

The Administrative Tribunal,

Considering the complaint filed by Mr M. S. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 7 April 2006, the Commission's reply of 17 July, the complainant's rejoinder of 27 September and the Commission's surrejoinder of 31 October 2006;

Considering Articles II, paragraph 5, and VII 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 is a United States national born in 1969 and a former staff member of CTBTO PrepCom. Following his successful application for the post of Personnel Clerk at grade G-4 (vacancy announcement VA131-42-2001), he was offered a fixed-term appointment with effect from 7 January 2002. Subsequently, job description No. 131/98 of 8 December 1998 was provided to him for his post. In February 2002 the Commission issued vacancy announcement VA269-4-2002 for the post of Personnel Clerk at grade G-5/G-4.

In the autumn of 2002 the complainant requested that the job description for his post be reviewed. The Personnel Section initiated a review process and soon thereafter the Commission's consultant on classifications met with the complainant to discuss his request. However, due to the recruitment of a new Chief of the Personnel Section around the same time, the review process was put on hold. In a memorandum of 20 January 2004 the complainant explained to the new Chief of Personnel that the job description for his post was outdated and requested that the review process be resumed without further delay. By a memorandum dated 16 February, the Chief of Personnel noted the increasing need to review and streamline all jobs within the Personnel Section and requested that all members of the Section facilitate the review process by completing a Classification Form, which would then form the basis for establishing relevant and updated job descriptions. On 12 May the complainant completed a form entitled "Job Description for Support Staff". His supervisor reviewed the form and added his comments on 5 August 2004. However, certain sections were left blank and the form was signed neither by his supervisor nor by the Section Chief. The complainant was subsequently notified that the review of job descriptions would not be completed until after the Integrated Management Information System had been implemented. By a memorandum of 1 December 2004 the complainant brought the matter to the attention of the Officer-in-Charge of the Commission in the absence of the Executive Secretary. He indicated that no progress had been made in respect to his request and that he expected to have an updated job description by 6 January 2005, the date of his separation from the Commission.

On 13 January 2005 the complainant lodged an appeal with the Joint Appeals Panel against what he described as "the decision not to conduct the job description review for post 131/98 and the actual classification of the post". In his Statement of Appeal he argued that the duties and responsibilities assigned to him corresponded to grade G-6, and he requested payment of the difference between the salary and allowances he would have received had he been classified at grade G-6 and those he actually received as a Personnel Clerk at grade G-4. He also claimed interest of 3 per cent per annum on that amount. In its report of 21 December 2005 the Joint Appeals Panel concluded that the complainant had failed to communicate to the Administration his claim for the upgrading of his post, as required under the Staff Regulations and Rules; there was consequently no decision to be reviewed by the Panel. It found that the evidence adduced did not support the complainant's claim that his duties did not correspond to G-4 grade, and recommended that his request for an updated job description be rejected in view of the fact that he had left the Commission. By a letter of 11 January 2006 the complainant was informed of the Executive Secretary's decision to endorse the recommendations of the Joint Appeals Panel. That is the impugned decision.

B. The complainant contends that the Executive Secretary's decision is unlawful. He submits that the Commission acted in breach of the Staff Regulations and Rules, Administrative Directive No. 20 (Rev.2) of 8 July 1999 and a policy document of 29 March 2004, all of which require the Commission to ensure that all posts and

staff are appropriately classified at the time of recruitment and “formally re-classified” in cases where the duties and responsibilities of the post change significantly. He argues that his post was a new post and that the Commission ought to have classified it either at or before the time it was advertised, or alternatively re-classified it, in light of the significant changes in the post’s duties and responsibilities. In spite of his repeated requests for a review of his job description and post classification and of the Administration’s assurances, the reviewing exercise was never completed for reasons solely attributable to the Commission, causing him to be left throughout his service with the Commission without a job description corresponding to the duties and responsibilities of his post.

The complainant alleges that the Joint Appeals Panel “widely overstepped its mandate” when carrying out its own review and classification of his post and made numerous errors of fact and of law. He underlines the Panel’s lack of authority to undertake a post re-classification, adding that its role is limited to reviewing the Administration’s acts and decisions. In that regard, he submits that the decision to maintain his post at grade G-4 was tainted with procedural irregularities and non-consideration of essential facts: the person acting as consultant was not the “competent body” to make a conclusive decision; the job description was incomplete; the desk audit was never completed and the assessment was based solely on the vacancy announcement; no proper methodology was followed for determining the appropriate classification and the standards set by the International Civil Service Commission (ICSC) were disregarded; in addition, the analysis on which the consultant’s conclusions were based was inherently flawed. He contends that his post should have been classified at grade G-6, or at least G-5, given that his duties and responsibilities as listed in job description No. 131/98 were similar to those contained in vacancy notice VA269-4-2002, and that he was also assigned duties relating to the Provident Fund. In that context, he argues that the Panel erred in requiring him to demonstrate that his post should have been classified at grade G-6, emphasising that the burden of proof rests with the Commission.

The complainant further submits that, in failing to provide him with an appropriate job description and a post classification which corresponded to his actual duties and responsibilities, the Commission acted in breach of its duty to ensure equal pay for equal work. He considers the successive delays in the classification review process as a violation of the Commission’s duty to act with due care and in good faith vis-à-vis its employees.

With regard to the question of receivability, he asserts that the Joint Appeals Panel made errors of law and of fact. As he cannot be held responsible for the Administration’s failure to carry out the classification review, his internal appeal was receivable.

The complainant asks the Tribunal to set aside the impugned decision and to order the Commission to pay him material damages in an amount equivalent to the salary, allowances and other emoluments he would have received in the period from 7 January 2002 until 6 January 2005 had his post been classified at grade G-6, or alternatively at grade G-5, less the earnings, allowances and other emoluments he received during that period as a staff member at grade G-4. He claims interest at the rate of 8 per cent per annum on this amount. He also seeks moral damages and costs.

C. In its reply the Commission contends that the complaint is irreceivable for failure to exhaust internal remedies. It is not clear which administrative decision the complainant appealed, since, under the applicable Staff Regulations, the decision he claims to have appealed is not an administrative decision subject to appeal. Moreover, contrary to the relevant Staff Rules, he failed to request that any decision be reviewed by the Executive Secretary.

On the merits, it submits that there was no mistake in the classification of the complainant’s post, as it was evaluated and accordingly classified at grade G-4 before it was advertised in 2002 and prior to the complainant’s employment with the Commission. Even though his duties changed later on, they remained at the G-4 level. Given that the complainant is no longer employed by the Commission, his appeal for re-classification was moot.

The Commission contests that the Joint Appeals Panel exceeded its mandate. In order to reach its conclusions, the Panel had to carry out its own investigation. It notes that the Panel conducted a review of the decision of the classification consultant, even though the receivability of the appeal was “highly questionable”. It also argues that it is for the complainant to show that his post was not correctly classified and observes that, if he believed that his duties corresponded to a higher grade, he should have brought the matter to the attention of the Administration during his period of employment. Having failed to do that, the complainant is now estopped from claiming retroactive remuneration equivalent to the G-6 level, especially after the termination of his employment at the Commission.

With regard to the internal proceedings, the Commission submits that in line with its established practice the consultant on classifications was the competent authority to carry out the classification of posts, a fact of which the complainant was always aware and to which he never objected. It denies the allegation that the consultant's assessment was flawed, arguing that it was conducted in accordance with the ICSC standards, on the basis of all available information, including the complainant's performance appraisal reports and his earlier interview by the consultant.

It submits that it never acted in breach of the principle of equal pay for equal work because the complainant's post was correctly classified at grade G-4. In response to the plea that it acted in breach of its duty of care and good faith, the Commission contends that it never denied the need to redraft the complainant's job description or intentionally delayed the review process. It does not consider that the complainant has suffered any material or moral injury as a result of having an outdated post description.

D. In his rejoinder the complainant maintains that his complaint is receivable. Referring to the Tribunal's case law, he submits that a complainant may challenge not only an explicit decision but also "a course of conduct involving lack of action" – such as the Administration's lack of action in completing the reclassification exercise – or even "an implicit decision". Assuming his appeal was premature, since the review had not been completed, it was the Commission's duty to advise him accordingly. By the same token, good faith and the duty of care would have required the Commission to notify him that the delays in the classification review would render the exercise of his right impossible because he was leaving the Commission. He dismisses the allegation that he did not communicate to the Administration his belief that he was performing duties falling outside the scope of a G-4 position. As he was repeatedly told that the classification review process was under way, he was awaiting the official grading before he could raise a claim. Furthermore, he would have requested a review by the Executive Secretary, if only the classification review process had been completed in a timely manner and he had been provided with a final decision.

E. In its surrejoinder the Commission maintains that the complaint is irreceivable. It denies any lack of action on its part, stating that the completion of the review process was a priority for the Administration and that the delays resulting from the implementation of the Integrated Management Information System affected all staff members. It also emphasises that upon receipt of the complainant's internal appeal, the Administration immediately notified him that he was not appealing an administrative decision in the sense of the Staff Regulations and advised him to observe the procedures by requesting review by the Executive Secretary.

CONSIDERATIONS

1. The complainant impugns the decision of 11 January 2006 informing him that the Executive Secretary had decided to endorse the recommendations of the Joint Appeals Panel. In its report the Panel stated that the complainant had failed to address his claim to the Administration in accordance with Staff Regulation 11.1 and Staff Rule 11.1.02(a) resulting in the absence of a decision which can be reviewed. It also stated that it found no indication that the complainant's post was incorrectly classified at the G-4 level nor that the complainant's actual duties and responsibilities were of a nature incompatible with a G-4 grade. It noted that during his three years of service the complainant had no job description corresponding to his actual duties and responsibilities and that the process of establishing one was not finalised during the complainant's tenure at the Commission.

2. The following issues are at stake in the present case: (1) the receivability of the appeal lodged before the Joint Appeals Panel; (2) the complainant's right to an updated job description after the termination of his employment; (3) error of procedure with regard to the Administration's reply to the complainant's request for a revised job description; and (4) the determination of the complainant's grade by the Tribunal or by the Commission on the basis of a new classification review.

3. In 2002 the complainant requested a review of his job description after noting that the duties and responsibilities of the vacancy announcement that he had answered did not match the job description he was given several months later or indeed the actual duties and responsibilities of his post. The Personnel Section initiated the review process, and in the autumn of that year the consultant on classifications met with the complainant to discuss his job description. However, there was no progress on the review process, and on 20 January 2004 the complainant sent a memorandum to the Chief of Personnel requesting that the review process be resumed without further delay. The Chief of Personnel responded on 16 February, with a memorandum to all staff of the section, advising that the

necessity of reviewing and streamlining all jobs within the Personnel Section was “becoming increasingly critical” and informed them that they would be receiving a classification form to fill out as part of the process for reviewing job descriptions.

4. On 12 May 2004 the complainant completed a form entitled “Job Description for Support Staff”. The complainant’s supervisor reviewed the classification form, adding some comments on 5 August 2004. Nevertheless, the form was never completed or signed. The complainant was not aware that the form was not completed or signed by his supervisor or by the Section Chief and believed he had, as mentioned in Judgment 941, “good reason to infer [and had done his utmost to ensure] [...] that his claim was still under review”. The complainant was subsequently informed that the review process was suspended pending the implementation of the Integrated Management Information System. No date was given with respect to the resumption of the review process. These facts are uncontested. Without taking account of the fact that the review process initiated in the autumn of 2002 was postponed on several occasions, the Tribunal takes the view that the suspension of the review process in 2004 due to the implementation of the Integrated Management Information System constitutes an egregious and inexcusable delay in the process.

5. The Tribunal considers that the memorandum dated 1 December 2004 sent by the complainant to the Officer-in-Charge, in the absence of the Executive Secretary, requesting that the Chief of Personnel be given “an order to implement her own decision of job reviews for the entire section with immediate effect and without any further delay”, indeed constitutes a request for review of an administrative decision in accordance with the provisions of Staff Rule 11.1.02(a). Since the Executive Secretary (or the Officer-in-Charge at the time) did not reply within one month, the complainant legitimately filed his appeal before the Joint Appeals Panel against the implied decision rejecting his request, as allowed under Staff Rule 11.1.02(a)(ii).

6. In its submissions to the Panel, the Commission suggested that the complainant’s request for a new job description was moot because the complainant was no longer a staff member and had, in its view, no right, or legitimate interest, to be provided with a job description. In its report the Panel stated that because the complainant had left the Commission it would not recommend that the job description be adjusted to reflect his former duties and responsibilities. The Commission maintains its arguments before the Tribunal.

7. The Tribunal considers that the above reasoning is flawed. First, the Commission has not demonstrated that there were applicable provisions preventing employees from exercising their right of recourse after termination of employment, nor did it raise any question of the request being time-barred. Even if such provisions existed, they would be unreasonable, and under certain circumstances, in contradiction with Article II(6)(a) of the Statute of the Tribunal, according to which the Tribunal shall be open to an official “even if his employment has ceased, and to any person on whom the official’s rights have devolved on his death”. Moreover, according to established precedent (see for instance Judgment 2111), “the relationship between officials and international organisations does not come to an end when they cease to work [...]. It must therefore be recognised that former officials who consider that the terms of their contracts of employment or staff regulations have been disregarded, or that the administration has not accorded them the protection and guarantees deriving from their position as international civil servants, may avail themselves of the means of recourse available for the recognition of their rights.”

The Tribunal notes that, in the present case, the complainant has been continuously requesting an updated job description since the beginning of his career with the Commission but that a reply to his request has been repeatedly delayed up to, and even after, the termination of his employment. To accept that the Commission has no obligation to deal with the complainant’s request would be to set a precedent encouraging organisations to ignore the claims of their employees until the date of their separation in order to avoid dealing with any problems submitted to them. That would be a clear denial of an employee’s right to recourse.

8. In conclusion, the complainant has a moral, economic and professional interest in receiving an updated job description which truly reflects his duties and responsibilities while employed by the Commission. When he requested an updated job description he probably considered the possibility that he could be entitled to a higher grade classification and therefore a higher salary and associated benefits. Regardless of whether the updated job description would maintain his classification at G-4 level or classify him at G-5 or G-6 level, he has a professional interest in updating his curriculum vitae to reflect his actual work experience and is therefore entitled to obtain an accurate and updated job description for his former post.

9. The Commission disregarded its own Administrative Directive No. 20 (Rev.2) of 8 July 1999 which

requires that all requests for recruitment action shall be sent to the Personnel Section, accompanied by a job description and a draft vacancy announcement defining inter alia the requirements of the post. It also requires that the Personnel Section review draft vacancy announcements to ensure that the qualifications required are job-related and necessary. That means that both the vacancy announcement and the job description must be accurate and up-to-date prior to the posting of a vacancy announcement. The Commission repeatedly breached its own procedures for reviewing the complainant's job description, firstly by requesting that the consultant on classifications base her assessment on (a) an undisputedly incomplete desk audit; and (b) a job description form which had no validity because the complainant's supervisor had not completed certain of its items and neither he nor the Section Chief had signed it; and secondly, by unnecessarily delaying the classification review process, thereby making it increasingly difficult and unlikely to arrive at an accurate conclusion. As a result of the constant interruptions in the review process, many of the steps were not completed and thus there was no adequate basis for a final decision.

10. The Tribunal will only substitute its own assessment or direct a new assessment if it is shown, for example, that the competent body acted on some wrong principle, overlooked some material fact, breached a rule of form or procedure, based its decision on an error of fact or law, or reached a clearly wrong conclusion (see in particular Judgements 1281 and 2514). If the Tribunal can identify that the competent body drew a clearly wrong conclusion because it overlooked some material fact, it will substitute the organisation's assessment with its own (see Judgment 2514, under 15). However, under the present circumstances it is impossible for the Tribunal, which lacks the information necessary to reach the right conclusion, to make an assessment regarding the correct grade.

11. The case must therefore be sent back to the Commission for decision. The Commission shall review the complainant's job description and reassess the classification of the complainant's post in accordance with the rules, standards and procedure that were applicable at the time the request was made in 2002. If, after following the correct procedure, it is established that the complainant should have been graded G-5 or G-6, the Commission shall pay the complainant material damages in the amount equivalent to the difference in salary, allowances and other emoluments that he would have received from 7 January 2002 to 6 January 2005, plus interest at the rate of 8 per cent per annum.

12. The breach of process and undue delay in reviewing the complainant's job description and classification have caused him moral injury for which, considering the numerous violations, compensation in the amount of 10,000 euros shall be paid. As the complainant succeeds, he is entitled to costs in the amount of 3,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is sent back to the Commission for a new decision in accordance with consideration 11 above.
3. The Commission shall pay the complainant moral damages in the amount of 10,000 euros.
4. It shall also pay him 3,000 euros in costs.

In witness of this judgment, adopted on 9 May 2007, Mr Michel Gentot, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Giuseppe Barbagallo

Dolores M. Hansen

