

T.

v.

CTBTO PrepCom

124th Session

Judgment No. 3864

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms L. T. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom, hereinafter “the Commission”) on 3 August 2015 and corrected on 14 August, the Commission’s reply of 29 October, corrected on 10 November 2015, the complainant’s rejoinder of 28 January 2016 and the Commission’s surrejoinder of 25 April 2016;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests the decision not to exceptionally extend her contract.

The complainant joined the Commission on 27 February 2007 as a Legal Officer at grade P-4. Her contract was extended for two years in 2009. On 29 June 2011 she was offered and accepted a fixed-term appointment for three years as Chief of the Legal Services Section, at grade P-5. The Letter of Appointment stated that it cancelled and superseded the unexpired portion of her previous contract, and that for the purposes of the Commission’s tenure policy, her entry on duty remained 27 February 2007. On 19 December this appointment was extended until 26 February 2014, the date at which she would complete seven years of employment with the Commission, the maximum tenure for staff in her category.

On 21 December 2012 a vacancy announcement for the post of Chief, Legal Services, was published and a recruitment process commenced. Short-listed candidates were interviewed by a Personnel Advisory Panel (PAP) on 17 and 18 July 2013, and a second round of interviews was held with the Executive Secretary and the Director of the Division of Administration on 30 and 31 July 2013. On 19 July the PAP met and assessed the outcome of the interviews and the possibility of granting an exceptional extension to the complainant, but agreed not to seek such an extension as “the selection process had identified suitable candidates with relevant skills and experience”.

On 22 August 2013 the Executive Secretary decided that the position should be offered to one of the candidates. On 23 August 2013 the complainant received a memorandum from the Director of Administration stating that her current fixed-term appointment would expire on 26 February 2014 and that the Executive Secretary had decided that there was no basis for granting an exception to the maximum period of service because of the need to retain essential expertise or memory. Accordingly, her contract would not be extended beyond its expiry date. The Memorandum stated that this decision had been made pursuant to Administrative Directive No. 20 (Rev.2) and the Note from the Executive Secretary of 19 September 2005, following a review by a PAP.

On 14 October 2013 the complainant submitted a request for administrative review to the Executive Secretary, challenging the decision not to offer her an exceptional extension, the composition of the PAP which had assessed her expertise and the decision to place the delivery of legal advice under the supervision of the Director of the Legal and External Relations Division (LEGREL), who was not a lawyer. On 13 November 2013 she received the Executive Secretary’s reply, maintaining all of the decisions. She subsequently lodged an internal appeal with the Joint Appeals Panel (JAP) which recommended that the Executive Secretary reject the complainant’s claims. The Executive Secretary notified the complainant by a letter dated 7 May 2015 that he had accepted the recommendations of the JAP. That is the impugned decision.

The complainant requests the Tribunal to set aside the decision not to grant her an exceptional extension of her appointment, and to award her compensation for loss of the salary, emoluments and entitlements she would have received had her contract been extended for a period of two years and four months from the date of separation until retirement age, as well as moral damages in the amount of 80,000 euros. She also asks the Tribunal to set aside the decision to revise the Vacancy Announcement/ Job Description of the post of Chief of Legal Services, to award her costs for the internal appeal and the present proceedings, as well as such other relief as the Tribunal may deem just, fair and equitable.

The Commission requests the Tribunal to uphold both the decision of 23 August 2013 and the impugned decision of 7 May 2015; or alternatively, if it is persuaded that the JAP's recommendation was tainted by a procedural or other flaw requiring the impugned decision to be set aside, to remit the matter to a differently constituted panel for a new recommendation to the Executive Secretary on the basis of the submissions already made; to dismiss the claim with respect to the purported decision to revise the Vacancy Announcement/Job description of the position of Chief of Legal Services. It asks the Tribunal to dismiss the complaint in its entirety and to award the Commission costs in an amount to be assessed at the end of the proceedings.

CONSIDERATIONS

1. The complainant impugns the decision of the Executive Secretary of the Commission, dated 7 May 2015, not to grant her an exceptional extension of her contract beyond its expiry date, 26 February 2014. The impugned decision confirmed the Executive Secretary's original decision of 23 August 2013. The complainant pleads the following grounds in seeking to set aside the latter decision and to obtain consequential relief:

- (1) There were errors in the procedure leading to the original decision in that:
 - (a) the PAP lacked competence;

- (b) the PAP did not conduct a thorough or fair assessment as it did not take sufficient time to complete its assessment;
 - (c) the second round of interviews which was conducted by the Executive Secretary and the Director of the Division of Administration was unlawful;
 - (d) there was a failure to recognize her essential expertise.
- (2) The final impugned decision is tainted by errors of law and failure to consider essential facts because the Joint Appeals Panel (JAP):
- (a) unlawfully restricted the scope of its review powers;
 - (b) failed to compare the merits of the candidates and to recognize her expertise.
- (3) The Executive Secretary was motivated by “personal prejudice against [her], manifesting finally in abuse of authority vitiating his decision not to extend her contract”.
- (4) The vacancy announcement of 2010 for the post of Chief, Legal Services Section, was revised in 2012 in a manner which undermined the independence of that post to which she was appointed in June 2011.

2. The Tribunal determines that ground 4 is out of time and accordingly irreceivable. The complainant was appointed to the post of Chief, Legal Services Section, in June 2011. The revision which she challenges in ground 4 was done in 2012. She did not challenge it then by lodging a grievance within two months of the date when she received notification of it, as Staff Rule 11.1.02 required. She cannot now raise that matter in the present complaint.

3. With respect to ground 3, the complainant did not raise the issue of personal prejudice in her grievance, but raised it during her appeal to the JAP. The JAP observed that the parties had often used the terms “personal prejudice”, “prejudicial treatment” and “harassment” interchangeably. It also noted the Commission’s submission that the complainant should have followed the procedure provided in the

relevant Administrative Directive for reporting harassment. However, it further noted that the complainant had clarified her pleading of this issue as she had stated that “the purpose of bringing the information on prejudicial treatment [...] is not [...] to raise a belated case of harassment. The information was properly brought as evidence of the [...] Executive Secretary’s personal prejudice against [her]”. The JAP considered the matter as such but did “not find that the decision not to offer the [complainant] an exceptional extension of her contract was vitiated by personal prejudice against her”. In her complaint, this ground is under the heading “Prejudicial Treatment of the Complainant”. She submits that the Executive Secretary harboured personal prejudice against her which manifested itself finally in abuse of authority vitiating the decision not to extend her contract. The complainant cites a number of incidents from 2008 to 21 February 2014 between her and the Executive Secretary, who was then Director of the International Data Center Division (IDC) prior to taking up his appointment as Executive Secretary on 1 August 2013, and some which allegedly occurred subsequently. In her rejoinder, this ground is subsumed under the heading “The personal prejudice and abuse of authority by the Executive Secretary”. Notwithstanding that the issues of personal prejudice and prejudicial treatment were not raised in the complainant’s grievance, the JAP held that the challenge on this ground was receivable on the authority of Judgment 2416, consideration 11.

4. Quite apart from these legal arguments, the Tribunal is satisfied that ground 3 is unfounded. The complainant submits that the Executive Secretary’s personal prejudice against her through the pattern of events which she adumbrates amounting to harassment played a role in both the original decision not to extend her contract and the impugned decision. This is not borne out in the evidence. While the evidence shows that there were strained work relationships between them over the years, it does not link the acts which the complainant alleged were perpetrated against her since 2008 when the Executive Secretary was IDC Director and after 1 August 2013 when he assumed the post of Executive Secretary, and the decision not to exceptionally extend her contract.

5. As a precursor to considering the other grounds on their merits, it is recalled that the Tribunal stated the following in Judgment 2763, consideration 15:

“The Tribunal wishes to stress that under the seven-year policy an incumbent has only the possibility of reappointment, not a right to reappointment. However, as the Tribunal has stated in many cases, a staff member is entitled to have the question of reappointment determined in accordance with the rules of procedure established by the Commission.”

6. The Commission is a non-career organisation and under its internal laws the maximum period of service for staff in the Professional and higher categories and for all internationally-recruited staff is seven years. Exceptions to this should be kept at an absolute minimum, as stated in paragraphs 4.1 and 4.2 of Administrative Directive No. 20 (Rev.2), concerning recruitment, appointment, reappointment and tenure of staff, which the Commission issued on 8 July 1999. Accordingly, a decision whether or not to exceptionally extend a contract beyond seven years is within the Executive Secretary’s discretion and there is no right to an extension. The complainant acknowledges this, but points out, correctly, that the discretion is not unfettered and it must be exercised lawfully observing the applicable rules. The Commission submits that the complainant has failed to show that the decision not to extend her contract is tainted with any irregularity justifying its quashing and that, accordingly, her allegations that the decision was unlawful are unfounded and there is no legal or factual basis on which to overturn the impugned decision.

7. With respect to ground 1, the applicable procedures for extending a staff member’s contract beyond seven years are set out in Administrative Directive No. 20 (Rev.2). This Directive embodies a policy whereby staff members appointed to the Professional and higher categories and all internationally recruited staff should not, except for certain limited exceptions, remain in service for more than seven years. It provides in paragraph 4.2 that exceptions to the period of seven years may be made because of the need to retain essential expertise or memory in the Secretariat and shall be kept to an absolute minimum compatible with the efficient operation of the Secretariat.

Additionally, the Note which the Executive Secretary issued on 19 September 2005 sets out a part of the system for implementing the service limitation provisions of Administrative Directive No. 20 (Rev.2). According to the Note, approximately one year before the expiry of a contract taking the period of service of a staff member to seven years or more, the post shall be advertised in parallel to considering the incumbent for exceptional extension in accordance with the Directive. As stated in the Memorandum accompanying the Note, the possibility for an incumbent to gain an exceptional extension, because of the need to retain essential expertise or memory in the Secretariat, must be judged against what the general job market can offer.

8. The manner in which the procedures for extension are to be carried out was explained as follows, in Judgment 2763, considerations 10 to 15:

“10. [...] To implement its seven-year policy, the Commission adopted the procedure described in the Note which incorporates the provisions of paragraph 1 of Administrative Directive No. 20 (Rev.2). This paragraph sets out the procedures for the preparation of vacancy announcements for established posts. It provides that requests for recruitment action must include a job description and a draft vacancy announcement. Based on this information, the classification of the post is reviewed and the contents of the draft vacancy announcement are re-examined to ensure, among other things, that the required qualifications are job-related.

[...]

12. As stated in the Note, the purpose of the procedure is to establish whether a position should be offered to someone other than the incumbent or whether an exceptional extension should be granted. It provides that the post is to be advertised in accordance with the provisions of Administrative Directive No. 20 (Rev.2) and that an incumbent will be considered without the need to submit an application or to be interviewed. After the external candidate interviews are completed, the incumbent's Director is required to submit his proposal regarding the incumbent's possible reappointment. Lastly, the Personnel Advisory Panel meets to decide the recommendation it will submit to the Executive Secretary. In making the recommendation, the Panel is required to take into account the outcome of the round of interviews and the information on the incumbent.

13. As stated by the Executive Secretary at the time the procedure was introduced, the possibility of granting an exceptional extension is to be judged against what the general job market can offer. Thus, it can be seen that the procedure by which the Commission may grant an exceptional extension is not considered in isolation. It is also linked to what the general job market can offer the Commission. This aspect of the process can only be accomplished through an advertising and screening process based on a vacancy announcement that accurately reflects the duties and responsibilities of the position.

14. In Judgment 2658, under 9, the Tribunal held that Administrative Directive No. 20 (Rev.2) requires that both the vacancy announcement and the job description must be accurate and up to date prior to the posting of a vacancy announcement. [...]

15. The Tribunal wishes to stress that under the seven-year policy an incumbent has only the possibility of reappointment, not a right to reappointment. However, as the Tribunal has stated in many cases, a staff member is entitled to have the question of reappointment determined in accordance with the rules of procedure established by the Commission.”

9. In ground 1(a), the complainant contends that the PAP lacked the necessary competence to make a valid comparison of her legal expertise and assess whether her expertise and memory were essential to the Commission. In effect, her contention is that the PAP lacked the specific subject matter competence to make a decision on the exceptional extension of her contract as a qualified legal professional as none of its members was a qualified lawyer. She relies, in particular, on Staff Regulation 4.2, and section 3.3 of Administrative Directive No. 20 (Rev.2) and also refers for comparison with the latter, to section 2.3 of the Directive.

Staff Regulation 4.2 relevantly states as follows:

“The paramount consideration in the recruitment, employment and promotion of the staff shall be the necessity of securing the highest standards of professional expertise, experience, efficiency, competence and integrity.”

Section 2 of the Directive is under the caption “Appointment”. Section 2.3 states:

“A Personnel Advisory Panel will be nominated in order to make recommendations for appointment in each case of international recruitment. Each Personnel Advisory Panel will consist of

- (a) the division director concerned or the officer-in-charge,

- (b) three staff members at the Director, Section Chief, Unit Head or Senior Officer level appointed by the Executive Secretary, as well as
- (c) the Chief, Personnel Section or the officer-in-charge.”

Section 3 of the Directive is under the caption “Reappointment”.
Section 3.3 states:

“A Personnel Advisory Panel will be nominated in order to make a recommendation in respect of each possible reappointment. Each Personnel Advisory Panel will consist of

- (a) the division director concerned or the officer-in-charge,
- (b) three staff members appointed by the Executive Secretary, including at least one General Service staff member in cases of recommendations in respect of possible reappointment of General Service staff members, as well as
- (c) the Chief, Personnel Section or the officer-in-charge.”

10. The complainant submits that given the terms of Staff Regulation 4.2, the PAP constituted under section 3.3 of Administrative Directive No. 20 (Rev.2) to consider her reappointment was tasked “to select a shortlisted candidate and compare his/her qualifications/performance/experience with that of the post’s incumbent and the essential expertise or institutional memory that he/she possesses [...]”. She argues that reading the two provisions, as well as the Note together “implies that the background of the panel members must be commensurate with the task at hand i.e. they must possess sufficient professional knowledge of the subject matter” of the subject post. She seems to suggest that at least one of the members should have had specialized competence in law given that the post is that of Chief, Legal Services Section. No member of the PAP was a qualified lawyer.

11. The Tribunal rejects these assertions. The PAP was constituted in accordance with the requirements set out in section 3.3 of Administrative Directive No. 20 (Rev.2). The members were senior officials of the Commission. One of its members was the complainant’s line manager for almost four years and, as the Commission points out, was familiar with the nature, subject matter and quality of the work which the subject post required. The members of the PAP possessed management expertise and, according to the Job Vacancy Notice, they were engaged not merely in appointing a senior

legal professional but a senior manager of the legal unit. Additionally, as the JAP noted, the PAP was constituted in keeping with the recommendations for the constitution of such bodies in the United Nations system based on the “Staff Recruitment in the United Nations system organizations – The recruitment process” (JIU/NOTE/2012/2). It is therefore determined that ground 1(a) of the complaint is unfounded.

It is also determined that ground 1(b), in which the complainant contends that the PAP did not conduct a thorough or fair assessment as it did not take sufficient time to complete its assessment, is likewise unfounded. The Tribunal cannot conclude, as against speculate, that the required assessments could not have been efficiently carried out within the time in which they were done.

12. The following provisions will elucidate ground 1(c), in which the complainant contends that the second round of interviews which was conducted by the Executive Secretary and the Director of Administration was unlawful. Section 3.5 of Administrative Directive No. 20 (Rev.2) relevantly states as follows:

“The Personnel Advisory Panel shall make recommendations in respect of possible reappointment by consensus to the Executive Secretary. If no agreement can be reached, the matter shall be referred to the Executive Secretary for decision. In making a recommendation, particular attention shall be paid to:

[...]

(f) The record of the staff member concerned based on his or her performance appraisal reports.”

According to paragraph 2 of the Note, the PAP appointed under section 3.3 to consider the reappointment of an incumbent is to assess the possibility of granting an exceptional extension to the incumbent in accordance with section 4 of Administrative Directive No. 20 (Rev.2). The Note further states that:

“The division director’s proposal on possible reappointment of the incumbent [...] shall be made after all interviews have been conducted.

After the submission of the proposal by the division director, a unique meeting shall take place of the [PAP] appointed in accordance with section 2.3 of Administrative Directive No. 20 (Rev.2) and of the [PAP] appointed in accordance with section 3.3 of Administrative Directive No. 20 (Rev.2),

having the same membership. In this meeting the members of the Panels shall consolidate their findings on whether, in view of the outcome of the round of interviews and the information on the incumbent, the incumbent can be considered to provide essential expertise or memory to the PTS, and therefore should be granted an exceptional extension, or whether one of the candidates interviewed should be offered the position. Upon completion of deliberations, the Panels shall make a recommendation to the Executive Secretary in accordance with sections 2.5 and 3.5 of Administrative Directive No. 20 (Rev.2) [...].” (Emphasis added.)

13. The Commission submits, in effect, that the second round of interviews which were conducted by the Executive Secretary and the Director of Administration had no impact upon the decision not to extend the complainant’s appointment as that decision had already been taken and these interviews were intended to assess the short-listed candidates. It is noted that the PAP did not reach agreement on a candidate and submitted the short-list of candidates for the decision by the Executive Secretary, as paragraph 2 of the Note permitted it to do. It is however observed that the complainant was informed of the non-extension of her appointment by letter of 23 August 2013 and the second round of interviews was conducted on 30 and 31 July 2014. The Tribunal is mindful that paragraph 2 of the Note requires that the division director’s proposal on possible reappointment of the incumbent shall be made after all interviews have been conducted.

14. However, the Tribunal is primarily concerned with ground 1(d) of the complaint, in which the complainant contends that there was a failure to recognize her essential expertise. Under Staff Regulation 4.2, section 3.3 of Administrative Directive No. 20 (Rev.2) and the relevant provisions of the Note, this is a critical element in determining whether her employment should have been exceptionally extended.

15. The Tribunal points to considerations 12 and 13 of Judgment 2763, which are reproduced in consideration 8 above.

16. The Tribunal notes that the proposal of the Director, LEGREL, to the PAP did not recommend the exceptional extension of the complainant’s appointment, but sees no evidence of an evaluation

of the complainant's performance and merits or whether she was or was not considered to be able to provide essential expertise or memory to the PTS. While the PAP stated its acceptance of the Director's recommendation concerning the complainant, there is no evidence in its report that, in its deliberations, the PAP carried out an evaluation to determine whether in view of the outcome of the round of interviews and the information on the complainant, she could have been considered to provide essential expertise or memory to the PTS, and therefore should be granted an extension, or whether one of the candidates interviewed should be offered the position. It is instructive that in its report of 19 July 2013, the PAP merely stated as follows:

“The Director, [LEGREL] is not seeking the extension of the current incumbent, [...] owing to the fact that the selection process had identified suitable candidates with relevant skills and experiences. The members of the panel took note of the excellent services provided to the Secretariat by the incumbent [...].

Panel unanimously agreed with the recommendation of the Director, [LEGREL], noting that the final selection decision rests with the Executive Secretary.”

The Tribunal sees no evaluation of the possibility of granting an exceptional extension to the complainant judged against what the general job market could have offered. There is no such evaluation or analysis in the original decision of 23 August 2013, as was required. The JAP erred by failing to recognise this in its review, as did the Executive Secretary in the final decision of 7 May 2015. The Tribunal accordingly determines that ground 1(d) of the complaint is well founded.

17. With respect to ground 2, it is noted that the JAP stated its conclusion concerning the issue raised in ground 1(d) as follows:

“65. The Panel was mindful of [the Tribunal's] jurisprudence (such as Judgment No. 2648), according to which the comparison of merits of candidates in a competition will not be entered into by the Tribunal unless it appears to be tainted with serious flaws. Nevertheless, on reviewing the recruitment file, the [JAP] was able to observe that, objectively speaking, the candidates possessed legal skills and experience matching or in excess of the requirements listed.

66. The [JAP] could therefore not conclude that there was a failure to recognize the essential expertise of the [complainant].”

This statement misapprehends the applicable principles and the JAP's mandate under its own rules and may have influenced its thinking (see Judgment 3125, under 12 and 13). Ground 2 of the complaint is therefore well founded. Since the impugned decision of 7 May 2015 was tainted by this as well as by the failure which was found on the basis of ground 1(d), the impugned decision must be set aside.

18. The complainant has not sought to be reinstated, but she seeks material damages. The Tribunal determines that she is entitled to material damages for the loss of a valuable opportunity to have her contract extended and also to be compensated for the moral injury which the breach of the Commission's rules caused her. She will be awarded 40,000 euros in moral damages. She will also be awarded, for material damages for loss of the valuable opportunity to have an exceptional contract extension, the sum of 80,000 euros. The complainant will also be awarded 7,000 euros costs.

19. The complainant requests that "[t]he decision to revise the Vacancy Announcement/Job Description of the post of P-5 Chief of the Legal Services Section be set aside in order to restore the independence of the role and function of the Legal Adviser to the Preparatory Commission". This matter is however not within the Tribunal's competence.

20. In the foregoing circumstances, the Commission's counterclaim for costs must be rejected.

DECISION

For the above reasons,

1. The impugned decision of 7 May 2015 and the original decision of 23 August 2013 are set aside.
2. The Commission shall pay the complainant material damages in the sum of 80,000 euros.

3. The Commission shall also pay the complainant 40,000 euros for moral injury.
4. The Commission shall also pay the complainant 7,000 euros costs.
5. All other claims are dismissed, as is the Commission's counterclaim.

In witness of this judgment, adopted on 3 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ