

**108th Session**

**Judgment No. 2868**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. S. against the South Centre on 13 May 2008 and corrected on 6 June, the Centre's reply of 22 August, the complainant's rejoinder of 28 October and the Centre's surrejoinder of 1 December 2008;

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 and the pleadings may be summed up as follows:

A. The complainant, an Indian national born in 1958, joined the South Centre in September 2000 as a Senior Editor at grade P.4 under a two-year fixed-term contract. When that contract expired, he was granted an initial extension of three months, because it had been decided that the expiry dates of contracts funded by the regular budget should generally coincide with the end of the Centre's financial year, i.e. 31 December. Thereafter, he obtained a series of one-year extensions.

At its 16th meeting in February 2006, the Board mandated the Executive Director to propose a strategy for restructuring the Centre's

Secretariat. To that end, the Executive Director engaged a consultant who was asked to ascertain whether the administrative structure of the Centre and the distribution of responsibilities were compatible with the Centre's mandate and programme of work. Basing his review on an organisation chart dated June 2006, in which the complainant was identified as Acting Head of the Information, Outreach, Communication and Dissemination unit (IOCD), the consultant concluded that there were a number of shortcomings in the Centre's structure. In his report dated 3 October 2006 (hereinafter the "Management Audit report"), he proposed a revised organisation chart in which certain functions were redistributed and several new posts were foreseen. In particular, a new grade P.5 post of Head of IOCD was to be created, and the consultant emphasised the "significant change of functions" between this new post and the complainant's post.

The Management Audit report was submitted to the Finance Committee, which approved the creation of three new posts, including that of Head of IOCD, whilst specifying that the grading of these posts should be left to the Executive Director. The Committee further recommended that the revised organisation chart should be approved. At its 17th meeting in October 2006 the Board endorsed that recommendation.

According to the minutes of a management meeting which the complainant attended on 23 November 2006, it was then clarified that for the purposes of Regulation 4.1.5 the expression "fixed-term appointment" referred to an initial appointment\*. Moreover, it was decided that fixed-term appointments of existing staff members could, in some circumstances, be extended for periods of less than 12 months. The issue of "short fixed-term contracts" was discussed again at the next management meeting, on 5 December 2006, during which the Executive Director confirmed that for 2007 the minimum duration of such contracts would be six months. The minutes of this meeting also indicate that the Executive Director decided that the post of Head of

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\* Regulation 4.1.5 relevantly provides: "Fixed-term appointments shall be defined as appointments of one year or more. Contracts shall be 1 or 2 years duration, renewable."

IOCD was to be advertised internally and externally as soon as possible.

By an e-mail of 15 December 2006 the Executive Director informed staff that, further to the Management Audit report and the adoption of its main recommendations by the Board, all contracts would be renewed for a period of six months, from 1 January to 30 June 2007. On 18 December the complainant and eight other staff members sent an e-mail to the Executive Director asking him to withdraw his “illegal” decision on contract renewals and to issue contracts in accordance with the Staff Regulations. At a staff meeting on 18 January 2007, when several staff members again questioned the legality of the six-month contracts, the Executive Director maintained his position and pointed out that those who disagreed with his decision had the option of not signing their contract. The complainant accepted the offer of a six-month extension that same day.

At its 18th meeting, held on 31 January and 1 February 2007, the Board noted that contracts expiring in December 2006 had been extended by six months and that two new posts, including that of Head of IOCD, had been advertised. The complainant applied for the latter post and was informed on 14 March that he had been shortlisted. However, by a letter of 30 March the Executive Director notified him that his contract would not be renewed upon its expiry on 30 June, since his post was to be abolished in accordance with the recommendations made in the Management Audit report.

A four-member interview panel was set up to interview the candidates for the post of Head of IOCD, but only three of its members were present when the complainant was interviewed on 2 April 2007. These members reached the conclusion that Mr N. was the best candidate for the post. The fourth panel member interviewed the candidates at a later date and reached the same conclusion. She submitted her assessment to the Executive Director on 20 June, but in the meantime the complainant had been informed by letter of 12 June that he had not been selected for the post.

On 25 September 2007 the complainant filed an appeal, alleging that the decision to renew his contract for a period of six months was

illegal, that the non-renewal of his appointment was motivated by malice and bad faith and that the selection process for the post of Head of IOCD was flawed. Although the appeal had been filed after the time limit stipulated in the Staff Regulations, the Board decided to consider it and an ad hoc Appellate Body was therefore constituted. In its report dated 17 February 2008 the Appellate Body found that the six-month contract and the contested selection process were consistent with the applicable regulations and guidelines, and that the complainant's allegation of malice was unfounded. In his complaint before the Tribunal, the complainant challenges those findings.

B. The complainant submits that, according to Regulation 4.1.5, fixed-term appointments must be for a period of one to two years. He acknowledges that, pursuant to Regulation 12.2, rules and administrative instructions may be established to supplement or amend the Staff Regulations, but points out that under Regulation 12.4.3 an Administrative Committee of the Board must be established to deal with administrative and staff rules. He infers from these provisions that the Executive Director's unilateral decision to renew fixed-term contracts for a period of less than one year was taken without authority. Referring to the case law, the complainant also argues that he had an acquired right to have his contract renewed for a period of not less than one year.

According to the complainant, the abolition of his post was illusory: in reality, his post was simply reclassified and renamed. He considers that there is an overwhelming similarity between the duties of his former post and those of the post of Head of IOCD, and he notes that the person who was selected for the post of Head of IOCD was in fact appointed at grade P.4, and not P.5. He concludes that the decision to abolish his post was vitiated by errors of law and fact. He adds that the Centre failed to provide him with objective reasons for that decision.

The complainant further contends that, even if it were accepted that there were valid grounds for abolishing his post, the Centre was

nevertheless under an obligation to find him an alternative post. Referring to the Guidelines for Selection of Candidates for vacant posts, he submits that in filling the post of Head of IOCD, priority should have been given to suitably qualified internal candidates. In this regard he argues that, since he was shortlisted for that post, he must have been considered a suitable candidate and, since he was the only internal candidate to have been shortlisted, he ought to have been appointed to the post. In these circumstances, by extending the selection process to external candidates the Executive Director committed an error of law.

Lastly, the complainant alleges that the decisions to abolish his post, not to renew his contract and not to select him for the post of Head of IOCD were tainted by prejudice, ill will and malice on the part of the Executive Director, whose intention was to retaliate against him for having protested against the decision to extend contracts for only six months, and for having voiced his objection to the summary dismissal of a colleague who had likewise challenged that decision.

The complainant requests oral hearings and the disclosure of various documents. By way of redress, he seeks the quashing of the decision not to renew his appointment and an order that he be appointed Head of IOCD under a two-year fixed-term contract. In addition, he requests that the decision of December 2006 renewing his appointment for six months be quashed and replaced with an appointment of at least one year, and he seeks an award of damages in an amount equal to the salary, benefits and other emoluments due to him from the date of separation to the date of reinstatement. He also claims 50,000 Swiss francs in moral damages, full reimbursement of legal costs incurred both before the Tribunal and during the internal appeal proceedings, interest on all the above sums and such other relief as the Tribunal determines to be just, necessary and equitable.

C. In its reply the Centre submits that, since the complainant's internal appeal was not lodged within the time limit stipulated in the Staff Regulations, his complaint should be dismissed as irreceivable, notwithstanding the Board's decision to examine the appeal.

Regarding the Executive Director's decision to renew fixed-term contracts for only six months, it points out that in accordance with the Board's interpretative clarification of Regulation 4.1.5, initial fixed-term appointments must be issued for a minimum period of one year, but subsequent fixed-term appointments may exceptionally be granted for shorter periods. It adds that this interpretative clarification was adopted by the Council of Representatives (hereinafter "the Council") at its 8th meeting on 4 October 2007. The Centre was facing funding problems and was engaged in a thorough restructuring of its administration based on an independent audit report. In these circumstances, the Executive Director was empowered to offer contracts of only six months to existing staff members, and indeed his decision was endorsed by the Board. According to the defendant, that decision complied with the applicable rules and did not breach any acquired right of the complainant. The Centre emphasises that the complainant freely agreed to the six-month extension of his contract.

It denies the allegation that the new post of Head of IOCD was the same as the complainant's former post. The new post encompassed broader responsibilities, particularly in the field of information technology, and the complainant lacked experience in that field, as he himself admitted. Recalling the case law according to which an international organisation necessarily has power to restructure some or all of its departments or units, including by the abolition of posts, the Centre argues that in this case the decision to abolish the complainant's post did not constitute an abuse of that power.

As for the allegation that the complainant was not informed of the reasons for that decision, the Centre asserts that he was aware at least by 23 November 2006 of the fact that his post would be abolished, because this matter was discussed at the management meeting that he attended on that date. It was also discussed at the management meeting of 5 December. Furthermore, the reasons given to the complainant were objective, and he was given due notice of the termination of his appointment.

Regarding the recruitment process for the post of Head of IOCD, the Centre submits that no formal rules prevented it from considering

external candidates. Moreover, the Executive Director's decision to advertise the post both internally and externally was taken at the management meeting of 5 December 2006, i.e. prior to the adoption of the Guidelines on Selection of Candidates for vacant posts, and the complainant raised no objection at that time. The Centre points out that the case law on which he relies in contending that, as an internal candidate, he should have been given priority over external candidates, makes it clear that such priority can only be given where qualifications are equal. In this case, the complainant's qualifications were clearly not equal to those of the selected candidate.

It considers that his allegation of retaliation is contradicted by the fact that several of his colleagues who joined him in protesting against the decision to grant six-month contracts are still working for the Centre. Referring to the case law, it submits that the complainant has no right to be reinstated, particularly since there is no available position corresponding to his skills. Lastly, it objects to the complainant's request for the production of documents which he has not identified, and submits that his application for hearings does not comply with Article 12, paragraph 1, of the Tribunal's Rules.

D. In his rejoinder the complainant argues that his internal appeal was lodged in a timely manner, as the Board formally extended the time limit for filing. Alternatively, he refers to Judgment 2255 and contends that, since the Centre raised no objection to the receivability of his appeal during the proceedings before the ad hoc Appellate Body, it cannot now object to the receivability of his complaint on the basis that his appeal was time-barred.

On the merits he points out that the Board's interpretative clarification of Regulation 4.1.5 post-dates the Centre's decision to offer him a six-month extension of contract. Consequently, at the material time the Executive Director had no authority to grant an extension for a period of less than one year. Regarding his acceptance of the six-month contract, he observes that, according to the case law, he cannot be estopped from asserting his right to obtain a contract for a longer period, because he never expressed an intention to waive that right. He adds that, realistically, he had no option but to sign the

contract. He also asserts that the selection procedure for the post of Head of IOCD was flawed, firstly because the decision to reject his candidature was taken before the fourth member of the interview panel had submitted her appraisal of the candidates, and secondly because Mr N. lacked the requisite experience for the post.

E. In its surrejoinder the Centre maintains its objection to receivability. It reiterates its position on the merits, emphasising that all four members of the interview panel reached the conclusion that Mr N. was the best candidate for the post of Head of IOCD.

### CONSIDERATIONS

1. The complainant joined the South Centre as Senior Editor at grade P.4 on a two-year fixed-term contract in September 2000. His appointment was subsequently renewed for additional one-year terms. At the material time, his contract was to expire on 31 December 2006.

2. At its 16th meeting in February 2006, the Centre's Board decided to revisit the Secretariat's administrative structure and asked the Executive Director to propose, at its next meeting, a strategy for restructuring the Secretariat.

3. The Executive Director engaged the services of an external consultant to conduct a management audit. In October 2006 the consultant submitted his Management Audit report to the Executive Director. Later that same month, the consultant's proposals regarding the restructuring of the Secretariat were, for the most part, approved by the Board, as recommended by the Finance Committee.

4. On 15 December 2006 the Executive Director informed the staff members that the main recommendations of the Management Audit had been adopted and were being implemented. He advised that all fixed-term contracts would be renewed for a period of six months from 1 January to 30 June 2007.

5. The complainant and eight other staff members wrote on 18 December 2006 to the Executive Director protesting the decision on the ground that it had been taken in violation of the Staff Regulations and Financial Rules. They asked that the decision be withdrawn and that fixed-term contracts be issued “as required under the Staff Regulations”. They referred in particular to Regulations 4.1 and 9.1.

6. At a staff meeting held on 18 January 2007, the Executive Director explained that the decision to extend all fixed-term contracts for six months had been made on the basis of the Regulations and practices of other organisations in similar circumstances.

7. In February 2007 a vacancy notice for the grade P.5 position of Head of IOCD was posted on the Centre’s website. The complainant applied and in mid-March he was informed that he had been shortlisted. However, on 12 June 2007 he was told that he had not been selected.

8. The Executive Director advised the complainant on 30 March 2007 that the recommendation in the Management Audit to abolish several posts, which the Board had subsequently endorsed, included the post of Senior Editor P.4 that he held. Accordingly, his contract would not be renewed.

9. The complainant, who had accepted on 18 January 2007 an extension of his contract to 30 June 2007, lodged an appeal on 25 September 2007. He claimed that the renewal of his appointment for less than one year was invalid, that the non-renewal of his contract was motivated by malice and bad faith and that the selection process for the position of Head of IOCD was flawed.

10. On 17 February 2008 the Appellate Body rejected the appeal for three reasons. First, the fixed-term contracts of six months’ duration were consistent with Regulation 12.2 and with UN practices. As well, the complainant had signed the contract without recording any objection in writing.

Second, the implementation process of the Management Audit recommendations had been undertaken in consultation with senior management, of which the complainant was a member. He had acknowledged that the new position was different from his previous position. He had been given three months' notice and there was no ground for his allegation that the non-renewal of his contract was motivated by malice.

Third, the selection process for the position of Head of IOCD was in conformity with the Guidelines for the Selection of Candidates for vacant posts.

11. In his complaint the complainant challenges: the renewal of his fixed-term appointment for a period of less than one year; the abolition of his post; the failure to reclassify his post; and the failure to appoint him directly to the post of Head of IOCD as a suitably qualified internal applicant or, failing that, on the basis of merit.

12. On the issue of receivability, the Centre contends that pursuant to section B, paragraph 1, of Annex VII to the Staff Regulations, the complainant was late in filing his appeal with the Board, and that his complaint is therefore not receivable.

13. The Tribunal rejects this objection to receivability. In a letter of 5 October 2007 the Chairman of the Board advised the complainant that the Board had decided to grant his request for review of the administrative decisions despite the late filing of the notice of appeal. Whether the granting of the request to proceed with the appeal despite the late filing is construed as a waiver of the time limit or an extension thereof, the Appellate Body accepted the appeal and, as no objection was then taken, it is not open to the Centre to object before the Tribunal. Further, as the Appellate Body considered the appeal and rendered a decision, the complainant is entitled to file a complaint against that decision with the Tribunal, as provided for in section C, paragraph 1, of Annex VII to the Staff Regulations.

14. However, the Tribunal observes that there are two aspects of the complaint that did not form part of the internal appeal, namely the abolition of the complainant's post and the failure to reclassify that post. As there is nothing in the record to indicate that these decisions were challenged internally, and they were not considered in the internal appeal process, the claims relating to these are accordingly irreceivable and will not be entertained.

15. The first question to be addressed is whether the renewal of the complainant's fixed-term contract for a period of less than one year is valid. In summary, the complainant contends that the decision to limit the duration of the renewed appointments was beyond the Executive Director's power and constitutes a breach of his acquired right to have his contract renewed for not less than one year.

16. The Centre asserts that in adopting Regulation 4.1.5 in July 2005, the Council granted the Board and the Executive Director the "flexibility to make exception in the short term". In making this assertion, the Centre relies on the "first footnote" to Regulation 4.1.5. It also argues that "on the basis of [Regulation] 4.1.5" the Board adopted the interpretative clarification found in the "second footnote" to that regulation. Further, it states that this interpretative clarification adopted by the Council at its 8th meeting is in accord with Regulation 12.2.

17. The Centre points out that it was facing funding difficulties and was in the midst of an administrative restructuring based on the Management Audit. This report, which was duly endorsed by the Board, "assigned to the Executive Director the duty to implement the recommendations of the auditor and clearly entitled him to develop a strategy for scaling down the activities of the [Centre] in case of insufficient funding".

In its view, it follows that the Executive Director had the power to decide to offer fixed-term contracts of six months when renewing the appointments of existing staff members. The Centre also points out that the decision of the Executive Director was endorsed by the Board

at its 18th meeting and had been discussed with the senior management, including the complainant. The decision took into consideration the interests of the Centre to maintain its fixed costs in line with available funds and to prevent staff members from losing the benefit of their fixed-term contracts. In addition to being fully compliant with the applicable rules, the decision did not breach any acquired rights. The Centre also takes the position that the complainant accepted the terms of the renewal for six months and is now precluded from challenging them.

18. The Tribunal rejects the Centre's assertion based on "footnote one" that the Council granted the Board and the Executive Director the "flexibility to make exception in the short term". The Council adopted the Staff Regulations at its 6th meeting on 14 July 2005, including Regulation 4.1.5, which reads as follows:

"Fixed-term appointments shall be defined as appointments of one year or more. Contracts shall be 1 or 2 years duration, renewable. Appointments for longer periods may be made if funds are expected to be available, subject to the condition explicitly stated in Letters of Appointment that the extended period shall be dependent on funds being made available for ensuing budgetary periods to which the appointment refers."

19. The complainant and the Centre submitted with their pleadings copies of the Staff Regulations. Although the text of Regulation 4.1.5 is the same in both versions, the footnote references for Regulation 4.1 are different.

In the Centre's copy, a single asterisk appears at the end of the text of Regulation 4.1.2 and a single asterisk appears at the end of the text of Regulation 4.1.5. Although there are two different footnotes, they are each referenced by a single asterisk.

In the complainant's copy of the Staff Regulations, there is only one footnote for Regulation 4.1 and it is to Regulation 4.1.2. Regulation 4.1.2 and the corresponding footnote (footnote one) read:

"In the appointment and promotion of staff, priority shall be given to securing talent and expertise at the highest level of competence and commitment corresponding to the Centre's mandate and functions. Staff members should only be recruited from among nationals of states members

of the Group of 77 and China, without distinction as to race, gender or religion.\*

\*In deciding to adopt the 2005 Staff Regulations, the Council of Representatives granted the Board and the Executive Director the ‘flexibility to make exceptions in the short-term’ in the implementation of this particular provision.” [Emphasis added.]

20. On the first page of the copies submitted by the parties, the amendments approved by the Council at its 7th meeting in October 2006 are listed. However, in the version submitted by the Centre additional amendments approved by the Council at its 8th meeting in October 2007 are also listed on the first page. Accordingly, it would appear that the discrepancy between the two versions stems from the fact that the Centre’s copy is a more recent version in which subsequent amendments are incorporated. It follows that “footnote one” is a footnote to Regulation 4.1.2 and not to Regulation 4.1.5, as the Centre alleges.

21. Based on the above analysis and having regard to the language of footnote one, it is clear that the “flexibility to make exceptions in the short-term” granted to the Board and the Executive Director is limited in its application to Regulation 4.1.2.

22. The Centre also relies on the interpretative clarification found in the “second footnote” to Regulation 4.1.5. That footnote reads, in part:

“Board interpretative clarification: In implementing and interpreting Regulation 4.1.5, in relation to Regulation 12.2, the following guidelines should be observed:

[...]

- (ii) However, as a case-by-case exception to the general rule, pursuant to Regulation 12.2 in relation to Regulation 4.1.5 of the Staff Regulations and taking into account the exigencies and best interests of the Centre (such as in cases of funding shortfalls or in connection with the implementation of personnel management processes that may require the exercise by the Executive Director of flexibility in personnel assignments), the Executive Director may offer subsequent fixed-term appointments for durations shorter than one year to staff members who have been initially provided with fixed-term appointments as defined

under Regulation 4.1.5. In doing so, the Executive Director shall take into account relevant UN rules, including but not limited to UN rules (such as UN Staff Rule 104.12(b)) and practice governing fixed-term appointments, and the experience and evolving circumstances of the South Centre as set out under Scope and Purpose. [Emphasis added.]

[...]"

23. In response to the complainant's argument that the interpretative clarification was not in force at the time the decision at issue was made, the Centre submits that pursuant to Article IX of the Agreement to Establish the South Centre (hereinafter "the Intergovernmental Agreement"), which came into force on 31 July 1995, the Secretariat headed by the Executive Director was "entitled", among other things, to draft a set of staff regulations and to undertake substantive work to fulfil the objectives of the Centre "with the Executive Director working in close consultation with the Chairperson of the Board". The defendant maintains that pursuant to Regulation 12.2 "in relation to" Regulation 12.4.2, the Board or its Chairperson is entitled to supplement or amend the Staff Regulations by rules and administrative instructions. Moreover, pursuant to Regulation 12.3 these rules must be reported by the Board annually to the Council for appropriate review and action, "but not necessarily for approval".

24. The Centre also points out that, given that almost all of the staff members' fixed-term contracts were due to expire at the end of December 2006, if the duration of the contracts had not been reduced before the end of the year, the implementation of the Management Audit would have been postponed by one year.

25. Further, the Centre points out that since the Board was not scheduled to meet until 31 January 2007, the Executive Director in consultation with the Chairperson of the Board and with members of senior management decided on 15 December 2006 to reduce the duration of all fixed-term contracts for 2007; this was accepted by the staff and subsequently approved by the Board at its meeting at the end of January 2007. Lastly, this implementing measure of the

Management Audit was formally set as a guideline of the Staff Regulations and formally approved by the Council at its meeting in October 2007.

26. The Centre's arguments are without merit. The question is whether the Executive Director had the authority to make the decision at issue. First, the fact that in the Intergovernmental Agreement the task of drafting a set of staff regulations for approval by the Council is assigned to the Secretariat is irrelevant. Second, Regulations 12.2 and 12.4.2 read together do not confer on the Board or its Chairperson the authority to supplement or amend the Staff Regulations by rules and administrative instructions. Regulation 12.2 reads:

“These Regulations may be supplemented or amended by Rules and administrative instructions as appropriate, taking into account the relevant UN rules and the experience and evolving circumstances of the South Centre as set out under Scope and Purpose.”

27. In the Tribunal's view, this provision does not assist the Centre. Although it provides that the Staff Regulations may be supplemented or amended by rules and administrative instructions, it does not address the question as to which body or person has the authority to make rules and issue administrative instructions. Nor does the combined operation of this regulation and Regulation 12.4.2 assist. Regulation 12.4.2 is simply an interpretative provision for the Staff Regulations and does not confer decision-making authority.

28. The Centre also attempts to lend validity to the Executive Director's decision on the grounds of expediency and that the decision subsequently received the Board's approval. The Tribunal observes that the non-observance of a regulation cannot be grounded on expediency. The Tribunal also observes that the Board did not approve the Executive Director's decision at its January 2007 meeting. According to the minutes of the meeting, in the context of the agenda item concerning the implementation of the Management Audit, the Board considered the Executive Director's report and “noted” at item 7.3 that “[t]he contracts that had come up for renewal in December 2006 were extended for a period of six months in

conformity with the rules provided for in the Staff Regulations and the practice of the United Nations in similar situations”. Even if this could be construed as implicit approval, the Board had no power in this regard.

29. Lastly, with respect to the Centre’s assertion that this implementing measure was approved by the Council at its October 2007 meeting, the Tribunal observes that the adoption of a so-called “interpretative clarification” that purports to give the Executive Director the authority to take certain action cannot validate an earlier decision taken without the requisite authority.

30. The Centre argues that the complainant accepted the terms of the renewal for six months and is now precluded from challenging them. In effect, it argues that the complainant has waived his right to challenge the validity of the renewal. As the Tribunal observed in Judgment 592, under 2, “[w]aiver of a right to bring an action may not be presumed”. As well, “[w]aiver is binding only if it is express or clearly implied on the facts”. In the present case, the complainant contested the validity of the impugned decision on 18 December 2006 and at no time did he formally waive his right to challenge the validity of the decision. He was also in a financially vulnerable position, faced with the prospect of unemployment if he did not accept the renewal of his contract. As well, he would have potentially left himself in a situation of not having the advantages accorded to an internal candidate in a subsequent competition for a vacant post. In these circumstances, in addition to there being no evidence of an express waiver, a waiver cannot be implied on the facts.

31. The Tribunal concludes that the Executive Director’s decision to renew fixed-term contracts for only six months was taken without authority and will be set aside. Having reached this conclusion, a consideration of the complainant’s remaining submissions concerning the validity of that decision is unnecessary.

32. The complainant raises additional arguments in relation to the Centre's obligations following the abolition of his post and the subsequent selection process for the Head of IOCD post. In summary, he submits that the Centre did not meet its obligation to find him an alternative post and failed to extend to him the priority due to a suitably qualified internal candidate; that the selection process itself was tainted; and that the decisions not to renew his contract and not to select him for the Head of IOCD post were tainted by prejudice, ill will and malice on the part of the Executive Director, and taken in retaliation for his having contested the decision to limit the renewal of the fixed-term contracts and the summary dismissal of a colleague.

33. It is well established in the Tribunal's jurisprudence that appointment and selection decisions, being discretionary, are subject to review on limited grounds. As stated in Judgment 1077, under 4, the Tribunal will "[...] exercise its power of review with special caution, its function being not to judge the candidates on merit but to allow the selection committee and the executive head full responsibility for their choice". That is, the Tribunal will only intervene if the decision "was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence" (see Judgment 2393, under 11).

34. With regard to the selection process, the complainant points out that he was advised on 12 June 2007 that he had not been selected for the post of Head of IOCD. However, one of the members of the interview panel did not submit her appraisal of the candidates until eight days after that decision had been communicated to the complainant. The Centre counters that this would "not change the fact that [Mr N.] should have been clearly acknowledged as the most suitable and capable candidate for the post of Head of IOCD by all members of the panel". The Tribunal finds that this is not responsive to the issue raised by the complainant.

35. At the material time, the Centre had not formally adopted a procedure for the selection of candidates for vacant posts; however, it had developed a set of Guidelines. According to the Guidelines, for posts at grades P.4 to P.5, following a pre-screening, an interview panel consisting of the Executive Director, the Head of Administration and one or two experts from outside with relevant experience is to conduct interviews with the shortlisted candidates. On the basis of the interviews, inter alia, the interview panel should “individually and collectively decide on the most suitable candidate for the post. The chairperson of the panel is responsible for the preparation of the comparative assessment report of the candidates interviewed.” Pursuant to Regulation 4.1, appointments of staff at the Professional or higher levels are made by the Executive Director with the concurrence of the Chairperson of the Board.

36. Although the Guidelines do not have the force of formally adopted regulations or rules, they are intended to foster a transparent selection procedure in which candidates are fairly evaluated against selection criteria. The process in the present case, in which a decision was taken before one of the panel members had presented her assessment of the candidates, undermines the credibility of the procedure and is an affront to the dignity of the complainant, who submitted his candidature in good faith and with the expectation that it would be considered in accordance with the procedure found in the Guidelines.

37. Although the affront to the complainant’s dignity warrants an award of moral damages, the selection process will not be set aside, as there is no evidence that he had the required knowledge and experience of information and communication technologies (ICT) applications.

38. Lastly, the Tribunal rejects the complainant’s allegations that the decision not to select him for the Head of IOCD post was tainted by prejudice, ill will and malice on the part of the Executive Director and taken in retaliation for earlier acts. It must be noted that the members of the interview panel were unanimous in their

recommendation of Mr N. Moreover, there is no material which could possibly give rise to a finding of bias, prejudice, ill will or malice.

39. In his complaint, the complainant made a general request for the production of documents. In his rejoinder he specifically requested the production of copies of the Staff Regulations as they existed at various points in time. In view of the Tribunal's finding in relation to the interpretative clarifications in force at the material time, the request for document production is denied.

40. The complainant also requested an oral hearing for the purpose of dealing with a "likely [...] contradiction between the complainant and other witnesses as to the factual matter of whether his post should have been reclassified and the complainant consequently regraded, and the question of bias on the part of the Executive Director". As stated earlier, the Tribunal has concluded that the claim in relation to the failure to reclassify the complainant's post is irreceivable. As there is nothing in the materials that could possibly give rise to a finding of bias, there is no basis upon which an oral hearing can be held.

41. In conclusion, as a decision had been taken to renew the complainant's contract, but for the unlawful decision to limit the renewal to six months he would have been entitled to a renewal of at least one year under the Staff Regulations. The Tribunal will order the Centre to pay him all salary, allowances and other benefits that he would have received for a period of six months, save for home leave

and related allowances, in respect of which the complainant would have no claim after his repatriation. The complainant is also entitled to moral damages in the amount of 10,000 Swiss francs and costs in the amount of 5,000 francs. All other claims for relief will be dismissed.

## DECISION

For the above reasons,

1. The Appellate Body's decision to dismiss the complainant's appeal is set aside, as is the decision to renew his contract for only six months.
2. The Centre shall pay the complainant all salary, allowances and other benefits that he would have received for a period of six months, save for home leave and related allowances, in respect of which the complainant would have no claim after his repatriation.
3. It shall pay him moral damages in the amount of 10,000 Swiss francs.
4. It shall also pay him costs in the amount of 5,000 francs.
5. All other claims are 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