

**115th Session**

**Judgment No. 3234**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D.-M. K. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom, hereinafter “the Commission”) on 1 March 2011, the Commission’s reply of 20 April, the complainant’s rejoinder of 3 June and the Commission’s surrejoinder of 18 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, a national of the Republic of Korea born in 1952, joined the Commission’s Provisional Technical Secretariat (hereinafter “the Secretariat”) on 29 November 2006 under a three-year fixed-term contract, at grade P-5, as Chief of the International Cooperation Section, in the Legal and External Relations Division.

On 5 February 2009 the Executive Secretary of the Commission announced that, as a result of restructuring, two sections in the aforementioned Division, the International Cooperation Section and the External Relations Section, would be merged to form a new External Relations and International Cooperation Section. The complainant was asked to act as Officer-in-Charge of this new section until the arrival in May 2009 of its new Chief, Mr D. P. At a subsequent meeting of the section Chiefs of the Legal and External Relations Division held on 10 February, the Director of the Division circulated a document which indicated that the complainant would perform the function of Senior International Cooperation Coordinator within the new structure.

In April 2009 the Commission issued an initial draft of the 2010 Programme and Budget Proposals, which reflected the restructuring within the complainant's Division. Mr D. P. took up his duties with effect from 1 May 2009. Later that month, by a memorandum of 26 May to the Chief of the Personnel Section, the Director of the Legal and External Relations Division recommended that the complainant's contract, which was due to expire on 28 November 2009, be extended on the basis of his satisfactory performance. A Personnel Advisory Panel was set up to consider the matter and on 8 June it unanimously recommended that the complainant be reappointed. However, on 30 June the Executive Secretary of the Commission informed the complainant verbally that, as a consequence of the restructuring, his post would be abolished but that he would be offered a special limited extension of his contract. By a letter of 3 July from the Chief of the Personnel Section the complainant received written notification to that effect and was offered an extension of his contract until 30 June 2010; he accepted the extension the same day.

In an e-mail of 15 July 2009 to the Executive Secretary the complainant set out his concerns regarding his situation and asserted, *inter alia*, that the restructuring of the Secretariat was in fact motivated by the aim to replace him with another individual, Mr K. By a letter of 17 July 2009 he asked the Executive Secretary to review the decision not to extend his contract for a full two-year period.

On 5 August 2009 the Commission issued the final draft of the 2010 Programme and Budget Proposals. In a letter of 11 August the Executive Secretary notified the complainant that he had decided to maintain the decision to extend the latter's contract until 30 June 2010 and offered to waive the jurisdiction of the Joint Appeals Panel over the matter in order to allow the complainant to file a complaint directly with the Tribunal if he so wished. Later that month, the complainant received a Letter of Special Limited Extension of Appointment dated 17 August 2009, confirming that his fixed-term appointment was extended until 30 June 2010 and that his functional title was Chief of the International Cooperation Section.

The complainant filed an incomplete Statement of Appeal with the Secretary of the Joint Appeals Panel on 7 September 2009, which he later completed on 2 October, challenging the decision not to offer him a two-year extension of his contract and claiming material and moral damages. He then wrote to the Secretary on 9 September and requested a suspension of the decision of 3 July 2009 until a decision had been taken on the merits of his appeal. On 10 February 2010 the Joint Appeals Panel recommended that the Executive Secretary dismiss the complainant's request for a suspension. The Executive Secretary accepted that recommendation and the complainant was so informed by a letter of 15 February 2010. He separated from service on 30 June 2010.

In its report dated 9 November 2010 the Joint Appeals Panel recommended that the Executive Secretary reject the complainant's requests to set aside the decision of 3 July 2009 and award him either a two-year extension of his contract or, alternatively, material damages in the amount he would have earned had his contract been extended for two years. However, it also recommended that he be awarded 15,000 United States dollars in moral damages for the "careless and confusing" manner in which he had been treated during the restructuring, and costs. By a letter dated 2 December 2010 the complainant was notified of the Executive Secretary's decision to reject his requests as well as the Joint Appeals Panel's recommendations to award him moral damages and costs. That is the impugned decision.

B. The complainant submits that, in breach of the relevant rules related to recruitment and Administrative Directive No. 20 (Rev.2), the Executive Secretary of the Commission promised Mr K. a post in the Secretariat despite the fact that he had not participated in an official selection process. In the complainant's view, the decision to restructure the Secretariat flowed directly from that promise.

Furthermore, the complainant points out that, although he was Chief of the International Cooperation Section and directly affected by the merger of two sections within his Division, he was not consulted about or involved in the restructuring process, which was notable for the Administration's failure to share information. Indeed, the process was not transparent and the only formal document describing the structure of the new External Relations and International Cooperation Section was a Personnel Bulletin issued on 10 December 2009, which indicated that the merger was effective as from 28 August 2009. In addition, the process was confusing in that he was not provided with a job description and it was unclear what functions and duties he was expected to discharge.

Referring to the Tribunal's case law, the complainant argues that, although international organisations have broad discretion regarding decisions to abolish posts, such decisions are reviewable if they are taken in bad faith or if they are motivated by extraneous considerations. He acknowledges that restructuring may be a valid reason to abolish a post, but he asserts that, in this case, the decision to restructure his Division was taken in order to replace him with Mr K. He states that he was not consulted about the decision to abolish his post, nor is it clear when that decision was actually taken. He alleges that the decision may be linked to a communication from Mr K. indicating that he would not join the Secretariat. In any event, the decision was taken in haste and the complainant refers to the initial and final drafts of the 2010 Programme and Budget Proposals in this respect, pointing out that a P-5 post in his Division was removed from the final draft, which stated that future use of that abolished post was "under discussion".

The complainant asserts that there were no legitimate grounds for the Administration to offer him a limited special extension of his contract for six months instead of two years, and he submits that the expiry date of his final extension coincided with the day that Mr K. would have been able to commence work at the Secretariat.

Lastly, referring to the case law, he contends that, following the abolition of his post, the Commission did not fulfil its duty to do its utmost to place him in another post which matched his skills and former responsibilities.

The complainant asks the Tribunal to set aside the decision of 3 July 2009. He seeks material damages in the amount he would have earned had his fixed-term contract been extended for two years, moral damages, and costs.

C. In its reply the Commission contends that, insofar as the complaint may be construed as challenging the decision of the Executive Secretary to abolish the complainant's post upon the expiry of his contract, it is irreceivable for failure to exhaust the internal means of redress because his internal appeal was directed solely against the decision not to grant him a two-year extension of contract.

On the merits, it asserts that the decision to restructure the Legal and External Relations Division was taken in the interest of the Commission and was based on objective considerations. It was not taken in order to replace the complainant with Mr K., and although members of the Administration were interested in having Mr K. join the Commission, at no time was he promised an appointment. In any event, the complainant has failed to demonstrate how any such alleged offer to Mr K. would constitute non-observance, in substance or in form, of the terms of his appointment within the meaning of Article II, paragraph 5, of the Statute of the Tribunal.

Regarding the decision to offer the complainant a special limited extension of his contract for a period of less than two years, the defendant submits that that decision conforms to the requirements of

Staff Rule 4.4.01(a) and it points out that the complainant accepted the extension unconditionally. In addition, it denies that the decision to abolish the complainant's post was taken in bad faith and, referring to the case law, it submits that he has failed to discharge the burden of proof in this respect.

The Commission emphasises that the complainant held a fixed-term contract which expired according to its terms and in conformity with the relevant statutory provisions. It had no legal obligation to place him in another position following the abolition of his post. Furthermore, if he suffered harm as a result of the expiration of his fixed-term contract, such prejudice is not legally attributable to any fault or wrongdoing on the part of the Commission.

D. In his rejoinder the complainant reiterates his pleas. With respect to his allegation that the Commission intended to replace him with Mr K., he asks the Tribunal to order the defendant to disclose copies of the e-mails exchanged on 13 July 2009 between Mr K. and a member of the Administration.

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

#### CONSIDERATIONS

1. Further to a restructuring in the Secretariat, the complainant's post was abolished. The complainant was so informed on 3 July 2009 and was offered a special limited extension of his contract until the end of June 2010. He accepted the extension but later raised concerns regarding his situation in an e-mail to the Executive Secretary dated 15 July 2009 and in a letter of 17 July 2009 he requested a review of the decision not to extend his contract for two years and referred to his earlier e-mail. The Executive Secretary responded by letter dated 11 August 2009, stating inter alia "bearing in mind the fact that you have accepted unconditionally the offer of a special limited extension of your current fixed-term contract, I have decided to confirm or maintain my administrative decision [...]"

[of 3 July 2009]”. The complainant filed a statement of internal appeal with the Joint Appeals Panel on 7 September which he later completed on 2 October 2009.

2. In its report of 9 November 2010 the Panel recommended that the Executive Secretary:

- “a. [...] Reject the requests of the [complainant] to:
  - Set aside his decision of 3 July 2009;
  - Consider the [complainant] for a two year extension of his contract or be awarded material damages in the amount he would have earned if his contract had been extended until the end of a two year extension.
- b. Award the [complainant] moral damages in the amount of \$15 000, as a consequence of the careless and confusing manner in which the situation of the [complainant] was handled during the process of restructuring the International Cooperation and External Relations Sections.
- c. Pay the legal costs of the appeal upon production of evidence by the [complainant] of the actual costs incurred.”

3. In a letter dated 2 December 2010 the Executive Secretary informed the complainant that he had decided to reject his requests and the Joint Appeals Panel’s recommendation that he be awarded moral damages and legal costs.

4. The complainant impugns this decision on the grounds of errors of law, procedural errors, and breach of good faith. His claims for relief are set out under B, above.

5. The Commission contests the receivability of the complaint insofar as the complainant challenges the abolition of his post upon the expiry of his fixed-term contract. It asserts that his internal appeal related solely and exclusively to the decision “to offer [him] a special limited extension of his fixed-term contract until 30 June 2010”. Referring to Judgment 2407, it contends that the complainant is not entitled to any damages because “if the [c]omplainant suffered some harm due to not receiving any particular extension of his appointment

to which his fixed-term contract gave him no right, that harm flowed not from any unlawful action of the Commission or its Executive Secretary, but from the normal legal effect of the contract he had freely and voluntarily entered into”.

6. The Tribunal states that the complaint is receivable *in toto*. As the Joint Appeals Panel pointed out in its report: “it was clear from the statement of Appeal that the [complainant] was in fact claiming that he had wrongly been offered a special six month extension instead of a two year extension of his fixed term appointment” and although the Panel agreed that the complainant had not specifically challenged the decision to abolish his post, “the wording of the letter dated 3 July 2009 from the Chief [of the] Personnel Section, to the [complainant] made it clear that the contested decision flowed directly from the restructuring of the International Cooperation and External Relations Sections and the abolition of the [complainant’s] P-5 post”. The Tribunal notes that in his appeal the complainant specifically argued that his P-5 post was not actually abolished but had planned to be moved to the office of the Director of the Legal and External Relations Division and that there was no reason to give him a special extension of six months instead of the normal extension of two years. Furthermore, in his letter of 17 July 2009 requesting a review of the decision of 3 July, the complainant explicitly refers to his e-mail of 15 July as the position paper setting out the details of his reasoning for the request for review. His e-mail of 15 July makes several references to the improper restructuring of the Provisional Technical Secretariat and therefore can be taken to mean that he refers also to the consequential abolition of his post. Considering this, the Tribunal is of the view that by impugning the decision of 3 July 2009, the internal appeal and the present complaint also impugn the abolition of the complainant’s post, as the decisions were intrinsically linked.

7. The complainant was not given proper notice of the decision to abolish his post, nor of the consequent decision to offer him a

seven-month special limited extension of his fixed-term contract with effect from 29 November 2009. His post was abolished without prior warning or consultation and the official communication of the decision was notified to the complainant in writing on 3 July 2009 with the offer of the seven-month contract extension (with oral notification having been given only a few days prior, on 30 June). As the Tribunal has previously held, “[t]he decision to abolish a post must be communicated to the staff person occupying the post in a manner that safeguards that individual’s rights. These rights are safeguarded by giving proper notice of the decision, reasons for the decision and an opportunity to contest the decision. As well, subsequent to the decision there must be proper institutional support mechanisms in place to assist the staff member concerned in finding a new assignment” (see Judgment 3041, under 8).

8. The Chief of the Personnel Section stated, in the letter of 3 July, that the reason for the abolition of the complainant’s post was related to “restructuring and streamlining the work of the International Cooperation and External Relations Sections of the Legal and External Relations Divisions” and therefore “to initiate a process whereby the duties and responsibilities entrusted to the International Cooperation Section will be absorbed by the External Relations Section and the two sections will be merged into one”. She went on to state that “this process of reform will directly affect your position and your post will be abolished upon expiry of your contract”. The Tribunal finds that this reason is generic, as it could be applied to any post within those sections. As it does not explain why the complainant’s specific post had to be abolished, it cannot be considered a valid reason. Moreover, in the meeting of 10 February 2009, mentioned above, under A, it was explained that the complainant would function as the Senior International Cooperation Coordinator in the newly merged section. Taking this into consideration, along with the fact that, on 26 May 2009, the Director of the Legal and External Relations Division recommended the complainant’s reappointment,

and the fact that the Personnel Advisory Panel unanimously recommended, in its report of 8 June 2009, that the complainant should be reappointed, it is clear that the intention to abolish the complainant's post was not originally part of the restructuring of the sections.

9. In its report the Joint Appeals Panel noted that the Commission claimed that the date of the decision to abolish the complainant's post was the same as the letter of 3 July, notifying the complainant of said decision. However, the Panel found that, as the complainant was informed orally on 30 June, the decision had to have been taken earlier. As the Panel could find no indication of a precise decision date, it had to assume that the decision was taken sometime between 8 June, when the Personnel Advisory Panel recommended the complainant's reappointment, and 30 June, when the complainant was informed orally of the decision. This again shows that the decision was taken in haste and without consultation with the complainant. While the Panel noted that there is no specific rule requiring that the Commission consult a staff member prior to abolishing her or his post, the Tribunal observes that in the interest of efficiency and impartiality the Commission should have taken care to show that the decision was taken following a logical analysis of the situation.

10. In the letter of 3 July 2009 the complainant was asked to confirm within ten working days of receipt of the letter, his acceptance of the special limited extension of his fixed-term contract, but was given the details of that appointment only later in the "Letter of Special Limited Extension of Appointment", dated 17 August 2009. The Commission's assertion that the complainant, by signing the letter of 3 July, did so "unconditionally and without any reservation whatsoever" is incorrect. The complainant's signature cannot be construed in any way to waive his rights to question, contest or appeal the contents of that letter.

11. The complainant alleges that the Commission acted in bad faith in abolishing his post and extending his contract for only seven

months instead of two years. He submits that the real goal of the restructuring exercise was to hire Mr K. and that the abolition of his post was consequent to Mr K.'s refusal of the offer of employment. According to the complainant, Mr K., a national Korean like him, was offered a post, outside of the normal hiring practices, but refused the offer when he realised that by taking up the position he would, in effect, be replacing the complainant. The Commission denies this allegation and submits that the complainant has no proof that Mr K. was offered a post in contravention of the Staff Rules and Staff Regulations. The Tribunal observes that no substantiated evidence has been presented which supports the complainant's allegation of bad faith. However, it observes that the Commission has acted inappropriately by refusing to present evidence requested by the Joint Appeals Panel, on the grounds that it did not consider the evidence to be pertinent to the appeal. It was for the Panel to decide, upon examination of the evidence, whether or not they were pertinent. Considering the fact that the evidence could have had an effect on the Panel's findings, and considering the Commission's refusal to submit to the authority of the Joint Appeals Panel without giving any reasonable explanation for such a refusal, the Tribunal finds that this is a violation of its duty to act in good faith and undermines the proper functioning of the internal appeals process. This will be taken into account in the calculation of the award of damages to the complainant (see Judgment 1319, under 9).

12. In light of the above considerations, the complaint must be allowed. The decision of 3 July 2009 to abolish the complainant's post and to extend his appointment for only seven months, and the subsequent decision of 2 December 2010 must be set aside. The Tribunal will award material damages for the complainant's lost opportunity to have his contract extended, in an amount of 30,000 United States dollars. The Tribunal will also award moral damages in the amount of 18,000 dollars and costs in the amount of 1,500 dollars. It will dismiss all other claims.

DECISION

For the above reasons,

1. The impugned decision of 2 December 2010 as well as the decision of 3 July 2009 are set aside.
2. CTBTO PrepCom shall pay the complainant material damages in the amount of 30,000 United States dollars.
3. It shall pay him moral damages in the amount of 18,000 dollars.
4. It shall also pay him costs in the amount of 1,500 dollars.
5. All other claims are dismissed.

In witness of this judgment, adopted on 10 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo  
Dolores M. Hansen  
Michael F. Moore  
Catherine Comtet