

K. (Nos. 1, 2, 3 and 4)

v.

CTBTO PrepCom

126th Session

Judgment No. 3996

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms R. K. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom, hereinafter “the Commission”) on 9 October 2014 and corrected on 13 November 2014, the Commission’s reply of 7 August 2015, the complainant’s rejoinder of 20 November 2015, the Commission’s surrejoinder of 14 March 2016, the complainant’s additional submissions of 4 August and the Commission’s final comments of 30 November 2016;

Considering the second and third complaints filed by Ms R. K. against the Commission on 7 April 2016 and corrected on 20 May, the Commission’s replies of 30 November 2016, the complainant’s identical rejoinders of 2 March 2017 and the Commission’s identical surrejoinders of 27 April 2017;

Considering the fourth complaint filed by Ms R. K. against the Commission on 2 February 2017 and corrected on 29 March, the Commission’s reply of 30 June, the complainant’s rejoinder of 22 September and the Commission’s surrejoinder of 23 October 2017;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision not to investigate her claim of harassment, the decision to permanently transfer her and the decision to offer her an extension of appointment in her new position.

Mid-2009 the complainant was appointed to the P-5 position of Chief of the Internal Audit Section (IAS) within the Commission under a Reimbursable Loan Agreement (RLA) between the Commission, the United Nations Children's Fund (UNICEF) and herself. The RLA provided that any amendments or changes to the RLA should be subject to the written agreement of the Commission, UNICEF and the complainant. It also provided that effective 1 December 2013 she would be transferred to the Commission, that is to say that she would become a staff member of the Commission.

In September 2012, while employed under the RLA, the complainant was temporarily transferred to the P-5 position of Special Assistant to the Executive Secretary on Oversight Activities. By a memorandum dated 28 October 2013 she was informed that her transfer was confirmed with retroactive effect from 13 August 2013. She contested that decision on the grounds that her permanent transfer was against her wishes, contrary to a commitment made by the former Executive Secretary, that no valid reason justified it and that it was in breach of the RLA since neither she nor UNICEF had approved it. On 7 January 2014 the Executive Secretary replied that her request for review was time-barred and hence irreceivable. He nevertheless gave a detailed analysis of the merits of her request for the sake of transparency. He stated that he had decided to modify the effective date of her transfer to 1 December 2013 on the ground that the RLA had been breached. However, he rejected her request for an award of moral damages and costs considering that the transfer decision was not an affront to her dignity, nor did it damage her professional reputation. Pursuant to her request for a review of that decision, the Executive Secretary informed her that the appropriate step for any further action was to file an appeal with the Joint Appeals Panel (JAP), which she did.

By letter of 12 January 2016 the complainant was informed that the Executive Secretary endorsed the recommendations of the JAP concerning the appeal she had filed against the decision to permanently

transfer her with effect from 13 August 2013, to award her 45,000 euros in moral damages on the ground that the decision was made in violation of the RLA, and to award her costs. He also agreed with the JAP that her appeal should otherwise be rejected as the permanent transfer could not be considered a demotion or an affront to her dignity. That is the decision she impugns in her second complaint.

By letter of 23 March 2016 the Executive Secretary informed the complainant that he endorsed the JAP's recommendation to dismiss the appeal she had filed against the decision of 7 January 2014 to modify the date of her permanent transfer. The JAP had found that there was no conclusive evidence of a breach of good faith but nevertheless noted that the way her transfer was handled was not "ideal". It did not consider the lateral move to another senior position as a demotion. That is the decision she impugns in her third complaint.

In the meantime, on 27 February 2014 the complainant was offered an extension of her appointment with the Commission from 7 July 2014 to 6 July 2016 as Special Assistant to the Executive Secretary on Oversight Activities. She contested that "decision" considering that it was the culmination of a series of "unwarranted and demeaning actions" demonstrating that the Commission no longer wished to employ her as Chief of the IAS and preferred to separate her from service. She asked to be reinstated as Chief of the IAS and to be granted a two-year extension of appointment in that position. She also claimed material and moral damages together with costs. Following written exchanges concerning the scope of her contestation in particular with respect to allegations of harassment, she was informed that it had been determined that her allegations of harassment were not supported by available facts, but that she could provide observations on the alleged "incident". She did so on 19 May 2014 and asked that her comments be forwarded to the Joint Disciplinary Panel. She separated from service on 7 July 2014. On 15 July she was informed that, following an investigation into her allegations of harassment, it had been determined that her allegations did not warrant the convening of a Joint Disciplinary Panel. On 15 September the complainant requested that the decision be forwarded to the JAP and that she be provided with a copy of the

“investigation” report. On 2 October 2014 the Commission provided her with a copy of the report but rejected her request to have the matter forwarded to the JAP on the grounds that this would be contrary to Administrative Directives Nos. 29 (Rev.1) and 52. On 9 October 2014 she filed her first complaint in which she impugns the decision of 15 July 2014.

By letter of 8 November 2016 the Executive Secretary informed the complainant that, in accordance with the recommendation of the JAP, her appeal against the decision to offer her an extension of her appointment as Special Assistant to the Executive Secretary on Oversight Activities was dismissed. That is the decision she impugns in her fourth complaint.

In her first complaint the complainant asks the Tribunal to quash the impugned decision of 15 July 2014. She also asks the Tribunal to examine whether she was harassed – rather than sending back the matter to the Commission for examination – and to find that she was. She claims material, moral and exemplary damages. She further asks the Tribunal to award her any other relief it deems just and proper, together with costs.

The Commission submits that the first complaint should be dismissed as irreceivable for failure to exhaust internal remedies, or as devoid of merit. It makes a counterclaim for costs on the grounds that the complaint is vexatious.

In her second complaint the complainant asks the Tribunal to set aside the impugned decision of 12 January 2016 insofar as the Executive Secretary did not find that the permanent transfer decision was tainted by abuse of authority, malice, breach of good faith and mutual trust and breach of due process. In her third complaint, she seeks the setting aside of the impugned decision of 23 March 2016. Noting that reinstatement would not be possible, in her second and third complaints she claims material, moral and exemplary damages. She also asks the Tribunal to award her any other relief it deems just and proper, and to award her costs.

The Commission asks the Tribunal to dismiss the second and third complaints as vexatious and devoid of merit and it makes a counterclaim for costs. It also asks the Tribunal to find that the complainant's claim with respect to tampering with evidence, which relates to the date on which the new Executive Secretary signed a memorandum, is irreceivable.

In her fourth complaint the complainant asks the Tribunal to set aside the impugned decision of 8 November 2016. She also asks the Tribunal to order her retroactive reinstatement as Chief of the IAS from the date of her separation or to award her damages in an amount equivalent to two years' salary plus allowances, benefits, "provident fund payments", and emoluments from the date of separation, together with interest. She further seeks an award of material damages for loss of enhanced earning capacity for diminished job prospects, moral damages and exemplary damages. Lastly she claims costs.

The Commission asks the Tribunal to dismiss the fourth complaint as irreceivable with respect to the claim of tampering with evidence and otherwise devoid of merit. It also asks that the complainant be ordered to pay the costs of the proceedings.

CONSIDERATIONS

1. The complainant has filed four complaints against four decisions of the Executive Secretary. As the facts leading to the four complaints overlap, it is convenient to deal with them in one judgment and to join the four complaints as the parties have requested, as well as to summarize the chronology here.

2. The complainant joined the Commission as Chief of the IAS on 7 July 2009, for a three-year period (from 7 July 2009 until 6 July 2012), pursuant to a letter of appointment issued by the Commission under an RLA between the Commission, UNICEF, and the complainant. The RLA required the consent of all parties for any amendment of its terms. The complainant was given two extensions to her appointment as Chief of the IAS on 2 April 2012: the first extension of her contract was until 30 November 2013 when the RLA would expire and she

would take early retirement from UNICEF, and the second was from 1 December 2013, when the complainant would become a Commission staff member, until 6 July 2014.

3. In 2012 a new Executive Secretary was elected and a competition for the position of Special Assistant to the Executive Secretary on Oversight Activities (P-5) was advertised. Allegedly, the outgoing Executive Secretary encouraged the complainant to apply, which she did on the evening of the last day for submissions, 21 May 2012. The complainant sat the first E-quiz and did not pass it, but the Commission nevertheless retained her application. The complainant withdrew her application on 10 September 2012 before the second E-quiz was due to take place. Subsequent to the second E-quiz, the outgoing Executive Secretary suspended the competition, and asked the complainant to accept the post as a temporary assignment to help him out in the transition period until the new Executive Secretary took office (1 August 2013). After ensuring that her appointment included an explicit clause stating that she would return to her post as Chief of the IAS at the expiration of the temporary assignment, the complainant accepted the temporary transfer. The complainant was temporarily transferred to the position of Special Assistant to the Executive Secretary on Oversight Activities on 28 September 2012, taking effect from 30 September 2012 under the clause that when the outgoing Executive Secretary left she would return to the post of Chief of the IAS.

The Tribunal will examine first the second complaint, followed by the third, then the fourth, and finally the first complaint.

The complainant applies for oral hearings in her first, second and third complaints. As the written submissions are sufficient to make a reasoned decision, oral hearings are unnecessary. Thus, the Tribunal denies the application for oral hearings.

4. The complainant was notified by memorandum dated 28 October 2013 that the new Executive Secretary had approved her permanent transfer to the post of Special Assistant to the Executive Secretary on Oversight Activities with effect from 13 August 2013.

This memorandum refers to a previous memorandum of 5 July 2013 (which was attached to the 28 October 2013 memorandum), whereby the former Executive Secretary approved the complainant's transfer to the said position.

The complainant requested a review of the decision of 28 October 2013 in a memorandum dated 9 December 2013, stating *inter alia* that the permanent transfer was against her wishes, and that it violated both the terms of the RLA and the written commitment of the former Executive Secretary made in the memorandum of 28 September 2012, according to which she would return to the position of Chief of the IAS. The Executive Secretary responded by a memorandum dated 7 January 2014 that her request was time-barred as she had been notified in July of the permanent transfer by the memorandum from the Chief of the Human Resources Section (HRS), dated 5 July 2013. Without prejudice to the receivability of the request for review, the Executive Secretary dealt with all the matters raised in the request. He acknowledged that the RLA had been breached, and, therefore, decided to review the 28 October 2013 decision to permanently transfer her with effect from 13 August 2013, and, instead, to permanently transfer her with effect from 1 December 2013 (following the RLA expiry on 30 November 2013). He rejected as unproven her claims that the transfer was an affront to her dignity and damaged her professional reputation, and denied her requests for damages and costs. He also denied her request to appeal directly to the Tribunal.

The complainant filed an appeal with the JAP on 28 January 2014 against that decision insofar as it related to the initial decision to permanently transfer her (effective 13 August 2013), and the related claims. In its report dated 16 December 2015, the JAP found that the appeal was receivable and that the RLA had been breached. It recommended that the complainant be awarded moral damages in the amount of 45,000 euros for the period during which the transfer breached the RLA, along with costs. It rejected the complainant's request for material damages as the transfer was lateral and she had suffered no material loss.

The Executive Secretary notified the complainant of his decision to endorse the JAP's recommendations in a letter dated 12 January 2016. This is the decision the complainant impugns in her second complaint filed on 7 April 2016.

4A. The complainant argues that in the impugned decision the Executive Secretary did not consider that the permanent transfer had no valid justification; that it was a demotion, which constituted an affront to her dignity as she was transferred against her wishes; and that the decision to transfer her violated the commitment made by the former Executive Secretary, and was based on an improper process. She concludes that the Commission abused its authority, and breached the principle of good faith and mutual trust, in making an unlawful transfer based on procedural irregularities. The complainant does not challenge the impugned decision insofar as the transfer decision was found unlawful for breaching the RLA and the Executive Secretary awarded her moral damages and costs.

4B. The complainant also alleges that the new Executive Secretary attempted to pervert the course of justice through tampering with evidence by stating the date of his signature as 8 July on a copy of the 5 July 2013 memorandum, thus rendering irreceivable the complainant's request for review of the decision of 28 October 2013 to permanently transfer her. Even if this plea has no direct bearing on the outcome of the second complaint (as the Executive Secretary considered in the impugned decision that the request for review was receivable), the Tribunal will address that issue in the context of the second complaint, which is the first to be examined in this judgment.

The Tribunal determines that this allegation of tampering with evidence is not proven. The complainant alleges that the copy of the 8 July 2013 memorandum (attached to the 7 January 2014 memorandum), which contained the signature of the new Executive Secretary, appeared suddenly, and was contradicted by many assertions provided to her by the Chief of HRS after July 2013. Moreover, she alleges that it differed from the copy signed by the former Executive Secretary on 5 July 2013,

and that the January 2014 memorandum only referred to the approval by the former Executive Secretary. Allegedly, furthermore, the fact that the new Executive Secretary signed the copy of the memorandum on 8 July 2013 was never mentioned in the meetings held before 7 January 2014 concerning her permanent transfer. The Tribunal finds that the explanation given by the Commission is plausible. According to this explanation, the delay in communicating that the new Executive Secretary had signed the copy of the memorandum on 8 July 2013, was due to an oversight as the Chief of HRS was not informed immediately of that signature, or was due to an error on the part of the latter. This finding is consistent with the general principle that the complainant bears the burden of proving malice, bad faith or misuse of authority (see Judgment 3743, under 12, and the judgments cited therein). Additionally, the Tribunal observes that the wording used by the Chief of HRS in her email sent to the complainant on 29 July 2013 does not contradict the Tribunal's remark that in July 2013 the former Executive Secretary was the only one competent to exercise the functions of that office as the subsequent Executive Secretary took up his functions only on 1 August 2013. In the email, the Chief of HRS made reference to a practice and not to a binding provision. Indeed, the Chief stated that "[a]s a transitional arrangement it ha[d] been the practice that both [the former Executive Secretary and the Executive Secretary elect] would sign off HR decisions going forward". Accordingly, the new Executive Secretary was not required to sign the decision in order to validate the initial transfer decision.

4C. The claims that the permanent transfer did not have any valid justification, was a demotion and an affront to the complainant's dignity, breached the principle of good faith and mutual trust, was based on an improper process, and that the Administration abused its authority are all unfounded.

4D. The Tribunal considers, contrary to the assertion of the JAP ("the argument presented by the Administration [...] does not stand"), that the Commission validly motivated its decision to permanently transfer the complainant from the post of Chief of the IAS to the post of Special Assistant to the Executive Secretary on Oversight Activities.

It is worth adding that the JAP's assertion does not appear to be an element of the *ratio decidendi* on which the JAP's recommendations were based. These recommendations were merely based on the breach of the RLA, and the Executive Secretary's endorsement of said recommendations was only based on the recognition of that breach. In his memorandum of 7 January 2014, the Executive Secretary, who had taken up his functions at the Commission on 1 August 2013, gave the reasons for the transfer. He confirmed that the transfer was due to concerns regarding conflict of interest or the appearance of a conflict of interest, due to the fact that the complainant, as Special Assistant to the Executive Secretary on Oversight Activities, had assumed managerial functions, which rendered improper her return to the post of Chief of the IAS. These concerns had been expressed by the External Auditor (EA), the Working Group A (WGA), and the Advisory Group (AG) at its 40th meeting. In his decision of 12 January 2016 the Executive Secretary limited his endorsement to the JAP's recommendations contained in paragraph 102 of its report, which reads in part as follows:

“[...] the Panel recommends the following to the Executive Secretary:

- i. To award the [complainant] Euro 45,000 in moral damages for the period in which the [complainant's] transfer breached the [RLA], namely in the period from 8 July 2013 – 30 November 2013.
- ii. To reject the [complainant's] request for material damages, as the move was a lateral move and therefore no material loss was suffered by the [complainant].
- iii. To pay the [complainant's] legal fees solely incurred for this appeal. [...]"

In his decision of 12 January 2016 the Executive Secretary confirmed the reasons given in his memorandum of 7 January 2014.

4E. The situation created by the complainant's temporary assignment to the position of Special Assistant to the Executive Secretary on Oversight Activities, and the concerns regarding a possible conflict of interest raised by the EA, AG, and WGA, constituted valid reasons for the impugned decision. The fact that these different bodies raised the issue is sufficient to conclude that a perception of conflict of interest would arise. Moreover, the complainant herself, by insisting that the

initial temporary transfer memorandum be revised to include a clause that she would be returned to her post after the temporary assignment, demonstrated that she was aware of the risk of not being returned to her former post. The complainant notes that the draft of the AG's report included the observation that "a person involved in management should not return to [Internal Audit] due to the independent status of the latter". Whereupon she realized that that observation "practically close[d] the door for [her] to return to [the Internal Audit]" (email of 2 May 2013 sent by the complainant to the former Executive Secretary).

The Tribunal finds that the former Executive Secretary did his best to comply with his commitment to transfer the complainant back to her previous post. At the 43rd plenary session of WGA, which took place on 27 May 2013, the Executive Secretary contended that the complainant's temporary assignment could not give rise to any conflict of interest. He claimed in summary:

"So the internal audit is under the normal rules of engagement subordinated to me, and, of course, my office is subordinated to me. So, in that respect, I do not see any change in the status of this subordination [...].

[...] the arrangement was done in a way where it was clear that the assignment should not violate the Professional Standards for Internal Audit. And the safeguard for that is that the Internal Audit Chief should refrain from assessing specific operations for which she was previously responsible and this is the standing rule as well under those Standards for Internal Audit."

4F. The complainant's allegation that the Executive Secretary's report was not followed by any other action did not change the fact that no statement was made to support his view, and the same morning a number of delegations had raised the concern about the conflict of interest. The complainant's allegation that the Executive Secretary did not immediately provide clarification to the EA, and to the AG, that their comments on the issue of conflict of interest were not correct, does not consider the institutional independence of these organs of the Commission, and the Executive Secretary's accountability to the WGA. Furthermore, there is no proof that his intervention would have changed the conclusions of those bodies. The Tribunal also observes that the complainant's return to her previous post, considering the temporary

activity carried on by her as Special Assistant to the Executive Secretary on Oversight Activities, would have undermined the appearance of impartiality of the IAS. Notwithstanding the fact that in alleged similar cases the organizations belonging to the United Nations system did not follow the same strict criterion applied by the Commission to guarantee the appearance of independence of the IAS, the Tribunal concludes that the Commission properly interpreted the provisions regarding the independence of the IAS and conflict of interest.

4G. In light of the above, the Tribunal determines that the Executive Secretary, in deciding not to transfer the complainant back to her previous post, exercised his discretion properly and respected the complainant's dignity. Accordingly, the complainant's arguments that the Commission abused its authority, breached the principles of good faith and mutual trust, that her permanent transfer was a demotion that constituted an affront to her dignity, that the Commission had failed to consider her wishes, and that the Commission violated the commitment made by the former Executive Secretary to her are all unfounded.

4H. Regarding the contention that the Commission officially informed the complainant about the permanent transfer on 29 October 2013, one day after that decision had been announced to the Governing Body by the Executive Secretary, the Tribunal finds that the complainant was aware of the Commission's intent to advertise the post of Chief of the IAS. The Commission paid particular attention to the issue regarding the complainant's permanent transfer. In an email sent to the former Executive Secretary on 25 July 2013, the complainant noted that, by sharing with her the memorandum of the Chief of HRS, dated 5 July 2013, he had communicated to her "that a decision had already been made to permanently transfer [her] to the [...] Special Assistant post". Following that, there was a meeting on the same issue with the new Executive Secretary, who had taken up his functions on 1 August 2013. Neither party alleges that during that meeting the new Executive Secretary hinted that he could reconsider the complainant's transfer already decided by the former Executive Secretary.

4I. Regarding the allegation that the complainant was notified of her permanent transfer after the post of Chief of the IAS had been advertised (12 August 2013), the Commission raises the objection that this claim is irreceivable as it was raised for the first time before the Tribunal. Notwithstanding this objection, the Tribunal considers that the complainant was already aware of the fact that the post would be advertised. In an email, dated 27 June 2013, to the Director of the Division of Administration, the complainant wrote that she had been informed that the new Executive Secretary would be discussing with the former Executive Secretary the fact that her transfer “to the [Special] Assistant of the [Executive Secretary] post [would] be made permanent, and that he would like to advertise the Chief Internal Audit post. This intention was also raised by [the new Executive Secretary] when the complainant talked to him on 31 May”.

4J. Regarding the allegation that the impugned decision in the second complaint violated the written commitment made by the former Executive Secretary, the Tribunal observes that the said commitment could not give rise to a legitimate expectation for the complainant. This is due to the fact that the Executive Secretary’s discretionary power with respect to a transfer must necessarily yield to the objective appearance of a conflict of interest; even more, considering that the complainant herself had requested the written commitment, and that the conflict of interest cannot be superseded by a commitment or an agreement. In conclusion, the Tribunal finds that the Commission examined with particular attention the question of the complainant’s permanent transfer and considered that it was impossible to satisfy the complainant’s wish and the commitment made by the former Executive Secretary to transfer her back to her previous post.

In light of the above considerations, the second complaint must be dismissed.

5. On 6 March 2014 the complainant requested a review of the decision of the Executive Secretary contained in the memorandum of 7 January 2014, that is, the decision to change the date of her permanent

transfer to 1 December 2013 (the date she became a Commission staff member following the expiry of the RLA). The Executive Secretary rejected her request for review in a memorandum dated 2 April 2014, stating, *inter alia*, that “[his] response of 7 January 2014, constitute[d] [his] answer to [her] request for review in its entirety”. He then forwarded the matter to the JAP, asking that it be joined to her first appeal. The complainant contested this in a memorandum dated 7 April 2014 arguing that she was contesting a new decision that was notified to her by the 7 January memorandum. She filed her second internal appeal on 29 April 2014. In its report dated 29 February 2016, the JAP recommended that the Executive Secretary dismiss the complainant’s request for material, moral and exemplary damages and costs. The Executive Secretary communicated his decision to endorse the JAP’s recommendation in a letter to the complainant dated 23 March 2016. This is the decision impugned in the complainant’s third complaint before the Tribunal, filed on 7 April 2016.

5A. The specific claim raised in the third complaint, which is not common to the second, regards the allegation that the Executive Secretary had acted inappropriately by changing the effective date of the complainant’s permanent transfer retroactively from 13 August to 1 December 2013. For the remainder, the complainant repeats, in essence, the same claims raised against the previous decision examined in the consideration above. She contends that the permanent transfer decision was wrong even after she became a staff member. The Tribunal considers that the Executive Secretary correctly endorsed the JAP’s recommendation of 29 February 2016 to dismiss the complainant’s appeal.

5B. The Executive Secretary, by reviewing the 28 October 2013 decision, which was not favorable to the complainant, and by deciding to correct a mistake by modifying the date of the permanent transfer, and by awarding the complainant 45,000 euros as moral damages considering the period in which the complainant’s permanent transfer had been in breach of the RLA, acted appropriately. The Executive Secretary did not legitimize his earlier unlawful decision, which violated the RLA, but, acting properly, acknowledged and corrected a previous

error. It must be underlined that the correction did not cause any injury to the complainant. It is worth adding that the complainant's permanent lateral transfer cannot be objectively considered a demotion. Taking into account that the new post was classified at the same level as the post of Chief of the IAS, an important element for an objective comparison between the two posts; that, as the JAP noted in its report, the tasks listed in the job description for the post of Special Assistant to the Executive Secretary on Oversight Activities were commensurate with those assigned to the Chief of the IAS; and that the tasks of the Special Assistant included, amongst other things, the coordination with the Internal Audit and the Evaluation Section of an annual oversight work schedule, staffing plan and budget, as well as providing direct advice to the Executive Secretary on the oversight activities, the third complaint must be dismissed.

6. The complainant received a letter of extension of appointment, dated 27 February 2014, from the Executive Secretary, offering an extension of "the fixed-term appointment set forth in the Letter of appointment dated 2 April 2012 and as amended as per [her] transfer to the Office of the Executive Secretary as Special Assistant to the Executive Secretary on Oversight Activities". The extension was from 7 July 2014 until 6 July 2016.

The complainant objected to this offer of extension for the post of Special Assistant in a memorandum dated 26 March 2014, requesting a review of the decision. She stated *inter alia* that she had "consistently objected to the transfer to this post, and requested the Commission to comply with its obligations under [her] terms of appointment." She went on to state that she considered the offer of extension to be constructive dismissal as the Commission breached its commitment to return her to the post of Chief of the IAS. She requested permission to appeal directly to the Tribunal, and submitted that she had been subjected to "a systematic campaign of harassment with the intention and ultimate goal of removing [her] permanently from the post of Chief, IA[S], and from the Commission altogether".

The Executive Secretary rejected her request for review in a memorandum dated 8 April 2014, stating that he had forwarded the matter to the JAP and had requested that it be joined to her pending appeal. He also dismissed her allegations of harassment and of constructive dismissal.

The complainant contested this in a memorandum dated 16 April 2014, stating that she would file an internal appeal against the rejection of her request, and that she would challenge the offer of extension of her appointment and ask that her allegations of harassment be properly investigated in accordance with the policy on harassment-related grievances.

She filed her third internal appeal against the offer of extension of appointment, which she considered to be constructive dismissal, on 5 May 2014. In its report dated 25 October 2016, the JAP recommended that the Executive Secretary dismiss the complainant's appeal in its entirety.

In a letter dated 8 November 2016, the complainant was notified of the Executive Secretary's decision to endorse the recommendation of the JAP. This is the decision impugned by the complainant in her fourth complaint before the Tribunal, filed on 2 February 2017.

6A. The fourth complaint is grounded on the complainant's characterisation of facts and decisions which, according to her, were all aimed at permanently removing her from her post of Chief of the IAS, and at constructively dismissing her. According to the complainant, the alleged conspiracy to constructively dismiss her started with the former Executive Secretary's request that she apply for the vacant position of Special Assistant to the Executive Secretary on Oversight Activities, and ended with the offer of the extension of her appointment from 7 July 2014 to 6 July 2016 as Special Assistant to the Executive Secretary on Oversight Activities and not as Chief of the IAS. She contends that it was impossible for her to accept the offer of extension as Special Assistant as that offer represented a demotion and was an affront to her dignity, and that the Commission had created an impossible working environment for her.

6B. In its report, under paragraphs 120 and 121, the JAP stated:

“[I]f there could indeed have been a conspiracy to constructively dismiss [the complainant] the [JAP] concluded that the [complainant] had in fact failed to fulfil the burden of proof in this respect. There was no convincing evidence that had been put forward that would prove this point.

[It] felt that it was unlikely that both the ongoing and incoming Executive Secretaries as well as the Chief of the Human Resources Section and the Director of Administration all conspired over a two-year period, to constructively dismiss the [complainant]. Furthermore, the documentation, arguments and evidence that the Panel had received in this respect failed to prove this point.”

These conclusions do not involve any reviewable error.

6C. The complainant’s allegations are contradicted by the Tribunal’s findings, under 4 and 5 above, that the complainant’s permanent transfer was lawful, and that her claims of abuse of authority, breach of the principles of good faith and mutual trust, failure to consider her wishes, breach of the commitment made by the former Executive Secretary, as well as her allegation that the permanent transfer was demotion that constituted an affront to her dignity, are all unfounded. These findings provide sufficient grounds to conclude that constructive dismissal was not proved. In light of the above, the fourth complaint will be dismissed.

7. In her first complaint, filed on 9 October 2014 directly with the Tribunal, the complainant, who separated from service on 7 July 2014, following the expiration of her fixed-term contract, impugns the decision of 15 July 2014. In that decision, the Administration noted that the complainant, in her 14 July 2014 memorandum, had stated that there had been an implied decision to close the investigation into her allegations of harassment. The Administration confirmed that the investigation into the allegations of harassment had been conducted in accordance with paragraph 2.3 of Administrative Directive No. 29 (Rev.1). It determined that the complainant’s allegations of harassment did not warrant the convening of the Joint Disciplinary Panel.

7A. The Commission contests the receivability of the complainant's first complaint as she filed it with the Tribunal without having first exhausted all internal means of redress.

7B. The first complaint is irreceivable. By a memorandum of 16 May 2014 the Chief of HRS replied to the complainant's memorandum dated 26 March 2014, in which the complainant made an allegation of harassment in connection with the decision to permanently transfer her to the post of Special Assistant to the Executive Secretary on Oversight Activities. She informed the complainant that following a meeting held on 29 April 2014 with the Chief of the Legal Services Section and the Director of the Division of Administration, to discuss her allegations of harassment and to determine whether the convening of the Joint Disciplinary Panel was warranted, "it ha[d] been determined that [her] allegations of harassment [were] not supported by the facts available". The Chief of HRS concluded her memorandum by stating: "it has been determined that your allegations of harassment are not supported by the facts available. Should you believe there are additional facts of which I am not aware, please provide me with a written report containing your observations of the incident, in accordance with paragraph 2.2 of Administrative Directive No. 29 (Rev.1)".

On 19 May 2014, the complainant, replying to the 16 May 2014 memorandum, insisted that the facts regarding her harassment complaint, as presented in her memoranda of 26 March 2014 and 16 April 2014 supported her allegations of harassment. She also requested that the Chief of HRS immediately refer the matter to the Joint Disciplinary Panel, and, owing to the Chief's alleged conflict of interest, recuse herself from considering the harassment complaint. This request also included other staff and members of the management team including the Executive Secretary himself. She further alleged that the Chief of HRS was a "party to a process that [was] tainted by harassment", and that there had been "both bias and prejudice in [her] actions [to that point]". Finally, she added that the Tribunal held (in Judgment 2524) that harassment and mobbing do not require any intent on the part of the actors. In that Judgment, the Tribunal stated: "Harassment and

mobbing do not require any [...] intent. However, behaviour will not be characterised as harassment or mobbing if there is a reasonable explanation for the conduct in question. (See Judgment 2370, under 17.) On the other hand, an explanation which is *prima facie* reasonable may be rejected if there is evidence of ill will or prejudice [...].”

7C. By a letter dated 14 July 2014 under the subject “Implied Decision to Close the Investigation on Harassment Complaint”, the complainant informed the Executive Secretary of the following:

“Given that I did not receive any substantive response to my memo of 19 May 2014, on 8 July 2014 I sent an email to Acting Chief HRS asking whether the misconduct investigation into my harassment allegations had been closed, and he replied that he would get back to me ‘shortly’. To date, I have not received response to my email.

Based on the above, I consider that you have taken a decision (albeit implied because of the lack of a reply to my 19 May 2014 memo) not to conduct an investigation and/or to refer the matter to the Joint Disciplinary Panel, and otherwise have decided to dismiss and close my harassment complaint. I also consider that this decision also implies the Commission’s conclusion that no harassment has taken place.”

7D. Staff Rule 11.1.02(a) provides:

“A staff member wishing to appeal an administrative decision, pursuant to Staff Regulation 11.1, shall, as a first step, address a letter to the Executive Secretary, requesting that the administrative decision be reviewed; such a letter must be sent within two months from the date the staff member received notification of the decision in writing.

- (i) If the Executive Secretary replies to the staff member’s letter, he or she may appeal against the answer within one month of the receipt of such reply;
- (ii) If the Executive Secretary does not reply to the letter within one month, the staff member may appeal against the original administrative decision within one month of the expiration of the time limit for the Executive Secretary’s reply.”

7E. In accordance with Staff Rule 11.1.02(a)(ii), the complainant had to appeal internally the original decision as she had time to do so before she separated from service. In accordance with the cited provision,

she could have filed an appeal against the implied decision to close the investigation on the harassment complaint from 18 June 2014 (when the one-month time limit for the Executive Secretary's reply to her memorandum of 19 May 2014 expired), as she was then still in service (she separated from service on 7 July 2014).

8. In light of all the above considerations, the four complaints must be dismissed. Regarding the Commission's counterclaims for costs, the Tribunal finds that in the circumstances, considering the complainant's apparent perception of the facts, the complaints cannot be considered vexatious, and therefore the counterclaims for costs should be dismissed.

DECISION

For the above reasons,

The complaints are dismissed, as are the Commission's counterclaims for costs.

In witness of this judgment, adopted on 10 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ

