

The Administrative Tribunal,

Considering the second complaint filed by Mr S. Y. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 10 April 2007, the Commission's reply of 15 May, the complainant's rejoinder of 2 August and the Commission's surrejoinder of 7 September 2007;

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, a national of Mongolia, was born in 1947. He joined the Preparatory Commission on 3 May 1997 under a three-year fixed-term contract as a Protocol Officer in the Provisional Technical Secretariat, at grade P.4. His contract was extended from time to time thereafter.

The Commission issued Administrative Directive No. 20 (Rev.2) on 8 July 1999. Paragraph 4.1 of Revision 2 of the Directive embodies a policy, first introduced in May 1999, whereby staff members appointed to the Professional and higher categories and all internationally recruited staff should not, except in certain limited exceptions, remain in service for more than seven years. Paragraph 4.2 provides in part that "[e]xceptions to the period of seven years referred to in paragraph 4.1 may be made because of the need to retain essential expertise or memory in the Secretariat".

In Judgment 2315, delivered on 4 February 2004, the Tribunal ruled on a case concerning the seven-year policy embodied in Administrative Directive No. 20 (Rev.2). The complainant was an intervener in that case. The Tribunal found that the policy was not applicable to a staff member until it had been incorporated into a contract of employment as a term or condition. Following that Judgment the Commission proposed to extend the complainant's fixed-term appointment. By a letter of 31 March 2004 he was offered a two-year extension commencing on 3 May 2004. The letter stipulated that the offer was subject to the provisions of the Staff Regulations, Staff Rules and Administrative Directives of the Commission. The complainant accepted the offer on 1 April 2004.

By a memorandum of 13 June 2005 the Director of the Administration Division recommended against a further extension of the complainant's appointment on the grounds that there was no justification for an exception based on the need to retain essential expertise or memory in the Secretariat. He explained that the complainant's protocol functions and related tasks could be undertaken by other staff members and that the "institutional memory" could be retained without him. He nevertheless indicated that the complainant's immediate supervisor did not share his view. A Personnel Advisory Panel was set up by the Executive Secretary on 15 June to advise him on whether or not the complainant should be "re-appointed" when his contract expired on 2 May 2006. The following day the Panel reported to the Executive Secretary that it could not reach a consensus.

The complainant was informed by memorandum of 28 June 2005 that after a careful review of the matter by both his division director and a Personnel Advisory Panel, the Executive Secretary had concluded that there was no basis for granting him an exceptional extension; consequently, he had decided not to extend his appointment beyond its expiry date of 2 May 2006. The complainant requested a review of that decision on 25 August 2005.

On 19 September 2005 the Executive Secretary issued a Note setting out one part of a system for implementing the service limitation provisions of Administrative Directive No. 20 (Rev.2). According to that system, around one year before the expiry of a contract taking the period of service of a staff member to seven years or more, the post is advertised in parallel to considering the possibility of an exceptional extension for the incumbent. Shortlisted candidates are then interviewed by a Personnel Advisory Panel, and the division director submits a proposal on possible reappointment of the incumbent. The Panel considers whether the incumbent provides essential expertise or memory to the Provisional Technical Secretariat and should therefore be granted an exceptional extension, or

whether the post should be offered to one of the interviewed candidates. It then makes a recommendation to the Executive Secretary.

The Executive Secretary rejected the complainant's request for review on 26 September 2005 on the grounds that an exceptional extension based on the need to retain essential expertise or memory was not justified in his case. He added that in the interest of equality he was inclined to give the complainant the opportunity to have his situation re-examined under the new system for implementing the service limitation provisions. However, he concluded that it was not possible to do so since he intended, as part of structural changes, to distribute the complainant's tasks between existing staff members, and there would therefore be no need for his post, in its current form, in the future.

The complainant filed an internal appeal with the Joint Appeals Panel on 24 October 2005 alleging in particular that he was not subject to the service limitation provisions laid down in Administrative Directive No. 20 (Rev.2) because he had served the Commission for more than seven years. He requested, inter alia, that the decision of 26 September be set aside and that he be awarded material damages in an amount equivalent to the salaries, benefits and emoluments he would have earned had his contract been extended, as well as moral damages.

In its report of 21 December 2006 the Joint Appeals Panel concluded that the complainant's claims were unfounded and recommended that the remedies he sought should not be granted. It noted that the letter of extension of appointment of 31 March 2004 expressly referred to the applicable rules and regulations concerning length of service and that the complainant had agreed to the terms and conditions set out in that letter; he therefore knew that the Commission's service limitation provisions would apply to him. The Panel pointed out that a fixed-term appointment does not carry any expectation of or right to extension or renewal and that the Executive Secretary may grant exceptions to the seven-year policy only on the basis of limited criteria established in Administrative Directive No. 20 (Rev.2). It further concluded that the complainant's contract was not terminated because his post was being abolished, and that the Administration therefore did not have to identify another post to which he would be suited. By a letter of 15 January 2007, which is the impugned decision, the Executive Secretary informed the complainant that he had decided to maintain his decision not to renew his contract and would hence not pay him the compensation sought.

B. The complainant contends that the decision not to extend his appointment is tainted with an error of law insofar as it is based on the seven-year policy. According to him, paragraph 4.2 of Administrative Directive No. 20 (Rev.2) applies only to staff members who are reaching seven years of service. Since he had served the Commission for nine years at the material time, that provision did not apply to him.

He points out that in his letter of 26 September 2005 the Executive Secretary stated that the complainant could not benefit from the new system set out in the Note of 19 September 2005 for implementing the service limitation provisions, because as part of "structural considerations" his tasks would be distributed between existing staff members at the expiry of his appointment. Therefore, since he did not identify the "structural considerations" on which his decision was based, the Executive Secretary's reference to such considerations was used as a type of "all-purpose catch-phrase" to justify his decision. In the complainant's view, the decision not to extend his appointment was consequently "speculative" and thus unlawful.

The complainant also contends that the decision not to renew his contract amounted to an abolition of his post. He indicates that, according to Staff Regulation 9.1, the Executive Secretary may terminate the appointment of a staff member if "the necessities for the service require abolition of the post or reduction of the staff". He adds that according to the Tribunal's case law, a decision to abolish a post must rest on objective and reliable facts and on the real needs of the organisation. In his view, the Executive Secretary did not produce evidence showing that, as he had asserted, there would be no need for his post in its current form in the future since his tasks would be redistributed amongst existing staff members. The complainant points out that his post was funded at least until the end of 2006 and that, consequently, the structural considerations invoked by the Executive Secretary to justify his decision did not exist. The decision is therefore tainted with an error of law.

The complainant alleges breach of the principles of equal treatment and good faith. He argues that other staff members in a similar situation to his had their contract extended for short periods to enable them to benefit from the system set out in the Note of 19 September 2005. He sees the reasons given in the challenged decision as merely "a pretext" to avoid giving him the possibility of obtaining an exceptional extension based on the aforementioned Note. In addition, he contends that the Commission injured his dignity by refusing to extend his contract, given that he was "one of the founding staff members". He points out that, according to his immediate

supervisor, he had acquired “unique skills, expertise and knowledge” in his area of responsibility. Also, he was close to retirement age and, in his supervisor’s view, it was unfair, and in contradiction with established practice, to separate him from service when it was practically impossible for him to secure adequate employment elsewhere.

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 “salaries, benefits and emoluments” he would have earned had his contract been extended for a period of two years, plus interest at the rate of 8 per cent per annum. He also claims moral damages and costs.

C. In its reply the Commission submits that, in accordance with Staff Regulation 4.4, the decision not to extend a fixed-term contract lies at the discretion of the Executive Secretary. It was therefore within the exercise of his discretionary authority that the Executive Secretary concluded that there was no justification for granting the complainant an exceptional extension based on the need to retain essential expertise or memory in the Secretariat. Moreover, the Executive Secretary was not compelled to re-examine the complainant’s situation in light of the Note of 19 September 2005, since the decision not to renew his appointment was taken before the publication of that Note. Nevertheless, he did consider the possibility of an exceptional extension of the complainant’s contract.

The defendant denies that the abolition of the complainant’s post was put forward to justify the non-renewal of his appointment. It maintains that the decision was taken on the ground that an exception to the service limitation provisions based on the need to retain essential expertise or memory in the Secretariat, as required by paragraph 4.2 of Administrative Directive No. 20 (Rev.2), was not justified in the complainant’s case. In that respect, it adds that the complainant’s post was transferred to the International Cooperation Section with effect from 3 May 2006, that is to say after he had left the Commission, and that the post would be occupied by an international cooperation officer. The Executive Secretary did consider carefully whether to extend the complainant’s contract, taking into account the maximum period of service specified in paragraph 4 of the above-mentioned Directive, the non-career nature of the Commission and the recommendation of the complainant’s former division director of 13 June 2005. It therefore denies that the challenged decision involved an error of law and that it acted in breach of the principles of good faith or equal treatment.

The Commission contends that the complainant shows bad faith in asserting that paragraph 4.2 of Administrative Directive No. 20 (Rev.2) does not apply to him. Indeed, he agreed to the conditions of his letter of extension of appointment of 31 March 2004, in which his attention was drawn to the fact that “the provisions on length of appointments and tenure in the Staff Regulations, Staff Rules and Administrative Directives [applied] to [his] appointment”. It points out that he did not allege that paragraph 4.1 of the aforementioned Directive, which fixes the maximum period of service at seven years, did not apply to him. Rather, he alleged that paragraph 4.2, which provides for exceptional extension, did not apply to him but he also requested an exceptional extension of his appointment. The Commission therefore concludes that the complainant acknowledges that paragraph 4.1 applied to him.

The defendant argues that the complainant may only challenge before the Tribunal the Executive Secretary’s decision of 28 June 2005, as confirmed by the decision of 26 September, insofar as the latter considered that the exceptional extension was not warranted by any need to retain essential expertise or memory in the Secretariat. It contends that, in the event that the Executive Secretary’s conclusion that it was inappropriate to re-examine his request for an exceptional extension in the light of the Note of 19 September 2005 is considered by the Tribunal to constitute a decision, the complainant cannot challenge that decision before the Tribunal because he has failed to exhaust internal remedies in that respect.

D. In his rejoinder the complainant denies that he acted in bad faith. He maintains that the seven-year service limitation did not apply to him since he had already served the Commission for nine years.

The complainant contests that the Executive Secretary’s decision not to allow him to benefit from the new system for implementing the service limitation provisions set out in the Note of 19 September 2005 constitutes a “new” decision. In his view, the Executive Secretary, in his decision of 26 September 2005, merely provided reasons for not reviewing his original decision not to extend his contract. In addition, he submits that the defendant has not produced evidence showing that at the material time there was a genuine need to redistribute his functions and that there would be no need for the post in its current form in the future.

E. In its surrejoinder the Commission reiterates its position. It points out that the letter of 26 September 2005

addressed to the complainant constitutes documentary evidence that his tasks were to be redistributed between existing staff members.

## CONSIDERATIONS

1. It should first be pointed out that this complaint relates to Judgment 2315 in which the Tribunal ruled that the Commission's seven-year policy was wholly irrelevant to the decision not to renew the contract of the staff member concerned. The complainant together with other staff members was an intervener in that case and his application was allowed as was the complaint.
2. The complainant initially accepted a fixed-term appointment of three years with the Preparatory Commission, effective as from 3 May 1997. After three two-year extensions of contract he was given notice on 28 June 2005 that, pursuant to Administrative Directive No. 20 (Rev.2) issued on 8 July 1999, his fixed-term appointment would not be extended beyond its expiry date of 2 May 2006. That revision embodied a policy, introduced in May 1999, that staff members appointed to the Professional and higher categories and internationally recruited staff of the Commission should not, except in certain limited exceptions, remain in service for more than seven years.
3. The Tribunal ruled in Judgment 2315 that the decision to apply Administrative Directive No. 20 (Rev.2) to the complainant in that case was not valid, since "such terms and conditions may be imposed on the grant of a fixed-term contract, and not subsequently". The Tribunal added that "[a]lthough the embodiment of the seven year policy in Administrative Directive 20 may properly be viewed as the prescribing of a term or condition upon which fixed-term contracts may be granted, it does not itself operate as the imposition of that term or condition. To be effective, a term or condition of the kind now in question must be incorporated in the contract, even if only by reference: a reference to the Staff Regulations and Rules is not sufficient because they do not incorporate the Administrative Directive in question. By implementing the seven year policy in the way that he purported to do in the present case, the Executive Secretary was attempting to enforce a term or condition that was not incorporated in the contract [...] the letters of extension contained no such provision."
4. On 31 March 2004, following the delivery of Judgment 2315, a new letter of extension of appointment was issued to the complainant, cancelling and superseding a letter dated 5 March 2004. It established 3 May 2004 as the effective date of the new extension, and 2 May 2006 as the new expiration date; it stipulated that the extension was subject to the Staff Regulations, Staff Rules and Administrative Directives, all of which the complainant accepted on 1 April 2004.
5. On 13 June 2005 the Director of the Administration Division recommended that the complainant's contract not be extended beyond 2 May 2006 on the basis that there was no justification for applying the exception to the seven-year policy. A contrary recommendation had been made by the complainant's immediate supervisor. On 16 June 2005 a Personnel Advisory Panel informed the Executive Secretary that it could not reach a consensus on a recommendation for reappointment of the complainant. By a memorandum of 28 June 2005 the complainant was informed that the Executive Secretary had decided not to extend his contract beyond 2 May 2006 on the ground that the need to retain essential expertise or memory in the Secretariat was not justified in his case. The complainant requested a review of that decision on 25 August 2005.
6. In the meantime the Executive Secretary issued a "Note for the Files" of 15 July 2005 explaining that before deciding whether a staff member who had served the Commission for seven years or more could be reappointed, he would consider whether that staff member possessed "essential expertise or memory", as required by paragraph 4.2 of Administrative Directive No. 20 (Rev.2). In that respect he noted that the complainant's "protocol function" was to a large extent a generic one. Taking this into account as well as the experience and expertise residing in External Relations and International Cooperation, he concluded that the complainant did not possess "essential expertise or memory". He further observed that the complainant was 59 years of age and that retirement age was set at 62 within the Commission; he expressed the view that therefore it was not appropriate to extend the complainant's contract.
7. The Executive Secretary rejected the complainant's request for review on 26 September 2005 stating that the decision not to extend his contract should be maintained. The matter was subsequently referred to the Joint Appeals Panel which recommended dismissing the appeal as unfounded. By a letter of 15 January 2007 the

Executive Secretary informed the complainant that he had decided to endorse that recommendation. This is the decision challenged before the Tribunal.

8. It is clear that the present case is different from that decided in Judgment 2315 in that the letter of extension of 31 March 2004 made express reference to Administrative Directives. Therefore, the Commission was right in applying Administrative Directive No. 20 (Rev.2) and its explanation of why it saw no reason to extend exceptionally the complainant's contract is reasonable enough, as is the explanation of why the time pending to his retirement age was not of a nature that justified an extension on that ground either.

9. In the instant case, furthermore, after the Tribunal's decision in Judgment 2315, the Commission extended the complainant's contract for an additional two years with effect from 3 May 2004, which it was not obliged to do. Indeed, upon the expiry of this extension the complainant had completed nine years of service. Although at the time the Commission could not rely on the seven-year service limitation policy, it could have applied the normal criteria for the extension or non-extension of his contract. The fact that the defendant decided to grant a further two-year extension, although including express contractual reference to Administrative Directives, is evidence that it acted in good faith towards the complainant and in full compliance with the Tribunal's decision in Judgment 2315.

10. Likewise, the Tribunal cannot accept the complainant's argument regarding the legality of the Directive on the ground that the Preparatory Commission has established, almost from the very beginning of its existence, the non-career character of its functions. Its very nature of being a "preparatory commission" for the Comprehensive Nuclear-Test-Ban Treaty Organization makes it obvious that the decision thus adopted was in perfect coherence with its own mandate, which is not of a permanent nature. The Tribunal finds therefore no error of law whatsoever in the application to the complainant of the seven-year limit for contract extensions, as established in Administrative Directive No. 20 (Rev.2).

11. Concerning the reasons as to why an exception to the Administrative Directive was not granted, they were more than adequately provided quite early in the proceedings, as explained above in paragraphs 6 and 8. The Joint Appeals Panel found no fault with that reasoning, nor does the Tribunal. What may or may not have occurred afterwards with the position, as claimed by the complainant, becomes therefore irrelevant for the disposition of the present case.

12. In light of the Tribunal's decision on the merits of the case, there is no need to deal with the issue of receivability.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2007, Mr Seydou Ba, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

