

The Administrative Tribunal,

Considering the complaint filed by Ms S. F. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 30 August 2001, the Preparatory Commission's reply of 18 October, the complainant's rejoinder of 14 December 2001, the Commission's surrejoinder of 31 January 2002, and the additional document submitted by the complainant on 28 February 2002;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, an Austrian citizen born in 1970, joined the Provisional Technical Secretariat of the CTBTO PrepCom on 4 June 1997 as a personnel clerk at grade G-4 under a three-year fixed-term contract, subject to satisfactory completion of a six-month probationary period. On 10 February 1998 the Executive Secretary of the Preparatory Commission certified that the complainant had done so and thereby confirmed her appointment. Following the satisfactory rating given in her performance appraisal reports for the periods 4 June to 3 December 1997 and 4 December 1997 to 3 June 1999, the complainant was awarded a salary increment on 1 June 1998 and 1 June 1999, respectively.

The Personnel Advisory Panel met on 21 October 1999 and recommended against renewing the complainant's appointment. On 12 November her supervisor - the Chief of the Personnel Section - orally informed her that the Executive Secretary had decided not to renew her appointment. On 7 March 2000 he sent her a memorandum, informing her of the separation procedures and benefits. On 7 April the complainant requested a review of the administrative decision by the Executive Secretary. On 3 May the Director of Administration informed her, on behalf of the Executive Secretary, that the decision had been maintained.

On 29 May 2000 the complainant appealed to the Joint Appeals Panel against that decision. In its report dated 30 May 2001 the Panel concluded that the decision not to renew the complainant's appointment had not been fully substantiated and that the complainant had not been given any prior indication that her performance was unsatisfactory enough to warrant the non-extension of her contract. It doubted the validity of the decision and recommended that it be set aside and the complainant reinstated; alternatively, it recommended payment of damages. Furthermore, noting that the complainant had not been given the reason for the decision until it was stated in the Administration's rejoinder to her appeal, the Panel also recommended a review of the procedures applicable to non-renewal of appointment to include due notification in line with the principles of the international civil service. On 15 June 2001 the Legal Officer informed the complainant, on the Executive Secretary's behalf, that the decision not to renew her appointment had been maintained. That is the impugned decision.

B. The complainant has four pleas. First, she was not given a reason for the decision not to renew her appointment. She had a first indication only during the appeal procedure. She argues that in not citing a reason for the decision the Commission breached the principles embodied in the Tribunal's case law.

Secondly, the Commission failed to justify her non-renewal. It did not indicate in what aspects she displayed shortcomings; she recalls that she was awarded two salary increments for satisfactory performance of her duties and her second performance appraisal report expressly mentions her ability to deliver work of good quality. She takes issue with the argument put forth by the Commission during the internal appeals procedure that the level of satisfactory performance necessary for awarding a salary increment is lower than that for renewal of contract. Furthermore, the Joint Appeals Panel noted that the guidelines on reappointment, found under Part 3 of

Administrative Directive No. 20 (Rev. 2) of 8 July 1999, give rise to reasonable expectations of contract renewal. She contends that it is only right, based on these guidelines, that a staff member be duly informed of the reasons why a contract is not renewed. She argues that there were procedural errors regarding how the non-renewal of her appointment was handled - it was the Chief of the Personnel Section who verbally informed her and not the Director of Administration, as has been the practice in the Commission. A recommendation made to the Personnel Advisory Panel regarding her appointment non-renewal was also only verbal, thus there has been a failure to create a proper "paper trail". In addition, that Panel did not state any reasons in its recommendation to the Executive Secretary, which is contrary to Part 3 of the Administrative Directive.

Thirdly, she was not given prior notice of any concern over, or dissatisfaction with, her performance. She submits that her supervisor used "highly nuanced and technical language" and that this was indicative of his approach to giving her feedback; she was never quite clear what was expected of her. He did not even use the performance appraisal report as a mechanism to enter into a dialogue with her; it cannot be argued that she received any warning that her performance was unsatisfactory.

As a final plea she contends that personal bias rather than genuine grounds for dissatisfaction governed the decision not to renew her appointment. The decision was based on an assessment of her work at one particular juncture and not over a protracted period of time. She points out that the Joint Appeals Panel stated that dissatisfaction has to be clearly communicated to the staff member in a written warning in order to give the staff member the opportunity to improve. Instead, her supervisor had a propensity to shout at Section meetings. She alleges that his behaviour contributed to a staff turnover which was higher in that Section than in other Sections of the Commission.

She asks the Tribunal to quash the Executive Secretary's decision not to renew her appointment and to order her reinstatement. If reinstatement is not possible she requests material damages equivalent to twenty-four months salary at grade G-4, including allowances and benefits. She also requests moral damages and costs.

C. The Commission replies that it complied with its obligation to provide the reason the complainant's contract was not renewed when she was orally informed of the decision by her supervisor on 12 November 1999. It is "common knowledge" that there is only one reason for non-renewal of the first three-year contract, namely performance; consequently, a written reason is not provided. As a clerk in the Personnel Section the complainant should have been aware of this practice. The Joint Appeals Panel erred in concluding that the reason must be provided in writing; there is no legal requirement for this and the complainant has suffered no detriment as a result.

Although her performance may have been satisfactory for the purpose of granting annual salary adjustments this did not give rise to an expectation of renewal. These increments are "all but automatic" and there is no link between them and the renewal of appointment. Based on her record the Commission was justified in concluding that her appointment should not be renewed. The procedures governing the possible renewal of contracts are contained in Administrative Directive No. 20 (Rev. 2) and are reflected by the established practice of the Commission; it denies there were any irregularities in the procedures followed in the complainant's case. Furthermore, she has not demonstrated how these were disadvantageous to her. The Commission is aware that the practice followed by the Director of Administration, to make only verbal recommendations to the Personnel Advisory Panel, is an "exceptional variation" of paragraph 3.2 of the Directive, but it was justified in the circumstances and the complainant suffered no harm as a result.

Her supervisor gave her ample indication of his concern over, and dissatisfaction with, her performance. The Commission submits that she was regularly provided with feedback and guidance, in both Section meetings and in private meetings. In her first performance appraisal report she was encouraged to show initiative and contribute her own ideas to the work process and the discussion of her second performance appraisal report constituted "more than ample warning". It cannot be blamed on the Commission if she failed to act on the feedback she received.

Lastly, it submits that the decision was not tainted with personal bias and was governed solely by considerations of her performance.

D. In her rejoinder the complainant observes that the relevant Staff Rules and Administrative Directives underscore the link between satisfactory performance and the award of salary increments. She denies that she was given proper notice of the decision: she was told "in passing" by her supervisor when she saw him about another matter; it was not a meeting convened by him in order to inform her. She reiterates that the Director of Administration should have been the person to inform her of the decision, but he was not.

She points out that she is one of the first staff members not to have her contract renewed as the first panels set up for the purpose of making recommendations on contract renewals were constituted only in the third quarter of 1999. Under these circumstances, no clear pattern of decisions governing renewals could have emerged at the material time. Furthermore, as the proceedings of the Personnel Advisory Panel are confidential she could not have been privy to knowledge regarding renewal practices. She notes that in its reply the Commission takes care to state that its "practices" were followed but it avoids stating that it followed the established Staff Rules and Administrative Directives. She submits that Administrative Directives "are binding on staff members and/or regulate the relationship between staff members and the organization"; therefore, the Commission is duty bound to either follow them or observe the correct procedures to amend them.

E. In its surrejoinder the Commission explains that performance appraisal reports are required to be completed before a staff member can be awarded a salary increment, but that these are not reviewed with a view to awarding one. The award of a salary increment gives no rise to a right of contract renewal. The Commission argues that in any event, a decision to renew an appointment is discretionary and mere satisfactory performance does not give rise to an entitlement to automatic renewal. It says, however, that the point is moot because the complainant's performance was manifestly not satisfactory. It maintains that she was provided with the reason why her appointment was not renewed.

It denies her assertion that it has taken care to avoid saying it followed the Staff Rules and Administrative Directives: the decision was taken in conformity with the Staff Regulations and Rules, the Administrative Directives, and established practice. It submits that "a constant and consistent practice may exceptionally override the provisions of a subsidiary source of law such as an Administrative Directive".

CONSIDERATIONS

1. The complainant impugns the decision of the Executive Secretary of the CTBTO PrepCom not to renew her fixed-term contract upon its expiry. She argues that the Commission failed to give her a reason for the non-renewal, that her performance did not justify a non-renewal of contract, that her supervisor did not warn her of his dissatisfaction or concern over her performance, and that the decision was based on personal bias rather than genuine grounds for dissatisfaction. Because of the conclusion it has reached on the complainant's first plea, it will not be necessary for the Tribunal to take up the complainant's other pleas.
2. The complainant began a fixed-term appointment on 4 June 1997 as a personnel clerk in the Personnel Section of the Commission's Provisional Technical Secretariat. The Secretariat itself began operating on 17 March 1997. The complainant's contract indicated that the term of her appointment was for three years and would expire without notice on 3 June 2000.
3. She completed a six-month probationary period on 3 December 1997 and the Executive Secretary confirmed her fixed-term appointment of three years on 10 February 1998.
4. During her appointment, the complainant received two performance appraisals. The first appraisal report, dated 5 February 1998, covered her probationary period; her supervisor found her work to be satisfactory and "of a very high quality". Her second appraisal report, issued in August 1999, was considerably less laudatory in certain areas. On 21 October 1999 the Personnel Advisory Panel recommended against reappointing the complainant. No reasons were given. On 12 November 1999 the complainant's supervisor informed her verbally that the Executive Secretary of the Commission had decided not to renew her contract.
5. Following the rejection of her request for a review of that decision, the complainant submitted an appeal on 29 May 2000 to the Joint Appeals Panel.
6. In its report to the Executive Secretary the Joint Appeals Panel concluded that the decision not to renew or extend the complainant's contract of employment was not fully substantiated, nor was the complainant immediately informed of the decision or given any prior indication that her performance was unsatisfactory enough to warrant a non-renewal.
7. On the contrary, she was never clearly informed of all the negative aspects of her work performance; she was

only informed of the Commission's true reason for non-renewal - which was that the Personnel Advisory Panel had in fact advised the Executive Secretary against renewing the complainant's appointment - at the appeal when she was provided with the Commission's rejoinder on her appeal.

8. The Joint Appeals Panel further concluded that the decision's validity was doubtful and that it should be set aside, the complainant reinstated, or in the alternative, be awarded a payment of damages. The Executive Secretary did not accept any of the recommendations of the Panel and reaffirmed his decision not to reappoint or reinstate the complainant.

9. In her complaint, the complainant maintains that at no time was she given a reason for the decision not to renew her appointment. The failure to cite a reason runs counter to principles embodied in a series of Tribunal judgments. The complainant cites Judgment 946 and more specifically, Judgment 1154 under 4, wherein the Tribunal states that:

"... it is a general principle of international civil service that there must be a valid reason for any decision not to renew a fixed-term appointment and that the reason must be given to the staff member."

10. Further affirmation of this principle is contained in Judgment 1544 under 11, wherein the Tribunal found that:

"A firm line of precedent has it that though a fixed-term appointment ends automatically at the scheduled date of expiry the staff member must be told the true grounds for non-renewal and given reasonable notice of it even if the contract does not expressly so require."

11. Similarly, in Judgment 675 under 13, the Tribunal stated that:

"... The staff member was entitled to know the reason at the time; ... But a statement that appears for the first time in the course of legal proceedings and then only as part of the argument cannot carry the same conviction as one that is immediately and readily given."

Reference may also be made to the decision rendered at the present session in Judgment 2124 and to the additional cases therein cited.

12. The Commission submits that it complied with its obligation to provide the complainant with reasons for non-renewal when the Chief of the Personnel Section, her immediate supervisor, informed her about the Personnel Advisory Panel's decision on 12 November 1999 (which is denied by the complainant) and that specifically, her performance was the reason for non-renewal. The reasons were given in a timely manner - seven months prior to the expiration of her contract.

13. The Tribunal notes that the Commission has adduced no evidence to support its contention that the complainant was orally advised of the reasons for the decision not to renew her contract in November. Nor has it produced any contemporary memorandum or other document to refute the complainant's denial of the alleged content of that meeting. It further notes that the only document mentioned, the report of the Personnel Advisory Panel, itself contains no reasons for recommending against the complainant's reappointment. The defendant has the clear burden of showing that it has complied with the requirements of the Tribunal's case law cited above. It has failed to do so.

14. Furthermore, even if the recommendation of the Personnel Advisory Panel had been timely communicated to the complainant, this would not in itself have been enough to satisfy the defendant's obligations, since that decision itself contained no reasons. To state that another body has recommended against renewal, without stating why, is not enough to satisfy the Tribunal that a reason for such non-renewal was given. Nor is it enough to argue, as the defendant does, at least inferentially, that the complainant must have known that the Panel would have based its decision on her performance.

15. The decision impugned cannot stand.

16. The complainant having apparently obtained employment elsewhere, the appropriate remedy is damages rather than reinstatement. The Tribunal will order that she be paid the value of all salary and other financial benefits to which she would have been entitled had she been reappointed for a period of twenty-four months from 4 June 2000. The complainant shall account for all net sums received by her from other employment during that period. She is also entitled to moral damages in the amount of 1,000 euros and to costs of 500 euros.

17. Since she has succeeded in her main contention there is no need to entertain her other pleas.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Commission shall pay to the complainant all salaries and other financial benefits to which she would have been entitled had she been reappointed for a period of twenty-four months from 4 June 2000, less any net sums received by her from other employment during that time.
3. It shall pay her 1,000 euros for moral damages.
4. It shall also pay her 500 euros in costs.

In witness of this judgment, adopted on 3 May 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet