

110th Session

Judgment No. 2981

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. H. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 3 April 2009 and corrected on 28 April, the Commission's reply of 9 June, the complainant's rejoinder of 16 July and the Commission's surrejoinder of 18 August 2009;

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 Tunisian national born in 1953, joined the Commission's Provisional Technical Secretariat (hereinafter "the Secretariat") on 16 May 1999 as a Seismic Officer, at grade P-3, in the Seismic Monitoring Section of the International Monitoring System Division. His initial three-year fixed-term appointment was extended twice, for a period of two years each time, and was due to expire on

15 May 2006, by which time he would have accumulated a total of seven years' service in the Secretariat.

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 should not remain in service for more than seven years. Paragraph 4.2 of the Directive foresees exceptions to that seven-year service limit based on "the need to retain essential expertise or memory". 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 in his or her contract as a term or condition.

Part of the system for implementing that policy is set out in a Note from the Executive Secretary of 19 September 2005. According to 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 staff member's post is advertised in parallel to considering the possibility of an exceptional extension for the incumbent. A Personnel Advisory Panel is set up to interview the shortlisted candidates and the incumbent's division director submits a proposal on his or her possible "reappointment". Another Panel, comprised of the same members, considers whether the incumbent provides essential expertise or memory to the Secretariat and should therefore be granted an exceptional extension, or whether the post should be offered to one of the interviewed candidates. The members of the Panels then make a recommendation to the Executive Secretary.

By a letter of extension of appointment dated 26 September 2005 the complainant was offered a further two-year extension of his fixed-term appointment, with effect from 16 May 2006, which he accepted. The letter stipulated that "the provisions on length of appointments and tenure in the Staff Regulations, Staff Rules and Administrative Directives and in the Note from the Executive Secretary apply to your appointment".

On 14 March 2007 a vacancy announcement was issued in respect of the complainant's post. By a memorandum of 4 July

the Executive Secretary set up two Personnel Advisory Panels with identical membership to conduct interviews of the candidates shortlisted for the post and to assess the outcome of those interviews as well as the possibility of granting an exceptional extension to the complainant. After the initial round of interviews, Mr P., an internal candidate who had not applied for the vacancy prior to the closure of the competition was included in the recruitment process and interviewed. Following the interviews, by a memorandum of 4 September the complainant's division director recommended against a further extension on the grounds that the complainant did not possess a level of essential expertise or memory that could not be provided by Mr P., whom the director recommended for the advertised post.

The Personnel Advisory Panel issued its report on 10 September 2007. The representative of the Staff Council on the Panel raised a concern about the inclusion of Mr P. in the recruitment process and the Panel did not reach a consensus as to whether to grant an exceptional extension to the complainant or to hire one of the other candidates. By a memorandum of 29 October the complainant was informed that the Executive Secretary had decided that his fixed-term appointment would not be extended beyond its expiry on 15 May 2008 because there was no basis upon which to grant an exception to the maximum period of service. By a letter of 13 November 2007 the complainant requested a review of that decision and the decision to appoint Mr P. to the post. The Executive Secretary replied on 21 November that he was maintaining his decision regarding the extension of the complainant's contract and that his request regarding the appointment of Mr P. was not allowed. The complainant separated from service on 15 May 2008.

On 11 December 2007 he had filed an internal appeal with the Joint Appeals Panel regarding the decision not to award him an exceptional extension. In its report of 22 December 2008 the Panel found that, although the Administration had the right to include candidates from an internal "roster" in the recruitment process, it was

inconsistent with both the wording and the spirit of Administrative Directive No. 20 (Rev.2) and the spirit of the Note from the Executive Secretary to do so after the first round of interviews with shortlisted candidates had been completed. In its view, candidates from the roster may be included in the recruitment process before the applications for a vacancy are sent to the division director for evaluation and before the interviews commence. The Panel recommended that the decision not to grant an exceptional extension be set aside and that the complainant be awarded material damages and costs. It rejected his claim for moral damages.

By a letter of 4 February 2009 the Executive Secretary informed the complainant that, in his view, the conclusions and recommendations of the Joint Appeals Panel were based on an error of law and mistake of fact. Consequently, he was upholding his decision regarding the complainant's appointment and dismissing his claims for damages and costs. That is the impugned decision.

B. The complainant submits that the decision not to extend his appointment is tainted by a breach of procedure. In his view, the Joint Appeals Panel rightly concluded that the inclusion of candidates from the internal roster in a recruitment process must occur before interviews are conducted in order to ensure that the process is fair. The proper procedure, if the first round of interviews does not produce a suitable candidate from those whose applications have been put forward, is to readvertise the post. According to the complainant, if there were no defined sequence of events for the identification of candidates within the same recruitment process, it would be open to the defendant to revert to potential candidates from the roster for further interviews until a suitable candidate is selected. As a consequence, the contractual rights of staff members to be considered for exceptional extensions would be "extinguished" and the Note from the Executive Secretary would be of no effect.

Furthermore, the complainant submits that it is well settled by the Tribunal's case law that international organisations are prohibited from giving consideration to late applications because this offends the principles of fairness and equality. As the identification of another

candidate after the first round of interviews was, in essence, equivalent to allowing a late application, the same principles should apply in this case and the Commission has therefore breached the principles of equal treatment and of fairness.

He contends that the Commission acted in bad faith by nullifying his right to have the possibility of an extension of his appointment considered in accordance with the Note from the Executive Secretary. In his view, the Commission engaged in two separate recruitment exercises, one of which violated proper procedure. Referring to the case law and to Staff Regulation 4.3, he argues that the defendant has a duty to deal with its staff in a transparent manner, particularly as regards the selection and appointment of candidates.

The complainant asks the Tribunal to set aside the impugned decision. He seeks material damages in an amount equivalent to what he would have earned had his contract been extended for a period of three years, including “all salaries, allowances, emoluments and entitlements”, plus interest from the date those damages are due. He also claims 25,000 euros in moral damages and 10,000 euros in costs.

C. In its reply the Commission contends that the complaint is manifestly irreceivable on the grounds that the complainant has failed to provide a power of attorney from his representative, as required by Article 5, paragraphs 1 and 2, of the Rules of the Tribunal.

On the merits, it points out that, pursuant to Staff Regulation 4.4, the Executive Secretary has the discretion to extend or renew a fixed-term appointment. This provision implies that the complainant had no contractual right to be granted an extension beyond the expiry date of his appointment. Furthermore, Staff Rule 4.4.01(c) provides that, in granting fixed-term appointments, the Executive Secretary shall bear in mind the non-career nature of the Commission. As a result, although paragraph 4.2 of Administrative Directive No. 20 (Rev.2) allows for contract extensions beyond seven years of service, the fact that a staff member may possess a certain type of essential expertise or memory is not determinative.

The Commission denies that proper procedure was not followed. It argues that, as occurred in this case, a fair process ensures that all external candidates and those who may be identified from a roster are evaluated by the relevant division director and interviewed by one and the same interviewing panel designated by the Executive Secretary before the division director makes his or her proposal regarding a possible exceptional extension and before the appointed Personnel Advisory Panels meet to formulate a recommendation. It submits that the complainant's employment came to an end with the expiry of his appointment and his only right – which the Executive Secretary duly respected – was to have the question of a possible extension considered on the basis of the need to retain essential expertise or memory.

With regard to the allegation of bad faith, the Commission notes that the complainant has produced no evidence showing that the impugned decision was motivated by malice, ill will, improper motive, fraud or similar dishonest purpose. Furthermore, it points to the fact that, in light of the Tribunal's decision in Judgment 2315, acting in good faith, it extended the complainant's appointment for a further two years with effect from 16 May 2006, even though it was under no obligation to do so.

In addition, the defendant rejects the accusation of unequal treatment, arguing that the complainant has provided no evidence in support of this claim.

D. In his rejoinder the complainant points out that a power of attorney was duly submitted to the Tribunal. The Commission's objection to receivability should therefore be rejected. He reiterates his pleas and stresses his view that the Commission's interpretation of the applicable provisions of Administrative Directive No. 20 (Rev.2) and the Note from the Executive Secretary are evidence of bad faith.

E. In its surrejoinder the Commission maintains its position in full.

CONSIDERATIONS

1. The complainant's contract which was due to expire on 15 May 2006 was extended up to 15 May 2008. In the letter of extension the Note from the Executive Secretary of 19 September 2005 and Administrative Directive No. 20 (Rev.2) were incorporated by reference.

2. On 14 March 2007 a vacancy announcement for the complainant's post was issued. By a memorandum of 4 July the Executive Secretary established the two Personal Advisory Panels that would, in accordance with Administrative Directive No. 20 (Rev.2) and the above-mentioned Note, conduct the interviews of shortlisted candidates, assess the outcome of the interviews and decide whether the complainant was eligible for an exceptional extension of his contract on the basis of the need to retain essential expertise or memory.

3. The three shortlisted candidates were interviewed but none of them was considered qualified. Therefore, a subsequent interview was scheduled with an internal staff member, Mr P., who had not applied for the advertised post but was listed on the internal "roster". Following Mr P.'s interview, the complainant's division director recommended on 4 September 2007 against an exceptional extension of the complainant's appointment on the grounds that he did not possess a level of essential expertise or memory that could not be provided by Mr P., whom he strongly recommended for the vacant post.

4. On 10 September 2007 the members of the Personnel Advisory Panels met, and recorded that they could not reach a consensus due to the Staff Council representative's objection. The latter considered that it was contrary to the recruitment process set out in paragraph 1.8 of Administrative Directive No. 20 (Rev.2) to add

after the first round of interviews a candidate from the roster who had not initially applied for the post.

5. By a memorandum dated 29 October 2007 the complainant was notified that the Executive Secretary had decided that there was no basis for granting him an exception to the maximum period of service and that his fixed-term appointment would expire on 15 May 2008 in accordance with the terms of his contract. The Executive Secretary having denied by a letter dated 21 November 2007 the complainant's request for a review of that decision, the complainant filed his appeal with the Joint Appeals Panel on 11 December 2007.

6. In its report dated 22 December 2008 the Joint Appeals Panel notified the Executive Secretary of its recommendations to set aside the decision not to grant the complainant an exceptional extension beyond the seven-year limitation of service, to award him material damages equivalent to nine months' salary and allowances based on his last salary, and costs. However, it recommended rejecting his claim for moral damages.

7. By a letter dated 4 February 2009 the complainant was notified of the Executive Secretary's decision not to follow the recommendations of the Joint Appeals Panel but, instead, to dismiss his appeal. That is the decision impugned before the Tribunal. In that letter the Executive Secretary stated that the conclusions and recommendations of the Panel were based on both an error of law and a mistake of fact. Furthermore, his opinion was that "the recruitment process concluded with the identification of a qualified person [...] in full conformity with the established procedures and in keeping with the basic rules of fair and open competition" and that "the Administration, when conducting a recruitment process, is in no way prevented from seeking suitable candidates in the general job market, as long as it is done in good faith and in keeping with the established procedures". Substantially, he noted that the Administration could continue to interview new candidates within the deadline of the

reporting date established at the time of publication of the vacancy notice.

8. The complainant bases his complaint on the grounds of a procedural flaw, which consisted of the addition of an internal candidate after interviews with the shortlisted candidates had taken place. Such addition, in the complainant's view, was tantamount to giving consideration to a late application for the post which offends against the principle of due process which includes ensuring transparency and fairness, and constitutes a breach of the principle of equal treatment. He claims that he was harmed materially by the loss of the opportunity to have his contract extended, and that he is entitled to moral damages and a reasonable award of costs.

9. The Commission objects to the receivability of the complaint on the grounds that the complainant has failed to comply with the requirements of paragraphs 1 and 2 of Article 5 of the Rules of the Tribunal. As a power of attorney was filed with the Tribunal's Registrar, who, in accordance with Article 6 of the Rules, then forwarded a copy of the complaint to the defendant, there is no violation of Article 5 and the objection is rejected.

10. On the merits of the case, the complaint is founded. As decided in Judgment 2980, under 10:

“It is the Commission's duty to consider all the factors – in particular the non-career nature of the Commission, the need for service limitations and rotation of staff while maintaining the efficient operation of the Provisional Technical Secretariat – against the possible need to retain essential expertise or memory within the Secretariat. That can be done either by granting an exceptional extension to an incumbent staff member, or by selecting a new candidate who fulfils the requirements of the post. While it is recognised that staff members on fixed-term contracts have no right to extension, nor any right to expect an extension of their contracts, staff members do have an interest in being considered for an exceptional extension against what the general job market has to offer. The process for consideration is regulated by the procedures set out by Administrative Directive No. 20 (Rev.2) and the Note from the Executive Secretary of

19 September 2005, which provide the framework for the legal protection of the staff member's interest as well as the needs of the Commission. The procedures are set out to guarantee the fairness and transparency of the recruitment process and thereby to ensure equality of treatment for all candidates.”

11. In the present case, as the Joint Appeals Panel stated, the Commission did not comply with the proper procedures, as another candidate was added to the shortlist after the interviews and evaluation of candidates from the original shortlist had taken place, yielding no qualified candidate. The Tribunal opines that a pool of candidates must be consolidated by the Personnel Section as a result of the preselection which has to identify “applications which obviously do not meet the requirements set out in the vacancy announcement” and “may include other candidates who have been identified during earlier recruitment processes”. This must be done before the process of effective evaluations begins. To add candidates to a shortlist after the evaluation process has begun does not comply with the mandatory fairness and transparency of the recruitment process, and could have a prejudicial effect on the outcome of the process as every evaluation is conditioned by the quantity and quality of candidates to be evaluated. It could also have the effect of appearing to have been done to satisfy improper interests, regardless of whether or not one of the candidates added at a later date eventually succeeds (see Judgment 2980, under 11). The fact that Mr P., who was selected for the post, was added to the shortlist after the evaluation process had begun may give the impression that he was chosen outside the context of the competition. As in the aforementioned judgment, this interpretation of the proper sequence – separate phases for identifying and then evaluating candidates – is also required by paragraphs 1.8 to 1.10 of Administrative Directive No. 20 (Rev.2), which provide:

“1.8 After the closing date of a vacancy announcement, the Personnel Section will make a selection of those applications which obviously do not meet the requirements set out in the vacancy announcement. All applications will be sent to the division director concerned for evaluation. The Personnel Section may include other candidates who have been identified during earlier recruitment processes.

- 1.9 The selection process should include an interview with the candidates to be arranged through the Personnel Section. Interviews may be confined to those candidates who appear to be equally qualified for the post in order to provide a better basis for final selection. References may be requested by the Personnel Section. For specific posts other means of selection may be applied such as aptitude and typing tests.
- 1.10 The division director concerned shall prepare an evaluation of all candidates indicating to what extent they meet the requirements of the post. The evaluation must be based solely on the requirements embodied in the [Comprehensive Nuclear-Test-Ban Treaty], in particular of securing the highest standards of professional expertise, experience, efficiency, competence and integrity. The evaluation shall conclude with an overall rating, according to the following categories, and an indication of the division director's preference:
 - (a) Well qualified
 - (b) Qualified
 - (c) Not qualified.

The evaluation shall be submitted by the division director concerned to the Personnel Section. Due consideration shall be given to the applications from existing staff members.”

It is also directed by the Note which states, in relevant part:

“The division director's proposal on possible reappointment of the incumbent, as specified in section 3.2 of Administrative Directive No. 20 (Rev.2) shall be made after all interviews have been conducted.”

12. For the above reasons, the impugned decision must be set aside on the basis of the procedural flaw of adding a candidate to the shortlist after the evaluation process had begun. The complainant requests material damages equivalent to what he would have earned if his contract had been extended for a period of three years, including all salaries, allowances and other benefits, plus interest. That claim must be rejected. There is no certainty that the complainant's appointment would have been extended for three years even if proper procedures had been observed. The complainant is nevertheless entitled to compensation on the basis that he lost a valuable opportunity to have his contract considered for an exceptional

extension in accordance with Administrative Directive No. 20 (Rev.2). The Tribunal fixes that compensation in an amount equivalent to nine months' salary, allowances and other benefits based on the amount that he would have earned had his contract been extended for nine months from 16 May 2008. The Tribunal also awards the complainant moral damages in the amount of 5,000 euros for the flawed decision. It finds, however, that he has not established lack of good faith. In this regard, precedent shows that "[t]he fact that the process was procedurally flawed does not support a finding of bad faith" (see Judgment 2763, under 24) and, accordingly, that claim is dismissed. The complainant is entitled to 5,000 euros for costs related to the procedure before the Tribunal.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Commission shall pay the complainant an amount equivalent to nine months' salary, allowances and other benefits based on the amount that he would have earned had his contract been extended for nine months from 16 May 2008.
3. It shall pay him 5,000 euros in moral damages.
4. It shall also pay him 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 29 October 2010, Ms Mary G. Gaudron, 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 2 February 2011.

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