

NINETIETH SESSION

Judgment No. 2031

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms B. F. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 15 September 1999 and corrected on 18 April 2000, the Preparatory Commission's reply of 30 May, the complainant's rejoinder of 14 August and the Commission's surrejoinder of 28 September 2000;

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

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant, a Swiss citizen born in 1939, is a former official of the CTBTO PrepCom. She joined the Provisional Technical Secretariat of the newly established CTBTO PrepCom in Vienna on 31 March 1997 at grade G.6. Under the terms of a letter of appointment dated 9 July 1997 she was appointed for a three-year period, retroactively to 31 March 1997, to the position of Associate Officer in the General Services Section at grade P.2. The letter specified that the provisions of the United Nations Staff

Regulations and Staff Rules applied to staff of the Provisional Technical Secretariat. Clause 3 of the letter stated that such a fixed-term appointment “may be terminated prior to its expiration date in accordance with the relevant provisions [of the above-mentioned rules]”. Clause 6 contained a special condition worded:

“This appointment is subject to certification of completion of six months satisfactory service. Failure to obtain such certification will result in termination of this appointment, subject to 30 days written notice.”

The complainant's six-month period of probation finished on 30 September 1997. Prior to that she had expressed interest in transferring to the International Monitoring System Division (IMS) as a training officer. The Director of Administration, who was her supervisor until the appointment of the Chief of General Services on 19 October, drew up a report on her performance and signed it on 6 October. He recommended terminating her appointment on the grounds that certain aspects of her service were “less than satisfactory”. In a meeting with the complainant on 7 October, the Executive Secretary of the Preparatory Commission offered to extend her probationary period by six months on the same post. No action was taken on that matter, and on 15 October the complainant was informed that her appointment would be terminated on 30 November.

On 9 October 1997 the Commission issued two directives. Administrative Directive No. 2 formalised the legal framework for appraisal procedures. Administrative Directive No. 3 governed the probationary period: it specified that in the event of a staff member's performance being deemed unsatisfactory, the Executive Secretary could prolong the probationary period by six months if the staff member agreed – failing that, 30 days' written notice of termination would be given.

In an appeal of 12 November 1997 to the Executive Secretary, the complainant contested the decision to terminate her contract on the basis of her performance evaluation report. On the same day she contested the report by requesting a “rebuttal” procedure. An Ad Hoc Panel on Performance Appraisal was constituted to hear her case and issued its report on 25 November. It found that the appraisal had been conducted in a way that was consistent with the terms of Administrative Directive No. 2. On 26 November she

received confirmation from the Executive Secretary that her contract would end on 30 November.

The complainant fell ill in the last days of November 1997. In letters sent to the Commission in March and early April 1998 she requested the extension of her contract and medical insurance coverage. On 8 April 1998 the Executive Secretary retroactively extended her contract to 7 December 1997 in view of her accrued sick leave entitlement.

On 19 December 1998 the complainant filed an appeal with the Joint Appeals Panel against the decision to terminate her appointment, claiming reinstatement and payment of outstanding salary and allowances. The Appeals Panel heard her case in April 1999, and in a report dated 26 May found that the decision to terminate her services was valid. It recommended rejecting her appeal. It also took note of the fact that under Annex III of the United Nations Staff Regulations, which were applicable at the time she was appointed, a termination indemnity may be paid. In a letter of 15 June 1999 to the complainant, the Chief of the Personnel Section confirmed the termination of her appointment and informed her of the Executive Secretary's decision to offer her a termination indemnity of 4,213 United States dollars "in full and final settlement" of any claims. That is the impugned decision.

B. The complainant contends that the Commission could not end her contract before its expiration date without complying with the relevant provisions of the United Nations Staff Regulations and Rules which governed her appointment. Her contract was for a fixed term of three years, and not for six months, with the possibility of extension to three years. Regarding the quality of her services, she stresses that the initial period in the Commission was "chaotic", that she had to master a huge workload and received no job description.

Her main plea is denial of due process on several counts. (1) There was undue delay in setting up the appeal mechanism to deal with her case. (2) The Commission took the decision to end her appointment before the rebuttal procedure regarding her performance appraisal report was completed. (3) Her working

relationship with her supervisor was “strained”; she was thereby denied an impartial assessment. (4) Her supervisor’s appraisal of her performance was tainted with prejudice. (5) The Commission did not allow her access to documents that she wanted to consult to prepare her case; indeed it told her the documents had been destroyed. Personal documents remained in her office and she could not retrieve them. (6) The job offer from IMS was “jeopardised by unfair practices”. Her supervisor drafted her appraisal report after she had asked him for permission to leave his division, and he did not immediately disclose to her that he intended to recommend the termination of her appointment. Because of the unfavourable appraisal the IMS withdrew its offer. She therefore views the performance report as being “unfair and harmful”.

She maintains that there were procedural irregularities at the hearing before the Joint Appeals Panel. She takes issue with allegations made by one of the witnesses who was present. Moreover, neither she nor her counsel had been informed of the names of witnesses who would appear. Not having been informed of certain allegations beforehand she had no real opportunity to rebut them.

She asks the Tribunal to rule that she has been denied due process and order the quashing of the impugned decision. In compensation she seeks “full pay and benefits” up to 30 March 2000, the date her contract was originally to end. She seeks a ruling pursuant to Article VIII of the Tribunal’s Statute that the Commission is to: pay all her outstanding entitlements “including salary and other benefits” due under the terms of her contract and the United Nations Staff Rules; pay all her outstanding contributions to Van Breda for her health insurance; and arrange payment of all outstanding medical expenses due to her, as well as a bill from the Tulln Hospital, including interest and penalties for late payment. She seeks damages for the delay in “dealing with the merits of her grievance”; the removal of the appraisal report from her personal file; the issuing of a “report and certificate which reflect the truth”; and an apology from the Preparatory Commission.

C. The Commission replies that its decision to terminate her contract was valid since the complainant failed to meet the probationary requirement of six months' satisfactory service. Moreover, the decision was carried out in accordance with the applicable rules.

It contests her allegation that she had no job description: she had a "sufficient description" of the duties she was to perform. Job descriptions for the whole staff were drawn up in late 1997. Prior to that supervisors defined tasks with staff members. In the first six months of its existence the Commission was establishing administrative procedures. It made every reasonable effort to respect the complainant's right to due process. Any delays that occurred in dealing with her grievance were ultimately to the complainant's advantage.

The performance report was drawn up on 6 October 1997 at the Personnel Section's request. By offering the complainant a six-month extension of her probationary period, the Executive Secretary gave her a chance of complying with the requirement of six months' satisfactory service. Since she declined that offer, termination ensued in accordance with the provisions of Directive No. 3. The Executive Secretary took his decision on the basis of the appraisal made by the complainant's supervisor, and on the complainant's comments thereon. The complainant was given an opportunity to state her case. She has moreover failed to show that her supervisor's evaluation was motivated by prejudice.

The Commission denies that there was an offer of employment for her in the IMS Division. The Director of the Division would have had no authority to make such an offer and any sign of willingness to consider her candidacy could not give rise to a legitimate expectation of an offer.

It denies refusing her access to certain documents. The Appeals Panel found such accusations to be false and the complainant has not substantiated them. As reported by the Panel, the personal papers left in her office were transferred, in the presence of a witness, to a locked cupboard and then, in April 1998, were transported to her home by a driver. It takes up her allegations of procedural shortcomings at the Appeals Panel

hearing. The witness referred to by the complainant presented evidence which had no bearing on the decision to terminate her appointment. She had every opportunity to call her own witnesses or to cross-examine those present at the hearing.

Notwithstanding the production of inadequate medical certificates the Commission extended the complainant's appointment to 7 December 1997, to allow her to use the remainder of her sick leave entitlement. As regards salary and medical premiums, it discharged its obligations toward her in full, until the revised separation date. It also extended her medical coverage to 31 December 1997.

D. In her rejoinder the complainant enlarges on her pleas.

She asserts that she did not see copies of Administrative Directives Nos. 2 and 3 when they were issued in October 1997. She refers to a letter of 9 May 2000, which the Commission failed to copy to her. The letter indicated that on 12 March 1998, the Commission had written to Van Breda to cancel the complainant's insurance coverage retroactively to end of 1997. Also, the letter reveals the Commission's bad faith as it was aware that she had been hospitalised and was still ill on 12 March. She contests its view that the medical certificates she sent in were "invalid".

She is of the opinion that the Commission filled her post before the rebuttal procedure was finalised. As for the extension of the trial period, she had agreed to such an extension provided it was in the IMS Division, where she had hoped to be transferred.

E. In its surrejoinder the Commission submits that it is of no consequence that the complainant may have consented to a six-month extension of her probationary period in a different department, since no such offer was ever made to her.

The fact that she did not see certain administrative circulars while she was still a staff member does not advance her case. Contrary to her allegations, the administration did not retroactively cancel the complainant's health insurance in its letter of 12 March 1998 to Van Breda; it merely confirmed instructions it had given

orally to Van Breda at the time of the complainant's separation in December 1997.

As regards filling her post, the staff member mentioned by the complainant moved into the General Services Section in February 1998 – two months after the complainant's separation. Moreover, the Commission points out that there is no foundation for her allegation that the decision to end her employment was taken before the rebuttal procedure was finalised, since the decision to confirm her termination was taken on 26 November 1997 – after the Ad Hoc Panel on Performance Appraisal had issued its report.

CONSIDERATIONS

1. The complainant entered the service of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 31 March 1997. On 9 July she was appointed for three years as an Associate Officer at grade P.2 in the General Services Section with retroactive effect to 31 March 1997. Her letter of appointment stated in clause 6 that her appointment was “subject to certification of completion of six months satisfactory service. Failure to obtain such certification will result in termination ... subject to 30 days written notice.”

The Staff Regulations and Rules of the United Nations were applicable *mutatis mutandis* to the contract of employment, in accordance with a decision taken by the Commission at its first session in New York in November 1996.

2. The complainant's probationary period having ended on 30 September 1997, she received a performance appraisal report on 6 October assessing ten aspects of her work. Two of them were deemed “satisfactory” and seven were rated “less than satisfactory”.

3. The supervisor's overall appraisal reads: “I do not recommend that Ms F. be continued past her probationary period except to give her notice of her termination and to give her

adequate time to plan for that eventuality.” The complainant refused to sign the report.

4. On 7 October the complainant had a meeting with the Executive Secretary who orally offered to extend her probationary period, in the same position, for six months to enable her to complete the six months of satisfactory service required by her letter of appointment. The complainant orally declined the offer and instead informed the Administration that she would accept such an extension only if she were assigned to a different position in the Commission; she alleged that she was considering an offer to transfer to the International Monitoring System Division (IMS). The Commission denies that any such offer, oral or written, was ever made and says that in any event the Director of that Division had no authority to make such an offer; to do so was the sole prerogative of the Executive Secretary.

5. On 15 October the Executive Secretary informed the complainant that her contract would be terminated on 30 November. To give her time to attend to personal arrangements, she would be given six weeks' notice.

6. In the meantime the complainant submitted to the Chief of the Personnel Section and the Executive Secretary a rebuttal, dated 12 November 1997, of her performance appraisal report.

7. On 18 November the Chief of Personnel informed the complainant of the establishment by the Executive Secretary of an Ad Hoc Panel on Performance Appraisal. It was asked to consider whether the appraisal report had been completed in accordance with the relevant administrative directives. On 25 November the Panel submitted its report to the Executive Secretary, concluding that the terms of Administrative Directive No.2 had been respected. The report stated that the Panel had not considered the substance of the appraisal report, because it had not been asked to do so.

8. In a letter of 26 November 1997 the Executive Secretary confirmed that the complainant's contract would be terminated on 30 November.

9. The complainant fell ill before that date and took sick leave from 27 November 1997 until 26 April 1998.

In several letters written in March and April 1998 she requested an extension of her contract and medical insurance coverage for the period of her illness. In a letter of 8 April 1998 the Executive Secretary informed the complainant that he agreed to extend her appointment to 7 December 1997 in order to enable her to use the remainder of her sick leave entitlement.

10. By an administrative directive of 25 May 1998 the Commission established the Joint Appeals Panel to which the complainant appealed. On 28 April 1999 the hearing was conducted and the Panel's report was submitted to the Executive Secretary on 26 May 1999. The Panel upheld the decision of the Executive Secretary to terminate the complainant's appointment since she failed to meet the requirement of six months' satisfactory service which was necessary to have the appointment confirmed.

11. By a letter of 15 June the Chief of Personnel informed the complainant that the Executive Secretary maintained his decision to terminate her appointment on the grounds that she had failed to meet the probationary requirement of six months' satisfactory service. He said that the Executive Secretary had decided to offer her a termination indemnity in the amount of 4,213 United States dollars "in full and final settlement of any claim against the Organization", an offer to which she did not respond. The complainant received that letter on 24 June. On 3 July she received a copy of the Panel's report under cover of a letter dated 25 June from the Chief of Personnel.

12. On 15 September 1999 the complainant filed this complaint with the Tribunal seeking the following relief:

- (1) that the Tribunal quash the challenged decision on the grounds that she has been denied due process;
- (2) that the defendant organisation pay her:
 - compensation of “full pay and benefits to the end of her contract ... on 30.03.2000”;
 - “all outstanding entitlements including salary and other benefits” due under the terms of her contract and the applicable United Nations Staff Rules;
 - all her outstanding contributions to Van Breda for her compulsory medical insurance, and arrange payment of outstanding medical expenses and a hospital bill;
 - damages for the injury she has suffered due to the “delay in dealing with the merits of her grievance”;
- (3) the removal of the “unfair and harmful” appraisal report from her personal file;
- (4) the drawing up of a “report and certificate which reflect the truth”; and
- (5) an apology from the defendant organisation.

13. Her claim that the challenged decision should be quashed is based on her contention that she has been denied due process. More specifically, she avers that there was undue delay in dealing with her grievance through the belated setting up of the legal mechanism to deal with her case. The Commission never replied to her counsel's offer of an amicable settlement; nor was it willing to recognise on a once-only basis an already established Appeals Board of another United Nations agency.

The Commission replies that it had to confront the stark reality that, as an institution established on 19 November 1996, it was still in the process of setting up structures, systems and procedures. It is *à propos* to state that the complainant was only the eighth staff member employed after the CTBTO PrepCom began its operations in Vienna on 17 March 1997. However, when she filed a rebuttal of her performance appraisal report, the Executive Secretary immediately appointed – on 18 November 1997 – an Ad Hoc Panel with terms of reference to guide it in determining whether the report was consistent with the procedure described in the relevant

Administrative Directive No. 2 of 9 October 1997. Seven days later – on 25 November 1997 – it submitted its report to the Executive Secretary.

14. Approximately six months later, a Joint Appeals Panel was established under Administrative Directive No. 22 of 25 May 1998. In the succeeding months, the composition of the Panel was finalised: it was then reconstituted upon objections from the complainant to two of its members. Finally, a hearing was held on 28 April 1999 and the report of the Panel submitted to the Executive Secretary less than a month later – on 26 May 1999. There was no undue or inordinate delay in the Joint Appeals Panel being set up and commencing its work. In any event, a delay in the internal appeal process could never allow a complainant to succeed on the merits; at most it might entitle him or her to appeal directly to the Tribunal.

15. The Commission admits that it declined to recognise the jurisdiction, even on an exceptional basis, of an established appeals board of any other international agency because of the lack of any agreements between CTBTO PrepCom and any other organisation having the approval of their respective governing bodies.

The delay which she pleads even worked to the advantage of the complainant for it enabled her to file her complaint with the Tribunal. The Commission deliberately made its recognition of the Tribunal's jurisdiction retroactive to 25 August 1999, the day its Staff Rules were promulgated, and not from November 1999, the date on which the Governing Body of the International Labour Office approved the recognition, otherwise the present complaint would have been excluded for want of jurisdiction. It has been pointed out that the complainant herself contributed to the protracted process by her requests for the “longest possible” extension of the time limit for submitting her corrected complaint and an additional exceptional extension for submitting more documents.

16. As regards the proposal to settle the dispute amicably, the Executive Secretary of the Commission was under no duty to accede to it. During the process of internal appeal the complainant was allowed to be represented by a serving or retired staff member of the Commission or even by a staff member of another international organisation.

17. The complainant's adverse performance appraisal report was transmitted to her on 6 October 1997. Thereafter, the Executive Secretary decided to terminate her probationary appointment.

18. On 7 October 1997 the Executive Secretary orally offered the complainant an extension of the probationary period for a further six months. The Chief of Personnel reiterated that offer the next day. On both occasions she declined on the grounds that she would only accept it if she were assigned to a different position in the Commission; besides, she said that she was considering an offer to transfer to the IMS Division.

19. At the hearing before the Joint Appeals Panel, the Director of that Division declared that he made the complainant no formal offer of a position as he did not have authority to do so. Moreover, he himself had doubts as to whether the planned structure would be implemented. In fact, it never was, and the position he had in mind for the complainant did not exist at the time of the hearing. The complainant herself admitted that she had received no written offer, only an oral one. Having declined the offer to have her probationary period extended for six months, the complainant was given notice of termination.

20. On 12 November 1997 the complainant filed a rebuttal of her performance appraisal report but, before the procedure was finalised, her employment was terminated. She contends that she was therefore denied due process; moreover, the Ad Hoc Panel set

up to review the report did not look at the substance but only the form.

21. The Tribunal holds that while there may indeed have been lapses in the rebuttal process, these were offset by the Executive Secretary's assiduousness in affording the complainant every opportunity to present her case. She submitted a considerable amount of correspondence to the Executive Secretary during the period from 6 October to 30 November 1997. As a result of these representations, she was offered an extension of her probationary period, which she declined. The Joint Appeals Panel concluded: "If there has been a denial of justice in this process, it is that the applicant has denied herself an opportunity to start anew."

22. The complainant's assertions that her performance appraisal was influenced by extraneous factors and that the report was arbitrary, prejudiced, "unfair and harmful" are not tenable. Her allegation that she was denied access to documents essential to her case is without foundation since the Commission has shown that it took steps to place her personal files in her possession.

23. In view of the foregoing findings, the complainant is not entitled to any compensation, payment of expenses, damages or other benefits claimed in her complaint.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 16 November 2000, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Florida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

MELLA CARROLL
JAMES K. HUGESSEN
FLERIDA ROMERO

CATHERINE COMTET