

NINETY-FIFTH SESSION

Judgment No. 2259

The Administrative Tribunal,

Considering the complaint filed by Mr J.R. S. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (hereinafter "the Commission") on 2 October 2002, the Commission's reply of 13 November 2002, the complainant's rejoinder of 6 January 2003 and the Commission's surrejoinder of 4 February 2003;

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

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

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

A. The complainant, a British national born in 1954, entered the service of the Preparatory Commission in the Personnel Section, at grade P.4, with a three-year fixed-term contract starting on 1 November 1998.

In a memorandum dated 27 April 2001, his supervisor, the Chief of the Personnel Section, gave him details of the termination of his appointment, since his contract would not be renewed on expiry. On 25 June the complainant wrote to the Executive Secretary asking him to reconsider that decision, since in his view his supervisor had not assessed his performance impartially. On 29 June the Executive Secretary drafted a note for the file giving an account of a discussion with the complainant on 25 June. In a letter of 4 July, the Executive Secretary informed the latter that he had decided to confirm the decision not to renew his appointment.

On 3 August 2001 the complainant sent a statement of appeal to the Joint Appeals Panel, which reported to the Executive Secretary on 2 July 2002, recommending that the appeal be dismissed. In a letter of 8 July 2002, which constitutes the impugned decision, the Legal Adviser informed the complainant that the decision not to renew his appointment had been upheld. Meanwhile, on 11 July 2001, the complainant had tendered his resignation. At his request, the resignation took effect on 3 September 2001.

B. The complainant notes that he was advised in September 1999 by his supervisor that his appointment would not be extended. According to him, the decision was due to the fact that he had received dependency benefits to which he was not entitled, for which he had been reprimanded. He concluded that his supervisor was prejudiced against him, in support of which he refers to several testimonials. In the complainant's view, his supervisor's prejudice was also reflected in the way his performance was assessed. He points out that on several occasions he was made Officer-in-Charge of the Personnel Section, to the satisfaction of the Director of the Administration Division, and argues that the fact that he was awarded annual salary increments showed that his performance was found satisfactory. He criticises the performance of his supervisor and blames him for being the primary cause of any lack of achievement. He also denounces the intimidating behaviour of his supervisor and accuses him of disregarding the required standards of conduct and of failing to observe the procedures for implementing disciplinary measures, as defined in Administrative Directive No. 29. In the complainant's view, his supervisor failed to show the necessary attitude of impartiality, tolerance and understanding.

The complainant submits that the appraisal procedure outlined in Administrative Directive No. 2 (Rev.2) was not followed correctly, particularly in that the stipulated time limits for submitting reports were disregarded. He expresses the same view with regard to Administrative Directive No. 20 (Rev.2) concerning the recruitment,

appointment and reappointment procedure, on the ground that the Director of the Administration Division did not provide a recommendation to the Personnel Advisory Panel regarding his reappointment. He points out that his supervisor selected the members of the Panel himself and gave them only 24 hours to consider his performance appraisal reports.

Referring to the Tribunal's Judgment 1154, the complainant asserts that although he was given several reasons why his contract was not renewed, he was not informed of the real reasons. Since the Executive Secretary was unaware of the reasons underlying the contested decision, he acted wrongly in terminating his appointment.

Lastly, the complainant criticises the approach of the Joint Appeals Panel and the conclusions it arrived at. In his view, the Panel's analysis was only superficially rigorous and always gave the benefit of any doubt to the defendant.

The complainant asks the Tribunal to quash the decision of the Executive Secretary not to renew his appointment and to order his reinstatement or, failing that, to award him material damages equivalent to 24 months' salary and all allowances at the P.4 level. He also claims 25,000 euros in moral damages and an award of costs.

C. In its reply the Commission contends that the complaint is devoid of merit, since the complainant voluntarily resigned in order to take up alternative employment, thereby preventing the decision not to renew his appointment from taking effect.

It also submits that the impugned decision complies with the terms and conditions of the complainant's appointment, as well as the applicable Staff Regulations, Rules and Administrative Directives. The proper procedures were observed before both the Personnel Advisory Panel and the Joint Appeals Panel. Neither the memorandum of reprimand addressed to the complainant, nor the witness statements produced by him, nor the positive comments of the Director of the Administration Division were sufficient to prove that the Chief of Personnel was prejudiced against him. For the Commission the latter did not breach the required standards of conduct and the criticism levelled at him is irrelevant. The complainant has not explained in what respect his supervisor was partial, intolerant or lacked understanding. The fact that he obtained annual salary increments does not establish that his performance was satisfactory, considering that his appraisal report for the period running from 1 November 1999 to 31 October 2000 shows the opposite. The defendant submits that the complainant has not proved any defect in his appraisal reports or in the recommendation of the Personnel Advisory Panel. His performance was the sole reason for the non-renewal of his contract. He was informed of that fact at the time that decision was taken, as attested by the Executive Secretary's note for the file dated 29 June 2001 and admitted by the complainant in the course of the internal appeal procedure. He cannot allege that the Executive Secretary gave an incorrect instruction regarding termination of his appointment since that instruction was given in response to a recommendation against reappointment by the Personnel Advisory Panel.

D. In his rejoinder the complainant begins by referring to a number of witness statements indicating that his performance was always satisfactory and that his supervisor was prejudiced against him, even going so far as to insult and humiliate him. He contends that he did not resign voluntarily; his resignation was precipitated by the decision not to extend his appointment. He points out that his change of work led to a loss of earnings. He considers that the Commission admitted to breaches of procedure and points out that according to the Staff Rules salary increments are awarded only where a staff member's performance is satisfactory. The complainant concludes by asking the Commission to provide him with a letter of reference and to submit it to him for approval within one month of the delivery of the Tribunal's judgment.

E. In its surrejoinder the Commission submits that it lies within an organisation's discretionary authority to decide not to renew a contract for unsatisfactory performance and that the Tribunal has only a limited power to review the appraisal of a staff member's performance. In criticising his supervisor's character and behaviour, the complainant merely tries to take the focus away from his own unsatisfactory performance. The witness statements he produces in this respect are not relevant insofar as the proceedings before the Tribunal are not directed against his performance appraisal reports. The defendant repeats its denial that there were any procedural irregularities that vitiated the decision of the Executive Secretary, which was in no sense arbitrary.

CONSIDERATIONS

1. The complainant joined the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization on 1 November 1998 under a three-year fixed-term contract. He was assigned to the Personnel Section at grade P.4. When he was told that his contract would not be renewed, he asked the Executive Secretary on 25 June 2001 to review the decision. On 4 July, however, the latter informed him that he would not reconsider his decision. On 3 August the complainant lodged an appeal with the Joint Appeals Panel. Meanwhile, on 11 July, he had tendered his resignation effective 3 September 2001, without renouncing any claims he might have. On 2 July 2002 the Joint Appeals Panel, in a long and carefully reasoned report, concluded after hearing witnesses that the impugned decision had been validly taken. On 8 July 2002 the Preparatory Commission's Legal Adviser informed the complainant that, in the light of the Panel's recommendation, the Executive Secretary had decided to confirm the decision not to renew his contract. This constitutes the impugned decision.

2. In presenting his case before the Tribunal, the complainant reiterates the arguments rejected by the Joint Appeals Panel and submits seven pleas. The defendant for its part contends that the decision not to renew the complainant's contract lay within the scope of its discretion and was in no way unlawful. It points out initially that the complainant decided to resign of his own volition and that his separation from the Commission was therefore not the result of the decision not to renew his contract.

3. The first issue to decide in this case is whether, in the circumstances, the complainant retains an interest in challenging the way in which the decision not to renew his contract was taken and in seeking his reinstatement or, failing that, compensation for alleged injury. The defendant argues in this respect that the complainant can show no injury since he voluntarily resigned from the Commission and that there is no causal link between the decision of the Executive Secretary and his separation. The Tribunal agrees with the Joint Appeals Panel that the complainant resigned before the expiry of his appointment only because he knew that it would not be extended and because he had received an offer of employment, in fact on less attractive terms. Had he turned down that offer, he faced the prospect of indefinite unemployment. The fact that he resigned is immaterial, since he did so out of necessity and his resignation in no way implied that he was waiving his right to lawful treatment or to claim compensation if it was shown that the Commission's decision had caused him injury.

4. The defendant is not wrong to point out that the decision not to renew a fixed-term contract lies within its discretion, but case law has it that this discretion does not authorise international organisations to take arbitrary decisions: staff members are entitled to know the reasons why a decision is taken, and the decision must not be tainted by flaws such as mistake of law or of fact, misuse of authority, breach of formal or procedural rules or blatant errors in the appraisal of the merits of staff members. The complainant's pleas therefore deserve careful consideration, since he submits that the defendant breached those principles in several respects.

5. The complainant's plea which needs to be considered initially, even though it was not the first argument he put forward, arises from the fact that he was allegedly not given the reasons why his contract was not renewed. He rightly refers to Judgment 1154, delivered by the Tribunal on 29 January 1992, in which it is stated under 4 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". In this case, the complainant objects not to the fact that he was not informed of the reasons for the impugned decision, but to the fact that the reasons differed depending on the authority that provided them: thus the Director of the Administration Division allegedly told him that the reason for the decision was "performance", and gave no further justification. In the course of a discussion with the Executive Secretary of the Commission on 25 June 2001, however, the reason the latter gave him was that there was a need to have turnover of staff due to the non-career nature of the Organization, and it was only subsequently that "performance" was mentioned, while the Executive Secretary gave him to understand that there had never been any particular problem. His supervisor, on the other hand, with whom he did not get along, as indicated below, advised him that since it was a situation that had not worked out, there was no reason to prolong it.

6. The complainant concludes that the parties involved gave different reasons to justify the decision taken concerning him and that the Executive Secretary had not been aware of any inadequacy in his performance.

In fact, it is plain on the evidence, and especially on a note for the file by the Executive Secretary dated 29 June 2001, that even though the need for staff turnover was mentioned, it was really the staff member's weak performance which constituted the reason for the decision not to renew the contract, of which the complainant was informed. The fact that the Executive Secretary mentioned the need for turnover in staff and said that it was natural that the first to go were those with a relatively weak performance is not contradictory. This explanation clearly

reflects the grounds put forward by the defendant.

It must nevertheless be established that the Executive Secretary was duly informed of the situation. On this point, the complainant contends that the procedures provided for in Administrative Directive No. 2 (Rev.2) of 25 April 2000 on appraisal of the performance of staff members, and in Administrative Directive No. 20 (Rev.2) of 8 July 1999, concerning *inter alia* appointment and reappointment, were not followed correctly.

7. With regard to Administrative Directive No. 2 (Rev.2), the complainant alleges that one of his appraisal reports was brought to the attention of the Executive Secretary and signed by his supervisor outside the time limits stipulated in the Directive. Such irregularities, however, would not be sufficient in themselves to invalidate the procedure followed in deciding not to renew the complainant's contract. That was the view taken by the Joint Appeals Panel and the Tribunal agrees, while noting that there is no provision in Administrative Directive No. 2 (Rev.2) which obliges the Chief of Personnel - the complainant's supervisor - to transmit the unfavourable appraisal report concerning the complainant in writing. It is nevertheless unfortunate that, contrary to the provisions of that Directive, the report was apparently not brought to the attention of the Executive Secretary by the Director of the Administration Division, although that error affected only the appraisal procedure and had no bearing in the circumstances upon the decision not to renew the complainant's contract, assuming that the procedure provided for such a decision was correctly followed.

8. On this point, however, the complainant argues that the procedure defined in Administrative Directive No. 20 (Rev.2), concerning *inter alia* contract renewals, was not complied with. Under the terms of that Directive, proposals for reappointment must be forwarded by division directors to the Personnel Section accompanied by a justification and a performance appraisal report. The Personnel Section must circulate the proposals to the members of a Personnel Advisory Panel, which submits recommendations for decision to the Executive Secretary. The complainant contends, and this is confirmed by the file, that no proposal for reappointment was submitted by the Director of the Administration Division. The latter, who has since left the Commission, told the Joint Appeals Panel that he did not prepare a recommendation because the Personnel Section did not request one, and that he had informed the Personnel Advisory Panel orally that he had reluctantly supported the recommendation put forward by the complainant's supervisor. The Joint Appeals Panel found that the procedure followed in the complainant's case did not comply with the terms of the Directive, but that it could not be established that the absence of a written recommendation had adversely affected the complainant. His case had in fact been discussed by the Director of the Administration Division and his supervisor, and it was clear to the former that the complainant would never be able to meet his supervisor's expectations. According to the Joint Appeals Panel, it would have been difficult for the Director to recommend the reappointment of the complainant when it was clear that the latter did not meet the requirements of satisfactory performance defined in Administrative Directive No. 20 (Rev.2). The defendant reiterates this argument, adding that it is the Commission's established practice not to circulate a written recommendation to members of the Personnel Advisory Panel before it gives an opinion and that this practice offers a better safeguard for staff members' interests.

9. Regardless of the reasons given to justify such a practice, the Tribunal finds that it is contrary to the provisions of Administrative Directive No. 20 (Rev.2) referred to above, and that in this case that omission was all the more regrettable for the fact that the members of the Personnel Advisory Panel, as the complainant has pointed out, were given only 24 hours to consider the performance appraisal reports of the complainant and three other staff members. Compliance with the rules of procedure is among the guarantees offered to international civil servants. There is nothing to suggest that the omission of a formality has no adverse effects on the situation of the staff members concerned. In the present case, a written proposal by the Director of the Administration Division would have been particularly necessary for consideration of the complainant's case. His plea based on the breach of Administrative Directive No. 20 (Rev.2) therefore succeeds.

10. The complainant also submits that the Executive Secretary was not informed of the real reasons for the recommendation not to renew the contract in question, and that the instructions he had written on 11 April on the report of the Personnel Advisory Panel were "incorrect". According to the complainant, the Executive Secretary's instructions implied that his decision was part of a termination procedure, which in the event was not followed. In fact, it was very clearly indicated, in the Advisory Panel's report, that the procedure that was followed concerned the reappointment of the complainant, and the phrase used by the Executive Secretary, however inaccurate the wording was, did fit into the context of that procedure. It is clear from the note for the file drafted by the Executive Secretary on 29 June 2001, concerning a meeting he had had on 25 June with the complainant, that there was no ambiguity in the decision taken concerning the complainant and that the Executive Secretary was in no doubt that it

concerned reappointment at the end of a three-year contract.

11. The complainant's other pleas are connected. He submits that his supervisor, the Chief of Personnel, was prejudiced against him: he had told him as early as September 1999 that his contract would not be renewed, and had then written to him several times about an incident concerning the failure to declare his spouse's income, which had led to a reprimand in December 1999. Since then his supervisor had never shown him the attitude of impartiality, tolerance and understanding required by Administrative Directive No. 29 concerning relations between staff members and their supervisors. According to the complainant, his performance was in fact satisfactory, as shown by the annual salary increments he had been granted, by the fact that on several occasions he was made Officer-in-Charge of the Personnel Section and by certain appraisals by his Director in the Administration Division. Only his supervisor's comments in his appraisal reports were negative, unjustified and clearly biased.

12. The Joint Appeals Panel, which followed the correct procedure, despite the complainant's objections, examined the situation in great detail and heard many witnesses, including the former Director of the Administration Division and other staff members and former staff members of the Personnel Section. It emerges from those hearings, as the Joint Appeals Panel noted, that the complainant's supervisor "has his own management style which most staff members of the Personnel Section did not feel comfortable with and which may have presented problems for them in their day to day work" and that this kind of behaviour "may not be in line with the standards of conduct expected of supervisors". The Panel added in this respect that it was up to the hierarchical superior of the Chief of the Personnel Section and the Executive Secretary to look into the matter further, but that it had not been proved that the complainant was exposed to prejudice or bias.

13. As the Tribunal has emphasised on several occasions (see for example Judgment 1732), allegations of bias are very difficult to prove, and the judge should be careful not to infer bias or bad faith simply because a staff member and his supervisor do not enjoy good professional relations. In the present case, even though it is established - in particular by the very detailed letter from the former Director of the Administration Division, whose testimony must be considered reliable - that the complainant's supervisor created a very difficult working environment for his colleagues, there is no doubt that he did not obtain the performance he expected from the complainant and that his negative appraisals cannot simply be regarded as being due to feelings of hostility towards the complainant, even though the latter was granted annual salary increments and assigned special duties in his sector of activity on several occasions. The fact that his supervisor decided to warn him, at the time of the incident that led to a reprimand, that he would not be proposing a renewal of his contract, is not sufficient evidence of bias.

14. Nevertheless, in view of the working atmosphere in the Personnel Section, of which the Commission's senior management must have been aware, the latter should have been particularly careful to ensure that the procedure laid down in administrative directives regarding the notification of reappointment proposals was scrupulously observed. That was not the case, and even though the final appraisals of the staff member's performance lay within the discretionary authority of the Executive Secretary, this formal flaw breached the complainant's rights and caused him injury.

15. Taking into consideration all the circumstances of the case, and in particular the fact that the complainant resigned before his contract expired in order to take on alternative, less well paid employment, and that his reinstatement with the Commission would not be appropriate, the Tribunal considers that the injury he incurred will be fairly compensated by the award of a sum equivalent to three months' salary and allowances based on his last salary, plus the sum of 10,000 euros for moral injury.

16. Having succeeded in part, the complainant is entitled to costs, which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The decisions of the Executive Secretary of 4 July 2001 and 8 July 2002 are set aside.

2. The Commission shall award the complainant compensation equivalent to three months' salary and allowances based on his last salary.

3. It shall also award him compensation in the amount of 10,000 euros for moral injury.

4. The Commission shall pay the complainant 2,000 euros in costs.

5. His other claims are dismissed.

In witness of this judgment, adopted on 16 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet