

**106th Session**

**Judgment No. 2800**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. W. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom hereinafter “the Commission”) on 3 October 2007, the Commission’s reply of 18 January 2008, the complainant’s rejoinder of 27 February and the Commission’s surrejoinder of 10 April 2008;

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 is a national of Indonesia born in 1958. He joined the Provisional Technical Secretariat of the Commission on 3 May 1998 as a Certification Officer in the On-site Inspection Division – at level P-3 – under a three-year fixed-term appointment. In May 2001 his appointment was extended for a period of two years and his title was modified to Equipment Officer; however, his duties and responsibilities remained the same. A further two-year extension was granted in May 2003 bringing his period of service with the Secretariat to a total of seven years.

According to a policy introduced by the Commission in Administrative Directive No. 20 (Rev.2) of 8 July 1999, staff members appointed to the Professional and higher categories and all internationally recruited staff should not remain in service for more than seven years. The Directive provides in paragraph 4.2 that exceptions to the period of seven years may be made because of the need to retain essential expertise or memory in the Secretariat and shall be kept to an absolute minimum compatible with the efficient operation of the Secretariat. In Judgment 2315 delivered on 4 February 2004, the Tribunal held that the seven-year policy was not applicable to a staff member until it had been incorporated into his or her contract as a term or condition. Following the delivery of that judgment, the Commission offered the complainant a third extension of his appointment, again for a period of two years, that is to say from 3 May 2005 to 2 May 2007. Unlike the previous ones, this offer, which the complainant accepted on 17 September 2004, indicated expressly that it was subject to the provisions of the Staff Regulations and Rules and Administrative Directives.

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). Under that system, approximately one year before the expiry of a contract taking the period of service of a staff member to seven years or more, the post shall, at the request of the relevant division director be advertised, in parallel to considering the incumbent for an exceptional extension in accordance with the Directive. In the memorandum accompanying his Note, the Executive Secretary stated that “the possibilities for an incumbent to gain an exceptional extension, because of the need for the [Secretariat] to retain essential expertise or memory, are judged against what the general job market can offer”. The complainant was invited to sign a rider whereby the Executive Secretary’s Note would be incorporated into his contract, and he did so on 26 September 2005.

Following the complainant’s request to be considered for an exceptional extension “in accordance with the tenure policy and the rider that [he had] signed”, the Executive Secretary informed him, by a memorandum of 4 October 2006, that his post would be

discontinued in the future due to organisational needs and that the possibility of granting him an exceptional extension would be decided according to the procedure laid down in Administrative Directive No. 20 (Rev.2), without advertising his post. A Personnel Advisory Panel was convened on 16 October to examine the possibility of exceptionally extending the complainant's appointment.

By memorandum of 19 October 2006 the complainant was notified that the Executive Secretary had concluded, after consideration by the Personnel Advisory Panel, that there was no basis for granting him an exceptional extension since his post was to be abolished; consequently, the Executive Secretary had decided not to extend his appointment beyond its expiry date of 2 May 2007. The complainant requested a review of that decision on 13 November 2006. His request having been rejected, on 3 January 2007 he filed an internal appeal with the Joint Appeals Panel. On 16 February he asked the Panel to suspend the decision not to extend his contract beyond 2 May 2007 for a period of five months in order to allow his children to complete their school year without interruption. The Panel recommended a suspension of action of approximately two months. That recommendation was rejected by the Executive Secretary on 28 March 2007.

In its report of 11 June 2007 the Joint Appeals Panel concluded that the decision not to extend the complainant's appointment was procedurally flawed insofar as the possibility of an exceptional extension had been considered according to Administrative Directive No. 20 (Rev.2) and not in the light of the procedure laid down in the Executive Secretary's Note of 19 September 2005. It held that if the complainant's post was to be discontinued, he should not have been invited to sign the rider. Consequently, the Panel recommended that the complainant be awarded material and moral damages.

By a letter of 11 July 2007 the Executive Secretary informed the complainant that he had decided not to follow the Panel's recommendations on the grounds that there was no continuing need for his post and that the decision to let his appointment terminate at the mutually agreed date of 2 May 2007 had been validly made. According

to him, the procedure set out in Administrative Directive No. 20 (Rev.2) was applied correctly in the complainant's case. That is the impugned decision.

B. The complainant contends that the decision to let his appointment terminate upon expiry is tainted with an error of law insofar as the Note from the Executive Secretary was not applied to his case. The Commission had decided not to advertise his post although it was bound to do so by the Note. Since he had accepted on 26 September 2005 that the Note be incorporated into his contract, the Commission was not entitled to amend unilaterally the terms of his contract on the grounds that his post would be abolished.

The complainant questions the timing of the proposal to abolish his post and argues that good faith would have required the Administration to inform him of any planned reorganisation before inviting him to sign the rider. He points out that up to August 2006 his post appeared on a list identifying the posts to be advertised in the near future. Thus, his post was not concerned by a restructuring exercise at the time when the Administration invited him to sign the rider. He also argues that the Commission created the circumstances that rendered it impossible to maintain his post by appointing Mr T. in August 2006 to perform tasks almost identical to his. It was not until the latter's appointment that the question of the abolition of his post was raised.

In addition, he alleges unequal treatment, stating that the Commission applied the procedure set out in the Executive Secretary's Note to other staff members who had signed the rider. He also alleges breach of due process insofar as none of the members of the Personnel Advisory Panel was chosen from a list of staff members proposed by the Staff Council, contrary to a recommendation of the Joint Consultative Panel endorsed by the Executive Secretary as indicated in the Personnel Bulletin of 17 July 2002. Lastly, the complainant contends that the decision to abolish his post has caused him prejudice since he has lost a valuable opportunity of having his appointment extended for a maximum period of three years, as provided for in the Note from the Executive Secretary.

The complainant asks the Tribunal to set aside the impugned decision, to order the Commission to reinstate him under a three-year contract with effect from 3 May 2007 and to pay him all salaries and benefits from 3 May 2007 until the date of his reinstatement. He also claims moral damages and costs.

C. In its reply the Commission submits that it was justified in taking the decision not to extend the complainant's appointment exclusively on the basis of Administrative Directive No. 20 (Rev.2). It contends that, according to the terms of the Executive Secretary's Note, it was a prerequisite that the division director request that the post be advertised. However, he could not do so because of a managerial decision to discontinue the post "in the form in which it existed at the material time". It adds that the Executive Secretary informed the complainant by a memorandum of 4 October 2006 that, due to organisational needs, his post would be discontinued in the future and that his "possibilities of gaining an exceptional extension [would] be decided following the procedure laid down in Administrative Directive No. 20 (Rev.2) without advertising the post". The complainant did not challenge that decision.

With regard to the allegation of bad faith, the Commission points out that the complainant has produced no evidence showing that the impugned decision was motivated by malice, ill will, improper motives, fraud or similar dishonest purpose. It asserts that the decision to abolish his post was taken in the genuine interest of the organisation; thus the complainant's post of Equipment Officer was changed to that of Training Officer with effect from 2 May 2007. The defendant denies that Mr T. was hired to take over the complainant's functions and provides a copy of their respective job descriptions showing that their duties and grades were different. It also rejects the accusation of unequal treatment, pointing out that the procedure laid down in the Executive Secretary's Note has been applied only with regard to posts that continued beyond the expiry date of the incumbents' fixed-term appointment, which was not the complainant's case.

The Commission contends that the composition of the Personnel Advisory Panel was governed by paragraph 3.3 of the aforementioned

directive, which does not require that a member of the Panel be nominated from a list of staff members proposed by the Staff Council. It indicates that the Personnel Bulletin of 17 July 2002, concerning the composition of the Personnel Advisory Panel, was issued for information purposes only; it did not constitute a decision from the Executive Secretary that amended Administrative Directive No. 20 (Rev.2). The defendant consequently denies any breach of due process.

In addition, it recalls that a fixed-term appointment carries no expectation of extension and that the decision to extend such an appointment is discretionary. Moreover, in taking his decision the Executive Secretary bears in mind the non-career nature of the Commission and its interests.

D. In his rejoinder the complainant submits that his appeal was directed against the decision of 19 October 2006 not to extend his contract, but also in substance against the decision of 4 October 2006 not to apply the rider procedure to him. He emphasises that there is no dispute as to the fact that, in May 2006, the decision to abolish his post had not yet been made. Consequently, the Commission could have followed the procedure laid down in the Note from the Executive Secretary. The complainant draws attention to the Joint Appeals Panel's finding that Mr T.'s job description was not consistent with the tasks he actually performed. He asserts that Directive No. 20 (Rev.2) was amended by a decision of the Executive Secretary as indicated in the Personnel Bulletin, notwithstanding the Commission's failure to issue a revised administrative directive.

E. In its surrejoinder the Commission maintains its position. It rejects the contention that the complainant challenged the decision of 4 October 2006 in his internal appeal. It stresses that the latter decision and that of 19 October 2006 were separate and concerned two distinct matters. The request for review that the complainant addressed to the Executive Secretary on 13 November 2006 unequivocally related to the decision of 19 October. With regard to Mr T.'s appointment, it concedes that it was not made on a competitive

basis; however, citing the Tribunal's case law and the Staff Regulations, it asserts that it was under no obligation to do so.

## CONSIDERATIONS

1. The complainant was initially appointed on 3 May 1998 as a Certification Officer at level P-3 for three years. He provided professional services primarily in the area of radionuclide technologies. When his appointment was extended in 2001 for two years, the title of his post was changed to Equipment Officer without any changes in his duties or responsibilities. He was subsequently granted another two-year extension.

2. Following Judgment 2315 in which the Tribunal held that the seven-year policy contained in Administrative Directive No. 20 (Rev.2) was unenforceable unless it had been incorporated into staff members' contracts, the complainant was offered another extension due to end on 2 May 2007. The letter of extension dated 17 September 2004 incorporated by reference the provisions of Administrative Directive No. 20 (Rev.2). On 26 September 2005 the complainant signed a rider to his contract, which constituted an amendment to the letter of extension and made him eligible for consideration for an exceptional extension, as provided for in the Executive Secretary's Note of 19 September 2005.

3. Just less than a year later, on 1 August 2006, Mr T. joined the Commission as an Equipment Officer at the P-4 level in the same Division as the complainant. Although Mr T.'s job description involved work in the seismic area, his performance appraisal report

shows that he focused on radionuclide-related activities similar to those performed by the complainant. On Mr T.'s arrival the complainant assisted in his training regarding the duties and responsibilities of his post.

4. Approximately nine months before the expiry of his contract, the complainant wrote a memorandum to the Executive Secretary requesting that he be considered for an exceptional extension. Concerned with the impact of Mr T.'s hiring, the complainant had earlier enquired with his division director about the possibility of an exceptional extension. His director had told him that his post would be discontinued after his term was completed.

5. In response to the memorandum, the Executive Secretary reminded the complainant that upon signing the rider to his contract, the Note of 19 September 2005 had been incorporated into his contract. The Executive Secretary confirmed that after analysing the organisational needs of the On-site Inspection Division, a decision was made that the post he was holding would be discontinued. He also stated that in a situation where a staff member's post was being abolished, the possibility of an exceptional extension would be decided in accordance with the procedure laid down in Administrative Directive No. 20 (Rev.2), without advertising the post. He indicated that when that procedure had been completed, the complainant would receive formal notification of the results at least six months before the expiry of his contract. The Executive Secretary stated that he had asked the Personnel Section to convene a Personnel Advisory Panel as quickly as possible, so that the complainant could be notified of the decision well in advance of the six-month formal deadline for notification.

6. On 12 October 2006 the division director proposed to the Personnel Advisory Panel that the complainant should not be granted an exceptional extension on the grounds that his post would "be discontinued" and "transferred to another section of the [On-site

Inspection] Division”. It was added that that section would require candidates with a different area of knowledge and expertise than that of the complainant. The Personnel Advisory Panel, which met on 16 October, recommended that the complainant not be granted an exceptional extension.

7. Three days later, the Chief of the Personnel Section informed the complainant that the Executive Secretary had decided that there was no basis for an exceptional extension. The complainant asked for a review of that decision. On 7 December 2006 the Executive Secretary informed him that he had decided to maintain his decision.

8. On 3 January 2007 the complainant filed an appeal with the Joint Appeals Panel. On 16 February the complainant asked the Panel to suspend the decision not to extend his contract for a period of five months or until the completion of the internal appeal proceedings so as to enable his children to complete their school year without interruption. The Panel recommended a suspension of action of approximately two months, but the Executive Secretary rejected that recommendation and the complainant formally separated from service on 2 May 2007.

9. In connection with the internal appeal, the complainant’s request of 16 April 2007 for documents relating to the recruitment, interview and appointment of Mr T., including the Personnel Advisory Panel’s recommendation, was denied.

10. In its report of 11 June 2007 the Joint Appeals Panel made a number of findings. In relation to the decision to discontinue the post, the Panel found that:

- the draft 2007 Programme and Budget, issued in May 2006, indicated that the post was not proposed for transfer;
- the complainant’s post was to be advertised as both “Training Officer” and as “Equipment Officer”;

- the transfer of the post to another Section of the On-site Inspection Division appeared only in the second version of the 2007 draft Programme and Budget after Mr T. was appointed;
- the process for the recruitment of Mr T. was not in accordance with the Staff Regulations;
- Mr T. performed similar tasks to those of the complainant and was not performing tasks in line with his job description; and
- the timing of Mr T.'s appointment "was questionable as it occurred at a time when the [complainant]'s post was discontinued although the [complainant] performed similar tasks to Mr [T.]".

As to the responsibilities of the Commission, the Joint Appeals Panel found that:

- the Commission did not safeguard the complainant's rights (citing Judgment 2090);
- the Administration should have tried to reach an amicable solution with the complainant, for instance by allowing him to compete for a similar post;
- the Commission was in breach of contract for failing to follow the procedure provided for in the Note from the Executive Secretary "which formed an explicit term of the [complainant]'s contract";
- the Administration did not follow the "established practice" in the Provisional Technical Secretariat or the procedure outlined in the Personnel Bulletin of 17 July 2002 with respect to the attendance of a staff council representative at the Personnel Advisory Panel; and
- the tone of the Executive Secretary's reply rejecting the recommendation to suspend the decision not to extend the complainant's contract while the complainant's children finished school was "inappropriate and offensive".

11. In terms of relief, the Joint Appeals Panel recommended that the complainant be awarded material damages equivalent to three months' salary, net of any earnings, and moral damages in the amount of 8,000 United States dollars.

12. By a letter of 11 July 2007 the Executive Secretary advised the complainant that he had decided not to accept the recommendations of the Joint Appeals Panel. He explained that, where there is no continuing need for a post, it is obvious that no request will be made to advertise the post and that in these circumstances the possibility of granting an exceptional extension will be determined solely on the basis of Administrative Directive No. 20 (Rev.2). The Executive Secretary concluded that, since the Directive had been correctly applied in the complainant's case, the decision to allow his contract to expire had been validly made.

13. The Commission takes exception to the matters relating to the appointment of Mr T. It submits that the circumstances surrounding this appointment have no relevance to the "legality or otherwise" of the Executive Secretary's decision to allow the complainant's fixed-term appointment to expire on 2 May 2007. It also argues that, if the complainant considered that the appointment of Mr T. constituted a breach of his own fixed-term contract, he should have challenged that appointment.

14. The Tribunal observes that it is evident from the submissions that the complainant is not challenging Mr T.'s appointment. However, the facts surrounding the appointment and the duties and responsibilities of the post to which Mr T. was appointed are clearly relevant to his complaint.

15. The complainant submits that the actions of the Commission constitute a breach of contract, good faith, and due process.

16. First, on the question of breach of contract the complainant adopts the opinion of the Joint Appeals Panel that the Commission

breached the terms of the Note from the Executive Secretary dated 19 September 2005. In response to the defendant's argument that the procedures set out in the Note do not apply in cases where a staff member's post is to "disappear", irrespective of whether or not the staff member concerned signed the rider, the complainant submits that the Commission had no right to ignore the terms of the rider even though circumstances (abolition of the post) made the performance of those terms "impossible or impracticable". He also submits that the Commission did not insert a provision into the Note allowing for the right to forgo the process whereby incumbents would be considered fairly and openly against outside candidates.

17. As stated in its introduction, the purpose of the Note is to set out one part of the system for implementing the seven-year policy, that is, the part which concerns advertising a post, conducting interviews and establishing whether the position should be offered to someone other than the incumbent or whether an exceptional extension should be granted. The rider to a staff member's contract simply incorporates the Note into the contract by referring to the Staff Regulations and Rules and Administrative Directives.

18. It is evident that the Note is only applicable to the process of an appointment to a post that is to be continued and advertised. It provides a system by which an incumbent may be granted an exceptional extension as contemplated in Administrative Directive No. 20 (Rev.2). Given that a decision had been taken to abolish the post, the Note was of no relevance in the present circumstances.

19. Second, the complainant submits that the Commission acted in bad faith. In response, the defendant states that Mr T.'s appointment is completely irrelevant as his hiring was outside the specific terms of the complainant's fixed-term appointment which expired on 2 May 2007. In addition, it denies that Mr T. was hired to take over the functions of the complainant and states that the two staff members had distinct posts and functions and it rebuts the complainant's assertion that had Mr T. not been appointed, the position would have been advertised in accordance with the Note from the Executive Secretary.

20. The Commission maintains that it had no obligation towards the complainant after the expiry of his appointment. It stresses that any extension beyond the seven-year service limit is an exception which is granted at the Executive Secretary's discretion.

21. As stated in Judgment 2116, relations between an organisation and its staff must be governed by good faith; an organisation must treat its staff with due consideration and avoid causing them undue injury. Also, it is well established in the case law that bad faith cannot be presumed, it must be proven. Additionally, bad faith requires an element of malice, ill will, improper motive, fraud or similar dishonest purpose (see Judgment 2293, under 12).

22. While international organisations have a broad discretion in relation to the abolition of posts, the decision to abolish a post will be reviewable where it can be established that the decision was taken in bad faith.

23. The Tribunal finds that viewed as a whole the circumstances surrounding the decision not to advertise the complainant's post show bad faith and a lack of transparency on the part of the Commission. In particular, the complainant's post was not affected by any planned reorganisation or restructuring prior to May 2006 and was contained on a list dated 27 June 2006 identifying posts to be advertised. Moreover, Mr T.'s duties and responsibilities were not those set out in his job description and were the same as those performed by the complainant. Likewise, the timing of Mr T.'s appointment and the fact that the usual recruitment process was not followed show bad faith and a lack of transparency.

24. However, the Tribunal rejects the complainant's allegation of a breach of due process for lack of a factual foundation.

25. Third, in support of his claim for relief, the complainant submits that he lost a valuable opportunity to have his contract extended up to a period of three years as provided for in the Executive Secretary's Note and as such his material damages extend beyond the

expiry of his contract. He consequently requests reinstatement for a term of three years and material damages equivalent to what he would have earned from his date of separation until the date of reinstatement.

26. Moreover, he contends that he suffered from stress because of the uncertainty of his professional future and his ability to provide for his family. His youngest child was particularly affected by the situation. In addition, he submits that his dignity and professional reputation were harmed and that he is entitled to a “significant award of moral damages”.

27. The Executive Secretary’s decision not to grant the complainant an exceptional extension was tainted by the bad faith actions of the Administration. Those actions in bad faith deprived the complainant of an opportunity to have his extension considered in accordance with the Note from the Executive Secretary of 19 September 2005. Although it cannot be said with any certainty that he would have been granted an exceptional extension to his contract, the complainant is entitled to an award of material damages for the lost opportunity in an amount of 5,000 euros. The Tribunal will not order reinstatement. However, the complainant is entitled to a significant award of moral damages which the Tribunal sets at 25,000 euros. He is also entitled to costs in the amount of 1,000 euros.

## DECISION

For the above reasons,

1. The Executive Secretary’s decision of 11 July 2007 is set aside.
2. The Commission shall pay the complainant 5,000 euros in material damages.
3. It shall also pay him 25,000 euros in moral damages.
4. The Commission shall pay the complainant 1,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 6 November 2008, Ms Mary G. Gaudron, Vice-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 4 February 2009.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet