exhaust the internal means of redress, as required by the Tribunal's Statute. However, there was some delay in forwarding the revised performance appraisal report and the complainant is entitled to be compensated on that account in the amount of 500 euros. Having succeeded in part, he is also entitled to costs in the amount of 300 euros.

10. The other claims in the complaint, namely for the removal from the complainant's personnel file of a document in which a former colleague accused him of harassment, for material damages and "the option of reappointment", are so manifestly without merit that it is unnecessary to consider whether they are receivable. The evidence shows that the document in which the complainant was accused of harassment was never placed on his personnel file. In view of the complainant's resignation, there is no basis on which he can claim material damages in an amount equivalent to the remuneration he would have received if his appointment had continued until its expiry date or "the option of his reappointment". Such claims could only be made on the basis that the decision to accept his resignation should be set aside. In any event, that decision was not timely challenged.

## DECISION

For the above reasons,

1. CTBTO PrepCom shall pay the complainant damages in the amount of 500 euros.
2. It shall also pay him 300 euros in costs.
3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 29 October 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Agustín Gordillo, 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  
Agustín Gordillo  
Dolores M. Hansen  
Catherine Comtet