114th Session **Judgment No. 3190**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. P. against the South Centre on 22 September 2010 and corrected on 5 January 2011, the Centre's reply of 11 March, the complainant's rejoinder of 26 May and the Centre's surrejoinder dated 28 July 2011;

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, an Australian national born in 1958, joined the South Centre in April 2005 as Personal Assistant to the Executive Director at grade G.4 under a nine-month short-term contract. With effect from 1 January 2006 she was employed under a one-year fixed-term contract with the same title and grade.

On 15 December 2006 the Executive Director informed staff that, further to a Management Audit report and the adoption of its main recommendations by the Board of the Centre, all contracts would be renewed for a period of six months, from 1 January to 30 June 2007.

The complainant signed her letter of extension of appointment on 22 December 2006. By a letter dated 30 March 2007 from the Head of Administration, she was notified that it had been decided to freeze her post and, consequently, her appointment would not be renewed beyond its expiry on 30 June.

An e-mail exchange ensued between the complainant and the Administration in which she sought, inter alia, additional information regarding the decision to freeze her post, advice as to how she could initiate any internal means of redress that were available to her and guidance as to which external adjudicative bodies had jurisdiction over the matter in the event that internal recourse was not available. In a letter of 15 May 2007 the Head of Administration explained that the Centre's internal appeal process was prescribed by Section B of Annex VII to the Staff Regulations and that, after exhaustion of that process, external recourse may be sought subject to the authorisation of the Board and the Council of Representatives (hereinafter "the Council") as to the jurisdiction of an external tribunal over cases involving the South Centre. At the material time, the aforementioned provisions of the Staff Regulations provided that an ad hoc Appellate Body composed of members of the Board of the Centre was the final arbitrator of challenges to administrative decisions taken by the Centre.

On 16 May 2007 the complainant sought clarification about the internal appeal process. In his response of 18 May the Head of Administration reiterated that a staff member had recourse against administrative decisions pursuant to Section B of Annex VII to the Staff Regulations and he stated that he would not engage in further correspondence on the matter. On 23 May the complainant and two other staff members wrote to the Executive Director, advising him of their intention to seek a remedy against the "illegal" decisions to extend their fixed-term contracts for only six months and then to allow them to expire on 30 June 2007. They pointed out that in an e-mail of 5 April of that year the Chairman of the Board had fully supported the Executive Director's actions in this respect, on the grounds that those actions were in line with decisions taken by the Board. As appeals

against administrative decisions were adjudicated by an ad hoc Appellate Body composed solely of members of the Board, they argued that the internal appeal process was neither independent nor impartial and they indicated that their options for redress included the "Swiss Labour Court, the European Court of Human Rights, or the courts of the United States". Two days later, the complainant submitted a written settlement offer to the Administration which, it was stated, would remain open for seven days from the date of its receipt. In an e-mail of 7 June the Executive Director invited the complainant and her two aforementioned colleagues to meet with him to discuss their concerns before they pursued formal legal remedies.

On 28 September 2007 the complainant lodged an application with the European Court of Human Rights in which she alleged violations of several Articles of the European Convention on Human Rights (hereinafter "the Convention") by the High Contracting Party, Switzerland, which had resulted in a denial of her right to a fair hearing, and she sought damages for the "illegal truncation and termination" of her fixed-term contract. The jurisdiction of this Tribunal was subsequently recognised by the South Centre with effect from 15 November 2007. Therefore, on 24 January 2008 the complainant filed a corrigendum to her application lodged with the European Court of Human Rights.

On 3 February 2010 the Tribunal delivered Judgment 2868, concerning a complaint filed by Mr S., another staff member of the Centre, which related, among other things, to the renewal of his fixed-term contract for a period of less than a year. In that judgment the Tribunal held that the Executive Director's decision to renew fixed-term contracts for only six months was taken without authority and it set aside that decision as it applied to Mr S. and awarded him damages. In April 2010 the complainant was notified that the European Court of Human Rights had declared her application inadmissible because it did not concern an interference with her rights under the Convention by the authorities of the respondent State and was therefore incompatible *ratione personae* with the provisions of the Convention.

On 28 May 2010 the complainant wrote to the Executive Director asserting that the facts and circumstances surrounding the "improper dismissal" of Mr S. were similar to her own and, referring to the principle of *res judicata* and with the aim of avoiding further expenses for both herself and the Centre, she asked that the decision in Judgment 2868 be applied to her. The Executive Director replied on 28 June that he was unable to accede to her request. He stated that Judgment 2868 was neither applicable to nor binding on individuals who were not parties to the case leading to that judgment, and he pointed out that the complainant had failed to file an internal appeal against the decisions she disputed within the prescribed time limits. That is the impugned decision.

B. Relying on the Tribunal's decision in Judgment 2868, the complainant contends that the renewal of her fixed-term contract for a period of less than one year was a violation of the Centre's Staff Regulations. She considers that the aforementioned judgment constitutes a legal precedent which should be applied to her and other similarly situated staff members, as there is no basis upon which the Centre can maintain administrative decisions which have been declared unlawful by the Tribunal.

She points out that after she was informed that her post would be frozen, the Centre did not reply to a number of her communications, including requests to have her case heard, and that any responses she did receive were unhelpful. Indeed, the Centre did not notify her that an ad hoc Appellate Body had been convened to hear Mr S.'s appeal and it also failed to respond to her offer to settle her case.

With respect to the remedies available to her, the complainant asserts that the internal appeal process available to staff members is inadequate because it fails to guarantee the impartiality or independence of the ad hoc Appellate Body, which is composed of Board members appointed by the Council of Representatives. She explains that members of the Appellate Body may be called upon to adjudicate appeals against decisions which are directly related to decisions they have taken in their capacity as Board members, and she

regards this as "clearly […] contradictory and impossible". She points out that the relevant statutory provisions do not permit staff members to object to the composition of the Appellate Body. Consequently, she was denied natural justice and due process, and although there was a clear need to set up an external adjudicative body to consider her case, the Centre failed to do so. She considered that she had exhausted the internal means of redress open to her and, as the Centre had not yet recognised the jurisdiction of the Tribunal, she submitted an application to the European Court of Human Rights. Having done so, she had to wait for a decision from that Court before filing a complaint with the Tribunal.

The complainant asks the Tribunal to quash the impugned decision as well as the decision of 30 March 2007 not to renew her appointment beyond 30 June 2007. She seeks an award of damages in an amount equal to the salary, benefits and other allowances that she would have received for a period of six months. She also claims 10,000 Swiss francs in moral damages and costs in the amount of 5,000 francs.

C. In its reply the Centre objects to the receivability of the complaint on a number of grounds. It contends that the complainant failed to exhaust the internal means of redress that were available at the time the administrative decisions of 15 December 2006, 30 March 2007 and 28 June 2010 were taken and that none of the circumstances permitting direct access to the Tribunal applies. By choosing not to engage the Centre's internal appeal process in relation to the decision of 30 March on the grounds that such a process would not be independent and impartial, she made an irreceivable direct application to the Tribunal. In any event, according to the Centre, any challenge to the decision of 30 March 2007 is now time-barred and hence irreceivable. Furthermore, pursuant to Article II, paragraph 5, of its Statute, the Tribunal does not have jurisdiction with respect to the complainant's claims related to the decision of 28 June 2010, because that decision does not involve any breach of the terms of her appointment or a violation of the Staff Regulations. Moreover, it is not

competent under the same provisions to examine her claims related to the decision of 30 March 2007 because, at the material time, the South Centre's recognition of jurisdiction of the Tribunal had not yet taken effect.

On the merits, the Centre refers to the Tribunal's case law and argues that its judgments operate *in personam* and not *in rem*, and that a judgment only has effect as between the parties to it. The complainant was not a party to the case leading to Judgment 2868, she has no privity with Mr S., nor is she his successor in interest and, consequently, there is no basis upon which she can benefit from that judgment. It challenges her reliance on the principle of *res judicata*, which applies only where the necessary three identities of person, cause and object are present. In the absence of privity or identity of person between the complainant and Mr S., the Executive Director, in his decision of 28 June 2010, correctly refused to apply that principle.

The Centre disputes the complainant's allegation that it purposefully withheld information from her regarding Mr S.'s internal appeal, pointing out that it has no duty under the Staff Regulations to provide such information to current or former staff members who are not parties to the proceedings in question.

It submits that the non-renewal decision of 30 March 2007 was taken as a result of budgetary constraints and argues that it is subject to only limited review. Furthermore, the complainant was given timely notice of that decision in accordance with the relevant provision of the Staff Regulations and the case law. The decision of 15 December 2006 to shorten renewals of fixed-term appointments to six months was also taken on the basis of budgetary constraints and was a valid exercise of the Executive Director's authority under the Staff Regulations.

Lastly, the Centre asserts that the Administration fully respected the complainant's dignity and reputation, in particular by providing her with due notice of its decisions and by responding fully and promptly to her queries.

It asks the Tribunal to be reimbursed for its actual costs in relation to the complaint.

D. In her rejoinder the complainant presses her pleas. She contends that her complaint is receivable and not time-barred. Relying in particular on Judgment 2868, she argues that the Tribunal has jurisdiction over her complaint on the basis that the Centre's decision of 30 March 2007 to limit the extension of her contract to six months was a violation of the Centre's Staff Regulations. In her view, the delivery of that judgment triggered her right to file a complaint with the Tribunal, and the Executive Director's decision of 28 June 2010 was a final administrative decision. She appends to her submissions an e-mail dated 28 March 2007 from a member of the Administration which, in her view, illustrates that the Centre was aware, well before the delivery of Judgment 2868, that the decision to extend staff contracts by only six months could be challenged as unlawful. She asserts that the Centre's submissions with respect to its financial situation up to 2007 are not relevant.

E. In its surrejoinder the Centre maintains its position in full. It objects to the complainant's reference to the e-mail of 28 March in support of her arguments and asserts that this evidence is inadmissible.

CONSIDERATIONS

1. By an e-mail of 15 December 2006 the Executive Director informed the Centre's staff that, as from 1 January 2007, their contracts would be renewed for six months and not for one year. Despite objections raised by various staff members the Executive Director maintained his decision, pointing out that those who disagreed with it had the option of not signing their contracts. On 22 December 2006 the complainant who had previously been granted a one-year fixed-term appointment with effect from 1 January 2006 signed her letter of extension of appointment. On 30 March 2007 she was informed in writing that her contract would not be renewed or extended beyond 30 June 2007, because the Board "at its 18th meeting […] [had] decided to rationalize the post structure of the Centre in relation to the availability of funds and anticipated contributions for

2007. This decision has resulted in the freezing of several posts, which regrettably include[d] the post of Personal Assistant to the Executive Director".

2. In an e-mail of 11 April 2007 to the Head of Administration, the complainant requested further information regarding the non-extension of her contract. Specifically, she asked why the Board had frozen her post, what reasoning had been used to reach that decision, why her post had been frozen due to lack of funds whereas the contracts of other administrative and support staff had been extended until 30 June 2008 and whether she would be automatically allowed to assume the post if or when the Board reversed its decision. In his response of 12 April the Head of Administration stated that the administrative actions taken to freeze a number of posts had been based on a Board decision and that as and when the posts were "unfrozen" they would be advertised for recruitment. He further explained that in the event she wished to apply for the post, her candidature would be considered, but there was no provision in the Staff Regulations entitling former staff members to automatic assignment for future vacancies.

3. By an e-mail of 8 May 2007 to the Head of Administration, which she copied in particular to the Executive Director and the Chairman of the Board, the complainant pointed out that he had not answered her questions satisfactorily. She asked whether there was any internal recourse against the Board's decision and requested his urgent advice in that respect. In the event that there was no internal appeals process she asked to be informed as to which "external binding adjudication forums" had been recognised by the South Centre so that she could appeal against the decision of the Board. She informed him that if the South Centre had not recognised any external adjudicative bodies she would have no option but to consider all other possible avenues of redress. On 15 May 2007 the Head of Administration replied to her that the decision to freeze posts had been taken in response to budgetary concerns. He went on to explain that the procedure for appeals of administrative decisions

could be found in Section B of Annex VII to the Staff Regulations, and that subsequent to the exhaustion of the internal appeal procedure, "external recourse may be sought subject to authorization of the Board and Council as to [the] jurisdiction of an external tribunal over cases involving the South Centre".

4. Section B of Annex VII provides in relevant part under the heading "Appellate Body":

> "1. A staff member wishing to appeal an administrative decision, or a decision taken consequent to the processes set out above on disciplinary measures and procedures, must, within one month of the date of receiving notification of the decision in writing, notify the Board, through the Chairperson, of intent to appeal. […]
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> 2. Within one month of receipt of the staff member's notice of intent to appeal, the Chairperson of the Board shall refer the appeal to an ad hoc Appellate Body, consisting of three of its members, one of whom shall act as Chairperson. [original emphasis]
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> […]
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> 5. The ad hoc Appellate Body shall forward its decision through its Chairperson to the full Board of the South Centre, and to the appellant not later than one month from the date it hears the appeal.
>
> 6. The decision of the ad hoc Appellate Body shall be final."

5. On 25 September 2007 another staff member, Mr S., filed an internal appeal alleging that the decision to renew his contract for a period of only six months contravened Staff Regulation 4.1.5 which provides:

> "Fixed-term appointments shall be defined as appointments of one year or more. Contracts shall be 1 or 2 years duration, renewable. Appointments for longer periods may be made if funds are expected to be available, subject to the condition explicitly stated in Letters of Appointment that the extended period shall be dependent on funds being made available for ensuing budgetary periods to which the appointment refers."

The ad hoc Appellate Body rejected his appeal on 17 February 2008. He subsequently filed a complaint with the Tribunal and on 3 February 2010 the Tribunal delivered Judgment 2868 in which it set aside the Appellate Body decision to dismiss his appeal as well as the decision to renew his contract for only six months.

6. In the meantime, on 28 September 2007, the complainant lodged an application with the European Court of Human Rights as she considered that an e-mail of 5 April 2007 from the Chairman of the Board to the Staff Association "to have evidenced the exhaustion of her internal means of redress, [and] even if she had seized such procedure, it would have been a nullity" because the Centre's entire dispute resolution system fell short of the requirements of an independent and impartial tribunal, inherent in the notion of a fair trial. The Chairman had stated, inter alia, "that the steps that the [Executive Director] has taken have my complete approval and are in line with decisions by the Board". On 30 April 2010 the complainant was notified by letter of the decision of the European Court of Human Rights to declare her application inadmissible as it "did not concern an interference with her Convention rights by the authority of the respondent State [Switzerland]. Accordingly, the application was incompatible *ratione personae* with the provisions of the Convention, within the meaning of Article 35 § 3."

7. On 28 May 2010 the complainant asked the Executive Director to apply Judgment 2868 to her. He replied on 28 June 2010 stating, inter alia, that "Judgment 2868 is binding and constitutes *res judicata* only with respect to the parties in that particular case and has no applicability or binding force on third parties who were not parties to that case. The judgments of the [Tribunal] operate only *in personam* and not *in rem.*"

8. In the present proceedings the complainant requests the Tribunal to quash the decisions dated 30 March 2007 and 28 June 2010 (as detailed above). She also requests that the Centre pay her all salary, allowances and other benefits that she would have received for a period of six months, moral damages in the amount of 10,000 Swiss francs and 5,000 francs in costs.

9. Article VII, paragraph 1, of the Statute of the Tribunal provides that:

> "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

The complaint cannot be allowed because the complainant failed to exhaust internal remedies with regard to the decision of 30 March 2007, as well as the decision of 28 June 2010. Her assertion that she did not file an appeal before the Centre's ad hoc Appellate Body because it could not be considered to be independent and impartial must be rejected. It is firm case law that a staff member is not allowed on his or her own initiative to evade the requirement that internal means of redress must be exhausted before a complaint is filed before the Tribunal (see Judgment 2811, under 10 and 11, and the case law cited therein). The complaint is therefore irreceivable.

10. The Centre's request for reimbursement of its costs in these proceedings must be denied, as this is not a case of abuse of process.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2012, Mr Seydou Ba, 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 6 February 2013.

Seydou Ba
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet