

The Administrative Tribunal,

Considering the complaint filed by Mr W. H. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 6 July 2005, the Commission's reply of 6 September, the complainant's rejoinder sent on 11 November 2005 and the Commission's surrejoinder of 16 January 2006;

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, a Canadian national, was born in 1950. He joined the Provisional Technical Secretariat (PTS) of the CTBTO PrepCom on 1 August 2003 under a three-year fixed-term appointment as Operations and Maintenance Coordinator, at grade P.5, in the International Monitoring System Division (IMS). This appointment was subject to the satisfactory completion of six months' probationary service.

In the complainant's first performance appraisal report, which was completed on 4 February 2004 and covered the first six months of his appointment, the Director of IMS, the complainant's supervisor, recommended extending the complainant's probationary period by six months. The Executive Secretary of the Commission informed the complainant by a letter of 10 February 2004 that his probationary period would be extended to 29 July 2004 and that failure to obtain "certification of six months' satisfactory service" at the end of that period would result in the termination of his appointment.

In a second performance appraisal report, which was completed on 28 June 2004 and covered the period from 30 January to 29 July 2004, the Director of IMS recommended not extending the complainant's contract beyond the probationary period. The Executive Secretary wrote to the complainant on 7 July 2004, advising him that his second six months of service had not proved satisfactory and giving him notice of termination; he added that the effective date of the complainant's separation would be 31 October 2004 and until that time the complainant would be on special leave with pay.

On 12 July 2004 the complainant wrote to the Executive Secretary, requesting a review of the decision to terminate his appointment. That same day he initiated a rebuttal process, objecting to his performance appraisal. The complainant was informed on 6 August that the Executive Secretary would respond to his request for review when the rebuttal process had been completed. On 13 August the complainant filed an appeal with the Joint Appeals Panel, challenging the decision to terminate his appointment.

A personnel advisory panel was constituted on 9 August to deal with the rebuttal. It issued its report on 24 August, recommending that the complainant's second performance appraisal report should not be maintained. Consequently, in a memorandum of 10 September the Executive Secretary told the complainant that his performance appraisal would be "reissued" and that a panel of three persons would then be appointed "to review [his] performance and to make a recommendation on whether or not to confirm [his] appointment". The complainant was asked to confirm his participation in that review process. He replied on 20 September, indicating that he would not participate in the process as he did not see the need to deviate from the "existing procedures established in the CTBTO staff rules, regulations and administrative directives".

The complainant's supervisor drew up a new appraisal report, again expressing reservations regarding the complainant's performance. On 12 October a copy was sent to the complainant, who was invited to submit comments. In reply, the complainant restated his objections to the review process that had been put in place and declined to take part in it. The review panel interviewed four staff members as well as the complainant's supervisor. It set out its findings in a memorandum to the Executive Secretary, dated 22 October, concluding that "by and large" the complainant's performance appraisal was "accurate and fair".

By a letter of 28 October the Executive Secretary informed the complainant that in view of the review panel's findings, a copy of which was attached, he had decided to maintain his decision to terminate the complainant's appointment with effect from 31 October 2004. The complainant subsequently requested a review of that decision. Replying on 28 January 2005, the Executive Secretary informed him that the decision of 28 October 2004 was already being considered by the Joint Appeals Panel as a result of the appeal the complainant had filed on 13 August 2004.

In its report dated 9 May 2005, the Joint Appeals Panel took the view that the administration had failed in its obligation to give the complainant "timely and precise warning" that it was not satisfied with his performance. It recommended setting aside the decision to terminate the complainant's appointment and paying him compensation for material and moral injury, in an amount equal to the salary and allowances that he would have received between the date of termination and the expiration of his appointment. By letter of 12 May 2005 the Executive Secretary informed the complainant that he did not concur with those recommendations and was maintaining the decision to terminate the complainant's appointment with effect from 31 October 2004. That is the impugned decision.

B. Relying on the findings of the Joint Appeals Panel, the complainant puts forward several pleas. Firstly, he submits that the decision to terminate his appointment was tainted by a procedural error, inasmuch as he did not receive advance warning that his performance was unsatisfactory and was not adequately warned that his job was in jeopardy. He contends that when a staff member's performance is found to be lacking, reasons should be given in writing, and in his case none was given. There were two officials responsible for evaluating his performance – his supervisor and the Executive Secretary – but during the first six months of his appointment neither official advised him, either orally or in writing, that his performance was less than satisfactory. His first performance appraisal report did not mention any failure to perform any of the tasks that were listed therein. Moreover, in the letter of 10 February 2004 informing him of the extension of his probation, the Executive Secretary did not give him any reasons for that extension. His supervisor had told him, however, that more time was needed to assess his performance. It was thus natural for him to assume that he had a reasonable expectation that his contract would be confirmed at the end of the probationary period.

Secondly, the complainant's right to due process was breached by the second review procedure. He shares the view of the Joint Appeals Panel, which found that the review panel was not the appropriate forum for judging whether a staff member's performance was satisfactory. He takes issue with the proceedings before the review panel, contending that it heard witnesses on the subject of his performance without having any authorisation to do so, that the panel was not provided with all the documentation it needed to see in order to fulfil its mandate, and that the conclusion it reached was expressed in a way that did not correspond to its mandate – which was to make a recommendation on whether or not to confirm his appointment.

Thirdly, he alleges abuse of authority, contending that the review panel process was put in place in order to achieve "a desired outcome", namely the termination of his appointment. In his opinion it was not governed by any staff regulation, rule or administrative directive. He believes that after the rebuttal panel issued its report in August 2004 the Executive Secretary could have exercised his discretion and confirmed his appointment. He contends that the Executive Secretary merely wanted to uphold the termination decision "under the cloak of a process alleging to be fair and impartial". The complainant alleges various improprieties, questioning in particular the impartiality of some of the witnesses interviewed by the panel.

Fourthly, he contends that his right to privacy was breached, given that the review panel disclosed confidential information to the witnesses. Such action amounted to an affront to his dignity and injured his professional reputation.

Lastly, he submits that the defendant breached its duty of care and failed to act in good faith towards him.

The complainant seeks the quashing of the impugned decision. He claims material damages in an amount equivalent to the salary, allowances and entitlements (including but not limited to education grant, repatriation grant, pension, accrued leave, home leave, health benefits and housing subsidy) that he would have received between 1 November 2004 and 31 July 2006, plus interest. He also claims moral damages in an amount of 25,000 euros. He wants both the performance appraisal report signed on 28 June 2004 and the "reissued" report of October 2004 to be removed from his personal file and replaced by the Tribunal's judgment on his case. He asks that the Tribunal's judgment be implemented by the defendant within thirty days. He claims costs with respect to his

internal appeal as well as the present proceedings.

C. The Commission submits that the complaint is unfounded. It argues that the Executive Secretary's decision was not tainted by procedural error, and that the complainant did receive "timely and precise" warning that it was not satisfied with his performance and that if there was no improvement his appointment would not be confirmed. As was pointed out to the complainant in the Executive Secretary's letter of 12 May 2005, the extension of the complainant's probationary period was itself a "most explicit warning" of the need to improve his performance, and he also received "oral feedback". The Commission also considers that it complied with the requirement to give him written reasons for the extension of his probation, as they were recorded in his first performance appraisal report. Moreover, the Executive Secretary acted within his discretion in not confirming the complainant's appointment. His decision was based on the complainant's performance during the probationary period as well as on the revised and reissued appraisal report covering the period from 30 January to 29 July 2004.

The Commission denies that the procedure followed by the review panel breached the complainant's right to due process. It points out that the legal basis for constituting the review panel was Staff Rule 4.1.01 and Administrative Directive No. 2 (Rev.2). Section 8(b) of that directive gives the Executive Secretary wide discretion in determining what action to take following a rebuttal process. The complainant's supervisor had made clear what he thought of the complainant's performance; as the complainant held a different view, the review panel was established in order to give the complainant an additional procedural safeguard. Taking up other points raised by the complainant, it says that he had the primary responsibility of ensuring that the panel had all the documents he wanted it to consider. As regards the witnesses heard by the panel, it states that nothing in the panel's mandate prevented it from hearing witnesses, and they were not asked to comment on the complainant's performance. The panel's finding was clearly an endorsement of the supervisor's recommendation not to confirm the complainant's appointment. Any deficiencies there may have been in the proceedings before the panel resulted, in major part, from the complainant's own refusal to participate in those proceedings, but none warranted setting aside the Executive Secretary's decision.

It denies that the Executive Secretary's decision amounted to abuse of authority. When a performance appraisal report is not maintained as a result of a rebuttal procedure, the Executive Secretary is expected to take some follow-up action to obtain a valid report. He cannot confirm the appointment of a probationer who has no performance appraisal report. Moreover, when an appraisal on the probationary period is set aside, that does not automatically mean that the staff member is entitled to have his appointment confirmed.

The Commission considers that there is no indication that the review panel breached the complainant's right to confidentiality or privacy. His performance appraisal report was not shown to any witnesses: the review panel merely put questions to the witnesses in order to verify the contents of the revised performance appraisal.

It acted in good faith in its dealings with the complainant, and gave him repeated opportunities to explain deficiencies in his performance. It denies any breach of its duty of care.

With regard to the material damages claimed by the complainant, it raises objections to some of the allowances that he asks to be taken into account, stating for one thing that he no longer had a right to home leave.

D. In his rejoinder the complainant develops his pleas. In particular, he denies having received oral warnings regarding his performance after his probation was extended. He contends that instead of constituting a new review panel, the administration should have referred the matter of his performance back to the rebuttal panel.

E. In its surrejoinder the defendant organisation adheres to its position. It maintains that the complainant was given "repeated verbal warnings", pointing out that to receive written warnings during an extended probationary period would have been "discouraging" or even "prejudicial". Contrary to the complainant's viewpoint, the Executive Secretary could not have referred the matter back to the original rebuttal panel as that would have created the impression that the Commission was influencing the rebuttal panel in order to make it change its original findings.

CONSIDERATIONS

1. The complainant was appointed Operations and Maintenance Coordinator, at grade P.5, in CTBTO

PrepCom's Internal Monitoring System Division (IMS) for a fixed term of three years, beginning on 1 August 2003, but subject to satisfactory completion of six months of probationary service. After this probationary period, the complainant's appointment was not confirmed. Instead, his probationary period was extended for another six months.

2. In the complainant's performance appraisal report dated 28 June 2004, for the extended probationary period from 30 January to 29 July 2004, his supervisor stated that he could not recommend that the complainant's contract be extended beyond the probationary period.

3. During the complainant's first six months of service, he had not been advised that his performance was less than satisfactory by his supervisor or by the Executive Secretary, the two officials in the organisation responsible for evaluating his performance. On 5 February 2004 the complainant was called into his supervisor's office and presented with his performance appraisal report for his first six months of service. The supervisor advised the complainant that he was not recommending confirmation of his appointment but rather an extension of the probationary period. He explained that he was pleased with the complainant's performance and that the reason for extending the probationary period was to provide him with more time to assess the complainant's work due to the complex nature of the job and due to the complainant's personal difficulties (as his wife was sick).

4. The performance appraisal report itself bears this out. In relevant part it reads:

"First, I would like to confirm that the long catalog of tasks that [the complainant] has listed in this appraisal is correct. The length of the list reflects the diverse and numerous responsibilities that the new coordinator of [Operations and Maintenance] has and the complexity of his job. I should also mention that the early months of [the complainant's] stay in Vienna were complicated by personal difficulties that made his landing a bit more difficult. Difficulties outside [the complainant's] control made the task of initiating his work at the PTS more difficult. On a professional level, the role and responsibility that the PTS has given to [the complainant] is a complex one. I have mentioned above that the number and diversity of issues under his watch is very large. However, this is probably not his biggest challenge. His most important challenge is to coordinate work among sections and divisions that are not under his direct responsibility. This role is not an easy one and in selecting him the [selection] panel trusted his experience and attitude. [The complainant] has had a steep learning curve of issues that are both technical and political. I have discussed with him that PTS is expecting a more aggressive attitude from his side and more initiative in defining the future philosophy and processes of our [Operations and Maintenance] tasks. I should say that [the complainant's] knowledge of the issues and, therefore, his performance, has improved considerably in the recent two months. We are all witnesses to him taking initiatives and fulfilling his role of coordinator and facilitator in a more effective manner. Based on the observations made before, I consider that [the complainant's] performance would be better and more fairly judged if his probationary period were extended for another six months. I am very confident that given more time [the complainant] will demonstrate his full potential for the benefit of the organization."

5. During the extended probationary period – from February to July 2004 – the complainant was again not provided with any written warnings from his superiors to the effect that his performance was unsatisfactory or that the confirmation of his appointment was in jeopardy.

6. On 28 June 2004, without previous notice of the purpose of the meeting, the complainant was called into his supervisor's office and presented with the final version of his performance appraisal report covering the extended probationary period. The complainant was told that his appointment would not be confirmed.

7. In a letter of 7 July 2004 the Executive Secretary advised the complainant that he had decided to terminate his appointment, effective 31 October 2004, because his second six months of service had not proven to be satisfactory. In this same letter, the complainant was advised that he was placed on special leave with pay until 31 October 2004, the effective date of his separation from service.

8. On 12 July 2004 the complainant submitted to the Executive Secretary a request for review of the administrative decision to terminate his appointment. He also, in due course, instituted the appropriate procedure for the rebuttal of the unfavourable performance appraisal report and, on 13 August 2004, he filed an appeal with the Joint Appeals Panel against the administrative decision of 7 July 2004 to terminate his appointment. On 24 August 2004 the personnel advisory panel, constituted to deal with the rebuttal, forwarded its report and recommendations to the Executive Secretary. It found that the performance appraisal report contained a "significant

number of material deviations from due process” and that it was “not ‘frank, fair, and factual’ or ‘objective’”. It recommended that the report not be maintained.

9. On 10 September 2004 the Executive Secretary advised the complainant that his performance appraisal report would not be maintained. However, the Executive Secretary did not concede that the consequence of setting aside the report would be that the decision to terminate the complainant’s appointment could not stand. Instead, the Executive Secretary proposed that another review of the complainant’s performance be undertaken by another panel after receiving representations from the complainant and the administration. The complainant objected to and did not participate in the proceedings of this review panel. He was right to do so; the unfavourable performance appraisal report had been set aside and since the organisation was in breach of its obligation to provide him with any necessary training, guidance and support during his probationary period, his completion of his initial appointment term of three years was no longer subject to the condition that he receive certification of having given satisfactory service during probation.

10. In its report the review panel purported to uphold a new performance appraisal report which had been “reissued” by the complainant’s supervisor and which, like the previous one, was unfavourable. The panel specifically disavowed making any assessment of compliance with proper procedure in the preparation of any of the performance appraisal reports. It did, however, make the following finding with regard to the complainant’s having been given proper notice and warning of deficiencies in his performance:

“[The complainant’s] supervisor recognized that [the complainant] did not receive periodic written feedback on his performance nor extensive mentoring. However, it appears that [he] was given verbal feedback on a number of occasions, not only by his supervisor but also by his subordinates and peers.”

The conclusion of the panel was:

“[...] by and large, the [complainant’s performance appraisal] is accurate and fair. We therefore find the recommendation of [his] supervisor to be consistent.”

11. The complainant’s appeal to the Joint Appeals Panel was heard following his separation from the organisation. In its report of 9 May 2005, the Panel found that:

“[...] the decision of the Executive Secretary to terminate the [complainant’s] appointment after his extended probationary period was tainted with a procedural error because the administration failed in its obligation to provide the [complainant] timely and precise warning that it was not satisfied with his performance and that if he did not improve the confirmation of his probationary appointment was in jeopardy. The [Panel] recommends therefore that the decision to terminate the [complainant’s] appointment should be set aside.”

12. In a letter to the complainant dated 12 May 2005, the Executive Secretary stated that he was not going to follow the Joint Appeals Panel’s recommendation and added:

“My reason for this is that you had the most explicit warning of the need to improve your performance through the extension of your probationary period. Notwithstanding encouraging words in the performance appraisal report leading to the extension of your probation, it was clear from the report that your performance was lacking, and that the path of improvement had to be rigorously pursued for you to achieve [certification] of satisfactory service which would allow your appointment to be confirmed. In addition, I note that the [review] panel constituted by me on 6 October 2004 established that you were given oral feedback on the deficiencies of your performance during the course of the extended probationary period.”

That is the impugned decision.

13. The complainant has five arguments:

(i) that he was not given timely and precise warnings regarding unsatisfactory performance and was not told that his appointment was in jeopardy;

(ii) that the second review procedure implemented by the Executive Secretary breached his right to administrative due process;

- (iii) that the Executive Secretary's decision amounted to an abuse of authority;
- (iv) that the organisation breached his right to privacy; and
- (v) that the organisation breached its duty of care and good faith towards him.

14. Because of the conclusion the Tribunal has reached on the first of these arguments it does not find it necessary to take up any of the others except for the fourth to the extent that it has an impact on the assessment of damages.

15. The Tribunal's case law is voluminous and consistent to the effect that an organisation owes it to its employees, especially probationers, to guide them in the performance of their duties and to warn them in specific terms if they are not giving satisfaction and are in risk of dismissal. (See Judgment 1212.) More recently, in Judgment 2414 the Tribunal held that:

“23. [...] A staff member whose service is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation. Moreover, he or she is entitled to have objectives set in advance so that he or she will know the yardstick by which future performance will be assessed. These are fundamental aspects of the duty of an international organisation to act in good faith towards its staff members and to respect their dignity. That is why it was said in Judgment 2170 that an organisation must ‘conduct its affairs in a way that allows its employees to rely on the fact that [its rules] will be followed’.”

16. The most that the organisation can pretend to, in the present case, is the allegation that the complainant's immediate supervisor gave him verbal warnings and that his subordinates and peers told him that he was falling short. That is clearly not enough. In Judgment 1386 the Tribunal said:

“21. The Administration is also at fault for not giving the complainant sufficient warning that there had been criticism of him and the success of his probation was in jeopardy. The Organisation contends that he did get several oral warnings. Yet, contrary to the requirements of due administrative process, the file contains no evidence of such warnings, or their date or substance. The Tribunal is therefore unable to assess their scope.”

17. The finding of the review panel that the complainant had been given “verbal feedback” by his “subordinates and peers” which was relied on by the Executive Secretary in the impugned decision is manifestly inadequate. Not only was such feedback not documented in any way, but it is simply inconceivable that the role of peers, let alone of subordinates, is properly that of giving warnings to senior officials such as the complainant, even when the official concerned is on probation. Likewise, neither the encouraging and sympathetic terms of the complainant's first performance appraisal report nor the simple fact of the extension of his probation, were, as the impugned decision maintains, the “most explicit warning” that his employment was in jeopardy. The impugned decision is vitiated by a clear error of law and cannot stand.

18. Nothing would be served at this time by ordering the complainant's reinstatement since the end of his three-year term of appointment will be almost concurrent with delivery of the present judgment. The Tribunal will order that the organisation pay him all salary, allowances and other benefits that he would have received to 31 July 2006 save for home leave and related allowances, in respect of which the complainant has no claim after his repatriation; the complainant must account for net earnings from other sources during that period.

19. The complainant is entitled to moral damages. It appears that the review panel improperly shared certain details of the complainant's performance appraisal reports with some of his subordinates and peers, thereby breaching his right of privacy and aggravating such damages; the Tribunal assesses them at 10,000 euros. He is also entitled to costs of 5,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The Commission shall pay the complainant the sums detailed in paragraph 18 above together with damages of 10,000 euros and costs of 5,000 euros.

3. His other claims are dismissed.

In witness of this judgment, adopted on 5 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet